The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case

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Contents

I. Introduction

The present paper deals with the protection of corporate investments abroad[1]) under general international law. This question has already been the object of extensive research, and also has engendered a vast amount of international practice[2]).

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[1]) The term "corporate investments abroad" refers to: investments made abroad by corporate entities; investments (shareholdings, bonds, loans) made by individuals or companies in corporate entities operating abroad.

[2]) See Caflisch, La protection des sociétés commerciales et des intérêts indirects en droit international public (The Hague 1969) and the writings and practice mentioned therein. Cf. also Feliciano, Legal Problems of Private International Business Enterprises: an Introduction to the International Law of Private Business Associations and Economic Development, Hague Recueil, vol. 118 (1966 II), pp. 213—312, at pp. 284—310; Gallagher, The Private Corporate Entity on the International Plane, Nebraska Law Review, vol. 34 (1954/1955), pp. 47—58; Harris, The Protection of Companies in International Law in the Light of the Nottebohm Case, International and Comparative Law Quarterly, vol. 18 (1969), pp. 275—317; Jennings, General Course on Prin-

The decisions given in 1964 and in 1970 by the International Court of Justice in the case of the *Barcelona Traction, Light and Power Company, Ltd. (Belgium* v. *Spain),* and the declarations, individual opinions and dissenting opinions appended to these judgments by various judges of the Court, provide new insights into this issue. They also throw some additional light on more general problems concerning investments abroad. Viewed from a political standpoint, they reflect the struggle which presently separates developing countries and developed States [3]).

This paper, however, is mainly confined to legal issues. It is proposed to examine the rules on corporate investments abroad as they emerge from the *Barcelona Traction* cases and to establish whether the Court's judgments adequately reflect the present state of general international law.

Before analysing the questions of law raised by the *Barcelona Traction* case, it is, however, necessary to sum up the facts of that case.

The Barcelona Traction, Light and Power Company, Ltd. (hereinafter referred to as Barcelona Traction), is a holding company incorporated in Canada in 1911, and its head office is located in Toronto. It had created a large number of subsidiary companies, some of which were incorporated in Canada, too, while others were registered in Spain; most of the shares of these subsidiaries were owned by Barcelona Traction. The object of this vast corporate complex was to produce and distribute electric power in the Spanish province of Catalonia.

According to Belgium, which was the claimant State in this case, a large part of the shares of Barcelona Traction have been continuously owned, since the end of the First World War, by Belgian nationals, in particular by the Sidro Company, an entity registered and having its headquarters in Belgium. According to the Belgian Government, the shares of Sidro's principal shareholder, the Sofina Company, are, in turn, predominantly owned by Belgian nationals. It must be added that during certain periods of the Second World War, a large number of shares of Barcelona Traction

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ciples of Public International Law, Hague Recueil, vol. 121 (1967 II), pp. 323—606, at pp. 469—470; Jiménez de Aréchaga, Diplomatic Protection of Shareholders in International Law, The Philippine International Law Journal, vol. 4 (1965), pp. 71—98; Radnay, Piercing the Corporate Veil under International Law, Syracuse Law Review, vol. 16 (1964/65), pp. 779—797; Schwarzenberger, Foreign Investments and International Law (London 1969); Seidl-Hohenveldern, Public International Law Influences on Conflicts of Law Rules on Corporations, Hague Recueil, vol. 123 (1968 I), pp. 1—116, especially at pp. 104—109; Vallat, International Law and the Practitioner (Manchester 1966), pp. 25—29; Charles De Visscher, Les effectivités du droit international public (Paris 1967), pp. 131—138.

[3]) On this point, see also Feliciano, *op. cit.,* p. 241, and Jiménez de Aréchaga, *op. cit.,* pp. 97—98.

owned by Sydro had been transferred to nominees and trustees of United States nationality. Belgium claimed, however, that these fiduciary relationships had ended on the critical date of the dispute[4]) and that they were irrelevant because Sidro had retained "real" ownership of the shares in question.

After the First World War, Barcelona Traction had issued bonds both in pesetas and in pounds sterling. These bonds were secured by a charge on bonds and shares of the Ebro Irrigation and Power Company, Ltd. (hereinafter referred to as Ebro), and of other subsidiaries of Barcelona Traction, as well as by a mortgage executed by Ebro. The National Trust Company, Ltd., of Toronto was appointed the trustee of the sterling bonds. The latter were to be serviced out of transfers made to Barcelona Traction by its subsidiaries operating in Spain.

The payment of interest on the bonds issued by Barcelona Traction was suspended in 1936 on account of the Spanish Civil War. Payments were resumed in 1940 for the peseta bonds but not for the sterling bonds, the Spanish exchange control authorities having refused to authorise the transfer to Barcelona Traction of the necessary foreign currency. The reason of their refusal was that it had not been proved that the said currency was to be used to repay debts arising from the genuine importation of foreign capital into Spain.

On February 9, 1948, three Spanish nationals who had recently acquired sterling bonds of Barcelona Traction petitioned the Court of Reus (province of Tarragona) for a decree declaring Barcelona Traction bankrupt for its failure to pay the interest due on these bonds. The petition was granted on February 12 of the same year, and the assets of Barcelona Traction and of some of its subsidiaries were subsequently seized and sold.

In the meanwhile several of the companies involved had initiated proceedings to set aside the bankruptcy decree and related decisions. However, Barcelona Traction, having received no judicial notice of the decree, took no steps prior to June 18, 1948, and thus failed to oppose the said decree within the prescribed time—limit of eight days from the date of its publication.

The bankruptcy decree engendered an impressive number of judicial proceedings initiated by the various persons and entities concerned before several Spanish tribunals, including the Supreme Court. It further prompted the Governments of the United Kingdom, the United States, Canada and Belgium to make diplomatic representations to Spain, whose administrative

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[4]) February 12, 1948, cf. below.

and judicial authorities had allegedly caused some prejudice to their nationals. While the United Kingdom and the United States Governments protected the interests of their nationals in Barcelona Traction, Canada intervened on behalf of the company itself. The same applied to the Belgian intervention, at least initially.

While the other States concerned seem to have discontinued their actions, the Belgian Government eventually submitted its claim on behalf of Barcelona Traction to the International Court of Justice by application of September 15, 1958. Proceedings were, however, discontinued in 1961 [5]. On June 14, 1962, Belgium submitted a new claim to the Court

> "... for damage ... caused to a number of Belgian nationals, ... shareholders in the Barcelona Traction..., by the conduct, ... contrary to international law, of various organs of the Spanish State in relation to that company and to other companies of its group" [6].

The Spanish Government filed four preliminary objections, two of which were rejected by the Court in its judgment on preliminary objections of July 24, 1964 (hereinafter referred to as first judgment) [7]. The third and the fourth preliminary objections made by Spain were joined to the merits. According to the third preliminary objection, the Belgian claim was inadmissible

> "... in view of the fact that the Barcelona [Traction] company does not possess Belgian nationality and that in the case in point it is not possible to allow diplomatic action or international judicial proceedings on behalf of the alleged Belgian shareholders of the company on account of the damage which the company asserts it has suffered" [8].

According to the fourth preliminary objection, the local remedies available under Spanish law had not been exhausted.

In the second phase of the proceedings, Belgium requested the Court to dismiss the two preliminary objections which had been joined to the merits. It further asked the Court to judge and declare that the conduct of Spanish authorities towards Barcelona Traction was contrary to international law and that Spain was obligated to proceed to a *restitutio in integrum* or to make reparation.

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[5]) See I.C.J. Reports 1964, p. 9.

[6]) *Ibid.*

[7]) *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections (Belgium* v. *Spain),* I.C.J. Reports 1964, p. 6. For comments, see Charpentier, in Annuaire français de droit international, vol. 10 (1964), pp. 327—352; Louis, in Belgian Review of International Law, vol. 1 (1965 I), pp. 253—278; Verzijl, in Netherlands International Law Review, vol. 12 (1965), pp. 2—42.

[8]) *Ibid.*, p. 12.

Spain requested the Court to uphold the preliminary objections in question and to declare that Spain had violated no rule of international law and, consequently, did not incur any international responsibility towards Belgium.

In its judgment of February 5, 1970 (hereinafter referred to as second judgment)[9]), the Court rejected the Belgian claim by fifteen votes to one, twelve votes of the majority being based on the reason set forth in the judgment, namely, the acceptance of Spain's third preliminary objection. Three judges added a declaration to the Court's decision (Judges Petrén, Onyeama and Lachs)[10]), and eight judges stated their views in separate opinions (Mr. Bustamante y Rivero, President; Judges Sir Gerald Fitzmaurice, Tanaka, Jessup, Morelli, Padilla Nervo, Gros and Ammoun)[11]), while the *ad hoc* Judge appointed by Belgium, Mr. Riphagen, wrote a dissenting opinion[12]).

It thus appears that the attention of the Court was centered upon the third preliminary objection of Spain, namely on the question whether Belgium was, under international law, entitled to present a claim to Spain on behalf of Belgian nationals, shareholders in a company, for damage allegedly inflicted by that State upon the company, which was incorporated in Canada. To frame the problem more abstractly: can a State put forward a claim on behalf of nationals who are shareholders in a company for damage done to the latter if that entity belongs neither to the claimant nor to the defendant State, but to a third country? The answer to this question will evidently depend upon the solution given to other problems: do the rules on international protection of economic rights and on diplomatic protection also apply to corporate entities? Which criteria have to be met by a company in order to be allocated to a State? Does international law provide some protection for the foreign shareholders of a company and, if so, to what extent? Are the rights and interests of foreign creditors of companies protected by international law if the debtor company suffers an injury? These are the problems which were analysed by the Court and which shall be dealt with in the following pages.

[9]) *Barcelona Traction, Light and Power Company, Limited, Second Phase (Belgium v. Spain)*, I.C.J. Reports 1970, p. 3. For first comments see Charles De Visscher, Observations sur le fondement de la protection diplomatique des actionnaires de sociétés anonymes, Belgian Review of International Law, vol. 6 (1970 II), pp. I—IV; Reimann, Nationality and Diplomatic Protection of Companies and Their Shareholders, Journal of World Trade Law, vol. 4 (1970), pp. 719—725. — For recent references see below (note 127).

[10]) Joint declaration of Judges Petrén and Onyeama, I.C.J. Reports 1970, p. 52; declaration of Judge Lachs, *ibid.*, pp. 52—53.

[11]) See *ibid.*, pp. 55, 65, 115, 162, 223, 244, 268 and 287. [12]) *Ibid.*, p. 335.

II. General Questions Pertaining to the Law of International Responsibility and to its Implementation

A State may be held responsible towards another State if its behaviour is contrary to international law and causes an injury to that State or to persons allocated to it. If the injury in question is inflicted upon such a person instead of being directed immediately against the State, the ensuing international responsibility is implemented through the channels of diplomatic protection, *i.e.* through diplomatic and possibly judicial action by the State to which the person in question is allocated. To exercise diplomatic protection—at least if judicial action is contemplated [13])—certain procedural requirements have to be fulfilled. The substance of a claim cannot be examined before it is shown that these requirements have been met by the claimant State.

If the above principles are applied to the *Barcelona Traction* case, the following problems arise:

— Is the question of whether a person is or is not allocated to the claimant State procedural or substantive?

— Is the subject-matter of Spain's third preliminary objection—*i.e.* the protection of foreign shareholders' interests—a procedural or a substantive issue?

— Are the rules on international responsibility also applicable to corporate entities?

1. Is the question of whether a person is allocated to the claimant State procedural or substantive?

International claims are generally held to be admissible only if the State presenting a claim on behalf of a person shows that the latter is allocated to it. When a claim is made for a natural person, the link required is usually [14]) that of nationality; it must further be established that such nationality is "opposable" to the defendant State. Logically, one could argue that international responsibility can only arise if the person on whose behalf a claim is put forward is connected with the claimant State; thus, the question of the existence of such a connection would be a matter of substance rather than of procedure [15]). This view is not, however, borne out by

[13]) In disputes which are settled through diplomatic channels, the separation between procedural and substantive issues is less apparent.

[14]) There are exceptions to this rule. Seamen, for instance, enjoy the protection of the flag State of the vessel on which they sail.

[15]) See dissenting opinion of Judge Morelli, I.C.J. Reports 1964, p. 112.

international practice, for problems of nationality appear to have been treated generally *in limine litis, i. e.* as points of procedure[16]). The joinder of Spain's third preliminary objection to the merits of the case does not constitute a departure from this practice; it is due to the fact that the objection also pertained to the right of the shareholders' national State(s) to present a claim and to the question whether the persons on behalf of whom the claim was made really were, during the relevant period of time, shareholders of Barcelona Traction[17]). It was at least arguable that both these problems were of a substantive character. At any rate, they could not, according to the Court, be settled without touching upon the merits of the case.

2. Are questions pertaining to the protection of foreign shareholders' interests procedural or substantive issues?

This was one of the main problems facing the Court in 1964. On the basis of Article 6, paragraph 5, of the Court's Rules[18]), it was joined to the merits. In justification of its ruling, the Court first set forth the situations in which joinder of preliminary objections to the merits had hitherto occurred:

(1) When the objection was so intimately connected with the merits that the former could not be decided upon without prejudging the latter[19]);

(2) When the preliminary objection could be regarded as a defence to the merits[20]);

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[16]) Cf. Abi-Saab, Les exceptions préliminaires dans la procédure de la Cour internationale (Paris 1967), pp. 115—116. But see also *ibid.*, p. 117. An exception is made to this rule when the determination of such nationality is difficult or impossible without impinging upon the merits of the case. See *Panevezys-Saldutiskis Railway* case *(Estonia* v. *Lithuania)*, judgment of February 28, 1939, P.C.I.J., series A/B, No. 76, p. 4, at p. 17.

[17]) See text of the objection, above, p. 165.

[18]) This provision runs as follows: "After hearing the parties the Court shall give its decision on the objection or shall join it to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings".

For a general survey of the problems connected with joinder to the merits, see Abi-Saab, *op. cit.*, pp. 194—200.

[19]) *Pajzs, Csáky and Esterházy* case, *Preliminary Objection — Joinder (Hungary* v. *Yugoslavia)*, Order of May 23, 1936, P.C.I.J., series A/B, No. 66, p. 4, at p. 9; case concerning the *Right of Passage over Indian Territory, Preliminary Objections (Portugal* v. *India)*, judgment of November 26, 1957, I.C.J. Reports 1957, p. 125, at pp. 150—152.

[20]) *Losinger & Co.* case, *Preliminary Objection (Switzerland* v. *Yugoslavia)*, Order of June 27, 1936, P.C.I.J., series A/B, No. 67, p. 15, at pp. 23—24; *Panevezys-Saldutiskis Railway* case, *Preliminary Objections*, Order of June 30, 1938, P.C.I.J., series A/B, No. 75, p. 53, at pp. 55—56.

(3) Whenever the interests of the good administration of justice required it[21]);

(4) When the parties to the dispute so requested[22]).

Turning then to the specific case under consideration, the Court, while noting that the Belgian nationality of a great part of the Belgian claim was also disputed, observed that the main issue appeared to be

> "... 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 ..." [23]).

This, according to the Court, was a substantive problem. The question was if, under the rules of international law concerning the treatment of aliens, the interests of foreign holders of shares in a company are protected when the company has suffered an injury. The legal qualification of the loss thus sustained by the shareholders depends upon the solution given to this problem. However,

> "... the [third] objection clearly has certain aspects which are of a preliminary character, or involves elements which have hitherto tended to be regarded in that light ..." [24]),

and the Court, instead of simply rejecting it, joined it to the merits.

This ruling did not remain unchallenged. Judges Wellington Koo, Spiropoulos and Armand-Ugon expressed the view that the Court should have reached a final decision on this matter; while Judge Wellington Koo would have dismissed the objection, the other two judges thought that the Court should have upheld it[25]). Judge Morelli arrived at the same conclusion as Judge Wellington Koo, but on the ground that the objection considered had no preliminary character at all[26]). This opinion is consistent with the general views held by Judge Morelli, according to which the nationality of claims as well as the protection of foreign shareholders' interests are substantive issues[27]).

The present writer would, on the whole, be inclined to agree with the

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[21]) *Panevezys-Saldutiskis Railway* case, *Preliminary Objections*, P.C.I.J., series A/B, No. 75, p. 53, at pp. 55—56.

[22]) Case of *Certain Norwegian Loans, Preliminary Objections (France* v. *Norway)*, Order of September 28, 1956, I.C.J. Reports 1956, p. 73, at p. 74.

[23]) I.C.J. Reports 1964, p. 44.

[24]) *Ibid.*, p. 45.

[25]) *Ibid.*, pp. 48, 53—54 and 163—166.

[26]) *Ibid.*, pp. 110—114.

[27]) See above, p. 167.

Court's position on this point[28]). It is true that the third objection presented by Spain was indeed preliminary, inasmuch as it raised the question of whether the alleged shareholders of Barcelona Traction possessed Belgian nationality continuously from February 12, 1948 (date of the bankruptcy decree) up to the presentation of the claim by Belgium. On the other hand, the Court correctly pointed out that the problem of foreign shareholders' interests under international law is a substantive issue[29]). This is also true for the question of whether the persons on behalf of which the claim was made could, on account of the fiduciary relationships which they had contracted, be considered to have been shareholders of Barcelona Traction continuously from the date of the bankruptcy decree up to the presentation of the claim by Belgium.

3. Are the rules on international responsibility also applicable to corporate entities?

The attitude taken by the Court on this fundamental issue is, as noted by Charles De Visscher[30]), the cornerstone of its decision. The Court's view, which comes even into sharper focus when read with Judge Morelli's separate opinion, is endorsed by Judges Padilla Nervo and Ammoun, whose concern for the economic interests of developing countries is conspicuous.

The Court proceeded from the assumption that basically the rules of international law concerning the treatment of economic rights of aliens apply to corporate entities as well as to individuals. Just as in the case of individuals, one must, therefore, deal with issues pertaining to the treatment of companies and of their shareholders by looking to the rules generally applied in municipal legal systems[31]). According to these rules, limited liability companies such as Barcelona Traction are endowed with a distinct legal personality, and thus their rights cannot be identified with those of their shareholders, the latter owning a separate set of rights. If, according to the aforementioned rules, a company as such possesses a right, and if that

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[28]) Cf. Verzijl, *op. cit.* (above note 7), pp. 37—40. See also Charpentier, *op. cit.* (above note 7), pp. 349—351.

[29]) However, opinions of writers and international practice are not absolutely unequivocal on this point. Cf. Caflisch, *op. cit.* (above note 2), pp. 14—15.

[30]) Observations, *op. cit.* (above note 9), at pp. I—II.

[31]) "It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers". I.C.J. Reports 1970, p. 37.

right is alleged to have been the object of an international wrong, the State to which the company is allocated may present a claim on its behalf.

Judge Morelli likewise assumed that in order to determine the status of investments made abroad—especially through corporate devices—principles of domestic law will apply, but he contradicted the Court by stating that the rules applicable are those of the alleged tortfeasor State's national law. Thus, the question of whether a natural or juristic person is vested with an economic right protected by international law would depend on the defendant State's internal legislation[32]), in the present case on Spanish law. Whether such a vested right has in fact been acquired depends on whether the defendant State's law enabled the person in question to acquire that right. If that person is a company, the question is whether the defendant State's domestic legislation has recognised the entity's legal capacity to acquire the right concerned and whether that entity, and not its shareholders, did in fact acquire it. The identity of the person(s) owning a vested right and on whose behalf a claim may consequently be presented is thus determined by reference to the defendant State's domestic law. In this connection, it is interesting to note that Judge Morelli, unlike several Italian authors[33]), leaves no doubt that States have the right to exercise diplomatic protection on behalf of corporate entities as such.

The Court and Judge Morelli both agreed that no exception to the basic principle of *renvoi* to (the defendant State's) national laws had been shown to exist. As will be seen later[34]), Sir Gerald Fitzmaurice did not unreservedly subscribe to this view; furthermore, both he and Judge Bustamante y Rivero stressed that some exceptions to this rule are desirable *de lege ferenda*[35]).

The Court's thesis drew strong opposition from Judges Tanaka, Jessup, Gros and Riphagen. These judges considered that where corporate instead of individual investments are involved, principles of domestic law and the separation established by the latter between the company and its members are not necessarily decisive[36]). Paraphrasing and adapting a dictum from a case recently decided by the United States Supreme Court[37]), Judge Jessup stated that

[32]) *Ibid.*, pp. 233—234.

[33]) For instance Quadri, Diritto internazionale pubblico (3rd ed. Palermo 1960), p. 534.

[34]) See below, pp. 184—185.

[35]) I.C.J. Reports 1970, pp. 55—57, pp. 66 ff., especially 76 ff.

[36]) *Ibid.*, pp. 120 ff., 168 ff., 271 ff., 335 ff.

[37]) *United States* v. *The Concentrated Phosphate Export Assn., Inc., et al.*, 89 S. Ct., p. 361, at pp. 366—367.

"... the International Court of Justice in the instant case is 'not bound by formal conceptions of' corporation law. 'We must look at the economic reality of the relevant transactions' ..." [38]).

Thus the shareholders' national State(s) may well own a valid claim under international law even if the foreign shareholders *ut singuli* do not possess a right under the defendant State's laws. Judge Gros added that, if the Court's views were to prevail and municipal law to be resorted to, this would eventually result in "... the establishment of a superiority of municipal over international law which is a veritable negation of the latter" and be in contradiction with the principle that under international law, domestic rules of law are considered to be mere facts [39]).

The principal weakness of the Court's reasoning lies in the assertion that in this field, one must look to the rules generally admitted by municipal law. This would seem to suggest that the rules in question are in the nature of general principles of law recognized by civilised nations (Article 38 (1) (c) of the Court's Statute). The existence of such principles is, however, difficult to conceive in this field [40]). If it were to be admitted, it would moreover create considerable legal insecurity, as these principles would be difficult to determine, and be contrary to the well-established rule of international law according to which the existence of vested rights is verified by reference to a specific legal order, namely, as pointed out by Judge Morelli, that of the defendant State. It remains to be seen, of course, whether international practice provides exceptions to this rule, especially as far as interests of foreign shareholders or creditors of companies are concerned (see below, IV and V).

The views advocated by Judges Tanaka, Jessup and Gros raise more basic objections. It is suggested that the needs of the international community and economic realities justify disregarding the strict construction resorted to by the Court and "piercing of the corporate veil". This attitude, called *wirtschaftliche Betrachtungsweise* in German legal theory, is an emanation of the sociological philosophy of law: it is claimed that social and economic phenomena or needs assume normative character because of their very existence. It would seem, however, that the mere existence of such phenomena or needs does not *ipso facto* transform them

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[38]) I.C.J. Reports 1970, p. 169.

[39]) *Ibid.*, p. 272.

[40]) It would imply that every country's municipal legislation would, at least in this field, be superseded by general principles of law abstracted from the domestic legislation of various countries.

into norms[41]), although social or economic factors may—and, indeed, should—contribute to the creation of new rules. Such new rules, however, come into being only once it is shown, pursuant to Article 38 (1) (b) of the Court's Statute, that they are founded upon a general practice accepted as law. In the present case, it must thus be proved that the rule of customary international law which makes the existence of vested rights and the identity of their owner(s) dependant upon the defendant State's internal law suffers one or several exceptions sanctioned by a general practice accepted as law by the international community. The possible existence of such exceptions will be dealt with below (see IV and V).

III. Nationality and Diplomatic Protection of Companies

It will be recalled that in its third preliminary objection, the Spanish Government contended, *inter alia,* that interference, by a State, with foreign shareholders' interests through injury caused to a company which is allocated neither to the interfering State nor to the shareholders' national State(s), but to a third country, does not give rise to a claim by the shareholders' national State(s), the only possible claim accruing to the State to which the company belongs[42]). If it is applied to the case under consideration, this proposition implies that Belgium has no claim vis-à-vis Spain for allegedly unlawful measures directed against Barcelona Traction, a Canadian company, Canada being the only State entitled to put forward a claim. The question of whether foreign shareholders' interests could be protected, should the company belong to the defendant State, was thus left open by Spain. In its third preliminary objection, the Spanish Government further voiced some doubts as to the Belgian allegiance of Sidro, which allegedly was Barcelona Traction's principal shareholder, and also of Sofina, the company controlling Sidro. It was therefore essential to deter-

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[41]) The Court itself implicitly took exception to this philosophy when Belgium argued that a company is nothing but a means for achieving the economic objectives of its shareholders and concluded that the latter's interests are the only reality which must be taken into account. Rejecting this argument, the Court stated:

"Yet even if a company is no more than a means for its shareholders to achieve their economic purpose, so long as it is *in esse* it enjoys an independent existence. Therefore, the interests of the shareholders are both separable and indeed separated from those of the company, so that the possibility of their diverging cannot be denied". I.C.J. Reports 1970, p. 36.

[42]) For the text of the third preliminary objection, see above, p. 165.

mine the allegiance of Barcelona Traction, Sidro and Sofina. Thus, the Court was faced, on three different levels, with the complex issue of what is commonly termed the "nationality" of corporate entities.

During the procedure on preliminary objections, it was generally agreed that States may exercise diplomatic protection on behalf of corporate entities which are their "nationals" [43]). The parties also agreed that as a general rule, the nationality in question is determined by the *lex causae*. Thus, just as in the case of natural persons, one will look to the laws and court decisions of each State whose nationality the entity m i g h t have, in order to decide whether it d o e s have it [44]). However, the Belgian Government further contended that, in order to be "opposable" on the international plane, the nationality thus established must be shown to possess some degree of effectiveness. This is achieved, according to Belgium, by proving that subjects of the entity's national State own a substantial part of the company's shares [45]). Spain replied that in most cases, the juridical link of nationality had been the only element required and that no reliance had, in particular, been placed on the nationality of the members of the entity [46]).

Having joined Spain's third preliminary objection to the merits, the Court, in its first judgment, did not have to pronounce upon the matter. In his separate opinion, Judge W e l l i n g t o n K o o however expressed the view that a company may be protected by the State

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[43]) In their separate or dissenting opinions appended to the first judgment, Judges W e l l i n g t o n K o o, B u s t a m a n t e y R i v e r o and M o r e l l i expressly affirmed this right. See I.C.J. Reports 1964, pp. 56—57, 83 and 110.

[44]) See the statements made by Mr. A g o (March 24, 1964), Mr. E. L a u t e r p a c h t (April 15, 1964), and Mr. S a u s e r - H a l l (April 17, 1964), C.I.J., *Affaire de la Barcelona Traction, Light & Power Co., Ltd. Procédure orale*, Distr. 65/5 *bis*, pp. 230—231, 510—512, 558—559.

[45]) This theory, first presented by B o r c h a r d, Rapport sur la protection diplomatique des nationaux à l'étranger, Annuaire de l'Institut de droit international 1931, vol. I, pp. 256—455, at pp. 353—355, was later developped by Paul D e V i s s c h e r, La protection diplomatique des personnes morales, Hague Recueil, vol. 102 (1961 I), pp. 395—511, at pp. 446 ff. See also Ch. D e V i s s c h e r, Les effectivités, *op. cit.* (above note 2), pp. 131—134.

[46]) «... dans la très grande majorité des cas, c'est exclusivement l'existence d'un rattachement juridique de nationalité qui a été requis comme condition de la faculté de protection diplomatique au profit d'une société, soit avec le résultat de reconnaître le droit de protection là où un tel rattachement existe, soit avec l'effet de le refuser là où ce même rattachement ne pouvait être prouvé, et sans attribuer, en particulier, aucun poids à la nationalité des membres de la société». Statement by Mr. A g o (March 24, 1964), C.I.J., *Affaire de la Barcelona Traction, Light & Power Co., Ltd. Procédure orale*, Distr. 65/5 *bis*, p. 230.

"... where it has been incorporated according to its laws and therefore is regarded as having assumed its nationality" [47]).

Judge Bustamante y Rivero, too, ventured an opinion which is not inconsistent with the view that a company's nationality, and consequently its diplomatic protection, are dependent upon the *lex causae* [48]).

In its second judgment, the Court examined a Belgian argument according to which foreign shareholders of a company may be protected whenever the entity's national State — in the present case Canada — lacks capacity to act on its behalf. This assertion raised the question of whether Canada really was Barcelona Traction's national State for purposes of diplomatic protection. According to the Court, the allocation of corporate entities to States is, to a limited extent, analogous to the nationality of individuals. Companies usually take the nationality of the State in which they are incorporated and have their registered office; it is sometimes claimed, on account of the Court's decision in the *Nottebohm* case [49]), that further or different elements are considered for purposes of diplomatic protection, such as the location of headquarters or of the "centre of control" and the nationality of the persons exercising control over the company or owning a substantial part of its shares. Only the presence of these elements would satisfy the requirement of a "genuine connection" between the claimant State and its national demanded by the Court in the *Nottebohm* case. The Court, however, rejected this theory by stating, without offering any further justification, that

"... given both the legal and factual aspects of protection in the present case ... there can be no analogy with the issues raised or the decision given in that case" [50]).

At any rate—the Court continued—there are many factors connecting Barcelona Traction with Canada: the entity is incorporated and has its registered office in Canada; board meetings have been held in that country; Barcelona Traction is listed in the records of the Canadian tax authorities and has

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[47]) I.C.J. Reports 1964, p. 58.

[48]) "... the two Parties ... agree on the fact that a general rule of international law exists with regard to the diplomatic and judicial protection of commercial limited liability companies which have been injured by the State in which they conduct their business, this rule being that the exercise of the right of protection belongs preferentially to the national State of the company. Since in the present case Barcelona Traction is a company incorporated under Canadian law, its protection ought in principle to be exercised by the State of Canada". I.C.J. Reports 1964, p. 83.

[49]) *Nottebohm* case, *Second Phase (Liechtenstein* v. *Guatemala)*, judgment of April 6, 1955, I.C.J. Reports 1955, p. 4.

[50]) I.C.J. Reports 1970, p. 42.

mainly been governed by Canadian law for over fifty years. It must finally be observed that the Canadian nationality of Barcelona Traction has received general recognition, even on the part of Spain and Belgium. The fact that, later on, Canada withdrew its protection from the company cannot be taken to mean that this State disclaims the entity's Canadian nationality, for

> "... within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting" [51]).

Dealing with the nationality, not of Barcelona Traction, but of Sidro, Judge Tanaka [52]) seems to follow the Court's reasoning in respect of nationality of companies [53]).

Other judges, on the contrary, held the view that a State may take up a claim on behalf of a company which is its national only if the existing link of nationality expresses a genuine connection between the claimant State and the entity [54]). According to Sir Gerald Fitzmaurice, the lack of such a connection, due to the company's ownership and control and main business being elsewhere, might bring about the disqualification of the national State or even suggest that in such cases a different test of nationality be applied [55]). Sir Gerald's view, which seems to be shared by Judges Jessup, Gros and Riphagen, heavily relied on the principles set forth by the Court in the *Nottebohm* case. As to recognition of Canada's right to claim by Spain and Belgium, Sir Gerald rightly pointed out that recognition of that right by Spain was by no means binding upon Belgium. Recognition by Belgium was also irrelevant because the latter's position was that it had a claim irrespective of any Canadian right [56]).

Neither the Court's reasoning nor the arguments of the judges mentioned above seem to be entirely satisfactory. The Court correctly pointed out

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[51]) *Ibid.*, p. 44.

[52]) So does Judge Ammoun, cf. *ibid.*, pp. 295—296.

[53]) *Ibid.*, pp. 140—141. In their joint declaration appended to the second judgment, Judges Petrén and Onyeama emphasized that, both parties having recognised Canada's right to grant protection to Barcelona Traction, the Court was dispensed from examining the applicability of the "genuine link"-principle to companies and from speculating upon any possible objections against the exercise of such protection by Canada. *Ibid.*, p. 52. Judge Lachs, on the other hand, stressed the importance of these questions for the reasoning of the Court. *Ibid.*, pp. 52—53.

[54]) Judges Sir Gerald Fitzmaurice, Jessup, Padilla Nervo, Gros and Riphagen, cf. *ibid.*, pp. 79—84, 170 ff., 254, 280—283, 346 ff.

[55]) See separate opinion of Sir Gerald Fitzmaurice, *ibid.*, p. 83.

[56]) *Ibid.*, pp. 82—83. Cf. also separate opinion of Judge Jessup, *ibid.*, p. 185.

that the principles governing the allocation of companies to States for purposes of diplomatic protection are to some degree analogous to the rules governing the nationality of individuals. Indeed, in both cases, the relevant connecting factor appears to be nationality; this nationality differs, in both cases, from other points of contact used mainly in domestic law—domicile, residence, etc.—because it is determined by reference to the *lex causae* and because the nationality so granted to individuals or corporate entities must, in principle, be recognised by other States. Thus, international law establishes no criteria of its own in matters of nationality, and the determination of the nationality of natural persons as well as of companies is within the ambit of each State's domestic jurisdiction. It follows that both the Court and the judges referred to above are incorrect inasmuch as they indicate a preference for a given criterion, such as incorporation, for example [57]).

It remains to be seen whether the discretion granted to States in matters of nationality is unfettered, at least as regards the effects of nationality on the international plane. In this connection, it has been pointed out that if an individual has dual or multiple nationality, the nationality based on the most effective link shall prevail [58]). In the *Nottebohm* case, the Court transposed this concept of effectiveness to cases where only one nationality is at stake. The debate over the Court's decision in this case has not yet subsided. On the same point, the Institute of International Law adopted a resolution stating that nationality acquired through naturalisation cannot be invoked on the international level "... in the absence of any connection ..." with the State concerned [59]). Thus, some minimum effectiveness is required. The formula used by the Institute seems to constitute a reasonable assessment of existing international law in matters of nationality. Though using different terms, it expresses the long recognised idea that nationality conferred upon a person in a manifestly abusive manner need not be taken into account internationally [60]).

The Court having conceded the existence of a limited analogy between the nationality of individuals and that of corporate entities [61]), it is difficult

[57]) Caflisch, *op. cit.* (above note 2), pp. 130 ff.

[58]) See Article 4 (b) of the resolution of the Institute of International Law, of September 10, 1965, Annuaire de l'Institut de droit international, 1965, vol. 51 II, p. 262. However, according to Article 4 (a) of that same resolution, this rule does not seem to apply when one of the nationalities concerned is that of the defendant State.

[59]) Article 4 (c) of the resolution of September 10, 1965, *ibid.* (emphasis added).

[60]) Cf. Guggenheim, Traité de droit international public, vol. I (1st ed. Geneva 1953), p. 317, who gives examples of abusive grants of nationality.

[61]) I.C.J. Reports 1970, p. 42.

to perceive why the principles set forth by the Court in the *Nottebohm* case could not be applied, *mutatis mutandis,* to companies[62]). If the basic idea expressed by the Court in the *Nottebohm* case and embodied in the resolution of the Institute of International Law is accepted, and if it is further conceded that this idea is also relevant for companies, it must be concluded that a State may not put forward a claim on behalf of a company having its nationality if the latter does not have at least some minimum effectiveness. It is questionable, however, whether such effectiveness is dependent upon the nationality of the entity's shareholders or on similar factors. This theory, which was originally put forward by Borchard and subsequently taken up by Paul De Visscher[63]), was subscribed to by Judges Sir Gerald Fitzmaurice, Jessup, Gros and Riphagen[64]) in view of the tendency shown by States to confine protection to national companies which prove the presence of a national interest and on the basis of the assumption that this tendency is indicative of an *opinio juris*[65]). A careful perusal of State practice reveals, however, that the restraint shown by States in this matter finds its basis in their discretionary power to grant or to withhold diplomatic protection[66]).

As was indicated above, the conception analysed here proceeds from the idea that, in view of the Court's ruling in the *Nottebohm* case, the nationality of a corporate entity must be based on some real connection. It is further assumed that only economic factors, *i.e.* the national character of the financial interests hidden behind the corporate veil, provide the means for ascertaining the existence of such a connection. This assumption is not based on any cogent reason or logical necessity.

It has been said earlier that a company's nationality is in principle determined by reference to criteria established by municipal law. The criteria which are most widely resorted to by domestic legislation are:

(i) Location of the company's headquarters[67]);

[62]) This point is made by Sir Gerald Fitzmaurice, *ibid.,* pp. 80 ff.; see also the separate opinions of Judges Jessup, pp. 182 ff., Padilla Nervo, p. 254 (implicitly), and Gros, pp. 281—282, and the dissenting opinion of Judge Riphagen, pp. 346 ff. The Court's approach would have been further challenged by Harris, *op. cit.* (above note 2).

[63]) See above (note 45).

[64]) I.C.J. Reports 1970, pp. 80—82, 170 ff., 280—283, 346 ff.

[65]) See Ch. De Visscher, Les effectivités, *op. cit.* (above note 2), pp. 133—134.

[66]) See, in particular, the opinion of the Solicitor of the U.S. Department of State on the *George D. Emery* claim, U.S. For. Rel. 1909, p. 462; Radnay, *op. cit.* (above note 2), p. 791; and the instructions communicated in 1911 by the British Foreign Office to the British Chargé d'affaires in Bangkok, British Digest of International Law, vol. 5, pp. 510—511.

[67]) This criterion is commonly resorted to by civil law countries.

(ii) Location of the place where the entity transacts its main business [68]);

(iii) Incorporation or location of the company's registered office [69]).

The first two criteria are in themselves the expression of a factual connection with the national State. It is thus unnecessary, even if the *Nottebohm* ruling is heeded, to resort to other factual connections, such as the nationality of the investors [70]). It is also evident that, if the criterion selected by municipal legislation were to be the control test [71]), there would be no problem of effectiveness.

The only possible doubts arise in respect of incorporation. It has been argued that this criterion does not guarantee minimum effectiveness [72]). This argument can, however, be countered by pointing out that here the minimum effectiveness required by international law flows from the fact that the entity's legal status is to a considerable extent governed by the laws of its State of incorporation. This assertion must, however, be qualified in one respect: international practice shows that nationality granted on the basis of incorporation is inoperative if invoked against a State whose nationals, directly or indirectly, exercise financial control over the entity [73]).

States are, of course, free to use the above criteria severally, alternatively, or cumulatively, or to select new criteria. Each newly selected criterion would, in turn, have to be tested as to its minimum effectiveness; it may be doubted whether a test based on the place of subscription of the company's shares, for instance, would meet that requirement.

It remains to be seen whether the above principles are acceptable *de lege ferenda*. Evidently, the discretion granted to States in conferring nationality upon corporate entities as well as upon individuals breeds ambiguity

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[68]) This is one of the tests used by Italian civil law, cf. Article 2505 of the Italian Civil Code.

[69]) This criterion is applied by common law countries.

[70]) See Ginther, Nationality of Corporations, Österreichische Zeitschrift für öffentliches Recht, vol. 16 (1966), pp. 27—83, at pp. 79—80.

[71]) At the present time, there is hardly any national legislation applying this test as a general criterion for conferring nationality upon companies. The control test has, however, been frequently used to establish the enemy character of corporate entities in times of war.

[72]) Ginther, *op. cit.*, p. 79.

[73]) *"I'm Alone"* case *(Canada* v. *United States)*, Special Commission, Reports of June 30, 1933, and January 5, 1935, U.N.R.I.A.A., vol. III, p. 1609. See also the case of the *Monte Blanco Real Estate Corporation*, decision No. 37-B, American Mexican Claims Commission, Report to the Secretary of State ... (Washington 1948), p. 191, and a communication made in 1898 by H. M. Acting Consul at Canton to H. M. Minister to China, which dealt with the protection of companies registered in Hong Kong but exclusively composed of Chinese nationals, British Digest of International Law, vol. 5, p. 515.

and confusion, because it opens the door to multiple nationality and statelessness. It thus seems desirable, in regard to individuals as well as to companies, that international law itself select criteria for the attribution of nationality instead of delegating this matter to States. Any uncertainty would thereby be removed, and cases of multiple nationality and of statelessness would be avoided. However, it is very doubtful, to say the least, whether a consensus would be readily forthcoming in this matter. It would further be difficult to select suitable criteria.

The control test or related criteria would clearly be inappropriate. Firstly, inasmuch as this test takes into account elements other than the nationality of shareholders—the nationality of the company's creditors and of the individuals forming the board of directors, for instance—there would be the difficulty of deciding which of the factors mentioned should be given priority. Secondly, even if only the nationality of shareholders is considered, it may be difficult to identify the latter, especially if the company has issued bearer shares. Thirdly, and most importantly, the application of this test would result in frequent changes of the company's nationality, for shares are generally transferable. As international claims must be endowed with the claimant State's nationality from the moment at which the damage occurred up to their presentation on the international plane, or even until an award is made by an international claims agency [74]), a considerable number of corporate claims would be ruled out because of changes in the company's nationality within the period described above. This would surely be undesirable, at least from the investor's point of view.

In support of the test based on the company's headquarters, it has been argued that headquarters constitute the most effective and genuine connection a company has with a given country and that their location is easily identified. Neither of these two assertions is entirely accurate. Firstly, it is not self-evident that having headquarters in a country results in establishing a closer connection with that country than, for instance, transacting the main business there. Secondly, it may be difficult to establish precisely in which State headquarters are located, for the activities pertaining to a company's administration may extend to several countries [75]).

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[74]) See, however, the criticism made by Sir Gerald Fitzmaurice, who observed that this rule contradicts the basic principle according to which a State assuming the protection of one of its nationals in reality asserts its own right. This principle calls for a rule prescribing that the national character of a claim must be shown to exist only at the time at which the injury occurred. I.C.J. Reports 1970, p. 100.

[75]) Thus, British courts had to admit that a corporate entity can have two residences, *i. e.* two administrative headquarters. *Swedish Central Railway* v. *Thompson*, [1925] A. C. 495.

The test of incorporation, in turn, is often challenged for its alleged lack of effectiveness and for the abuses it condones. These — real or imaginatory—defects are, however, largely compensated for by the considerable practical advantages it offers[76]). The test of incorporation leads to clear results and is in general easy to apply, although cases of multiple incorporation may occasionally occur[77]).

IV. Protection of Foreign Shareholders' Rights and Interests under International Law

1. Introduction

The problem of the protection of foreign shareholders' interests was the crucial issue before the Court in the *Barcelona Traction* case. It will be recalled that in its third preliminary objection, the Spanish Government asserted that international law does not extend its protection to the interests of foreign shareholders who suffer losses through injury inflicted upon a company's rights. There was no doubt, however, that personal rights of shareholders, such as the right to share in the company's surplus assets after liquidation, the right to declared dividends, the right to participate in shareholders' meetings, etc., are rights of the shareholders under municipal law and thus constitute vested rights under international law; consequently, the shareholders' national States have a valid claim if such rights are wrongfully interfered with by another State[78]).

The real problem facing the Court was, therefore, the fate of foreign shareholders' interests. Before turning to this question, the Court should, in strict logic, have examined whether the persons on behalf of which the claim was made—especially Sidro—were Belgian nationals from February 12, 1948 (date of the bankruptcy decree) up to the presentation of the claim by Belgium, and whether, within this period, these persons had title to shares of Barcelona Traction.

Nevertheless, for the sake of expediency, the Court first examined the main issue, *i.e.* the status of foreign shareholders' interests; this question having been answered negatively, it became unnecessary to dwell upon other problems which, theoretically, may have had priority. Both Judges

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[76]) See Feliciano, *op. cit.* (above note 2), pp. 293—294.

[77]) Foley, Incorporation, Multiple Incorporation and the Conflict of Laws, Harvard Law Review, vol. 42 (1928/29), pp. 516—549.

[78]) I.C.J. Reports 1970, p. 36.

Jessup and Morelli[79]) commented upon this procedure which, it may be added, is by no means unprecedented[80]).

Questions pertaining to the nationality of companies have been averted to earlier (see above, III); the problems of continuous nationality and ownership of claims, on the other hand, are not restricted to the area of corporate investments and shall not, therefore, be treated here. Thus, only two problems remain to be examined:

— Who is, under international law, deemed to be a shareholder?

—Are foreign shareholders' interests protected by general international law?

2. Who is a shareholder?

It will be remembered that shares of Barcelona Traction owned by Sidro were, during the Second World War, handed over to United States firms which were to be Sidro's nominees or trustees. Belgium failed to prove that these fiduciary relationships had been terminated on February 12, 1948, the date of the bankruptcy decree. It had thus to be assumed that they were still in existence. This raised the question of who, under international law, has title to shares which form the object of a fiduciary relationship. Belgium naturally favoured the beneficial owner—Sidro—, whereas Spain opted for the legal owner, *i. e.* the American firms mentioned above. Should beneficial ownership prevail, continuous Belgian ownership of the claim during the relevant period of time could be proved. To admit the contentions of Spain amounted to destroying such continuity.

The most sweeping view on this point was that expressed by Judges Tanaka and Riphagen: diplomatic protection aiming at preserving the "real" economic interests involved, beneficial ownership must prevail; thus, existing fiduciary relationships have no effect on the international level[81]).

A more sophisticated opinion was put forward by Judge Jessup: if shares are given in trust, the trustee—unlike a nominee—is considered to have acquired title to them. As Belgium did not disprove that on February 12, 1948, the shares in question were held in trust by an American firm,

[79]) *Ibid.*, pp. 202, 226 ff.

[80]) Thus, in the *Ziat, Ben Kiran* case, Max Huber examined whether the conduct of organs of the Spanish State was contrary to international law prior to inquiring whether the claimants had what the Court would call *jus standi*. Having replied negatively to the first question Huber was dispensed from pronouncing upon the second, which logically should have come first. *Affaire des biens britanniques au Maroc espagnol*, Report of May 1, 1925, claim No. 53, U.N.R.I.A.A., vol. II, p. 729.

[81]) I.C.J. Reports 1970, pp. 135—136, 352—353.

the required continuity of Belgian ownership of the claim was not established; thus, the claim was to fail [82]). Judge Jessup's views were shared by Judge Gros [83]) and, to a certain extent, by Sir Gerald Fitzmaurice. Sir Gerald pointed out, however, that the trust deeds between Sidro and its American trustees were executed under particular conditions—the impending invasion of Belgium by Germany—and might therefore warrant a special interpretation favouring Sidro, the beneficial owner [84]).

The present writer is inclined to agree with the conclusions reached by Judge Jessup. As has been shown elsewhere [85]), international practice tends to give to legal ownership precedence over beneficial ownership except if, under the terms of the trust deed, the fiduciary relationship is ephemeral or can be terminated by simple notice. The burden of proof for Sidro's ownership of the shares being on Belgium, the latter should have established either the termination or the ephemeral character of the fiduciary relationship between Sidro and its American trustees. As it omitted to do so, the claim must fail.

3. Are foreign shareholders' interests protected by general international law?

In dealing with this problem, two issues should be distinguished: a. the status of foreign shareholders' interests if the company whose rights are injured is a national of the defendant State; b. the status of foreign shareholders' interests if the company whose rights have been injured is a national of neither the claimant nor the defendant State, but of a third State.

a. The status of foreign shareholders' interests in companies which are nationals of the defendant State

This would have been the question facing the Court, had Barcelona Traction been of Spanish instead of Canadian nationality. As this was not the case, however, the Court left the issue open and gave the following explanation:

"... a theory has been developed to the effect that the [national] State of the shareholders has a right of diplomatic protection [sic] when the State whose responsibility is invoked is the national State of the company. Whatever the

[82]) *Ibid.*, pp. 202—220.
[83]) *Ibid.*, p. 282.
[84]) *Ibid.*, p. 99.
[85]) Caflisch, *op. cit.* (above note 2), pp. 238 ff.

validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction" [86]).

Nevertheless, some of the judges volunteered *obiter dicta* on this point, and the contents of these *dicta* widely differ. Judge Morelli strictly adhered to the rule according to which the existence of vested rights under international law and the identity of their owners depend exclusively upon the relevant domestic legislation, *i. e.* Spanish law. Under the latter, shareholders have no right over the corporate assets, which are vested in the company. In Judge Morelli's view, the rule referring to the defendant State's municipal law suffers no exception, not even if the company itself is a national of that State. Although it is true that corporate investments may thus go entirely unprotected,

"... to say that in such a case the national States of the shareholders are entitled to protect the latters' interests because there is no possibility of their benefiting indirectly from any protection afforded the company would be to make havoc with the system of international rules regarding the treatment of foreigners. It would, furthermore, be a wholly illogical and arbitrary deduction" [87]).

Though he concedes that

"... international law is obviously bound to deal with companies as they are ..." [88]),

the conclusions drawn by Sir Gerald Fitzmaurice are entirely different from those reached by his colleague. Sir Gerald observes that even under domestic law, the "hegemony" of the entity over its members, and therefore its legal personality, is restricted, the members being permitted to take action under certain circumstances. It must be examined whether these restrictions are reflected on the international level, *i. e.* whether there are exceptions to the rule of international law which refers to national legislation. It seems that at the present time, there is only one such exception,

"... namely where the company concerned has the nationality of the very State responsible for the acts or damage complained of, and these, or the resulting circumstances, are such as to render the company incapable *de facto* of protecting its interests and hence those of the shareholders" [89]).

This occurs, in particular, when the entity itself was forced to take on local nationality before being permitted to operate.

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[86]) I.C.J. Reports 1970, p. 48.
[87]) *Ibid.*, pp. 240—241.
[88]) *Ibid.*, p. 67.
[89]) *Ibid.*, p. 72.

Naturally, the principle formulated by Sir Gerald was also admitted by those judges who favoured protection of foreign shareholders' interests regardless of the company's nationality [90]). Judge Jessup added that the rationale of this "exception" to the general rule appeared to consist largely of equitable considerations [91]). He further observed that

"... the State whose nationals own the shares may protect them *ut singuli*" [92])—

which may suggest that protection is possible even if only a single share is involved—and that

"... the doctrine in question generally does not insist that the life of the corporation must have been extinguished so that it could be said the shareholders had acquired a direct right to the assets" [93]).

These contentions are supported by a long and continuous, albeit not uncontroversial, series of precedents which have been described elsewhere [94]). It would seem, therefore, that foreign shareholders' interests are protected by international law if the company is a national of the defendant State, regardless of whether the entity is "practically defunct" or not, and regardless of the amount of shareholdings involved [95]). The claim will evidently be proportionate to the relation existing between the national shareholdings of the claimant State and the total share-capital of the company.

If the above can be said to constitute a rule of positive international law, an interesting question arises: to what extent, and by whom, must local remedies be exhausted? There is, of course, no reason for discarding the local remedies rule altogether. It has been contended, however, that if the company is dissolved or prevented from taking action, it will be dis-

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[90]) That is, Judges Tanaka, Jessup, Gros and Riphagen. See also Judge Wellington Koo's separate opinion appended to the first judgment, I.C.J. Reports 1964, p. 51, at pp. 58 ff.

[91]) I.C.J. Reports 1970, pp. 191—192. See also the statement made by Max Huber in the *Ziat, Ben Kiran* case (see above note 80) to the effect that, in the matter considered here, international law chiefly relies on equitable considerations. See further the remark made by Sir Herbert Sisnett in the *Shufeldt* case *(United States* v. *Guatemala)*, award of July 24, 1930, U.N.R.I.A.A., vol. II, p. 1079, at p. 1098.

[92]) I.C.J. Reports 1970, p. 192.

[93]) *Ibid.*, p. 193.

[94]) Caflisch, *op. cit.* (above note 2), pp. 171 ff.

[95]) Cf. also I.C.J. Reports 1970, p. 48: "... it would seem that the owner of 1 per cent. and the owner of 90 per cent. of the share-capital should have the same possibility of enjoying the benefit of diplomatic protection... protection by the national State of shareholders can hardly be graduated according to the absolute or relative size of the shareholding involved". In the same vein, P. De Visscher, *op. cit.* (above note 45), p. 478.

pensed from complying with that rule [96]). This contention does not seem to be entirely accurate. If the company in question has been dissolved, it must be borne in mind that an entity in liquidation or under receivership continues to exist and can sue through its liquidator or receiver. Accordingly, local remedies can be, and should be, exhausted. Conversely, if the company is prevented from taking action, it is also prevented from exhausting local remedies. Therefore, the rule will not apply, as no remedies are available to the entity [97]); municipal law may, however, allow the company's shareholders to act, either on behalf of the company or for themselves. The shareholders will then have to utilize these remedies. It follows from the above that either the entity itself or its members are bound to exhaust all the judicial remedies afforded by municipal law.

Does the exceptional rule granting relief to the shareholders' national States under the circumstances described earlier extend to other, similar situations by way of analogy? In this context, Judge Jessup mentioned a theory according to which the rule in question also covers cases where the company—whatever its nationality—has been liquidated by its State of incorporation after the injury has been inflicted, the reason being that the foreign shareholders' interests have been transformed into rights. However, Judge Jessup rightly observes that

> "... at the time of the unlawful act, they did not have such a property interest and therefore under the rule of continuity the claim did not have in origin the appropriate nationality on that basis" [98]).

The situation is naturally different if liquidation has preceded the injury or if it is precisely the latter which has put an end to the entity's legal existence.

It is believed that the exception formulated earlier can further be extended, by analogy with the general principles governing diplomatic protection of individuals, to shareholders in stateless companies [99]) or in entities whose nationality is not "opposable" to the defendant State. The latter occurs when the nationality test selected by the claimant State's do-

[96]) Rudolf Bindschedler, La protection de la propriété privée en droit international public, Hague Recueil, vol. 90 (1956 II), pp. 173—304, at pp. 237—238.

[97]) "A claimant in a foreign state is not required to exhaust justice in such state when there is no justice to exhaust". Mr. Fish, Secretary of State, to Mr. Pile, United States Minister to Venezuela, May 29, 1873, Moore, A Digest of International Law (Washington 1906), vol. VI, p. 677.

[98]) I.C.J. Reports 1970, p. 193.

[99]) Just as in the case of natural persons, statelessness is also conceivable for corporate entities, because the latters' as well as the formers' nationality is in principle determined by municipal law. In addition, there seems to be at least one legislation — the laws of Argentina — which altogether refuses nationality to companies.

mestic law does not have the minimum effectiveness required by international law, or when the company possesses the claimant State's nationality on the basis of incorporation but is controlled by nationals of the defendant State [100]). Finally, the exception in question possibly covers foreign shareholders' interests in entities having dual or multiple nationality, if one of these nationalities is that of the defendant State [101]).

b. The status of foreign shareholders' interests in companies which are not nationals of the defendant State

In this connection, two hypotheses must be examined: (1) the company belongs to the claimant State; (2) the company is a national of neither the claimant nor the defendant State, but of a third State.

The first hypothesis is easily disposed of. It will be remembered that States have discretionary powers in matters of diplomatic protection; therefore, the company's national State, though entitled to put forward the entity's claim in its entirety, is at liberty to present only a part thereof, namely the part which corresponds to the share-capital held by its nationals.

As was demonstrated by the *Barcelona Traction* case, the second hypothesis described above, on the contrary, raises highly complex problems. In dealing with them, the Court proceeded from the assumption that, international law containing no rules of its own in this field, the general principles applicable in municipal legal systems must be applied [102]). According to these rules, shareholders have no rights over the corporate assets as long as the company legally exists, even though the company's assets and shareholders' interests may be identical from the economic viewpoint. To grant shareholders' national States a claim would furthermore result in concurrent claims on account of the same injury by the company's and the shareholders' national States. Citing its Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* [103]), the *Court*

[100]) If the "genuine link"-theory advocated by P. De Visscher (see above, p. 178) is extended to companies so as to require, in addition to the formal link of nationality, the presence of a substantial national interest, the rule should be further broadened to cover cases in which the company cannot be protected by its national State because of the absence of such an interest.

[101]) If it is admitted, in conformity with Article 4 (a) of the resolution of the Institute of International Law referred to earlier (see note 58), that no claim can be made in such a case. It has been asserted, however, that such situations are governed by the rule of effectiveness, too. See, for instance, the *Mergé-Strunsky* case, United States and Italy, Conciliation Commission, decision no. 55 of June 10, 1955, U.N.R.I.A.A., vol. XIV, p. 236, at p. 247.

[102]) For a criticism of this reference to "general principles", see above, p. 172.

[103]) I.C.J. Reports 1949, p. 174.

conceded, in response to a Belgian argument, that there are cases where concurrent claims may be presented: if an individual serving in an international organisation retains his nationality, he may subsequently, in certain cases, enjoy the protection of the organisation as well as that of his national State. In this context, one speaks of functional and diplomatic protection. No analogy could, however, be drawn between this instance of concurrent claims and the case now facing the Court.

The Court then mentioned certain conventions and arbitral awards which permit the "lifting of the corporate veil" in favour of foreign shareholders and thereby convert what under municipal law were mere interests into rights on the international plane. The Court reached the conclusion—too hastily perhaps— that these were solutions *sui generis*, providing no guidance for the present case.

The equitable grounds invoked by Belgium in support of its claim—the Court continued—may be of importance when the company itself is a national of the defendant State, because otherwise the investment in question would go wholly unprotected. This consideration does not apply here, for protection may be exercised by the entity's national State. If shareholders' interests were protected, too, competing claims might be made, and an atmosphere of insecurity and confusion would ensue.

Were there other circumstances which militated in favour of "piercing the corporate veil"? Belgium had argued that the abandonment, by Canada, of its claim on behalf of Barcelona Traction prompted the conclusion that intervention by Belgium was the only means of obtaining redress[104]). Rejecting this argument, the Court pointed out that a State exercising diplomatic protection on behalf of one of its nationals asserts its own right. A State has the discretionary power to grant or to withhold such protection, whatever be the rights of the individuals or corporate entities concerned on the domestic scene. It follows that the refusal of a State to extend protection to a company in no way affects the position of shareholders' national States under international law. The Court added that the essence of a secondary right—the existence of which is asserted by Belgium—is that it comes into being only once the original right— *i. e.* the right to put forward a claim on behalf of the company—has ceased to exist. The original right, as indicated, is of a discretionary nature and cannot be deemed to have lapsed merely on account of its non-exercise. Thus, it

[104]) Statement by Mr. Sauser-Hall (April 20, 1964), C.I.J., *Affaire de la Barcelona Traction, Light & Power Co., Ltd. Procédure orale*, Distr. 65/5 *bis*, pp. 592—593; rejoinder by Mr. E. Lauterpacht (May 13/14, 1964), *ibid.*, pp. 932—936, 952; rejoinder by Mr. Sauser-Hall (May 15, 1964), *ibid.*, p. 973.

continues to exist. The contention that the non-exercise of the principal right to protect the company brings into existence a secondary right to make a claim on behalf of the shareholders must consequently be rejected. Further, the Belgian theory would leave certain problems unresolved. If, for instance, the company's national State concludes a compensation agreement with the defendant State, and if that agreement does not satisfy the shareholders' national State(s), the latter could, in turn, put forward claims and thus introduce a lack of security into the negotiation of this kind of agreement. In addition, the existence of subsidiary claims might create a large number of potential protectors which could not be easily identified. As equitable arguments have been adduced by Belgium, it must finally be observed that incorporation abroad normally takes place in view of tax and other advantages; is it not equitable to assume that such advantages should be matched by a corresponding risk, namely the risk due to the fact that the protection of the corporate investment rests with the host State?

The Court's arguments were challenged by Judges Wellington Koo, Tanaka, Jessup, Gros and Riphagen[105]). Their view was that the shareholders' national States have an independent claim if the investments involved form a part of their national economy, either because the individual investors are nationals of that State or because the investments are otherwise connected with their national wealth. Judges Wellington Koo and Tanaka went even farther by asserting that shareholders' national States may present claims regardless of the importance of the investment concerned. Conflicts between claims of the company's and of the shareholders' national States could, according to Judge Wellington Koo, be solved through "... solutions inspired by goodwill and common sense ...", bearing however in mind that the defendant State cannot "... be compelled to pay the reparation due in respect of the damage twice over"[106]). Judges Tanaka and Jessup, on the contrary, suggested that a solution should be sought on a "first come, first served" basis[107]).

The subsidiary argument put forward by Belgium, *i. e.* the coming into existence of a secondary claim in favour of shareholders' national States if the company itself is denied protection, found favour only with Sir

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[105]) I.C.J. Reports 1964, pp. 55 ff.; I.C.J. Reports 1970, pp. 116 ff., 191 ff., 268 ff., 334 ff.

[106]) I.C.J. Reports 1964, p. 61, citing the Court's Advisory Opinion in the *Reparations* case, I.C.J. Reports 1949, pp. 185—186.

[107]) I.C.J. Reports 1970, pp. 130—131 and 200.

Gerald Fitzmaurice[108]), who rejected it *de lege lata* but advocated its admission *de lege ferenda;* at the same time, Sir Gerald proposed the creation, within the international legal order, of a body of rules of equity akin to those existing in common law systems[109]) [110]).

> "There is no reason of principle"—Sir Gerald wrote—"why, if the law so wills, failure to utilize a right of action by the party prima facie entitled to do so should not sanction its exercise by another party whose material interest in the matter may actually be greater. Practical difficulties there might be; but this is not a serious objection where no inherent necessity of the law stands in the way[111])".

On the whole, one would subscribe to the decision reached by the Court, as supplemented by the observations of Sir Gerald Fitzmaurice. The Court correctly starts from the basic assumption that in the absence of autonomous rules of international law, rules of municipal law apply, and that under the latter, shareholders have no rights over the corporate assets. It then rightly examines whether there is an exception to this principle in situations like the one with which the Court is confronted. In so doing, closer attention should, however, have been paid to international practice, although the latter, as has been indicated elsewhere[112]), yields no tangible result. The case law available mostly pertains to situations where the company itself was a national of the defendant State. State practice is scarce and contradictory. International agreements are of a questionable value for proving the existence of customary rules[113]); besides, the few conventional provisions which bear on this point are conflicting. Opinions of writers differ widely. One thus must

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[108]) See also the separate opinion appended by Judge Bustamante y Rivero to the first judgment, I.C.J. Reports 1964, pp. 82—84.

[109]) I.C.J. Reports 1970, pp. 84—86.

[110]) For the distinction to be made between such a set of rules and the Court's power to decide *ex aequo et bono*, governed by Article 38 (2) of the Court's Statute, see *ibid.*, p. 85.

[111]) *Ibid.*, p. 78.

[112]) Caflisch, *op. cit.* (above note 2), pp. 221—229.

[113]) See case of the *"S.S. Lotus" (France* v. *Turkey)*, judgment of September 7, 1927, P.C.I.J., series A, No. 10, p. 4, at p. 27. In this case, France had asserted the existence of a rule of customary international law conferring exclusive jurisdiction on the flag State in cases of collision occurring on the high seas. France had justified this assertion by showing that the alleged rule was contained in several treaties. Rejecting the French argument, the Court stated: "Finally, as regards conventions expressly reserving jurisdiction exclusively to the State whose flag is flown, it is not absolutely certain that this stipulation is to be regarded as expressing a general principle of law rather than as corresponding to the extraordinary jurisdiction which these conventions confer on the State-owned ships of a particular country in respect of ships of another country on the high seas".

fall back on general considerations. The general rule pertaining to vested rights is, as will be recalled, that of *renvoi* to the domestic law of the defendant State, *i.e.* to Spanish law. Under the latter — as under most municipal legislation —, individual shareholders have no rights over the corporate assets. It would seem that exceptions to a general rule such as the principle referred to above must be proved with special care. This is impossible for the situation contemplated here; failing any convincing evidence to the contrary, it must thus be concluded that the general rule prevails. The Belgian claim must, therefore, be rejected.

This analysis is borne out by other considerations. It has been said earlier [114]) that international law protects the interests of foreign shareholders if the company itself is a national of the defendant State. The rationale underlying this exception to the general rule governing vested rights is that in the absence of such an exception, the investment would enjoy no protection at all.

This rationale does obviously not apply to the present situation, quite on the contrary: if a further exception to the general rule were to be made, the claim presented by the company's national State and claims made by shareholders' national States would collide.

It has been asserted that the existence of parallel claims is by no means unprecedented in international law, and the *Reparations* case [115]) has been cited in support of this proposition. The opinion which was given by the Court in this case is highly debatable [116]), because "goodwill and common sense" may well be of little assistance for the solution of conflicts between parallel claims which are supposed to be on an equal footing. Thus, in defiance of a basic rule of international law, the defendant State could be obliged to make reparation twice for one and the same injury. Besides, as the Court observed, the present instance and the *Reparations* case are dissimilar. In the latter, the Court recognised the coexistence of claims having different bases, namely functional and diplomatic protection. In the present instance, one would be faced with two concurrent claims which would both be founded upon diplomatic protection. It is true, as the Court indicates, that such concurrence may also occur in the event of claims presented on behalf of individuals who have dual or multiple nationality. Conflicts will however be solved by having recourse to the principle of effectiveness [117]). Judges Jessup and Gros asserted that

[114]) Cf. above, p. 185.

[115]) I.C.J. Reports 1949, p. 173.

[116]) See the dissenting opinions of Judges Hackworth, Badawi Pasha and Krylov in the *Reparations* case, *ibid.*, pp. 197—204, 205—216 and 217—219.

[117]) I.C.J. Reports 1970, p. 50.

this principle could also be applied to claims made on behalf of shareholders: thus, the latter would be protected only if their interests are substantial, *i.e.* if they represent an important asset of the claimant State's economy [118]).

This view is the fruit of a confusion between the theory which requires the presence of a substantial national interest for the protection of companies as such and the entirely different problem of the protection of foreign shareholders' interests [119]). Furthermore, the view expressed by Judges Jessup and Gros, coupled with the theory which requires the presence of a substantial national interest in matters of protection of corporate entities, by no means rules out the possibility of conflicting claims. Let it be supposed that a company is endowed with the nationality of State A. Forty per cent of its shares are owned by nationals of that State, and forty per cent of the shares belong to nationals of State B. The entity suffers an injury in State C. States A and B will both be entitled to put forward a claim, the former on behalf of the company, the latter on behalf of the shareholders who are its nationals. The remedy proposed by Judges Jessup and Tanaka to solve this conflict, namely the rule of "first come, first served", is as inadequate as that suggested by the Court in the *Reparations* case.

The Court's rejection of Belgium's thesis asserting the existence of a subsidiary claim in favour of the shareholders' national State(s) is motivated by the idea that a secondary right only comes into existence once the principal right, *i.e.* the right which may be exercised by the company's national State, has become extinct. This principal right is, however, of a discretionary nature: a State may or may not exercise it. Mere non-exercise of the right cannot be taken to mean that it has lapsed; thus, there is no room for subsidiary claims. This is an extremely dangerous argument, for every right, by its very nature, is discretionary; otherwise it would not be a right but a duty. The Court's reasoning thus implies a total rejection of the concept of secondary rights. This cannot possibly be correct. It is regrettable that the Court did not confine itself to stating simply that there is no international practice attesting the existence of a subsidiary claim on the part of foreign shareholders' national States.

The Court could have argued further that if there existed a subsidiary

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[118]) *Ibid.*, pp. 195 ff., 268 ff.

[119]) P. De Visscher, *op. cit.* (above note 45), p. 478. See also the statement made by the Court, quoted above (note 95), and Judge Tanaka's separate opinion, I.C.J. Reports 1970, p. 128.

claim of the shareholders' national State(s), that claim, being subsidiary, would come into existence only once the company's national State has decided not to exercise its principal right. This renunciation would of necessity be subsequent to the date at which the injury occurred, *i. e.* February 12, 1948. A State's claim, in order to be valid, must however have been continuously owned by its nationals from the moment at which the injury occurred—in the present case February 12, 1948—up to the presentation of the claim on the international plane. The rule of continuous national ownership described above would be infringed if a subsidiary claim were to be attributed to shareholders' national States, because this attribution would necessarily take place after February 12, 1948, and because Belgium did not prove any exception to the rule of continuous national ownership.

One might wonder, however, if such an exception would be impossible to establish *de lege ferenda.* Sir Gerald Fitzmaurice thinks that it would not. It is indeed difficult to see why no exception to the rule of continuous national ownership of the claim could be made in this case, or, to use a different construction, why it should be considered an absurdity [120]) to assume that, by virtue of a legal fiction, the secondary claim is deemed, retroactively, to have come into existence at the moment at which the injury occurred.

The question of whether such an exception would be desirable is more difficult to answer. The answer to be given depends essentially upon the attitude taken in the struggle between developed and developing countries. The judges belonging to the former emphasize the idea that international law must necessarily offer some sort of protection to every investment abroad and therefore favour a more "liberal" approach, *i. e.* a more comprehensive protection of investments. The judges who are nationals of developing countries, on the contrary, advocate a more "conservative" approach and thus wish to maintain the *status quo.* One of them, Judge Ammoun, pointed out that the negative conclusion reached by him on the basis of *lex lata*

> "... is reinforced by the opinion ... held by a multitude of States—new States and other, very numerous developing States—with regard to the application of diplomatic protection, the rules of which are only accepted by them to the extent that they take account of their state of underdevelopment, economic subordination and social and cultural stagnation, in which the colonial powers left them ..." [121]).

[120]) This is the term used by Judge Morelli, *ibid.*, p. 242.
[121]) *Ibid.*, p. 329.

While some ideas contained in this statement may be taken exception to, they seem to indicate that in the near future, public international law is not likely to develop rules which will protect interests such as those which Belgium has sought to safeguard in the present case.

V. Protection of Foreign Creditors' Rights and Interests under International Law

The question which will now be considered is the following: if a company's rights are injured by a State, can the foreign creditors—especially bondholders—of that company be protected by their national State(s) for losses suffered by them through the diminution of the assets of the debtor company? On this point, the Court's second judgment contains an interesting statement to the effect that

> "Creditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss" [122]).

This assertion seems to be contradicted by Judge J e s s u p who observes that

> "There are . . . abundant precedents for protection of bondholders . . ." [123])

and adds that in the present case, Great Britain and the United States had initially undertaken to protect the interests of bondholders of Barcelona Traction.

The problems of international law connected with corporate debts, especially bondholdings, and the relevant precedents in this field have been fully dealt with elsewhere [124]). It will be enough to recall that in this matter, the basic rule of *renvoi* to the defendant State's domestic law receives full application. The Court correctly stated that under municipal law, creditors or bondholders in general have no rights against persons who cause them loss by wronging their debtor, who may be an individual or a company. Consequently, if the rule of *renvoi* referred to above is applied, the creditor, even if he is a foreign national, has no vested right under international law.

The situation appears to be different in respect of secured debts.

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[122]) *Ibid.*, p. 35.

[123]) *Ibid.*, p. 207.

[124]) C a f l i s c h, *op. cit.* (above note 2), pp. 252—265; the same, Indirect Injuries to Foreign Creditors in International Law, Belgian Review of International Law, vol. 3 (1967 II), pp. 404—427.

According to municipal law, the security attached to the debt may constitute a limited right *in rem*. Such a right can be invoked *erga omnes*, including the wrongdoer who, in the situation contemplated here, would be a State. If the rule of *renvoi* is again applied here, the security guaranteeing the debt constitutes a vested right which should be protected by international law. This seems indeed to be the case, although international practice on this point is still in a state of flux.

VI. Conclusions

The conclusions emerging from this paper may be summarised as follows:

1) The Court's decision in the present case does not warrant a departure from the rule that a company's nationality, and hence its diplomatic protection, are largely dependent upon the *lex causae*.

2) Foreign shareholders' personal rights are protected as vested rights by international law, because they have the character of rights under the defendant State's municipal law.

3) It is still possible to assert that foreign shareholders' i n t e r e s t s —whatever their importance—are protected by international law if the company is a national of the defendant State.

4) This assertion can be broadened so as to include interests of foreign shareholders in stateless companies or in entities the nationality of which is not "opposable" to the defendant State.

5) Interests of foreign shareholders remain unprotected if the company is a national of neither the defendant nor the claimant State, but of a third country.

6) The question of who, under international law, is deemed to be the shareholder when the shares are the object of a fiduciary relationship has been left open. There are indications, however, that legal ownership shall prevail if the relationship considered is based on a trust deed.

7) The protection of foreign creditors' rights and interests is a problem which has not been analysed in depth by the Court; it thus continues to be governed by the existing precedents and by the State practice available.

An eminent author[125]) has characterised the Court's decision as "narrow", and narrow it is. It is true that parts of it are open to criticism. However, the Court being bound by its Statute to apply the existing rules of international law[126]), it is difficult to see how it could have reached a different conclusion. It is furthermore unlikely, in view of the conflicting attitudes and interests of developed and developing countries in the field of foreign investments, that the rule applied by the Court will undergo a change in the near future.

[125]) Ch. De Visscher, Observations, *op. cit.* (above note 9), at p. IV.

[126]) See Article 38.

[127]) (Continuation of note 9 above) Briggs, Barcelona Traction: The *Jus Standi* of Belgium, AJIL, vol. 65 (1971), pp. 327—345; Louis, Note, in Belgian Review of International Law, vol. 7 (1971 I), pp. 347—367; Ch. De Visscher, La notion de référence (renvoi) au droit international dans la protection diplomatique des actionnaires, *ibid.*, pp. 1—6; Susman, The Barcelona Traction Case, Harvard International Law Journal, vol. 12 (1971), pp. 91—210; Note, in The Journal of International Law and Economics, vol. 5 (1971), pp. 239—248.