

SYMPOSIUM ARTICLES

INDIRECT CLAIMS UNDER THE ICSID CONVENTION

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1. INTRODUCTION

Protection of shareholders under international law has been the subject of much controversy among scholars.¹ Since a large part of

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¹ See, e.g., LUCIUS CAFLISCH, *LA PROTECTION DES SOCIÉTÉS COMMERCIALES ET DES INTÉRÊTS INDIRECTS EN DROIT INTERNATIONAL PUBLIC* (1969) (discussing the tension between the concept of nationality and the rights of foreign investors under international law); Yoram Dinstein, *Diplomatic Protection of Companies Under International Law*, in *INTERNATIONAL LAW: THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY* 505 (Karel Wellens ed., 1998) (contending that in order to protect the property of foreigners in an era of increased global investment, the nationality of foreign subsidiaries should be the same as the parent company's nationality for purposes of diplomatic protection); Vaughan Lowe, *Shareholders Rights to Control and Manage: From Barcelona Traction to ELSI*, in *1 LIBER AMICORUM JUDGE SHIGERU ODA* 269 (Nisuke Ando, Edward McWhirney & Rüdiger Wolfrum eds., 2002) (noting the importance of Judge Oda's separate opinion in the *ELSI* case, in which he narrowly construed the rights of U.S. shareholders in an Italian company to be no greater than rights guaranteed under Italian law); IGNAZ SEIDL-HOHENVELDERN, *CORPORATIONS IN AND UNDER INTERNATIONAL LAW* 109-22 (1987) (noting that "inter-State enterprises" lack an international personality and therefore to protect individual property interests it is necessary to "lift the corporate veil" by allowing a partner State to espouse a claim according to its citizens' share in the enterprise); Alessandra Gianelli, *La Protezione Diplomatica di Società Dopo la Sentenza Concernente la Barcelona Traction*, *LXIX RIVISTA DI DIRITTO INTERNAZIONALE* 762 (1986);

foreign investment is channeled through local companies, the issue has always been whether such investment can be protected through international procedures even when the company in question is not itself a foreign investor.²

Whenever the host state adopts measures that directly affect shareholders' rights, such as the right to receive any declared dividend or to participate in shareholders meetings, it is undisputed that under international law either the shareholder, if it has direct access to an international procedure, or its national state through diplomatic protection, will have standing to claim against the

Rosalyn Higgins, *Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.*, 11 VA. J. INT'L L. 327 (1971) (providing background information and discussion of the key issues and reasoning in the *Barcelona Traction* case); Eduardo Jiménez de Aréchaga, *Diplomatic Protection of Shareholders in International Law*, 4 PHIL. INT'L L.J. 71 (1965) (exploring the treatment of shareholder claims by international law and international tribunals' relating to diplomatic protection); Richard B. Lillich, *Editorial Comment: Two Perspectives on the Barcelona Traction Case*, 65 AM. J. INT'L L. 522 (1971) (critiquing the judgment in the *Barcelona Traction* case for the court's determination of the customary international law rule governing the case); Francis A. Mann, *The Protection of Shareholders' Interests in the Light of the Barcelona Traction Case*, 67 AM. J. INT'L L. 259 (1973) (attempting to grasp the full impact of the *Barcelona Traction* decision by providing further analysis of the case to supplement a previous summary by Herbert W. Briggs); Stanley D. Metzger, *Editorial Comment: Nationality of Corporate Investment under Investment Guarantee Schemes – The Relevance of Barcelona Traction*, 65 AM. J. INT'L L. 532 (1971) (examining the *Barcelona Traction* case with regards to whether, in the absence of a special international agreement, dominant shareholders of a corporation could be protected by their governments in formal claims proceedings even though the corporation itself was incorporated in another nation); Sean D. Murphy, *The ELSI Case: An Investment Dispute at the International Court of Justice*, 16 YALE J. INT'L L. 391 (1991) (construing the *ELSI* case as reaffirming the shareholder protections afforded by bilateral treaties despite the adverse holding against the United States); Manuel Díez de Velasco, *La Protection Diplomatique des Sociétés et des Actionnaires*, 141 RECUEIL DES COURS DE L'ACADEMIE DE LA HAYE [R.C.A.D.I.] 93 (1974); Francisco Orrego Vicuña, *Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement*, 15 ICSID REVIEW- FOREIGN INV. L.J. 340 (2000) (arguing that modern trends in international law point toward a broadening of individual rights for foreign national shareholders); Stephen A. Kubiakowski, Note, *The Case of Elettronica Sicula S.p.A.: Toward Greater Protection of Shareholders' Rights in Foreign Investments*, 29 COLUM. J. TRANSNAT'L L. 215 (1991) (concluding that despite rejecting U.S. claims on the merits, the International Court of Justice ("ICJ"), in *ELSI*, preserved bilateral treaties as protections for foreign shareholders).

² For a reference to this concern in the context of the International Centre for Settlement of Investment Disputes ("ICSID") Convention, see Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS DE L'ACADEMIE DE LA HAYE [R.C.A.D.I.] 331, 358–59 (1972).

measures.³ The problem arises, however, when the contested measure affects only the rights of the company because, in any event, it will generally also affect the economic interests of its shareholders.

For the purposes of this Article, an indirect claim (or an indirect action)⁴ is defined as a claim in which 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. As will become readily apparent, however, one of the most difficult tasks in this domain is determining whose rights are the ones really affected, notwithstanding the allegation of the shareholder-claimant (who will always argue that it is invoking its own rights and not those of the company).

The last several years have witnessed an important growth in the exercise of indirect actions before arbitral tribunals constituted under the auspices of the International Centre for Settlement of Investment Disputes (“ICSID”), an evolution that is directly related to the recourse to ICSID pursuant to the provisions of a Bilateral Investment Treaty (“BIT”). This is because whilst when the arbitration is brought under a BIT shareholders can frequently rely on broad definitions of protected investments,⁵ when the case is brought invoking a clause that provides for ICSID jurisdiction in an investment agreement, such action will typically have been initiated by the company party to the contract and not by its shareholders.

Recourse to ICSID arbitration under a BIT, although a much extended phenomenon nowadays, is also a relatively recent one.⁶

³ See *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3, para. 7 (Feb. 5) [hereinafter *Barcelona Traction*] (establishing cited case law); see also *Case Concerning Ahmadou Sadio Diallo (Rep. Guinea v. Dem. Rep. Congo)*, 2007 I.C.J. 103, para. 64 (May 24) [hereinafter *Diallo Case*] (analyzing direct shareholders’ rights).

⁴ The expression “derivative claim” is given the same meaning in this Article as the expression “indirect claim,” notwithstanding the meaning of both concepts under domestic legal systems.

⁵ BITs typically have long lists of protected investments including broad references to “every kind of asset” See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Rep. Pak.*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, para. 113 (Nov. 14, 2005), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&dcdId=DC523_En&caseId=C27.

⁶ See *Antoine Goetz v. Rep. of Burundi (Burundi)*, ICSID Case No. ARB/95/3, Award, 6 ICSID Rep. 3, para. 67 (Feb. 10, 1999) [hereinafter *Goetz*] (stating that the present case is only the second of its kind).

That explains why the issue of indirect actions generally did not have to be dealt with by the first ICSID tribunals ruling on investment disputes.

Although in principle indirect actions are beneficial for foreign investors, who increase their chances of bringing claims against measures that affect their investments, they also involve serious legal complexities. Perhaps the most acute is the possibility of double recovery since, if under different legal theories it is established that the same measure having one economic impact affects both the rights of the company and the rights of the shareholders, the state that adopted the measure could theoretically be required to pay compensation to the latter and to the former.

Another concern raised by indirect claims is related to the interrelationship between the rights and the obligations derived from a specific investment. If shareholders are going to be allowed to, in essence, exercise the rights of the local company (if not formally, in terms of the expected economic benefits of the investment), shouldn't they also be required to comply with the obligations that the local company acquired in relation to the investment (for example, the obligation to submit all disputes exclusively to local courts)? If the shareholder is going to directly receive compensation for a measure affecting the revenues of the local company, shouldn't it be liable for at least some of the obligations of the local company that were related to the affected revenues?

The following Section of this Article discusses the admissibility of indirect claims under the ICSID Convention. After considering the provisions of the ICSID Convention and its *travaux préparatoires*, it concludes by affirming that indirect claims are outside ICSID's jurisdiction, in accordance with the intention of the states which are parties to the ICSID Convention. Section 3 considers the three cases of the International Court of Justice ("ICJ") that have delved into the issue of the *jus standi* of shareholders under customary international law and under a specific treaty. This Section demonstrates that the position that the ICJ adopted in the first case, distinguishing between measures that affect shareholders' rights and measures that only affect their interests (because they are adopted in respect of the company's rights), is still the position that it holds today. It also shows that the attempt by some arbitral tribunals to disregard the findings of the ICJ as applicable only in the context of diplomatic protection — and not when a BIT is invoked — is not well founded. The discussion as to what are the rights of a shareholder in a given case is essentially the same in both scenar-

ios, independent of who will pursue the claim – the shareholder itself (if possible) or the state of its nationality.

Section 4 analyzes the jurisprudence of ICSID Tribunals as to their competence and as to ICSID's jurisdiction over indirect claims. It examines the first ICSID cases to consider derivative claims, and then gives particular consideration to the arbitral decisions arising from the cases brought against Argentina following the explosion of its economic and political crisis. In light of a jurisdictional objection advanced by Argentina as to the lack of standing of shareholders, these last cases have produced a considerable jurisprudence on indirect claims. Although the vast majority of the cases have accepted the admissibility of what in fact were indirect claims as defined here, the grounds for those decisions are not always consistent and some exhibit serious deficiencies and lacunae. These deficiencies and lacunae are discussed when considering each of the decisions. This Section ends by analyzing an ICSID case that recognized the importance of determining which company actually concluded the contract on which the claim was based. The Tribunal in this last case decided that the case was inadmissible because it had not been brought by the party to the contract, notwithstanding the links between the latter and the claimant.

Section 5 concludes by discussing some of the legal and policy problems posed by the exercise of indirect claims. It argues that these problems can be resolved through an express regulation of indirect claims, which *inter alia* establishes the requirements for their exercise, as in fact it has been done within the context of certain international dispute resolution systems. Within reasonable confines, the exercise of indirect claims can continue to be one of the ways in which foreign investment is protected, without leading to unfair situations that can be created by their indiscriminate use.

2. THE ICSID CONVENTION

According to Article 25(1) of the ICSID Convention, the jurisdiction of ICSID extends to:

any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State,

which the parties to the dispute consent in writing to submit to the Centre.⁷

This provision establishes the “outer limits” of ICSID jurisdiction, which cannot be extended even with the consent of both parties to the dispute.⁸

The jurisdiction of ICSID as an international legal person⁹ should not be confused with the competence of arbitral tribunals formed under ICSID rules, which are subject to the parties’ disposition. Under the ICSID Convention, the jurisdiction of ICSID “mean[s] the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings.”¹⁰

Arbitral tribunals have construed Article 25 of the ICSID Convention as requiring the existence of a dispute between a state party and a national of another state party, that the dispute is a legal dispute, and that it arises directly out of an investment.¹¹ Often the problem arises when the party to the contract that constitutes the main investment is a local company—albeit with foreign shareholders—so that the nationality criterion will not be met since any dispute that arises will be between the host state and one of its nationals.¹²

For the purposes of this Article, the crucial question is whether ICSID’s jurisdiction covers indirect claims by shareholders. In this

⁷ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25 (1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

⁸ Aron Broches, *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes*, in *THE ART OF ARBITRATION* 63, 67 (Jan C. Schultsz & Albert Jan van den Berg eds., 1982).

⁹ See ICSID Convention, *supra* note 7, art. 18, U.N.T.S. 159 (giving the Centre “full international legal personality”).

¹⁰ Executive Directors of the International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, para. 22 (Mar. 18, 1965), reprinted in *International Centre for Settlement of Investment Disputes, ICSID CONVENTION, REGULATIONS AND RULES* 38, 43 (2006) [hereinafter *Report of the Executive Directors*].

¹¹ See *Cont’l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, para. 74 (Feb. 22, 2006), available at <http://icsid.worldbank.org/ICSID/index.jsp> [hereinafter *Continental Jurisdiction*].

¹² See Broches, *supra* note 2, at 358–59 (describing the potential need for foreign shareholders in a locally incorporated company to specifically contract for the right to bring ICSID claims, as they may not automatically fall under the jurisdiction of ICSID).

respect, as will be seen, it is not disputed that shareholdings are covered by the term “investment” included in Article 25(1) of the ICSID Convention, even if such shareholdings are indirect—in other words, held through other companies—and non-controlling.¹³

During the negotiations of the text of the ICSID Convention, drafters considered the possibility of granting a direct action to controlling shareholders of local companies. Many foreign investors operate through a local company—either because it is required by the host state or because it is the company’s own choice; thus, if direct action was not provided, the investors would be left out of the coverage of the ICSID Convention if the company holder of the final investment—for example a concession contract—was a national of the host state.¹⁴ In this respect, it was maintained that a great part of foreign investment would have been excluded from the ICSID Convention’s scope if it were not for the solution afterwards adopted.¹⁵

However, the possibility of granting controlling shareholders of local companies direct access to ICSID’s facilities in respect of rights of the local company was entirely rejected. In this respect, Professor Schreuer explains that: “A suggested solution to give access to dispute settlement not to the locally incorporated company but directly to its foreign owners was discarded.”¹⁶

Instead, the alternative prescribed by Article 25(2)(b) *in fine* was included. Under this provision, a local company, controlled by a foreign owner, is given the right to sue its own state, provided that the parties had agreed that the local company should be treated as

¹³ See, e.g., *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 7 ICSID Rep. 494, paras. 51–52 (July 17, 2003) [hereinafter *CMS Jurisdiction*] (“There is indeed no requirement that an investment, in order to qualify [for ICSID jurisdiction], must necessarily be made by shareholders controlling a company or owning the majority of its shares”).

¹⁴ See CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 290–91 (2001) [hereinafter *ICSID COMMENTARY*] (discussing the preliminary draft of the convention and the debate that surrounded the possibility of granting a direct right of action for controlling shareholders).

¹⁵ See Broches, *supra* note 2, at 359 (“If no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside the scope of the Convention.”).

¹⁶ *ICSID COMMENTARY*, *supra* note 14, at 291 (internal citations omitted).

a "national of another Contracting State" due to its foreign control.¹⁷

The *travaux préparatoires* of the ICSID Convention, and even its actual text—in particular Article 25(2)(b) *in fine*—show that, outside of the possibility created by this latter provision, actions by shareholders based upon the rights of the company in which they hold shares are incompatible with the ICSID Convention. If the drafters of the ICSID Convention considered and rejected the possibility of extending ICSID's jurisdiction to such claims, this jurisdiction cannot now be extended in order to include them, not even through a treaty. Except, of course, if the treaty amends the ICSID Convention under Articles 65 and 66.

It has been stated that the mechanism enshrined in Article 25(2)(b) *in fine* is "only an alternative for very specific purposes"¹⁸ that:

is precisely meant to facilitate agreement between the parties, so as not to have the corporate personality interfering with the protection of the real interests associated with the investment. The same result can be achieved by means of the provisions of the BIT, where the consent may include non-controlling or minority shareholders.¹⁹

But if the mechanism of Article 25(2)(b) *in fine* is "only an alternative," this raises the question of why the drafters of the Convention saw the need to create it,²⁰ and why commentators such as Broches conclude that if it were not for such mechanism, a great part of foreign investment would have been excluded from the jurisdiction of ICSID.²¹ It is clear that if the mechanism of Article 25(2)(b) *in fine* would be "only an alternative" for the shareholder—who would be entitled to choose between this mechanism and claiming in its own name for damages suffered by the company—had the "alternative" mechanism not been created, no foreign investment would have been excluded from the jurisdiction of ICSID.

¹⁷ ICSID Convention, *supra* note 7 art. 25(2)(b).

¹⁸ CMS Jurisdiction, *supra* note 13, para. 58.

¹⁹ *Id.* para. 51.

²⁰ Cf. ICSID COMMENTARY, *supra* note 14, at 291 (noting that the drafters considered and discarded "[a] suggested solution to give access to dispute settlement not to the locally incorporated company but directly to its foreign owners.>").

²¹ *Id.* (confirming Broches's view regarding the Article 25(2)(b) mechanism).

2.1. *Indirect Claims and BITs*

In the case of ICSID arbitrations initiated on the basis of a BIT, it has been argued that shareholders are not exercising indirect claims, since they invoke rights directly granted to them.²² In fact, BITs generally grant to investors in shares, among many other kinds of foreign investors, certain direct rights such as the right not to be expropriated except for a public purpose and against adequate compensation, to be treated in a fair and equitable way, to receive full protection and security, and to be free from discriminatory or arbitrary treatment.

When the claim involves measures affecting typical shareholder rights and invokes standards of protection commonly found in BITs, for example fair and equitable treatment,²³ there is no doubt that the shareholder is exercising a direct claim, and thus, ICSID has jurisdiction. The problem arises, however, when the shareholders' claims do not seek to espouse their individual rights, but rather the shareholders' claim is made in relation to measures affecting rights of the company, such as measures regulating company-made contracts.

In this last case, ICSID does not have jurisdiction over the claim.²⁴ Even if the shareholder claims that the measure—although exclusively regulating the “local” rights of the company—also affected the company's BIT rights, allowing the claim would circumvent the “outer limits” imposed on ICSID's jurisdiction by the ICSID Convention. This Convention grants foreign owners the possibility of bringing claims against measures affecting the operations of the local company in which they hold shares, but exclusively through the mechanism enshrined in Article

²² See cases cited *infra* Section 4.2.

²³ See discussion *infra* Section 3.1; see also *Agrotexim v. Greece*, 330 Eur. Ct. H.R. (ser. A) at 23–24, para. 62 (1995) (noting that a clear distinction exists between an infringement on an individual shareholder's right and an infringement on corporations' rights).

²⁴ It is very important to bear in mind that the conclusions of this Article as to the scope of ICSID's jurisdiction are based upon an interpretation of the ICSID Convention. The fact that indirect claims, as defined herein, are outside of ICSID's jurisdiction does not mean, in any way, that a BIT claim commenced under other arbitral rules would be inadmissible. The admissibility of such a claim depends upon the interpretation of the applicable arbitral rules and of the applicable BIT, and even on the interpretation of general international law, if the BIT does not depart from it as regards admissibility of shareholders' claims.

25(2)(b) *in fine*; other possibilities, such as granting them direct access, were considered and discarded.²⁵

BITs *cannot* modify such limits to ICSID jurisdiction that derive from the text and structure of Article 25 of the ICSID Convention,²⁶ not even by granting additional rights to shareholders that would seem to provide, under certain interpretations, an international protection to “local” rights that belong not to them but to the company. In any event, it is at least doubtful that treaties protecting foreign investments, as a general matter and except for specific provisions appearing in some of them, intended to allow for indirect claims before any forum.

In fact, there are treaties that provide for indirect claims, but through specific provisions that expressly authorize shareholders to initiate them, and that are subject to very important conditions. For instance, the North American Free Trade Agreement (“NAFTA”) authorizes indirect claims in Article 1117 by controlling shareholders, but subject to certain requirements, including the ones established in Article 1135, which provide that any compensation to be granted does not go to the shareholder but to the company on behalf of which the claim was brought.²⁷

The U.S.-Chile Free Trade Agreement also provides for indirect claims, under certain conditions, and it also establishes that any compensation is to be paid to the company and not to the person that made the claim on behalf of it.²⁸ Finally, the 2004 Model BIT of the United States authorizes shareholders to bring claims on be-

²⁵ See ICSID COMMENTARY, *supra* note 14, at 290-91 (“A suggested solution to give access to dispute settlement not to the locally incorporated company but directly to its foreign owners . . . was discarded.”).

²⁶ See Broches, *supra* note 8, at 67 (stating that any agreement that provides for jurisdiction beyond Article 25’s established limits “will have no effect”).

²⁷ North American Free Trade Agreement, ch. 11, arts. 1117, 1135, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993). Cases have also discussed the issue of indirect or derivative claims under NAFTA. See *Gami Invs., Inc. v. United Mex. States*, Final Award, NAFTA/UNCITRAL Case, paras. 26-43 (NAFTA Ch. 11 Arb. Trib. Nov. 15, 2004), available at <http://www.state.gov/s/1/c7119.htm> [hereinafter *Gami Final Award*] (analyzing the issues of jurisdiction and standing under NAFTA); *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB (AF)/00/3, Award, 6 ICSID Rep. 192, 210-13, paras. 76-86 (Oct. 11, 2002) (examining the issue of standing under NAFTA).

²⁸ U.S.-Chile Free Trade Agreement, art. 10.25(2), June 6, 2003, 42 I.L.M. 1026 (2003).

half of an enterprise they control,²⁹ provided they submit “the claimant’s and the enterprise’s written waivers of any right to initiate or continue before any administrative tribunal or court under the law of either party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach,”³⁰ and an award of damages “shall provide that the sum be paid to the enterprise.”³¹

These provisions are strong evidence that when the states intend to allow for indirect claims of shareholders, they do so expressly. A different interpretation would render such provisions superfluous, a result which is contrary to basic principles of treaty construction.³²

Further, the position under customary international law is clear as to the inadmissibility of claims by or on behalf of a shareholder in relation to damages suffered by the corporation.³³ Since “an important principle of customary international law should [not] be held to have been tacitly dispensed with, [by an international agreement,] in the absence of any words making clear an intention to do so,”³⁴ the admissibility of indirect claims should be expressly provided for to allow a Tribunal’s acceptance.

Under these principles, the fact that shares are among the protected investments in a BIT is far from enough evidence to admit indirect claims. BITs do not, for example, allow a shareholder to claim under the fair and equitable treatment provision against a measure having an impact on the revenues of the company, unless they say so expressly.

²⁹ U.S. Dep’t of State & USTR, U.S. Model Bilateral Investment Treaty, art. 24.1(b) (2004), available at <http://www.state.gov/documents/organization/38710.pdf>.

³⁰ *Id.* art. 26.2(b)(ii).

³¹ *Id.* art. 34.2(b).

³² Compare the position of the United States in relation to Articles 1116, 1117 and 1139 of NAFTA in its submission pursuant to Article 1120 of NAFTA in Gami Final Award, *supra* note 27, paras. 2–5.

³³ See, e.g., Diallo Case, *supra* note 3, para. 89 (expressing the Court’s opinion that state practice and international court decisions do not reveal an exception to customary international law allowing for protection of shareholders by substitution).

³⁴ Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 42 (July 20) [hereinafter ELSI].

3. THE ICJ CASES

3.1. Barcelona Traction

In the *Barcelona Traction* case, the Belgian government was claiming against certain measures of the Spanish government which, allegedly in violation of international law, had caused damage to the Barcelona Traction, Light and Power Company, Limited (Barcelona Traction).³⁵ Belgium was seeking reparation for such damage, as sustained by shareholders of Barcelona Traction who were Belgian nationals³⁶ and who, according to Belgium, controlled the company.³⁷

Barcelona Traction had been incorporated in 1911 in Toronto, Canada,³⁸ where it had its registered office.³⁹ In light of Barcelona Traction's place of incorporation, one of Spain's four preliminary objections "was to the effect that the claim is inadmissible because the Belgian Government lacks any *jus standi* to intervene or make a judicial claim on behalf of Belgian interests in a Canadian company."⁴⁰ It should be noted that, in order to develop its electric power production and distribution system in Catalonia, Spain, Barcelona Traction had formed a number of subsidiary companies in Canada and Spain, some of which were concession-holders.⁴¹

The measures complained of had been taken in relation to Barcelona Traction and not to the Belgian shareholders.⁴² Therefore, the Court considered it:

essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account of its nationals' having suf-

³⁵ *Barcelona Traction*, *supra* note 3, para. 1.

³⁶ *Id.* para. 2.

³⁷ *Id.* para. 9.

³⁸ *Id.* para. 8.

³⁹ *Id.* para. 30.

⁴⁰ *Id.* para. 3.

⁴¹ *Id.* para. 8.

⁴² *Id.* para. 32.

ferred infringement of their rights as shareholders in a company not of Belgian nationality?⁴³

It is clear, then, that although the case involved an exercise of diplomatic protection by Belgium on behalf of certain shareholders, the Court discussed which were the rights of the shareholders and whether such rights were the subject matter of Belgium's claim. The Court believed that this determination was necessary in order to next establish whether Belgium's own rights had in turn been violated.

The ICJ commenced such discussion by affirming that "international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction."⁴⁴ It then stated that "[t]he concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights",⁴⁵ and that "[s]o long as the company is in existence the shareholder has no right to the corporate assets."⁴⁶ For the Court, it is only the corporate organs that can take action in relation to matters that pertain to the company.⁴⁷

The analysis then continued with a paragraph which is at the crux of the Court's rejection of Belgium's *jus standi*:

Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. Creditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss. In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder's interests are harmed by an act done to the

⁴³ *Id.* para. 35.

⁴⁴ *Id.* para. 38.

⁴⁵ *Id.* para. 41.

⁴⁶ *Id.*

⁴⁷ *Id.* para. 42.

company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.⁴⁸

The Court rejected an argument which appears frequently in investment litigation: the company is merely a means of the shareholders, who constitute the "reality behind it" that should be protected.⁴⁹ The ICJ affirmed that "even if a company is no more than a means for its shareholders to achieve their economic purpose, so long as it is *in esse* it enjoys an independent existence."⁵⁰

The core of the Court's argument lies in the distinction between measures that affect the shareholders' rights and measures that affect their interests. For the Court, a measure that causes damage does not necessarily involve the duty to make reparation.⁵¹ It is not when a "mere interest [is] affected," but only when a right is infringed that responsibility arises.⁵² The Court did refer to cases in which it is the rights of shareholders and not those of the company that are affected:

The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.⁵³

The independence of companies with respect to its sharehold-

⁴⁸ *Id.* para. 44.

⁴⁹ *Id.* para. 45.

⁵⁰ *Id.*

⁵¹ *Id.* para. 46.

⁵² *Id.*

⁵³ *Id.* para. 47.

ers is not, however, absolute.⁵⁴ In this context, the Court referred to the concept of “lifting the corporate veil” or “disregarding the legal entity,” which is recognized in municipal law in order to prevent the misuse of the legal personality.⁵⁵ According to the ICJ, such process of lifting the veil already forms part of international law as well, and can be resorted to not only in the interest of those dealing with the company, but also (more exceptionally) in favor of the shareholders.⁵⁶

For the purposes of the present Article, it is important to note that the Court, in light of the parties’ submissions, left aside the issue of special “terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection.”⁵⁷ Hence, although the general legal discussion contained in *Barcelona Traction* about the rights of shareholders is relevant for determining the admissibility of indirect claims, it is simply the framework for interpreting the provisions of the ICSID Convention and for determining whether the ICSID system was designed to allow such claims.

The Court considered the case in which the company has ceased to exist,⁵⁸ but it clarified that although *Barcelona Traction* was entirely paralyzed from an economic point of view,⁵⁹ it still existed from a legal point of view.⁶⁰ It is only when the company has ceased to exist from a legal standpoint, and therefore the shareholder is deprived of any remedy through it, that the latter can institute action in respect of measures affecting the company’s rights.⁶¹

Finally, the Court refers to new developments in international law, which could be relevant for the issue of the admissibility of indirect claims under the ICSID Convention.⁶² However, the Court refers specifically to the case in which the company itself is vested with the right to present a claim against the host state—

⁵⁴ *Id.* para. 56.

⁵⁵ *Id.*

⁵⁶ *Id.* paras. 57–58.

⁵⁷ *Id.* para. 63.

⁵⁸ *Id.* para. 64.

⁵⁹ *Id.* para. 65.

⁶⁰ *Id.* para. 66.

⁶¹ *Id.*

⁶² *See id.* para. 90 (describing the frequent practice of stipulating shareholder terms in special agreements or treaties).

instead of having to depend on its state of nationality espousing the claim through diplomatic protection⁶³ – which no doubt was one of the main innovations of the ICSID Convention. Nevertheless, such development should not be confused with whether the shareholder can claim damages for measures affecting the company's rights, which is a separate issue that has to be determined independently under the provisions of the ICSID Convention.

3.2. *The Elettronica Sicula Case*

The *Elettronica Sicula* ("ELSI") case was decided by a Chamber of the ICJ in 1989,⁶⁴ almost 20 years after the decision of the Court in *Barcelona Traction*. The United States instituted proceedings against Italy "in respect of a dispute arising out of the requisition by the Government of Italy of the plant and related assets of Raytheon-Elsi S.p.A., previously known as Elettronica Sicula S.p.A. (ELSI), an Italian company which was stated to have been 100 per cent owned by two United States corporations."⁶⁵

The United States alleged that certain acts and omissions of Italy had violated several provisions of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic of 1948 and its Supplementary Agreement.⁶⁶ The claim concerned the treatment received by the Raytheon Company (Raytheon) and The Machlett Laboratories Incorporated (Machlett), in relation to ELSI, which was wholly owned by those two corporations.⁶⁷

Italy argued that the claim was inadmissible because local remedies had not been exhausted, that in any event the provisions of the treaty mentioned by the United States had not been breached and, in subsidy and alternatively, that the alleged violations had caused no injury.⁶⁸ However, Italy did not raise objections to the jurisdiction of the Court, since it was "common ground between the Parties that the Court ha[d] jurisdiction".⁶⁹

ELSI had been incorporated in Palermo, Sicily, where it pro-

⁶³ *Id.* (discussing agreements directly between companies and states).

⁶⁴ See ELSI, *supra* note 34, para. 1 (outlining the filing of the case).

⁶⁵ *Id.* para. 1.

⁶⁶ See *id.* para. 12 (explaining the United States' claim).

⁶⁷ *Id.*

⁶⁸ See *id.* para. 11 (explicating Italy's defense claims).

⁶⁹ *Id.* para. 48.

duced electronic components.⁷⁰ After several years of a continuous decline, by 1967 ELSI was facing a financial crisis,⁷¹ which eventually led the Mayor of Palermo to requisition ELSI's plant on April 1, 1968.⁷² The goal of the requisition was to avoid the serious consequences for the workers and the impact on the public opinion and the press that closing the plant would have.⁷³

However, the company was declared bankrupt by a tribunal of Palermo on May, 16 1968, following a voluntary bankruptcy petition by ELSI's Board of Directors.⁷⁴ Since the amount realized in the bankruptcy proceedings was not even enough to pay ELSI's creditors, there was no remainder for Raytheon and Machlett.⁷⁵ Although Raytheon had to pay some of ELSI's debts that it had guaranteed, it succeeded in cases brought by five banks that tried to hold it liable for some of ELSI's unsecured loans, which were rejected by the Italian Court of Cassation or discontinued by the claimants.⁷⁶

The question is whether the *ELSI* case represents a departure by the Court from *Barcelona Traction*. It has been stated that in *ELSI* the Chamber accepted "the protection of shareholders of a corporation by the State of their nationality in spite of the fact that the affected corporation had a corporate personality under the defendant State's legislation."⁷⁷ However, the Court in *Barcelona Traction* expressly recognized that the rights of Belgium could be affected by an infringement of the rights of Belgian shareholders,⁷⁸ and that these had an "independent right of action,"⁷⁹ but for the Court it was necessary that the rights (and not just the interests) of such shareholders were affected.⁸⁰

Although the United States' claim referred to the treatment re-

⁷⁰ *Id.* para. 13.

⁷¹ *See id.* para. 26 (recounting ELSI's financial problems).

⁷² *Id.* para. 30.

⁷³ *See id.* para 30 (reporting the Mayor's order).

⁷⁴ *Id.* para. 36.

⁷⁵ *Id.* para. 44.

⁷⁶ *Id.* para. 45.

⁷⁷ CMS Jurisdiction, *supra* note 13, para. 44.

⁷⁸ *See Barcelona Traction, supra* note 3, para. 35 (analyzing the right to bring a claim).

⁷⁹ *Id.* para. 47.

⁸⁰ *See id.* para. 44 (stating that there can be no claim to compensation when the "interests of the aggrieved are affected, but not their rights").

ceived by Raytheon and Machlett,⁸¹ it should be noted that some of the measures in question were, at least in principle, aimed at the rights of ELSI.⁸² However, it is problematic for several reasons to regard the *ELSI* case as an abandonment of *Barcelona Traction* and its position with respect to the rights of shareholders under international law.

First, in *ELSI* it was "common ground between the Parties that the Court ha[d] jurisdiction . . . under Article 36, paragraph 1, of its Statute, and Article XXVI of the Treaty of Friendship, Commerce and Navigation, of 2 June 1948 ('the FCN Treaty'), between Italy and the United States."⁸³

Second, among the four acts characterized by the United States as violations of the treaty, two of them referred to direct rights of the shareholders as characterized by the ICJ in *Barcelona Traction*.⁸⁴ In effect, the United States stated that Italy had "violated its legal obligations when it unlawfully requisitioned the ELSI plant on 1 April 1968 which denied the ELSI stockholders their direct right to liquidate the ELSI assets in an orderly fashion" and "when it interfered with the ELSI bankruptcy proceedings."⁸⁵ And the other two acts, allowing ELSI workers to occupy the plant and unreasonably delaying the ruling on the lawfulness of the requisition, were also related, in the United States case, to the right of shareholders to orderly dispose of the company's assets.⁸⁶ This in turn is closely related to one of the direct rights of shareholders expressly mentioned by the ICJ in *Barcelona Traction*: "the right to share in the residual assets of the company on liquidation."⁸⁷

Third, the Chamber expressed "doubts whether the word 'property' in Article V, paragraph 1 [providing for "the most constant protection and security"], extends, in the case of shareholders, beyond the shares themselves, to the company or its assets."⁸⁸ The Chamber did "nevertheless examine the matter on the basis argued by the United States that the 'property' to be protected under this provision of the FCN Treaty was not the plant and equip-

⁸¹ *ELSI*, *supra* note 34, para. 12.

⁸² *See id.* para. 65 (noting the alleged treaty violations).

⁸³ *Id.* para. 48.

⁸⁴ *Barcelona Traction*, *supra* note 3, para. 47.

⁸⁵ *ELSI*, *supra* note 34, para. 65.

⁸⁶ *Id.* para. 56.

⁸⁷ *Barcelona Traction*, *supra* note 3, para. 47.

⁸⁸ *ELSI*, *supra* note 34, para. 106.

ment the subject of the requisition, but the entity of ELSI itself.”⁸⁹ This assertion of the Chamber could provide support for the admissibility of indirect claims under BITs that refer not only to shares but also to the company as a protected investment, although in such cases the shareholder will generally have to control the company in order to bring a claim in relation to the latter’s rights. However, as has been noted, under the ICSID Convention indirect claims are inadmissible even if they are brought by the controlling shareholder, unless the mechanism established in Article 25(2)(b) *in fine* is resorted to.⁹⁰

Finally, in relation to a provision of the applicable FCN that provided for the right “to acquire, own and dispose of immovable property or interests therein within the territories of the other High Contracting Party,” the Chamber had to consider an objection by Italy that the article “does not apply at all to Raytheon and Machlett because their own property rights (*diritti reali*) were limited to shares in ELSI, and the immovable property in question (the plant in Palermo) was owned by ELSI, an Italian company.”⁹¹ The Court expressed “some sympathy” with the United States position that opposed the Italian objection, but because the provision included the word “interests” along with the word “property,” and because:

Raytheon and Machlett, being the owners of all the shares, were in practice the persons who alone could decide (before the bankruptcy), whether to dispose of the immovable property of the company; accordingly, if the requisition did, by triggering the bankruptcy, deprive ELSI of the possibility of disposing of its immovable property, it was really Raytheon and Machlett who were deprived; and allegedly in violation of Article VII.⁹²

This last conclusion of the Chamber is quite in line with the distinction made by the Court in *Barcelona Traction* between rights of the shareholders and interests of the shareholders, and with the latter’s reference to “direct rights of shareholders” among which it included the right to share in the residual assets upon liquidation of

⁸⁹ *Id.*

⁹⁰ *See supra* Section 2.

⁹¹ ELSI, *supra* note 34, para. 132.

⁹² *Id.*

the company.⁹³ For all the above reasons, the *ELSI* case should not be regarded, at least as a matter of principle, as a departure from *Barcelona Traction* on the issue of the admissibility of indirect claims, and some of the Chamber's conclusions are strictly based upon the specific language of the applicable treaty.

3.3. *The Diallo Case*

In a case brought by the Republic of Guinea against the Democratic Republic of Congo ("DRC") the ICJ had occasion to discuss once again the issue of the standing of shareholders with respect to the rights of the company.⁹⁴ The case concerns a Guinean citizen, Mr. Ahmadou Sadio Diallo, who resided and made business in Guinea basically through two companies incorporated under Zairean law, Africom-Zaire and Africontainers Zaire.⁹⁵

Mr. Diallo was arrested and deported from Zaire on January 31, 1996, on charges of having breached the public order.⁹⁶ Guinea alleged that the arrest and expulsion of Mr. Diallo were arbitrary, that he was subjected to humiliating and degrading treatment, that he was deprived of the exercise of his rights of ownership and management in respect of the two companies, that he was prevented from pursuing recovery of numerous debts owed to him and the companies, and that the DRC had failed to pay the debts it owed to him and to the companies, all in violation of international law.⁹⁷

The DRC objected to the admissibility of the claim *inter alia* on the ground that Guinea lacked *jus standi* to exercise diplomatic protection, since it was essentially seeking to "secure reparation for injury suffered on account of the alleged violation of rights of companies not possessing its nationality."⁹⁸

At the outset, the ICJ noted that Guinea was exercising diplomatic protection in respect of three distinct categories of rights, Mr. Diallo's "individual personal rights," his rights as partner of the local companies, and "the rights of those companies, by 'substitution.'"⁹⁹ It began its legal analysis of the issue of shareholder's

⁹³ *Barcelona Traction*, *supra* note 3, para. 47.

⁹⁴ See generally *Diallo Case*, *supra* note 3.

⁹⁵ *Id.* para. 14.

⁹⁶ *Id.*

⁹⁷ *Id.* para. 11.

⁹⁸ *Id.*

⁹⁹ *Id.* para. 31.

standing by reaffirming the principles established in *Barcelona Traction*, and in particular by stating that “[c]onferring independent corporate personality on a company implies granting it rights over its own property, rights which it alone is capable of protecting.”¹⁰⁰

Importantly, it confirmed that “what amounts to the internationally wrongful act, in the case of *associés* or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that State.”¹⁰¹ Those direct rights of shareholders, however, do not include “the company’s debts receivable from and owing to third parties,”¹⁰² which should have a bearing on the issue whether foreign investors have a direct right to claim against measures affecting local companies’ receivables (such as payments under contracts).

After rejecting the DRC’s objection as to Mr. Diallo’s rights as an individual,¹⁰³ in accordance with the doctrine of *Barcelona Traction*, the Court affirmed the admissibility of Guinea’s case as to his direct rights as *associé* of Africom-Zaire and Africontainers-Zaire.¹⁰⁴ Under that doctrine, it also confirmed that at present it cannot be found “an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea.”¹⁰⁵ The Court, however, concluded that Guinea lacked standing to exercise diplomatic protection as regards measures of the DRC against the rights of the two companies.¹⁰⁶ The Court, nonetheless, made *in passim* the following statement:

[I]n contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Set-

¹⁰⁰ *Id.* para. 61.

¹⁰¹ *Id.* para. 64.

¹⁰² *Id.* para. 63.

¹⁰³ *See id.* paras. 34–48 (determining that Guinea had standing to espouse Mr. Diallo’s individual rights because the DRC failed to prove the existence of available and effective local remedies that should have been exhausted by him).

¹⁰⁴ *Id.* para. 67.

¹⁰⁵ *Id.* para. 89.

¹⁰⁶ *Id.* para. 94.

tlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors The theory of protection by substitution seeks indeed to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available, the allegedly unlawful acts having been committed against the company by the State of its nationality.¹⁰⁷

It is important for the purposes of this article to stress that, for the ICJ, the principle under general international law remains that shareholders cannot claim against measures affecting the rights of the company, and that one has to look into specific treaties to find exceptions to that principle.¹⁰⁸ The ICSID Convention, mentioned by the Court, provides for such an exception, but only through the second sentence of Article 25(2)(b).

4. THE JURISPRUDENCE OF ICSID

4.1. *The First ICSID Cases*

4.1.1. *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*

Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka concerned an investment made by Asian Agricultural Products Ltd. ("APPL"), a Hong Kong corporation, in the Democratic Socialist Republic of Sri Lanka. The investment was made in 1983 and consisted in equity capital of Serendib Seafoods Ltd., a Sri Lanka public company.¹⁰⁹ This company was in the business of shrimp culture, for which it owned a farm in Sri Lanka.¹¹⁰

There was some disagreement among the parties as to the exact percentage of AAPL's share ownership in Serendib Seafoods Ltd. While AAPL ultimately claimed that it owned 48.2% of the com-

¹⁰⁷ *Id.* para. 88.

¹⁰⁸ *Id.* para. 89.

¹⁰⁹ *Asian Agric. Prod. Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 4 ICSID Rep. 245,251, para. 3 (June 27, 1990).

¹¹⁰ *Id.*

pany's shares, Sri Lanka maintained that A.A.P.C.'s fractional ownership was much smaller, due to the existence of preference shares owned by a third party that "should be taken into consideration as an integral part of Serendib's equity capital."¹¹¹ The Tribunal, however, did not settle the issue; it concluded that "[f]or the purpose of evaluating the market price of AAPL's shares . . . the result would be ultimately the same whether or not" the preference shares were taken into account.¹¹²

In its counter memorial, Sri Lanka affirmed: "To the extent there was excessive destruction, the Government of Sri Lanka is ready to compensate AAPL for its proportionate ownership."¹¹³ There was hence no issue raised as to the admissibility of the claim in relation to the Claimant's *jus standi*.

The Tribunal accepted that AAPL was entitled to claim compensation under the Sri Lanka/U.K. Bilateral Investment Treaty simply on the ground that "the Claimant's 'investments' in Sri Lanka 'suffered losses' owing to events falling under one or more of the circumstances enumerated by Article 4(1) of the Treaty ('revolution, state of national emergence, revolt, insurrection', etc. . .)."¹¹⁴ However, in admitting the indirect action pursued by AAPL, the Tribunal introduced an important distinction that, as will be seen, was not expressly reiterated by more recent arbitral decisions that accepted the admissibility of indirect claims.

The Tribunal clearly stated that the "undisputed 'investments'" of AAPL in Sri Lanka was its shares in Serendib Company.¹¹⁵ Consequently, the award concludes that, in the case, the protection provided by the Treaty did not reach the local company's assets as such, but that it was "limited to a single item: the value of [the foreign investor's] share-holding in the joint venture entity (Serendib Company)."¹¹⁶

In accordance with the *AAPL v. Sri Lanka* Tribunal's reasoning, therefore, an investor pursuing an indirect action can only seek damages for a decrease in the value of its shares that resulted from a measure attributable to the host state and that violated the applicable BIT. It cannot directly seek damages, for example, for losses

¹¹¹ *Id.* para. 93.

¹¹² *Id.* para. 98.

¹¹³ *Id.* para. 32(E) (quoting Sri Lanka's Counter-Memorial).

¹¹⁴ *Id.* para. 95.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

suffered by the local company on its own investments—although this, in turn, would probably have an impact on the value of that company's shares.

It is worth noting that in accepting the claim for damages the Tribunal indicated that the local company had ceased to be a "going concern" in Sri Lanka—"thus causing AAPL's investment therein to become a total loss."¹¹⁷ In the *Barcelona Traction* case, the International Court of Justice considered an instance in which a company, in fact, had ceased to exist.¹¹⁸ However, it concluded that "[o]nly in the event of the legal demise of the company" can "an independent right of action" arise for the shareholders.¹¹⁹

4.1.2. American Manufacturing & Trading v. Republic of Zaire

American Manufacturing & Trading Corporation (Zaire), Inc. ("AMT") was an American company, incorporated in the state of Delaware and controlled by U.S. nationals.¹²⁰ AMT's investment in Zaire consisted in 94% of the stock of a limited liability private company named Société Industrielle Zaïroise ("SINZA") Société privée à responsabilité limitée.¹²¹ According to AMT, armed forces of Zaire had, on September 23–24, 1991 and on January 28–29, 1993, caused damages to properties and installations belonging to SINZA, in violation of the BIT signed by the United States of America and the Republic of Zaire on August 3, 1984.¹²²

In its Counter-Memorial, Zaire challenged the jurisdiction of ICSID and the competence of the Tribunal inter alia on the ground that AMT did not have "the capacity to act in the name of SINZA."¹²³ Zaire affirmed that the dispute was not between AMT and Zaire but between the latter and SINZA, a Zairian Company, and that therefore ICSID had no jurisdiction to entertain it.¹²⁴ Closely related to this objection, Zaire also alleged that, under Zairian law, AMT's claim was inadmissible since AMT had never

¹¹⁷ *Id.* para. 99.

¹¹⁸ *Barcelona Traction*, *supra* note 3, para. 66.

¹¹⁹ *Id.*

¹²⁰ *Am. Mfg. & Trading Inc. (AMT) v. Zaire*, ICSID Case No. ARB/93/1, Award, 5 ICSID Rep. 11, 14, para. 1.01 (Feb. 10, 1997).

¹²¹ *Id.* para. 1.05(2).

¹²² *Id.*

¹²³ *Id.* para. 3.09.

¹²⁴ *Id.*

made a direct investment in Zaire, and that SINZA, as the direct investor, was the only one empowered to institute arbitral proceedings.¹²⁵ Zaire even contended that AMT “is not an investor in the Republic of Zaire,”¹²⁶ although it later acknowledged that AMT “invested by participating in the capital of SINZA.”¹²⁷

The Tribunal rejected Zaire’s objection on the ground that the applicable BIT clearly included “[a] company or shares of stock or other interests in a company or interests in the assets thereof.”¹²⁸ It concluded that “SINZA belongs to AMT 94 per cent and that AMT, formed in the United States of America with 55 per cent of its shares owned by United States citizens, is controlled by the Americans, and hence is a U.S. company.”¹²⁹ For the Tribunal, that made SINZA an investment of AMT under the BIT and a juridical person included in Article 25(2) of the ICSID Convention.¹³⁰ With that, the Tribunal concluded that AMT was acting in its own capacity as an investor in Zaire and not in the name of SINZA, and therefore it rejected the objection based on the defect in the capacity of the claimant to bring the case.¹³¹

Although the Tribunal did not base its rejection of Zaire’s jurisdictional objection on Article III of the applicable BIT, paragraph 2 of that article is an example of the admission of indirect actions not found in other BITs—which, of course, does not cause the admissibility of indirect claims under the ICSID Convention. Article III, relating to expropriations and nationalizations, established in its paragraph 2:

If either Party expropriates the investment of any company duly constituted in its territory, and if nationals or companies of the other Party hold shares or any recognized right in the expropriated company, then the expropriating Party shall ensure that such nationals or companies of the other

¹²⁵ *Id.* para. 3.13.

¹²⁶ *Id.* para. 5.08.

¹²⁷ *Id.* para. 5.11 (quoting Zaire’s reply).

¹²⁸ *Id.* para. 5.14.

¹²⁹ *Id.* para. 5.15.

¹³⁰ *Id.*

¹³¹ *Id.*

Party receive compensation in accordance with the provisions of the preceding paragraph.¹³²

4.1.2. Antoine Goetz et consorts c. République du Burundi

Goetz v. Burundi concerned investments done by Belgian investors in a limited liability company named Affinage des Métaux, en abrégé AFFIMET ("AFFIMET"), constituted in Bujumbura, Burundi.¹³³ The 1000 shares of AFFIMET were all distributed between six Belgian nationals, except for one share held by a national of Rwanda.¹³⁴ The ICSID arbitration was initiated by all the Belgian shareholders on the basis of Article 8 of the BIT between the Belgium-Luxembourg Economic Union and the Republic of Burundi.¹³⁵

Burundi had granted a series of fiscal and customs exemptions to AFFIMET, as well as certain benefits in the fields of labor law and foreign exchange regulations under a free zone regime.¹³⁶ Such benefits were suspended a few months after they were granted¹³⁷ and subsequently given back to AFFIMET.¹³⁸ However, they were finally withdrawn from AFFIMET on 29 May 1995, following a decision by the Council of Ministers.¹³⁹

It is interesting to note that AFFIMET initiated legal actions before the Administrative Court of Bujumbura, in order to obtain the annulment of the decision that revoked its benefits under the free zone regime.¹⁴⁰ The same demand was included in the request for arbitration, although the latter also included a subsidiary request for damages.¹⁴¹ However, the legal actions pursued before the local authorities were initiated in the name of AFFIMET and not in the name of the shareholders.¹⁴²

¹³² Am. Mfg. & Trading Inc. (AMT) v. Zaire, ICSID Case No. ARB/93/1, *Invidual Opinions*, 5 ICSID Rep. 37, para. 4(ii)(2), (Feb. 21, 1997).

¹³³ Goetz, *supra* note 6, para. 3.

¹³⁴ *Id.*

¹³⁵ *Id.* para. 18.

¹³⁶ *Id.* paras. 1, 5.

¹³⁷ *Id.* para. 10.

¹³⁸ *Id.* para. 11.

¹³⁹ *Id.* para. 15.

¹⁴⁰ *Id.* para. 17.

¹⁴¹ *Id.* para. 58.

¹⁴² *Id.* paras. 17-18.

No jurisdictional objection was raised by Burundi,¹⁴³ which basically did not intervene in the proceeding. However, recalling its duty under Rule 42 of ICSID Arbitration Rules, the Tribunal examined ICSID's jurisdiction and its own competence over the dispute.¹⁴⁴

The Tribunal also considered *proprio motu* the admissibility of the request, and in this respect it analyzed whether the claimants had *jus standi* even if the measure in question was directed to the company.¹⁴⁵ Responding to a question from the Tribunal, the claimants explained that the arbitration had been initiated by the shareholders because the company itself was constituted under the laws of Burundi and could therefore not have recourse to arbitration against that country pursuant to the ICSID Convention.¹⁴⁶

The position adopted by the claimants in this case is very relevant for the purposes of this article. Indeed, the claimants implicitly acknowledged that the rights invoked in the arbitration by the shareholders were the same rights that the company was invoking in the local proceedings, although the latter was procedurally barred from resorting to ICSID arbitration.¹⁴⁷

Even though the Tribunal disagreed with part of the claimants' reasoning,¹⁴⁸ it did not assert the admissibility of the request based on a supposed distinction between the rights being invoked by the shareholders and the ones being invoked by the company in local proceedings.¹⁴⁹ The Tribunal limited itself to observe that ICSID jurisprudence did not grant *jus standi* only to the juridical person to whom the measure was directed but also to the shareholders of such person, who are the "true investors."¹⁵⁰

It is also important to note that the Tribunal expressly took into

¹⁴³ *Id.* para. 78.

¹⁴⁴ *Id.* para. 79.

¹⁴⁵ *Id.* paras. 86–87.

¹⁴⁶ *Id.* para. 88.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (stating "[t]he fact that AFFIMET was a Burundian company did not in consequence prevent it from lodging the claim for arbitration so long as the Burundian government had given its consent").

¹⁴⁹ In fact, for the purposes of the admissibility of the request, the Tribunal did not attach much relevance to the distinction between AFFIMET and its shareholders. The Tribunal considered that the pre-arbitration consultation requirement under the applicable BIT had been met, even though it had been initiated by AFFIMET and not by its shareholders. *Id.* para. 91.

¹⁵⁰ *Id.* para. 89.

account the fact that the claimants in the case were the controlling shareholders of the company in question.¹⁵¹ This appears to have been one of the reasons why it concluded that the request was admissible.¹⁵²

After the award was rendered, the parties reached an agreement as to the execution of the Tribunal's decision.¹⁵³ The agreement was concluded between the Republic of Burundi and AFFIMET, with the latter's shareholders taking no formal part in it.¹⁵⁴ Furthermore, although the parties in the ICSID proceeding had been the shareholders and not the company, it was again only AFFIMET that, pursuant to the terms of the agreement, renounced any claim it may have had before ICSID or before the courts of Burundi in relation to the object of the international arbitration.¹⁵⁵

This last aspect of the case shows once again that not only the Tribunal, but also the parties, were aware that the rights in question were the same, albeit invoked by AFFIMET before the local courts and by its shareholders before ICSID. There was no effort to create a distinction between rights under the treaty and rights under the local instrument, a distinction that would later be made by several tribunals in justifying the admissibility of indirect actions.

4.1.3. *Lanco International Inc. v. The Argentine Republic*

In *Lanco v. Argentina* the government had awarded a concession agreement for the development and operation of a port terminal in Buenos Aires.¹⁵⁶ The agreement had been signed not only by the local company that was the grantee of the concession, but also by other companies including the claimant in the ICSID arbitration, "as awardees and guarantors of the grantee's obligations."¹⁵⁷

At the time of the preliminary decision on the jurisdiction of the arbitral tribunal, Lanco had 17.4% of the capital stock of Terminales Portuarias Argentinas S.A., the grantee of the concession,

¹⁵¹ *Id.* (citing several cases in which standing was given to strong majority shareholders of companies).

¹⁵² *Id.*

¹⁵³ *Gortz v. Republic of Burundi*, ICSID Case No. ARB/95/3, Second Part: The Parties Agreement, 6 ICSID Rep. 46, paras. 1-8 (Dec. 23, 1998).

¹⁵⁴ *Id.* para. 3 (citing Article 3 of the agreement).

¹⁵⁵ *Id.* para. 8.

¹⁵⁶ *Lanco Int'l Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 5 ICSID 367, paras. 4-5 (Dec. 8, 1998).

¹⁵⁷ *Id.* para. 5.

plus “usufruct rights in respect of 13% of the capital stock of that company.”¹⁵⁸ Argentina argued that since the claimant’s only investment was its shareholder equity in the grantee company, but that it was not itself the grantee of the concession, it could not claim for the performance of the obligations arising under the concession agreement.¹⁵⁹

In order to establish its jurisdiction, the Tribunal started by asserting that the claimant had an investment protected under the Argentina-US BIT.¹⁶⁰ It confirmed that shares of stock in a company were an investment, even if such capital stock did not confer control over the administration of the company.¹⁶¹

However, the Tribunal also considered it “fundamental” that Lanco was “a party, in its own name and right, to the Concession Agreement.”¹⁶² This factor differentiates this case from other cases involving concession agreements, in which the shareholder was allowed to pursue its claim in relation to the agreement even if it was not a party to it. In light of that circumstance, the Tribunal concluded that the claimant’s investment was not only its shares, but also its participation “in [its] own name and on [its] own behalf” in the concession agreement.¹⁶³

Apparently, for the Tribunal, the fact that the claimant had shares in an Argentine company coupled with its being a party “in its own name and right” to the concession agreement, was enough to find jurisdiction, since it did not specifically analyze Argentina’s objection as to the *jus standi* of the claimant.

As it is argued in this Article, those two factors should be given completely different weight in determining the admissibility of a claim by a shareholder. If the shareholder is a party to the agreement in question, he may be claiming for his own rights under such agreement, and therefore, in that case, the issue of indirect claims simply does not arise. But the fact that shares are a protected investment under the applicable BIT does not dispose of the question whether the investor has *jus standi*, since it will still be necessary to determine whether the claim genuinely refers to the rights that such investment confers.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* para. 7.

¹⁶⁰ *Id.* para. 10.

¹⁶¹ *Id.*

¹⁶² *Id.* para. 12.

¹⁶³ *Id.* para. 13.

4.2. *The Argentine Saga*

The economic, political and social crisis suffered by the Republic of Argentina, which exploded at the end of 2001 and during 2002,¹⁶⁴ gave way to 30 ICSID cases.¹⁶⁵ The total amount in play in those arbitrations is so high that it has led some commentators to affirm that the claims "add up to virtually the total annual budget of the Argentinean government."¹⁶⁶

Since most of those ICSID cases were brought by investors that had shares in Argentine companies, and the measures in question were not aimed at the shareholders' rights,¹⁶⁷ their *jus standi* under the ICSID Convention and the applicable BITs was questioned by Argentina. This in turn has produced the most extensive jurisprudence on the admissibility of indirect claims under international law that exists so far.

4.2.1. *CMS v. Argentina*

CMS v. Argentina concerned an investment by an American company, CMS Gas Transmission Company ("CMS"), in Transportadora de Gas del Norte ("TGN").¹⁶⁸ TGN had been incorporated in Argentina and in 1992 had obtained a license for the transportation of gas.¹⁶⁹ After two purchases, CMS's shareholding in TGN reached 29.42% of the company's shares.¹⁷⁰

TGN's license contained certain provisions as to the calculation and adjustment of tariffs.¹⁷¹ CMS alleged that its "compensation

¹⁶⁴ See, e.g., PAUL BLUSTEIN, AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF, AND THE BANKRUPTING OF ARGENTINA 1 (2005) (describing the collapse of the Argentine economy following the withdrawal of the IMF mission in early December 2001 and the subsequent political, social, and economic turmoil that followed in subsequent years).

¹⁶⁵ Most but not all ICSID cases against Argentina did directly arise from the referred-to crisis. See International Centre for Settlement of Investment Disputes, List of Concluded Cases, <http://icsid.worldbank.org/> (follow "Cases" hyperlink; then follow "List of Cases" hyperlink; then follow "Concluded Cases" hyperlink).

¹⁶⁶ Vaughan Lowe, *Some Comments on Procedural Weaknesses in International Law*, 98 AM. SOC'Y INT'L L. PROC. 37, 39 (2004).

¹⁶⁷ Although, as it will be seen, the claimants in the Argentine cases affirmed they were invoking their rights under the BITs and not the rights of the local companies.

¹⁶⁸ CMS Jurisdiction, *supra* note 13, para. 19.

¹⁶⁹ *Id.* para. 19.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* para. 20.

claim" was founded "on the loss in value of its investment due to Argentina's dismantling of the dollar-based tariff regime."¹⁷² The measures in question had been adopted by the Argentine government in response to the crisis and included the change of the exchange and monetary policy in effect until the end of 2001.¹⁷³

Argentina questioned the admissibility of the claim, arguing that CMS lacked *jus standi*. In particular, Argentina asserted "that the Claimant does not hold the rights upon which it bases its claim—to wit, TGN being the licensee, and CMS only a minority shareholder in this company, only TGN could claim for any damage suffered."¹⁷⁴ Argentina also alleged "CMS is claiming not for direct damages but for indirect damages which could result from its minority participation in TGN."¹⁷⁵

CMS argued *inter alia* that it was "not claiming for rights pertaining to TGN but for the rights associated with its investment in the company."¹⁷⁶ CMS further stated that it qualified "as a foreign investor under the BIT and its participation as a shareholder is a foreign investment protected under that Treaty, thus having a right of action independently from TGN" arising "directly from the BIT provisions."¹⁷⁷ Hence, CMS concluded, its claims were "direct and not indirect."¹⁷⁸

In its Decision on Jurisdiction, in order to deal with Argentina's objection as to the claimant's *jus standi*, the Tribunal analyzed the concept of "[c]orporate personality in Argentine legislation,"¹⁷⁹ "[s]hareholder rights under general international law,"¹⁸⁰ "[s]hareholder rights under the ICSID Convention,"¹⁸¹ and "[s]hareholder rights under the Argentina-United States Bilateral Investment Treaty."¹⁸² Although this Article refers to ICSID's jurisdiction over indirect claims under the ICSID Convention, it is

¹⁷² *Id.* para. 30.

¹⁷³ *Id.* paras. 23–24 (discussing the end of the regime of convertibility and parity of the Argentine peso with the U.S. dollar).

¹⁷⁴ *Id.* para. 36.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* para. 40.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* para. 42.

¹⁸⁰ *Id.* paras. 43–48.

¹⁸¹ *Id.* paras. 49–56.

¹⁸² *Id.* paras. 57–65.

useful to consider the analysis done by the Tribunal of Argentine law, general international law, and the BIT, since such analysis helps in part to explain why the Tribunal found that ICSID had jurisdiction over CMS's claim.

Regarding corporate personality under the relevant Argentine legislation, the Tribunal acknowledged that "the corporate legal personality is distinct and separate from that of the shareholders," but stated that "it is not determinant in this case" since national legislation is not applicable for jurisdictional purposes.¹⁸³ The Tribunal did nonetheless consider the Argentine legislation by stating "that that legislation has contributed significantly to the piercing of the corporate veil when the real interests behind the corporate personality need to be identified as evidenced for example by Article 54, para. 3, of Law 19.550, as amended by Law 22.903."¹⁸⁴

Article 54, para. 3 of Law No. 19.550 however, refers to the rare cases in which the activities of the company can be directly attributed to the partners or controllers (or some of them).¹⁸⁵ It has no relationship whatsoever with the issue of whether shareholders can claim on their own behalf for alleged violations of the rights of the company. A reference by the Tribunal to the provisions of Argentine law granting rights to shareholders would have been more pertinent, instead of alluding to the provision that establishes in which cases the latter can be liable for damages caused by the company.¹⁸⁶

As to "[s]hareholder rights under general international law," the Tribunal analyzed *inter alia* the decision of the International Court of Justice in the *Barcelona Traction* case.¹⁸⁷ It tried to distinguish it from the CMS case by agreeing with the Claimant that *Barcelona Traction* "was concerned only with the exercise of diplomatic protection in that particular triangular setting."¹⁸⁸

As will be seen in the discussion of the cases that followed the CMS decision on jurisdiction, other tribunals would later also dis-

¹⁸³ *Id.* para. 42.

¹⁸⁴ *Id.* para. 42 (footnote omitted).

¹⁸⁵ See Law No. 19.550, Mar. 4, 1972, 25 B.O. 4, art. 54, para. 3.

¹⁸⁶ For a discussion of the doctrine of "veil piercing" under customary international law, see *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 11 ICSID Rep. 313, paras. 53-56 (April 29, 2004) [hereinafter *Tokelés*].

¹⁸⁷ CMS Jurisdiction, *supra* note 13, paras. 43-48.

¹⁸⁸ *Id.* para. 43.

tinguish *Barcelona Traction* as a case of diplomatic protection and therefore distinct from an ICSID arbitration (although *Barcelona Traction* has been cited by ICSID tribunals in other contexts).¹⁸⁹ But the statements of the ICJ in *Barcelona Traction* in relation to the rights of shareholders under municipal and international law are formulated in general and abstract terms, without being made dependent upon the fact that the case concerns an exercise of diplomatic protection.¹⁹⁰

This is not to say that the facts of a case are not important in order to evaluate the conclusions of the Tribunal as to points of law. But the CMS Tribunal never explained in what way the assertions of the ICJ in *Barcelona Traction* as to the rights of shareholders would have been different had the case not involved an exercise of diplomatic protection.

The analysis of general international law on this issue concludes with the affirmation that there is “no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders.”¹⁹¹ The problem with indirect claims, however, does not relate to the issue whether shareholders can claim independently from the company. No one can seriously question that they can, *as long as they are invoking their own rights and not those of the company*.

In *Barcelona Traction*, the ICJ had already recognized that the shareholder has an independent right of action, but only “[w]henver one of his direct rights is infringed”¹⁹² It maintained, however, that the shareholder does not have a right of action in regard to “difficulties or financial losses to which he may be exposed as the result of the situation of the company.”¹⁹³

Conversely, the CMS Tribunal found that it was “immaterial for the purpose of finding jurisdiction” whether the investor is a party to a concession agreement or a license agreement with the host State “since there is a direct right of action of shareholders.”¹⁹⁴ It is clear that the Tribunal is conflating the determination of

¹⁸⁹ See Tokelès, *supra* note 186, paras. 53–56 (ruling that the Tribunal had jurisdiction over the case).

¹⁹⁰ See, inter alia, *Barcelona Traction*, *supra* note 3, paras. 41–47, 52.

¹⁹¹ CMS Jurisdiction, *supra* note 13, para. 48.

¹⁹² *Barcelona Traction*, *supra* note 3, para. 47.

¹⁹³ *Id.*

¹⁹⁴ CMS Jurisdiction, *supra* note 13, para. 65.

whether shareholders hold a direct right of action, with the issue of which rights the shareholder can invoke through such action. In fact, neither in its decision on jurisdiction, nor in the award, did the Tribunal establish that the rights in play were those of CMS and not those of TGN.

With respect to “[s]hareholder rights under the ICSID Convention,” the Tribunal started by discussing whether the “ownership of shares” can be considered an investment within the terms of Article 25(1) of the ICSID Convention.¹⁹⁵ It concluded that it can, even if the shareholders in question do not control or own the majority of the shares.¹⁹⁶

The Tribunal then analyzed ICSID’s jurisdiction in respect of indirect investments, taking into account that “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment.”¹⁹⁷ Citing *Fedax v. Venezuela*, the Tribunal concluded that the jurisdiction of the Centre extends to direct and indirect investments.¹⁹⁸ In light of those conclusions, the Tribunal affirmed that “there is no bar to the exercise of jurisdiction in light of the 1965 Convention.”¹⁹⁹

Here again, the Tribunal confused the issues of whether shares can be an investment under Article 25 of the ICSID Convention and whether ICSID’s jurisdiction can extend to indirect investments, with the determination of which rights a shareholder can claim. The fact that shares can constitute an investment under the ICSID Convention and that ICSID’s jurisdiction can extend to indirect investments, does not alter (and does not even relate to) the fact that under the ICSID Convention shareholders are not allowed to claim for damages suffered by the company.

It is clear that CMS was claiming for the alleged “dismantling” of a tariff regime that granted rights to TGN, not to CMS, according to the latter’s *own* statements.²⁰⁰ This is typically an indirect or

¹⁹⁵ *Id.* paras. 49–51.

¹⁹⁶ *See id.* para. 51 (“There is indeed no requirement that an investment, in order to qualify, must necessarily be made by shareholders controlling a company or owning the majority of its shares.”).

¹⁹⁷ ICSID Convention, *supra* note 7, art. 25(1).

¹⁹⁸ *See CMS Jurisdiction, supra* note 13, para. 52 (noting the “broad reach that the term ‘investment’ must be given in light of the negotiating history of the convention”) (quoting *Fedax NV v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 5 ICSID Rep. 183, 192, para. 24 (July 11, 1997)).

¹⁹⁹ *CMS Jurisdiction, supra* note 13, para. 56.

²⁰⁰ *See id.* para. 30 (noting that CMS’s compensation claim is founded on the

derivative claim, in which one entity ("CMS") claims compensation for the alleged infringement of rights pertaining to another entity (TGN). The Tribunal itself acknowledged that the company affected by the measures was TGN, not CMS.²⁰¹

It should be stressed once again that even if the applicable BIT allows for the exercise of indirect claims,²⁰² this is not determinant as to the issue whether such claims are permitted under Article 25 of the ICSID Convention. As has already been noted, the "outer limits" of ICSID's jurisdiction are not subject to the parties' disposition, not even through a BIT.

In the merits phase, the Republic of Argentina raised certain defenses that bear upon the issue of the admissibility of indirect claims. In the award, the Tribunal discussed whether the Claimant had the right to have the tariffs calculated in dollars,²⁰³ obtain tariff adjustments in accordance with the Producer Price Index of the United States (US PPI),²⁰⁴ and benefit from the purported stabilization clause in TGN's gas transportation license.²⁰⁵ In response to Argentina's position that those rights belonged to TGN and not to CMS (since TGN was the holder of the license), the Tribunal refused to discuss this topic, stating that it had already been decided in the Decision on Jurisdiction.²⁰⁶

It should be noted, however, that the Tribunal never ruled in its

"loss in value of its investment due to Argentina's dismantling of the dollar-based tariff regime." (quoting Counter-Memorial on Jurisdiction, para. 50).

²⁰¹ *Id.* para. 113.

²⁰² *See id.* paras. 57–65 (finding jurisdiction under the specific provisions of the BIT whether or not the protected is in addition a party to a concession agreement or a license agreement with the host, since there is a direct right of action of shareholders).

²⁰³ CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, paras. 127–38, (May 12, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC504_En&caseId=C4 [hereinafter CMS Award] (exploring the argument of CMS that it had a right to a tariff calculated in American dollars, and the belief of the Argentine Republic that this was not provided for by law).

²⁰⁴ *See id.* paras. 139–44 (asserting CMS's belief that they had a right to a tariff adjustment in accordance with the US PPI, which was a significant factor in their decision to invest in TGN).

²⁰⁵ *See id.* paras. 145–51 (discussing CMS's belief that they had the right to stabilization mechanisms under the license).

²⁰⁶ *See id.* para. 126 (rejecting additional discussion of Claimant's *jus standi*); *id.* para. 132 (rejecting additional discussion on CMS's reliance on TGN's License since it had been resolved by the jurisdictional decision); *id.* para. 148 (rejecting Respondent's contention that beneficiary from the stabilization clause should be reviewed again in this dispute).

Decision on Jurisdiction that CMS was entitled to have tariffs calculated in dollars and adjusted in accordance with the US PPI, or to benefit from stabilization provisions in the License. Furthermore, in the Decision on Jurisdiction the Tribunal gave clear indications that it regarded the terms of the License and the rights contained therein as independent from those of the Treaty. In paragraph 68 of the Decision on Jurisdiction it stated that:

Because . . . 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.²⁰⁷

In paragraph 76 of the Decision on Jurisdiction the Tribunal also concluded that:

It therefore holds that the clauses in the License or its Terms referring certain kinds of disputes to the local courts of the Republic of Argentina are not a bar to the assertion of jurisdiction by an ICSID tribunal under the Treaty, as the functions of these various instruments are different.²⁰⁸

In addition, not only did the Tribunal never affirm in its Decision on Jurisdiction, not even *prima facie*, that CMS had specific rights under TGN's gas transportation license, but it also referred to CMS's rights in the following way: "[t]hese rights relate mainly to fair and equitable treatment and full security and protection, arbitrariness and discrimination, observance of obligations and indirect expropriation without compensation."²⁰⁹

Finally, in relation with the umbrella clause, Argentina alleged that "the Claimant can invoke no rights or commitments under the License as these concern only TGN."²¹⁰ When confronted with this argument, the Tribunal affirmed, as it did when it discussed the rights under the License, that it would "not discuss the jurisdictional aspects involved in the Respondent's argument, as these

²⁰⁷ CMS Jurisdiction, *supra* note 13, para. 68.

²⁰⁸ *Id.* para. 76.

²⁰⁹ *Id.* para. 114.

²¹⁰ CMS Award, *supra* note 203, para. 298.

were dealt with in the decision on jurisdiction.”²¹¹ But again in the decision on jurisdiction the Tribunal never ruled that the Republic of Argentina had assumed obligations *vis à vis* CMS under the license.

In short, neither the decision on jurisdiction nor the award explained why it was CMS and not TGN that had a right to a tariff calculated in US dollars, to the adjustment of tariffs in accordance with the US PPI, and to stabilization mechanisms under the license. However, from the outset these were the rights being invoked by CMS, along with the BIT provisions, even if only the latter could grant rights to CMS. In that way, the real problem caused by the exercise of indirect claims, *i.e.*, whose rights are in essence being invoked and who will receive a compensation for an injury to such rights, was never really discussed, even if the Tribunal ordered the Republic of Argentina to pay compensation to CMS.²¹²

Argentina sought annulment of the award affirming *inter alia* that “the Tribunal lacked jurisdiction over the case because CMS was claiming compensation for alleged breaches of rights belonging not to it, but to TGN.”²¹³ The *Ad Hoc* Committee rejected this ground of annulment by concluding there had been no excess of power,²¹⁴ since CMS’s claims for violations of its rights under the BIT were within the jurisdiction of the Tribunal.²¹⁵

For reaching its conclusion the *Ad Hoc* Committee simply noted that the definition of investment in the BIT was very broad,²¹⁶ and that CMS had made an investment and was an investor within the

²¹¹ *Id.* para. 299.

²¹² The Tribunal also concluded that CMS had to transfer to Argentina the ownership of its shares in TGN, upon payment by Argentina of an additional sum. *Id.* para. 469. Although this unorthodox conclusion might dispel some of the concerns raised by indirect claims, the state should not be required to acquire the investment of the investor in order to avoid, for instance, double recovery.

²¹³ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, para. 62 (Sept. 25, 2007) (quoting Argentina’s Annulment Memorial, para. 68), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4 [hereinafter *CMS Annulment*].

²¹⁴ *Id.* para. 76.

²¹⁵ *See id.* para. 75 (asserting that CMS “must be considered an investor within the meaning of the BIT”).

²¹⁶ *Id.* para. 72.

meaning of the treaty.²¹⁷ Accordingly, it could assert causes of action under the BIT in connection with its protected investment.²¹⁸

The Committee does not provide a satisfactory explanation as to the compatibility between the mechanism provided for in Article 25(2)(b) *in fine* of the ICSID Convention and an indirect claim brought by a shareholder.²¹⁹ It limits itself to observing that whether the locally incorporated company may claim for the violation of its rights, this “does not affect the right of action of foreign shareholders.”²²⁰

Interestingly, however, the *Ad Hoc* Committee did annul the finding of the Tribunal on the umbrella clause for failure to state reasons.²²¹ Argentina had submitted that it had assumed no obligation to CMS apart from the provisions of the BIT itself, and that therefore CMS was not in a position to invoke the umbrella clause.²²²

Since the *ad hoc* Committee did not find it necessary to decide whether the umbrella clause allowed CMS to enforce TGN's rights,²²³ its position on such an interpretation cannot be definitively determined. However, its description of “major difficulties with this broad interpretation” – which include the fact that “it would appear that the *parties* to the obligation (*i.e.*, [sic] the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause” – suggests that the CMS *Ad Hoc* Committee did not favor an interpretation of the umbrella clause that allows a shareholder to invoke rights that have been conferred to the company.²²⁴

4.2.2. Azurix Corp. v. Argentina

Azurix Corp. (Azurix), “a corporation incorporated in the State of Delaware of the United States of America,”²²⁵ first created in

²¹⁷ *Id.* para. 75.

²¹⁸ *Id.*

²¹⁹ *See id.* para. 74 (acknowledging that both avenues are open without determining the extent of their compatibility).

²²⁰ *Id.*

²²¹ *Id.* para. 97.

²²² *Id.* para. 87.

²²³ *Id.* para. 98.

²²⁴ *Id.* para. 95.

²²⁵ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 10 ICSID Rep. 413, para. 1 (Dec. 8, 2003) [hereinafter *Azurix*].

Argentina two indirect subsidiary companies.²²⁶ These two Argentine companies were established specifically for making a bid offer in the privatization of the state company which provided potable water and sewerage services in the Province of Buenos Aires.²²⁷

After winning the bid, those two Argentine companies incorporated a third one, Azurix Buenos Aires S.A. (ABA), to act as the concessionaire.²²⁸ The concessionaire had to be a locally incorporated company²²⁹ and would be granted "a 30 year concession for the distribution of potable water and the treatment and disposal of sewerage in the Province."²³⁰

Argentina argued that Azurix had no *jus standi* to bring a claim in relation to the concession "since it is an indirect shareholder of ABA."²³¹ Argentina also claimed that Azurix had agreed to the jurisdiction of local courts and waived all other fora, and that through its alter ego, ABA, it had "made an election under Article VII of the BIT to submit the dispute to the jurisdiction of the local courts of the Argentine Republic."²³²

In the way it was presented by Argentina, the objection based on Azurix's agreement to submit disputes to local tribunals was related to the *jus standi* objection. Argentina argued that Azurix could not "have it both ways": if it wanted to put forward claims related to ABA's contractual rights penetrating its juridical personality, it also had to comply with the latter's jurisdictional commitments.²³³ If it was claiming only as a shareholder, the *jus standi* objection applied.²³⁴

Probably because Argentina had invoked the *Barcelona Traction* precedent,²³⁵ the Tribunal started its treatment of the *jus standi* objection by making the by now classic (and irrelevant) affirmation in this discussion that the case did not concern "diplomatic protection under customary international law but the rights of investors, in-

²²⁶ *Id.* para. 21.

²²⁷ *Id.* para. 19.

²²⁸ *Id.* para. 22.

²²⁹ *See id.* para. 19 (stating how the concessionaire was required "to be a company incorporated in Argentina.").

²³⁰ *Id.* para. 22.

²³¹ *Id.* para. 24.

²³² *Id.* para. 23.

²³³ *Id.* para. 42.

²³⁴ *Id.*

²³⁵ *See id.* para. 70 (indicating how the respondent based its arguments on the ICJ *Barcelona Traction* case).

cluding shareholders, as determined by treaty, namely, under the BIT."²³⁶

For this Tribunal, "given the wide meaning of investment" in the Argentina-U.S. BIT, the provisions of the latter "protect indirect claims."²³⁷ The Tribunal also cited the CMS decision for the statement that "there is a direct right of action of shareholders."²³⁸

It should be noted that Argentina had expressly recognized that shares were a protected investment, and "that an investor in shares has standing to activate dispute settlement mechanisms under BITs,"²³⁹ so that was not the basis of the objection. The basis of the objection, which the Tribunal did not address, is that a shareholder cannot put forward claims which essentially involve the rights of the company, especially under the provisions of the ICSID Convention.

The Tribunal next considered whether Azurix, given that it was pursuing an indirect claim in relation to its investment in ABA, was bound to comply with the latter's contractual obligation to submit all disputes to local courts.²⁴⁰ It concluded that in its claim Azurix was invoking obligations owed to it by Argentina under the BIT and that such claim was "based on a different cause of action from a claim under the Contract Documents."²⁴¹ Hence, Azurix was not required to follow the jurisdictional provisions of the contract in question, which in any event involved entities different from the parties to the dispute.²⁴²

It should be noted that, in order to discern whether the claimant is putting forward a direct or an indirect claim—as in order to discern whether the claim is contractual or is a genuine treaty claim—it is not enough to take into account that the claimant is invoking its rights under the BIT. The claimant will always allege that it is its rights that are involved (and not the ones of the company) and that its claim derives from the provisions of the BIT and not from the provisions of a contract (although the provisions of the latter may have to be analyzed in the course of decision).

²³⁶ *Id.* para. 72.

²³⁷ *Id.* para. 73.

²³⁸ *Id.* (quoting *Elettronica Sicula SpA (ELSI)*, Judgment (U.S. v. Italy), 1989 I.C.J. 15 (July 20)).

²³⁹ *Id.* para. 69.

²⁴⁰ *Id.* para. 74.

²⁴¹ *Id.* para. 76.

²⁴² *Id.*

But the Tribunal has to undertake its own analysis in order to verify whether the “essential basis of [the] claim,” to borrow the words of the ad hoc Committee in *Vivendi II*,²⁴³ involves the rights of the shareholder or those of the company. As a general matter, whenever the measures in question, be they general or particular, are directed to the company and its activities, they will affect the rights of it and not those of its shareholders, although a case by case analysis is necessary. Very frequently, the Tribunal will have enough elements to conduct such analysis in the jurisdiction phase.

In the Award the Tribunal stated that “Azurix and the Respondent have no contractual relationship” and that “[t]he obligations undertaken by the Province in the Concession Agreement were undertaken in favor of ABA not Azurix.”²⁴⁴ This was important for the Tribunal in the application of the umbrella clause, since it concluded that the “underlying premise” of such clause “that a party to the BIT has entered into an obligation with regard to an investment...is inexistent.”²⁴⁵

Although the interpretation given by the Tribunal to the umbrella clause and to the underlying contract was correct—in that it required the existence of an obligation undertaken in favor of the foreign investor and not the local company for the umbrella clause to be applicable—it is not clear whether such finding is coherent with the Tribunal’s acceptance of the admissibility of indirect claims. If the foreign investor is allowed to claim a compensation for breaches of rights that pertain to the company, it is not clear why it should not be allowed to invoke obligations undertaken in favor of the company under the umbrella clause.

4.2.3. LG&E v. Argentina

LG&E v. Argentina involves three companies constituted in the United States: LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. (LG&E).²⁴⁶ The investment of LG&E con-

²⁴³ *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 6 ICSID Rep. 340, para. 98 (July 3, 2002) [hereinafter *Vivendi II*].

²⁴⁴ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award para. 52 (July 14, 2006).

²⁴⁵ *Id.* As a consequence of the inexistence of an obligation entered into “with regard to an investment,” *id.*, the Tribunal later dismissed Azurix’s allegation that Argentina had breached the umbrella clause. *Id.* para. 384.

²⁴⁶ *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction, 11 ICSID Rep. 411, para. 1 (Apr. 30, 2004).

sisted in "shares in three gas distribution licensees constituted in Argentina: Distribuidora de Gas del Centro ("Centro"), Distribuidora de Gas Cuyana S.A. ("Cuyana"), and Gas Natural BAN S.A. ("GasBan")."²⁴⁷

LG&E's claims against Argentina were similar to the ones of CMS. In fact, LG&E complained for certain measures adopted by the Republic of Argentina in relation to the way gas distribution tariffs were to be calculated and adjusted.²⁴⁸

Argentina questioned LG&E's *jus standi* because: (a) LG&E's claims involved the rights of the Argentine licensees and therefore could only be brought by them; (b) Argentine and international law provide that the legal personality of shareholders and corporations is distinct, and do not allow shareholders to file claims for indirect damages; (c) the lack of an express provision in the Argentina-U.S. BIT could not be construed as allowing for indirect claims.²⁴⁹ It should be noted that Argentina affirmed that its *jus standi* objection "is not merely a jurisdictional issue," and that therefore had to be decided applying not only the ICSID Convention and the BIT, but also Argentine domestic law pursuant to Article 42 of the ICSID Convention.²⁵⁰

In dealing with the *jus standi* objection, the Tribunal started by stating that shares were an investment within the meaning of the BIT, and that it was "irrelevant whether the shares are majority or minority shares."²⁵¹ It also tried to distinguish *Barcelona Traction* by affirming that "it concerned diplomatic protection by a State to its nationals whilst the present case involves the contemporary concept of direct access to dispute settlement by an investor in investor-State arbitration."²⁵²

As the *Azurix* Tribunal, this Tribunal cited the *CMS* case for the proposition that shareholders have "a separate cause of action under the Treaty in connection with the protected investment," which can "be asserted independently from the rights of [the company]."²⁵³ It concluded by affirming that "the Claimants should be

²⁴⁷ *Id.* para. 19.

²⁴⁸ *See id.* para. 23 (alleging that various measures taken by Argentina amounted to a breach of BIT).

²⁴⁹ *Id.* para. 29.

²⁵⁰ *Id.* para. 44.

²⁵¹ *Id.* para. 50.

²⁵² *Id.* para. 52.

²⁵³ *Id.* para. 60.

considered foreign investors, even though they did not directly operate the investment in the Argentine Republic but acted through companies constituted for that purpose in its territory.”²⁵⁴

This and other cases show that, in the discussion on the admissibility of indirect claims, the issue of whether the shareholder is bound by the jurisdictional commitments of the company arises very frequently.²⁵⁵ The *LG&E* Tribunal affirmed that the shareholder does not have to follow the jurisdictional provisions of the contract concluded by the company, since the former is exercising “a cause of action under the BIT.”²⁵⁶ But even if such a proposition were correct as a matter of principle, it seems unfair to allow the shareholder not to comply with the contract jurisdictional obligations if, in essence, it is at the same time exercising the contract rights (although through a mechanism enshrined in a treaty).

In the Decision on Liability, the Tribunal reaffirmed its conclusion as to *jus standi*.²⁵⁷ It also “insisted on the independent treatment of LG&E regarding the licensees, both from the point of view of the legal personality of each entity and from the actions of each,”²⁵⁸ and stated that “the recognition of the independence among these entities was the basis on which the jurisdiction of the Centre and the competence of the Tribunal were supported.”²⁵⁹ However, although formally all Tribunals acknowledge the independence of the shareholder from the company, in the end the admission of indirect claims implies a non-recognition of such independence, since the shareholder is exercising the company’s rights (although not being required to fulfill the latter’s obligations).

4.2.4. Enron v. Argentina

Enron Corporation and Ponderosa Assets, L.P. (Enron) commenced two ICSID cases against the Argentine Republic. The first one, known as Enron I, “concerns certain tax assessments allegedly

²⁵⁴ *Id.* para. 63.

²⁵⁵ See *id.* paras. 61–62 (noting several cases that have discussed similar jurisdictional issues).

²⁵⁶ *Id.* para. 61.

²⁵⁷ *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, para. 177 (Oct. 3 2006), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC627_En&caselId=C208.

²⁵⁸ *Id.* para. 79.

²⁵⁹ *Id.*

imposed by some Argentinean provinces in respect to a gas transportation company in which [Enron] participated through investments in various corporate arrangements."²⁶⁰ The second one, known as Enron II and accepted by the Tribunal as a claim ancillary to the first one,²⁶¹ arose in the words of the Claimant "from the refusal of the Argentine Government to allow tariff adjustments in accordance with the United States Producer Price Index ("PPI") and the enactment of Law No. 25.561 which nullified PPI adjustments and the calculation of tariffs in dollars of the United States of America."²⁶² The Tribunal decided to treat separately the issues of jurisdiction arising from both claims.²⁶³

Enron's claims concerned the Argentine company *Transportadora de Gas del Sur* ("TGS"), which operates "one of the major networks for the transportation and distribution of gas produced in the provinces of the South of Argentina."²⁶⁴ Through two wholly-owned companies, EPCA and EACH, Enron owned 50% of an Argentine company called CIESA, which in turn owned 55.30% of the shares of TGS.²⁶⁵ EPCA, EACH, and ECIL, another corporation controlled by Enron, also hold 75.93% of EDIDESCA, an Argentine corporation that owned 10% of TGS's shares, and EPCA had acquired an additional 0.02% of TGS.²⁶⁶ According to Enron, its total investment amounted to 35.263% of the shares of TGS.²⁶⁷

In the decision on jurisdiction in Enron I, in light of Argentina's objection that the case was inadmissible because Enron did not have the rights upon which it based its claim,²⁶⁸ the Tribunal stated that "the essential question is whether the claimant invoking the benefit of [the BIT's] provisions qualifies as a protected inves-

²⁶⁰ Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 11 ICSID Rep. 273, para. 1 (Jan. 14, 2004) [hereinafter Enron I].

²⁶¹ *Id.* para. 17.

²⁶² Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), 11 ICSID Rep. 295, para. 8 (Aug. 2, 2004) [hereinafter Enron II].

²⁶³ Enron I, *supra* note 260, para. 17.

²⁶⁴ *Id.* para. 21.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* Enron's "evolving structure of ownership" underwent further modifications in 2005 and 2006. See Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, paras. 53-54 (May 22, 2007) available at: <http://icsid.worldbank.org/ICSID/Index.jsp> [hereinafter Enron Award].

²⁶⁸ Enron I, *supra* note 260, paras. 34.

tor.”²⁶⁹ But the “essential question” as to the admissibility of indirect claims is not whether the claimant qualifies as an investor, since he may have made a protected investment and still be advancing a claim that involves the rights of another person.

Argentina also argued that the measures in question directly affected only TGS, and that Enron was only indirectly affected as a minority shareholder.²⁷⁰ Since TGS and CIESA were Argentine companies not controlled by Enron, they did not qualify as an investment or as an investor under the Argentina-U.S. BIT.²⁷¹ Having invested in shares, Enron could only claim “in respect of measures affecting the shares *qua* shares, as in the event of expropriation of the shares or other measures affecting directly the economic rights of the shareholders.”²⁷²

By then, the *Enron* Tribunal already stated that, in relation to the standing of shareholders, it did “not intend to discuss again questions that have been amply considered in recent decisions.”²⁷³ It did however affirm somewhat vaguely that the *Barcelona Traction* decision was not “controlling in investment claims such as the present one, as it deals with the separate question of diplomatic protection in a particular setting.”²⁷⁴

The Tribunal emphasized “that there is nothing contrary to international law or the ICSID Convention in upholding the concept that shareholders may claim independently from the corporation concerned, even if those shareholders are not in the majority or in control of the company.”²⁷⁵ Like other arbitral tribunals that considered the subject, the *Enron* Tribunal conflated the issue of whether shareholders can claim independently from the corporation concerned – which nobody seriously contests – with the issue whether measures directed against the company’s rights can give rise to claims for compensation by the shareholders.

What distinguished the *Enron* case from previous cases was the fact Enron was not a direct shareholder in the local company, but an indirect one. Therefore, the Tribunal found it necessary to ana-

²⁶⁹ *Id.* para. 33.

²⁷⁰ *Id.* para. 34.

²⁷¹ *Id.*

²⁷² *Id.* para. 35.

²⁷³ *Id.* para. 38.

²⁷⁴ *Id.*

²⁷⁵ *Id.* para. 39.

lyze whether the principles it had affirmed in relation to claims by shareholders were applicable to such a situation.²⁷⁶

The Tribunal, however, started with the usual argument about the broad definition of investment, and how such definition “does not exclude claims by minority or non-controlling shareholders.”²⁷⁷ It also stated that the fact that a treaty does not provide for certain rights of the shareholders does not mean that such rights were excluded from the former treaty if they can be inferred from its provisions.²⁷⁸ This was because Argentina had argued that “when treaties have wished to include within their scope indirect damages . . . they have done so expressly” — as is the case of NAFTA and the Algiers Claims Settlement Declaration; so, if the relevant treaty is silent, indirect claims are inadmissible, given that they are not permitted under local laws or general international law.²⁷⁹

It is important to note that the Tribunal expressly stated that “[w]hether the locally incorporated company may further claim for the violation of its rights under contracts, licenses or other instruments, does not affect the direct right of action of foreign shareholders under the Bilateral Investment Treaty for protecting their interests in the qualifying investment.”²⁸⁰ There is no indication given, however, as to how those two claims could be compatible — the one by the shareholder and the one by the company — since if the shareholder is exercising an indirect claim, a claim by the company in relation to the same measures will inevitably lead to the state paying twice for the same damage.

This last problem is particularly acute in cases such as the *Enron* case, where the foreign investor had “invested in a string of locally incorporated companies that in turn made the investment in TGS.”²⁸¹ Argentina argued that “this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain.”²⁸²

The Tribunal recognized that “there is indeed a need to estab-

²⁷⁶ *Id.* para. 41.

²⁷⁷ *Id.* para. 44.

²⁷⁸ *Id.* para. 46.

²⁷⁹ *Id.* para. 45.

²⁸⁰ *Id.* para. 49.

²⁸¹ *Id.* para. 50.

²⁸² *Id.*

lish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company.”²⁸³ It found that the answer lay in whether the state had given its consent in respect of the relevant investor and investment,²⁸⁴ and that Argentina through different instruments had sought Enron’s investment.²⁸⁵ Therefore, Argentina’s consent included Enron, who “cannot be considered to be only remotely connected to the legal arrangements governing the privatization,” and instead, “are beyond any doubt the owners of the investment made and their rights are protected under the Treaty as clearly established treaty-rights and not merely contractual rights related to some intermediary.”²⁸⁶

This is not the place to discuss whether the Tribunal’s conclusion was correct as to the extent of Argentina’s consent or as to the effect that it recognized to certain instruments. Nonetheless, it appears that the Tribunal’s proposed “cut-off point” – the consent of the state – is not satisfactory, at least from a systemic point of view. In most cases, a direct relationship will not be present between the host state and a foreign shareholder, in that inter alia such state will not have granted any specific promises to the latter apart from those contained in the BIT. But that factor should not prevent the shareholder to exercise its rights under the BIT, nor should an ample offer of jurisdiction by the state that includes such shareholder grant him substantive rights that it otherwise does not hold.

An objection made by Argentina “that any remedy would really have its effect on TGS,” was rejected by the Tribunal on the grounds that “the Claimants are exercising a right in their own capacity under the Treaty which is separate from any rights appurtenant to TGS. Whether a remedy, in addition to protecting the investors’ rights, benefits a separate but related corporate entity is not a ground for objection to jurisdiction.”²⁸⁷

However, in the *Enron* case the issue was not very problematic, at least in concrete terms, since if the Tribunal ordered the tax assessments to be cancelled, that would indeed benefit both the shareholder and the company without placing an illegitimate burden on the state. But the situation is different when the remedy

²⁸³ *Id.* para. 52.

²⁸⁴ *Id.*

²⁸⁵ *Id.* para. 56.

²⁸⁶ *Id.*

²⁸⁷ *Id.* para. 75.

sought is essentially monetary compensation, so that if the shareholder has a remedy under the Treaty and the company has a remedy under the contract in relation to the same measure, the result is double recovery.

In the *PPI* case, Argentina also raised the issue of Enron's lack of *jus standi* and of the inadmissibility of indirect claims.²⁸⁸ The Tribunal once again addressed such arguments, albeit briefly, given that they had "already been discussed in the Stamp Tax Decision."²⁸⁹

Argentina's concern "that successive claims by minority shareholders that invest in companies that in turn invest in other companies, could end up with claims that are only remotely connected to the measures questioned," was rejected by the Tribunal.²⁹⁰ It found that "there is a clear limit to this chain in so far as the consent to the arbitration clause is only related to specific investors."²⁹¹ However, consent to arbitration through a BIT is anything but specific in relation to the covered investors—the definitions of investment are very broad—so it is difficult to see what the "clear limit" to endless corporate chains to which the Tribunal refers is.

In this last decision, the Tribunal once again emphasized that Enron was: [S]pecifically invited to participate in the privatization process, various companies were set up in Argentina to this effect and investments were channeled into TGS through this network of corporate arrangements. It is simply not tenable to try now to dissociate TGS from those other companies and the investors and argue that [Enron does] not have *ius standi*.²⁹²

This last reasoning seems to be based upon reasons of equity more than on reasons of law. It seems to suggest that if the host state invited the foreign investor to make a particular investment, then it cannot invoke "formalities" in order to leave that investor without the protection of the BIT. The proposition, however, is questionable.

The fact that a certain investor does not have access to an inter-

²⁸⁸ Enron II, *supra* note 262, para. 14.

²⁸⁹ *Id.* para. 15.

²⁹⁰ *Id.* para. 20.

²⁹¹ *Id.*

²⁹² *Id.* para. 28.

national jurisdiction in relation to specific state measures does not mean that it does not have rights, even under international law. So the invited investor will have certain rights, though these may not include certain procedural rights. For a shareholder to have the right to pursue an indirect claim, it is necessary to show that the state consented to such action, independently of whether the state invited it to invest. However, it is worth insisting on the fact that a state cannot consent to indirect actions within the framework of the ICSID system.

The Tribunal also stated that the definition of investment of the Argentina-U.S. BIT, which it affirmed “controls the whole discussion” of Enron’s *jus standi*, “includes the channeling of investments through locally incorporated companies, particularly when this is mandated by the very legal arrangements governing the privatization process in Argentina.”²⁹³ Here again, the Tribunal conflates the issue of whether the claimant has a protected investment with the issue of whether the measure in question affected rights arising from such investment or only the interests of the investor – for instance, by affecting the rights of somebody else.

It was argued by Argentina that the United States had in *Mondev International Ltd. v. United States of America* (“*Mondev*”)²⁹⁴ and in *Gami Investments Inc. v. United Mexican States* (“*Gami*”)²⁹⁵ affirmed “that shareholders cannot assert claims under the North American Free Trade Agreement (“NAFTA”) for damages suffered by the company in which they own shares.”²⁹⁶ The Tribunal noted that the Tribunal in *Mondev* had “reached a different conclusion,”²⁹⁷ and that, in light of a decision of the United States Supreme Court, it should be understood that the United States view is that minority shareholders deserve protection under bilateral investment treaties.²⁹⁸

However, there is no contradiction between this last affirmation and the United States’ position in *Mondev* and *Gami* as the Tribunal seems to suggest. Nobody denies that minority shareholders

²⁹³ *Id.* para. 30.

²⁹⁴ *Mondev Int’l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 6 ICSID Rep. 292, para. 1 (Oct. 11, 2002).

²⁹⁵ *Gami Invs. Inc. v. United Mex. States*, Final Award, NAFTA/UNCITRAL Case (June 30, 2003) (submission of the United States of America).

²⁹⁶ *Enron II*, *supra* note 262, para. 34.

²⁹⁷ *Id.* para. 35.

²⁹⁸ *Id.* paras. 38–39.

are protected under bilateral investment treaties. What minority shareholders cannot do, unless otherwise expressly provided for in the BIT, is “assert claims . . . for damages suffered by the company in which they own shares.”²⁹⁹

In the award, which concerns only the *Stamp Tax* case, because the *PPI* case was discontinued following an agreement by the parties,³⁰⁰ the Tribunal recognized the danger of “double-dipping,” or “double recovery” if two shareholders in different levels of the corporate chain are compensated for the same harm.³⁰¹ However, no criterion is provided as to which shareholder – or which level of the corporate chain – should be compensated.

Interestingly, the Tribunal addressed an argument by Argentina that if Enron were compensated for non-application of the tariff arrangements and later the licensee obtained a tariff increase, consumers would end up paying twice for the same interest.³⁰² However, the Tribunal expressed “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.”³⁰³

The response by the Tribunal to Argentina’s concern is problematic. Avoiding double recovery – a quite questionable result from the point of view of law and of justice – cannot depend on the ability of “able government negotiators or regulators”³⁰⁴ and on the actual existence of ways to avoid it, but should depend on firm – and already existing – legal principles.

4.2.5. Siemens v. Argentina

In *Siemens v. Argentina*, the Claimant, Siemens A.G. (“Siemens”), had established a local corporation, Siemens IT Services S.A., through its wholly-owned affiliate Siemens Nixdorf Informationssysteme AG (“SNI”).³⁰⁵ The creation of such local company

²⁹⁹ *Id.* para. 34.

³⁰⁰ Enron Award, *supra* note 267, paras. 26–28.

³⁰¹ *Id.* para. 167.

³⁰² *Id.* para. 211.

³⁰³ *Id.* para. 212.

³⁰⁴ *Id.*

³⁰⁵ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 12 ICSID Rep. 171, para. 23 (Aug. 3, 2004).

was required to participate in a bid for “a contract to establish a system of migration control and personal identification.”³⁰⁶

The bidding terms also required that the local company, Siemens IT Services S.A. (“SITS”), provide evidence that the sole owner of its shares, SNI, was wholly integrated and managed by Siemens, and that “by virtue of law is jointly liable for the obligations that SNI assumes before third parties.”³⁰⁷ SITS won the bid and it signed the contract with the Argentine government on October 6, 1998.³⁰⁸

The contract was suspended in February 2000 and SITS agreed to a renegotiation proposal in November 2000.³⁰⁹ The contract was afterwards terminated by the Argentine government on May 18, 2001, in accordance with the terms of Law 25.344.³¹⁰

Argentina advanced eight objections to jurisdiction, two of which referred to Siemens’ lack of *jus standi*.³¹¹ The Tribunal decided to consider jointly all the objections that referred to *jus standi*.³¹²

In this case, Argentina recognized that indirect claims were admissible “under Article 4 of the [Argentina-Germany BIT] and the related Ad Article 4 of the Protocol.”³¹³ In fact, Ad Article 4 of the Protocol establishes that “[a] claim to compensation shall also exist when any of the measures defined in Article 4 is taken in respect of the company in which the investment is made and as a result the investment is severely impaired.”³¹⁴

However, Argentina affirmed that Siemens’ claim was inadmissible because it did not hold the shares of SITS, the party to the contract, and therefore there was not a direct relationship between the investor and the investment as required by the treaty.³¹⁵ Siemens denied that such direct relationship was required by the treaty.³¹⁶

³⁰⁶ *Id.*

³⁰⁷ *Id.* para. 24 (citing Request for Arbitration, para. 13).

³⁰⁸ *Id.* para. 25.

³⁰⁹ *Id.* para. 26.

³¹⁰ *Id.*

³¹¹ *Id.* sec. III.

³¹² *Id.* para. 122.

³¹³ *Id.* para. 124.

³¹⁴ *Id.* para. 124 n.105.

³¹⁵ *Id.* para. 123.

³¹⁶ *Id.* para. 128.

The Tribunal commenced by affirming that Ad Article 4 of the Protocol "is used only in the context of expropriation or measures tantamount to expropriation."³¹⁷ It found "that this clause focuses on damage to the investment directly, or indirectly through measures taken against the company in which the investment has been made, rather on who may base a claim on it."³¹⁸ For the Tribunal, under that provision, "the right to be compensated exists in case of expropriation and measures having the equivalent effect, and 'also' in the case of measures directed against the company in which the investment has been made."³¹⁹

The position of the Tribunal is not sustainable. There can be no doubt that a right to be compensated exists in case of expropriation and in case of other measures that cause damage in violation of the BIT, provided that the claim is brought by the holder of the rights concerned. Hence, the only possible relevance of Ad Article 4 of the Protocol is precisely as to who can bring the claim, which under that provision can be brought not only by the company in question but also by somebody who invested in the company, even if the measure was "taken in respect of the company."

As had been done by the arbitral tribunals that considered the matter before, the Tribunal denied the relevance of *Barcelona Traction* and *ELSI*.³²⁰ The only reason provided by the Tribunal in this respect was that "[t]he issues before this Tribunal concern not diplomatic protection under customary international law but the rights of investors, including shareholders, as determined by the Treaty."³²¹

It should be noted that the Tribunal considered that Siemens investment was not only in shares, but also consisted of rights emerging from the contract entered into by the local company.³²² In that way, and without providing any reason whatsoever, the Tribunal completely disregarded the independent existence, in legal terms, of the different companies involved.

³¹⁷ *Id.* para. 138.

³¹⁸ *Id.* para. 139.

³¹⁹ *Id.*

³²⁰ *Id.* para. 141.

³²¹ *Id.*

³²² *Id.* para. 150.

4.2.6. AES v. Argentina

AES Corporation (“AES”) submitted a claim against Argentina regarding its “investment in eight electricity generation companies and three major electricity distribution companies in Argentina.”³²³ As most of the cases commenced against Argentina following its crisis, the case concerned disputes among the parties as to the regulatory regime applicable to such electricity generation and distribution companies.³²⁴

In considering Argentina’s argument that “AES ha[d] failed to prove its status as an investor for the purposes of the US-Argentina BIT,”³²⁵ the Tribunal briefly addressed the issue of the “actual protection of shareholders and that of their *jus standi* before an ICSID Tribunal.”³²⁶ For the Tribunal, the U.S.-Argentina BIT definition of investment provides “solid ground for recognizing AES’ legal interest as a claimant for alleged losses suffered as a result of its investment in Argentina.”³²⁷ Since such definition “is a very wide one,” there is no doubt that AES made an investment in Argentina.³²⁸

Here again, the AES tribunal conflates the discussion as to whether the claimant made an investment, with the issue of which rights such investment confers and whether these last rights are the ones being invoked by the claimant. The Tribunal concludes by affirming that “AES is the proper claimant,”³²⁹ without discussing whether its investment in shares of Argentine companies gave it the right to receive a reparation for the alleged non-application of tariff arrangements which granted rights only to such local companies and not to AES.

4.2.7. Camuzzi and Sempra v. Argentina

Camuzzi International S.A. (“Camuzzi”) commenced two arbitrations against Argentina. The first one concerned its “investment in two natural gas distribution companies which together serve

³²³ AES Corporation v. Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 12 ICSID Rep. 308, para. 1 (Apr. 26, 2005).

³²⁴ *Id.*

³²⁵ *Id.* para. 75.

³²⁶ *Id.* para. 85.

³²⁷ *Id.* para. 86.

³²⁸ *Id.* para. 88.

³²⁹ *Id.* para. 89.

seven Argentine provinces,"³³⁰ in which a decision on objections to jurisdiction was rendered on May 11, 2005. The second one referred to another investment made by Camuzzi in three electricity distribution and transport companies,³³¹ where the decision on jurisdiction was adopted one month later, on June 10, 2005.

For its part, Sempra Energy International ("Sempra") submitted a claim against Argentina concerning the same gas distribution companies involved in Camuzzi's first claim.³³² Although Argentina agreed with Camuzzi³³³ and with Sempra³³⁴ to set up a single Tribunal to hear both requests, they were decided separately. In fact, on the same day that it ruled on jurisdiction in Camuzzi's first claim the Tribunal delivered a jurisdictional decision in Sempra's claim.

In the Sempra decision it is explained that Camuzzi and Sempra owned 56.91 percent and 43.09 percent, respectively, of the shares of Sodigas Sur S.A. and Sodigas Pampeana S.A., two Argentine companies.³³⁵ In turn, these local companies owned 90 percent and 86.09 percent, respectively, of the shares in Camuzzi Gas del Sur S.A. and Camuzzi Gas Pampeana S.A., which held licenses for the distribution of natural gas in seven Argentine provinces.³³⁶ As the previous cases involving the Argentine crisis, the dispute concerned regulations adopted in relation to the licensees' tariffs, although Sempra and Camuzzi's claim also involved other measures regarding subsidies, taxes, levies, payment for services, labor restrictions, and transfers of costs applicable to the licensees.³³⁷

³³⁰ Camuzzi International S.A. v. Argentine Republic, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, para. 1 (May 11, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC510_En&caselD=C10 [hereinafter Camuzzi I].

³³¹ Camuzzi International S.A. v. Argentine Republic, ICSID Case No. ARB/03/7, Decisión del Tribunal de Arbitraje sobre Excepciones a la Jurisdicción, para. 1 (June 10, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC643_Sp&caselD=C227 [hereinafter Camuzzi II].

³³² Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, para. 5 (May 11, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC509_En&caselD=C8 [hereinafter Sempra].

³³³ Camuzzi I, *supra* note 330, para. 4.

³³⁴ Sempra, *supra* note 332, para. 5.

³³⁵ *Id.* para. 19.

³³⁶ *Id.*

³³⁷ *Id.* para. 20.

Argentina opposed *Sempra's jus standi*.³³⁸ In treating another jurisdictional objection, however, and before referring to the one related to *ius standi*, the Tribunal alluded to the interpretation of Article 25(2)(b) of the ICSID Convention.³³⁹ It affirmed that this provision creates an option that allows that the claim to be brought by the foreign investor or by the local company itself, provided that the pertinent requirements are complied with.³⁴⁰ For the Tribunal, the "supplementary nature" of the mechanism under which the local company can submit a claim "is clearly marked by the word 'and' with which the second sentence of the article begins."³⁴¹

For the reasons already expressed, the argument that the mechanism enshrined in the second sentence of Article 25(2)(b) of the ICSID Convention is only an alternative for the shareholder is incorrect. The argument given by the *Sempra* Tribunal as to the inclusion of the word "and" is not tenable, since the question there is not whether such mechanism is different from the case in which the shareholder is advancing the claim, which clearly is.

The problem is whether the shareholder who invokes a claim involving the local company's rights can choose between bringing the claim itself or having the company sue the host state. A proper interpretation of the Convention leads inevitably to the conclusion that in that case only the local company can commence an ICSID arbitration (provided the requirements of the second sentence of Article 25(2)(b) of the ICSID Convention are present), since if not the mechanism would not have been created as a possibility in the absence of which the investment would have been left outside of ICSID jurisdiction.³⁴²

It should also be noted that the *Sempra* Tribunal resorted to "corporate law" in deciding an issue concerning the exercise of control by the foreign shareholders over the local company.³⁴³ Indeed, it affirmed that "from the standpoint of corporate law, it is quite normal that various shareholders might control the policies and operations of a company through a shareholders' agreement,

³³⁸ *Id.* para. 21.

³³⁹ *Id.* para. 38.

³⁴⁰ *Id.* para. 42.

³⁴¹ *Id.* para. 41.

³⁴² *Convention on Settlement of Investment Disputes*, *supra* note 2, at 359.

³⁴³ *Sempra*, *supra* note 332, para. 47.

the terms of which are as mandatory as a contract."³⁴⁴ However, it afterwards disregarded corporate law as to legal personality, since it considered that the definition of investment included in the BIT was meant "to facilitate agreement between the parties thereby preventing that the corporate personality of the company might interfere with the protection of the real interests associated with the investment."³⁴⁵

In the treatment of the issue of indirect claims, the Tribunal makes an important admission when it states that it is "theoretically correct" that "if the right of shareholders to claim when only their interests are affected is recognized it could lead to an unlimited chain of claims."³⁴⁶ As the *Enron* Tribunal, however, this Tribunal affirmed that "any claim for derivative damages will be limited by the arbitration clause," and that "[i]f consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such investor are admissible under the treaty."³⁴⁷

Here again, the proposed limitation is far from satisfactory. BITs provide general definitions of investment and investor, from which consent to jurisdiction has to be determined. Therefore, in the absence of an act by which the state can be considered to have consented to jurisdiction in respect of a specific investor, basically no limitation to derivative claims can be found in the ample definitions contained in BITs.

The Tribunal rejected the *jus standi* objection basically by affirming that Sempra could make a claim even though it was a minority shareholder, in light of the BIT's broad definition of investment,³⁴⁸ and by concluding that Sempra's claim was "founded on both the contract and the Treaty."³⁴⁹ This last conclusion is not based upon any explanation as to how Sempra's claim, which refers to issues of tariffs contained in a license, is genuinely a treaty claim.

There is again an important recognition as to the possibility of "double recovery for the same harm, one as a result of domestic contract-based action and the other as the outcome of an interna-

³⁴⁴ *Id.*

³⁴⁵ *Id.* para. 70.

³⁴⁶ *Id.* para. 77.

³⁴⁷ *Id.*

³⁴⁸ *Id.* paras. 91-93.

³⁴⁹ *Id.* para. 101.

tional arbitral award;" but although the Tribunal states that "international law and decisions offer numerous mechanisms for preventing the possibility of double recovery" it refers to none.³⁵⁰ In fact, if compensation is granted to the shareholder on the basis of the reduction in the value of the company as a result of a measure that affected the latter's future revenues,³⁵¹ it is difficult to see how double recovery would be avoided if the company presents its own claim for the loss of such revenues.

The decision on jurisdiction in Cammuzzi's first claim, rendered by the same Tribunal as in Sempra's claim and on the same day, provides identical reasons to the ones given in the *Sempra* decision as to indirect losses and *jus standi* of shareholders.³⁵² As to the decision on jurisdiction in Cammuzzi's second claim, the Tribunal, with a different composition than in the first case, affirmed that Cammuzzi's claim was a direct one since it involved the rights of the foreign investor under the BIT and not the contractual rights of the concessionaires.³⁵³

The Tribunal also disregarded the applicability of *Barcelona Traction*, since it affirmed that the applicable BIT constituted an agreement under which Camuzzi was entitled to have immediate and direct access to an international jurisdiction to claim for the protection of its rights.³⁵⁴ The core of the problem presented by indirect claims, that is whether the shareholder's claim genuinely involves its rights or the rights of the local company, was never discussed by this Tribunal. In this sense, it is not enough to state that the shareholder is invoking its rights under the Treaty (e.g., its right to receive a treatment that is fair and equitable, etc.), since if all the measures in question exclusively regulate the rights of the company, in principle only the rights of the latter will be involved.

The award in the *Sempra* case presents a troubling derivation of the admission by Tribunals of indirect claims by shareholders. The two local companies where *Sempra* had shares and in respect of which it had brought the claim, reached agreements with the

³⁵⁰ *Id.* para. 102.

³⁵¹ See CMS Award, *supra* note 203, paras. 418–68 (ordering Argentina to pay \$133.2 million to a gas company for failing to meet its treaty obligations).

³⁵² See Cammuzzi I, *supra* note 330, paras. 45–91 (finding jurisdiction to hear the claim in spite of arguments against jurisdiction for indirect nature of damages and lack of *jus standi*).

³⁵³ Cammuzzi II, *supra* note 331, para. 34(iv).

³⁵⁴ *Id.* para. 44.

government, which provided for tariff increases and “the suspension and discontinuance of judicial or arbitral claims.”³⁵⁵

Argentina argued that “the agreements made the claim in this case inadmissible as the Licensees had accepted a new tariff regime and the investor did not have any separate claim of its own.”³⁵⁶ For the Tribunal, however, Sempra was still an investor, and it was in any event not bound by the agreements, which “are to this effect *res inter alios acta*.”³⁵⁷

The paradox created by the Tribunal’s decisions is that Sempra was allowed to bring a claim derived from licenses,³⁵⁸ which were as to it *res inter alios acta* (since concluded by the licensees). Notwithstanding that, Sempra’s claim was not affected by subsequent agreements arrived at by the licensees—under which the latter consented to the measures contested by Sempra and renounced to all claims in that respect—because the Tribunal considered that such subsequent agreements were *res inter alios acta*!

Further, the Tribunal specifically addressed the possible double recovery “resulting from, on the one hand, the compensation which the investor would receive as a result of arbitration and, on the other hand, the compensation which the company would receive in the context of a renegotiated adjustment of tariffs or some other mechanism.”³⁵⁹ For the Tribunal, double recovery was not likely “since Government negotiators will make sure that any recovery obtained from one source is not duplicated by means of a separate recovery from another source,”³⁶⁰ as in fact it had happened in the case through an indemnity agreement obtained by the government of Argentina from the Licensees.³⁶¹

It should be stressed once again that the avoidance of double recovery in the context of indirect claims by shareholders cannot

³⁵⁵ Sempra Energy Int’l v. Argentine Republic, Award, ICSID Case No. ARB/02/16, Award, para. 224 (Sept. 28, 2007), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8 [hereinafter Sempra Award].

³⁵⁶ *Id.* para. 225.

³⁵⁷ *Id.* para. 227.

³⁵⁸ It cannot be denied that the claim basically derives from the licenses and other instruments only addressed to the licensees, and from measures regulating such licenses and instruments, notwithstanding the fact that Sempra in turn invokes the provisions of the Treaty in relation to those measures.

³⁵⁹ Sempra Award, *supra* note 355, para. 395.

³⁶⁰ *Id.*

³⁶¹ *Id.*

depend, as a general matter, on the ability of government negotiators to obtain appropriate compensation from the local companies or possibly from non-claiming shareholders, and on the latter capacity and willingness to provide such compensation. Double recovery has to be avoided through legal considerations (such as who is the owner of the affected rights, who is entitled to compensation, etc.), and not through contingent factors that may or may not be present.

4.2.8. Gas Natural SDG v. Argentina

Gas Natural SDG S.A., a company incorporated in Spain, submitted a claim before ICSID regarding the impact of Argentina's emergency measures on its investment, which consisted of an indirect shareholding in an Argentine gas distribution company.³⁶² The Tribunal posed "to the parties three preliminary questions relating to the jurisdiction of the Centre," before the claimant submitted its memorial on the merits and even before Argentina raised jurisdictional objections.³⁶³

In its decision "on Preliminary Questions on Jurisdiction" the Tribunal analyzed claimant's standing.³⁶⁴ Interestingly, in affirming that the claimant had a protected investment under the Argentina-Spain BIT as a shareholder in an Argentine corporation, it stated:

The rights appertaining to shareholders under the law pursuant to which the corporation is organized are, as the second paragraph of Article I(2) states, subject to the law of Argentina. That law would determine, for example, how shareholders' meetings are convened, how directors are elected, what accounts must be maintained, etc.³⁶⁵

The Tribunal, however, concluded that Gas Natural SDG S.A. had standing to claim the impairment of the value of its shares as the protected investment, and that that gave rise to an investment

³⁶² See *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, para. 9 (June 17, 2005), <http://asil.org/pdfs/GasNat.v.Argentina.pdf> (introducing claimant Gas Natural and its investment at issue in the arbitration).

³⁶³ *Id.* para. 5.

³⁶⁴ See *id.* para. 32 (laying out the arguments from each side regarding standing).

³⁶⁵ *Id.* para. 34.

dispute under the BIT.³⁶⁶ Clearly, the Tribunal failed to see that the problem with indirect claims is not the existence of an investment but the rights in play in the claim. Moreover, while it seemed to suggest that the rights of shareholders protected by the BIT are those conferred by local law (i.e., the direct rights of shareholders recognized in *Barcelona Traction*), it nevertheless affirmed the admissibility of a claim which plainly did not refer to those rights but to the rights of the local licensee.³⁶⁷

4.2.9. Vivendi v. Argentina

The famous *Vivendi* case was commenced by Compañía de Aguas del Aconquija S.A., an Argentine company, and Compagnie Générale des Eaux (afterwards Vivendi), a French company,³⁶⁸ in relation to a water and sewage concession in the Argentine province of Tucumán.³⁶⁹ A first award in the case was rendered on November 21, 2000, which was partially annulled by an ad hoc Committee on July 3, 2002,³⁷⁰ leading to a resubmission of the case on August 29, 2003.³⁷¹

The second Tribunal rendered a Decision on Jurisdiction on November 14, 2005.³⁷² There it rejected the objection that one of the claimants could not claim because its claim “constitutes a derivative claim forbidden by Argentine and international law.”³⁷³

Although the Tribunal considered that the issue was res judi-

³⁶⁶ *Id.* para. 35.

³⁶⁷ Of course, the claimant alleged that the impact on certain rights of the licensee resulted in a reduction of the value of the investor's shares, which in any event is an indirect claim *par excellence*. See *id.* para. 17.

³⁶⁸ See *Compañía de Aguas del Aconquija, S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, para. 1 (Nov. 21, 2000), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC548_En&caseId=C159 [hereinafter *Vivendi I*] (providing the procedural history and background of the case).

³⁶⁹ *Id.* para. 25.

³⁷⁰ See *Vivendi II*, *supra* note 243, paras. 1–3.

³⁷¹ *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, para. 1.1.7 (Aug. 20, 2007), <http://ita.law.uvic.ca/documents/VivendiAwardEnglish.pdf> [hereinafter *Vivendi Award*].

³⁷² *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, (Nov. 14, 2005), <http://ita.law.uvic.ca/documents/AgueasVivendijurisdictiondecision.pdf> [hereinafter *Vivendi Jurisdiction*].

³⁷³ *Id.* paras. 88–94. In the award, the Tribunal confirmed that the companies that had brought the claim were the “proper claimants” in the proceedings. See *Vivendi Award*, *supra* note 371, para. 11.1(i).

cata, having been decided by the first Tribunal and “endorsed by the *ad hoc* Committee,”³⁷⁴ it nevertheless briefly analyzed the issue. It disposed of the objection basically by affirming that shareholders, whether majority or minority, are investors under the ICSID Convention and the Argentina-France BIT,³⁷⁵ and shares are an investment under these instruments.³⁷⁶

Since shareholders are investors and have an investment, the Tribunal affirmed that they have a right to pursue a claim alleging a BIT breach with respect to those investments.³⁷⁷ The Tribunal, as several other Tribunals that considered the issue before, wrongly considered that the problem with derivative claims is whether shareholders have an “independent right of action.”

4.2.10. Continental v. Argentina

Continental Casualty Company (“Continental”) is a U.S. company that invested in an Argentine insurance company called CNA Aseguradora de Riesgos del Trabajo S.A. (“CNA ART”).³⁷⁸ Initially, Continental acquired a 70% interest in the local company and later acquired a 99.995% interest.³⁷⁹ In its ICSID claim, Continental complained of the emergency measures adopted by Argentina, including the “pesification” of certain assets, “restrictions on transfers,” and “rescheduling of cash deposits.”³⁸⁰

Argentina affirmed that the claim did not involve a legal dispute because Continental was “not the holder of the legal rights that it alleged have been breached by the Argentine Republic.”³⁸¹ It also questioned Continental’s *jus standi* “since the investment of the Claimant consists in shares of an Argentine company, while the measures have affected the Argentinean corporation of which the Claimant is a shareholder”³⁸² Continental seemed to recognize that the measures concerned not its rights, but those of the local company, but it affirmed that it is “now well settled that an in-

³⁷⁴ Vivendi Jurisdiction, *supra* note 372, para. 89.

³⁷⁵ *Id.* para. 90.

³⁷⁶ *See id.* paras. 91–93 (stating that the applicable definition of investment explicitly includes shares).

³⁷⁷ *Id.* paras. 93–94.

³⁷⁸ Continental Jurisdiction, *supra* note 11, para. 1.

³⁷⁹ *Id.* para. 22.

³⁸⁰ *Id.* para. 25.

³⁸¹ *Id.* para. 37.

³⁸² *Id.* para. 52.

vestor may bring an investor-state claim under the BIT for measures interfering with the legal rights of its Argentine subsidiary and not just for measures affecting the investor's shares in the subsidiary."³⁸³

Like its predecessors, the Tribunal started the treatment of the *jus standi* objection by considering whether the claimant had a protected investment under the Argentina-U.S. BIT.³⁸⁴ However, it then made the following affirmation:

These provisions warrant an interpretation of the BIT according to which, in case of an acquisition by an investor of one Contracting Party of the entire capital of a company of the other Party, the treaty protection is not limited to the free enjoyment of the shares, that is the exercise of the rights inherent to the position as a shareholder, specifically a controlling or sole shareholder. It also extends to the standards of protection spelled out in the BIT with regard to the operation of the local company that represents the investment.³⁸⁵

The position of this Tribunal appears not to coincide with the position adopted by tribunals in previous jurisdictional decisions. In fact, the *Continental* Tribunal affirmed that "the treaty protection is not limited to the free enjoyment of the shares," and "also extends to the standards of protection spelled out in the BIT with regard to the operation of the local company that represents the investment," but "in case of an acquisition by an investor of one Contracting Party of the entire capital of a company of the other Party"³⁸⁶

The *Continental* decision suggests that in the case of a non-controlling shareholder "the treaty protection is . . . limited to the free enjoyment of the shares, that is the exercise of the rights inherent to the position as a shareholder."³⁸⁷ This Tribunal made a dis-

³⁸³ *Id.* para. 53.

³⁸⁴ *Id.* para. 78.

³⁸⁵ *Id.* para. 79.

³⁸⁶ *Id.*

³⁸⁷ *Id.* In paragraph 81 the Tribunal reaffirms this position by stating that, different from the case of portfolio (i.e., non-controlling shareholding) investment, "in case of acquisition of a company established in the other country the scope of [the BIT's] application is not merely limited to the ownerships of the shares." *Id.* para. 81.

inction between sole or controlling shareholders and non-controlling shareholders, which was not introduced by other Tribunals and which entails that indirect claims by the latter are inadmissible.

The Tribunal stated that the admissibility of indirect claims, albeit by sole or controlling shareholders, "is supported by the object and purpose of the BIT."³⁸⁸ It further affirmed that "[d]isregard of the actual treatment of the company representing the investment, by removing it from the BIT coverage would therefore require a restrictive interpretation of the BIT's terms contrary to its object and purpose" and would "render most of its provisions ineffective and useless for investors"³⁸⁹

These statements by the Tribunal appear to be *de lege ferenda* expressions, more than an objective description of how the law stands. BITs are not human rights instruments conferring fundamental rights on investors, and the fact that investors cannot bring certain types of claims does not mean that their rights cannot be protected in other fora. Although it is true that the majority of foreign investment is channeled through local companies, this type of investment is made voluntarily by the investor (even if the state requires the incorporation of a local company, because the investor can always decide not to make the investment). This characteristic of modern foreign investment cannot alter the decision of the BIT's state parties as to whether to admit indirect claims.

In any event, the Tribunal concluded that "[t]he claims of Continental cannot therefore be defined as indirect claims (or 'derivative' claims)," because Continental was invoking treaty rights.³⁹⁰ It nonetheless affirmed that "not any and all action by the host State that causes a damage or prejudice to the assets of the local company automatically and necessarily represents an indemnifiable treaty breach."³⁹¹

For the Tribunal, compensation under the BIT only proceeds if, apart from a treaty breach, damages to the local company's assets "amount at the same time, quality or quantity wise, to an injury caused to the very investment of the foreign investor."³⁹² The Tribunal here seems to forget that for purposes of admissibility of the

³⁸⁸ *Id.* para. 80.

³⁸⁹ *Id.*

³⁹⁰ *Id.* para. 87.

³⁹¹ *Id.* para. 89.

³⁹² *Id.* para. 89(a).

claim it is not determinant, as recognized by the ICJ in *Barcelona Traction*, whether a certain measure causes an injury to the claimant, but whether or not such measure refers to the latter's rights.

4.2.11. SAUR International v. Argentina

This case concerns an investment by a French investor, SAUR International ("SAURI"), in an Argentine company, Obras Sanitarias de Mendoza S.A., providing water and sewage services in the Argentine province of Mendoza.³⁹³ SAURI acquired a minority stake in the concessionaire, consisting of two different types of shares, through three local companies.³⁹⁴

In the Decision on Jurisdiction, the Tribunal notes that SAURI was not a party to the water and sewage concession contract.³⁹⁵ However, it also notes that SAURI entered into a technical assistance contract with the concessionaire, under which SAURI was to provide technical assistance as the technical operator of the concession.³⁹⁶

Importantly, the Tribunal agreed with Argentina that BITs do not provide protection against fluctuations in the value of shares.³⁹⁷ While stating that the measures in question had been adopted in relation to the concessionaire and not its shareholders, for the Tribunal the question was whether such measures had resulted in a violation of SAURI's rights under the Argentina-France BIT.³⁹⁸

As had been expressly accepted by Argentina, the Tribunal noted that indirect shareholdings were an investment expressly protected under Article 1.1.b) of the BIT.³⁹⁹ It also stressed that SAURI was not exercising the contractual rights of the local company but its own rights under the Treaty.⁴⁰⁰

When faced with perhaps the most difficult problem posed by indirect claims, that is, that the payment of damages will not go to the holder of the rights but to another party, the Tribunal simply

³⁹³ SAUR Int'l v. Argentine Republic, ICSID Case No. ARB/04/4, Decision on Objections to Jurisdiction, para. 2 (Feb. 27, 2006).

³⁹⁴ *Id.* para. 19.

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.* para. 79.

³⁹⁸ *Id.* para. 81.

³⁹⁹ *Id.* para. 87.

⁴⁰⁰ *Id.* para. 89.

reiterated its position that SAURI was demanding damages under the BIT and not under the contract.⁴⁰¹ This statement, however, is not acceptable, since claimants in these types of cases always require payment of damages for the earnings that, but for the measures, the local company would have received under the contract (or at least for the reduction of the value of the company produced after such earnings reduction).

4.2.12. Metalpar v. Argentina

Metalpar S.A. and Buen Aire S.A., two companies incorporated in the Republic of Chile, commenced arbitration against Argentina in relation to their investment in an Argentine company dedicated to the fabrication of vehicles for public transportation.⁴⁰² The claim essentially concerns Argentina's emergency legislation adopted at the end of 2001 and the beginning of 2002.⁴⁰³ However, in contrast to most of the ICSID cases brought against Argentina, this case does not concern a contract between a local company and the government, but contracts between the Argentine company Metalpar Argentina S.A. and private parties.

As to *jus standi*, the Tribunal affirmed that indirect investments are protected by the Argentina-Chile BIT and that their owners are entitled to bring an ICSID claim.⁴⁰⁴ It further stated that it agreed with previous arbitral decisions that shareholders can bring forward claims for damages suffered in their indirect investments.⁴⁰⁵ The Tribunal did not consider it necessary to provide additional reasons for its conclusion on *jus standi*, other than stating that the claimants had made an investment, which gave them the right to invoke the ICSID protection,⁴⁰⁶ an assertion that does not address the objections that have been raised in relation to indirect claims.

⁴⁰¹ *Id.* para. 92. The Tribunal does, however somewhat contradictorily, acknowledge that the development of the relationship between the concessionaire and the government may have an impact on the damage suffered by SAURI. *Id.* para. 93.

⁴⁰² Metalpar S.A. y Buen Aire S.A. v. República Argentina, ICSID Case No. ARB/03/5, Decisión Sobre Jurisdicción Dictada, para. 1 (Apr. 27, 2006), <http://ita.law.uvic.ca/documents/Metalpar-Argentina-Jurisdiction.pdf>.

⁴⁰³ *Id.* paras. 24-27.

⁴⁰⁴ *Id.* para. 65.

⁴⁰⁵ *Id.* para. 62.

⁴⁰⁶ *Id.* para. 68.

4.2.13. Telefónica v. Argentine Republic

Telefónica S.A. ("Telefónica"), a Spanish corporation, brought an ICSID claim against Argentina in relation to its 97.91% shareholding of Telefónica de Argentina S.A. ("TASA"), an Argentine corporation.⁴⁰⁷ The claim derives from Argentina's emergency measures concerning telephone tariffs to be charged by the local company and the compatibility of such measures with the Argentina-Spain BIT.⁴⁰⁸

As had been done by the Tribunal in *Continental v. Argentina*,⁴⁰⁹ the *Telefónica* Tribunal distinguished between an "acquisition by an investor of one Contracting Party of the entire capital of a company of the other party, [where] treaty protection is not limited to the free enjoyment of the shares," and the case of minority shareholders, on which it reserved its position.⁴¹⁰ Making such a distinction, however, does not seem to be justified unless some consequence stems from it as to the scope of treaty protection.

The Tribunal also stressed that "the legal regime applicable to TASA's operations was the object of an undertaking by Argentina with Telefónica" and that Telefónica's "claim is therefore not barred by the fact that TASA may be the legal holder of certain of those rights and connected obligations under the laws of Argentina."⁴¹¹ However, leaving aside of course instruments where the foreign investor is itself a party, the fact that the state was interested in obtaining foreign participation in a certain investment does not in principle change the legal nature of the channels through which the investment was made.

Further, the Tribunal's conclusion that it was "competent to entertain claims that measures affecting the legal regime of TASA's operations have breached Telefónica's rights under the BIT"⁴¹² does not provide any indication as to how to distinguish between

⁴⁰⁷ Telefónica S.A. v. Argentine Republic, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, para. 11 (May 25, 2006) [hereinafter *Telefónica*].

⁴⁰⁸ *Id.* paras. 12-14.

⁴⁰⁹ See *Continental Jurisdiction*, *supra* note 11, para. 79 (holding that "in [the] case of an acquisition by an investor of one Contracting Party of the entire capital of a company of the other Party, the treaty protection is not limited to the free enjoyment of the shares").

⁴¹⁰ *Telefónica*, *supra* note 407, para. 76.

⁴¹¹ *Id.* para. 80.

⁴¹² *Id.* para. 81.

the rights of TASA and the rights of Telefónica (either under the Treaty or under the telephony license). For example, does the license belong to both of them or just to TASA, its holder? In the event of a measure that is considered to have breached the license as well as the Treaty, are both companies to receive compensation?

The Tribunal's previous conclusion that the company itself should be considered the investment,⁴¹³ can provide some basis for affirming that Telefónica can claim for injuries to TASA's rights,⁴¹⁴ even though the conclusion was not based upon the Argentina-Spain BIT, which differs from other BITs in that it does not include corporations within protected investments.⁴¹⁵ However, it does not solve the problem of ICSID's jurisdiction, because the fact that the foreign shareholder controls the local company (which is to be considered the investment according to the *Telefónica* Tribunal) is precisely one of the requirements contained in the second sentence of Article 25(2)(b) of the ICSID Convention that allows the local company – and not the shareholders – to sue the host state.

Faced with the objection raised by Argentina as to *jus standi*, the Tribunal denied that Telefónica's claim was indirect or derivative⁴¹⁶ because

Telefónica asserts its own treaty rights for their protection, regardless of any right, contractual or non-contractual, that TASA might assert in respect of such assets and rights under local law before the courts of competent jurisdiction of Argentina for damages suffered as a consequence of actions taken by those authorities in breach of applicable provisions of such law.⁴¹⁷

It seems that for the Tribunal, certain assets and rights may be held at the same time by Telefónica under the Treaty and by TASA under local law, although no explanation is given as to which company is entitled to compensation when an asset – upon which

⁴¹³ *Id.* para. 75.

⁴¹⁴ Still, much will depend on the intention of the parties to the BIT as to whether it can be established that solely through listing corporations among the protected investments they intended to allow indirect claims by shareholders.

⁴¹⁵ See Agreement on the Reciprocal Promotion and Protection of Investments (with Protocol), Arg.-Spain, art. I(2), Oct. 3, 1991, 1699 U.N.T.S. 202 (defining "investments" for purposes of the treaty).

⁴¹⁶ Telefónica, *supra* note 407, para. 90.

⁴¹⁷ *Id.* para. 89.

both companies hold rights under different titles – is affected by a measure.⁴¹⁸

4.2.14. Suez et al. v. Argentine Republic

In 2003 Suez, Sociedad General de Aguas de Barcelona S.A., InterAguas Servicios Integrales del Agua S.A., and an Argentine company, Aguas Provinciales de Santa Fe S.A. (“APSF”), commenced proceedings against Argentina.⁴¹⁹ The claim referred to investments made by the claimants “in a concession for water distribution and waste water treatment in the Argentine Province of Santa Fe” and the alleged refusal by Argentina to apply certain tariff adjustments to the concession.⁴²⁰

On January 11, 2006 the local company, which was the concessionaire,⁴²¹ withdrew its claim.⁴²² APSF had initiated its proceeding through Article 25 of the ICSID Convention and Article (1)(2)(c) of the Argentina-France BIT.⁴²³

Argentina submitted a jurisdictional objection stating that “Suez, AGBAR, and InterAguas, as mere shareholders of APSF are not legally qualified to bring claims in ICSID arbitration for alleged injuries done to APSF.”⁴²⁴ In its decision on jurisdiction, the Tribunal began the consideration of this objection by affirming that the claimants’ “shares in APSF are ‘investments’ under the Argentina-France and Argentina-Spain BITs”⁴²⁵ and that therefore they were “entitled to have recourse to ICSID arbitration to enforce their treaty rights.”⁴²⁶ Furthermore, the Tribunal stated that the distinction between shareholders’ direct—as opposed to derivative—claims, which is

⁴¹⁸ It appears that according to the Tribunal’s reasoning, both companies would be entitled to compensation, one under local law and the other one under the Treaty. This result, however, makes double recovery inescapable.

⁴¹⁹ Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction, para. 1 (May 16, 2006), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC514_En&caseId=C18 [hereinafter Suez Jurisdiction].

⁴²⁰ *Id.*

⁴²¹ *Id.* para. 23.

⁴²² *Id.* para. 16.

⁴²³ *Id.* para. 39.

⁴²⁴ *Id.* at 24 (Fifth Jurisdictional Objection).

⁴²⁵ *Id.* para. 49.

⁴²⁶ *Id.*

“present in [the] domestic corporate law of many countries, does not exist in any of the treaties applicable to this case.”⁴²⁷

As to Argentina’s concern about the danger of double recovery, the Tribunal simply noted it and expressed its belief that “any eventual award in this case could be fashioned in such a way as to prevent double recovery.”⁴²⁸ The Tribunal gave no indication, however, as to how the award would be fashioned so that granting compensation to the shareholders for measures directed to the company’s rights would not result in double recovery.

Moreover, the Tribunal concluded that the withdrawal of the local company from the case “vitiates any concerns about a possible double recovery to the shareholders and the corporation for the same injury.”⁴²⁹ It should be noted, however, that the presence of the corporation as a party in the case is perhaps one of the few ways in which double recovery can be avoided in these cases, since then the Tribunal can precisely determine whose rights are in play and grant compensation to the company if only its rights, and not those of the shareholders, have been affected.

The parallel case, commenced on the same day by Suez, Sociedad General de Aguas de Barcelona S.A., Vivendi Universal S.A., AWG Group Ltd., and Aguas Argentinas S.A. (“AASA”) and with the same Tribunal, concerned “a concession for water distribution and waste water treatment services in the city of Buenos Aires and some surrounding municipalities.”⁴³⁰ As in the APSF case, before the decision on jurisdiction the local company, AASA, withdrew its claim.⁴³¹

The Tribunal, in its decision on jurisdiction of August 3, 2006, rejected Argentina’s objection about the capacity of the shareholders to bring the claim on essentially the same grounds as the APSF Tribunal.⁴³² On *Barcelona Traction*, the Tribunal commented that the decision “has been criticized by scholars over the years.”⁴³³ However, the recent ratification by the ICJ of the *Barcelona Traction*

⁴²⁷ *Id.*

⁴²⁸ *Id.* para. 51.

⁴²⁹ *Id.*

⁴³⁰ Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Jurisdiction, para. 1 (Aug 3, 2006), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC518_En&caseId=C19.

⁴³¹ *Id.* para. 18.

⁴³² *Id.* paras. 46–51.

⁴³³ *Id.* para. 50.

principles as to rights of shareholders under international law⁴³⁴ suggests that, notwithstanding the criticisms referred to by the Tribunal, that decision is still good law.

4.2.15. Pan American et al. v. Argentina

This case involves two claims, the first one by Pan American Energy LLC and BP Argentina Exploration Company,⁴³⁵ and the second one by BP America Production Company, Pan American Sur S.R.L., Pan American Fueguina S.R.L., and Pan American Continental S.R.L.,⁴³⁶ which were consolidated with the agreement of the parties.⁴³⁷ The investments in question were made in the electricity and hydrocarbons sectors,⁴³⁸ and the claimants complained of Argentina's emergency measures.⁴³⁹

As to Argentina's objection concerning the inadmissibility of indirect claims by shareholders, the Tribunal commenced its analysis by stating that "there is, under general international law, some doubt on the subject" whether the issue really pertains to the merits and should not be treated in the jurisdictional phase.⁴⁴⁰ It concluded, however, contrary to the claimant's submission, that it would consider the issue together with the rest of the jurisdictional objections.⁴⁴¹

The Tribunal noted that the claimants had established their investor status and therefore had standing to bring claims, including the local companies under Article 25(2)(b) of the ICSID Convention.⁴⁴² It did, however, refer to the problem of the *jus standi* of foreign shareholders as having "a long but uncertain past in international practice."⁴⁴³

⁴³⁴ See Diallo Case, *supra* note 3, para. 86.

⁴³⁵ Pan Am. Energy LLC & BP Argentina Exploration Co. v. Argentine Republic, ICSID Case No. ARB/03/13; BP Am. Prod. Co., Pan Am. Sur SRL, Pan Am. Fueguina, S.R.L. & Pan American Continental SRL v. Argentine Republic, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, para. 1 (July 27, 2006), <http://ita.law.uvic.ca/documents/PanAmericanBPJurisdiction-eng.pdf> [hereinafter Pan American].

⁴³⁶ *Id.* para. 3.

⁴³⁷ *Id.* para. 4.

⁴³⁸ *Id.* paras. 18-19.

⁴³⁹ *Id.* para. 27.

⁴⁴⁰ *Id.* para. 209.

⁴⁴¹ *Id.*

⁴⁴² *Id.* para. 213.

⁴⁴³ *Id.* para. 214.

Regarding claims by shareholders, the Tribunal distinguished between “direct claims (*e.g.*, concerning the payment of dividends)” and “indirect rights.”⁴⁴⁴ It stated that the home state of the shareholders could not claim regarding the latter’s indirect rights, unless “the shareholders’ indirect rights had become direct . . . as a result of the winding up of the company.”⁴⁴⁵

It also referred to the tendency to allow for an exception when the measures in question had been taken by the state of which the company was a national.⁴⁴⁶ However, the Tribunal noted that the ICJ in *Barcelona Traction* ruled out “at the level of general international law, claims made on behalf of foreign shareholders’ indirect interests.”⁴⁴⁷

For the Tribunal, however, the applicable treaty – the Argentina-U.S. BIT – deviated from *Barcelona Traction* by allowing claims based on foreign direct or indirect shareholdings.⁴⁴⁸ But the Tribunal never explained: (a) whether the fact that direct and indirect shareholdings are protected necessarily means that indirect claims are authorized; (b) if so, why do some BITs expressly provide for indirect claims, *apart from* protecting direct and indirect shareholdings while others, such as the Argentina-U.S. BIT, do not provide for indirect claims; or (c) whether the ICSID Convention authorizes indirect claims outside of the possibility provided for in the second sentence of Article 25(2)(b).

Interestingly, the Tribunal recognized that “[t]he danger of double recovery by the Claimants, and, conversely, double jeopardy for the Respondent may be rather real. Actually, in the present case, there may even be triple recovery/jeopardy.”⁴⁴⁹ It also noted the danger posed by indirect claims of shareholders to other shareholders, creditors, and employees, but concluded that this threat does not authorize it to refuse jurisdiction since shareholdings are a protected investment.⁴⁵⁰ With respect to these two issues, the Tribunal lost sight of the fact that, in the regimes that do

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* para. 215. The Tribunal refers to the *El Triunfo* case. See Award of Arbitrators, Given on May 8, 1902, (U.S. v. El Sal.), 15 R.I.A.A. 467, 468–69 (1966) (awarding damages to the United States to be paid by the Republic of El Salvador).

⁴⁴⁷ Pan American, *supra* note 435, para. 216.

⁴⁴⁸ *Id.* para. 217.

⁴⁴⁹ *Id.* para. 219.

⁴⁵⁰ *Id.* para. 220.

authorize indirect claims, the compensation if any will generally go to the company, thereby excluding any possibility of double recovery or prejudice to other shareholders or creditors of any sort.

The *Pan American* Tribunal seemed to recognize that the claimants were exercising an indirect claim, although it concluded that these claims were permissible under BITs protecting shareholdings. Such recognition is important because, in rejecting the incorrect assertion that these claims are direct, due to their invocation of rights under the Treaty, it at least contributes to the discussion of the subject (although its ultimate conclusion is erroneous).

4.2.16. Total v. Argentina

Total S.A. ("Total") is a French company that "has made a number of investments in Argentina in the gas transportation, hydrocarbons exploration and production and power generation industries."⁴⁵¹ Argentina contested its *jus standi* to bring the claim "because, according to a well-known principle of both international and Argentine law, a company's shareholders cannot bring a claim to redress the impairment of rights of the company itself."⁴⁵²

In its response to that objection, among other arguments, Total alleged that the BIT's definition of investment "was meant to enlarge the jurisdictional protection available to investors pursuant to the ICSID Convention."⁴⁵³ It is clear, however, that a BIT simply cannot enlarge the "outer limits" of ICSID's jurisdiction.

The Tribunal, after rejecting the applicability of *Barcelona Traction*,⁴⁵⁴ concluded that Total was not actually advancing a derivative or indirect suit.⁴⁵⁵ In fact, it was invoking its own rights under the Argentina-France BIT regardless of any right under domestic law of the local companies in which it holds shares.⁴⁵⁶

The distinction that the Tribunal introduces between claims under domestic law of local companies on one side, and claims under the BIT of foreign investors on the other, is however not dispositive of the issue of indirect claims. Domestic law will be often

⁴⁵¹ Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, para. 9 (August 25, 2006).

⁴⁵² *Id.* para. 33.

⁴⁵³ *Id.* para. 38.

⁴⁵⁴ *Id.* para. 78. The Tribunal asserts that *Barcelona Traction* is only relevant in the context of customary international law, and not under BIT law. *Id.*

⁴⁵⁵ *Id.* para. 81.

⁴⁵⁶ *Id.*

(if not always) relevant in the determination of what rights the foreign investor acquired with its investment (which in turn is protected by the BIT⁴⁵⁷). And, if the claim involves *local* rights that do not belong to the claimant, the claim will be inadmissible, even if those rights could potentially also be protected by a BIT.

4.3. Consorzio Groupement L.E.S.I. - DIPENTA v. Algeria

Consorzio Groupement L.E.S.I. - DIPENTA ("Consortium"), the claimant in the case, was a consortium formed in Italy by two Italian companies, Lavori Edili Stradali Industriali L.E.S.I. S.p.A. ("Lesi") and GRUPPO DIPENTA COSTRUZIONI S.p.A. ("Dipenta").⁴⁵⁸ The Claimant alleged an expropriation of its investment under Article 4.3 of the Algeria-Italy BIT.⁴⁵⁹

Algeria questioned Consortium's *jus standi*, essentially because it did not hold any right under the contract in question, the parties to which were only Lesi and Dipenta.⁴⁶⁰ Importantly, this objection bore on the Tribunal's competence rather than on the admissibility of the claim.⁴⁶¹

The Tribunal commenced its analysis of the objection by recognizing that the parties to the contract were not identical to the party that had submitted the request for arbitration.⁴⁶² Further, neither party contested that the claimant, Consortium, had the capacity to hold rights and initiate judicial proceedings.⁴⁶³

For the Tribunal, it was evident that it had no competence over the claim since it had been brought by a subject of law that was not party to the contract to which the claim referred.⁴⁶⁴ The following is the crucial passage of the decision in this respect:

⁴⁵⁷ See, e.g., *EnCana Corp. v. Republic of Ecuador*, London Ct. of Int'l Arb. Case No. UN3481, Award, para. 184 (Feb. 3, 2006), <http://ita.law.uvic.ca/documents/EncanaAwardEnglish.pdf>.

⁴⁵⁸ *Consorzio Groupement L.E.S.I.-DIPENTA v. Algeria*, ICSID Case No. ARB/03/08, § I, para. 1 (January 10, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC645_En&caseId=C228 [hereinafter L.E.S.I.-DIPENTA].

⁴⁵⁹ *Id.* § I, para. 47(v).

⁴⁶⁰ *Id.* § II, para. 35(iii).

⁴⁶¹ *Id.* § II, para. 34.

⁴⁶² *Id.* § II, para. 37.

⁴⁶³ *Id.* § II, para. 37(ii).

⁴⁶⁴ *Id.* § II, para. 37(iv)-(v).

Il est évident pour le Tribunal arbitral qu'il ne peut entrer en matière sur une réclamation si celle-ci lui est soumise par un sujet de droit qui n'est pas lié par le contrat sur lequel elle repose. L'affirmation est si essentielle qu'elle n'a pas besoin d'être spécialement documentée. Peu important les liens économiques qui peuvent exister entre les entreprises; ainsi, la société-mère ne pourrait réclamer des prestations revenant contractuellement à sa société-fille, même si celle-ci dépend totalement d'elle, à moins de circonstances très particulières qui ne sont pas alléguées en l'espèce. Ce sont ces parties qui ont choisi de recourir pour des motifs qui leur appartiennent à des structures juridiques différentes; elles ne peuvent ensuite demander à l'autre partie d'en faire purement et simplement abstraction.⁴⁶⁵

It is clear that the existence of economic links between the companies did not affect the Tribunal's conclusions. In fact, it expressly negates the possibility of a controlling company claiming payments for a wholly-owned subsidiary.⁴⁶⁶ Since the claimant was not party to the contract through which the investment was made, not only did the Tribunal have no competence, but also the claimant could not be considered an investor in the terms of Article 25(1) of the ICSID Convention.⁴⁶⁷

The conclusions of the Tribunal seem to be *a fortiori* applicable to claims brought by shareholders in relation to the rights of their company. In this case the parties to the contract were the individual companies (through a consortium with no legal personality)⁴⁶⁸ and the case was brought by a consortium composed of the same companies with legal personality (at least to a certain extent),⁴⁶⁹ while in the case of the typical indirect claims, the party to the contract is the company and the case is brought by its shareholders. It cannot be denied that a company is "more separated" or is "more independent" from its shareholders than a consortium from its members.

⁴⁶⁵ *Id.* § II, para. 37(iv). See also *id.* § II, para. 39(ii) (noting that the Consortium must respect the rights and obligations of the contracts it signs).

⁴⁶⁶ *Id.* § II, para. 37(iv).

⁴⁶⁷ *Id.* § II, paras. 37(iv), 40(ii).

⁴⁶⁸ *Id.* § II, para. 37(i).

⁴⁶⁹ *Id.* § II, para. 37(ii).

5. CONCLUSION

Claims by or on behalf of shareholders in relation to damages suffered by the company are inadmissible under general international law.⁴⁷⁰ They are also inadmissible under the ICSID Convention, which provides for the protection of foreign shareholders against measures affecting local companies, but only through the mechanism of Article 25(2)(b) *in fine*.⁴⁷¹

ICSID jurisprudence, however, has basically accepted the admissibility of indirect claims,⁴⁷² with very few exceptions⁴⁷³ or limitations.⁴⁷⁴ This jurisprudence is inconsistent with the position of at least some states.⁴⁷⁵ Further, if indirect claims fall outside the “outer limits” of ICSID, as this article affirms in Section 3, this cannot be modified by ICSID Tribunals, given the “subsidiary” character of jurisprudence as a source of international law.⁴⁷⁶

The ICSID cases that have admitted indirect claims present several inconsistencies as to their theoretical foundations. For ex-

⁴⁷⁰ See *supra* Section 3. But *c.f.* Int’l Law Comm’n, *Fourth Report on Diplomatic Protection*, para. 47, U.N. Doc. A/CN.4/530 (Mar. 13, 2003) (endorsing the view that “the State of incorporation of a company enjoys the right to exercise diplomatic protection on behalf of the company”).

⁴⁷¹ See *supra* Section 2 (exploring the ICSID Convention).

⁴⁷² See *supra* Section 4 (examining the jurisprudential history of the ICSID); see also *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, para. 174 (Apr. 22, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&dDocId=DC642_En&caselId=C224 (pointing to previous according decisions by the ICSID that minority and non-controlling shareholders have a right “to claim independently of a separate corporate entity for the measures that affect their investment”).

⁴⁷³ See *L.E.S.I.-DIPENTA*, *supra* note 458, § III, para. 1 (holding that the Tribunal had no jurisdiction over the dispute in question). For a recent rejection of at least certain types of indirect claims in a non-ICSID context, see *Vladimir Berschader & Moïse Berschader v. Russian Federation*, Arbitration Inst. of the Stockholm Chamber of Commerce, Case No. 080/2004, Award, paras. 114-150 (Apr. 21, 2006).

⁴⁷⁴ See *Continental Jurisdiction*, *supra* note 11, para. 79 (apparently limiting indirect claims to controlling shareholders).

⁴⁷⁵ See *Gami Final Award*, *supra* note 27, para. 11 (noting the position of the United States in its submission pursuant to Article 1128 of NAFTA); see also *supra* Section 4.2 (discussing Argentina’s objections to ICSID jurisdiction).

⁴⁷⁶ See Statute of the International Court of Justice, art. 38.1(d), June 26, 1945, 59 Stat. 1031, 1060 available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (providing that the Court shall apply “subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”).

ample, most consider that shareholders are not really exercising indirect claims because they are invoking their own rights,⁴⁷⁷ while some seem to accept the indirect nature of the claim but regard it as admissible under the ICSID system.⁴⁷⁸

However, the most troubling aspect of this jurisprudence is that it leaves the most acute problems posed by indirect claims without resolution. In this respect, several tribunals have acknowledged the danger of double recovery when ordering the payment of compensation to a shareholder for measures directed against the company in which the shareholder has shares.⁴⁷⁹ None, however, has suggested a satisfactory solution, and the alternatives that have been mentioned are quite ad hoc, contingent on the facts of each case, and not based upon legal principles.⁴⁸⁰

Apart from the issue of double recovery, the non-acceptance of indirect claims "is also critical to ensuring that creditors' rights with respect to the investment are respected."⁴⁸¹ Indeed, if the compensation corresponding to revenues lost by the company goes not to itself but to its shareholders (and maybe not to all of them), what happens with all the other parties that may have a legitimate interest in the company's assets? Isn't that an expropriation of the company that may have prejudicial effects not only on those third parties but also on non-claiming shareholders and the company itself? Is it admissible for the shareholder to collect such compensa-

⁴⁷⁷ See, e.g., *Telefónica S.A. v. Argentine Republic*, *supra* note 407, para. 90; *Camuzzi II*, *supra* note 331, para. 34(iv).

⁴⁷⁸ See *Pan American*, *supra* note 435, para. 217 (noting the applicability of the ICSID and BIT Conventions, not necessarily general international law); *Azurix*, *supra* note 225, para. 73 (citing the relevant BIT and judicial decisions concerning this BIT, as well as judgments related to similar BITs); *Goetz*, *supra* note 6, para. 89 (considering admissibility issues with respect to shareholder claims).

⁴⁷⁹ See *Sempra Award*, *supra* note 355, para. 395 (explaining that the Tribunal believes double recovery is not likely due to government efforts); *Enron Award*, *supra* note 267, para. 167 (preventing additional, eventual compensation because it would constitute a double recovery); *Pan American*, *supra* note 435, para. 219 (noting the existence of a double recovery problem, and perhaps triple recovery); *Suez Jurisdiction*, *supra* note 419, para. 51 (recognizing the hazard of double recovery); *Sempra*, *supra* note 332, para. 102 (acknowledging the problem of double recovery).

⁴⁸⁰ *Enron Award*, *supra* note 267, para. 212; *Sempra Award*, *supra* note 355, para. 395.

⁴⁸¹ *Gami Invs., Inc. v. United Mex. States*, Submission of the United States of America, NAFTA/UNCITRAL Case, para. 17 (NAFTA Ch. 11 Arb. Trib. June 30, 2003), <http://www.state.gov/documents/organization/22212.pdf>.

tion without bearing any responsibility as to the company's debts, for example, because the latter has gone bankrupt?

All these legal and policy problems can be avoided if tribunals, when faced with an indirect claim, determine its genuine nature and do not order compensation to the shareholder-claimant in such a case. In this situation, the ICSID Convention affects the jurisdiction of ICSID, but this determination does not necessarily have to be done in the jurisdictional phase of a proceeding, because it might be necessary to go to the merits of the dispute to ascertain whose rights are really in play.

Moreover, protection of foreign shareholders through established mechanisms that admit indirect claims under certain conditions, such as Article 25(2)(b) *in fine* of the ICSID Convention, does not create as serious problems. Resorting to these measures is an effective way to secure such protection and to further the development of international investment law, without creating legal perplexities that may diminish the confidence of states in this important area of international law.