Lukas Vanhonnaeker. ***Shareholders' Claims for Reflective Loss in International Investment Law***. Cambridge: Cambridge University Press, 2020. Pp. xxxvii, 391. ISBN: 978-1-108-48943-0.

Whether shareholders should be able to bring claims for breaches of company rights has been, and remains, a highly debated issue in legal doctrine, case law and state practice. While having 'a long but uncertain past in international practice',[1] it still fascinates generations of lawyers and animates a lively debate – and hundreds of pages of books and articles – between legal practitioners, judges, arbitrators and academics. The rather widespread, sometimes unqualified, acceptance of claims brought by shareholders before investment arbitration tribunals has added some new fuel to the fire that seemed to have slowly faded after the *Barcelona Traction* and *Elettronica Sicula* cases before the International Court of Justice (ICJ).[2] More recently, states and other stakeholders have started to return to this controversial issue in the framework of the long-lasting discussions on the necessary – or maybe only desirable or desired – reform of the investment arbitration system organized by the United Nations Commission on International Trade Law (UNCITRAL).

Lukas Vanhonnaeker's book constitutes without doubt a useful contribution to the ongoing controversy. The academic debate between those who support a liberal approach to shareholder claims[3] and those that are more reluctant to grant shareholders a right or standing to claim for reflective loss[4] is ongoing; Vanhonnaeker's analysis offers an important defence of the first approach. It is of course largely overshadowed by a growing hostility against investment arbitration as such and, certainly, against reflective loss claims: the discussions in UNCITRAL Working Group III now clearly point to restricting reflective loss claims, even if it remains to be seen how this restriction will eventually be put into place.[5]

1 ICSID, *Pan American and BP Argentina v. Argentine Republic – Decision on Jurisdiction*, 27 July 2006, ICSID Case nos ARB/03/13 and ARB/04/8, para. 214.

2 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 5 February 1970, ICJ Reports (1970) 3; *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, ICJ Reports (1989) 15.

3 See, e.g., Ren, 'Shareholder Reflective Loss: A Bogeyman in Investment Treaty Arbitration?', 39(3) *Arbitration international* (2023) 425.

4 See, e.g., G. Bottini, *Admissibility of Shareholder Claims under Investment Treaties* (2020); Suraweera, 'Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States', 38(3) *ICSID Review – Foreign Investment Law Journal* (2023) 595; Kyriakou, 'Mitigating the Risks Entailed in Shareholders' Claims for Reflective Loss: Suggestions for Investment Treaty Reform', 19(4) *Journal of World Investment and Trade* (2018) 693; Arato *et al.*, 'Reforming Shareholder Claims in Investor-state Dispute Settlement', 14(2) *Journal of International Dispute Settlement* (2023) 242.

5 See, in particular, Draft Provision 10 (Shareholder Claims) of the UNCITRAL Working Group III's Draft Provisions on Procedural and Cross-cutting Issues, reprinted in UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural and Cross-cutting Issues: Note of the Secretariat, UN Doc. A/CN.9/WG.III/WP.231 (2023), at 6; Annotations to the Draft Provisions on Procedural and Cross-cutting Issues, Note by the Secretariat, UN Doc. A/CN.9/WG.III/WP.231 (2023), at 7; see also UNCITRAL, Report of Working Group III on the Work of Its Thirty-ninth Session (Vienna, 59 October 2020), UN Doc. A/CN.9/1044 (2020), paras 41–56; Shareholder Claims and Reflective Loss: Note by the Secretariat, UN Doc. A/CN.9/WG.III/WP.170 (2019); Organisation for Economic Co-operation and Development (OECD), Shareholder Claims for Reflective Loss in Investment State Dispute Settlement: A 'Component-by-Component' Approach to Reform Proposals, Informal Discussion Paper, December 2021.

In this rather discouraging setting, the aim of the book is ambitious: to demonstrate why claims of shareholders for damages that are merely reflective of the loss suffered by the company in which they hold shares (such as a reduction in the value of their shares) should be accepted. In fact, according to Vanhonnaeker, this '*should be* the prevailing legal principle to adequately pursue the key objectives of international investment law' (at 12; emphasis added). The author's analysis is based on the premise that, given the increasing importance of often complex corporate structures through which investments are channelled – for more or less obvious and respectable reasons – the legitimacy of the system of investment arbitration is linked to, and measured against, the possibility of protecting the 'real parties in interest' (at 18). By allowing shareholders to recover losses incurred by the cooperate entity in which they hold shares, international investment arbitration – in the eyes of the author – incentivizes foreign investors to engage in foreign investments 'knowing that they have a way to enforce their rights when their company incorporated in a foreign country incurs a loss' (*ibid.*).

Municipal legal systems rather consistently preclude shareholder claims for reflective loss, as the author confirms through a *tour d'horizon* of common law and continental legal systems. Indeed, there seems to be no reason to disregard the separate legal personality of a corporate entity that is better placed to bring claims aiming at repairing injury to the benefit and in the interest of all concerned: shareholders and creditors. It is also accepted that general international law – at least the rules established by the ICJ in the *Barcelona Traction* case – relies on general principles of corporate law and the separate nature of the legal entity *vis-à-vis* its shareholders.[6] As the Court recognized, 'a wrong done to the company frequently causes prejudice to its shareholders'.[7] Yet this is not sufficient to grant a claim for compensation to shareholders. Because, as the Court continued, '[n]ot a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected'.[8] For this reason, it is the corporate entity – or, under the rules of diplomatic protection, the state of nationality of the company – that must institute the appropriate action for redress because, 'although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed'.[9] This does of course create situations under general international law in which shareholders might be entirely deprived of any protection for wrongful acts committed by a state *vis-à-vis* a locally incorporated company.

It is true – and this is certainly the reason for the criticisms now raised against investment arbitration – that investment arbitration tribunals have moved beyond general international and municipal law and paved the way for reflective loss claims to succeed on the basis of international investment agreements. Yet this is not the result of any particularly legal policy pursued by those tribunals and its members, nor does it

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

7 *Ibid.*, at 35, para. 44.

8 *Ibid.*, at 36, para. 46.

9 *Ibid.*, at 35, para. 44.

seem necessary to ensure the promotion and protection of foreign investments (as the author seems to suggest throughout the book). It is largely the result of the different law applicable to shareholder claims and, more generally, of the changing content of the relevant investment protection agreements. The author rightly underlines that, rather than simply putting aside the municipal law principle prohibiting or restraining claims for reflective loss – as seems to be the understanding of some stakeholders in the discussions on the investment arbitration reform[10] – under (some) international investment agreements, '[t]he rights at issue in shareholders' claims for reflective loss belong to the shareholders and not to the company' (at 32). Depending on the actual content and wording of the relevant international investment agreement, shareholders do not only enjoy rights as shareholders (that is, direct shareholder rights, like the right to declared dividends or the right to vote) but also rights in respect of assets that they own or control through their shareholding in corporate entities.[11] The mere inclusion of 'shares' in the treaty definitions of 'investment' might not be sufficient to create such rights in respect of assets of the company.[12] However, as shown in some decisions,[13] the fact that an investment can be owned or controlled by an investor not only directly (through direct ownership) but also indirectly (through interests and shares in corporate entities) creates new treaty rights, which can be vindicated by investor shareholders under the relevant international investment instrument.

Rather than an inherently justifiable and necessary deviation from generally accepted corporate rules,[14] the possibility for shareholders to bring claims in respect of assets of the corporate entity and loss caused to them by host state measures has been recognized by states themselves, which have formulated rules to this effect in international investment agreements. Arbitral decisions recognizing indirect shareholder claims are nothing more – and nothing less – than a faithful translation of what states, when they are drafting investment agreements, consider a policy objective to be pursued through the relevant legal rules and process. Whether the legal rules thus created are justified under larger policy considerations, and whether they give rise to difficulties in their concrete implementation, is a different question. It is certainly not for arbitral tribunals to remedy potential shortcomings by simply refusing indirect shareholder claims where these are firmly established in the relevant international investment agreement (at 11, 53).

Such claims do create difficulties and challenge the existing system of arbitration though. The author identifies several potential shortcomings, mainly borrowing from what he considers to be policy considerations against reflective loss claims in municipal legal orders or in general international law. They include the multiplication of

[10] OECD, *supra* note 5, at 710; Shareholder Claims and Reflective Loss, *supra* note 5, at 25.

[11] See also Smutny, 'Claims of Shareholders in International Investment Law', in C. Binder *et al.* (eds), *International Investment Law for the 21st Century* (2009) 363, at 373.

[12] ICSID, *El Paso v. Argentine Republic – Award*, 31 October 2011, ICSID Case no. ARB/03/15, para. 214.

[13] ICSID, *Azurix v. Argentine Republic – Annulment Decision*, 1 September 2009, ICSID Case no. ARB/01/12, para. 94.

[14] See also Suraweera, *supra* note 4.

claims concerning the same measure in respect of the same corporation, parallel proceedings, inconsistent decisions between different tribunals, increased costs and the allocation of damages and double recovery. These concerns have also been raised by stakeholders during the discussions about the reform of the investment arbitration system.[15] These considerations are not entirely new: the ICJ had already expressed similar concerns in the *Barcelona Traction* case, explaining that 'the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations', particularly with respect to companies with an international presence and whose shares are widely scattered and frequently change hands.[16] States were thus warned of the consequences of recognizing the far-reaching rights to shareholders, including the right to claim for damages that affect their investments in a corporate entity. However, the Court's warning did not prevent states from putting in place the system of investment protection that they now contest.

Vanhonnaeker embarks on 'the ambitious endeavor of finding answers and solutions, if any, to such risks' in his 'quest for a just and equitable framework for international investment law and arbitration which seeks to ensure that all the parties in interest are properly identified, acknowledged as such, and adequately protected' (at 237). His proposals stretch through a large spectrum of procedural mechanisms that, as he accepts, are far from perfect but could still constitute a toolbox to address difficulties and shortcomings. This is certainly the case with *res judicata*, issue estoppel or *lis pendens*. Although these three concepts could provide some useful guidance to address, and avoid, the multiplication of claims and inconsistent proceedings, they remain to be tested thoroughly in the particular system of investment arbitration operating with decentralized tribunals set up for specific individual cases. Three further options – consolidation, joinder or even 'mass claim' proceedings – offer similarly interesting avenues to tackle the issue of multiple claims by multiple shareholders concerning the same measure, resulting in forms of multi-party arbitration. Irrespective of their procedural shortcomings – in particular, in light of the necessary consent of the parties concerned – multi-party arbitrations, involving different legal instruments, are likely to render such proceedings extremely complex. Of course, as the author explains, the mere fact that remedial procedural actions render proceedings more complex, lengthy and costly is not in itself a reason not to try. The author takes a similar stance on the question of the calculation of damages and the avoidance of double recovery. Without questioning the inherent difficulties of determining and allocating damages for shareholder claims, he considers that 'means exist to assess the damage caused to particular shareholders and the remedies to which they are entitled' (at 349). At the end, the solution to this salient question is left to the appreciation and, if possible, coordination between arbitral tribunals.

However, while they are no doubt useful, one cannot but remain puzzled when reading the author's proposals for addressing the risks of multiple shareholder claims. If, indeed, as he consistently explains, proceedings should be joined or consolidated,

[15] Shareholder Claims and Reflective Loss, *supra* note 5, at 57.

[16] *Barcelona Traction*, *supra* note 2, at 49, para. 96.

or could even be barred procedurally by relying on *res judicata* or *lis pendens* because the interests of different claimant shareholders are largely identical or at least similar, then would it not be better for all those involved to address questions of responsibility and compensation in a single coordinated action of the company in the first place? The company after all represents the interest – the combined interest – of its shareholders. In line with this understanding, attempts to address the problems of multiple claims by proceeding from the position of the company remain attractive: Article 25(2)(b) of the ICSID Convention (which was adopted, as noted by the author, because of the uncertainties concerning direct claims of shareholders [at 112]) is one example; the determination of corporate nationality on the basis of control (as envisaged by several international investment agreements) or derivative claims are others.[17] These approaches are certainly not perfect either, but they adequately address and avoid some of the procedural shortcomings of direct shareholder claims for reflective loss. They might have deserved a fuller treatment in the book.

Nonetheless, one must applaud Vanhonnaeker for his study. It is a vigorous plea in defence of shareholder claims, which offers a thorough overview of the relevant case law, doctrine and policy arguments as well as a comparative perspective on the treatment of reflective loss in domestic and international law. Drawing on a wide range of sources and authorities, the book is a valuable contribution to the literature on international investment law and arbitration and a useful reference point for scholars, practitioners and policy-makers interested in the topic of shareholder claims. Whether the nuanced arguments advanced by Vanhonnaeker will be implemented is another matter. So far, it seems that, unfortunately, discussions in UNCITRAL Working Group III seem to favour the simpler response to the question that, as the author describes it, consists of 'simply discard[ing] the availability of shareholders' claims for reflective loss and, in an abstract manner, impose a general bar upon such claims' (at 237). In line with this, draft provision 10, favoured by UNCITRAL Working Group III, would allow only claims for direct loss, 'separate and distinct from any alleged loss or damage to the enterprise in which the shareholder holds shares'.[18] Whether this can adequately address the question remains doubtful. Only a more comprehensive review of the definition of 'investment' in international investment agreements, and a thorough reflection by states and stakeholders on the desirability of protecting investments owned or controlled indirectly through shareholding in corporate entities in light of the existing experience in arbitral proceedings, can provide lasting solutions and the necessary certainty.

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https://doi.org/10.1093/ejil/chae045

[17] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 1965, 575 UNTS 159.

[18] Draft Provision 10 (Shareholder Claims), *supra* note 5.