

THE LEGAL STANDING OF SHAREHOLDERS BEFORE ARBITRAL TRIBUNALS: HAS ANY RULE OF CUSTOMARY INTERNATIONAL LAW CRYSTALLISED?

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I. INTRODUCTION

States have concluded thousands of bilateral investment treaties (“BITS”) in the 1990s that regulate the treatment of foreign investors and their investments in the host State where an investment is made.¹ These investment treaties provide foreign investors with an unprecedented level of *substantive* legal protection over and above the usual protections otherwise

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1. According to United Nations Conference of Trade and Development (“UNCTAD”), *Recent Developments in International Investment Agreements (2006–June 2007)*, IIA MONITOR No. 3, at 2 (2007), available at http://www.unctad.org/en/docs/webiteiia20076_en.pdf, there were 2,573 treaties at the end of 2006. It should also be noted that States have also entered a limited number of multilateral investment agreements at the regional level, for instance, the North American Free Trade Agreement (“NAFTA”). North American Free Trade Agreement [NAFTA], U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

available to them.² BITs also offer groundbreaking *procedural* benefits to foreign investors by allowing them to submit their disputes with the host State *directly* to an international arbitral tribunal.

One area of the law on foreign investments where significant new developments have occurred in recent decades is the legal standing of shareholders of corporations investing abroad to submit claims to arbitral tribunals constituted under investment treaties.³ The focus of this Article is *not* to systematically analyse the legal standing of shareholders under these treaties. This question has recently received the attention of several scholars,⁴ including the present Author.⁵ As summarised by Alexandrov, “it is beyond doubt that shareholders have standing in [International Centre for Settlement of Investment Disputes (“ICSID”)] to submit claims separate and independent from the claims of the corporation” and “this principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.”⁶

This Article focuses instead on whether or not any rule of *customary international law* has emerged concerning the protection of shareholders and their legal standing before arbitral tribunals. The first Section offers an overview of the legal standing under investment treaties of different actors typically involved in foreign investment, including majority and minority

2. Apart from the legal protection existing under custom, other types of protection can also be found in the host State’s legislation on investment, and sometimes, in contracts entered into directly between a foreign investor and the host State (or a State-owned entity).

3. In this Article, the term “shareholder” is used in its general meaning. It includes both physical persons as well as legal persons (i.e. corporations or partnerships) owning shares or other forms of participation in another corporation. This Article does not intend to discuss so-called “portfolio investment,” which includes shares traded on stock markets. See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 227–28 (2d ed. 2004). The other related issue of bondholders will also not be examined; see P. Griffin & A. Farren, *How ICSID Can Protect Sovereign Bondholders?*, 24 INT’L FIN. L. REV. 21 (2005); Michael Waibel, *Opening Pandora’s Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT’L L. 711 (2007).

4. See, e.g., Stanimir A. Alexandrov, *The “Baby Boom” of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as Investors and Jurisdiction Ratione Temporis*, 4 L. & PRAC. INT’L CTS. & TRIBUNALS 19 (2005); Christopher Schreuer, *Shareholder Protection in International Investment Law*, 2 TRANSNAT’L DISP. MGMT. (2005); F.O. Vicuña, *The Protection of Shareholders Under International Law*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 161–70 (M. Ragazzi ed., 2005); Ian A. Laird, *A Community of Destiny: The Barcelona Traction Case and the Development of Shareholder Rights to Bring Investment Claims*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 77 (Todd Weiler ed., 2005); R. Doak Bishop, *Multiple Claimants in Investment Arbitration: Shareholders and Other Stakeholders*, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 239 (Belinda Macmahon ed., 2009).

5. M.J. Valasek & Patrick Dumberry, *Developments in the Legal Standing of Shareholders and Holding Companies in Investor-State Disputes* (forthcoming, 2010).

6. Alexandrov, *supra* note 4, at 30.

shareholders in corporations investing in the host State. The second Section contrasts the broad legal protection offered to corporations and their shareholders under modern investment treaties with the situation that has historically prevailed under international law. The third Section examines some authors claim that a new rule of customary international law has emerged providing shareholders with a procedural “right” to bring arbitration claims against the State where they make the investment.

In the present Author’s view, no such customary rule has crystallised. This is mainly because the scope and extent of legal protection offered to corporations and shareholders under BITs are not consistent enough to constitute the basis for any custom rule. There is also no evidence of any *opinio juris* in the context of investment treaties. Moreover, any such customary rule would be contrary to the general principle that corporations lack any automatic *jus standi* before international tribunals in the absence of specific State consent. It would also be contrary to the principle that an arbitral tribunal cannot exceed its powers.

II. LEGAL STANDING OF SHAREHOLDERS UNDER INVESTMENT TREATIES

As mentioned above, BITs regulate the treatment of one State’s foreign investors investing in the other State party to the treaty.⁷ They provide foreign investors with unprecedented level of *substantive* legal protection. These treaties normally provide for equal treatment of domestic and foreign investors (the so-called “national treatment” and “most-favoured-nation treatment” clauses), a minimum standard of treatment to investors (the obligation for the host State to provide a “fair and equitable treatment”) and compensation in case of expropriation of an investment by the host State.⁸ BITs also offer groundbreaking *procedural* benefits to foreign investors, such as the ability to resolve investment disputes by bringing arbitration claims *directly* against the States in which they invest. This aspect has rightly been described as “one of the most important progressive developments in the procedure of international law of the twentieth century.”⁹ In recent years, there has been a remarkable increase in the number of international arbitration cases involving disputes between foreign

7. Valasek & Dumbery, *supra* note 5.

8. W. Salacuse, *The Treatification of International Investment Law?*, 3 L. & BUS. REV. AM. 155.

9. Stephen M. Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law*, 3 TRANSNAT’L DISP. MGMT. 2 (2006). It can be argued that as a result of these changes, corporations can be deemed as (derived, limited, relative and functional) “subjects” of international law in the context of investor-State arbitration arising from BITs. See Patrick Dumbery, *L’entreprise, sujet de droit international? Retour sur la question à la lumière des développements récents du droit international des investissements*, 108 REV. GENERALE DE DROIT INT’L PUB. 103 (2004) (Fr.).

investors and States under these BITs. There are currently some 290 known investor-State arbitration cases pending.¹⁰

Ultimately, the legal standing of corporations (and their shareholders) to submit arbitration claims against the host State depends on the specific wording of the applicable legal instrument under which the arbitral tribunal is constituted. Before examining the procedural rights typically available for corporations and their shareholders under modern investment treaties, a few preliminary observations should be made about basic corporate structure and typical investment scenarios under which corporations invest in a foreign country.

The most straightforward option is, of course, that of a *direct* investment by a foreign corporation in the host State. Another common option involves the so-called “parent” corporation making an investment in a foreign country *through another corporation*, its wholly-owned subsidiary. Arbitral tribunals have recognised the right of a *parent* corporation to bring an arbitration claim against the host State for damages sustained by its local subsidiary.¹¹

In many countries, foreign investments are required to be channeled through a local corporation incorporated in the State where the investment is made. In general, such a local corporation *does not* have standing to file an arbitration claim against the host State under the ICSID Convention because it is not considered as a “foreign” investor.¹² As a matter of principle, a legal dispute between a local corporation and the host State should be settled before the local courts of that country. However, an exception to that principle is set out in Article 25(2)(b) of the ICSID Convention which allows under specific circumstances claims by local corporations.¹³ Based

10. UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA MONITOR No. 1 at 1, UNCTAD/WEB/ITE/IIA/2008/3 (2008) (based on a draft prepared by Federico Ortino). The statistic highlighted by this source is the most up to date figure as of this publication. As well, there are undoubtedly a large number of other investor-State disputes currently being settled by arbitration about which information is not publicly available. This is true for most cases where the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules and other *ad hoc* arbitration rules apply.

11. *Amco Asia Corp. v. Republic of Indonesia*, ICSID (W. Bank) Case No. ARB/81/1, ¶ 24 (Sept. 1983), *reprinted in* 23 I.L.M. 351 (1984).

12. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1975, 17 U.S.T. 1270, 575 U.N.T.S. 160 [hereinafter ICSID Convention], was entered into force in 1966, when it had been ratified by twenty State members of the World Bank, and established the International Centre for the Settlement of Investment Disputes (“ICSID”). The ICSID Convention’s primary aim is the promotion of economic development and the facilitation of private international investments through the creation of an impartial and reliable system for the settlement of disputes between foreign investors and States.

13. Int’l Bank for Reconstruction & Dev., *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, at art. 25, ICSID/15 (Oct. 14, 1966), available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [hereinafter ICSID Convention]. Where the element of foreign control is present, a

on the particular circumstances of the case, arbitral tribunals have allowed *locally-incorporated corporations* to bring a claim against the host State.¹⁴

In some other instances, the locally incorporated corporation is not fully-owned by the “parent” corporation. Sometimes that local corporation will be controlled not by a single corporation, but by several foreign corporations or individuals. In this case, one foreign corporation may hold the majority of the shares of the local corporation, while another or several others will be a “minority” or non-controlling) shareholder. Modern BITs typically contain a broad definition of the term “investment” that includes shares or other forms of participation in corporations within its scope. In such cases, tribunals have had no difficulty accepting that the participation by a corporation in a locally-incorporated corporation as an investment that is protected under the treaty. ICSID decisions show that there is no material distinction between majority and minority shareholders for jurisdictional purposes. A foreign corporation that is a shareholder with either a majority¹⁵ or a minority¹⁶ participation in a locally-incorporated corporation can typically submit a claim before an ICSID arbitral tribunal. It is also recognised in ICSID decisions that the right of a majority or minority shareholder to bring a claim is *independent* of that of the locally-incorporated corporation.¹⁷ In fact, decisions of several ICSID tribunals

locally-incorporated company that possesses the host State’s nationality may nevertheless be deemed to be a national of *another* contracting State and be allowed to submit a claim under the Convention provided that two conditions are fulfilled. *Id.* First, Article 25(1) states that there must be an agreement with the host State that reflects its undertaking to treat a locally-incorporated company that is foreign-controlled as a national of the State whose national controls the company. *Id.* Such agreement between the parties is usually found in an investment treaty or in a contract entered into directly between the foreign investor and the host State. *Id.* Second, Article 25(2)(b) states that the locally-incorporated company must also be effectively controlled by nationals of another Contracting State. *Id.* In other words, the objective element of “foreign control” must be present. *Id.*

14. See, e.g., *Aguas del Tunari et al. v. Republic of Bolivia*, ICSID (W. Bank) Case No. ARB/02/3 (Oct. 2005); *Autopista Concesionada de Venez., C.A. v. Bolivarian Republic of Venezuela*, ICSID (W. Bank) Case No. ARB/00/5 (Sept. 2001); see also *TSA Spectrum de Arg. S.A. v. Argentine Republic*, ICSID (W. Bank) Case No. ARB/05/5 (Dec. 2008).

15. *Antoine Goetz et al. v. Republic of Burundi*, ICSID (W. Bank) Case No. ARB/95/3, ¶ 89 (Feb. 1999); *Gas Natural SDG S.A. v. Argentine Republic*, ICSID (W. Bank) Case No. ARB/03/10 ¶¶ 9, 34 (June 2005).

16. *Asian Agricultural Products Ltd. v. Democratic Socialist Republic of Sri Lanka*, ICSID (W. Bank) Case No. ARB/87/3 (June 1990); see *Lanco Int’l, Inc. v. Argentine Republic*, ICSID (W. Bank) Case No. ARB/97/6 (Dec. 1998); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID (W. Bank) Case No. ARB/01/8 ¶ 47 (July 2003); *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID (W. Bank) Case No. ARB/01/3, ¶¶ 44, 49 (Jan. 2004); *Gami Investments, Inc. v. Mexico*, ¶ 37, UNCITRAL (Nov. 2004).

17. *Suez, Sociedad General de Aguas de Barcelona S.A. & InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID (W. Bank) Case No. ARB/03/17, ¶ 51 (May 2006); *Enron*, *supra* note 16, ¶¶ 39, 49.

also show that minority and majority shareholders can each submit their *own distinct claims* in connection with the same events.¹⁸

Another slightly more complicated, but common, investment scenario is the following: a foreign investor (the “parent” corporation) does *not* make its investment in the host State directly with the locally-incorporated corporation, but instead *indirectly* through *another* “intermediate” corporation (or, sometimes, through several such corporations), which, in turn, has an interest in this local corporation. These intermediate corporations are often special-purpose “holding” or “shell” corporations. They usually have no significant assets or operations and are established for the sole purpose of owning shares of other corporations.¹⁹ Arbitral tribunals have recognised the right of a foreign investor to submit a claim for damages suffered by a local corporation in the host State even if its interest in such corporation is held indirectly.²⁰ This right for a foreign investor was also recognised by tribunals in cases where the intermediate corporation had neither the nationality of the investor nor that of the host State, but the nationality of a *third State*.²¹ Arbitral tribunals have also recognised the right of intermediate (“shell”) corporations to submit *their own claims* to arbitration for damages sustained by the locally-incorporated corporation.²²

In sum, BITs generally define the terms “investor” and “investment” very broadly and typically allow a foreign corporation that is a majority or a minority shareholder in a local corporation of the host State to submit an arbitration claim against that State. That right has even been recognised for investments made in the host State indirectly through one or several “intermediate” corporations.

18. *Sempra Energy Int’l v. Argentine Republic*, ICSID (W. Bank) Case No. ARB/02/16 (May 2005); *Camuzzi Int’l S.A. v. Argentine Republic*, ICSID (W. Bank) Case No. ARB/03/2 (May 2005).

19. Intermediate companies will sometimes be incorporated in another jurisdiction to benefit from a tax treaty with the host State or for other reasons (for example, the British Virgin Islands, Cyprus, the Netherlands, etc.).

20. *Siemens A.G. v. Argentine Republic*, ICSID (W. Bank) Case No. ARB/02/8, ¶ 137 (Aug. 2004); *Société Générale v. Dominican Republic*, LCIA Case No. UN 7927 ¶¶ 48, 51 (Sept. 2008). The Siemens case involved an intermediate corporation with the same nationality as the *claimant investor*. Tribunals have also had to decide cases where the intermediate corporation had the nationality of the *host State* of the investment. See *Enron*, *supra* note 16.

21. *Encana Corp. v. Ecuador*, LCIA Case No. UN 3481 ¶ 115 (Feb. 2006); *Waste Mgmt. v. United Mex. States*, ¶¶ 80, 85, UNCITRAL (Apr. 2004); *Azurix Corp. v. Argentine Rep.*, ICSID (W. Bank) Case No. ARB/01/12, ¶¶ 73-74 (Dec. 2003); *Ronald S. Lauder v. Czech Rep.*, UNCITRAL (Sept. 2001).

22. See *Saluka Investments BV (Neth.) v. Czech Rep.*, ¶ 226, UNCITRAL (Mar. 2006); *ADC Affiliate Ltd. & ADC & ADMC Management Ltd. v. Rep. of Hungary*, ICSID (W. Bank) Case No. ARB/03/16, ¶¶ 357–58 (Oct. 2006); *Aguas del Tunari*, *supra* note 14, ¶¶ 330–32.

III. IS THE *BARCELONA TRACTION* CASE STILL RELEVANT?

The broad procedural legal protection offered to corporations and their shareholders under modern investment treaties contrasts with the situation that has historically prevailed under international law. A good starting point to examine the rapid evolution of the rights of shareholders at international law is to recall the findings of the now classic *Barcelona Traction* case decided in 1970 by the International Court of Justice (“ICJ” or the “Court”). In that case, at issue was whether the Belgian shareholders of Barcelona Traction, a Canadian corporation, could have their claim against Spain for harm done to the corporation espoused by Belgium. The Court held that the nationality of a corporation is determined by its place of incorporation and where it has its registered office. Consequently, Belgium could not espouse the claim by Belgian shareholders against Spain. On the rights of shareholders under customary international law, the Court stated that:

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. . . . 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 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.²³

The Court’s holding suggests that foreign shareholders are not entitled to any international protection *independent* from that existing for a corporation affected by a wrongful act committed by a State.²⁴ Indeed, one author concluded at the time the judgment was rendered that “shareholders are powerless under international law, having no effective remedy for their injuries.”²⁵ However, it should be emphasised that the Court’s statement

23. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 4, 35 (Feb. 5.) [hereinafter *Barcelona Traction*]. The case has been recently “revisited” by authors, see G. Sacerdoti, *Barcelona Traction Revisited: Foreign-Owned and Controlled Companies in International Law*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE* 699–716 (Y. Dinstein ed., 1989); see Lawrence Jahoon Lee, *Barcelona Traction in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later*, 42 *STAN. J. INT’L L.* 237 (2006); see Laird, *supra* note 4; see generally Vaughan Lowe, *Shareholders’ Rights to Control and Manage: From Barcelona Traction to ELSI*, in *LIBER AMICORUM JUDGE SHIGERU ODA* 269, 269–84 (Nisuke Andō et al. eds., 2002).

24. The Court, however, recognized that there are some exceptions to that rule, for instance, when the shareholders’ rights are directly affected. *Barcelona Traction*, *supra* note 23, at 36. Or when the company has ceased to exist where it is incorporated. *Id.* at 40–41.

25. P.G. Lutz, *Diplomatic Protection of Corporations and Shareholders: Capacity of Government to Espouse Claims of Shareholders of a Foreign Corporation*, 1 *CAL. W. INT’L L.J.* 148, 148 (1970).

was made in the context of diplomatic protection rather than a claim brought under an investment protection treaty. In fact, the Court specifically explained that shareholders could have a remedy at international law whenever a breach of an investment treaty provision was involved.²⁶

Today, as explained above, the legal protection for shareholders of corporations investing abroad is offered through the existence of a growing number of bilateral and multilateral investment treaties. In the 2007 *Diallo* case, the ICJ recognised that in “contemporary international law” the question of the protection of the rights of shareholders is “essentially governed” by investment treaties and that “the role of diplomatic protection somewhat faded.”²⁷ In other words, investment treaties have generally replaced diplomatic protection in terms of legal protection offered to corporations and their shareholders investing abroad.²⁸ As a result, it has been suggested that “the *Barcelona Traction* case is no longer applicable or instructive as a statement of international law on the protection of foreign investment.”²⁹ Similarly, for Vicuña, “[i]t is hardly conceivable that general international law might still be identified with the *Barcelona Traction* findings.”³⁰

In the present Author’s view, the findings of the ICJ in the *Barcelona Traction* case are still pertinent today in the specific context of diplomatic protection.³¹ The Draft Articles on Diplomatic Protection adopted in 2006 by the International Law Commission confirm the classic principle (and its exceptions) on the protection of shareholders as set out in *Barcelona Traction*.³² As a matter of principle, the rule remains that “[a] State of

26. *Barcelona Traction*, *supra* note 23, at 47. Several ICSID tribunals have stated expressly that the findings of the ICJ in this case in the context of diplomatic protection are not applicable *per se* in the *different* context of investor-State disputes under investment treaties. See CMS Gas, *supra* note 16, ¶¶ 43–44; Suez, Sociedad General, *supra* note 17, ¶ 50; Siemens, *supra* note 20, ¶ 141.

27. Case Concerning Ahmadou Sadio Diallo (Rep. Guinea v. Dem. Rep. Congo), 2007 I.C.J. 103, ¶ 88 (May 24).

28. David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT’L L. 104, 154–55 (1990).

29. Laird, *supra* note 4, at 94.

30. Vicuña, *supra* note 4, at 169.

31. See also, *Id.* at 165, 169.

32. Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session in *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)* [hereinafter Draft Articles]. It should be noted, however, that the Draft Articles adopted a novel approach with respect to the issue of nationality of corporations. Draft Article 9 provides as follows: “For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.” *Id.* art. 9.

nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation.”³³ To that rule, the Draft Articles provide three exceptions. One such exception is when an internationally wrongful act causes a “direct injury to the rights of shareholders,” distinct from those of the corporation.³⁴ The fact that the *Barcelona Traction* ruling remains today the statement of the law on the protection of shareholders in the context of *diplomatic protection*³⁵ was recently confirmed by the ICJ in the 2007 *Diallo* case.³⁶

IV. TOWARDS THE EMERGENCE OF A RULE OF CUSTOMARY INTERNATIONAL LAW?

Customary international law is one of the sources of international law.³⁷ The question of what treatment is to be accorded to foreign investors under customary international law has been very contentious amongst States for decades. In fact, for many years no broad international consensus emerged on the existing legal protection because of persisting differences in approach between developed and developing States.³⁸ For a long time the

33. *Id.* art. 11. Article 17 indicates that “[t]he present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.” *Id.* art. 17.

34. *Id.* art. 12. Under Article 11, the two other exceptions under which the State of nationality of shareholders is entitled to exercise diplomatic protection are as follows: (1) “[t]he corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury,” (2) “[t]he corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.” *Id.* art. 11(a)–(b).

35. C. MACLACHLAN, L. SHORE & M. WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 124 (2007); Vicuña, *supra* note 4, at 165.

36. *Diallo*, *supra* note 27, ¶ 87. Where the Court confirmed the rule of customary international law that “the right of diplomatic protection of a company belongs to its national State.” In that case, Guinea contended there was one exception to that rule of customary international law: “the shareholders of a company can enjoy the diplomatic protection of their own national State as regards the national State of the company when that State is responsible for an internationally wrongful act against it.” *Id.* ¶ 83. The Court rejected the existence, “at least at the present time,” of such a rule of diplomatic protection “by substitution.” *Id.* ¶ 89. Interestingly enough, the Court in *Barcelona Traction*, *supra* note 23, at 48 mentioned in its judgment that “a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company.” The Court in *Barcelona Traction*, however, stopped short of endorsing this exception by indicating that “whatever the validity of this theory may be” it was not applicable to the present circumstances of the case. *Id.* In *Diallo*, the Court did not rule on whether or not the “more limited rule of protection by substitution” contained at Article 11(b) of the ILC Draft Articles reflects customary international law. *Diallo*, *supra* note 25, ¶¶ 91, 93.

37. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, (stating that “international custom” requires a “general practice” that is “accepted as law.”).

38. See Schwebel, *supra* note 9, at 1.

absence of any such consensus prevented the development and crystallisation of rules of customary international law in the field of international investment law. The ICJ drew the same conclusion in 1970 in the *Barcelona Traction* case:

Considering the important developments of the last half-century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.³⁹

In fact, it is precisely because of this perceived lack of established customary principles that States concluded thousands of BITs in the 1990s.⁴⁰

Despite the early lack of consensus, it is undeniable that some principles of customary international law have now emerged in the field of international investment law.⁴¹ For instance, the obligation for the host State to provide foreign investors with the “minimum standard of treatment” is a customary norm.⁴² Similarly, the host State cannot expropriate a foreign investor’s investment unless four conditions are met: the taking must be for a public purpose, as provided by law, conducted in a non-discriminatory manner and with compensation in return.⁴³ This Section examines whether any customary rule has emerged specifically on the legal standing of shareholders before arbitral tribunals.

39. *Barcelona Traction*, *supra* note 23, 46–47.

40. R. Dolzer & A. von Walter, *Fair and Equitable Treatment: Lines of Jurisprudence on Customary Law*, in *INVESTMENT TREATY LAW, CURRENT ISSUES II 99* (Federico Ortino et al. eds., 2007).

41. See Patrick Dumberry, *Are BITs Representing the “New” Customary International Law in International Investment Law?* 28(4) *Penn State International Law Review*, 2010.

42. *Mondev Int’l Ltd. v. United States*, ¶ 121, ICSID (W. Bank) Case No. ARB/99/2 (Oct. 2002) (“[T]he phrase ‘Minimum standard of treatment’ has historically been understood as a reference to a minimum standard under customary international law.”); see also L. REED ET AL., *A GUIDE TO ICSID ARBITRATION* 48 (2004); IOANA TUDOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 61–62 (2008); OECD, *Fair and Equitable Treatment Standard in International Investment Law* 8 (Directorate for Financial and Enterprise Affairs, Working Paper No. 2004/3, 2004).

43. *Generation Ukraine, Inc. v. Ukraine*, ICSID (W. Bank) Case No. ARB/00/09, ¶ 11.3 (Sept. 2003) (stating “[i]t is plain that several of the BIT standards, and the prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed in customary international law”). See also Catherine Yannaca-Small, “*Indirect Expropriation*” and the “*Right To Regulate*” in *International Investment Law*, 3 (OECD, Working Paper No. 2004/4, 2004); C. MACLACHLAN, *supra* note 35, at 16.

Because of the proliferation of BITs allowing shareholders to submit claims to arbitration, some writers argue that this possibility—which first developed as a *lex specialis*—has now, in fact, become a *general rule*.⁴⁴ The *CMS v. Argentina* Tribunal came to the same conclusion:

The Tribunal therefore finds 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. Although it is true, as argued by the Republic of Argentina, that this is mostly the result of *lex specialis* and specific treaty arrangements that have so allowed, the fact is that *lex specialis in this respect is so prevalent that it can now be considered the general rule*, certainly in respect of foreign investments and increasingly in respect of other matters. To the extent that customary international law or generally the traditional law of international claims might have followed a different approach—a proposition that is open to debate—then that approach can be considered the exception.⁴⁵

This statement could be interpreted as suggesting that a rule of customary international law on the protection of shareholders has actually crystallised as a result of the large number of BITs containing comparable definitions of “investment” or “investor” and the fairly consistent interpretation of those BITs by arbitral tribunals. However, it is important to note that in the subsequent case of *Camuzzi v. Argentina* another Tribunal (with Professor Vicuña acting as president just like in the *CMS* case) clarified the meaning of the above-mentioned *CMS* dictum, suggesting that no custom had in fact emerged:

In *CMS*, the tribunal held that the system of treaties on protection gives rise to a *lex specialis* which “can now be considered the general rule, certainly in respect of foreign investments and international claims” *However, this does not necessarily mean that it refers to the emergence of a customary rule.* The general rule is evidenced by the fact that practically all disputes relating to foreign investments are today submitted to arbitration by resorting to the mechanisms of that *lex specialis*, as expressed by means of bilateral or multilateral treaties or other agreements. Only in very exceptional instances do the affected parties resort to diplomatic protection; the latter cannot then be considered the general rule in the system of international law presently governing the matter, but as a residual mechanism available when the affected individual has no direct channel to claim on its own right.⁴⁶

44. C. MACLACHLAN, *supra* note 35, at 186.

45. *CMS Gas*, *supra* note 16, ¶ 48 (emphasis added).

46. *Camuzzi*, *supra* note 18, ¶ 145 (emphasis added) (citation omitted).

One writer nevertheless argues in favour of the emergence of a new rule of customary international law with respect to shareholders' procedural rights to bring arbitration claims against the State where they make an investment.

[W]ith the recent exponential development and growth of international investment treaties and related jurisprudence since the ELSI case, a reasonable argument can be now made that we have reached that tipping point at which a general rule of international law, as evidenced in state practice motivated by *opinio juris*, can be said to have emerged with respect to *shareholders' rights to bring claims*.⁴⁷

For him, "a strong argument can now be made that *sufficient consistency* does exist in investment instruments and related jurisprudence, and that this particular area of international law has evolved to reflect a *new and consistent* state of international custom."⁴⁸ The same position also seems to have been adopted by Lowenfeld, for whom the "understanding . . . that disputes between foreign investors and host State should be subjected to impartial adjudication or arbitration [is] a general principle[] and do[es] not depend on the wording or indeed the *existence of any given treaty*."⁴⁹

Such statements are part of a larger debate in doctrine about the impact that 2,500 BITs have had on the development of customary international law in general.⁵⁰ Some writers have recently argued that BITs represent the "new" customary international law. This is the position of Judge Schwebel, who stated, "when BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs."⁵¹ This seems also to be the position of

47. Laird, *supra* note 4, at 86 (emphasis added).

48. *Id.* at 96 (emphasis added).

49. ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 586 (Oxford University Press, 2d ed. 2008) (emphasis added).

50. Stephen M. Schwebel, *Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L L. PROC. 27-30 (2004); see also Steffen Hindelang, *Bilateral Investment Treaties, Custom and a Healthy Investment Climate: The Question of Whether BITs Influence Customary International Law Revisited*, 5 J. WORLD INVEST. & TRADE 789 (2004); see Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123 (2003); Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formation of Customary Int'l Law*, 14 NW. J. INT'L L. & BUS. 327 (1994); see generally Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998); Abdullah Al Faruque, *Creating Customary International Law Through Bilateral Investment Treaties: A Critical Appraisal*, 44 INDIAN J. INT'L L. 292 (2004); Tarcisio Gazzini, *The Role of Customary International Law in the Protection of Foreign Investment*, 8 J. WORLD INVEST. & TRADE 691 (2007).

51. Schwebel, *supra* note 50, at 29-30.

Lowenfeld, “*taken together*, the [BITs] are now evidence of customary international law, applicable even when a given situation or controversy is not explicitly governed by a treaty.”⁵² In other words, for these writers the content of custom would simply be the *same* as that of these numerous BITs. The present Author has explained elsewhere why the proposition equalling custom and BITs should be rejected.⁵³

V. A REBUTTAL TO THE PROPOSITION THAT ANY CUSTOMARY RULE HAS DEVELOPED

In the present Author’s view, no rule of customary international law on the legal standing of shareholders before arbitral tribunals has crystallised. This is essentially for three reasons. First, the main weakness of the proposition that any such “rule” has emerged is that the purported rule does not meet the definition of customary international law. Second, the practical consequences of recognising the existence of such a rule would be contrary to the well-known principle that corporations (just like individuals) lack any *automatic jus standi* before international tribunals to contest a violation of international law in the absence of specific State consent. Third, the practical consequences of recognising such a rule would also be contrary to the principle that an arbitral tribunal is limited by the wording of the BIT under which it is constituted.

A. BITs Are Missing the Two Necessary Elements of Customary International Law

Custom has two constitutive elements: a “constant and uniform” (but not necessarily unanimous) practice of States in their international relations and the belief that such practice is required by law (*opinio juris*).⁵⁴ This double requirement is one of the most well-established principles of international law.⁵⁵ It is constantly applied by tribunals in the context of investor-State arbitration.⁵⁶ These two requirements will now be examined in turn.

52. LOWENFELD, *supra* note 49, 584 (emphasis added); Lowenfeld, *supra* note 50, 123–30.

53. See Dumberry, *supra* note 41 (arguing that BITs are missing the two necessary elements of customary international law, but that BITs will nevertheless necessarily influence custom: they will contribute to the consolidation of *already existing* custom rules and will also contribute to the *crystallisation of new rules* of custom in the future).

54. *Statement of Principles Applicable to the Formation of General Customary International Law*, International Law Association, Final Report 8 (2000).

55. See, e.g., *Continental Shelf (Libya v. Malta)*, 1985 I.C.J., 13, ¶ 27 (June 3).

56. *United Parcel Serv. of Am. v. Gov’t. of Canada*, ¶ 84, UNCITRAL (Nov. 2002).

1. *The Lack of Consistent State Practice*

The first basic requirement of custom is proof of consistent State practice.⁵⁷ This is particularly true in the context of BITs where rapidly increasing State practice is a rather recent phenomenon that accelerated only in the 1990s. As explained by the ICJ in the *North Sea Continental Shelf* case, State practice must be “both extensive and virtually uniform” where it is asserted that a rule of customary international law has emerged in a short period of time.⁵⁸ As mentioned above, modern investment treaties typically define the term “investment” very broadly to encompass shares in corporations. The term “investor” is also usually defined in broad terms.

There remain, however, some important inconsistencies between BITs with respect to how they specifically define “investor” and the nationality of corporations.⁵⁹ This is important because nationality is the gateway to legal protection under an investment treaty.⁶⁰ The scope of the definition of what is considered an “investor” under a BIT determines if a corporation and its shareholders receive any protection under that treaty. In other words, the legal standing of a shareholder and its access to arbitration always depends on whether or not it fits into the definition of “investor” under a specific treaty.

A recent study of BITs entered into by countries of the Americas highlights the great inconsistency in the definitions of corporate nationality.⁶¹ Out of forty BITs examined, the author found no less than five different definitions of “investor”: five treaties defined nationality of a corporation solely based on incorporation; fifteen required incorporation plus the seat of management; nine required incorporation, seat of management, *and* effective economic activities; ten allowed claims based on incorporation plus the seat of management *or* economic activities; and finally, only one treaty required incorporation and control. In other words, what is an “investor” under these BITs really depends on the exact wording of each treaty. Clearly, no general standard exists in the Americas.

The same is also true for the rest of the world. Some treaties require that a corporation be not only incorporated in a party State, but that its effective management (such as its headquarters) also be located there.⁶² Other

57. This section is largely drawn from Dumberry, *supra* note 41.

58. *North Sea Continental Shelf* (F.R.G. v. Denmark), 1969 I.C.J. 3, ¶ 75 (Feb. 20).

59. Gazzini, *supra* note 50, 709; *see also* R. DOLZER & M. STEVENS, *BILATERAL INVESTMENT TREATIES*, 34 (1995); Kishoiyian, *supra* note 50, at 346–53.

60. Anthony C. Sinclair, *The Substance of Nationality Requirements in Investment Treaty Arbitration*, 20 ICSID REV. FOREIGN INV. L.J. 357 (2005); Pia Acconci, *Determining the Internationally Relevant Link between a State and a Corporate Investor, Recent Trends Concerning the Application of the ‘Genuine Link’ Test*, 5 WORLD INV. & TRADE 139 (2004).

61. Lee, *supra* note 23, 272–73.

62. Sinclair, *supra* note 60, at 374 (discussing examples and referring specifically to the U.K.-Philippines BIT and the Italy-Libya BIT).

treaties further require that the corporation be controlled by nationals of the State of incorporation or have substantial business activities in that State.⁶³ At the other extreme, some BITs entered into by the Netherlands extend protection to legal entities not even incorporated in that country provided that they are controlled by Dutch nationals.⁶⁴ These are clear examples of State practice not consistent enough to form the basis of any customary rule.

In fact, completely different approaches are sometimes adopted by the *same country* depending on the treaty. A good illustration is Canada's position concerning holding corporations. Most BITs entered into by Canada provide that a corporation is considered "Canadian" under the treaty if it is "incorporated or duly constituted in accordance with applicable laws of Canada."⁶⁵ A holding corporation incorporated in Canada would therefore be covered under these treaties. However, other BITs require that a corporation also be "controlled" (either directly or indirectly) by Canadian nationals.⁶⁶ The same requirement is found in the Model BIT adopted by Canada, which requires that a corporation have "substantial business activities" in Canada to be considered Canadian.⁶⁷ Shell corporations incorporated in Canada that do not meet these requirements are therefore not protected under these treaties. Other inconsistencies also exist in BITs entered into by Canada concerning protection to "indirect" shareholders.⁶⁸

In sum, the scope and extent of protection offered under BITs to corporations and shareholders greatly varies. Indeed, there is no general standard on the legal standing of corporation and their access to international arbitration. The existence of this procedural right ultimately depends on the exact wording of each treaty. No standardised solution exists in BITs. The variegated State practice is certainly not consistent

63. See, e.g., the United States Model Bilateral Investment Treaty (2004) [hereinafter U.S. Model BIT]; Canadian Model Foreign Investment Protection and Promotion Agreement (2004) [hereinafter Canada Model BIT].

64. For instance, the Netherlands-Bulgaria BIT, discussed in Sinclair, *supra* note 60, at 368.

65. Canada Model BIT, *supra* note 63.

66. See, for instance, the BITs entered into by Canada with Hungary and Costa Rica.

67. Canada Model BIT, *supra* note 63, art. 18. The same rule is found in NAFTA at art. 1113(2) and in the recent Canada-Peru BIT at art. 18.

68. Most of Canada's BITs define "investment" as any kind of asset invested by a Canadian company in the territory of the other party "either directly, or indirectly through an investor of a *third State*." Canada Model BIT, *supra* note 63 (emphasis added). However, an earlier BIT entered into with Poland in 1990 does not make explicit reference to "indirect" investments. Also, although the Canada-Hungary BIT does refer to "indirect participation," it does not explicitly refer to the possibility of such participation being made through a company incorporated in a *third State*. The issue of indirect claims is discussed in Markus Perkams, *Piercing the Corporate Veil in International Investment Agreements: The Issue of Indirect Shareholder Claims Reloaded*, in INTERNATIONAL INVESTMENT LAW IN CONTEXT 93 (A. Reinisch & C. Knahr, eds., 2008).

enough to constitute the basis for any rule of customary international law concerning shareholders' rights.⁶⁹

2. BITs Lack any *Opinio Juris*

The second requirement for custom is *opinio juris*.⁷⁰ As explained by Schachter, "the repetition of common clauses in bilateral treaties does not create or support an inference that those clauses express customary law" because "[t]o sustain such a claim of custom one would have to show that apart from the treaty itself, the rules in the clauses *are considered obligatory*."⁷¹ There is no evidence of any *opinio juris* in the context of investment treaties.⁷² As the UPS Tribunal stated, "while [BITs] are large in number their coverage is limited; and . . . in terms of *opinio juris* there is no indication that they reflect a general sense of obligation."⁷³ In fact, the evidence suggests that States enter into BITs solely based on their *perceived* economic interest.

As explained by one writer, "a BIT between a developed and a developing country is founded on a grand bargain: a *promise* of protection of capital in return for the *prospect* of more capital in the future."⁷⁴ Guzman convincingly concludes that it is "simply not possible to explain the paradoxical behaviour of [less developed countries] toward foreign investment based on a view that BITs reflect *opinio juris*" as these BITs "do not reflect a sense of legal obligation but are rather the result of countries using the international tools at their disposal to pursue their economic

69. See also SORNARAJAH, *supra* note 3, at 232 ("The absence of uniformity of approach in the several bilateral investment treaties to the problem of protecting companies again indicates that they cannot provide the basis upon which common principles or customary law can evolve on the issues of corporate nationality and shareholder protection in international law. They merely represent a consensus of opinion as between the two parties to the agreement as to such issue."); see also Kishoiyian, *supra* note 50, at 352; Gazzini, *supra* note 50, at 707–10.

70. This section is largely drawn from Dumberry, *supra* note 41.

71. Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121, 126 (1984) (emphasis added).

72. In *North Sea Continental Shelf*, the Court explains that "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough." *North Sea Continental Shelf*, *supra* note 58, ¶ 77.

73. UPS, *supra* note 56, ¶ 97.

74. J.W. Salacuse, *The Treatification of International Investment Law?*, 3 L. & BUS. REV. AM. 155, 159 (2007) (emphasis added); see also J.W. Salacuse & N.P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67 (2005).

interests.”⁷⁵ Ultimately, BITs are the result of trade-offs and mutual concessions between States. Their content depends on the political and economic bargaining power of each party to the negotiations.⁷⁶ BITs are the result of a compromise between conflicting interests; they are not entered into by States based on any perceived legal obligation.

B. Corporations Lack any Automatic *Jus Standi* Before International Tribunals in the Absence of State Consent

The unlikelihood of the emergence of any rule of customary international law on the legal right of shareholders to bring claims to international arbitration is clear when one considers the practical consequences of the recognition of the existence of such a rule.

Such a procedural customary “rule” would be binding on *all States*, even those that have not entered into any BITs. The “rule” could therefore be invoked by *any foreign investor* irrespective of whether or not its State of origin has entered into a BIT with the country where it made its investment. In practical terms, this would mean that *any* corporation investing *anywhere* in the world could rely on such a “rule” for legal protection and have access to international arbitration to settle disputes with the host State.

Such an outcome would be contrary to one of the most fundamental tenets of international law. At the heart of international law remains the principle that corporations (just like individuals) lack any *automatic jus standi* before international tribunals to contest a violation of international law. Their standing to submit claims against States directly before international judicial bodies does not exist without the *consent* of the State against which a claim is submitted.⁷⁷ In other words, corporations do not have direct access to international tribunals in the absence of a specific instrument providing for such access.⁷⁸ There is, indeed, no presumption of *jus standi* of corporations (and their shareholders) before an international tribunal.

75. Guzman, *supra* note 50, at 687.

76. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 303 (1991); see also Kishoiyian, *supra* note 50, at 333.

77. Such consent by the State can be found in BITs or other treaties, in the investment legislation of the host State or in a direct investment agreement between a corporation and the host State.

78. It should be noted that many older BITs do not offer investors (or shareholders) any right to commence direct arbitration proceedings against the host State of the investment; they only provide for a State-to-State dispute settlement mechanism. This is certainly the case for many BITs of the 1960s before the creation of ICSID (in 1965). See Agreement Between the Federated Republic of Germany and the Federation of Malaysia Concerning the Promotion and Reciprocal Protection of Investments, F.R.G.-Malay., Dec. 22, 1960, http://www.unctad.org/sections/dite/iaa/docs/bits/germany_malaysia.pdf; see DOLZER & STEVENS, *supra* note 59, at 119.

In contemporary international law the procedural capacity of individuals (and corporations) to submit claims against States directly before international judicial bodies remains the *exception* and not the rule.⁷⁹ This is so even though an increasingly important number of tribunals and courts of an international nature do provide for such direct access for individuals. Apart from a few rather marginal examples at the turn of last century,⁸⁰ it should be noted that direct access for individuals (and corporations) to international tribunals existed in treaties following the First⁸¹ and Second World Wars.⁸² Since then other tribunals or commissions have been created at the end of international conflicts to deal with claims by individuals or corporations, including the U.S.-Iran Claims Tribunal,⁸³ the U.N. Compensation Commission,⁸⁴ and more recently the Ethiopian-Eritrea claims commission.⁸⁵ Another category of international tribunals providing individuals with the procedural capacity to file claims against States are those created by international treaties for the protection of human rights.⁸⁶

79. DOLZER & STEVENS, *supra* note 59, at 119 (“This type of provision [i.e. those providing for the settlement of disputes between investors and States] is unusual in treaty practice insofar as it accords private parties the right to pursue claims under an international treaty.”); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 585 (5th ed., 1998) (“[T]he assumption of the classical law that only states have procedural capacity is still dominant and affects the content of most treaties providing for the settlement of disputes which raise questions of state responsibility, in spite of the fact that frequently the claims presented are in respect of losses suffered by individuals and private corporations.”).

80. Convention for the Establishment of a Central American Court of Justice, Dec. 20, 1907, 206 C.T.S. 78 (functioning for only 10 years); Convention Respecting the Laws and Customs of War on Land [1907 Hague Convention IV], Oct. 18, 1907, Annex, 36 Stat. 2277 (setting up an International Prize Court, but since the treaty was never ratified, the court only existed on paper).

81. Treaty of Versailles, June 28, 1919, T.S. No. 4, 2 Bevans 43, art. 297 (allowing nationals of the Allied and Associated Power to submit claims against Germany before Mixed Arbitral Tribunals established under Article 304 of the Treaty).

82. Supreme Restitution Court established by the Convention on the Settlement of Matters Arising out of the War and the Occupation [Bonn Convention], May 26, 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed at Paris on October 23, 1954), 6 U.S.T. 5652, 5670, T.I.A.S. 3425.

83. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran art. II, ¶ 1, Jan. 19, 1981, 20 I.L.M. 223, 230 [hereinafter Claims Settlement Declaration].

84. S.C. Res. 692 (20 May 1991) implementing S.C. Res. 687 (3 April 1991) and the Secretary-General’s Report (2 May 1991, S/22559).

85. Agreement on Cessation of Hostilities Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eth.-Erit., June 18, 2000, 2138 U.N.T.S. 86; Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eth.-Erit., Dec. 12, 2000, 2138 U.N.T.S. 94.

86. The most important convention providing direct access for individual to an international court is no doubt the Protocol No. 11 of November 1, 1998 to the European

In the area of international investment law, despite the proliferation of BITs, the legal standing of corporations and their shareholders to bring claims to international arbitration remains even today *the exception* rather than the general rule. However numerous BITs may be (more than 2,500), it remains that they certainly do not cover the whole spectrum of possible bilateral treaty relationship between States. According to one writer, BITs in fact only cover some 13% of the total bilateral relationships between States worldwide.⁸⁷ For instance, Canada has entered into BITs with only twenty-four countries,⁸⁸ while the United States has entered into forty such treaties.⁸⁹ In other words, more often than not a corporation making an investment in another country does not benefit from the substantive and procedural rights typically contained in a BIT. In most cases, foreign investors doing business abroad do not have direct access to international arbitration under an investment treaty.⁹⁰

For most scholars, the right to international adjudication existing under modern BITs has simply not crystallised to become a rule of customary international law binding on all States and available for all foreign investors.⁹¹ For instance, Judge Schwebel states:

In view of the treaty-specific nature of grants of international adjudication, and the presumption that States are not amenable to international adjudication unless they consent to it, it would not be tenable to suggest that BIT provisions that afford arbitral recourse have themselves found their way into the body of customary international law.⁹²

The rule of customary international law remains that “[s]tates are not subject to international claims by private parties without their express consent.”⁹³

In sum, it is one thing to say that under modern BITs, “shareholder rights to bring international claims have become the norm rather than the

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

87. Gazzini, *supra* note 50, at 691.

88. See Minister of Foreign Affairs and Trade, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx> (last visited Feb. 24, 2010).

89. See Office of the U.S. Trade Representative, <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties> (last visited Feb. 24, 2010).

90. For the sake of completeness, it should be noted that so-called State contracts, between States and investors (whether corporations or individuals), are also a recognized mechanism by which a corporation may have direct access to an international arbitral tribunal.

91. Kishoiyian, *supra* note 50, at 368; C. MACLACHLAN, *supra* note 35, at 11, 17; Gazzini, *supra* note 50, 707–10.

92. Schwebel, *supra* note 50, at 30.

93. Gus van Harten, *Judicial Supervision of NAFTA Chapter 11 Arbitration: Public or Private Law?*, 21 ARB. INT’L 493, 505 (2005).

exception.”⁹⁴ It is quite another to argue that a rule of customary international law has emerged on the *jus standi* of shareholders before international tribunals. In the present Author’s view, no such rule exists.

C. An Arbitral Tribunal Cannot Exceed its Powers

It seems appropriate to mention at this juncture another practical consequence of recognising a rule of customary international law on the legal right of shareholders to bring claims to international arbitration. Such a “rule” would not only be beneficial for foreign investors deprived of *any* treaty protection, but also for those that are covered by investment treaties. Thus, any shareholder faced with an unfavourable treaty provision could simply invoke such customary “rule” before an arbitral tribunal constituted under that treaty. For instance, such a rule could be invoked by an investor when faced with a BIT not providing any protection for “indirect” investment made through intermediary corporations, or a BIT not covering “minority” (non-controlling) shareholders. Similarly, any holding company could invoke the “rule” even if it does not qualify as an investor under a BIT requiring that the corporation be controlled by nationals of one State and have “substantial business activities” in that State. In other words, a shareholder’s “right” to have access to international arbitration could always be “saved” by customary international law despite the existence of incompatible treaty language.

In the present Author’s view, this would be contrary to the principle that the power of an arbitral tribunal is limited by the wording of the BIT under which it is constituted. In fact, a “[t]ribunal cannot read more into [a] BIT than one can discern from its plain text.”⁹⁵ As explained by the *Saluka* Tribunal, “it is not open to [a] [t]ribunal to add other requirements [in a BIT] which the parties could themselves have added but which they omitted to add.”⁹⁶ In other words, it is clearly not for a tribunal to cure any perceived treaty “defect” in terms of shareholders protection. No arbitral tribunal has yet taken the liberty to accord any *procedural rights* to shareholders based on customary international law *despite* clear treaty provision to the contrary. Arguably, any tribunal doing so would go beyond its power.

94. Laird, *supra* note 4, at 86.

95. ADC, *supra* note 22, ¶ 359.

96. Saluka, *supra* note 22, ¶ 241; *see also* Rompetrol Group N.V. v. Romania, ICSID (W. Bank) Case No. ARB/06/3, ¶ 85 (Apr. 2008).

The Tribunal would in any case have great difficulty in an approach that was tantamount to setting aside the clear language agreed upon by the treaty Parties in favour of a wide-ranging policy discussion. Such an approach could not be reconciled with Article 31 of the Vienna Convention on the Law of Treaties (which lays down the basic rules universally applied for the interpretation of treaties), according to which the primary element of interpretation is “the ordinary meaning to be given to the terms of the treaty.”

VI. CONCLUSION

The legal protection offered to shareholders under international law has rapidly evolved in the last decades. However important these new developments may be, no rule of customary international law providing corporations and their shareholders with an automatic right to submit arbitration claims before international tribunals has yet crystallised.

Ultimately, it matters little that no such rule has yet emerged. The impact of numerous BITs offering greater procedural and substantive rights to corporations and shareholders resonates in other ways. The very existence of these BITs has had an impact on the treatment received *by all investors*, not just those covered by BITs. Thus, as a result of broad BIT language usually allowing claims by indirect and intermediate corporations, it is becoming increasingly difficult for a host State to know whether or not a certain investment is covered by a BIT.⁹⁷ For one writer, “it should be assumed [by the host State] that an investor of a party to an investment treaty may be ultimately owned by an investor of a non-state party, or by an investor of the host state itself.”⁹⁸ Consequently, host States must *assume* the existence of such BIT protection and, therefore, treat *all investors* according to standards of protection typically offered under such treaties. As explained by Legum:

Under these circumstances, the only way to comply with the treaty is for the host state to assume that *all investors*—all companies—are covered by the highest standards of any BIT in force for the state. The reality that foreign capital is highly fungible and the breadth of the definitions of investor and investment thus combine effectively to transform the facially bilateral obligations of the BIT into an obligation that the host state must consider potentially applicable to all investors.⁹⁹

97. Barton Legum, *Defining Investment and Investor: Who is Entitled to Claim?* 22 *ARB. INT’L* 524 (2006).

[U]nder normal circumstances, host state officials will *never know* at the time they must take action whether a given company is covered by a given treaty. Where a host state has entered into BITs that cover indirectly controlled investments, there could be between one and 20 or more layers of intermediate holding companies that separate the company the host state officials see and the company which is a covered investor under the treaty. The covered investor could itself, in fact, be an intermediate holding company, with the ultimate parent company publicly traded or controlled by third country nationals. A lower level official reviewing a permit application (just like a minister reviewing a bid proposal of national importance) will not normally have access to information concerning the nationality of intermediate holding companies in the applicant’s corporate hierarchy.
Id.

98. GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 115 (Oxford Univ. Press 2007).

99. Legum, *supra* note 97 at 524; *see also* K.J. Vandeveld, *International Decision: Aguas del Tunari v. Bolivia*, 101 *AM. J. INT’L L.* 179 (2007).

The policy implication of the global network of BITs is therefore that a *higher threshold of treatment* is increasingly being offered to all foreign investors and their investments.