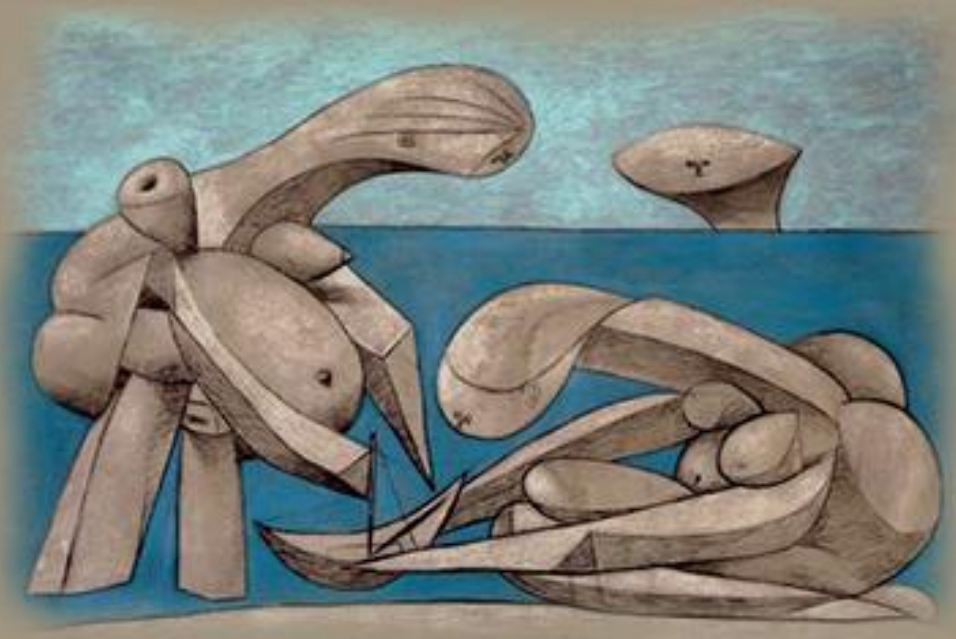
Journal du Droit Transnational



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Vol. 1 – 2025

Alicia Grace v Mexico: A turning point in shareholder claims for reflective loss?

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1. Introduction

On 19 August 2024, an ICSID-administered tribunal established under the 1976 UNCITRAL Rules rendered a final award in the dispute *Alicia Grace v. Mexico*.[1] The dispute arose from a series of contracts ('Oro Negro Contracts') between Petróleos Mexicanos ('Pemex'), the Mexican State-owned oil enterprise, and Perforadora Oro Negro ('Perforadora'), a corporation operating in the lease of oil platforms constituted under the law of Mexico as a subsidiary of Integradora de Servicios Petroleros Oro Negro ('Integradora'), the holding company.

In September 2017, on account of the insolvency proceedings filed before Mexican courts by Integradora and its subsidiaries (collectively known as 'Oro Negro'),[2] Pemex terminated the Oro Negro Contracts, immediately returning the five oil platforms that were in lease.[3] Later on, criminal investigations and tax controls were launched in Mexico against Integradora, Perforadora and various physical persons related to them.[4] In the meanwhile, following the default of Oro Negro, some of the bondholders who had massively financed the operations of the group sought to enforce their credit guarantees, attaching the platforms: this was possible, the Claimants contended, due to the collusion of Mexican authorities, which were allegedly interested to «drive Integradora out of business and […] award the Oro Negro Contracts to the Bondholders».[5]

According to the Claimants, such course of action by Mexico resulted in an unlawful expropriation, a breach of the fair and equitable treatment standard,[6] as well as a violation of the full protection and security standard[7] under the North American Free Trade Agreement ('NAFTA').[8] Following the jurisdictional objections raised by the Respondent State, the tribunal had first to decide on whether, in accordance with the relevant treaty, the Claimants: *i*) qualified as nationals of another State party and held a

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[1] *Alicia Grace et al. v. The United Mexican Case*, ICSID Case No. UNCT/18/4, Final Award (19 August 2024) (Diego P. Fernández Arroyo, President; Andrés Jana Linetzky; Gabriel Bottini).

[2] Ibid., para. 381.

[3] Ibid., paras 383-385.

[4] Ibid., para. 396.

[5] Ibid., para. 216.

[6] For a critical overview of this standard of treatment, see, *ex multis*: M. PAPARINSKIS, *The International Minimum Standard and Fair and Equitable Treatment*, Oxford University Press, 2013; P. DUMBERRY, *The Fair and Equitable Treatment. A Guide to NAFTA Case Law on Article 1105*, Wolters Kluwer, 2013; F.M. PALOMBINO, *Fair and Equitable Treatment and the Fabric of General Principles*, Springer, 2018.

[7] In this regard, see: S.A. ALEXANDROV, "The Evolution of the Full Protection and Security Standard", in M. KINNEAR ET AL. (eds), *Building International Investment Law. The First 50 Years of ICSID*, Wolters Kluwer, 2015; S. MANTILLA BLANCO, *Full Protection and Security in International Investment Law*, Springer, 2020.

[8] North American Free Trade Agreement, signed 17 December 1992, entered into force 1 January 1994, terminated 1 July 2020.

covered investment; and *ii*) had *ius standi* – i.e., the entitlement[9] – to bring their claims under either Article 1116 or Article 1117 of the NAFTA.

As for the first question, it was answered in the affirmative, except for Mr. Williamson-Nasi and Mr. Cañedo White, who failed to prove that their dominant and effective nationality was that of the United States, thus being considered Mexican citizens for the purposes of the proceedings. With regard to the second issue, the tribunal concluded that the Integradora shareholders lacked the required legal standing to commence proceedings against Mexico. In light of the foregoing, the arbitrators unanimously held that they lacked jurisdiction on all the claims.

The Award's significance lies primarily in the critical stance of the arbitrators on shareholder claims,[10] which challenges the well-established practice of investment tribunals to grant investors permission not only to initiate proceedings for compensation in response to measures affecting their own personal rights (such as the ones to declared dividends or to participate in the general meetings),[11] but also to recover losses suffered indirectly as a result of harm endured by the corporation ('reflective loss'). In doing so, the tribunal delved into one of the most contentious issues in international investment law and arbitration, namely the extent to which, if any, shareholders *qua* investors are entitled to commence proceedings to claim compensation for measures targeting the corporation in which they hold shares.[12]

The present comment only deals with the second of the two mentioned objections to the jurisdiction of the arbitral tribunal, namely the one concerning the legal standing of the shareholders, by proceeding as follows: Section 2 summarizes the main arguments put forward by the parties on shareholder claims under Article 1116 and 1117 of the NAFTA, as well as the conclusion reached by the tribunal; Section 3 then discusses the award against the case law of investment tribunals on shareholder claims for reflective loss, whose general admissibility threaten the viability and legitimacy of investor-State arbitration; finally, Section 4 draws some concluding remarks on the relevance of the Award to future cases.

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[9] A. DEL VECCHIO, "International Courts and Tribunals, Standing", in *Max Planck Encyclopedia of Public International Law*, last updated in November 2010.

[10] See D. MÜLLER, *La protection de l'actionnaire en droit international*, Pedone, 2015; G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, Cambridge University Press, 2020; L. VANHONNAEKER. *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press, 2020; G. MINERVINI, *Shareholder Claims in International Law*, Giappichelli, 2024.

[11] For an overview, see: A. CHARMAN, J. DU TOIT, *Shareholder Actions*, 2nd edition, Bloomsbury, 2017, p. 157 ff.; V. JOFFE ET AL., *Minority Shareholders: Law, Practice, and Procedure*, 6th edition, Oxford University Press, 2018, p. 123 ff.

[12] In this respect, see, *ex multis*: R. REN, "Shareholder reflective loss: a bogeyman in investment treaty arbitration?", in *Arbitration International*, 2023, pp. 425-444; A. SURAWEERA, "Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States", in *ICSID Review*, 2023, pp. 595-624; T. GAZZINI, A. PIETROBON, "Parallel Proceedings Concerning Investment and Human Rights Claims", in R. BUCHAN, D. FRANCHINI, N. TSAGOURIAS (eds), *The Changing Character of International Dispute Settlement. Challenges and Prospects*, Cambridge, 2023, pp. 45-75.

2. The main arguments of the parties and the tribunal's decision

The core issue of the award concerned whether, under Article 1116 of the NAFTA, the Claimants as shareholders of Integradora were entitled to bring reflective loss claims, that is to say, to request compensation for the drop in value of the shares allegedly caused by the measures taken by Mexican authorities against the corporation and its subsidiaries. To this effect, the parties' arguments built upon opposite understandings of the text of Article 1116, headed «Claim by an Investor of a Party on Its Own Behalf», according to which:

> 1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation [...] and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

At the same time, the discussion also revolved around the relationship between Article 1116 and Article 1117, which – under the head «Claim by an Investor of a Party on Behalf of an Enterprise» – provides that:

> 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation [...] and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

By looking at these two provisions, it is quite apparent that the NAFTA provided investors with a double path: on the one hand, under the first rule, an investor could act in its own name, claiming that it suffered a loss or damage as a consequence of the host State's conduct; on the other hand, pursuant to Article 1117 of the NAFTA, the same investor might commence proceedings on behalf of a corporation it controls or owns, the latter being known as derivative claim.[13] In such a scenario, therefore, the arbitral tribunal was called to ascertain the requirements according to which the Claimants – both physical and legal persons[14] – had legal standing to sue the Mexican State.
As far as the Claimants are concerned, they contended that a share loss in value could well be recovered through Article 1116 of the NAFTA, stressing that

> it would have made little sense for the NAFTA Parties to afford the protection to shares in a local enterprise, and to have granted an investor that has made a protected investment the ability to claim for damages, if

[13] Through derivative actions, the shareholders are entitled to litigate a claim of the corporation, seeking remedy on behalf of the legal entity. For an analysis, see: A. REISBERG, *Derivative Actions and Corporate Governance*, Oxford University Press, 2007; A.K. KOH, S.S. TANG, "Direct and derivative shareholder suits: towards a functional and practical taxonomy", in A. AFSHARIPOUR, M. GELTER (eds), *Comparative Corporate Governance*, Edward Elgar, 2021, pp. 431-453.
[14] *Alicia Grace et al. v. The United Mexican Case*, Final Award, cit., para. 2.

> that investor was prohibited from making claims to recover for the so-called 'reflective loss'.[15]

At the same time, the Claimants argued that a finding denying the recoverability of reflective losses would be «contrary to the plain language of the NAFTA's text, as well as the Treaty's object and purpose».[16] In their view, indeed, «[t]here [was] simply no basis for reading into these provisions an additional restriction preventing investors from claiming 'reflective loss'».[17] To further advance such interpretation, the Claimants also recalled the well-established case law of NAFTA tribunals, which «have overwhelmingly declined to adopt the restrictive interpretation of Articles 1116 and 1117 advocated by México»:[18] *Pope & Talbot* and *GAMI v. Mexico* were cited to this effect.[19]

The Respondent State, on its part, denied that a claim concerning measures affecting the rights of the corporation could be brought by shareholders acting in their own name under Article 1116 of the NAFTA, to the extent that «it is a well-established legal principle that a company has a legal personality of its own and its assets do not belong to its shareholders in a proportion equivalent to their shareholding».[20] According to Mexican authorities, indeed, the mechanism under Article 1116 could only be used by the Claimants in case their personal rights *qua* shareholders had been affected by the allegedly wrongful measures.[21]

While the Claimants relied upon the case law of investment tribunals to support their position, the Respondent State recalled the decisions in the matter of diplomatic protection to argue that reflective loss claims are inadmissible,[22] so as to avoid «[t]he confusion of uncoordinated and parallel remedies».[23] According to Mexico, all the claims fell outside the jurisdiction of the arbitral tribunal, as the only exception to the general rule that shareholders lack standing to bring claims for measures affecting their corporation was to be found in the derivative action under Article 1117 of the NAFTA. In the view of the Mexican authorities, indeed, no other rule having the nature of *lex specialis* could be found to allow the case to proceed.

Interestingly, both Canada and the United States of America (USA) resorted to their right under Article 1128 of the NAFTA to «make submissions to a Tribunal on a question of interpretation of this Agreement». In greater detail, the former contended that no derogation from customary international law and «general principles of corporate law recognized by domestic legal systems»[24] could be found in Article 1116, thus preventing

[15] *Ibid*., para. 178.
[16] *Alicia Grace et al. v. The United Mexican Case*, Claimants' Reply, 22 March 2021, para 2.
[17] *Ibid*., para. 522.
[18] *Ibid*., para. 530.
[19] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL (1976), Award in Respect to Damages, 31 May 2002; *GAMI Investments Inc. v. United Mexican States*, UNCITRAL (1976), Final Award, 15 November 2004).
[20] *Alicia Grace et al. v. The United Mexican Case*, Final Award, cit., para. 233.
[21] *Ibid*., para. 250.
[22] *Alicia Grace et al. v. The United Mexican Case*, Statement of Defence (Spanish) 1 June 2020, para. 532.
[23] E. JIMENEZ DE ARECHAGA, "Diplomatic Protection of Shareholder in International Law", in *Philippine International Law Journal*, 1965, p. 76.
[24] *Alicia Grace et al. v. The United Mexican Case*, Final Award, cit., para. 307.

a shareholder from claiming «for losses incurred by an enterprise it owns and controls».[25] This was all the more true in light of Article 1117, which actually derogated from customary international law: in this respect, the Canadian Government argued that the admissibility of reflective loss claims under Article 1116 «would render Article 1117 redundant».[26] Moreover, Canada stressed that ignoring the distinction between the two provisions of the NAFTA would actually increase the risks of double recovery, conflicting outcomes, as well as prejudices to creditors, banks and other stakeholders of the corporation.[27]

Similar arguments were advanced by the USA, which contended that Articles 1116 and 1117 were «drafted purposefully in light of two existing principles of customary international law addressing the status of corporations»:[28] on the one hand, the general prohibition for the shareholders to claim losses suffered as a consequence of the damage endured by the company whose shares they hold;[29] on the other hand, the principle according to which an international claim cannot be pursued against a State on behalf of its own nationals.[30] It is against the background of this second principle that the exception under Article 1117, but only that one, was enshrined in the NAFTA. To ignore such a distinction, thus allowing shareholders to claim reflective losses under Article 1116, would «render the above framework ineffective»[31] and put at risks the interests of third parties such as corporate creditors and other stakeholders.

Having considered all the arguments put forward by the Parties, the arbitral tribunal recalled the need to interpret the provisions of the NAFTA in accordance with Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties ('VCLT').[32] At the same time, while acknowledging that NAFTA tribunals have traditionally interpreted Article 1116 so as to allow shareholder claims for reflective loss, the arbitrators stressed that various decisions cited by the Claimants were more than fifteen years old.[33] Moreover, the tribunal pointed out the failure by some of the tribunals to properly engage in treaty interpretation as required by the VCLT.

Moving from these considerations, the arbitrators stressed the need to read Articles 1116 and 1117 in conjunction, since «they provide an immediate context to each other».[34] In this respect, the tribunal concluded that the former exclusively covered injuries against the investors as such (for the purposes of the shareholders, this meaning any – but only – interferences with their personal rights), while the latter «governs the capacity of investors to appear on behalf of a specific third party […], articulating allegations that the

[25] *Ibid*.
[26] *Alicia Grace et al. v. The United Mexican Case*, Article 1128 Submission of the Government of Canada, 24 August 2021, para. 18.
[27] *Ibid*., paras 20-22.
[28] *Alicia Grace et al. v. The United Mexican Case*, Article 1128 Submission of the United States of America, 24 August 2021, para. 17.
[29] *Ibid*., para. 17.
[30] *Ibid*., para. 20.
[31] *Ibid*., para. 29.
[32] *Alicia Grace et al. v. The United Mexican Case*, Final Award, cit., para. 518.
[33] *Ibid*., para. 520.
[34] *Ibid*., para. 522.

host State has breached any of the NAFTA provisions dedicated to the protection of investments specified therein».[35]

To bolster up such a conclusion, the arbitral tribunal also relied upon the subsequent practice of the NAFTA Contracting Parties *ex* Article 31(3)(b) of the VCLT, deemed to be the «most persuasive and compelling element in the interpretation of Articles 1116(1) and 1117(1)».[36] In this respect, the arbitrators found that Canada, Mexico and the USA had consistently manifested their views on the inadmissibility of shareholder claims for reflective loss under Article 1116. Therefore, the only way for the shareholders to lodge a complaint for measures affecting the corporation in which they own shares was the derivative action enshrined in Article 1117.

Having ascertained the proper interpretation of the relevant provisions regulating the legal standing under the NAFTA, the arbitral tribunal found that, under Article 1116, it lacked jurisdiction to hear the claims put forward by the shareholders against measures affecting the corporation.[37] Similarly, the arbitrators deemed that the Claimants could not avail themselves of the remedy under Article 1117, inasmuch as they did not either control or own the affected corporation. In light of the foregoing, the tribunal dismissed all the claims in their entirety.[38]

3. The *Alicia Grace* award on shareholder claims for reflective loss: a critical assessment

In his book *The International Law of Investment Claims*, Zachary Douglas authoritatively claimed that «[p]erhaps the single greatest misconception that has plagued the investment treaty jurisprudence to date concerns the problem of claims by shareholders».[39] Indeed, to say that shareholders *qua* foreign investors are entitled to commence proceedings before investment tribunals since the shares they hold in a corporation are protected investments under the relevant treaty is far from being the end of the reasoning process.

As pointed out by Mark Clodfelter and Joseph Klinger, the fact that under most investment treaties shareholders qualify as investors and their shares as investments, thus having the chance to resort to arbitration in case of alleged breaches, «simply does not answer the distinct questions of what rights adhere to share ownership and the types of harm for which shareholders have standing to claim».[40] Instead, it is a matter of understanding how the international legal order and, for the purposes of our analysis, international investment law shapes and regulates the complex relationship between a corporation and its shareholders. This is anything but a new issue.

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[35] *Ibid*., para. 532.
[36] *Ibid*.
[37] *Ibid*., para. 543.
[38] *Ibid*., para. 546.
[39] Z. DOUGLAS, *The International Law of Investment Claims*, Cambridge University Press, 2009, p. 398.
[40] M.A. CLODFELTER, J.D. KLINGER, "Reflective Loss and Its Limits under International Investment Law", in C.L. BEHARRY (ed.), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*, Brill, 2018, pp. 57-80, at 62 (italics added).

Back in the 1960's, the International Court of Justice ('ICJ'), in its judgment on the preliminary objections raised by Spain in the *Barcelona Traction* case, questioned precisely «whether international law recognizes for the shareholders in a company a separate and independent right or interest in respect of damage done to the company by a foreign government; and if so to what extent and in what circumstances».[41] When deciding the merits of the dispute, the ICJ came to the conclusion that – under the law of diplomatic protection – only the State of nationality of the corporation was entitled to commence proceedings concerning damages allegedly suffered by the enterprise.[42]

To this effect, the Court rejected the Belgian contention that a State has always the right to act in diplomatic protection of its national shareholders in a foreign corporation even if the lamented acts, being directed against the legal entity, only affect the value of the shareholding. According to the ICJ, such a course of action was allowed under general international law only in some specific circumstances, as an exception to the general prohibition. Despite receiving harsh criticism for its decision in *Barcelona Traction*,[43] the ICJ restated such a rule in *Diallo*,[44] when saying that «only the State of nationality may exercise diplomatic protection on behalf of the company when its rights are injured by a wrongful act of another State».[45]

Interestingly, in deciding the issue under general international law, the Court argued that «international law [was] called upon to recognize institutions of municipal law that have an important and extensive role in the international field».[46] Accordingly, the Court adopted the municipal law clear-cut distinction between the rights of the corporation and the personal rights of the shareholders. In doing so, it has been contended that the ICJ resorted to general principles *in foro domestico* under Article 38(1)(c) of its Statue so as to identify a suitable rule for the legal standing of shareholders under general international law.[47] While providing an in-depth analysis of the arguments employed by the Court to this effect falls out of the scope of the present comment, suffice to mention that the municipal law rationale underlying the prohibition of reflective loss claims could be also applied in the international legal order.[48]

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[41] International Court of Justice, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Judgment, 24 July 1964, in *ICJ Reports* 1964, p. 44.

[42] International Court of Justice, *Barcelona Traction*, Judgment, 5 February 1970, in *ICJ Reports* 1970.

[43] See, *ex multis*: H. CLAY, "Recent Developments in the Protection of American Shareholders' Interests in Foreign Corporations", in *Georgetown Law Journal*, 1956, pp. 1-19; R.B. LILLICH, "Two Perspectives on the Barcelona Traction Case: The Rigidity of Barcelona", in *American Journal of International Law*, 1971, p. 524; R. HIGGINS, "Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.", in *Virginia Journal of International Law*, 1971, pp. 327-343; S.A. KUBIATOWSKI, "The Case of Elettronica Sicula S.p.A: Toward Greater Protection of Shareholders' Rights in Foreign Investments", in *Columbia Journal of Transnational Law*, 1997, pp. 215-244.

[44] International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections Judgment, 24 May 2007, in *ICJ Reports* 2007.

[45] International Court of Justice, *Ahmadou Sadio Diallo*, Preliminary Objections Judgment, cit., para. 61.

[46] International Court of Justice, *Barcelona Traction*, Judgment, 5 February 1970, cit., para. 38.

[47] In this sense, International Law Commission, "Third Report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur", 18 April 2022, A/CN.4/753, para. 39 ff. See also, L. CAFLISCH, "The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1971, p. 172.

[48] E. JIMENEZ DE ARECHAGA, "Diplomatic Protection of Shareholder in International Law", cit., p. 76.

In our recent study on this subject, indeed, it has been argued that the prohibition to claim for reflective loss – a rule that can be found in domestic legal orders from all around the world – is not based on a mandatory interpretation of the law, but rather on compelling reasons of legal policy.[49] In other words, the prohibition for shareholders to sue a wrongdoer for damages suffered by the enterprise is not mandated by the rules concerning the separate legal personality of corporations or the law of civil responsibility. Quite the opposite, the rule is nothing but the free choice of national legislators to uphold certain interests that are deemed worthy of protection, such as the safeguard of creditors and other stakeholders of the corporation, the avoidance of multiple proceedings and double recovery, as well as the need to ensure corporate governance. These legal policy reasons apply within the international legal order as well. After all, as argued by Mervyn Jones in 1949, if reflective losses were recoverable «the results would be just as chaotic on the international plane as they would be under municipal law if any group of shareholders were allowed to sue in any case where the company has sustained damage».[50]

Against this background, the current situation in investment arbitration may appear, to some extent, paradoxical: what is convincingly prohibited under domestic and general international law is instead permissible in international investment law. In short, under investment agreements, as generally interpreted by arbitral tribunals, shareholders are entitled to commence proceedings against the host State whenever the rights of a corporation are infringed upon. Investment treaties, therefore, are deemed to provide shareholders with an autonomous cause of action to claim for damages resulting from an unlawful act against the enterprise whose shares they hold.[51] Starting there, the analysis has now to consider how the overturn of the prohibition took place, disregarding the concerns that, under both municipal and general international law, uphold the separation between the rights of corporations and those of the shareholders.

To this end, it is all the more necessary to look at the case law of arbitral tribunals. Indeed, to the extent that – as well highlighted by Lukas Vanhonnaeker – «the vast majority of investment treaties and applicable procedural rules are silent on the question of shareholders' claims for reflective loss»,[52] it is only by scrutinizing the reasoning employed by arbitrators that one can properly understand how the general admissibility of such claims was established. The relevant steps in the practice of investment arbitration shall be thus briefly traced back.

In *AAPL v. Sri Lanka*,[53] the tribunal was called to rule on the admissibility of reflective loss claims for the first time. The dispute concerned the destruction, by the Sri Lankan security forces, of a farm owned by a local vehicle in which the claimant held shares. Since the investment consisted in shares, the tribunal clarified that «[t]he scope of the international law protection granted to the foreign investor in the present case is limited to a single

[49] G. MINERVINI, *Shareholder Claims for Reflective Loss*, cit., pp. 66-68.

[50] J.M. JONES, "Claims on Behalf of Nationals Who are Shareholders in Foreign Companies", in *British Yearbook of International Law*, 1949, p. 234.

[51] G. BOTTINI, *Admissibility of Shareholder Claims under Investment Treaties*, cit., p. 154.

[52] L. VANHONNAEKER. *Shareholders' Claims for Reflective Loss in International Investment Law*, cit., p. 103.

[53] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990

item: the value of his share-holding in the joint-venture entity».[54] To put it otherwise, the tribunal found that the only damage that could be compensated to the shareholder was the loss in value of its shares following the wrongful act of the respondent State against the local vehicle. However, to the extent that the Respondent State did not challenge the standing of the applicant, the tribunal did not really delve in the issue.

A more reasoned analysis on shareholder claims for reflective loss was provided by the tribunal in *CMS v. Argentina*, a case arising from the well-known sovereign debt crisis of Argentina. When, in July 2001, the corporation commenced arbitral proceedings, the Respondent State contested the admissibility of the claims, since the rights allegedly affected were those of TGN, a local subsidiary of CMS, and not those of the latter. To rule on such an objection, the arbitrators moved from general international law. In this regard, they excluded the relevance of *Barcelona Traction*, since the case was deemed only to concern with the exercise of diplomatic protection in favour of a corporation possessing the nationality of a third State. Even more, the Tribunal argued that recent State practice had shifted towards a different direction to the extent that the «*lex specialis* in this respect is so prevalent that it can now be considered the general rule».[55] Put it another way, the very rule of general international law had changed its content: from a general prohibition to bring reflective loss claims to a general admissibility of them.

The relevance of *Barcelona Traction* was also discussed in *Suez v. Argentina*,[56] with the tribunal coming to the conclusion that the ruling rendered by the ICJ

> is not controlling in the present case. That decision [...] concerned diplomatic protection of its nationals by a State, an issue that is in no way relevant to the current case. Unlike the present case, Barcelona Traction did not involve a bilateral treaty which specifically provides that shareholders are investors and as such are entitled to have recourse to international arbitration to protect their shares.[57]

While it is undeniable that the *Suez* case did not concern diplomatic protection, the reasoning of the arbitral tribunal is far from convincing. Once again, to say that shareholders are investors under the relevant treaty does not answer the question as to whether they are entitled to claim reflective loss. Quite the opposite, by considering the rule of general international law under Article 31(3)(c) of the VCLT, one could argue that – unless a derogation is found somewhere in the treaty – the latter should be interpreted in accordance with the prohibition of reflective loss claims.

Be that as it may, the reality is that investment tribunals «have assumed that the broad meaning of 'investment' is so encompassing that it would, without difficulty, allow a shareholder to claim in its own right damage suffered by investing in an enterprise».[58] In

[54] *Ibid*., para. 95.
[55] *Ibid*., para. 48.
[56] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006.
[57] *Ibid*., para. 50.
[58] J. CHAISSE, L.Z. LI, "Shareholder Protection Reloaded. Redesigning the Matrix of Shareholder Claims for Reflective Loss", in *Stanford Journal of International Law*, 2016, p. 63.

this respect, despite many authors arguing that the admissibility of reflective loss claims under investment treaties made the fortune of investor-State arbitration, it is apparent that such an approach puts at risk the viability of the system as a reliable mechanism to solve disputes. The conflicting outcomes in the *CME/Lauder* saga are just an example.[59] At the same time, the protection granted to indirect investments can give rise to a conundrum of multiple, either parallel or subsequent, proceedings that could be brought by all the rings of the corporate chain of a multinational enterprise.

It is precisely within this context that the *Alicia Grace* award should be read as a refreshing decision, having possibly a long-lasting impact on the whole system. In this respect, the approach of the tribunal is certainly to be praised for the attention paid to treaty interpretation under the VCLT. By reading Article 1116 of the NAFTA in light of Article 1117, the tribunal did nothing but upholding a contextual interpretation of the provisions, an operation that all arbitrators shall duly carry out. Even more, it is interesting to note that the arbitral tribunal did not rely upon the *jurisprudence constante* of investment arbitration which have assumed that the broad meaning of investment should be interpreted as allowing shareholders to claim reflective loss. Quite the opposite, the *Alicia Grace* award carefully delved into the arguments put forward by both the Claimants and the Respondent State in finding that reflective losses could not be recovered via the mechanism set up by Article 1116. In this respect, the tribunal did not conflate the issue as to whether the shareholders qualified as investors and the shares as investments with the question concerning what can actually be claimed by the shareholders.

On a concluding note, it shall not be overlooked the deference paid by the tribunal to the extensive practice of the Contracting Parties as supporting the inadmissibility of reflective loss claims. It is not the first time that NAFTA Parties have availed themselves of the right to make submissions under Article 1128: quite the opposite, they have consistently argued for a principled distinction between claims admissible under Article 1116 and those pursuant to Article 1117.[60] Similar arguments, after all, have been advanced also when NAFTA Parties acted as Respondent States.[61] Until now, however, arbitral tribunals had generally excluded their relevance as subsequent practice under Article 31(3)(b) of the VCLT.[62] In that respect, the decision of the tribunal in *Alicia Grace* represents a relevant development to be singled out.

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[59] *Ronald S. Lauder v. Czech Republic*, UNCITRAL (1976), Final Award, 3 September 2001; *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL (1976), Final Award, 14 March 2003.

[60] See *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (1976), 18 September 2001, paras 6-10; *GAMI Investments Inc. v. Mexico*, UNCITRAL (1976), Submission of the United States of America, 30 June 2003, paras 8-18; *Legacy Vulcan v. Mexico*, ICSID Case No. ARB/19/1, Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 7 June 2021, para. 29. See also the references provided in *Legacy Vulcan v. Mexico*, Submission of the United States of America, 7 June 2021, para. 23, footnote 45.

[61] See *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, U.S. Rejoinder on Competence and Liability, 1 October 2001, pp. 60-61; *GAMI Investments Inc. v. Mexico*, Statement of Defense, 24 November 2003, para. 167; *United Parcel Service of America, Inc. v. Government of Canada*, UNCITRAL (1976), Canada's Counter-Memorial (Merits Phase), 22 June 2005, paras 523-525.

[62] As for the requirements of Article 31(3)(b) VCLT, see: M. VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill, 2008, pp. 431-432; O. DÖRR, "Article 31. General rule of interpretation", in O. DÖRR, K. SCHMALENBACH (eds), *Vienna Convention on the Law of Treaties. A Commentary*, 2nd edition, Springer, 2018, p. 595 ff.

4. Concluding remarks

As discussed, the *Alicia Grace* award found that, under Article 1116 of the NAFTA, shareholders *qua* investors were not entitled to commence proceedings against the Respondent State so as to recover the share drop in value resulting from the damage suffered by the corporation: that is, to claim reflective loss. This appears a convincing and sound conclusion, which is based on a contextual interpretation of Articles 1116 and 1117, one in light of the other, aimed at preserving the balance of the treaty obligations negotiated by the NAFTA Contracting Parties.

In this respect, the decision of the tribunal deserves to be praised for two main reasons. On the one hand, indeed, provisions such as those enshrined in Articles 1116 and 1117 can be found in other investment treaties, thus making the *Alicia Grace* award quite a relevant precedent: suffice to mention Article 10.16 of the Central America-Dominican Republic Free Trade Agreement (DR-CAFTA),[63] Article 11.16 of the Free Trade Agreement between the United States of America and the Republic of Korea (Korea-US FTA),[64] and Article 14.D.3 of the United States-Mexico-Canada Agreement (USMCA).[65] Interestingly, both Article 10.16 of the DR-CAFTA and Article 11.16 of the Korea-US FTA were recently interpreted, respectively in *Kappes and Kappes v. Guatemala*[66] and *Mason Capital v. South Korea*,[67] so as to allow the shareholders to bring reflective loss claims in their own name. This resulted, in our view, in the undermining of the mechanisms enshrined in both treaties to avoid parallel proceedings and possible prejudice to third parties, including other stakeholders and creditors of the corporations. Hopefully, the award under scrutiny may pave the way for a different interpretation of such provisions.

On the other hand, despite the tribunal itself «caution[ed] against extrapolating its conclusions beyond the confines of the NAFTA»,[68] it is submitted that the critical stance of the arbitrators on the admissibility of shareholder claims for reflective loss should well inform the reasoning of other tribunals dealing with the same subject matter. This does not mean that reflective losses shall be ruled out in all and any circumstance: needless to say, attention shall always and foremost be paid to the text of the governing treaty. However, to the extent that many investment treaties are silent as to whether claims for reflective loss are admissible, the rationale behind this decision might contribute to the current debate concerning the need to reform shareholder claims, to ensure the legitimacy and viability of investment arbitration as a dispute settlement mechanism.

[63] Central America-Dominican Republic Free Trade Agreement, signed 16 April 1998, entry into force 3 October 2001.

[64] Free Trade Agreement between the United States of America and the Republic of Korea, signed 30 June 2006, entry into force 15 March 2012.

[65] United States-Mexico-Canada Agreement, signed 30 November 2018, entry into force 1 July 2020.

[66] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on the Respondent's Preliminary Objection, 13 March 2020.

[67] *Mason Capital L.P. (U.S.A.) 2. Mason Management LLC (U.S.A.) v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent's Preliminary Objections, 22 December 2019.

[68] *Alicia Grace v. Mexico*, Award, cit., para. 541.