

Special Issue: International Investment Law

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SHAREHOLDERS' ACTION TO CLAIM FOR INDIRECT DAMAGES IN ICSID ARBITRATION

DOLORES BENTOLILA*

International Centre for Settlement of Investment Disputes (ICSID) tribunals have consistently admitted claims by foreign shareholders based on the varying definitions of investment which often include shares and other forms of economic participation. The agreements referring to shareholdings as covered investment usually limit themselves to just that without further specification. The question may therefore arise: how far does protection accorded by the investment agreements extend? Does this protection allow the shareholder to claim for loss incurred by the local company in which the shareholder holds shares? Evidently, the mere inclusion of shares in the scope of protection of an investment agreement does not, per se, grant protection to the shareholder interests in a local company. The protection therefore remains limited to the "shares" in themselves as an economic unit and not to the underlying enterprise. However, some treaty rights, as applied by ICSID tribunals, may have this effect. Conversely, shareholders' protection could generate multiple claims and a risk of double recovery. Given that shareholders are protected indirectly through the local company's actions the shareholder would receive double protection. This risk is furthered by the fact that both direct and indirect shareholdings may be protected. This article seeks to analyze all these issues and more in greater detail.

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I. INTRODUCTION

In recent years, an overwhelming number of cases have been brought by foreign shareholders of subsidiaries incorporated in Host States before the International Centre for Settlement of Investment Disputes (ICSID). In most instances, if not all, shareholders were claiming for damages resulting from measures directed at and affecting local companies directly. These cases have given rise to a plethora of literature on shareholders' right to claim under ICSID arbitration.¹ The intensive debate triggered by these disputes stems from the fact

¹ Christoph Schreuer, *Shareholders' protection in International Investment Law*, available at: http://www.univie.ac.at/intlaw/pdf/csunpublpaper_2.pdf (last visited 10th Feb., 2010) (hereinafter Schreuer- *Shareholders' protection in International Investment Law*); Stanimir A. Alexandrov, *The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals. Shareholders as "Investors" under Investment Treaties*, 6 J. WORLD INVESTMENT & TRADE 417 (2005); Stanimir A. Alexandrov, *The "Baby Boom" of Treaty- Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "investors" and Jurisdiction Ratione*

that, according to customary international law applicable to diplomatic protection, the national State of the shareholder does not have standing to seek redress on behalf of the shareholder if damage is done to the company in which the shareholder holds shares.² The landmark case cited is *Barcelona Traction*³ where the International Court of Justice (ICJ) refused Belgium standing to claim for the expropriation by the Spanish government of a company incorporated in Canada controlled by Belgian shareholders. The reasoning behind this was that if every State of the nationality of the shareholders of an injured corporation had standing, a mass of states would bring claims on behalf of shareholders, thus “creat[ing] an atmosphere of confusion and insecurity in international economic relations”.⁴

Despite these considerations, the second half of the 20th century has witnessed the striking development of numerous regional⁵ and bilateral investment treaties (BITs).⁶ These treaties always include shares as covered investments and give the investor direct access to international arbitration.⁷ Based

Temporis, 4 L. & PRAC. INT'L CTS. & TRIBUNALS 19 (2005); Gabriel Bottini, *Indirect claims under the ICSID convention*, 29 U. PA. J. INT'L L. 563 (2007) (hereinafter Bottini); Engela C. Schlemmer, *Investment, Investor, Nationality and Shareholders*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008) (hereinafter Schlemmer); Abby Cohen Smutny, *Claims of Shareholders in International Investment Law*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY. ESSAYS IN HONOUR OF CHRISTOPH SCHREUER, (Christina Binder et al. eds., 2009); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 396 (Cambridge University Press 2009) (hereinafter DOUGLAS).

² Case concerning the Barcelona Traction, Light and Power Company (Belgium v Spain) [1970] I.C.J. REP. 44 (hereinafter *Barcelona Traction*); Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, I.C.J., 24 May, 2007, available at: <http://www.icj-cij.org/docket/files/103/13856.pdf> (last visited Mar. 29, 2010) (hereinafter *Diallo*) ¶ 54 – 57.

³ *Barcelona Traction, id.*

⁴ *Id.* ¶ 96.

⁵ See, for example: Energy Charter Treaty, 26, December 17, 1994, 2080 U.N.T.S. 100, Art. 1(6) and North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, 17 December, 1992, 32 I.L.M. 289 (hereinafter NAFTA).

⁶ UNCTAD, RECENT DEVELOPMENTS IN INTERNATIONAL INVESTMENT AGREEMENTS, IIA MONITOR INTERNATIONAL INVESTMENT AGREEMENTS, (2009) at 2-4.

⁷ See for example the 1994 US Model BIT, the 2004 US Model BIT and 2007 Model FIPA (Canadian Model Foreign Investment Promotion and Protection Agreement (FIPA) cited in OECD, INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS. A COMPANION VOLUME TO INTERNATIONAL INVESTMENT PERSPECTIVES 51 (OECD Publishing 2008) (hereinafter

on such provisions, arbitral tribunals have consistently admitted claims by shareholders of locally incorporated companies.⁸ The extent of this treaty

OECD Companion Volume.); The Austria-Mexico BIT (Agreement between the United Mexican States and the Republic of Austria on the Promotion and Protection of Investments, 28 June 1998; *available at*: http://www.sice.oas.org/Investment/BITSbyCountry/BITs/MEX_Austria.pdf) (last visited March 29, 2010); The 2005 Germany Model BIT and the 2003 Japan-Korea BIT (both cited in the OECD Companion Volume, *supra*, at 51); 2000 Mexico-Greece BIT (Acuerdo entre el Gobierno de los Estados Unidos Mexicanos y el Gobierno de la República Hellenica para la promoción y protection reciproca de las inversiones, *available at*: http://www.sice.oas.org/Investment/BITSbyCountry/BITs/MEX_Greece_s.pdf. (last visited March 29, 2010)); *Cf.* Schlemmer, *supra* note 1 at 82; Noah Rubins, *The Notion of 'Investment' in International Investment Arbitration*, in *ARBITRATING FOREIGN INVESTMENT DISPUTES. PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS* 296 (S. Kröll N. Horn ed., 2004) (hereinafter Rubins (for individual work) & hereinafter Kröll N. Horn ed. (for the collection of works)); RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 15 (1st ed., Oxford University Press 2008) (hereinafter DOLZER & SCHREUER).

⁸ Antoine Goetz and others v. Republic of Burundi (ICSID Case No. ARB/95/3) Award embodying the parties' settlement agreement of February 10, 1999, [French original] 15 ICSID REV.—FOREIGN INVESTMENT L.J. 457 (2000) (hereinafter *Goetz v. Burundi*) ¶ 89; Emilio Agustín Maffezini v. Kingdom of Spain (ICSID Case No. ARB/97/7) Decision on Objections to Jurisdiction of January 25, 2000, 5 ICSID REP. 396 (2002); 124 I.L.R. 9 (2003) (hereinafter *Maffezini* Jurisdiction) ¶ 68/70; Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina (ICSID Case No ARB/97/3) Decision on jurisdiction of November 14, 2005, *available at*: <http://ita.law.uvic.ca/documents/AguasVivendijurisdictiondecision.pdf> (last visited: March, 29, 2010) (hereinafter *Vivendi* Jurisdiction); Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12) Decision on Jurisdiction of December 8, 2003, 43 I.L.M. 262 (2004) (hereinafter *Azurix* Jurisdiction) ¶ 72-76; LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1) Decision of the Arbitral Tribunal on Objections to Jurisdiction of April 30, 2004, [English original] 21 ICSID Rev.—FOREIGN INVESTMENT L.J. 155 (2006) (hereinafter *LG&E* Jurisdiction) ¶ 50 and in the Decision on Liability of October 3, 2006, 21 ICSID Rev.—FOREIGN INVESTMENT L.J. 203 (2006) (hereinafter *LG&E* Award) ¶ 177; American Manufacturing & Trading, Inc v United States (ICSID Case No ARB/93/1) Award and separate opinion of February 11, 1997, *available at*: www.investmentclaims.com (last visited March 29, 2010) (hereinafter *AM&T v. US*) ¶ 5.14; Alex Genin and others v. Republic of Estonia (ICSID Case No. ARB/99/2) Award of June 25, 2001, 17 ICSID Rev.—FOREIGN INVESTMENT L.J. 395 (2002) (hereinafter *Genin*), CME Czech Republic BV v Czech Republic, Partial Award and Separate Opinion, *Ad hoc*—UNCITRAL Arbitration Rules, September 13, 2001 *available at*: www.investmentclaims.com (last visited March 29, 2010) (hereinafter *CME* Partial Award) at 375-377; Camuzzi International S.A. v. Argentine Republic (ICSID Case No. ARB/03/2) Decision on Objections to

Jurisdiction of May 11, 2005, *available at*: <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited March 29, 2010) (hereinafter *Camuzzi* Jurisdiction) ¶ 47; *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16) Decision on Objections to Jurisdiction of May 11, 2005, *available at*: www.investmentclaims.com (last visited March 29, 2010) (hereinafter *Sempra* Jurisdiction) ¶ 41; *Gas Natural SDG, S.A. v. Argentine Republic* (ICSID Case No. ARB/03/10) *available at*: <http://www.asil.org/pdfs/GasNat.v.Argentina.pdf> (last visited March 29, 2010) (hereinafter *Gas Natural* Jurisdiction) ¶ 35; *AES Corporation v. Argentina*, (ICSID Case No. ARB/02/17) Decision on Jurisdiction of April 26, 2005, 12 ICSID REP. 308 (hereinafter *AES* Jurisdiction) ¶ 86-88; *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9) Decision on Jurisdiction of February 22, 2006, *available at*: <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited: March, 29, 2010) (hereinafter *Continental Casualty* Jurisdiction) ¶ 78; *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic* (ICSID Case No. ARB/03/13) Decision on Preliminary Objections of July 27, 2006, *available at*: <http://ita.law.uvic.ca/documents/PanAmericanBPJurisdiction-eng.pdf> (last visited March 29, 2010) (hereinafter *Pan American* Jurisdiction) ¶ 213; *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8) Decision on Jurisdiction of August 3, 2004 (hereinafter *Siemens* Jurisdiction) ¶ 137-142; *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1) Decision on Objections to Jurisdiction of August 29, 2006, *available at*: www.investmentclaims.com (last visited March 29, 2010) (hereinafter *Total* Jurisdiction) ¶ 78-81; *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Decision on Objections to Jurisdiction of July 17, 2003, 42 I.L.M. 788 (2003) (hereinafter *CMS* Jurisdiction) ¶ 40-65; *CMS Annulment Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic*, September 25, 2007, *available at*: <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited March 29, 2010) (hereinafter *CMS Annulment*) ¶ 69; *Lauder v. Czech Republic*, Final Award, Ad hoc—UNCITRAL Arbitration Rules, September 3, 2001, *available at*: www.investmentclaims.com (last visited March 29, 2010) (hereinafter *Lauder*) ¶ 77; *Lanco International, Inc. v. Argentine Republic* (ICSID Case No. ARB/97/6) Preliminary Decision on Jurisdiction of December 8, 1998, 40 I.L.M. 457 (2001) (hereinafter *Lanco* Jurisdiction) ¶ 10; *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt* (ICSID Case No. ARB/02/9) Decision on Jurisdiction of October 21, 2003, 19 ICSID Rev.—FOREIGN INVESTMENT L.J. 275 (2004) (hereinafter *Champion Trading* Jurisdiction) ¶ 18; *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/87/3) Award and Dissenting Opinion of June 27, 1990, 4 ICSID REP. 246 (1997) (hereinafter *AAPL v. Sri Lanka*) ¶ 95; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Decision on Jurisdiction of January 14, 2004, *available at*: <http://www.asil.org/ilib/Enron.pdf> (last visited March 29, 2010) (hereinafter *Enron* Jurisdiction) ¶ 49; *SAUR International v. Argentine Republic* (ICSID Case No. ARB/04/4), Decision on Objections to Jurisdiction of February 27, 2006 cited by Bottini, *supra* note 1, at 626. (hereinafter *SAUR* Jurisdiction) ¶ 87; *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic* (ICSID Case No. ARB/03/5) Decision on

protection can be reasonably derived from their interpretation. However, investment treaties usually simply refer to shareholdings as a type of covered investment without further specifications. This broad wording of treaties gives rise to numerous questions. – How far does this protection extend? Do minority, majority, and indirect shareholders have standing before ICSID arbitral tribunals? Can they claim for direct and/or indirect damage? Can they claim for the rights of the local company?

Arguably, shareholders' protection could generate multiple claims and the consequent risk of "double dipping"⁹. If indirect shareholdings are protected by investment treaties, different but linked (via shareholdings) companies of the same group might receive protection regarding the same investment; in one case, the direct investment, and in the other case, the indirect investment. In addition, given that the shareholder is indirectly protected by the local company's actions, there would be in theory a risk of multiple claims and "double dipping" by the shareholder.

These unclear issues raised by the protection of shareholders interests in investment treaties are the subject of this article. Section II will analyze the scope of shareholders' action in ICSID arbitration (focussing on the ICSID Framework and its limitations) while Section III will assess the problems that shareholders' action has produced, especially with respect to multiple claims and double recovery.

II. THE SCOPE OF SHAREHOLDERS' ACTION IN TREATY-BASED ICSID ARBITRATION

A. *The ICSID Convention and Derivative Actions*

The jurisdiction of ICSID is governed by Art.25 of the ICSID Convention.¹⁰ Under this provision, the following conditions must be cumulatively met in order

jurisdiction of April 27, 2006, *available at*: www.investmentclaims.com (last visited: March, 29, 2010) (hereinafter *Metalpar* Jurisdiction) ¶ 68; *Agua Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Jurisdiction of May 16, 2006; *available at*: <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited: March, 29, 2010) (hereinafter *Suez*) ¶ 49.

⁹ Bottini, *supra* note 1, at 626.

¹⁰ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, March 18, 1965, 575 U.N.T.S. 159 (hereinafter ICSID Convention, the Convention or Washington Convention). The jurisdiction of ICSID and other investment arbitration tribunals is more complex than that of other

to establish the jurisdiction of the Centre: existence of a dispute of a legal nature, which arises out of an investment between a national of a Contracting State (investor) and another contracting State, where the parties have consented in writing to submit the dispute to ICSID for resolution.

As to the scope of the jurisdiction *ratione personae* according to Art.25(2) an investor is any natural or legal person who has the nationality of another Contracting State; unless, in the case of legal persons, the parties agree to treat the local company as foreign.¹¹

The term “shareholder” does not flow from the wording of Art.25 of the ICSID Convention.¹² An indirect reference is discernible in Art.25(2)(b) wherein the second sentence refers to foreign control, though not to grant standing to the shareholder (the investor) but to the local company itself. In any case, if the shareholder (who is an investor) has the nationality of another Contracting State the requirement of Art.25(2) would be fulfilled.

The definition of investment was not established in the ICSID Convention. ICSID case law has attempted to determine the elements an investment should have for jurisdictional purposes. These elements include: a) a contribution;¹³ b) duration;¹⁴ c) participation in risk;¹⁵ d) good faith;¹⁶ e) in accordance with the law

arbitration institutions. Apart from consent to arbitration, ICSID tribunals have their jurisdiction limited by Art.25 of the ICSID Convention. SEBASTIEN MANCIAUX, INVESTISSEMENTS ETRANGERS ET ARBITRAGE ENTRE ÉTATS ET RESSORTISSANTS D'AUTRES ÉTATS. TRENTE ANNEES D'ACTIVITE DU CIRDI 33 ¶ 24 (Université de Bourgogne ed., Litec. 2004).

¹¹ See ICSID Convention, *supra* note 10, Art. 25 reads:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute ...; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute ... and any juridical person which had the nationality of the Contracting State party to the dispute ... and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

¹² *Id.*

¹³ This is considered an essential element though the contribution may not be monetary. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4) Decision on Jurisdiction of July 23, 2001, [French original] 129 JDI 196 (2002), English translations of French original in 42 I.L.M. 609 (2003), 6 ICSID REP. 400 (2004) (hereinafter *Salini*) ¶ 53

¹⁴ The activity should be performed in the medium or long run. *Id.* ¶54.

¹⁵ Rubins, *supra* note 7, at 66.

of the Host State¹⁷ and, though controversially, f) contribution to the economic development of the Host State.¹⁸ In theory, a “share” being a part-proprietorship of property held by joint owners, may clearly comprise these elements. For this reason, shares cannot be excluded *per se* from an objective and jurisdictional definition of investment. Of course, such a determination will depend on the specific circumstances of the case, *e.g.* on the duration, magnitude or on the existence of a contribution, etc.¹⁹ However, it is not possible to refuse shareholders’ direct action based on narrow reasons. If an investment treaty includes in its definition investment shares and other forms of participation and contains an invitation to settle any dispute arising out of the violation of the treaty before an ICSID tribunal, the shareholder, as an investor, has access to the procedural mechanisms provided for in the treaty; in particular a direct action to claim before an ICSID tribunal. In practice, it is common for investment treaties to refer to “shares” as covered investments.²⁰

Therefore, investment treaties including shares in their definition of investment and an ICSID arbitration provision grant shareholders a right to claim before ICSID tribunals for breaches of the treaty. Such a claim could in theory meet the

¹⁶ Phoenix Action Ltd. v. Czech Republic (ICSID Case No. ARB/06/5) Award of April 15, 2009, *available at*: <http://ita.law.uvic.ca/documents/PhoenixAward.pdf> (last visited March 29, 2010) (hereinafter *Phoenix*) ¶ 114 -142.

¹⁷ *Id.* ¶ 114.

¹⁸ This element finds support in the preamble of the ICSID Convention. However case law is not that consistent: whereas it was considered a decisive requirement in *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7) Decision on the Stay of Enforcement of the Award of November 30, 2004, [English original] 20 ICSID REV.—FOREIGN INVESTMENT L.J. 587 (2005) *available at*: <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited March 29, 2010)) it has not been considered decisive in *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/05/3) Decision on Jurisdiction (July 12, 2006) *available at*: <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited March 29, 2010)) and it has in *Malaysian Historical Salvors, SDN, and BHD v. Malaysia* (ICSID Case No. ARB/05/10) Award of May 17, 2007 *available at*: <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited March, 29 2010) ¶ 123 (hereinafter *Malaysian Historical Salvors*). *See further* Omar E. García-Bolívar, *Protected Investments and Protected Investors: The Outer Limit of ICSID's Reach* 2(1) Trade, L. & Dev. ____ (2010).

¹⁹ *Salini*, *supra* note 13, ¶ 53-54; *Malaysian Historical Salvors*, *supra* note 18, ¶ 123; *Phoenix*, *supra* note 16, ¶ 114.

²⁰ United States of America Bilateral Investment Treaty 2004 Model, *available at*: http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (last visited March 29, 2010); *see also* Kantor, M., “New Draft Model US BIT”, *O.G.E.L.*, Vol. 2, (2004).

jurisdictional requirements of Art.25 of the ICSID Convention as shareholdings are not excluded *per se* from an objective definition of investment and the shareholder could have potentially the nationality of another contracting State. The question that then arises is: Can the shareholder claim for the damages incurred by the locally incorporated company in which the shareholder holds its shares?

In the *travaux préparatoires*, much debate existed on whether shareholders should be given standing to claim for the damages of the local company.²¹ Discussions following the preliminary draft raised doubts about the practicability of a control test; instead, it was suggested that protection be directly afforded to the individual shareholders.²² A majority of the delegates advocated the need for inclusion of both locally incorporated and foreign companies within the ambit of ICSID jurisdiction.²³ One of the proposals tabled was to grant protection directly to the shareholder instead of the local company.²⁴ This proposal did not succeed because delegates considered implementation too difficult, particularly where shareholders were dispersed and unorganized.²⁵ Finally, they agreed on Art.25(2)(b) of the ICSID Convention which makes a reference to “control” as an element to determine the foreign nationality of the locally established company. The subject possessing direct standing, is not the shareholder but is, instead, the local company. Shareholders would be protected indirectly through the company’s actions.

A different solution was followed by Article 1117 of the North American Free Trade Agreement²⁶ (NAFTA), which entitles the foreign investor to claim on behalf of the locally established company it controls to enforce the rights of the latter²⁷

²¹ HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 287,325,287,325,359/361,394,397,400,449,581 ¶ II (1968) (hereinafter History of ICSID Convention); Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of other States* 136 RECUEIL DES COURS 360 (1972) (hereinafter Broches); CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 291 (Cambridge University Press, 2001) (hereinafter SCHREUER- THE ICSID CONVENTION).

²² *Id.*

²³ History of ICSID Convention, *id.* at 287, 325, 359, 360, 361, 394, 397, 400, 449, 581; Broches, *id.* at 361; SCHREUER-THE ICSID CONVENTION, *id.* at 291.

²⁴ History of ICSID Convention, *id.* at 360, 396, 397, 446, 447, 449, 538, 705, 709, 871; Broches, *id.* at 360; SCHREUER-THE ICSID CONVENTION, *id.* at 291.

²⁵ History of ICSID Convention, *id.* at 449, 538, 581; Broches, *id.* at 360.

²⁶ NAFTA, *supra* note 5.

²⁷ NAFTA, *supra* note 5, art. 1117: “An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or

It has been suggested that the second sentence of Art.25(2)(b), is an obstacle for the existence of a shareholder action to claim for the rights of the local company.²⁸ This stems from the fact that the delegates had clearly rejected giving shareholders standing because when there is damage produced to or violation of the rights of the local company Art. 25 provides for considering such company as foreign.²⁹ Accordingly, the local company is entitled to claim for the damage incurred by it and not its shareholder. A claim of the shareholder in this sense would be a claim of a derivative or indirect character – a claim to enforce rights of third parties – which would fall beyond the jurisdiction of the ICSID. If derivative claims were allowed the provision contained in the second sentence of Art.25(2)(b) would be rendered meaningless.

Some commentators go a step further and consider the claim of a shareholder to obtain reparation for the loss suffered to his shares due to measures directed at the local company to be a derivative claim..³⁰ Gabriel Bottini and Zachary Douglas, who are of this view, suggest that the shareholder action in investor-State arbitration is limited to claim for the shareholders' own rights as such, *i.e.* to vote, to the remaining capital in case of liquidation, to dividends, etc.³¹ Thus, the claim for the loss incurred on the shares due to a decrease in the profitability of the local company would be, in principle, excluded.³²

Nevertheless, these authors may be mistaken for several reasons. First, they consider that investment treaties protect only the following shareholders' rights: to vote in shareholders' meetings, to dividends, and to a part of the remaining capital in case of liquidation³³. For this reason, the shareholder could be able to claim for the violation of an investment treaty only if one of these rights has been expropriated or unjustly treated. By the same token, in case of decrease of the value of the share if the shareholder maintains the free disposal of the above mentioned rights there would be no breach of the treaty. Thus, the investment treaty would not protect the value of the share itself. However, this interpretation is erroneous and the confusion lies on the fact that they qualify the rights of the shareholder by using domestic law. In fact, the shareholders' rights they mention

indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under [...]" ; *See also* SCHREUER-THE ICSID CONVENTION, *supra* note 21 at 307.

²⁸ Bottini, *supra* note 1, at 570.

²⁹ The same argument could be invoked in NAFTA according to art. 1117.

³⁰ Bottini, *supra* note 1 at 565..

³¹ *Id.*; DOUGLAS, *supra* note 1, at 407.

³² Bottini, *supra* note 1.

³³ Bottini, *supra* note 1, at 570; DOUGLAS, *supra* note 1, at 407-425.

are rights which arise out of the *lex societatis*; i.e. the law applicable to the company in accordance with private international law³⁴. Therefore, the authors are using domestic law to interpret a treaty; in particular, the word “shares”.

Arguably, recourse to domestic law concepts could be useful to define treaty terms such as “shares” in order to establish the material scope of application of the treaty. Nevertheless, the use of domestic law cannot have the effect of restraining the scope of treaty rights as they were established in the treaty. The treaty is subject to a different legal order, governed by the rules of public international law. These rules, in particular Art.31 of the Vienna Convention on the Law of the Treaties (VCLT)³⁵ establish secondary rules on the way the primary conventional rules have to be interpreted. This provision provides that a treaty is to be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose and not in accordance with domestic law. For this reason, the ordinary meaning of “shares” should not be established by the *lex societatis* but by its ordinary economic or commercial meaning.

In ordinary language, “shares” are “a definite portion of a property owned by a number in common; [*specifically*] each of the equal parts into which the capital of a joint-stock company or corporation is divided”.³⁶ This is what a treaty protects – the item of property and not the rights the owner has by virtue of domestic law. As an item of property, shares have value – a price – and this value may, and very frequently will, be affected by measures directed at the local company (given that the price of shares depend to a great extent on the value and on the income producing potential of the company). Treaty rights protect property holders (investors) against loss suffered on their property (investment). Thus, a loss incurred on the value of the share should grant the shareholder a right to claim reparation regardless of whether the shareholder maintains free disposal and full exercise of the rights he has by virtue of the *lex societatis*.

Second, this treaty right the shareholder has is different from any right the company may have since the item of property protected is an item of property belonging to the shareholder and not to the company. For this reason, the

³⁴ It is for the law applicable to the company to establish the rights shareholders have in relation to the company. JEAN-MICHEL JACQUET ET AL., *DROIT DU COMMERCE INTERNATIONAL* (Dalloz, 2007).

³⁵ The Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) (hereinafter VCLT).

³⁶ OXFORD DICTIONARY 631 (Oxford University Press, 1978).

company has no right to compensation due to measures which affect the value of the share.

Third, such authors confuse the notion of derivative actions with the direct action to claim for indirect damage. Gabriel Bottini mentions that a claim is derivative or indirect when “a shareholder requests compensation for damages resulting from a measure that was directed exclusively against the rights of the company in which it holds shares”.³⁷ However, the same measure may affect multiple rights of multiple legal persons and not only the rights of the person at whom the measure was directed. The conformity of a measure with the law (personal rights) is established by the applicable rules to the legal relationships or legal situations of the different affected persons and not only by the rules applicable to the relationship between the State who enacted the measures and the person against whom these were directed. Such narrow interpretation would have the effect of denying the existence of the rights of third parties to claim for incidental loss (this is considered in the causal nexus between the measures and the damage) by injurious measures directed at someone else.

The fact that “B” and “C”, have a right to claim for the loss they suffered on their property produced by measures directed at “A” does not make “B” and “C” the right holders of the item of property of “A” (item of property at which the measures were directed) nor does it give them the right to enforce the rights of “A” (derived from the injuries to the item of property of “A”). By the same token, “A” is not entitled to claim for the injury incurred by the property of “B” and “C” but only for “A”’s own property. Nevertheless, “B” and “C” may have an interest in the item of property of “A” since damage produced to this item of property may produce damage to their own item of property. If the law gives “B” and “C” a right to claim reparations for this incidental damage then they have a “*right*” and not a mere interest. This right to claim is different from that of “A” since the right holder is different, and so is the extent of the right and the loss to be repaired. Thus, a person may have a right (different from the right of the directly injured) to claim for indirect damage produced to its own item of property. Further, the indirectness of the damage does not affect the direct nature of the right which has been breached. The same reasoning is applicable to the claim of the shareholder for measures directed at the local company which affect the profitability of the company and thus the value of the share. In such a situation, the shareholder would be claiming for the loss he suffered on his shares in violation of a treaty right and not for the rights of the local company. A shareholder would be claiming for his *own* right and his *own* loss - inflicted on his *own* assets (shares) and not on the assets of the company though the damage

³⁷ Bottini, *supra* note 1, at 565.

would be *indirect* through measures directed at and producing damage to the local company. For these reasons, the shareholders' claim for loss on his share due to measures directed at the local company and which affect the latter directly is not a derivative claim and is thus not prohibited by Art.25 of the ICSID Convention.

The protection of indirect damage of the shareholder is not granted in domestic law because it is unnecessary, given that the shareholder is already protected indirectly through the exercise of the company's actions. Any action of the local company would affect positively the value of its shares and the benefits he receives. However, if a treaty gives the shareholder a right to claim for reduced dividends, capital depreciation or loss resulting from prejudice caused to the company, this protection would not go beyond the objective limits of ICSID jurisdiction. This provision³⁸ stipulates that the jurisdiction of the Centre is limited to legal disputes arising directly out of an investment between a contracting State and a national of another Contracting State. However, nothing in Art.25 can be interpreted as a prohibition to claim for the reparation of indirect damage but only for derivative claims.

B. *Legal Basis of the Action of Shareholders*

As mentioned above, arbitral practice is extensive and uniform in accepting shareholders' standing based on investment treaties.³⁹ The first case brought by a shareholder, surprisingly also the first dispute brought under a BIT, was *AAPL v. Sri Lanka*.⁴⁰ In that case, the Claimant, a company incorporated in Hong Kong, had invested in Sri Lanka through equity participation in Serendib Seafoods Ltd. (Serendib), a locally incorporated public company established for the purpose of cultivating and exporting shrimp. In a counter insurgency operation conducted by the Sri Lankan security forces against the Tamil rebels, Serendib's farm was destroyed. Based on the UK-Sri Lanka BIT the claimant requested for compensation for the destruction of the farm in violation of the government's obligation to provide full protection and security. The tribunal found in favor of the Claimant. There was no discussion on the admissibility of the claim because the Government of Sri Lanka had declared in its counter memorial "to the extent there was excessive destruction, the Government of Sri Lanka is ready to compensate AAPL for its proportionate ownership".⁴¹

³⁸ ICSID Convention, *supra* note 10, art. 25.

³⁹ Alexandrov, *The Baby Boom and the Jurisdiction of ICSID Tribunals*, *supra* note 1, 394; DOLZER & SCHREUER, *supra* note 7, at 57; *Cf. Siemens Jurisdiction*, *supra* note 8, ¶ 43.

⁴⁰ *AAPL v. Sri Lanka*, *supra* note 8.

⁴¹ *Id.* ¶ 32.

However, in subsequent cases Host States raised objections to the right of shareholders to espouse claims for the damage suffered by the companies. In *AMT v. Zaire*, armed forces of Zaire had destroyed certain installations belonging to ZINZA, a locally incorporated company. American Manufacturing & Trading Corporation (AMT) who held shares in ZINZA brought a claim against Zaire under the US-Zaire BIT for the damages caused. Zaire argued that AMT did not have the capacity to act in the name of ZINZA (the locally incorporated company in which AMT held shares) and that the dispute was between Zaire and ZINZA, and not the shareholder.⁴² The tribunal rejected Zaire's objection because the applicable BIT included "shares or interest in the company or in the assets thereof". The tribunal concluded that AMT was acting on its own behalf and not on behalf of ZINZA.⁴³

Finally, in the overwhelming number of cases brought against Argentina after the 2002 economic crisis,⁴⁴ shareholders were claiming for damages produced by regulatory action, in particular the Emergency Law No. 25.561,⁴⁵ which provided, among other things, for the "pesification",⁴⁶ and which affected the profitability of licenses and concessions of the locally established subsidiaries and led to the freezing of tariffs. In *CMS, Total, Siemens, Camuzzi, Sempra, Suez* and *Azurix*, to mention a few, Argentina considered that the shareholders were bringing claims for the breach of the licenses of the subsidiaries.⁴⁷ Accordingly, it raised a wide range of defenses against the action of the shareholders to claim for the damages and the rights of the local companies. First, it objected that the shareholder cannot bring a claim for the violation of rights of the company⁴⁸ because this

⁴² *AMT v. Zaire*, *supra* note 8, ¶ 3.09.

⁴³ *Id.* ¶ 5.15.

⁴⁴ *Vivendi* Jurisdiction, *supra* note 8; *Azurix*, *supra* note 8; *LG&E*, *supra* note 8; *Camuzzi*, *supra* note 8; *Sempra*, *supra* note 8; *Gas Natural*, *supra* note 8; *AES*, *supra* note 8; *Continental Casualty*, *supra* note 8; *Pan American*, *supra* note 8; *Siemens*, *supra* note 8; *CMS*, *supra* note 8; *Lanco Enron*, *supra* note 8; *SAUR*; *Metalpar*, *Suez*, *supra* note 8.

⁴⁵ Ley de Emergencia Pública y Reforma del Régimen Cambiario No. 25.561, Approved by decree No. 30/2002, 6 January 2002, Argentina, available at: <http://www.portaldeabogados.com.ar/noticias/020104.htm> (last visited on 29 March, 2010).

⁴⁶ Term referring to substitution of the fixed exchange rate which pegged the Argentine Peso with the US dollar for a floating exchange rate system.

⁴⁷ *CMS* Jurisdiction, *supra* note 8; *Total* Jurisdiction, *supra* note 8; *Siemens* Jurisdiction, *supra* note 8; *Camuzzi* Jurisdiction, *supra* note 8; *Sempra* Jurisdiction, *supra* note 8; *Suez* Jurisdiction, *supra* note 8; *Azurix* Jurisdiction, *supra* note 8.

⁴⁸ See for example: *Total* Jurisdiction, *supra* note 8, ¶ 33; *Azurix* Jurisdiction, *supra* note 8, ¶ 72; *Siemens* Jurisdiction, *supra* note 8, ¶ 140; *CMS* Jurisdiction, *supra* note 8, ¶ 55; *Enron*

would lead to misappropriation of the company in clear violation of the principle of legal personality and separateness of legal entities.⁴⁹ The shareholder can claim for the damage to the share but not for the damage to the assets of the local company.⁵⁰ Second, the *Barcelona Traction* judgment⁵¹ extends beyond the exercise of diplomatic protection.⁵² Third, the ICSID Convention excludes the right of action of shareholders.⁵³ On the other hand, the Claimants submitted that the shareholder was not claiming redress for the impairment of the rights of the company – for its licenses and other rights (derivative claims) - but for his own rights which were established in an investment treaty.⁵⁴ Since shares and other forms of participation are covered investments in investment treaties, they give the shareholder the substantive protection contained therein. These substantive rights are different from those of the company. Therefore, the shareholder may claim for the damage caused to his shareholding by the measures which were directed at the company in which the shareholder participates.⁵⁵ Moreover, *Barcelona Traction* is not applicable because treaty law is *lex specialis* to general international law.⁵⁶

Faced with these opposing arguments, ICSID tribunals have identified themselves with the view of the investors and therefore found that Argentina had violated several obligations of the respective BITs, such as fair and equitable treatment⁵⁷ and that the measures were discriminatory⁵⁸ *vis-à-vis* the shareholders. Let us now turn to analyze each of these concerns separately.

Jurisdiction, *supra* note 8, ¶ 39/40 and *Goetz v. Burundi*, *supra* footnote 8, ¶ 89; *Suez* Jurisdiction, *supra* note 8, ¶ 46.

⁴⁹ In addition to international public law, Host States make reference to their domestic legislation which does not allow derivative actions. *Total* Jurisdiction, *supra* note 8, ¶ 35; *Cf. Suez* Jurisdiction, *supra* note 8, ¶ 46.

⁵⁰ *CMS* Jurisdiction, *supra* note 8, ¶ 66.

⁵¹ *Barcelona Traction*, *supra* note 2.

⁵² *Total* Jurisdiction, *supra* note 8, ¶ 34; *Siemens* Jurisdiction, *supra* note 8, ¶ 125; *Suez* Jurisdiction, *supra* note 8, ¶ 50; *CMS* Jurisdiction, *supra* note 8, ¶ 43.

⁵³ *Total* Jurisdiction, *supra* note 8, ¶ 34; *Suez* Jurisdiction, *supra* note 8, ¶ 47; *CMS* Annulment, *supra* note 8, ¶ 65/66.

⁵⁴ *Total* Jurisdiction, *supra* note 8, ¶ 36; *Suez* Jurisdiction, *supra* note 8, ¶ 47; *CMS* Jurisdiction, *supra* note 8, ¶ 50.

⁵⁵ *Total* Jurisdiction, *supra* note 8, ¶ 38.

⁵⁶ *CMS* Annulment, *supra* note 8, ¶ 69; *Total* Jurisdiction, *supra* note 8, ¶ 37.

⁵⁷ *E.g.*, *Siemens* Award and Separate Opinion of February 6, 2007, available at: www.investmentclaims.com (last visited March 29, 2010) (hereinafter *Siemens* Award) ¶ 308; *LG&E* Award, *supra* note 8 ¶ 123/139; *CMS* Award of May 12, 2005, 44 I.L.M. 1205 (2005), available at: <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited March 29, 2010) (hereinafter *CMS* Award) at 164, 264/269; *Azurix* Award of July 14, 2006, available

1. A Treaty Right to Claim for Both Direct and Indirect Damage

Tribunals have considered that investment treaties which include shares in their scope of protection give rights to shareholders.⁵⁹ These rights cannot be assimilated with the rights of the company.⁶⁰ Tribunals have stressed that claiming for a violation of a treaty does not entail claiming for the violation of the rights of their subsidiaries.⁶¹ Therefore, if the investment treaty has an invitation to arbitrate, the shareholder has an action, *i.e.* the right to bring a claim to enforce these treaty rights before an arbitration tribunal. Since the shareholder is the right holder, the action is direct and not derivative.

The sources of the rights are different. The rights of the shareholder arise from the treaty and the rights of the company arise from domestic (contract, tort or administrative) law. Each set of rights is governed by a different legal order and the right holders are legally distinct.

Treaty rights vary, but they often include the obligation of the State to compensate expropriation, fair and equitable treatment, full protection and security, the obligation not to discriminate, etc.⁶² These obligations are owed towards the investor. Given that the investor is a shareholder because the shareholding is the protected investment, these obligations are owed towards the shareholder and not towards the company. Thus, a violation of these treaty standards gives rise to a right of action to the shareholder and not to the company.

At the same time, the shareholder may not claim for the rights of the company. A shareholder is not a party to the local company's contracts and may not claim for the breach of them.⁶³ This could be particularly interesting regarding umbrella clauses which provide an obligation of the State to respect investment engagements.⁶⁴ Whether contractual engagements are included in this

at: <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited March 29, 2010) (hereinafter *Azurix Award*) ¶ 374/377.

⁵⁸ *Azurix Award*, *Id.* ¶ 393; *LG&E Award*, *Id.* ¶ 147/148.

⁵⁹ *Total Jurisdiction*, *supra* note 8, ¶ 77; *Suez Jurisdiction*, *supra* note 8, ¶ 51.

⁶⁰ *Total Jurisdiction*, *supra* note 8, ¶ 80/81.

⁶¹ *Id.*

⁶² UNCTAD, *BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULEMAKING* 28-51 (2007).

⁶³ *CMS Annulment*, *supra* note 8, ¶ 95.

⁶⁴ *Id.*

clause is quite controversial in both doctrine⁶⁵ and case law.⁶⁶ Case law is not very consistent either in requiring that the parties need to be the same.⁶⁷ However, while dealing with an umbrella clause, the Annulment Committee in CMS declared:

⁶⁵ In doctrine: Prosper Weil, *Problèmes relatifs aux contrats passés entre un Etat et un particulier*, 128 RECUEIL DES COURS 130 (1969); F. A. MANN, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. Y.B. INT'L L. 241, 246 (1981); RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES 81/82* (Kluwer International 1995); Christoph Schreuer, *Travelling the BIT Route. Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INVESTMENT & TRADE 250-251 (2004); Jarrod Wong, *Umbrella clauses in bilateral investment treaties: of breaches of contract, treaty violations, and the divide between developing and developed countries in foreign investment disputes*, 14 GEO. MASON L. REV. 135 (2006); Emmanuel Gaillard, *L'arbitrage sur le fondement des traités de protection des investissements*, 3 REVUE DE L'ARBITRAGE 853, 868 (2003). In an intermediate approach there is T. Wälde who believes that the principle of international law would only protect breaches and interference with contracts made with a government or subject to government powers, if the government exercised its particular sovereign prerogatives to escape from its contractual commitments or to interfere in a substantial way with such commitments; Against: P. Mayer, *La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat*, J. DR. INT'L 36-37 (1986). See also, in this Issue, Mihir Naniwadekar, *The Scope and Effect of Umbrella Clauses: The Need for a Theory of Deference?* 2(1) TRADE L. & DEV. 153 (2010).

⁶⁶ It has been rejected in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) Decision on Objections to Jurisdiction of August 6, 2003, 42 I.L.M. 1290 (2003) 8 ICSID REP. 406 (2005), French translation of English original in 131 J. DR. INT'L 257 (2004) (excerpts) (hereinafter *SGS v. Pakistan*) ¶ 165/167; accepted within certain limits in *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11) Award of August 6, 2004, 19 ICSID REV.—FOREIGN INVESTMENT L.J. 486 (2004), French translation of English original in 132 J. DR. INT'L 163 (2005) (excerpts) available at: <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited March 29, 2010) (hereinafter *Joy Mining*) ¶ 63 and *CMS Jurisdiction*, *supra* note 8, ¶ 296/301 and accepted without limits ("all contractual obligations") in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6) Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004, 8 ICSID REP. 518 (2005) (hereinafter *SGS v. Philippines*) ¶ 117/118 and in *Consortium Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/03/8) Award of January 10, 2005, [French original] 19 ICSID REV.—FOREIGN INVESTMENT L.J. 426 (2004), available at: <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited March 29, 2010) (hereinafter *Consortium L.E.S.I.-DIPENTA*) ¶ 25.

⁶⁷ *Siemens Award*, *supra* note 57, ¶ 204; *Azurix Award*, *supra* note 57, ¶ 384. However, the contrary was found in *LG&E Award*, *supra* note 8, ¶ 175 and *CMS Award*, *supra* note 57, ¶ 299/303.

(c) The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the parties to the obligation (i.e., the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.

(d) The obligation of the State covered by Article II (2)(c) will often be a bilateral obligation, or will be intrinsically linked to obligations of the investment company. Yet a shareholder, though apparently entitled to enforce the company's rights in its own interest, will not be bound by the company's obligations, e.g. as to dispute settlement.⁶⁸

The distinction between the contractual rights of the local company and the treaty rights of the shareholder is reasonable.⁶⁹ The parties are different and each claim belongs to a different order which has its own rules and its own adjudicatory system.⁷⁰ Thus, there would be no conflict as long as each dispute is separately adjudicated.⁷¹ As suggested, the objective of an investment treaty is to establish an independent system of conventional protection; a treaty right can never arise from a contract.⁷²

The same reasoning applies to the domestic rights of the local company and the treaty rights of the shareholder. It may happen very often that the local company, under municipal tort or administrative law, has a right to claim against the State for unlawful action such as expropriation. Under these circumstances both the local company (under domestic legislation) and the foreign shareholder (under a BIT) may claim against the same measures. In such a situation, the

⁶⁸ CMS Annulment, *supra* note 8, ¶ 95.

⁶⁹ H. Ben Hamida, *L'Arbitrage Transnational Face a un Désordre Procédural: La Concurrence des Procédures et les Conflits de Juridictions*, 3 TRANSNAT'L DISP. MGMT. 7 (2006) (hereinafter Ben Hamida).

⁷⁰ As pointed out in *Vivendi*:

Where 'the fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state (...) cannot operate as a bar to the application of a treaty standard.

Vivendi Jurisdiction, *supra* note 8, ¶ 101.

⁷¹ Ben Hamida, *supra* note 69, at 7.

⁷² B. CREMADES & D J. A. CAIRNS, CONTRACT AND TREATY CLAIMS AND THE CHOICE OF FORUM IN FOREIGN INVESTMENT DISPUTES 20 (2004) (hereinafter CREMADES & CAIRNS). Some commentators, however, highlight the risks inherent in this distinction. Prof. Mayer in: B. AUDIT ET AL., LE SYSTÈME ACTUEL EST-IL DÉSÉQUILIBRÉ EN FAVEUR DE L'INVESTISSEUR PRIVÉ ÉTRANGER ET AU DÉTRIMENT DE L'ÉTAT D'ACCUEIL? 198 (Charles Leben ed., LGDJ, 2006).

claims would belong to two different legal orders, the municipal and the international one.⁷³

Moreover, the fact that the same measures are contrary to both the rights of the local company and to the rights of the shareholder does not prevent an ICSID arbitration tribunal's adjudication of the claim. The fact that the same measure constitutes a violation of a contract with the local company would not hinder a tribunal from analysing whether the same measure leads to a violation of the treaty.⁷⁴

Undoubtedly, the direct action of the shareholder under a treaty gives the shareholder a right to claim for direct damage to the shares, that is, damage produced by measures which were directed at the shares or the shareholder; *e.g.*, an expropriation of shares, a regulation prohibiting the shareholder to receive dividends or a measure impeding the shareholder to vote in the shareholders' meeting. The question therefore follows: does this action to claim for a breach of the investment treaty allow the shareholder to claim for indirect damage? In the cases against Argentina mentioned before, based on definitions of investments in BITs, which included shares as a covered investment, shareholders claimed compensation for the loss they suffered due to measures directed at the local subsidiaries.

In *CMS, Argentina*, while analysing Mr. Bottini's argument (that the claim of the shareholder for indirect loss is a claim for the rights of the local company),⁷⁵ claimed that while the acquisition of shares qualifies as an investment under the Treaty, the "license" did not.⁷⁶ The license is an asset of the company and does

⁷³ For example, in *Vivendi Annulment* the Tribunal explained the relationship between domestic and international law (even if it was considering contract claims and not legislation-based claims):

In the Committee's view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties

Infra note 116, ¶ 101/102.

⁷⁴ See for example *Vivendi Annulment*, *infra* note 116, ¶ 95/96.

⁷⁵ Bottini, *supra* note 1, at 570.

⁷⁶ *CMS Jurisdiction*, *supra* note 8, ¶ 66.

not constitute the investment under the treaty.⁷⁷ CMS argued that it was claiming for its shares and not for the licenses of the local companies.⁷⁸ The Tribunal declared in a rather summary way that since:

The rights of the claimant can be asserted independently from the rights of TGN and those relating to the License, and because the Claimant has a separate cause of action under the Treaty in connection with the protected investment, the tribunal concludes that the present dispute arises directly from the investment made and that therefore there is no bar to the exercise of jurisdiction on this count.⁷⁹

In the same line of reasoning, in *Camuzzi*, Argentina argued that the claimant could only validly claim if it could prove that a legal right that it possessed in its capacity as shareholder, had been violated, causing direct loss.⁸⁰ If it were a matter of a mere interest affected, as a result of a measure that affects the company in which it is a shareholder, it is then the company that is entitled to claim and not the shareholder.⁸¹ Argentina argued that the shareholding had not been expropriated nor treated unjustly, and, if there had been such a violation, only the licensees could consider themselves the holders of the right entitling them to claim; Camuzzi's claim was solely on the decrease of the company's value and how that impacted the proportional part owned by it as a shareholder.⁸² In other words, Argentina claimed that the shareholder could only claim if its rights as such, that is as a shareholder, had been violated. Consistent with the approach followed in *CMS*, the tribunal declared that the claimant was claiming for the violation of the treaty rights and not of the rights of the company and declared: "the fact must be noted that if the investor has rights protected under a treaty their violation will not result in merely affecting its interests but will affect a specific right of the protected investor".⁸³

These answers appear unsatisfactory. The fact that the right of the shareholder arises from a treaty and that it is different from the contract does not resolve whether this treaty right protects indirect loss resulting from prejudice caused to the interests of the local company. In general, tribunals had been quite reluctant to declare expressly that the treaty rights protect shareholders' interests in the company; *i.e.* in capital depreciation, risk of reduced dividends or loss

⁷⁷ *Id.*

⁷⁸ *Id.* ¶ 67.

⁷⁹ *Id.* ¶ 68.

⁸⁰ *Camuzzi* Jurisdiction, *supra* note 8, ¶ 45.

⁸¹ *Id.* ¶ 45.

⁸² *Id.*

⁸³ *Id.* ¶ 66.

arising out of damage caused to the local company. However, in the recent decision of the Annulment Committee in *Azurix*,⁸⁴ the committee made it very clear that treaty rights entitle the shareholder to an action to claim for indirect damage and explained in very patent terms that Argentina was wrong in confusing the right of a shareholder to claim for indirect damages with the rights of the company. The Committee first drew an analogy of the shareholders' action to claim for indirect damages with the situation of some parties to contracts of insurance, where persons who are not the legal owners of an item of property but have a direct or indirect interest, may make insurance claims to be compensated on their own pecuniary loss.⁸⁵ The Committee thus declared:

In the same way, the Committee considers that, even where a foreign investor is not the actual legal owner of the assets constituting an investment, or not an actual party to the contract giving rise to the contractual rights constituting an investment, that foreign investor may nonetheless have a financial or other commercial interest in that investment. ... The Committee sees no reason in principle why an investment protection treaty cannot protect such an interest of a foreign investor, and enable the foreign investor to bring arbitration proceedings in respect of alleged violations of the treaty with respect to that interest. An investment protection treaty having this effect does not alter the legal nature of the investor's interest nor that of the legal owner of the investment, nor does it ignore the separate legal personalities and separate legal rights and obligations of the shareholder and the company. Rather, it merely ensures that whatever interest, legal or otherwise, that the investor does have will be accorded certain protections....Although more than one person may be able to claim in different fora in respect of the same damage to the same assets, each may ultimately only be entitled to be compensated to the extent of its own loss.⁸⁶

Accordingly, investment agreements which include shares in their scope of protection may give the shareholder a direct action to claim for loss incurred on the shares incidental to the loss incurred by the local company in which the shareholder holds shares. As to the scope of this right, the shareholder would be claiming for the violation of its own right (treaty right), for its own loss (personal though indirect) produced to its own assets (shares).

⁸⁴ *Azurix Corp v Argentina*, (ICSID Case No ARB/01/12), Decision on Application for Annulment of November 1, 2009, available at: www.investmentclaims.com (last visited March 29, 2010) (hereinafter *Azurix* Annulment).

⁸⁵ *Id.* ¶ 107-109.

⁸⁶ *Id.*

Clearly, this particular nature of the right raises some problems. First, since the shareholder would receive indirect protection through the exercise of the rights of the company, the shareholder would be protected twice. However, BITs do not protect shareholders in a subsidiary or conditional way. The protection is additional and the exercise of the local company's rights does not affect the exercise of the treaty rights and vice versa. Hence, the existence of local proceedings brought by local companies does not affect the right of the shareholder to bring an action based on a BIT. This has been dealt with in *Camuzzi*⁸⁷ where Argentina argued that the tribunal did not have jurisdiction because the claim was not "mature", given that a renegotiation process with the local companies was taking place.⁸⁸ The tribunal did not find a bar in the existence of this renegotiation process to decide the dispute.

Second, the local shareholders would be in a disadvantaged position. However, as the tribunal highlighted in *Camuzzi*⁸⁹ this is precisely the idea of BITs. In its words:

It is quite evident that in the context of a system of investment protection under international law, only the beneficiaries of such protection can resort to it. This was the intention of the treaty and is also the situation in international law as it enables specific parties to take action in the light of its rules and mechanisms. Whether this protection can or should be extended to national investors is an alternative which only the evolution of international law and/or domestic law will be able to determine, but is not what the parties to the treaty intended. The protected foreign investors clearly can claim on account of measures that affect the company to the extent that it is possible under the terms of the respective treaty, as is the case in this instance. This is entirely different from the intra-company relations to which the argument mentioned also appears to refer. To the extent that the acts of the company benefit the foreign investors, there is no reason why such benefits should not be taken into account at the appropriate time.⁹⁰

Some of these negative effects are analyzed in Section III. Nevertheless, it should be stressed that investment treaties contain international obligations and warranties the State undertakes as an investment policy to attract foreign investment. The existence of these additional warranties is perhaps amongst the incentives foreign investors have to invest in that country. This was the case of

⁸⁷ *Camuzzi* Jurisdiction, *supra* note 8.

⁸⁸ *Id.* ¶ 92.

⁸⁹ *Id.*

⁹⁰ *Id.* ¶ 100/101.

Argentina, where the existence of BITs signed by Argentina was expressly mentioned in the invitations to participate in the privatization process.⁹¹ Therefore, if BITs extend protection to the risk of reduced dividends or loss resulting from prejudice caused to the local company, (which are in domestic law unprotected simple interests) they deserve BIT protection. The fact that these obligations are burdensome to the State cannot override the principle of *pacta sunt servanda*.⁹²

2. The *Barcelona Traction* Case is Not Applicable to Investment Treaty Arbitration

ICSID tribunals⁹³ have justified the non-application of the International Court of Justice (ICJ) *Barcelona Traction* case.⁹⁴ The case concerned the Barcelona Traction, Power & Light Company, a company incorporated in Canada, which operated in Spain and of which 88% shares were owned by Belgians. Belgium claimed that the Spanish government had expropriated the company. Spain asserted that international law did not extend its protection to the interests of foreign shareholders who suffered losses through injury inflicted upon the rights of the company in which they hold shares.

The ICJ refused Belgium standing because the Barcelona Traction company was incorporated in Canada. Instead of analyzing customary law⁹⁵, the ICJ resolved *Barcelona Traction* by making reference to municipal laws.⁹⁶ It applied the

⁹¹ See *CMS Jurisdiction*, *supra* note 8, ¶ 60.

⁹² VCLT, *supra* note 35, art. 26.

⁹³ *Total Jurisdiction*, *supra* note 8, ¶ 78; *CMS Annulment*, *supra* note 8, ¶ 69; *Goetz v. Burundi*, *supra* note 8, ¶ 89; *GAMI Investments, Inc v Mexico*, Final Award, Ad hoc—UNCITRAL Arbitration Rules, November 15, 2004, available at: www.investmentclaims.com (last visited March 29, 2010) (hereinafter *GAMI*) ¶ 30-31; *Suez Jurisdiction*, *supra* note 8, ¶ 50.

⁹⁴ *Barcelona Traction*, *supra* note 2.

⁹⁵ Precedents have been analysed by the council of Spain, Diez de Velasco, to support the domestic law distinction between the rights of the company and those of the shareholders in the international plane. Manuel Diez de Velasco, *La protection diplomatique des sociétés et des actionnaires*, 141 RECUEIL DES COURS 149-152 (1974) (hereinafter Diez de Velasco). A thorough analysis of State practice previous to the *Barcelona Traction* case may be consulted in Lucius Cafilisch's thesis. The thesis was defended after the issuance of the judgement; Lucius Cafilisch, *The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case*, in ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 187 (1971) (hereinafter Cafilisch).

⁹⁶ *Barcelona Traction*, *supra* note 2, ¶ 33. See Rosalyn Higgins, *Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.*, 11 VA. J. INT'L L. 331 (1970).

corporation-shareholder distinction to conclude that States have no standing to espouse claims on behalf of shareholders of an injured corporation, except under special circumstances,⁹⁷ which were not applicable in the case.

This ruling was confirmed in the recent *Diallo Case*⁹⁸ where the Court rejected the claim brought on behalf of the locally established subsidiaries.⁹⁹ The Court declared: “not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected”.¹⁰⁰

The question arises: is such a rule incompatible to shareholders direct action in ICSID arbitration? Arbitration tribunals have answered to this question in the negative and declared that:

This was criticized by judge Riphagen who considered that municipal law has a different end than public international law and a company’s legal personality under municipal law should not have been regarded by the court as “an exclusive touchstone”; *Barcelona Traction*, Judge Riphagen Separate Opinion, *supra* note 2 at 337, 341, 343.

⁹⁷ *Barcelona Traction*, *Id.* ¶ 40-45. The ICJ considered the following exceptions to the rule. These are:

a) In case of property belonging to war enemies;

b) When the company has ceased to exist; (this is to be interpreted strictly as definite extinction; *i.e.*, when the winding up process is finished, the company has been liquidated and the legal personality cancelled. *See* Diez de Velasco, *supra* note 95, at 158.; and the criticism by the Belgian Council Mr. Mann who considered that the ICJ ignored Spanish rules on the effects of bankruptcy which established a *capitis diminutio* on the company; F. A. Mann, *The Protection of Shareholders Interests in the Light of the Barcelona Traction Case*, 67 AM. J. INT’L L. 261/265 (1973) (hereinafter *Mann-Protection of Shareholders*).

c) When the State lacks capacity to act on behalf of its national (this is because it has no genuine link with the private person). The failure to afford protection does not create a lack of capacity to act. *See* *Mann-Protection of Shareholders*, *Id.* at 269. As to whether the shareholder of a company incorporated in the Host State has a right of action the ICJ did not pronounce on that issue because it did not need to. *See* *Barcelona Traction*, *Id.* ¶ 92; Lucius Cafilisch declared after the *Barcelona Traction* case that, the rule under international law is still that foreign shareholders interests are protected by international law if the company has the nationality of the Host State. Cafilisch, *supra* note 95, at p. 185

Some authors saw an exception in that shareholders could claim for their rights according to municipal law. However, this is rather the general rule, *i.e.* that the shareholders State cannot claim for the simple interests of shareholders.

⁹⁸ *Diallo*, *supra* note 2.

⁹⁹ *Id.* ¶ 57.

¹⁰⁰ *Barcelona Traction*, *supra* note 2, ¶ 46.

1. The *Barcelona Traction* case referred to customary law whereas treaty based arbitration is within the field of conventional law (constituting *lex specialis* to the general rule);¹⁰¹
2. Shareholders are not claiming for the rights of the company but their own rights derived from the treaty (thus the regime would be within the general rule);
3. The case is applicable to diplomatic protection not investor-State arbitration (thus there would be no conflict of norms);¹⁰²
4. In any case, the *ELSI* case allowed the State of the nationality of the shareholders of a company incorporated in Italy to have recourse to diplomatic protection.¹⁰³

The reasons used by ICSID tribunals to set aside the *Barcelona Traction* judgment are presented in different, usually alternative, ways. Some reasons are more compelling than others; in particular it is more persuasive that the rule of *Barcelona Traction* is not applicable because it is limited to general international law in the field of diplomatic protection and not to treaty-based Investor-State arbitration. Perhaps, what is less compelling is the alternative way in which these reasons are presented. Is conventional investment law *lex specialis* to the general rule or is the rule not applicable? The ambiguity of these findings perhaps is akin to the ambiguity in which tribunals explain why treaty rights protect indirect interests of foreign shareholders.

In any case, investment treaties have the effect of protecting what in domestic and general customary international law are unprotected simple interests. Therefore, the shareholder would now be claiming for a *right* and not a mere simple interest; *i.e.* a treaty right which allows him to claim for indirect damage produced by measures directed at the local company.

3. Shareholders' Direct Action to Claim for Indirect Damage is Within the Objective Limits of Art.25 of the ICSID Convention

Third, ICSID tribunals consistently considered that shareholders' direct action falls within the objective limits of the jurisdiction of the Centre.¹⁰⁴ In the application for annulment of *CMS*,¹⁰⁵ Argentina claimed that the tribunal erred in

¹⁰¹ *CMS* Jurisdiction, *supra* note 8, ¶ 48; *Cf. Total* Jurisdiction, *supra* note 8, ¶ 78; *Suez* Jurisdiction, *supra* note 8, ¶ 50.

¹⁰² *Azurix* Jurisdiction, *supra* note 8, ¶ 72.

¹⁰³ This was also stated in *GAMI*, *supra* note 93, ¶ 30.

¹⁰⁴ *Total* Jurisdiction, *supra* note 8, ¶ 78; *CMS* Annulment, *supra* note 8, ¶ 69.

¹⁰⁵ *CMS* Annulment, *Id.*

finding that CMS Gas had standing; in particular, that it went beyond the “outer limits” of the ICSID jurisdiction set out in Art.25 of the Convention even if the BIT authorized it to do so.¹⁰⁶ “If the tribunal had followed the applicable rules of treaty interpretation, as reflected in the VCLT, it would have avoided the manifest excess into which it fell.”¹⁰⁷ Argentina further claimed that the action of CMS was a derivative or an indirect claim falling clearly outside ICSID’s jurisdiction as attested by the *travaux préparatoires* and by Article 25(2)(b) of the ICSID Convention, which gives standing to the local company and not to the controlling shareholder.¹⁰⁸

After quoting Art.25(1) of the ICSID Convention, the Annulment Committee declared that there was no attempt therein to define investment.¹⁰⁹ On the contrary, this was left to be established by the different instruments on which jurisdiction is based.¹¹⁰ In the case at hand, the Argentina-US BIT included in its definition of investment “a company or shares of stocks or other interests in a company or interest in the assets thereof”.¹¹¹ The definition, though very broad, was considered still compatible with the object and purpose of the Convention.¹¹² Indeed, the object and purpose of the BIT was to protect investments and since the parties considered shares as one type of investment, the latter needed protection. The Convention just requires that there be a legal dispute arising directly out of an investment between a contracting State and a national of another contracting State, which they have consented to submit to ICSID for resolution. As mentioned before shares cannot *per se* be excluded from an objective definition of investment. Therefore, a claim of a shareholder based on a violation of a BIT which includes shares in its scope of protection and which has the nationality of another contracting State is in accordance with Art.25 of the ICSID Convention. In addition, as explained above, the claim of the shareholder is not derivative but direct because the shareholder claims for its own rights arising out of the treaty. Only derivative claims, that is claims for the “rights” of the local company, could be considered prohibited by Art.25 of the ICSID Convention.

The Annulment Committee also addressed the fact that the existence of a right to claim of the locally incorporated company under Art.25(2)(b), second

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* ¶ 66.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* ¶71.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* ¶ 72.

sentence of the ICSID Convention, does not affect the right of action of foreign shareholders under the BIT.¹¹³ Therefore according to the reasoning of the Annulment Committee, the treaty right of the shareholder may overlap with a treaty right of the local company. In such a case, both rights would be the same in substance and both rights would be protecting the “foreign investment”. In these circumstances the question arises: is it reasonable to apply the distinction mentioned above between the right of the shareholder and the rights of the local company when both rights are treaty rights?

The legal persons, the scope or content of the rights, and the loss are still different. On the one hand, the content of the rights would differ since the local company would be able to claim for a violation of an umbrella clause regarding the commitments entered into with the Host State, whereas the shareholder would not. Further, the assets protected would be different, *i.e.* the assets of the local company and the shares. Therefore, the local company would be able to claim for the expropriation of its assets but not for the expropriation of the shares whereas the shareholder would be able to claim for the expropriation of the shares but not for the expropriation of the assets of the company. As it will be analyzed below, the expropriation of the local company’s assets does not necessarily entail the expropriation of the shares. Both assets (shares and company’s assets) even if they are closely interrelated are different and their value should be assessed differently. Finally, given that the rights and the assets are different so is the assessment of the damages inflicted on them.

C. Standing

As explained in the previous section, a shareholder has standing before ICSID tribunals when an investment treaty includes shares in its scope of protection and also an invitation to settle any dispute arising from it through ICSID arbitration. The question of which shares offer shareholders standing depends on the way the treaty is drafted. However, in general, treaties are limited to declaring that “shares and other forms of participation” are covered investments. In such a case, do the shares need to be majority, minority, controlling, direct or indirect?

1. Majority/Minority and Controlling/Non-controlling Shareholdings

If “shares” without further specification are established as a covered asset in an investment treaty then, in principle, no distinction should be made between

¹¹³ *Id.* ¶ 74.

majority and minority shares.¹¹⁴

In a wide range of cases concerning the standing of shareholders, respondent States have objected that only majority or controlling shareholders can bring a claim.¹¹⁵ This has been consistently refused by ICSID tribunals. The Annulment Committee in *Vivendi*¹¹⁶ considered that Compagnie Générale des Eaux “CGE”, a minority French shareholder of the local company Compañía de Aguas del Aconquija, was an investor for the purposes of jurisdiction without making a distinction between majority and minority shareholders.¹¹⁷

More clearly, in *Lanco*¹¹⁸ the ICSID tribunal expressly recognized the right of a minority shareholder to bring a claim under a BIT. Lanco held 18.3% shares of a concessionaire operating a cargo terminal in the port of Buenos Aires. The ICSID tribunal declared that:

Argentina-US Treaty says nothing indicating that the investor in the capital stock has to have control over the administration of the company, or a majority share; thus the fact that Lanco holds an equity share of 18.3% in the capital stock of the Grantee allows one to conclude that it is an investor in the meaning of Article I [of the BIT].¹¹⁹

This conclusion was further confirmed in *CMS; Enron; Champion Trading; Camuzzi; Suez; APPL v. Sri Lanka; Lauder; LG&E; and Sempra*.¹²⁰

¹¹⁴ ALEXANDROV, *The Baby Boom and the Jurisdiction of ICSID Tribunals*, *supra* n. 1, 395.

¹¹⁵ E.g., *CMS Jurisdiction*, *supra* note 8, ¶ 46; *Sempra Jurisdiction*, *supra* note 8, ¶ 29.

¹¹⁶ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment of July 3, 2002, [English original] 41 I.L.M. 1135 (2002), 6 ICSID REP. 340 (2004), French translation of English and Spanish originals in 130 J. DR. INT'L 195 (2003), available at: <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited March 29, 2010) (hereinafter *Vivendi Annulment*) ¶ 50.

¹¹⁷ *Id.* ¶ 50. See also ALEXANDROV, *The Baby Boom and the Jurisdiction of ICSID Tribunals*, *supra* note. 1 at 395.

¹¹⁸ *Lanco Jurisdiction*, *supra* note 8.

¹¹⁹ *Id.* ¶ 12-14.

¹²⁰ *CMS Decision on Jurisdiction*, *supra* note 8, ¶ 48; *Enron Jurisdiction*, *supra* note 8, ¶ 44; *Champion Trading Jurisdiction*, *supra* note 8, ¶ 3/18; *Camuzzi Jurisdiction*, *supra* note 8, ¶ 32; *Suez*, *supra* note 8; *APPL v. Sri Lanka*, *supra* note 8, ¶ 95; *Lauder*, *supra* note 8; *LG&E Jurisdiction*, *supra* note 8, ¶ 38; *Sempra Jurisdiction*, *supra* note 8, ¶ 38/58. In the framework of NAFTA arbitration under UNCITRAL Arbitration Rules in *GAMI*, *supra* note 93, ¶ 37/38 and *Goetz v. Burundi*, *supra* note 8, ¶ 89.

These cases have demonstrated that under ICSID case law, there is no general requirement of control or majority shareholding for a shareholder to have standing to claim for the violation of a BIT. The reasoning is consonant with the fact that shareholders' direct action is based on an independent treaty right and not because he is equated to the local company.

2. Indirect Shareholdings

Sometimes claimants are not the immediate shareholders of the affected company whereby the question arises whether the parent company can make a claim in relation to this investment.¹²¹ As explained above, some investment treaties include both "direct and indirect" shareholdings as "investments". However, a great number of treaties, especially in Latin America, do not specify whether the investment needs to be direct or whether it can be indirect.¹²²

Previous case law considered that it was necessary for indirect shareholders to be controlling shareholders. The reason for such protection stemmed from the search of the real, *de facto*, investor and the identification of the shareholder with the corporation.¹²³ This was the case in *Sedelmayer v. Russia*,¹²⁴ where the tribunal found its jurisdiction based on Sedelmayer's full control of the US company and considered that the BIT's object and purpose would not allow a non-controlling indirect investor.¹²⁵

The value of this award yet has been referred to as "trivial"¹²⁶ since it has not been followed by subsequent cases.¹²⁷ In a strong dissenting opinion, arbitrator Prof. Ivan S. Zykin stated that the issue was not determining whether the "control theory" is known in international public law, national laws and legal doctrine, but whether the treaty allows the claimant to bring a suit and under what conditions.¹²⁸ Recent awards have followed a different approach.¹²⁹ In these,

¹²¹ Schreuer-*Shareholders' protection in International Investment Law*, *supra* note 1; Rubins, *supra* note 7, at 314.

¹²² Rubins, *id.* at 314.

¹²³ Schreuer-*Shareholders' protection in International Investment Law*, *supra* note 1.

¹²⁴ *Sedelmayer v Russian Federation*, Award; *Ad hoc* Arbitration Rules; IIC 106 (1998), July 7, 1998, available at: http://www.iisd.org/pdf/2004/investment_sedelmayer_v_ru.pdf (last visited March 29, 2010) (hereinafter *Sedelmayer*).

¹²⁵ *Id.* ¶ 2.1.5.

¹²⁶ Schreuer-*Shareholders' protection in International Investment Law*, *supra* note 1.

¹²⁷ Except, to a certain extent, for the *Enron* where the tribunal based its finding on the intervention of the shareholder in the management of the company; *Enron* Jurisdiction, *supra* note 8, ¶ 46.

¹²⁸ *Sedelmayer* Dissenting Opinion, *id.* at 1-2.

the protection of indirect shareholders is not based on who is the real investor, but on an interpretation of the BIT.

In *Siemens*,¹³⁰ Siemens AG, a German company, participated in a company incorporated in the Host State, Siemens IT Services S.A. (SITS), through another German company, Siemens Nixdorf Informationssysteme AG (SNI).¹³¹ Argentina objected that there was no direct relationship between the investment and Siemens because the shares in SITS were held by SNI¹³² and not by Siemens. According to Argentina the Argentina-Germany BIT, which was silent on the directness criteria, implicitly required a direct relationship between the investor and the investment.¹³³ Contrary to the arguments of the respondent, the claimant saw in the broad definition of investment contained in the treaty as an “all inclusive”, requiring in case of exclusion of certain assets an express declaration.¹³⁴ The Tribunal concluded that since the Argentina-Germany BIT did not expressly require that there be no interposed company, a German shareholder was protected under the treaty.¹³⁵

This approach was further followed in *Wena Hotels v. Egypt; Sempra; Camuzzi; Gas Natural and Lauder*.¹³⁶ Therefore, investments by intermediate companies do

¹²⁹ *Siemens* Jurisdiction, *supra* note 8; *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on Jurisdiction of June 29, 1999, 41 I.L.M. 881 (2002); 6 ICSID REP. 74 (2004) (hereinafter *Wena Hotels* Jurisdiction) ¶ 45-46; *Sempra* Jurisdiction, *supra* note 8, ¶ 90/91; *Camuzzi* Jurisdiction, *supra* note 8, ¶ 63; *Gas Natural* Jurisdiction, *supra* note 8, ¶ 33/35; *Lauder*, *supra* note 8, ¶ 77.

¹³⁰ *Siemens* Jurisdiction, *supra* note 8.

¹³¹ *Id.* ¶ 23.

¹³² In this case, since the shareholder had the same nationality as that of the intermediary, both qualified as investors by the same treaty. However, SNI did not initiate proceedings before ICSID. *Id.* ¶ 123.

¹³³ In its Memorial on Jurisdiction, Argentina submitted that:

It is clear that an investor in shares has standing to activate dispute settlement mechanisms under bilateral investment treaties in cases of acts by the Host State that affect it directly. The situation is different when shareholders bring a claim for damages suffered by the company in which they have shares (indirect claims).

Id. ¶ 123.

¹³⁴ Counter-Memorial on Jurisdiction, *Id.*, ¶ 308-309; *Id.* ¶ 128.

¹³⁵ *Id.* ¶ 137/142.

¹³⁶ *Wena Hotels* Jurisdiction, *supra* note 129 ¶ 45-46; *Sempra* Jurisdiction, *supra* note 8, ¶ 90/91; *Camuzzi* Jurisdiction, *supra* note 8, ¶ 63; *Gas Natural* Jurisdiction, *supra* note 8, ¶ 33/35. The Czech Republic objected that the claimant had “failed to prove that he owns or controls an investment in the Czech Republic”. Jurisdiction was upheld without any mention of the indirect nature of Mr. Lauder's investment. However, Mr. Lauder's claim

not deprive the shareholder of the ability to pursue claims against the violation of BITs.¹³⁷ Tribunals consistently recognized protection to indirect shareholders through an intermediary in the investor Home State¹³⁸, in the Host State¹³⁹ and in a third State¹⁴⁰ and little attention was given to whether the shareholding was controlling or not.¹⁴¹ Accordingly, unless otherwise expressly provided in the treaty, indirect shareholdings are included in the broad category of shares.

This interpretation could be criticized for being taken too lightly. Could one see in the ordinary terms “shares and other forms of participation” an inclusion of indirect shares? As mentioned above, shares are a portion of the property of a company. The indirect shareholder cannot transfer or dispose this portion of property. Arguably, a treaty shall be interpreted in the light of its object and purpose, and the purpose of a BIT is to protect investments; hence, an investor, albeit an indirect one, should be given protection. E.g. if the direct shareholder is not protected by an investment treaty, as a matter of justice the indirect investor whose national State has signed a BIT with the Host State should have a right to claim. And what if the direct investor is already protected by a BIT? Shall both of them be protected at the same time? These concerns take us to the very basic question of why the indirect investor should be protected. Is it because he is the “real investor” or because all shareholders of the same group, or at least some of them, should be protected? If it were because he is the real investor, then such a determination should be made carefully in order to avoid the existence of multiple claims of investors at competing levels. However, as demonstrated above, arbitration tribunals do not require that the indirect shareholding is controlling or majority. Therefore, all shareholders would be protected altogether regardless of who is “real” investor. Then, the risk is evident: there would be unnecessary multiple protections which could lead to forum shopping, treaty shopping and abuse of process.

was based on the US-Czech bilateral investment treaty, which limits the definition of indirect investments to those which are controlled by the claimant. *Lauder*, *supra* note 8, ¶ 77.

¹³⁷ Schreuer-*Shareholders' protection in International Investment Law*, *supra* note 1; Rubins, *supra* note 7, at 313 *et seq*; MARIEL DIMSEY, *THE RESOLUTION OF INTERNATIONAL INVESTMENT DISPUTES: CHALLENGES AND SOLUTIONS* 69 (Eleven International Publishing 2008) (hereinafter DIMSEY).

¹³⁸ *Siemens* Jurisdiction, *supra* note 8.

¹³⁹ *Enron* Jurisdiction, *supra* note 8.

¹⁴⁰ *Lauder* Jurisdiction, *supra* note 8.

¹⁴¹ Schreuer makes this classification. Schreuer-*Shareholders' protection in International Investment Law*, *supra* note 1.

In any case, the object and purpose of the treaty can never be that of allowing pretextual claims for extremely remote interests. It could be argued that these claims would not be allowed since they would not fall within the jurisdictional requirement of a legal dispute arising directly out of an investment. *Quid Juris?* The analysis follows.

D. The Jurisdictional Requirement of a Legal Dispute Arising Directly Out of an Investment

As mentioned above, Art.25 also requires that the dispute be directly related to the investment. This is an objective requirement that the legal dispute must be reasonably closely connected to the investment.¹⁴² To draw a line in general terms between disputes arising directly and those arising indirectly out of an investment, an analysis on a case-by-case basis is needed. Prof. Schreuer mentions that the dispute must have distinctive features linking them to the investment that are not shared by disputes unrelated to investments.¹⁴³

Would measures directed at the local companies that indirectly affect the value of the shares constitute a legal dispute in a direct relationship with an investment? In other words, is this jurisdictional requirement a bar to claim for indirect damage?

The ICSID Convention gives no answer. Unlike NAFTA Art.1101,¹⁴⁴ the ICSID Convention does not require that the *measures* be in a direct relationship with the investment or the investor. Hence, measures which are not directed at the shares could still give rise to a legal dispute; *i.e.*, a disagreement regarding the existence and scope of a legal right or obligation,¹⁴⁵ which would be in a direct relationship with the shares since the measures would allegedly violate treaty standards causing prejudice, though indirectly, to the value of the shares.

¹⁴² SCHREUER-THE ICSID CONVENTION, *supra* note 21, at 114.

¹⁴³ *Id.* at 121.

¹⁴⁴ NAFTA, *supra* note 5, art. 1101: "This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party ...".

¹⁴⁵ A disagreement regarding the existence and scope of a legal right or obligation or regarding the nature or extent of the reparation to be made for the breach of the legal obligations. L. REED ET AL., GUIDE TO ICSID ARBITRATION 15 (Kluwer Law Int'l 2004) (hereinafter REED ET AL.). The Report of the Executive Directors clarified: "The expression legal dispute has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence of scope of a legal right or obligation or the nature or extent of the reparation to be made for breach of a legal obligation". 1 ICSID REP. 28.

As explained above, in the cases against Argentina,¹⁴⁶ investors were claiming for damages to their investment produced by actions which affected the profitability of licenses and concessions of the locally established subsidiaries.

In *Total*,¹⁴⁷ Argentina claimed that the wording “dispute arising directly out of an investment” in Art.25(1) of the ICSID Convention meant that the measure needs to be specifically addressed at the investment.¹⁴⁸ To support its claim Argentina referred to *Methanex*.¹⁴⁹ where the tribunal found it did not have jurisdiction because the environmental regulations prohibiting MTBE¹⁵⁰ were not directed at Methanex or Methanol.¹⁵¹ The claimant, Total S.A., a French company which had made a number of investments in Argentina in the gas transportation, hydrocarbons exploration and production and power generation industries, argued that Argentina’s submission was mistaken because the requirement contained in Art.25(1) referred to the “dispute” and not to the “measures”.¹⁵² In addition, it referred to “directly” not “specifically”.¹⁵³ The tribunal agreed with the Claimant. It considered that a general measure not addressed at the investment can directly affect an investment and thus meet the requirement “dispute arising out of an investment”¹⁵⁴. It suffices that the measure is applied and implemented *in respect* of the investment, as was the case with the Argentinean law No. 25.561.¹⁵⁵ Moreover, in the present case, some of the measures claimed by Total S.A. were directed at and applied specifically to public services and their providers under license.¹⁵⁶ Finally, making reference to the *Methanex* case cited by Argentina, it made the distinction that NAFTA Art. 1101(1) made reference to “measures” while Art.25(1) of the ICSID Convention referred to “legal disputes”.¹⁵⁷

¹⁴⁶ *Camuzzi* Jurisdiction, *supra* note 8, ¶ 46 *et seq.*; *Total* Jurisdiction, *supra* note 8, ¶ 23/27; *Sempra* Jurisdiction, *supra* note 8, ¶ 90/91; *CMS* Jurisdiction, *supra* note 8, ¶ 58 *et seq.*; *Azurix* Jurisdiction, *supra* note 8, ¶ 117 *et seq.*; *Enron* Jurisdiction, *supra* note 8, ¶ 58/60; and *Siemens* Jurisdiction, *supra* note 8, ¶ 150.

¹⁴⁷ *Total* Jurisdiction, *supra* note 8.

¹⁴⁸ *Id.* ¶ 23.

¹⁴⁹ *Methanex Corp. v. United States of America*, Award, Ad hoc—UNCITRAL Arbitration Rules, August 3, 2005, available at: <http://www.naftaclaims.com> (last visited March 29, 2010) (hereinafter *Methanex*).

¹⁵⁰ An additive of gasoline.

¹⁵¹ *Total* Jurisdiction, *supra* note 8, ¶ 23.

¹⁵² *Id.* ¶ 25.

¹⁵³ *Id.*

¹⁵⁴ *Id.* ¶ 62.

¹⁵⁵ *Id.* ¶ 64.

¹⁵⁶ *Id.* ¶ 65.

¹⁵⁷ *Id.* ¶ 66.

In *Camuzzi*¹⁵⁸, Camuzzi International S.A., a company which held indirect shares in two gas distribution companies in Argentina which were licensees to supply and distribute natural gas in several Argentinean provinces, claimed that the suspension of the licensee company's tariff increases, amongst other things, resulted in a breach of the guarantees granted by the Argentine Republic pursuant to law, the licenses, and was in violation of an investment treaty.¹⁵⁹ Argentina alleged that the loss was not direct because the suspension of the tariff increases affected the local companies and not the shareholders, whose mere interests only were affected.¹⁶⁰ Further, Argentina cited the *Methanex* case¹⁶¹ and the pleadings of the US in the *GAMI* case.¹⁶² The Claimant argued that in *Methanex*¹⁶³ there was no link between the measure and the investment and in the present case there was.¹⁶⁴ The Tribunal considered that there was a dispute (conflicting views between the parties on the nature and extent of their rights) and that the dispute was directly related to the investment since,

[T]he investment was made to carry out the specific economic activity involved in the privatization project, in addition to the fact that in doing so contracts leading to the issuance of a license were signed with the State.¹⁶⁵

Moreover, it declared that in the *Methanex* case,¹⁶⁶ that connection did not exist since the Claimant did not even demonstrate that it was regulated by the measures questioned.¹⁶⁷ Moreover, the Tribunal cited the *GAMI* award,¹⁶⁸ where the Tribunal considered that, the fact that the Host State did not interfere with share ownership, was not decisive.¹⁶⁹ The same conclusion was followed in *CMS*, *Azurix*, *Enron*, *Siemens*, and in *Generation Ukraine*.¹⁷⁰

¹⁵⁸ *Camuzzi* Jurisdiction, *supra* note 8.

¹⁵⁹ *Id.* ¶ 10.

¹⁶⁰ *Id.* ¶ 45.

¹⁶¹ *Methanex*, *supra* note 149.

¹⁶² *Camuzzi* Jurisdiction, *supra* note 8, ¶ 45.

¹⁶³ *Methanex*, *supra* note 149.

¹⁶⁴ *Camuzzi* Jurisdiction, *supra* note 8, ¶ 52.

¹⁶⁵ *Id.*

¹⁶⁶ *Methanex*, *supra* note 149.

¹⁶⁷ *Camuzzi* Jurisdiction, *supra* note 8, ¶ 52.

¹⁶⁸ *GAMI*, *supra* note 93.

¹⁶⁹ *Camuzzi* Jurisdiction, *supra* note 8, ¶ 63.

¹⁷⁰ *CMS* Jurisdiction, *supra* note 8, ¶ 58; *Azurix* Jurisdiction, *supra* note 8, ¶ 117; *Enron* Jurisdiction, *supra* note 8, ¶ 58-60; *Siemens* Jurisdiction, *supra* note 8, ¶ 150; *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9) Award of September 16, 2003, 44 I.L.M. 404 (2005) (hereinafter *Generation Ukraine*) However, the Tribunal said that *Generation Ukraine* had not demonstrated that its ownership rights were affected by

All these decisions demonstrate that ICSID tribunals have rejected the arguments presented by the Host States that a dispute with a shareholder relating to the assets of the company, such as contracts or licenses, does not arise directly out of an investment.¹⁷¹ The fact that tribunals found a direct relationship between the investment and the dispute, when *the measures were directed at and applied specifically to public services* (which was the activity of the company), and when *the investment* (the share) *was made to carry out the specific economic activity* (of the local company), is quite confusing. Indeed, tribunals see in the direct relationship between the dispute and the company, a direct relationship of that dispute with the shares held in that company. This would amount to confusing or substituting the shares with the company.

However, recourse to such reasoning is indeed not needed to arrive at the conclusion that the dispute on a treaty violation which produces indirect damage on a share is in a direct relationship with the investment (share). If a measure indirectly produces loss on the shares, in violation of a treaty obligation, there is a direct relationship between the dispute (*i.e.* a disagreement on the existence of a treaty violation) and the share. Undoubtedly, the measures would not be in a direct relationship with the investment, yet this is not a requirement under Art.25 of the ICSID Convention.¹⁷²

E. Some Specific Grounds or Causes of Action

The purpose of this section is not to analyze substantive investment protection (which would merit its own research). On the contrary, the aim is to analyze how some frequently claimed investment rights are applied when the investment is a shareholding. These are expropriation and the fair and equitable treatment standard.

1. Expropriation

BITs usually include provisions restraining expropriations. A classic provision may be found in the US-Czech Republic BIT:

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except for a public purpose; in accordance with due

Ukrainian conduct because Heneratsiya had not made the investment in the urban project and it was not in a position to claim pre-investment protection, ¶ 8.6.

¹⁷¹ ALEXANDROV, *The Baby Boom and the Jurisdiction of ICSID Tribunals*, *supra* note 1 at 406.

¹⁷² ICSID Convention, *supra* note 10, art. 25.

process of law; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation.¹⁷³

As can be seen from this provision, expropriation is defined in broad terms including direct – *de jure* – and indirect – *de facto* – expropriation.¹⁷⁴ Jan Paulsson and Douglas Zachary explain that expropriation is direct when it deprives the owner of the legal rights of ownership of its property and it is indirect when it: “affect(s) property interests in more subtle ways. Legal title to the property is not disturbed. Rather, its income producing potential is somehow diminished by acts attributable to the Host State”.¹⁷⁵

Transposing the distinction to shareholdings, shareholders may claim direct expropriation of their shares as such or of their dividends.¹⁷⁶ Instances of direct or *de jure* expropriation of dividends can be seen in *Foremost Tebran, Inc. v. Iran*¹⁷⁷ and of shares in *Reineccius v. Bank of International Settlements*.¹⁷⁸

¹⁷³ US-Czech BIT cited in *CME Final Award and Separate Opinion, Ad hoc—UNCITRAL Arbitration Rules, IIC 62 (2003), March 14, 2003, available at: <http://www.investmentclaims.com/ViewPdf/ic/Awards/law-iic-62-2003.pdf> (last visited March 29, 2010) (hereinafter *CME Final Award*) at no. 23, 24.*

¹⁷⁴ “Any measures depriving, directly or indirectly, investors of the other contracting party of their investments”, Art. 5 of the Netherlands-Czech BIT (Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic), *available at: http://www.unctad.org/sections/dite/ia/docs/bits/czech_netherlands.pdf*. (last visited March 29, 2010).

¹⁷⁵ J. Paulsson & Z. Douglas, *Indirect Expropriation in Investment Treaty Arbitrations, in* ARBITRATING FOREIGN INVESTMENT DISPUTES 152 (N. Horn ed., 2004). In *Lauder* the tribunal explained that “the concept of indirect (or *de facto* or creeping”) expropriation is not clearly defined. Indirect expropriation or nationalization is a measure that does not involve an overtaking but that effectively neutralized the enjoyment of the property”, *Lauder, supra* note 8, ¶ 200.

¹⁷⁶ This is when the Government acquires title and benefits from it or interferes in the use of property and enjoyment of rights; *See* JAMES CRAWFORD ET AL., FOREIGN INVESTMENT DISPUTES 884 (Kluwer Law International 2005) (hereinafter CRAWFORD ET AL.).

¹⁷⁷ *Foremost Tebran, Inc. v. Iran*, Award No. 220-37/231-1 of April 11, 1986, 10 IRAN-U.S. CLAIMS TRIBUNAL REP. 228, 246, 250-53 (1987).

¹⁷⁸ *Arbitral Tribunal of the Bank of International Settlements* (January 8, 2001). Although shares in the Bank of International Settlements (BIS or Bank) were held primarily by governments, as of 2000 13.73% of these shares were held by private investors. In early 2001, the Board of Governors of the BIS amended the BIS Statutes to require the recall of all privately-held shares with compensation determined by the Bank. Private investors

However, more often shareholders will claim indirect or *de facto* expropriation of their shares.¹⁷⁹ The issue was dealt with in the cases against Argentina¹⁸⁰ Investors claimed that the measures adopted during the period 2000-2002, as described above, had indirectly, but effectively, deprived the investors of the use and enjoyment of their investment, including the deprivation of the whole or a significant part of the economic benefit of property, constituting measures tantamount to expropriation.¹⁸¹ Argentina objected that the investors retained their shares and the possibility to receive dividends since the companies continued to operate normally.¹⁸²

In *CMS, LG&E* and *Azurix*, the measures were not considered to be tantamount to expropriation since the Claimants had not demonstrated a substantial deprivation;¹⁸³ the Claimants were still in control of their investment; the Government did not manage the day-to-day operations of the company; and the investor had full ownership and control of the investment.¹⁸⁴

Further, in *GAMI*, GAMI claimed a violation of Art. 1110 NAFTA (which prevents investors against wrongful expropriation) because Mexico had, among other measures, expropriated a few mills of its local subsidiaries. The Tribunal said:

The position then is: GAMI is entitled to invoke the protection of Article 1110 if its property rights (the value of its shares in GAMI) were taken by conduct in breach of NAFTA. GAMI argues that such conduct was manifest in the Expropriation Decree. This Tribunal finds it likely that the Expropriation Decree was inconsistent with the norms of NAFTA. But

who had owned BIS shares challenged this decision; *CRAWFORD ET AL.*, *supra* note 176 at 884.

¹⁷⁹ See *CME* Final Award, *supra* note 173; *Lander*, *supra* note 8, ¶ 196 *et seq.*; *Goetz v. Burundi*, *supra* note 8, ¶ 130 *et seq.*

¹⁸⁰ *CMS* Award, *supra* note 57; *LG&E* Award, *supra* note 8; *Azurix* Award, *supra* note 57; *Siemens* Award, *supra* note 57.

¹⁸¹ See for example *Siemens* Award, *supra* note 57, ¶ 213; *CMS* Award, *supra* note 57, ¶ 254.

¹⁸² *CMS* Award, *supra* note 57, ¶ 258/259.

¹⁸³ This approach is from *Metalclad Corp v Mexico*, Award, Ad hoc—ICSID Additional Facility Rules; (ICSID Case No. ARB(AF)/97/1) (2000), signed August 25, 2000 dispatched August 30, 2000, available at: <http://www.investmentclaims.com/ViewPdf/ic/Awards/law-iiic-161-2000.pdf> (last visited March 29, 2010) (hereinafter *Metalclad*) ¶ 103.

¹⁸⁴ *CMS* Award, *supra* note 57, ¶ 263/264; *LG&E* Award, *supra* note 8, ¶ 198; *Azurix* Award, *supra* note 57, ¶ 322.

Mexican conduct inconsistent with the norms of NAFTA is only a breach of NAFTA if it affects interests protected by NAFTA. GAMI's investment in GAM is protected by Article 1110 only if its shareholding was "taken".¹⁸⁵

In brief, expropriation of shares can be direct or indirect. And the interest protected has been considered to be the *value* of the share. If the shares are protected against creeping expropriations, then the shareholder would be protected against measures taken by the Host State which, while not affecting its direct rights as shareholder according to domestic law (ownership, dividends, etc), would decrease their value. This decrease could result from a decrease in the income producing potential of the company in which those shares are held. The value of a share is based on expectations and these depend, amongst other things, on the performance of the company and its assets. Of course, the direct damage to the company is not equal to the damage to the share. The decrease in the value of the company's assets may not have an impact on the value of the share in the same proportion. As explained the damage of the shareholder could be indirect but must be personal (*i.e.* inflicted to the shares held by the shareholder).¹⁸⁶

In any case, the determination of the existence of creeping expropriation is quite unusual. Indeed, arbitral tribunals are reluctant to find that there has been substantial deprivation of shares. Thus, whilst a *de jure* expropriation of the assets of the company would in general give rise to a right of the local company to claim reparation, such measures would rarely amount to an expropriation of the shares. According to the case law cited, shares would be considered to have been indirectly expropriated in cases where the value of the shares has decreased so dramatically that the "company" has been virtually taken.

2. Fair and Equitable Treatment

The most frequently violated treaty right with respect to shareholders is the fair and equitable treatment standard. Many BITs include provisions establishing that the:

[I]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law¹⁸⁷

¹⁸⁵ *GAMI*, *supra* note 93, ¶ 129.

¹⁸⁶ Otherwise the claim would be of a derivative character.

¹⁸⁷ Art. II(2)(a) of the Argentina-US BIT. Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and

Most of them do not define the standard of fair and equitable treatment.¹⁸⁸ The definition of fair and equitable treatment is one of the most imprecise in international investment law.¹⁸⁹ Arbitral tribunals have attempted to define or explain fair and equitable treatment in general terms. Amongst these there are wilful disregard of due process of law and an act which shocks or at least surprises a sense of judicial propriety;¹⁹⁰ acts that can be regarded as improper and discreditable;¹⁹¹ arbitrariness,¹⁹² idiosyncrasy,¹⁹³ injustice,¹⁹⁴ lack of good faith,¹⁹⁵ and lack of due process and proportionality.¹⁹⁶ Moreover, they have declared that:

[T]o the modern eye, what is unfair or inequitable need not equate with the outrageous or egregious. In particular, a State may treat a foreign investor unfairly and inequitably without necessarily acting in bad faith.¹⁹⁷

Protection of Investment, *available at*: <http://www.sice.oas.org/BITS/USAARGTC.ASP> (last visited March 29, 2010).

¹⁸⁸ *CMS Annulment*, *supra* note 8, ¶ 82.

¹⁸⁹ CHRISTOPH SCHREUER, *Fair and equitable treatment in arbitral practice*, 6 J. WORLD INVESTMENT & TRADE 359, 364 (2005).

¹⁹⁰ *Eletronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. REPORTS 1989, at 15 (hereinafter *ELSI*) ¶ 128; *Pope & Talbot Inc v Canada*, Award on the Merits of Phase 2, *Ad hoc*—UNCITRAL Arbitration Rules, IIC 193 (2001), signed April 10, 2001, *available at*: www.investmentclaims.com (last visited March 29, 2010) (hereinafter *Pope & Talbot*) ¶ 63; *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award of October 11, 2002, 42 I.L.M. 85 (2003), 6 ICSID REP. 192 (2004), *available at*: <http://www.state.gov/documents/organization/14442.pdf> (last visited March 29, 2010) (hereinafter *Mondev*) ¶ 127.

¹⁹¹ *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award of June 26, 2003, 42 I.L.M. 811 (2003), 7 ICSID REP. 442 (2005), French translation of English original in 131 J. DR. INT'L 219 (2004) (excerpts), *available at*: <http://www.state.gov/documents/organization/22094.pdf>. (last visited March 29, 2010) (hereinafter *Loewen*) ¶ 131-131.

¹⁹² *ELSI*, *supra* note 190, ¶ 128; *Pope & Talbot*, *supra* note 190, ¶ 63; *Waste Management Inc v Mexico* (ICSID Case No ARB(AF)/00/3) Award of April 30, 2004, *available at*: www.investmentclaims.com (last visited March 29, 2010) (hereinafter *Waste Management*) ¶ 98.

¹⁹³ *Waste Management, Id.* ¶ 98.

¹⁹⁴ *Id.*; *MTD Equity Sdn Bhd and MTD Chile SA v Chile* (ICSID Case No ARB/01/7), Award of May 25, 2004, *available at*: www.investmentclaims.com (last visited March 29, 2010) (hereinafter *MTD*) ¶ 113.

¹⁹⁵ *Genin*, *supra* note 8, ¶ 367.

¹⁹⁶ *Pope & Talbot*, *supra* note 190, ¶ 64.

¹⁹⁷ *Mondev*, *supra* note 190, ¶ 116; *Siemens Award*, *supra* note 57, ¶ 265.

As to how this standard works when the investment is a shareholding, the answer will of course, depend on the circumstances of the case. In general terms, one might ask whether the standard protects the value of the share against measures directed at the local company. In the Argentinean cases mentioned above¹⁹⁸ shareholders claimed that Argentina had failed to provide an environment of stable investment in accordance with legitimate expectations by passing of the emergency law and the freeze of tariffs of the licensees of the local subsidiaries. Tribunals have found that Argentina had violated its obligation under the fair and equitable treatment standard.¹⁹⁹ In *Azurix*²⁰⁰ the Tribunal considered that the conduct of the Province *towards the concession* (performed by the local company) and the tariff regime, had violated the obligation of fair and equitable treatment *vis-à-vis Azurix*. In *CMS* the emergency legal framework was considered to violate the fair and equitable principle.²⁰¹ The Tribunal stated that “a stable legal and business environment is an essential element of fair and equitable treatment”.²⁰² The Tribunal concluded that the measures complained of “did in fact entirely transform and alter the legal and business environment under which the investment was decided and made”.²⁰³ It added that “the guarantees given in this connection under the legal framework and its various components were crucial for the investment decision”.²⁰⁴ The decision was upheld by the Annulment Committee.²⁰⁵ Similar findings can be found in *Siemens* and *LG&E*.²⁰⁶

From these cases the following conclusions can be drawn. First, the acts which breached the standard of treatment were directed at local companies. These were the directly injured and were unjustly treated. The damage of the shareholders was indirect and incidental to the damage suffered by the local company. Second, the expectations of the claimants were expectations of the shareholders on the performance of the local company (on the shareholders’ interest in the company). Does this entail a confusion of expectations between the expectations of the shareholder and those of the local company? Not really. In fact, the treaty protects the expectations the shareholder has in his investment – the shares. These expectations include the value and the economic performance

¹⁹⁸ *CMS* Award, *supra* note 57; *LG&E* Award, *supra* note 8; *Azurix* Award, *supra* note 57; *Siemens* Award, *supra* note 57.

¹⁹⁹ *Azurix* Award, *supra* note 57, ¶ 374/377.

²⁰⁰ *Id.* ¶ 374/377.

²⁰¹ *CMS* Award, *supra* note 57, ¶ 164, 264, 292, 299.

²⁰² *Id.* ¶ 274.

²⁰³ *Id.* ¶ 275.

²⁰⁴ *Id.* ¶ 275.

²⁰⁵ *Id.* ¶ 85.

²⁰⁶ *Siemens* Award, *supra* note 57, ¶ 308; *LG&E* Award, *supra* note 8, ¶ 132/139.

of the shares. Given the close link between both – the value and economic performance of the shares and that of the company – the fair and equitable treatment standard protects the expectations the shareholder has *in* the performance of the company. At the same time, an investment treaty does not protect the expectations of the company regarding its economic performance; only the expectations the shareholder has on the performance of the company are protected. Rarely are expectations of the local company on its own performance protected by a State under international law. In addition, even if both the company and the shareholder could eventually claim for such arbitrary or unjust measures, each of these persons would claim for their own loss produced to their own protected assets or interests. The fact that a treaty protects shareholders' expectations on the performance of the company does not make the shareholder the owner of the company, nor does it allow him claiming for the company's rights (or the company's protected expectations).

To sum up, shareholders who are protected in BITs which contain an offer to settle any eventual disputes in ICSID arbitration have a direct action in treaty-based ICSID arbitration to claim for the violation of the treaty rights they hold. These rights may include in their scope of protection, the risk of capital depreciation and loss resulting from damage caused to the local company, thus allowing the shareholder to claim for direct and indirect damage, *i.e.* loss to the shares produced by acts which affect the shareholders' interest in the company in which he holds shares.

III. DIFFICULTIES ARISING FROM THE IMPLEMENTATION OF SHAREHOLDERS' DIRECT ACTION IN TREATY-BASED ICSID ARBITRATION

In this part, two difficulties of implementing shareholders direct action are assessed: on the one hand, the existence of multiple claims of persons belonging to the same corporate group (A); and on the other, the assessment of reparations of persons belonging to the same corporate group and double recovery (B).

A. Multiple Claims of Persons of the Same Corporate Structure

As explained above, the recognition of shareholders' direct action based on broad BITs which include shares in their investment definition, are the rule. Shares often include both direct and indirect shares. This recognition allows multiple persons of the same group to claim for the same set of facts and regarding almost the "same" investment. Moreover, these BITs not only establish the jurisdiction of one tribunal but also give a choice to the investor amongst several forums. This would allow multiple tribunals independent of each other to

treat same issues simultaneously or successively without any jurisdictional coordination. This intensifies the problem.

Accordingly, multiple shareholders protected by different BITs could bring an action against the Host State for the same measures. Further, the company, whether based on domestic law or on international law (based on Art.25(2)(b)), could also have a right of action for the same measures.

Where the parties and the dispute are the same, parallel proceedings before State courts and international arbitration tribunals would not raise many difficulties. Indeed, in international arbitration the existence of an arbitration agreement prevents domestic courts from adjudicating the dispute, unless the arbitration agreement is invalid or unenforceable, or has expired or otherwise terminated or the dispute is not arbitrable or does not fall within the arbitration agreement.²⁰⁷

Cases of parallel arbitral proceedings (based on two BITs) could be solved by the principles of *lis pendens* and *res judicata*, though tribunals would not be obliged to apply these principles.

Nevertheless, given the doctrine of legal separateness between the company and the shareholder and amongst shareholders, neither the principles of *res judicata* and *lis pendens* apply nor can the dispute settlement clause of the contract or of the BIT be considered to be binding on both parties. Thus, parallel proceedings would not be solved by traditional mechanisms.

1. Multiple Claims of the Local Company and the Shareholder

As explained above, both the local company and the foreign shareholder may have a right of action to claim for the same set of facts. Since the rights are different and so are the parties, the proceedings initiated by the local company would not affect the proceedings initiated by its shareholder. It could be argued that if domestic protection given to the local company is successful, the

²⁰⁷ A domestic court would also have jurisdiction if the Defendant does not raise the defense of lack of jurisdiction of the domestic court based on the existence of an arbitration agreement. In these circumstances parallel proceedings might arise. *IIA Interim Report on Res Judicata and Arbitration*. 35-66 (2004). State courts would play in a limited way, in enforcement and annulment procedures. Norbert Horn, *Arbitration and the Protection of Foreign Investment: Concepts and Means*, in Kröll N. Horn ed., *supra* note 7, at 15; EMMANUEL GAILLARD ET AL., *ON INTERNATIONAL COMMERCIAL ARBITRATION* 416 (Kluwer Law International 1999).

shareholder would be receiving double protection; the direct action of the treaty and the indirect satisfaction of its interests through participation in the local company. Yet, as demonstrated above, the treaty right is neither subsidiary nor conditional to the existence or exercise of the right of the local company; it is additional.

Examples of parallel proceedings between the local company and the shareholder can be seen in, *SGS v. Pakistan*,²⁰⁸ *Salini*,²⁰⁹ *Goetz v. Burundi*²¹⁰ and in many of the cases against Argentina²¹¹ where local companies had initiated local mechanisms provided for in the contracts or licenses while the foreign shareholder had initiated ICSID proceedings. Sometimes there has been recourse to ICSID proceedings once local proceedings had failed, though more frequently, this occurred while the local proceedings were still pending.²¹² A case worth mentioning is *Aguas Argentinas S.A. v. Argentina*, where three parallel proceedings are pending; ICSID's arbitration,²¹³ the one initiated by the local company to claim for the license²¹⁴ and the bankruptcy proceedings where the foreign investor filed a creditor's claim²¹⁵.

²⁰⁸ Pakistan had initiated the local arbitration proceedings as provided for in the Contract; see Yuval Shany, *Notes and Comments: Contract Claims v. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT'L L. 840 (2005).

²⁰⁹ *Id.* at 844.

²¹⁰ *Goetz v. Burundi*, *supra* note 8, ¶ 22.4.

²¹¹ *Vivendi*, *supra* note 8; *Camuzzi* Jurisdiction, *supra* note 8, at 92; *CMS* Jurisdiction, *supra* note 8, ¶ 86; *Enron* Jurisdiction, *supra* note 8, ¶ 98; *Siemens* Jurisdiction *supra* note 8, ¶ 111.

²¹² In *Vivendi* where the local company had claimed against the Province of Tucuman for breach of the concession contract before the contentious administrative courts of Tucuman. *Vivendi* Jurisdiction, *supra* note 8. In *Camuzzi*, the foreign investor initiated ICSID proceedings while the renegotiation of the licenses was pending, though the claimant argued that the local proceedings were paralyzed, *Camuzzi* Jurisdiction, *supra* note 8, ¶ 92; See also *CMS* Jurisdiction, *supra* note 8, ¶ 86; *Enron* Jurisdiction, *supra* note 8, ¶ 98; *Siemens* Jurisdiction, *supra* note 8, ¶ 111.

²¹³ *Suez* Jurisdiction, *supra* note 8.

²¹⁴ "*Aguas Argentinas S.A. c. Estado Nacional- Subsecretaría de Recursos Hídricos s. Contrato Administrativo*" (Expediente N° 2645/2006), Juzgado Nacional de Primera Instancia en lo Contenciosos Administrativo Federal N° 8, Dra. Clara María Do Pico, Secretaría N° 15 in P MACHMAR, El CIADI frente a los contratos de servicios públicos en Argentina, Master Thesis (UES21 - MDE - Córdoba, Argentina (2008) (Master, UES21)).

²¹⁵ "*Aguas Argentinas S.A. s/ Concurso preventivo*", Juzgado Nacional de Primera Instancia en lo Comercial de la Capital Federal N° 17, Secretaría 34, expediente N° 065555 in P MACHMAR, El CIADI frente a los contratos de servicios públicos en Argentina, Master Thesis (UES21 - MDE - Córdoba, Argentina (2008) (Master, UES21)).

In numerous cases the result of local claims was unsuccessful. In the big amount of cases brought against Argentina, local courts: “have remained mostly silent. No injunctions have been granted by them in favor of the utilities. No decision of an Argentine court awarding damages or invalidating Government measures that hurt the utilities are recorded.”²¹⁶ This led an Argentinean commentator, Mr. Mairal, to name the situation as “the silence of Argentinean courts”.²¹⁷ He further explains that:

[T]he Argentine courts were practically not called to intervene in the disputes that arose among the Government and the public utility operators and investors, who were the parties most affected by the legal changes. (...) The renegotiation took a long time to get under way due to the cumbersome procedure put in place, and repeatedly amended, by the Government. It has not resulted in significant redress for the operators and their investors specially in the case of the main utilities that were privatized (electricity, water and gas distribution and gas transportation, comprising fourteen companies in all). Some contracts were terminated on grounds of default of the concessionaire, others were partially renegotiated but then the Government did not comply with the renegotiated contract, while in most other cases renegotiation did not produce any agreement. Tariff increases were granted in some cases but only to be allocated to trust funds which were to finance expansions of the network to be built by contractors selected by the trustee and with little intervention of the concessionaire, thus introducing a totally new mechanism in the existing contracts. Some foreign investors have sold their shares at a fraction of the amount they had invested.^[218] Many of these utilities are technically insolvent and have had to restructure their financial obligations....²¹⁹

These facts evidence that the risk of multiple proceedings granting recovery to both the local company and the foreign investor may, sometimes, be overstated.

In any case, the claims are different and each Claimant will claim for its own loss produced by the allegedly illegal measures taken by the Host State. There would be, in principle, no parallel proceedings involving the same parties and the same cause of action and, then there would be no need to coordinate these multiple claims amongst tribunals. Arguably, since the shareholder would be

²¹⁶ Hector Mairal, *The Silence of the Argentine Courts*, Paper submitted to the Global Administrative Law Seminar held in Buenos Aires on March 9-10, 2007, hosted by the Institute for International Law and Justice, New York University.

²¹⁷ *Id.*

²¹⁸ This has been the case of Electricité de France with its investment in Edenor, an electricity distributor in Buenos Aires. *Id.*

²¹⁹ *Id.*

indirectly protected through the company's actions there could be a risk that he receives double reparations. Still, as explained, it is imperative that the claims are not coordinated.

2. Multiple Claims of Shareholders of the Same Corporate Group

As to multiple proceedings between shareholders of the same corporate group, this could arise between shareholders at the same level of ownership or at different competing levels. The latter situation arises from the admission of indirect shareholdings as protected investments by ICSID tribunals.²²⁰ It could be argued that in such a case the disputes are alike since the rights invoked would be the same in substance (*e.g.* obligation to compensate expropriation, to give fair and equitable treatment, *et cetera.*) and so would be the source of the right, *i.e.* treaty law, and the type of the claimant (shareholder).

However, arbitral tribunals have considered such treaty disputes to be different on the grounds that the parties were legally distinct.²²¹ In *CME v Czech Republic*²²² and *Lauder*²²³ the same measures taken by the Czech Republic were subject to two arbitration proceedings regarding the same investment but by different, though linked, Claimants (the direct investor, a Dutch company CME, and the indirect one, a US national, Mr. Lauder) based on different BITs. In this case, Mr. Lauder controlled CME which in turn owned 99% of the shares of CNTS, a broadcasting company incorporated in the Czech Republic. The dispute arose due to regulatory action taken by the Czech Government.²²⁴ Mr. Lauder initiated *ad hoc* arbitration proceedings in London under UNCITRAL rules, against the Czech Republic on August 19, 1999²²⁵ for the violation of the US-Czech Republic BIT. On February 2, 2000, CME also initiated also *ad hoc* arbitration proceedings in Stockholm under UNCITRAL rules, against the Czech Republic for violations under the Netherlands-Czech Republic BIT.^{226, 227} The

²²⁰ Giorgio Sacerdoti, *The Proliferation of BITs: Conflicts of Treaties, Proceedings and Awards*, Bocconi University Legal Studies Research Paper Series *available at*: <http://ssrn.com/abstract=981020> (last visited on March 29, 2010) (hereinafter Sacerdoti).

²²¹ *CME* Final Award, *supra* note 137, ¶ 432/436.

²²² *Id.*

²²³ *Lauder*, *supra* note 8.

²²⁴ Schreuer- *Shareholders' protection in International Investment Law*, *supra* note 1.

²²⁵ *Lauder*, *supra* note 8, ¶ 11; Moreover, CME brought ICC arbitration proceedings against Mr. elezný and numerous civil actions were commenced before the Czech courts. *Lauder*, *Id.* ¶ 143.

²²⁶ Claiming in particular, unfair treatment and expropriation without compensation.

²²⁷ *CME* Partial Award, *supra* note 8, ¶ 2.

tribunals in both proceedings were not bothered by the existence of parallel proceedings and rendered different awards regarding the same set of facts and practically identical treaty provisions.²²⁸ In *CME v. Czech Republic*²²⁹ the Respondent made a litispence submission. However, it was indicated that claims brought under separate BITs by an investor and its controlling shareholder concerning the exact same purported acts of expropriation constituted separate causes.²³⁰ Moreover, the Tribunal declared that (in any case) even if the dispute was the same this would not affect the jurisdiction of the tribunal given that the parties were not the same.²³¹ The Czech Republic challenged the Stockholm Tribunal's award before the Svea Court of Appeal, alleging, *inter alia*, that the Arbitral Tribunal should have taken into account the proceedings before the London Tribunal under the principles of *lis pendens* and *res judicata*.²³² The Swedish Court held:

One of the fundamental conditions for *lis pendens* and *res judicata* is that the same parties are involved in both cases, and that this condition was not met in the present case, since identity between a minority shareholder, albeit a controlling one, and the actual company cannot ... be deemed to exist in a case such as the instant one.²³³

The Svea Court of Appeal found instead that the fact that two cases were commenced under two different BITs “militates against these legal principles being applicable at all”.²³⁴

This highlights the problem that it is almost impossible to establish the identity of the parties and of the cause of action in international investment arbitration. The case has triggered intensive literature condemning the resulting

²²⁸ Agreement on Encouragement and Reciprocal protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (Prague, April 29, 1991) art. 8; The Treaty between the United States of America and the Czech and Slovak Federal Republic concerning the Reciprocal Encouragement and Protection of Investments (Washington, 27 October, 1991), art. 6; Schreuer- *Shareholders' Protection in International Investment Law*, *supra* note 1; Sacerdoti, *supra* note 220.

²²⁹ *CME Final Award*, *supra* note 173.

²³⁰ *CME Final Award*, *supra* note 173, ¶ 433.

²³¹ To support its position it cited case law. *CME Final Award*, *supra* note 137, ¶ 432/436.

²³² *CME Czech Republic BV v CME Czech Republic BV*, Judgment of the Svea Court of Appeal, T 8735-01, May 15, 2003, available at: www.investmentclaims.com (last visited March 29, 2010) (hereinafter *Svea Court of Appeal*).

²³³ *Id.* at 40.

²³⁴ *Id.* at 39.

conflicting awards²³⁵ and has driven some commentators to suggest, *de lege ferenda*, that the requirements be relaxed.²³⁶ Others consider that there is simply no identity of parties.²³⁷ Anyway, as it has been suggested, the decisions were in fact not contradictory, since both tribunals found a breach of the treaty obligations; the only difference would be that in *Lauder* the tribunal found that the claimant had not proven damages.²³⁸

Regardless of whether the *Lauder*/CME episode has provoked conflicting awards or not, it makes clear that the protection of indirect shareholdings creates an imminent risk of forum shopping, treaty shopping and abuse of process not easy to remediate. Further, the Host State could end up paying double recovery. The problem stems from the protection of indirect shareholdings without any limitations. The inclusion of indirect shareholdings as covered investments should be made in a way to protect the real investor and not, to protect all shareholders belonging to the same corporate structure. This can be achieved by limiting consent to arbitrate in BITs; *e.g.* the action of the indirect shareholder could be conditioned to the existence or exercise of the action of the direct shareholder. However, the limitation of the scope *ratione materiae* of consent to arbitrate is not frequent and in practice broad consent clauses are the rule.²³⁹

²³⁵ W. Kühn, *How to Avoid Conflicting Awards, The Lauder and CME Cases*, 5 J. WORLD INVESTMENT & TRADE 77 (2004).

²³⁶ Some commentators such as Schreuer and Reincish propose to follow an economic and flexible approach for the determination of the dispute. *See* Legal opinion of June 20, 2002 addressed to the arbitral tribunal in *CME* cited by Ben Hamida, *supra* note 69, at 30. Crivellaro proposes to take into consideration the disputed measure. Antonio Crivellaro, *Consolidation of arbitral and court proceedings in investment disputes*, Dossier of the ICC Institute of World Business Law: Parallel State and Arbitral Procedures in International Arbitration, 114 (2005) (hereinafter Crivellaro). Ben Hamida, *supra* note 69, at 29; August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, in THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 56/61 (2004); Nora Gallagher, *Parallel Proceedings, Res Judicata and Lis Pendens*, in PERSUASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 349 (Julian D. M. Lew Loukas A. Mistelis ed., 2006); Charles N. Brower & Jeremy K. Sharpe, *Multiple and Conflicting International Arbitral Awards*, 4 J. WORLD INVESTMENT & TRADE 216 (2003) (hereinafter Brower & Sharpe). The council of the Czech Republic, Clifford Chance, declared that the saga is “absolutely ludicrous, and highly regrettable for the fact that it makes the law look stupid”, cited Brower & Sharpe, *Id.* at 216.

²³⁷ Christer Söderlund, *Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings*, 22 J. INT'L ARB. 320 (2005).

²³⁸ Crivellaro, *supra* note 237, at 114.

²³⁹ SCHREUER- HHE ICSID CONVENTION, *supra* note 21, at 235; REED ET AL., *supra* note 145, at 23.

B. *Reparations to Persons of the Same Corporate Structure and Double Recovery*

The question of how to establish the quantum of the damages incurred by the shareholder was dealt with in *AAPL v. Sri Lanka*.²⁴⁰ In that case, the Tribunal found in favor of the Claimant. In assessing damages, the Tribunal emphasized that the amount of compensation due has to be calculated in a manner that adequately reflects the full value of the Claimant's shareholding in Serendib. The Tribunal concluded that the treaty protected the shares not the assets of the company:

The undisputed "investments" effected since 1985 by AAPL in Sri Lanka are in the form of acquiring shares in Serendib Company, which has been incorporated in Sri Lanka under the domestic Companies Law. Accordingly, the Treaty protection provides no direct coverage with regard to Serendib's physical assets as such ("farm structures and equipment", "shrimp stock in ponds", cost of "training the technical staff", etc.), or to the intangible assets of Serendib if any ("good will", "future profitability", etc...). The scope of the international law protection granted to the foreign investor in the present case is limited to a single item: the value of his share-holding in the joint-venture entity (Serendib Company).²⁴¹

Consequently, the tribunal considered that the damage of the shareholder is different from that of the company since the damaged assets in one case and the damaged assets on the other are different; *e.g.* the license, contracts or buildings in the case of the local company and the shares in the case of the shareholder. Still, whatever method is applied to determine the damage to the shares, the value of the shares will still depend to a certain extent on the value of the company, which will depend, amongst other, on its assets.²⁴² Thus, measures directed at the company which determines its assets, such as contracts or other non-current assets, would affect the company's income producing potential, probably provoking at the same time a decline in the share's price, and thus damage to the shareholder.

As mentioned above this *indirect* nature of the damage has not prevented investment arbitration tribunals to award damages to shareholders. This was the case in which an overwhelming number of cases were brought against Argentina after the 2002 economic crisis where tribunals found violations of BITs produced

²⁴⁰ *AAPL v. Sri Lanka*, *supra* note 8.

²⁴¹ *Id.* ¶ 94-95; see also M SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 231 (2nd ed., Cambridge University Press 2004).

²⁴² Bottini, *supra* note 1, at 638.

by regulatory action which affected the profitability of licenses and concessions of the locally established subsidiaries.²⁴³

In domestic law and general international law, the shareholder is not allowed to claim for indirect damages because he is already protected indirectly through the company's action.²⁴⁴ However, this is the effect of BITs; to give an additional protection to the investor.²⁴⁵ Given this additional character of the treaty protection of the shareholder, the exercise of the local company's rights does not affect the exercise of the shareholder treaty rights and vice versa. Hence, the shareholder would receive indirect protection through the exercise of the rights of the company and direct protection through investment arbitration. Consequently, a risk of double recovery of the foreign shareholder of a locally incorporated company arises.

In addition, according to ICSID case law,²⁴⁶ investments by intermediate companies do not deprive the shareholder of the ability to pursue claims against the violation of BITs.²⁴⁷ Therefore, both a direct shareholder and an indirect shareholder could be protected for the damage indirectly produced to their shares by measures directed at the local company. This further exacerbates the risk of double recovery because the indirect shareholder would be protected multiple times: directly through the BIT and indirectly through the actions of the companies in which the shareholder holds shares; *i.e.* the company which is the direct investor (shareholder of the locally incorporated subsidiary) and the locally incorporated subsidiary. An analysis of these concerns follows.

1. Reparations to Shareholders and to the Local Company

The jeopardy of double recovery has been highlighted by numerous investment arbitration tribunals. In *Enron*²⁴⁸ the Tribunal declared that: "if these

²⁴³ *E.g.*, *Siemens Award*, *supra* note 57, ¶ 308; *LG&E Award*, *supra* note 8, ¶ 123/139; *CMS Award*, *supra* note 57, ¶ 164, 264/269; *Azurix Award*, *supra* note 57, ¶ 374/377.

²⁴⁴ *E.g.* when the company seizes a local court based on tort or contract law.

²⁴⁵ *CREMADES & CAIRNS*, *supra* note 72, at 20.

²⁴⁶ *Wena Hotels Jurisdiction*, *supra* note 129, ¶ 45-46; *Sempra Jurisdiction*, *supra* note 8, ¶ 90/91; *Camuzzi Jurisdiction*, *supra* note 8, ¶ 63; *Gas Natural Jurisdiction*, *supra* note 8, ¶ 33/35.

²⁴⁷ *Schreuer-Shareholders' protection in International Investment Law*, *supra* note 1; Rubins, *supra* note 7, at 313 *et seq.*; *DIMSEY*, *supra* note 137, at 69.

²⁴⁸ *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Award of May 15, 2007, available at: www.investmentclaims.com (last visited March 29, 2010) (hereinafter *Enron Award*).

(CIESA and TGS) were separately compensated, is correct, and if such eventual compensations were to be accumulated they would result in a “double-dipping” or double recovery”.²⁴⁹

In a subsequent passage, the Tribunal offered no solution. Later, while dealing with the argument of Argentina that if tariffs were increased, then consumers would end up paying twice for the same interest, it left it to the government to negotiate and regulate.²⁵⁰

This was further highlighted in *Sempra*²⁵¹ where the Tribunal stated that “international law and decisions offer numerous mechanisms for preventing the possibility of double recovery”, yet it refers to none and considered that double recovery “was not likely”.²⁵² In *Suez*, the Tribunal noted that “any eventual award in this case could be fashioned in such a way as to prevent double recovery”,²⁵³ but then referred to no such solutions.

It seems that tribunals have underestimated the problem. At the hypothetical level, one may distinguish two situations. In the first situation, if reparations are awarded to the company before they are awarded to the investor, then the compensation received by the local company would positively affect the value of the share. Thus, in principle there would be no problem, since there would be no damage to the shareholder. However, the question arises whether, a shareholder can recover reparations which are in addition to those received by the local company, if an international tribunal considers that a local court has awarded the shareholder indirectly – in this case - insufficient reparations. In the second situation, if reparations are awarded to the shareholder, this compensation will not be reflected in the assets of the company. As a matter of justice, the State may want to have a proportional reduction of the amount of reparations in the amount it has to pay to the local company because it has already paid. Could the reparations made to the shareholder be discounted from the reparations to be paid to the company? What about the local shareholders and creditors?

²⁴⁹ *Id.* ¶ 167.

²⁵⁰ “In respect of another argument concerning double recovery, it can only express the certainty that if the situation arises or its consequences would end up affecting the tariffs, able government negotiators or regulators would make sure that no such double recovery or effects occur.” *Id.* ¶ 212.

²⁵¹ *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16) Award of September 28, 2007, available at: www.investmentclaims.com (last visited March 29, 2010) (hereinafter *Sempra Award*) at 395.

²⁵² *Id.* at 395.

²⁵³ *Suez*, *supra* note 8, ¶ 51.

These issues have been highlighted by the Tribunal in the *GAMI* case.²⁵⁴ *GAMI* claimed for damages against the expropriation of sugar mills belonging to *GAM*. *GAM*, the local company, had initiated local proceedings against Mexico and had obtained compensation for some of the expropriated mills. The Arbitral Tribunal stated:

A consequence of *GAMI*'s independent right of action under NAFTA may be illustrated by a hypothetical example. The notional compensation of *GAM* by Mexico in an amount representing M\$ 100 per share would not in principle disentitle *GAMI* from asking the NAFTA Tribunal for an additional amount representing an additional M\$ 50 per share. But the theory gives rise to a number of practical difficulties. One might imagine a perfect world in which a national court of last recourse sits down with a NAFTA tribunal incapable of reviewable error to discharge their respective responsibilities. This could be done quite logically. The Mexican court could order payment to *GAM* based on an evaluation of the five expropriated mills. As a matter of mathematics that evaluation might represent M\$ 100 per share of all shares of *GAM*. At the same time the NAFTA tribunal might find that a higher level of compensation was mandated and thus order a top-up to *GAMI* of M\$ 50 per share²⁵⁵

The Tribunal then concluded that "this scenario is of course fantasy" since it lacked legal foundation and legal credibility.²⁵⁶ On what reasonable ground could the payment to *GAMI* be reduced to account for the payment to *GAM* given that *GAM* had never paid dividends to its shareholders?²⁵⁷ Further, "why should *GAMI*'s recovery be debited on account of a payment to *GAM* which is perhaps utterly unlikely to find its way to the pockets of its shareholders?"²⁵⁸ Explaining a situation where the shareholder was awarded damages before the Mexican courts, it said:

It is sufficient to consider the hypothesis that a NAFTA tribunal were to order payment to *GAMI* before the Mexican courts render their final decision. One might adapt the hypothetical example given in paragraph 116 above. *GAMI* would thus have received M\$ 150 per share (there would have been no prior offsetting Mexican recovery). What effect should the Mexican courts now give to the NAFTA award? How could *GAM*'s recovery be reduced because of the payment to *GAMI*? *GAM* is the owner of the expropriated assets. It has never paid dividends. It would have been

²⁵⁴ *GAMI*, *supra* note 93.

²⁵⁵ *Id.* ¶ 116.

²⁵⁶ *Id.* ¶ 117 /118.

²⁵⁷ *Id.* ¶ 118.

²⁵⁸ *Id.*

most unlikely to distribute revenues in the amount recovered by GAMI. At any rate such a decision would have required due deliberation of GAM's corporate organs. Creditors would come first. And other shareholders would have an equal right to the distribution. GAM would obviously say that it is the expropriated owner and that its compensatable [sic] loss under Mexican law could not be diminished by the amount paid to one of its shareholders.²⁵⁹

Finally, it stated that these statements "can quickly transport the analysis onto a fragile limb"²⁶⁰ and continued to analyse the claim as an independent one.²⁶¹ GAMI was not awarded damages because none of the claims of GAMI violated NAFTA; however if the tribunal had found a violation and a damage it would have awarded damages independently.

Let us return to our first situation, that is, the company receiving compensation prior to the shareholder. Could the shareholder receive an additional relief? Yes, based on the treaty, which creates an independent system of protection.²⁶² Would this relief be "conditional" to the one received by the local company? No. The question is not to reduce the shareholders' reparation based on reparations received by the local company, but to determine the loss suffered in the value of the shares. Undoubtedly, reparations received by the local company will affect the value of the share but the shareholder would be receiving full compensation. Would this put local shareholders in a disadvantaged position? It clearly will but that is the idea of treaty investment arbitration; to give *special* treatment and additional warranties to foreign investors as an investment promotion policy. Moreover, this is the best solution given that the rights of the company, of other shareholders and creditors would remain intact.

As to the second situation, that is, if the shareholder was awarded damages prior to the company, could the quantum of reparations of the company be reduced because the State has previously already paid the foreign shareholder? This would put at stake the basic principles of corporate law and stability of economic relations. If the quantum of reparations to be awarded to the local company were to be reduced in the amount paid to the shareholder, this would, first, affect the rights of the company (and indirectly the local shareholders) since the company would have its municipal right to compensation taken (a treaty right should be interpreted in a way that gives "more" rather than removing what the local subjects already had according to domestic law). Second, the rights of

²⁵⁹ *Id.* ¶ 120.

²⁶⁰ *Id.* ¶ 121.

²⁶¹ *Id.* ¶ 133.

²⁶² CREMADES & CAIRNS, *supra* note 72, at 20.

creditors of the company would be jeopardized since only the shareholders' creditors would have access to the compensation. Third, for what reason would the shareholder receive those benefits of the company? Could it be seen as an anticipation of capital, extraordinary dividends? This would require in any case a corporate decision. Fourth, treaty rights are additional and independent of domestic rights. For all these reasons, the State should pay twice. A different solution would produce a state of insecurity in economic relations apart from being less equitable to creditors and other shareholders.

Arguably, it would be different in a case where the local company is a mere instrument of the foreign shareholder. In such a case, both subjects would be considered a unity. Still, the practicability of this hypothesis is still too problematic. What about creditors of the local company? Could they also consider both entities as a single unit?

2. Reparations to Different Shareholders of the Local Company

In the situation of shareholders at the same level of ownership receiving reparations altogether, there would be no problem of double recovery since the reparations would be proportional to their shares. Conversely, if shareholders at different levels of ownership were to receive reparations the risk of double recovery emerges.

There are no instances where the question of damages between different shareholders of the same group at different levels of ownership has been considered. On the hypothetical plane, one may ask which shareholder is entitled to reparations? The direct or the indirect one? Judges Tanaka and Jessup in their separate opinions in the *Barcelona Traction* case proposed as a solution the first come, first serve approach.²⁶³ Arguably, even if the approach could seem at first sight, to be a good option, it is difficult to see how to coordinate the assessment of damages amongst different independent tribunals.

Moreover, there are no instances where compensation has been reduced in cases involving parent companies and subsidiaries. The problem becomes apparent due to the fact that reparation would be awarded to two different legal entities based on different rights regarding different assets (the assets of the

²⁶³ *Barcelona Traction*, *supra* note 2, Judge Tanaka Separate Opinion at 130 *et seq.* See also Prof. Cafilisch who considers it is an inadequate method as it was suggested by the I.C.J. in the Reparations Case. Cafilisch, *supra* note 95, at 192.

company and the shares of the shareholder).²⁶⁴ Hence, can reparation be considered to have been awarded more than once in respect of the same injury? Is it the same injury? Does it result in unjust enrichment of the claimant? Is it the same claimant? Since the parties are different the stringent criteria of piercing of the corporate veil shall be met. Due to these concerns, Thomas Wälde explains:

On considerations of all aspects it seems correct to apply rather a standardised approach of “economic identity” and to presume, without detailed counter-proof, that the subsidiary’s harm is economically equivalent to the harm suffered, and to be compensated, by the foreign owner pro rata commensurate with its share ownership.²⁶⁵

In any case this leads to the very basic question of why the indirect investor should be protected. If the idea is to grant protection to all shareholders of the same group at different levels, the risk is evident: there would be an unnecessary multiple protection leading to double recovery and abuse of investors rights. Arguably, the more indirect the shareholder gets the more remote the damage will be. Logically, at one point the causal link between the measures and the damage will disappear. This lead Thomas Wälde, one of the few to have studied the issue of damages in investment arbitration and the risk of double-dipping in the case of companies of the same group, to suggest that the solution was to set a cut-off (ownership) point and require a sufficient direct relationship with the damage.²⁶⁶

IV. CONCLUSION

Under the current state of conventional international investment law and since the 1990’s with the first case brought by a shareholder, *AAPL v. Sri Lanka*,²⁶⁷ shareholders have a direct action before arbitration tribunals to claim for indirect damage incurred by their shares; this is produced through measures directed at the local company and which affect the latter directly. Such an action is triggered by investment treaties which include in their definition of investment “shares or any kind of assets” and give the investor an offer to settle any dispute arising out of the application or interpretation of the treaty through arbitration. The inclusion of shares in the definition of “investment” in investment treaties

²⁶⁴ The problem of assessing the damages of parent and subsidiary companies arose in the *Chorzów Factory* case, *PCIJ Collection of Judgments*, Series A, No. 17, at 48. See also the Advisory Opinion in *Reparation for Injuries Suffered in the Service of the United Nations*, in which the ICJ stated that the defendant State cannot “be compelled to pay the reparation due in respect of the damage twice over”. I.C.J. REP. 1949, 186.

²⁶⁵ T.W. Wälde & B. Sabahi, *Compensation, Damages and Valuation in International Investment Law*, 4 TRANSNAT’L DISP. MGMT. 43 (2007).

²⁶⁶ *Id.* at 42.

²⁶⁷ *AAPL v. Sri Lanka*, *supra* note 8.

per se does not grant the shareholder protection of its interests in the company. However, some treaty rights may have this effect. This is the case of indirect expropriation and fair and equitable treatment where the shareholder has a right to claim against any measure affecting the *value* or the *expectations the shareholder has on the value* of the shares. Given that the value of the shares depend to a large extent on the value of the company, any injurious measures directed at the latter will very frequently, though not necessarily, affect the value of the share and thus, give the shareholder a right to claim reparations before an arbitration tribunal.

This direct action exists also under the ICSID framework and it is before this arbitration institution that the direct action was mainly exercised. Were tribunals wrong in accepting their jurisdiction? No. The objective jurisdictional requirements imposed by Art.25 of the ICSID Convention are not an obstacle to shareholders direct action to claim for indirect damages but to derivative actions to claim for the rights and injury of the local company. As explained in these pages, the fact that the action allows the shareholder to claim for indirect injury does not affect the direct nature of the action. The shareholder claims for the violation of its own right, for its own loss (personal) produced to its own assets (shares). Being this action direct, it is not contrary to the object and purpose of Art.25 of the ICSID Convention.

This direct action the shareholder has in investor-State arbitration is the exact opposite of what the ICJ decided in *Barcelona Traction*²⁶⁸ in the field of general customary international law applicable to diplomatic protection. As analyzed above, the ICJ refused standing to the State of the nationality of the shareholder of the local company to claim for injury of the latter because there was a silence in international law in this respect and because domestic law does not give shareholders a right on the assets or performance of the company but an unprotected simple interest. Whether we consider BITs or not as a source of State practice (and thus as elements of customary international law) or as *lex specialis* to the general rule;²⁶⁹ treaty-based investor-State arbitration tribunals have

²⁶⁸ *Barcelona Traction*, *supra* note 2.

²⁶⁹ This would require a thorough examination of state practice and a wide range of instruments. Whether BITs could be taken into account to establish if there is a customary rule in international law is controversial. BITs could be seen as *lex specialis* to the customary rule. However it could be argued that they are sovereign acts of the State which constitute State Practice. (ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 113-114 (1971). It is worth noting that the ICJ's analysis of state practice in the *Nottebohm* case only involved a series of bilateral nationality treaties from where the ICJ extracted the requirement of a genuine link for determining nationality of natural persons.

considered the protection of shareholders *interests* in the company regardless of whether they are direct, indirect, controlling, majority or minority. A broad definition of investment contained in a BIT, such as “shares”, together with high treaty standards of treatment will likely be interpreted as encompassing a protection of the shareholder in its interest in the company.

This change of paradigm may be explained by historical and practical reasons. Since the issuance of the judgment, 1970, the world was facing an oil crisis which made countries fear about their access to natural resources and triggered many nationalizations. Many new socialist countries and former colonial territories nationalized many of their industries²⁷⁰ and the Declaration of the Establishment of the New World Economic Order (NIEO) and the Charter of Economic Rights and Duties of the State were signed.²⁷¹ All this furthered the cause of many Third World countries who challenged classic international law rules which they collectively condemned because they considered them to exclusively protect the interests of industrialized and ex-colonialist countries.²⁷² By the 1990's the NIEO largely collapsed. Developed countries had recovered from the oil crisis and the debt crisis of the 1970's made foreign investment more attractive to developing States who needed capital without debt.²⁷³ Thus, a new rapid investing environment emerged²⁷⁴ and also a new paradigm.²⁷⁵ Developed States were willing to risk capital on developing States but through credible assurances. Developed States engaged in investment liberalization in the early 1960's. In the 1960's the World Bank sponsored the ICSID Convention. Yet at that time it was

²⁷⁰ UNCTAD, *Trends in International Investment Agreements 1999*, UNCTAD/ITE/IIT/13 at 16 (hereinafter UNCTAD-Trends); Lawrence Jagoon Lee, *Barcelona Traction in the 21st Century: Revisiting its customary and policy underpinnings 35 years later*, 42 STAN. J. INT'L L. 265 (2006) (hereinafter Jagoon Lee).

²⁷¹ For an in-depth study of the new world economic order see JERZY MAKARCZYK, *PRINCIPLES OF A NEW INTERNATIONAL ECONOMIC ORDER. A STUDY OF INTERNATIONAL LAW IN THE MAKING* (Martinus Nijhoff 1988).

²⁷² Jean-Favien Lalive, *Contrats entre Etats et Personnes Privées*, 181 RECUEIL DES COURS 34 (1983) (hereinafter Lalive).

This can be perceived in the judgement. Indeed, Judges Jessup and Gros have shown in their separate opinions in the *Barcelona Traction* case, that the notion of the social function of property has made so much headway in market economy states that these states may oblige their citizens to repatriate their overseas investment where this is required by the national interest. See I. Seidl-Hohenveldern, *International Economic Law: General Course on Public International Law*, 198 RECUEIL DES COURS 53 (1986).

²⁷³ UNCTAD-Trends, *supra* note 270, at 29.

²⁷⁴ Lalive, *supra* note 272, at 33.

²⁷⁵ Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism*, 41 HARV. INT'L L.J., 419/420 (2000).

primarily only to the developed States which ratified the convention.²⁷⁶ In response to NIEO and the uncertain status of their investments, developing countries began to sign BITs with developing States.²⁷⁷ In the beginning developing countries, mainly Latin American countries, refused to sign them.²⁷⁸ By 1998 over 160 States had signed at least one BIT.²⁷⁹ The Washington Convention certainly had in mind the protection of investors which invest through corporate structures. However, the means set forth in Art.25(2)(b), *i.e.* allowing the parties to agree on control as a nationality criteria, ended up being minor or rather insufficient. Faced with an omission of a definition of investment in the ICSID Convention, together with a new investment environment, States had the door open to a “biting war”, subjecting developing states to rigorous standards and broad definitions of investment.

Shareholders' protection thus emerged as a reply to this new investment environment and the inefficiency of diplomatic protection. It had the advantage of providing an efficient mechanism to both investors and Host States. On the one hand, it gave assurances to investors that they would have a safe and fast mechanism to claim for reparations in case of disruptions of the Host State, and, on the other hand, it served as an investment policy promotion instrument for developing countries to obtain foreign investments. In the end, these investors do not form part of the community of the Host State as local investors do, and it would be unfair to make them liable for unexpected structural political, social and economic changes in the Host State.

However, one cannot close their eyes to the over expansive way in which arbitration tribunals have been granting such direct action to claim for indirect loss; in particular, by admitting indirect shareholdings based on broad definitions of investment in BITs. Indirect shareholdings, as the Lauder-CME saga has demonstrated, can be a double-edged sword as it allows different shareholders belonging to the same corporate group to claim before independent international tribunals for the same investment/dispute/facts. This clearly changes the balance between investors and Host States in detriment of the latter. The recognition of indirect shareholders' claims allows different shareholders of the same corporate group at different levels to have recourse to treaty and forum shopping by

²⁷⁶ <http://www.worldbank.org/icsid/constate/c-states-en.htm> (last visited March 29, 2010).

²⁷⁷ Jahoon Lee, *supra* note 270, at 269.

²⁷⁸ Alden Abbott, *Latin American and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INT'L L.J. 131/138 (1976).

²⁷⁹ Kenneth Vanderverde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 503 (1998).

making claims before different independent arbitration tribunals which cannot apply the principles of *lis pendens* and *res judicata* to conciliate the multiple claims, and, which may finally, end up awarding full reparation many times. It could be argued that the Lauder-CME Saga should not be overstated because in the end the Czech Republic was awarded damages only once. In *Lauder*²⁸⁰ the Tribunal found that the damage was too remote and that Mr. Lauder had not proved sufficiently the damage incurred by it.²⁸¹ The Tribunal knew about the existence of the other case brought by the direct shareholder and refused to apply the principles of *lis pendens* and *res judicata* because the criteria could never have met given that the parties were legally different. However, the tribunal was clever enough to refuse Mr. Lauder's claim based on the casual link between the damage and the breach. Here, in my view, is where the solution lies. Reasonability is a good instrument for judges and arbitrators to arrive at just and equitable solutions without ending up in applying principles *lege ferenda*. A reasonable casual link between the measures and the damage can be a useful tool to help avoiding remote and unfounded claims of shareholders.

²⁸⁰ *Lauder*, *supra* note 8.

²⁸¹ *Id.* ¶ 235.