THE PROTECTION OF SHAREHOLDERS IN INVESTMENT ARBITRATION

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Árbitro

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Miguel Ángel Fernández-Ballesteros ha sido una de las figuras fundamentales en el arbitraje español. Académico, autor, presidente de institución arbitral, árbitro, abogado —su vida ha cubierto todas las facetas de nuestra profesión. Dentro del mundo del arbitraje, el de inversión fue siempre una de sus áreas preferidas; recuerdo su interés en que Madrid y su Corte de Arbitraje, por entonces bajo su presidencia, asumieran protagonismo en este campo. Por ello, para rendirle homenaje, he elegido un tema clásico de esta disciplina: la protección del accionista en el arbitraje de inversión. Y he escrito el trabajo en inglés. Miguel Ángel era políglota; cuento con su comprensión por haber usado la lingua franca *de nuestra disciplina.*

This article will explore one of the most puzzling questions of international investment law: who is (or who should be) the beneficiary of protection under international law, the local company whose assets have been impaired, or any of its (majority or minority) shareholders? This question has been addressed in a string of seminal cases, dating from the ICJ's *Barcelona Traction* judgment in the 1970s to recent ICSID tribunals' awards. Walking through this jurisprudential chronology, this article aims to provide some clarity by pinning down:

A definition of reflective (or indirect) loss (**I.**), and

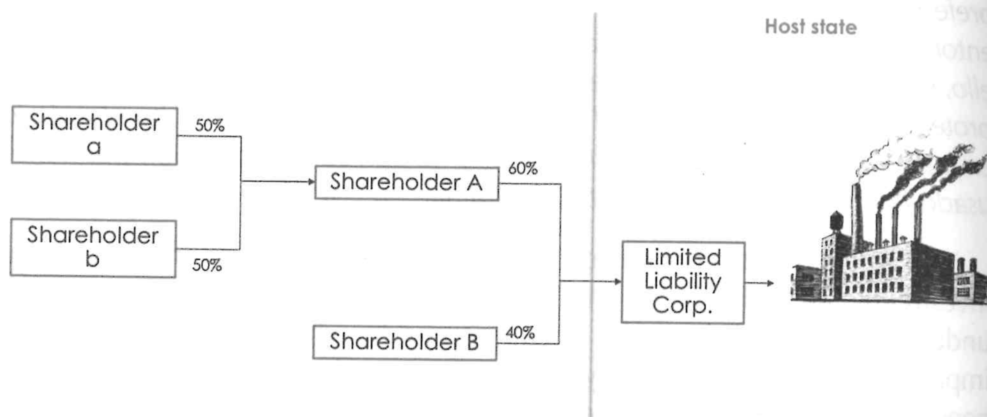
Four principles governing its recoverability in international arbitration (**II.**).

I. REFLECTIVE VS DIRECT LOSS

States accept to provide foreign investors with investment protection under international law and submit to the jurisdiction of international arbitral tribunals for self-regarding reasons: they assume that this legal shield will attract additional foreign investment, brought in by investors who demand a reduced country risk premium; more and cheaper foreign investment will (the States hope) further economic development and the creation of wealth.

To secure these advantages, States are prepared to execute investment treaties, foregoing the safe haven of their own jurisdiction and assuming the burden, the risk and the cost of being sued by dissatisfied investors before international arbitral tribunals.

To channel their investments, investors prefer to incorporate subsidiaries in the host State. The typical situation warranting investment protection involves an investor who has the nationality of the home State and who decides to incorporate a limited liability subsidiary in the host State. This can be visualised as follows:



The limited liability subsidiary in the host State, which owns the investment, is subject to the legal risk that the State might expropriate (or otherwise unlawfully impair) the asset (in this case the factory). If this happens, both the subsidiary and its shareholders suffer loss. Specifically,

— the subsidiary suffers direct loss,

— while shareholders suffer a reflective loss, equal to the reduction in value of their shares (this applies to majority and minority shareholders, like A. and B., and also to indirect shareholders like a. and b.).

Yet shareholders are not only exposed to reflective loss – they can also endure direct loss. This occurs in a different factual scenario: if the host State, instead of focussing on the factory, decides to expropriate the shares in the subsidiary (or otherwise impair the investor's rights as shareholder, e.g., by depriving foreigners of the right to appoint directors).

II. THE FOUR PRINCIPLES

In these situations, does international investment protection law shield shareholders against direct and/or reflective loss? The proposed answer is summarized in four principles:

— Under municipal law, shareholders cannot claim reflective loss – they can only claim direct loss (**1.**);

— Under customary international law, shareholders are also barred from claiming reflective loss (**2.**);

— Under international investment protection law, protected shareholders are entitled to claim both reflective and direct loss (**3.**); and

— Under US investment treaty practice, the customary international law principle prevails, with one *caveat* and one exception (**4.**).

1. First principle: under municipal law, shareholders cannot claim reflective loss

Under all municipal law systems companies enjoy separate legal personality; shareholders are not responsible for the company's liabilities, their only obligation being to pay in the capital or other equity contribution which they have underwritten; the company's solvency is only supported by its own equity, and there are strict rules governing the shareholders' right to recover such equity.

The necessary consequence of this principle of limited liability is that, when a company suffers loss, it is the company itself (and only the company) that has standing to claim the compensation; shareholders are not entitled to claim the reflective loss which the value of their shares suffered. Otherwise, the company would suffer the damage, while the compensation would flow to the shareholders – draining the company's equity, the only guarantee available to its creditors.

The principle that shareholders have no standing to claim reflective loss is generally upheld in all municipal legal systems (with very limited exceptions, e.g., shareholders may be authorized to step in on behalf of the subsidiary if its directors fail to protect the company's interests).

That said, shareholders can of course claim for their own, direct loss suffered in regard of the shares they hold.

2. Second principle: under customary international law, shareholders are also barred from claiming reflective loss

Under customary international law, the principle is similar: when loss has been inflicted to assets owned by the subsidiary, shareholders are not entitled to claim the reflective losses suffered in the value of their shares. This principle underlies the ICJ's seminal decision in *Barcelona Traction*[(2)], later reiterated in *Diallo*[(3)].

Barcelona Traction, a case of diplomatic protection pitching Belgium against Spain, concerned a claim of private expropriation through denial of justice. The ICJ dismissed Belgium's case for lack of standing, finding that under customary international law shareholders were not authorized to claim on behalf of the corporation. It did not address the question of denial of justice.

The impaired investor was the Barcelona Traction Light and Power Company, a Canadian company with 88% majority Belgian shareholders, which owned various subsidiaries in Spain. Barcelona Traction was successful and highly profitable, covering approximately 20% of the Spanish electricity market. Since the 1910s Barcelona Traction had placed bonds denominated in Pounds Sterling on the London market. After the civil war, Spain imposed exchange control restrictions. As a result, Barcelona Traction, although profitable, was unable to repatriate from Spain funds in foreign currency and defaulted upon its obligations; the bonds severely devalued.

On the Spanish side, the beneficiary of the expropriation was Juan March, at the time one of Spain's richest and most influential entrepreneurs. Seeing a profitable business opportunity, March tried to acquire control over Barcelona Traction at a discounted price, but his offer was rejected by the Belgian shareholders. In February 1948, three bondholders (in fact, strawmen of March, who had bought the bonds a couple of days before) approached a local judge in Reus, a small town in Catalonia where a subsidiary of Barcelona Traction owned a hydroelectric power plant. The bondholders successfully

(2) Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment of 5 February 1970, ICJ Reports 1970. For a deep insight and analysis of *Barcelona Traction*, see Jan Paulsson, 'Chapter 9: Why Investment Treaties Should Not Be Subverted by Barcelona Traction', in Cavinder Bull, Loretta Malintoppi, et al. (eds), ICCA Congress Series No. 21: *Arbitration's Age of Enlightenment?*, (ICCA & Kluwer Law International 2023) pp. 145-168.

(3) Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment of 30 November 2010, ICJ Reports 2010.

convinced the judge to declare the bankruptcy of the Canadian company *ex parte* under the 1829 Commercial Code[(4)]. The Reus Judge designated a receiver and trustee, a person close to March, and proceeded with a judiciary sale of the assets. The only bidder was FECSA, a company recently created by March and chaired by one of his most trusted lieutenants.

Barcelona Traction only became aware and filed an opposition to the declaration of bankruptcy after the legal term to do so had already passed; its appeal went through the Spanish Court system up to the Supreme Court and was dismissed. As a result, in 1958 Belgium filed ICJ proceedings under diplomatic protection against Spain. After a protracted procedure (armies of lawyers and experts on each side, a sum of 150 million USD claimed), in 1970 the ICJ rendered its judgement dismissing Belgium's claims. The Court accepted (unanimously, except for the Belgian *ad hoc* judge) an admissibility objection which had been joined to the merits: that the standing corresponded to Canada, and not to Belgium. The underlying reasoning was that international law recognizes the legal personality of companies, that shareholders cannot claim for reflective loss to the value of their shares and that diplomatic protection corresponds to the State whose nationality the corporation has[(5)].

The elephant in the room remained the question of whether a denial of justice had occurred. This was only addressed in the separate opinions, with Judge Tanaka concluding this was not the case[(6)], and Judge Fitzmaurice opining that the notice provided by the Reus court probably amounted to a denial of justice[(7)].

The ICJ reaffirmed its position in 2010 in the *Diallo* judgment, quoting *Barcelona Traction*[(8)]:

> "The Court observes that international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders [...]

(4) Pursuant to that version of the Code, there was a period of eight days for the merchant to oppose the declaration. Because its Canadian address was unknown, Barcelona Traction was given notice of its bankruptcy declaration by publication in the Official Gazette of the Province of Tarragona — a publication which the officers of the Canadian company apparently were not in the habit of reading.

(5) *Barcelona Traction*, paras. 88-90.

(6) *Barcelona Traction*, Separate Opinion of Judge Tanaka, pp. 144-147.

(7) *Barcelona Traction*, Separate Opinion of Judge Sir Gerald Fitzmaurice, paras. 75-83.

(8) *Diallo*, paras. 155-156.

> Furthermore, it must be recognized that the liabilities of the company are not the liabilities of the shareholder [...]
>
> The Court, in the *Barcelona Traction* case, recognized that 'a wrong done to the company frequently causes prejudice to its shareholders' [...] But, it added, damage affecting both company and shareholder will not mean that both are entitled to claim compensation:
>
> '...whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed'."

Barcelona Traction crystallized the customary international law principle that shareholders have no standing to claim reflective loss — and thus perceivably weakened diplomatic protection of investors. This contributed to the surge of treaty-based investment protection.

3. Third principle: under treaty-based investment protection shareholders can claim for reflective loss

Let us now turn to treaty-based investment protection. In this area of international law, protected shareholders are of course entitled to claim for their direct losses, if the host State expropriates their shares or impairs their rights as shareholders. But do these shareholders also enjoy standing if the assets expropriated or impaired are owned by the subsidiary in the host State? The answer to this question is the opposite to the customary international law solution: investment treaties do provide protected shareholders (including indirect and minority shareholders) with standing to claim reflective loss.

Where is the legal basis for this variance between customary international law and international investment law?

No treaty says that shareholders are authorised to claim their reflective loss, as well as their direct loss; in fact, investment treaties do not even use the terminology "reflective loss" vs. "direct loss". Yet all treaties include a definition of protected investments, and the assets which qualify as such invariably include the category "shares" (sometimes including a reference to "indirect" and/or to "minority" participations — but the inclusion or not of the reference is irrelevant for the principle). Using this definition as a springboard, investment arbitration case law has unanimously concluded that shareholders do enjoy this double standing.

Support for this thesis can be traced back to the seminal decision in *CMS v. Argentina*[9].

In that case, CMS, a company incorporated in the US, acquired in the 1990s a 29.42% shareholding in an Argentine company, TGN, which had been granted a license to transport gas in Argentina. At that time the Argentinian peso — and thus all relevant gas tariffs — was pegged to the US Dollar. In the aftermath of the Argentinian economic crisis at the turn of the century, Argentina amended its legislation and decoupled the tariffs from the US Dollar. As a result, CMS commenced ICSID arbitration against Argentina, claiming that the new legislation impaired its investment.

The tribunal, chaired by Prof. Francisco Orrego Vicuña, examined the rights of (in this case, minority) shareholders under international law, under the ICSID Convention and under the terms of the Argentina-US BIT. The tribunal concluded that international investment law does not bar shareholders from bringing actions against the State, based on CMS's shareholding in TGN[10]. These findings were later confirmed in the annulment decision of the *ad hoc* committee, which began its analysis by accepting (as the ICJ had done in the 2007 *Diallo* judgement) the primary distinction between[11]:

— Cases concerned with diplomatic protection and subject to customary international law — in which claims for reflective loss are not admissible, and

— Claims for the protection of the rights of investors under treaties relating to the protection of investments, which as *lex specialis* must be given preference over customary international law.

Based on this distinction, the *CMS* annulment committee observed that the definition of investment in the BIT was "very broad" and that "[i]nvestments made by minority shareholders are covered by the actual language of the definition", that claimant "must be considered an investor within the meaning of the BIT" and that it "assert[s] causes of action under the BIT in connection with that protected investment", which are "within the jurisdiction of the [t]ribunal"[12].

(9) *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8.

(10) *CMS v. Argentina*, Decision of the Tribunal on Objections to Jurisdiction dated 17 July 2003, paras. 43-48.

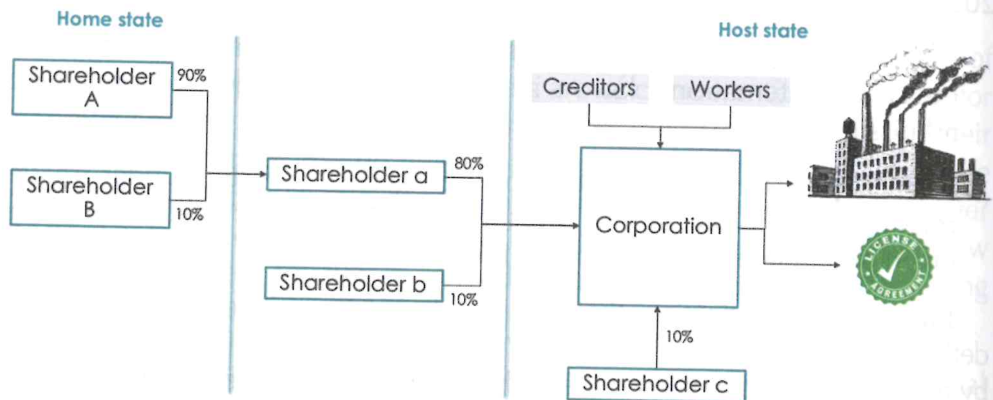
(11) *CMS v. Argentina*, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic dated 25 September 2007, para. 69.

(12) *CMS v. Argentina*, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic dated 25 September 2007, paras. 72-76.

The principle was then repeated in numerous decisions, and the *status quaestionis* was summarized in the 2013 *ST-AD* decision. In this award, the tribunal, invoking the precedents of *Paushok* and *RosInvestCo*(13) said:

> "[A]n investor whose investment consists of shares cannot claim, for example, that the assets of the company are its property and ask for compensation for interference with these assets. Such an investor can, however, claim for any loss of value of its shares resulting from an interference with the assets or contracts of the company in which it owns the shares. [...]
>
> In other words, if it could be proven by the Claimant that the Bulgarian authorities expropriated the Property belonging to [the company], the Claimant could present a claim for the loss of value of its shares in that company resulting from such expropriation, if all other conditions for such claim were satisfied." [Emphasis added]

This investment law principle self-evidently increases the protection of foreign investors; but it also gives rise to concerns. The following visual example may help to understand the issue:



As we have seen, under investment protection law, if the host State decides to expropriate or impair the subsidiary's investment in the factory, foreign

(13) *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction dated 18 July 2013, paras. 282-285, citing to *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. The Government of Mongolia*, Award on Jurisdiction and Liability dated 28 April 2011, para. 202, and to *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. Arb. V 079/2005, Final Award dated 12 September 2010, para. 608.

shareholders protected by treaty (in the scheme A. and B.) have standing to claim the reflective loss suffered by the value of their shares — a right which is denied to domestic shareholders (in the scheme C.), who are subject to municipal law (and municipal law routinely does not permit this standing).

The treatment of foreign and local shareholders is thus totally different.

There are additional difficulties: if shareholders A. and B. successfully claim in investment arbitration against the State, and are able to collect compensation for the reflective loss which they have suffered, the solvency of the subsidiary is undermined: the subsidiary has suffered a loss, but it is deprived of compensation (because there cannot be double recovery for the same loss, and the compensation has already flown to its foreign shareholders). Payment of compensation to protected foreign shareholder thus de-capitalizes the subsidiary and subverts the general principle that shareholders collect last — to the detriment of the subsidiary's creditors (including workers and preferred or secured creditors) and its local shareholders.

Gabriel Bottini (the lawyer who defended Argentina in the *CMS* case) has devoted his doctoral thesis to this matter. Contrary to the prevailing case law, he advocates that shareholders' claims should be declared inadmissible, if there is a fair possibility that these claims be adjudicated at municipal level[(14)].

4. Fourth principle: under US treaty practice the customary internatio-nal law principle prevails

In this matter (as in so many others) the United States of America have followed their own path: the standard language used in US treaties only permits protected shareholders, acting on their own behalf, to claim direct loss which they have personally suffered — either because their shares were expropriated or their rights as shareholders were impaired. In the interpretation given by the US to its treaty language, direct loss includes situations where the shareholder owns 100% of the subsidiary and the host State expropriates the enterprise in whole. This standard language seeks to align the treaty regulation with customary international law.

The principle knows one *caveat*: a shareholder is entitled to claim direct loss on behalf of the subsidiary incorporated in the host State, provided that

(14) Gabriel Bottini, *Admissibility of Shareholder Claims under Investment Treaties* (Cambridge University Press, 2020).

three conditions are cumulatively met (conditions which seek to assuage the concerns caused by the shareholders' entitlement, under treaty-based investment protection, to claim reflective loss):

— The investor must own or control the local subsidiary;

— The compensation must flow to the subsidiary, not to the shareholder (so that the funds benefit other shareholders and creditors); and

— The local subsidiary must waive any claims on its own behalf (to avoid double recovery).

The development of this distinct approach can be traced back to three cases:

— *Kappes v. Guatemala*[15],

— *Carlyle v. Morocco*[16], and

— *Lopez-Goyne v. Nicaragua*[17].

Each is addressed below in turn.

4.1. *Kappes v. Guatemala*

Mr. Daniel Kappes, a US citizen, acquired shares in a local company called Exmingua, which in 2011 had obtained a 25-year licence to exploit gold and silver. The direct shareholders of Exmingua were Mr. Kappes and Minerales KC — another Guatemalan company held by Mr. Kappes and by his US-based company Kappes, Cassiday & Associates (KCA).

Mr. Kappes and KCA held that their investment had been impaired by the Guatemalan State in breach of its FET, FPS and expropriation obligations and commenced ICSID proceedings under the Dominican Republic-Central America FTA (DR-CAFTA), asking to be compensated for the losses they suffered as Exmingua's shareholders.

Guatemala objected on the ground that the claimants were seeking to recover Exmingua's losses rather than their own, in breach of DR-CAFTA Article

(15) *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43.

(16) *The Carlyle Group L.P., Carlyle Investment Management L.L.C., Carlyle Commodity Management L.L.C. and others v. Kingdom of Morocco*, ICSID Case No. ARB/18/29.

(17) *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44.

10.16.1(a), which only allows investors to recover their direct damage[18]. In Guatemala's view, any claims for losses incurred by a local enterprise should have been brought on behalf of the local enterprise, under Article 10.16.1(b)[19].

The *Kappes* tribunal did not receive a US third party submission and issued a split decision, with the majority defending that the investment protection law principle also extended to the DR-CAFTA and that consequently claims for reflective loss were admissible and Prof. Zachary Douglas dissenting and defending that investors can only claim direct loss.

The majority concluded that the investors could claim reflective damages under DR-CAFTA Article 10.16.1(a)[20]:

> "But with respect to Article 10.16.1(a), the text they adopted contains no language suggesting that it be interpreted other than through the ordinary meaning of its terms — and the particular terms adopted are not consistent with barring a claimant from pursuing "on its own behalf" a claim for losses it "incurred," just because those losses may have been incurred indirectly rather than directly. If this was not what the State Parties intended, they still may clarify this through the recognized mechanisms for doing so, including issuance of a joint interpretation. But unless and until they do so, tribunals interpreting DR-CAFTA must work with the tools they have, rather than ascribing to the State Parties particular intentions which (however potentially sound from a policy perspective) are not revealed through recognized VCLT analysis."

By contrast, Douglas defended in a separate opinion that the treaty did not allow claims for reflective losses under DR-CAFTA Article 10.16.1(a). The arbitrator said that if a claimant could bring a claim for reflective loss under paragraph (a) in respect of an alleged prejudice to a local enterprise, then:[21]

> "...the specific objectives underlying Articles 10.18 and 10.26 — the prevention of multiple claims in respect of the same prejudice, the avoidance of double

(18) Article 10.16.1 of DR-CAFTA provides that "In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim [...] [or] (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim [...]."

(19) *N.B.* DR-CAFTA Article 10.16.1 is identical to FTA Article 10.15.1.

(20) *Kappes v. Guatemala*, Decision on the Respondent's Preliminary Objection dated 13 March 2020, para. 157.

(21) *Kappes v. Guatemala*, Partial Dissenting Opinion of Prof. Zachary Douglas QC, para. 9.

> recovery and the protection of the company's creditors — can be defeated by the simple election of the claimant under Article 10.16.1 […]."

Therefore, Prof. Douglas concluded that:[22]

> "[i]f a particular interpretation of Article 10.16.1 fatally undermines Articles 10.18 and 10.26, then the obvious inference to be drawn is that that interpretation is wrong".

4.2. Carlyle v. Morocco

Carlyle is the first case where the US clearly voiced its opinion on the recoverability of reflective loss by shareholders in investment cases based on US treaties.

The case was filed by seven US companies affiliated with the Carlyle Group which had concluded several oil purchase and storage agreements with *Société Anonyme Marocaine de l'Industrie du Raffinage* (SAMIR), a company which owned the only refinery in Morocco, and which was not affiliated to the Carlyle Group. In 2015 SAMIR became insolvent and its assets were seized. Having suffered losses as a result, the US claimants[23] commenced ICSID proceedings against Morocco under the US-Morocco FTA.

The United States filed a submission explaining its interpretation of the FTA, which was in line with Morocco's position (and the dissenting opinion of Prof. Douglas in *Kappes*)[24]:

> "In sum, Article 10.15.l(a) adheres to the principle of customary international law that shareholders may assert claims only for direct injuries to their rights. Where an investor suffers loss to its investment and that investment is not an enterprise or held by an enterprise, the Barcelona Traction rule does not apply and Article 10.15.l(a) of the U.S.-Morocco FTA provides a remedy. By contrast, where the injury is to an enterprise or an asset held by that enterprise, the harm to the investor is generally derivative of that to the enterprise and *Barcelona Traction* precludes a claim for direct injuries to a shareholder's rights. Article 10.15.l(b), but not Article 10.15.l(a), is available to remedy any violation of Chapter Ten in

(22) *Kappes v. Guatemala*, Partial Dissenting Opinion of Prof. Zachary Douglas QC, para. 10.

(23) The Carlyle Group L.P., Carlyle Investment Management L.L.C., Carlyle Commodity Management L.L.C., TC Group, L.L.C., TC Group Investment Holdings, L.P., Celadon Commodities Fund, LP, and Celadon Partners, LLC.

(24) *Carlyle v. Morocco*, Submission of the United States of America dated 4 December 2020, para. 7.

> such a case. Article 10.15.1(b) may be applicable only where the breach causes loss to an 'enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly.' Were shareholders to be permitted to claim under Article 10.15.l(a) for indirect injury, Article 10.15 .1(b)' s narrow and limited derogation from customary international law would be superfluous." [Emphasis added]

Following the US Submission, the proceedings were discontinued[25].

In sum, the position held by Morocco and the US in this case was that the FTA does not cover reflective losses suffered by shareholders — only direct losses to its own assets. If a shareholder decides to claim reflective losses, the only avenue is to claim on behalf of the subsidiary, provided that the shareholder controls the local corporation and is prepared to accept that the compensation goes to the corporation (and thus can benefit other shareholders or creditors) and that the subsidiary waives its own right to claim.

4.3. Lopez-Goyne v. Nicaragua

Lopez-Goyne is a case where the tribunal applied an expansive interpretation of direct loss (supported by the US in its third-party submission): the tribunal held that the investor was in fact claiming direct loss, because Nicaragua had (allegedly) expropriated the totality of asset owned by the local subsidiary.

A group of US investors initiated ICSID arbitration against Nicaragua in 2017 under the DR-CAFTA. The investors held shares in a Nicaraguan oil and gas company, *Industria Oklahoma Nicaragua* (ION). Collectively, they represented 58% of ION's share capital and argued that Nicaragua had expropriated their investments by *inter alia* terminating ION's oil exploration concession.

Claimants, despite recognising that their claims were for reflective losses, relied on the *Kappes* majority decision to argue that such claims were not barred under Article 10.16.1(a) of the DR-CAFTA[26].

The tribunal started from the premise that the *Barcelona Traction* principle of customary international law still applies:

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(25) *Lopez-Goyne v. Nicaragua*, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding Pursuant to ICSID Arbitration Rule 43(1) dated 14 Sept 2022.

(26) *Lopez-Goyne v. Nicaragua*, Award dated 1 March 2023, para. 357.

"... it is well-recognized that an international agreement should not be held to have tacitly dispensed with an important principle of international law "in the absence of words making clear an intention to do so." Nothing in the text of Article 10.15.1(a) suggests that the Treaty Parties intended to derogate from customary international law restrictions on the assertion of shareholder claims. [...]

The first of these principles is that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. [...]

Thus, only direct loss or damage suffered by shareholders is cognizable under customary international law."

The tribunal then concluded that claimants were, in fact, claiming direct loss — not reflective loss:

"The Claim is thus unquestionably one for compensation for the deprivation of the benefits of ownership of ION. Following the termination of the Contract, which was ION's sole asset, Claimants were left as mere shareholders 'with bare title to a stripped asset', as the majority in *Kappes* put it. As Prof. Douglas characterized it in his dissent in that case, concurring on this point with the majority, this type of claim is "a claim to vindicate [Claimants'] legal rights as shareholders rather than their mere economic interest in the value of [the expropriated entity's] shares".

Since the Contract was ION's only asset, its termination wiped out any present or future potential value of ION's shares. Therefore, the effect of the termination of the Concession, that is the object of the Claim, is not a mere reduction in the value of ION's shares, but a complete elimination of their value.

It follows that, despite Claimants' hurried answer to the Tribunal's question and contrary to Respondent's characterization, the Claim is not for reflective loss, for a decrease in the value of their shareholding caused by injury to ION, but rather for direct loss. It is not by chance that Claimants right from the start submitted that '[the] Treaty breaches caused direct and substantial harm to the Claimants'."

In the end, the tribunal dismissed claimants' claims on the merit.

III. CONCLUSION

This article has explored the rights of shareholders as investors, and has come to some startling conclusions — an outcome that Prof. Fernández Ballesteros, with his fine appreciation for the nuances of arbitration law, would have enjoyed.

In a nutshell: the general rule under customary international law is that shareholders are not entitled to claim reflective loss. As an exception, under treaty-based investment rules, protected shareholders are entitled to claim reflective loss equal to the loss in value of their shares in the local subsidiary. There is an exception to that exception for US treaties, which (in accordance with the interpretation favoured by the US) follow the general rule of customary international law: investors can only claim direct losses suffered by the investments they own or control (including within direct loss the expropriation of the subsidiary in its totality). Under US practice a shareholder may, however, claim on behalf of the local subsidiary it controls, but the compensation must flow to the subsidiary, which also must waive its right to claim compensation.

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