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Protection of Shareholder Interests in Foreign Corporations - Barcelona Traction Revisited

PROTECTION OF SHAREHOLDER INTERESTS IN FOREIGN CORPORATIONS—*BARCELONA TRACTION* REVISITED

Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed, and if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.[1]

I. INTRODUCTION

The number of citizens who invest capital abroad has steadily grown since the beginning of the century.[2] "According to The New York Times, in 1960 'American industry's direct investment in other countries came to $30,000,000,000, roughly three times as much as one decade earlier and mounting at a rate of more than $2,500,000,000 a year.' Over 2,800 United States corporations have a direct interest in one or more of 10,000 enterprises abroad."[3] The ramifications of this growth will be varied, but most seem to agree that "the number of international claims seems destined to increase."[4]

Security of the investor's commitment from uncompensated interference by the host nation would appear to be an important factor in stimulation or deterrence of further investment.[5] If the investment is made in a domestic corporation doing business in a foreign state by means of a branch office, security would seem guarded by the possibility of an international claim by the state of incorporation against the host nation for breaches of international law which harm that state's

1. E. Vattel, The Law of Nations 136 (Eng. transl. 1758).

2. "With the drawing together of the world by increased facilities for travel and communication, the number of persons going abroad for purposes of business or of pleasure has steadily increased. Coincidentally, an increasing amount of capital, American as well as European, has been seeking investment in foreign countries . . . ." E. Borchard, Preface to Diplomatic Protection of Citizens Abroad at v (1915) [hereinafter cited as Borchard]. See also R. Lillich & G. Christenson, International Claims: Their Preparation and Presentation 2-3 (1962) [hereinafter cited as Christenson]; C. Joseph, Nationality and Diplomatic Protection 1 (1969); Atkey, Foreign Investment Disputes: Access of Private Individuals to International Tribunals, 5 Can. Y.B. Int'l L. 229 (1967); Kutner, Habeas Proprietatem: Due Process for International Investments: A Prior Consideration for Investments Abroad, 40 U. Det. L.J. 617, 619 (1963).

3. Christenson 2-3 (footnotes omitted); N.Y. Times, June 25, 1961, § 4, at 5, col. 1; Kutner, supra note 2, at 619 (in 1961 the figure was up to $34,700,000,000). The preliminary figures for 1969 show that the figure has reached $70,763,000,000. U.S. Department of Commerce, Statistical Abstract of the United States 754 (92d ed. 1971).

4. Christenson 2. See also Borchard, preface at v.

5. See Borchard §§ 162-63; cf. Head, A Fresh Look at the Local Remedies Rule, 5 Can. Y.B. Int'l L. 142, 145 (1967): "True climates of confidence will only exist when exporters, investors and tourists all have some reasonable expectation that their proper claims will be adjudicated . . . ." See also Kutner, supra note 2, at 620, re the risks taken by an investor, and his "weighing the odds."

juridical national—the corporation.[6] Complications arise, however, where the investor is a shareholder in a foreign corporation. This method of foreign investment machinery, the multinational corporation, is ever on the increase.[7]

While it is true that some states provide their investing nationals with alternate forms of security,[8] it is not the aim of this Comment to discuss internal protective measures. Rather, the Comment will investigate an area in which the "existing protective measures are generally inadequate and often inconsistent"[9]—diplomatic protection of shareholder interests in foreign corporations.

This Comment will examine the general background of international claims,[10] and the place of the corporation and its shareholders in international law.[11] It will attempt to show that the International Court of Justice's recent decision in the *Barcelona Traction Case*[12] was a step backward in affording the international community outlets to solve economic disputes, as well as an abandonment of the Court's role as interpreter of developing customary international law.

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.[13]

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6. See 5 G. Hackworth, Digest of International Law 833 (1943). The term national is broader than citizen and includes a corporation incorporated in a state. The commission allowed the United States to espouse the claim of a corporation incorporated in the United States despite ownership of its shares by Canadian nationals. Id.

7. Examples of such corporations are wholly owned subsidiaries having value in their avoidance of certain direct and indirect trade restrictions. See Kronstein, The Nationality of International Enterprises, 52 Colum. L. Rev. 983 (1952). Kronstein alludes to charters of convenience and relates them to the flags of convenience used for maritime purposes. These charters, such as the use of Panamanian corporate form, allow for tax and other economic benefits. Id. at 983. As to the multinational corporations, "[i]n addition to the fact that it is the economic enterprise and not the fictitious legal entity or corporation with which the law should deal, [it is] indicate[d] that an international enterprise may consist of a variety of operating units which perform different functions in different countries." Id. at 984. See also Mann, International Corporations and National Law, 42 Brit. Y.B. Int'l L. 145 (1967); Miller, The Corporation as a Private Government in the World Community, 46 Va. L. Rev. 1539 (1960).

8. Such as the various investment guarantee programs of the United States and other nations. Kirgis, Developments in the Law and Institutions of International Economic Relations, 64 Am. J. Int'l L. 106, 109 (1970); Metzger, Nationality of Corporate Investment Under Investment Guaranty Schemes—The Relevance of Barcelona Traction, 65 Am. J. Int'l L. 532 (1971); see 22 U.S.C. §§ 2181-83 (1970).

9. Drucker, The Protection of Foreign Investment, 16 Int'l & Comp. L.Q. 217, 217-18 (1967).

10. See Part II infra.

11. See Part III infra.

12. Barcelona Traction, Light, and Power Co., Ltd., (New Application: 1962), Second Phase, [1970] I.C.J. 3.

13. Mavrommatis Palestine Concessions Case, [1924] P.C.I.J., ser. A, No. 2, 6, 12.

II. International Claims

Although it has been maintained that diplomatic protection (international claims) had its roots in pre-feudal times,[14] there was little development in the doctrine prior to the nineteenth century.[15] It was not until 1915, when Edwin Borchard presented his work *The Diplomatic Protection of Citizens Abroad*, that a scientific study devoted entirely to the subject was available.[16] Borchard set forth the circumstances under which an international claim might lie. Central to these circumstances was the theory of state responsibility.

A. *State Responsibility*

The classical position as to state responsibilty was based upon the sovereignty and equality of nations. Each nation as a sovereign has full jurisdiction over its territory and over all persons or things present therein. Similarly, all sovereigns have a personal sovereignty over their nationals. While on one hand a sovereign state is under no duty to admit foreign nationals, once it has done so a relationship of duties and rights exists not only between the host sovereign and the alien, but also between the sovereign host and the state of which the alien is a national. That is, the admitting state must answer to the alien's sovereign for harms suffered by the alien which result from a breach of some international duty imposed upon the host.[17]

The standard of care to be exercised by a state in fulfilling the duty owed to an alien is "incapable of exact definition."[18] Once the standard is violated, however, a right to claim remuneration arises in the alien's sovereign if certain conditions are met. The standard is not violated "merely because an alien has been injured or has suffered loss within the state's territory;"[19] rather, the sovereign state itself must in some way be responsible for the injury or loss.

For example, an internal act of state by the legislature, judiciary, or executive officers, or their agents, may give rise to such breach if the wrongs are committed in their public, or apparently public, capacity.[20] Acts of individuals generally do not give rise to state responsibility since the individuals are "in no sense authorities of the state."[21] In certain circumstances, however, if the state has *condoned* the action, it may be held responsible.[22]

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14. Joseph, supra note 2, at 2.

15. F. Dunn, The Protection of Nationals 46-47 (1970) [hereinafter cited as Dunn].

16. Joseph, supra note 2, at 3.

17. W. Bishop, International Law: Cases and Materials 626-27 (2d ed. 1962) [hereinafter cited as Bishop]; Borchard §§ 1-50; Joseph, supra note 2, at 3.

18. Borchard preface at v.

19. Bishop 627.

20. Bishop 636-55; Borchard §§ 47-72; Dunn 116-33. In one case an American citizen, A.K. Cutting, was held in custody in Mexico in 1886. The United States showed serious jurisdictional abuses contrary to international law. It was alleged that Cutting was "subjected to pains and depredations which no civilized Government should permit to be inflicted on those detained in its prisons . . . ." Mr. Bayard, Secretary of State, to Mr. Jackson, Minister to Mexico, telegram, July 19, 1886, 1886 For. Rel. 701.

21. Borchard § 86. See also Dunn 136.

22. Dunn 137.

Mob violence is an act closely related to the acts of individuals. Where the state has used "due diligence" to prevent such violence or to subdue the perpetrators it will be absolved of responsibility for harm to aliens which might otherwise arise.[23]

Closely allied with the acts of individuals for which the state may be held responsible are acts of civil war. Early theories held the state responsible for injuries suffered at the hands of revolutionaries.[24] Today these theories have been abandoned; the state will be responsible only where "there is proven fault or a want of due diligence on the part of the authorities in preventing the injury or in suppressing the revolution."[25]

Another important area of state responsibility concerns war claims. In earlier times there was no rule of pecuniary indemnity to individuals for damages suffered in ordinary hostilities.[26] Recently the rights of individuals in times of war have grown in conjunction with the tendency of the victors to shift the burden of the cost of war upon the losers. "Contemporary practice . . . provides for both [claims arising from breach of international rules of war and those arising from the ordinary conduct of hostilities] in treaties of peace and domestic claims legislation. Whichever legal base is used, war claims are established in much the same way as are claims for wrongs to persons or property."[27]

In two other important areas sovereigns have been held to assume international responsibility: contractual claims, and denials of justice. Contractual claims are of great import since there has been a "constant growth of international intercourse."[28] When the breach of a contract made between a national of one state and a national of another sovereign state or that other state is met with a denial of justice on the part of the other state, it may give rise to an international claim.[29]

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23. See Borchard § 89; Dunn 142-46; cf. G. Thorpe, Preparation of International Claims 5 (1924) [hereinafter cited as Thorpe]. The Department of State supported this view when it said: "While it is a general principle of international law that a government is obligated to take all reasonable measures necessary to protect the property of aliens within its jurisdiction, a government is not ordinarily regarded as internationally responsible for losses or damages sustained by aliens as a result of the acts of private individuals in the absence of evidence of complicity or negligence on the part of its authorities." Statement for the General Information of American Nationals Desiring to Present International Pecuniary Claims for Losses or Damages Sustained in Spain [undated].

24. Borchard § 93.

25. Id. at 229; accord, Dunn 159-60; Thorpe 53. See generally the case of Frank Lenz, Report of Mr. Olney, Secretary of State, to the President, Dec. 19, 1895, [1895] 2 Foreign Rel. U.S. 1257, 1316, 1332 (1895).

26. Borchard § 99.

27. Christenson 66 (footnote omitted); accord, Borchard §§ 98-99.

28. Borchard § 109.

29. Id.; Dunn 163-69; Christenson 62-65, 81-84; Thorpe 54. A denial of justice is, in effect, a refusal on the part of the sovereign to remedy the wrong done to the alien. Borchard § 127, at 330. In its broader definition (lato sensu) it refers to all acts of state which deny the alien that treatment prescribed by the ordinary principles of civilized justice. Id.; see Dunn 146-56. In its narrower sense (stricto sensu) it refers to the refusal of the judiciary of the state to allow the alien his day in court. Dunn 148. In essence,

Finally, a state may become responsible in circumstances where state interference either directly or indirectly results in a situation whereby the alien deserves to be compensated. Refusal to compensate this individual may allow the alien's state to press a claim on his behalf for compensation.[30]

Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State.[31]

B. *The Exercise of Diplomatic Protection*

Under the principles of customary international law, an individual has no standing to present claims against foreign states.[32] It is the individual's government which must sponsor the claim. Diplomatic protection of an alien's rights is not an everyday occurrence. A state must examine the circumstances under which it is asked to intercede and will demand reparation "only for such injuries as the state in its discretion deems a justification for diplomatic protection."[33] While there are no specific guidelines it is generally stated that "not every injury warrants immediate interposition by the state. It is only when the citizen has suffered flagrant injustice or maltreatment by or at the direction of an authority of the state of residence, that his national government is warranted in taking immediate measures of repression."[34] And then, "it is entirely a matter for the State to decide whether, for juridical or political reasons, the case shall be taken up or not."[35] Diplomatic protection of an individual's rights cannot be considered a matter of right, but rather as an "extraordinary legal remedy."[36]

When espousal occurs, the government "adopt[s the national's] private grievance as its own,"[37] and obtains complete control over it.[38] The government has

any act by any individual may evolve into an international claim, should the sovereign state refuse the alien the opportunity to be made whole through the judiciary or similar branch. Id.

30. Borchard § 50.

31. Nottebohm Case, Second Phase, [1955] I.C.J. 1, 24.

32. "Customary international law maintains that individuals have no standing to present claims against foreign states for the taking of their property or for other international wrongs. Instead, under the theory that whoever wrongs an individual indirectly injures his state, a claimant must seek redress by convincing his own government to adopt his private grievance as its own and espouse it diplomatically against the offending foreign state." R. Lillich, International Claims: Postwar British Practice 1 (1967) (footnotes omitted) [hereinafter cited as Lillich].

33. Borchard § 134, at 351.

34. Id. (footnote omitted).

35. Bagge, Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders, 34 Brit. Y.B. Int'l L. 162, 164 (1958).

36. Borchard §§ 134-35. See also Christenson 3.

37. Lillich 1.

38. Borchard § 144; Christenson 94-95. "[I]n taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law." Panevezys-Saldutiskis Ry. Case, [1939] P.C.I.J., ser. A/B, No. 76, at 16.

power over the presentation, prosecution, abandonment or settlement of the individual's claim.[39] The individual does not even have a legal right to the award, should his government recover one,[40] though these awards are generally given to the individual.[41] The extent of protection varies with the circumstances of each claim. But despite varying circumstances, some nations have established policies with regard to diplomatic protection upon which their nationals may rely.[42] These policies must be examined when a national is considering investment abroad.[43]

C. *Object of Protection*

Stated simply, the object of the protection of an international claim is the person and property of the national of the asserting state.[44] "The most important condition precedent to securing government espousal of an individual's grievance is the requirement that it have been owned by a . . . national at the time of loss or injury."[45]

While ideally all nationals who have suffered harm would seem to fit in this category, the legal relationships of individuals tend to complicate the process. A person may be a national of more than one state;[46] a corporation may be a national of the state in which it is incorporated,[47] and concurrently be related to another nation where it has its center of active administration (*siège social*);[48] a shareholder may be a national of one state and own an interest in a corporation which is incorporated in another state.[49] It may therefore become imperative for a state wishing to espouse a claim, to determine whose national the wronged party truly is, for only that state is entitled to espouse the claim.

D. *Limitations on Diplomatic Protection*

The first hurdle for a prospective claimant is the collection of conditions placed upon the espousal of his claim by the claimant's government.[50] For instance, the United States State Department has set forth directives concerning certain claims commissions. One specifies that before a corporation's claim will be espoused a certain percentage of shareholders must be United States nationals.[51] Similarly British claimants must satisfy the requirements of the Foreign Compensation Commission as established through various Orders In Council.[52]

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39. Bishop 742; see Borchard §§ 151-52.
40. Borchard § 152.
41. Id.
42. Id. at § 162.
43. Id. at §§ 162, 163.
44. Id. at §§ 198-301; Christenson 7-8, 26-39; Joseph, supra note 2, at 7-24.
45. Christenson 8 (footnote omitted).
46. Nottebohm Case, [1955] I.C.J. 4.
47. Borchard § 277; see Part III infra.
48. Borchard § 277; see Part III infra.
49. Borchard § 282.
50. Id. at § 302; see Christenson 88-115; Lillich 37-38.
51. See Christenson 88-116.
52. Lillich 24-59.

These conditions are in addition to any political nuances which may play upon the possibility of the claim being espoused.

There are other limitations upon espousal which have developed independently of the states' own criteria. The first of these concerns continuous nationality, whereby a national must maintain ownership of the claim at the time the claim arose, as well as the time it is espoused, presented and settled.[53] This doctrine has been somewhat eroded where the claim is not espoused and presented in an international tribunal, but instead is presented to a claims commission in connection with a lump sum settlement agreement.[54]

Another limitation concerns acts of the citizen himself which may remove his right to espousal. A citizen may act in a manner which is censurable and thus lose his claim.[55] Additionally, a citizen may renounce by express contract his rights of espousal. This refers to the famous "Calvo Clause," whereby a citizen agrees, as a condition to being permitted to conduct his affairs in another country, to waive his rights of espousal by his own state.[56] Courts have interpreted the Calvo Clause in several different ways.[57] Some have considered it merely a requirement to pursue local remedies,[58] while others have stated that a citizen cannot waive the protection of his government.[59] Closely related to the Calvo Clause are certain concession agreements which require incorporation in the granting countries. These have been construed as a renunciation by express contract of the right to diplomatic protection.[60] It is also possible to renounce by implication.[61]

The last and most important limitation upon the ability to espouse a claim centers on the claimant's exhaustion of local remedies.[62] The theory here is that the defendant state should be given every opportunity to right the wrong on its

53. Christenson 9-12; Lillich 24; Clay, Recent Developments in the Protection of American Shareholder's Interests in Foreign Corporations, 45 Geo. L.J. 1, 7-9 (1956) [hereinafter cited as Clay]. But see Freidberg, Unjust and Outmoded—The Doctrine of Continuous Nationality in International Claims, 4 Int'l Law. 835 (1970). "The wholesale migrations forced upon people in this century, and the greater mobility made possible by modern transportation, combine to make the doctrine of continuous nationality an archaic relic which does not serve the ends of justice." Id. at 835-36.

54. Lillich 24-34.

55. Borchard §§ 337-70.

56. Id. at § 371; Christenson 13-14; Dunn 169-72.

57. The Tattler (United States v. Great Britain), Claims Arbitration Under the Agreement of Aug. 18, 1910, Nielsen's Rep. 489 (1926); North American Dredging Co. Case (United States v. United Mexican States), General Claims Commission, 1926, Opinions 21 (1927).

58. International Fisheries Co. Case (United States v. United Mexican States), General Claims Commission, 1931, Opinions 207 (1931).

59. North American Dredging Co. Case (United States v. United Mexican States), General Claims Commission, 1926, Opinions 21, 33 (1927).

60. Borchard § 372.

61. Id. at §§ 379-80.

62. Id. at §§ 381-83; Christenson 96-98; Dunn 156-59; Joseph, supra note 2, at 4-7; Bagge, supra note 35, at 165; Clay 9-11.

own—the claimant must pursue his local remedies until there are no appeals available to him before an international tribunal will exert jurisdiction. Though this rule has been referred to as a well established requirement of customary international law,[63] the conditions under which the rule developed have changed substantially. The rule has been eliminated in some respects when dealing with negotiated lump sum settlements of claims.[64] It is also obviated where there is a treaty or convention which, in general terms, allows the conflict to be brought to an arbiter. When the alien's state is bringing the same claim at the same time, when the exhaustion would prove futile in view of prior determinations based on similar facts, or when the available remedies would provide less than that expected of justice in a civilized nation, the exhaustion may also be unnecessary.[65]

III. The Place of the Corporation in International Law

A. *Definition*

The corporation is a juridical person which has an identity separate from that of its incorporators and shareholders.[66] The shareholders have limited liability to the extent of their investment in shares purchased.[67] The traditional view would not let the investor have his cake and eat it too, since it was concluded that the shareholder had no direct interest in the property of the corporation except in liquidation.[68] Consequently, "[u]nder [the traditional] view, a foreign corporation was considered a separate entity distinct from its shareholders, and was thus an alien in whose behalf the parent state of its shareholders has no right to intervene."[69]

Although early foreign investments were welcomed, national opinion in many countries turned against this alleged form of " 'economic exploitation' by the foreigner."[70] Social reformation revolutions resulted in measures of expropriation which "raised the question of the position under international law of individuals who had invested."[71] It is generally granted that the state of the situs has the right to nationalize an alien investor's property which is in the state.[72] Such nationalization under traditional views, raises a duty on the part of the state to afford "just, prompt, and effective compensation."[73] When the nationalizing state fails to fulfill its duty, an international economic dispute arises.

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63. Christenson 96.

64. Id. at 98.

65. Bagge, supra note 35, at 166-67.

66. 1 G. Hornstein, Corporation Law and Practice § 12 (1959); see Note, 16 Syracuse L. Rev. 779, 782 (1965).

67. H. Henn, Corporations § 73 (2d ed. 1970).

68. See Id. at § 352.

69. Clay 4.

70. Jones, Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies, 26 Brit. Y.B. Int'l L. 225 (1949) [hereinafter cited as Jones].

71. Id.

72. Kutner, supra note 2, at 617.

73. Id. See also Sweeney, The Restatement of the Foreign Relations Law of the United States and the Responsibility of States for Injury to Aliens, 16 Syracuse L. Rev. 762 (1965).

"Today there is a growing body of informed opinion asserting that impartial transnational arbitration or adjudication is the most feasible single means of resolving these types of private foreign investment disputes."[74] Thus far, however, international tribunals have been ineffective in resolving the problems in this area.[75] These tribunals continue to apply the traditional standards of espousal of international claims, and therefore investors must weigh the odds of risking the uncompensated nationalization or impairment of their investments.[76] Considering the importance of foreign investments, and their favorable influence on the global standard of living[77]

> [i]t is questionable whether the policy of requiring strict compliance with such conditions is in the inclusive interests of the global community, in light of the necessity for securing for injured individuals the widest possible access to remedies, for the purpose of accelerating the flow of wealth across the boundaries of national territories.[78]

Under the existing views, it becomes important to determine who may espouse the claim of the injured corporation, and under what circumstances a shareholder may seek reparation independently of his corporation.

B. *Nationality*

At the beginning of this century, businesses had no nationalities.[79] Rather, they were independent organizations "which generally did not come into conflict with the political side of life."[80] The need to establish a nationality for corporations arose incidentally to arising conflicts of laws problems,[81] and although a corporation is a juridical person to which international law *attempts* to attribute nationality, "there is no unanimity as to the rules to be applied in determining that nationality."[82] Under the Anglo-American view, a corporation is a national of the state under whose laws it is incorporated.[83] European views, on the other hand, have been a battleground of continuing philosophical argument. One of the contending European views was that the place of incorporation determined nationality.[84] A second view held that the place of active administration, its *siège social*, determined corporate nationality.[85] A third view held that the main situs

74. Atkey, supra note 2, at 229.

75. Kutner, supra note 2, at 617, 620-25; see Atkey, supra note 2, at 234: "[T]he Court has not been an effective forum for the settling of private international investment disputes."

76. Kutner, supra note 2, at 620.

77. Id. at 619.

78. Atkey, supra note 2, at 232. The author calls for a locus standi for individuals before international tribunals. Id. at 231-32. But see Note, 3 N.Y.U. J. Int'l L. 390, 400-01 (1970), for a discussion of the contrary view of the underdeveloped and communist states.

79. Kronstein, supra note 7, at 985.

80. Id.

81. Id. at 986.

82. Jones 226; 16 Syracuse L. Rev., supra note 66, at 784.

83. Bishop 396; Borchard § 278.

84. Borchard § 277.

85. Id.

of production, the *principale exploitation*, was determinative.[86] The controlling factor under a fourth view was the nationality of the shareholders, and under the fifth view, the nationality of the majority of the shareholders.[87] The last view held that no one factor was determinative: rather, the arbiter should take cognizance of all of the factors and circumstances.[88]

Early in the century the majority of European commentators held that *domicil*, which referred to either *siège social* or *principale exploitation*,[89] was determinative. Today European law views *siège social* as the determinative factor.[90]

Some commentators have expressed the feeling that the concept of nationality of corporations is meaningless.[91] Considering the recent developments in the use of "charters of convenience,"[92] one might at least conclude that the concept, as presently applied, is constrictive. One commentator has noted that a more apt term would be "rational character."[93] The status of the citizenship of an individual and his nationality is generally determined by municipal law. As to the *nationality* of a corporation, municipal law is generally silent.[94] Customary international law often fails to keep pace with changes in the social and economic order of the world. The rights of investors under international law are in such a state of under-development.[95] In looking to customary international law to determine the nationality of the corporation, the subject of disregarding the corporate fiction—"piercing the veil"—falls into a similar underdeveloped state.

Under municipal law, there have been developed certain exceptions to the theory of corporate separateness and limited liability. The first illustration involved the English case of *Foss v. Harbottle*.[96] This case allowed "lifting the veil" to combat acts of an ultra vires nature or those acts of fraud or breach of the director's trust. Under these principles, municipal law disregards the corporate entity in favor of creditors or where equitable relief is demanded.[97] But the law is slow to pierce the veil in order to *favor* the shareholders with a corporate claim.[98]

The normal rule as to claims for damages done to the corporation is that they

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86. Id.
87. Id.
88. Id.
89. Id.
90. Bishop 396.
91. Graving, Shareholder Claims Against Cuba, 48 A.B.A.J. 226, 227 (1962); Timberg, Corporate Fictions: Logical, Social and International Implications, 46 Colum. L. Rev. 533, 572-75 (1946).
92. See Kronstein, supra note 7, at 983-85.
93. Bishop 396.
94. Jones 226.
95. Bagge, supra note 35, at 174.
96. 67 Eng. Rep. 189 (Ch. 1843); see Bagge, supra note 35, at 171; Jones 232; 16 Syracuse L. Rev., supra note 70, at 790.
97. See Jones 232-33; 16 Syracuse L. Rev., supra note 66, at 790.
98. 16 Syracuse L. Rev., supra note 66, at 790.

accrue to the corporation and not to the shareholders.[99] At the same time, both Anglo-American and European law recognize an action by shareholders[100] when the corporation is harmed so as to effect shareholders' indirect rights when the corporation will or cannot take the action on its own incentive.[101]

An additional area where municipal law will act to "pierce the corporate veil" is that of national security. In the case of *Daimler Co. v. Continental Tyre and Rubber Co.*[102] the House of Lords pierced the veil of a corporation to determine actual control. These steps were taken during World War I in an act of state protection.[103] An American case which afforded the Supreme Court an opportunity to follow the English control approach was decided shortly thereafter in a contrary fashion.[104] The statute concerning trade with the enemy[105] was later amended,[106] and during World War II, in the case of *Clark v. Uebersee Finanz-Korporation, A.G.*,[107] the control approach of *Daimler* was followed, thus overruling *Behn Meyer & Co. v. Miller*.[108] After the hostilities the courts returned to the place of incorporation test.[109]

Piercing may also occur in certain statutory situations,[110] or for purposes of diplomatic intervention.[111] A sovereign may pierce to find the true ownership of the corporation. This is done to investigate proportionate ownership by nation-

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99. See Henn, supra note 67, at § 78; Jones 233-34.

100. Jones 233-34. Normally the action in the European States is one of action sociale, by the corporation to right the wrongs against the corporation. Id. The corporation's shareholders, when injured directly in their shareholder capacities, have an action individuelle. These are the French terms, but the ideas are followed similarly in a number of European nations. Id.

101. Id. The common law countries refer to this as the derivative action. The French system refers to it as an action ut singuli—an action by shareholders for wrongs to the corporate entity. It is more-or-less followed in Switzerland, Austria, Sweden, and Norway. Id. and Norway. Id.

102. [1916] 2 A.C. 307.

103. Id. at 344. See also Bagge, supra note 38, at 172.

104. Behn, Meyer & Co. v. Miller, 266 U.S. 457 (1925).

105. Trading with the Enemy Act, ch. 106, § 5(b), 40 Stat. 411, 415 (1917) (codified as amended, 12 U.S.C. § 95a (1970)).

106. Ch. 185, § 1, 54 Stat. 179 (1940).

107. 332 U.S. 480 (1947).

108. Id. at 489; see Kronstein, supra note 7, at 987-88.

109. Kronstein, supra note 7, at 988.

110. Under the Jones Act, ch. 250, § 33, 41 Stat. 1007 (1920) (codified as amended, 46 U.S.C. § 688 (1970)), as interpreted in Bobolakis v. Compania Panamena Maritima San Gerassimo, S.A., 168 F. Supp. 236 (S.D.N.Y. 1958), relying on Lauritzen v. Larsen, 345 U.S. 571, 572 (1953), where the United States Supreme Court held that foreign incorporation was ineffective as a shield against the Jones Act. These cases looked beyond the corporate entity and held that inasmuch as the majority of shareholders were United States citizens the Jones Act was applicable; see Hellenic Lines v. Rhoditis, 398 U.S. 306 (1970).

111. 16 Syracuse L. Rev., supra note 66, at 790-92. See also Christenson 46-49; Clay 4; Lillich 36-40.

als.[112] A state may not wish to espouse a claim if the corporation is wholly owned by aliens, or if there is no substantial state interest in espousal.[113]

It may be seen then, that although the normal rule in municipal law recognizes the separateness of the corporation and its shareholders, there are a number of exceptions to the normal rule. International law looks to municipal law to determine the nature of the corporation, and with good reason adopts the normal rule.[114] It would seem, therefore, that the exceptions to the normal rule should also be adopted, for, "in a particular case, the normal rule [may] work [an] injustice."[115]

C. *Protection of the Corporation*

From the discussion to this point it may be observed that, treaty stipulations aside, a state may espouse only claims of its nationals. It is also true that authorities consider corporations to be nationals. These corporations are considered under municipal law to be juridical persons with an identity separate from that of their shareholders. International law has adopted this view of the municipal law concerning these separate identities, as well as the view that a wrong to the corporation is not necessarily a wrong to the shareholders, and consequently, that a corporate wrong should be redressed by corporate rather than shareholder action.[116] "Assuming, therefore, that corporations may be nationals [and that the exceptions of municipal law concerning piercing the corporate veil are not considered], it follows that only the state of which they are nationals may intervene on their behalf, and this notwithstanding the fact that most of the members may be nationals of another state."[117]

In an 1868 case, *Ruden and Co. (United States v. Peru)*,[118] it was held that a claim of a corporation formed under the laws of Peru could not be espoused by the United States, but that the claim of an American shareholder could. The holding as to the former issue was correct and represents the trend of international law.[119] As to the second issue, the umpire's determination was erroneous.[120] It was decided on the mistaken belief that the damage "sustained by a corporation must always be the subject of a claim by the corporation or always a claim by the members."[121] This case is one of the earliest concerning the claims of a wronged corporation. Early arbitral agreements did not recognize claims by corporations although specific provisions were later made on their behalf.[122]

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112. Christenson 15-17; Lillich 36-40.

113. Christenson 15-17; Lillich 36-40.

114. Jones 234-35.

115. Id. at 236.

116. Id. at 232.

117. Id. at 227.

118. Lapradelle-Politis, 2 Recueil des arbitrages internationaux 589 (1924), decided by the Claims Commission between the United States and Peru.

119. Jones 227-28.

120. See Id. at 228.

121. Id.

122. Id. at 227.

Corporate claims were in fact rare before the turn of the century.[123] Early expressions in America stated that American corporations' claims would be espoused regardless of foreign ownership of shares therein.[124] Later American practice placed limitations upon ownership. Before the State Department would espouse a claim, it required, in some instances, a 50 percent minimum beneficial ownership by United States nationals.[125] Other treaties and agreements were passed with different percentage requirements but there was generally a need for some substantial American ownership.[126] British practice was similar to the American practice of requiring national ownership, but this requirement has dissolved.[127]

The practice of these states illustrates the problems caused by allowing only the corporation's sovereign to seek compensation. Generally, unless a state has a serious economic interest in the corporation it will not be inclined to espouse the claim. This may leave unprotected the substantial investments of a great number of shareholders. It would seem that exceptions to the normal rule are needed in several situations. Where the corporation is extinct, defunct, or in liquidation the normal rule will not operate properly. Once the corporation is out of existence there is no nation to protect it and the shareholders should be permitted to intervene. Similarly, when the state oppressing the corporation is the very one under which it is incorporated, there is no state which can espouse the claim of the corporation on the international plane. Under these circumstances the nation of the shareholders should be permitted to intervene diplomatically. Furthermore, when the corporation is of one state, but most or all of the shareholders are of a different state, the state of incorporation may not be inclined to intervene. Such a situation often results from an incorporation of convenience.[128]

D. *Protection of Shareholders*

The law of international claims requires that the claim espoused be that of the state's national. If a state cannot go behind the corporate entity to consider the loss suffered by the shareholder, the state of the shareholder will have no claim. It then becomes imperative for a state to determine when it may go behind the corporate entity to protect its shareholders. That is, what harms suffered by investors are recompensable under an international claim, and under what circumstances may such claims be pressed.

A claim may not be pressed, theoretically, "on any indirect loss whatever which a foreign subject may have suffered by damage caused to the property of the

123. Christenson 15.

124. Id. at 15-16.

125. Id. See also Clay 11; Lillich 36-40.

126. Christenson 15-17.

127. Lillich 36-40.

128. The practice of association or registration with the nation affording most favorable treatment is most frequently associated with maritime law. Owners often fly the flag of that state whose policies promise beneficial tax laws or maritime laws. This is generally referred to as "flying a flag of convenience." See generally B. Boczek, Flags of Convenience: An International Legal Study (1962).

corporation."[129] Bondholders fall in the category of those generally considered to have indirect interests in the corporation.[130] On the other hand, shareholders in the corporation have been described as holding a different position, with an "actual share in its assets."[131]

The corporation bears the primary right to redress the wrongs committed against it, and "cannot be deprived of its rights . . . by the fact that the damage caused to the shareholder may form a basis for an international claim of indemnity."[132] But, where no claim can be made by the corporation it would seem that a right to such should exist in the shareholders.[133] Put differently, "[t]he possibility exists of two distinct claims . . . ."[134] The problem is in then deciding when the claim by the shareholder will lie, and whether there exist times when either the shareholder *or* the corporation may have a claim with respect to the same damage.[135]

1. Early Practice

In practice, international law has developed, over the last century, certain recognizable instances where shareholder claims will be permissible. During the mid-nineteenth century there were political reasons for non-intervention by states of shareholders.[136] The United States diplomatically refused to espouse the claims of American shareholders in a Chilean corporation in 1865 and in 1875.[137] British practice was similar.[138]

By 1889 both the United States and Great Britain recognized the economic importance of foreign investment and the duty which they owed to their investing nationals and intervened on behalf of national shareholders in the *Delagoa Bay Ry. Case* (*United States v. Portugal*).[139] This case concerned a concession contract with Portugal, entered into by an American citizen. The American had sought and received financial assistance from British financiers who became sole owners in the Portugese corporation set up to handle the concession. The American, in turn, had received nearly all the shares of the British financiers' corporation.[140] The Portugese government breached, and the claim, espoused by the American and British governments, went to international arbitration. The corporation had become practically defunct, and since it was a Portugese cor-

129. Bagge, supra note 35, at 169.
130. Id.
131. Id.
132. Id. at 170; Lillich 40-53.
133. Bagge, supra note 35, at 170.
134. Jones 228.
135. Id.
136. Id.
137. 6 J. Moore, International Law Digest 644-47 (1906).
138. Jones 229.
139. 2 J. Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party 1865 (1898).
140. Id. at 1880. See also Bagge, supra note 35, at 172; Clay 5-6; Jones 229; 16 Syracuse L. Rev., supra note 66, at 794.

poration, there was apparently no means of redress for the corporation in the international field. Under these circumstances the foreign shareholders' nations were permitted to intervene.[141] Thus it appears that the first exception concerns situations in which the infringing state is one whose nationality the corporation bears.

Later cases developed further the availability of international redress for wronged shareholders. In 1911 a dispute arose between a Mexican corporation and the Mexican government. The claim in the *Tlahualilo Case* (*United States v. Mexico*)[142] involved a reduction of a water supply granted by the government under a concession contract for the colonization of cotton producing lands. The corporation exhausted its local remedies and its claim was espoused by the state of foreign shareholders.[143] Although the Mexican government settled through diplomatic channels, the case is another illustration of allowing a shareholder claim where the corporation is a national of the transgressing nation.

A later and more relevant decision arose in the *Romano-Americana Case* (*United States v. Rumania and Great Britain*).[144] In 1916 the British and Rumanian governments agreed to destroy oil plants to prevent their falling into the hands of the axis powers. The corporation which owned the plants was Rumanian, with American shareholders. In this case the United States pressed the claims of its nationals against both Rumania and Britain.[145] The claim as against Britain was different than those involved in the *Delagoa* and *Tlahualilo* cases. There was a wrongdoing state, but it was not the state of which the corporation was a national. The situation of a third party state was involved—as in the *Barcelona Traction, Light and Power Co. Case*.[146] The cause of action against Great Britain was abandoned and the diplomatic correspondence between the United States and Great Britain seemed to show that no claim of this nature could lie.[147] The claim against Rumania was similar to the *Delagoa* and *Tlahualilo* claims. Under those causes of action the wrongdoers were the nations of incorporation. In *Romano* the United States was at least partially successful in exerting the claim.[148]

Of late, many special agreements include provisions to take in cases of the third party type. The frequency of such agreements seems to indicate the development of customary international law.[149] "Where, over a considerable period of years, a large number of agreements of this kind have been concluded they do show that it is the practice to allow claims to be brought on behalf of nationals interested in foreign corporations where the parties consider that justice requires it."[150]

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141. Jones 236.
142. [1913] Foreign Rel. U.S. 993 (1913).
143. Jones 237-39.
144. 5 G. Hackworth, Digest of International Law 840 (1943).
145. Id. at 841, 844. See also Jones 239-41; Bagge, supra note 35, at 172.
146. [1970] I.C.J. 4.
147. 5 G. Hackworth, Digest of International Law 841-42 (1943).
148. Id. at 844. See also Jones 241
149. Jones 241.
150. Id.

In 1938, a diplomatic dispute arose between Great Britain and Mexico. The property of the Mexican Eagle Company, a Mexican corporation 70 percent of which was owned by British and Dutch nationals, and 25 percent of which was owned by French nationals, was expropriated by Mexico.[151] The Mexican government argued that there was no direct interest to be defended, since the shareholders had no legal rights, but rather an interest in equity. Although the Mexican government eventually settled in 1946,[152] the case illustrated the widely held theory that the interest to be protected must be a real legal right rather than an indirect interest in corporate property.

2. Arbitral Jurisprudence

The practices of arbitral jurisprudence in the area of interpretation by countries on behalf of their nationals interested in foreign corporations are not well defined, but rather are "spasmodic, and not always clear."[153] Unlike permanently established judicial panels, international arbitrations genenerally find their existence as a result of the very dispute they seek to solve.[154] For this reason their determinations may be questionable in predicting judicial policy. However, since they represent decisions made by nations in conflict, with an eye to the political circumstances, they illustrate practical trends in international custom. For this reason they are worthy of review.

In the *Orinoco Steamship Case* (*United States v. Venezuela*),[155] a British corporation with 98 per cent American ownership had a concession contract in Venezuela. A claim arose due to the wrongful acts of the host state, but Great Britain refused to intervene. The American shareholders, therefore, formed an American corporation to pursue redress. The United States pressed the claim in international arbitration and the claim was allowed despite the lack of continuity of nationality[156] (which some authorities say was created by the transfer). The arbitrator stated that the need for continuity had been altered by treaty.[157]

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151. Id.

152. Id. at 242.

153. Id. at 243.

154. It is often more fortuitous for a state to submit a dispute to arbitration rather than to submit to a judicial panel such as the International Court of Justice. If a case is based on settled law, the court may be the logical organ for settlement. However, where a state desires to change the law, or where the other side's case is strong based upon settled law, it is best to submit to arbitral jurisprudence. Arbitrations arise in two different manners. The older method is "an ad hoc submission" of a dispute through an instrument called a compromis which sets out the ground rules by which the panel shall run the arbitration. This method calls for the establishment of an ad hoc arbitration panel. The later, an ever more popular method, is to construct, by prior treaty agreement, that should certain disputes arise they be submitted to arbitration. This is known as "anticipatory submission." In 1899 the Hague Conference devised the Permanent Arbitral Tribunal. It is still in existence, and is really a list of arbiters from which the arguing countries may choose to fill the panel.

155. J. Ralston, Venezuelan Arbitrations of 1903, at 72 (1904); see Jones 243 n.3.

156. See note 53 supra and accompanying text.

157. Ralston, supra note 155, at 84-85 (1904).

This decision suggests a possible slackening in the strict continuity of nationality requisite for prosecution of international claims.

The *Baasch & Romer Company Case* (*The Netherlands v. Venezuela*)[158] staged the development of the "extinct firm exception."[159] In *Baasch*, the firm had become extinct due to the wrongful acts of the host state, and the Netherlands-Venezuelan Commission allowed the state of the shareholders of the extinct firm to press the claim.[160] The logic of this exception is patent. If the corporation no longer exists, the state of incorporation loses its protective capacity. In order to provide some degree of protection for corporate rights it is necessary to allow the shareholder's state to prosecute these claims.

In the *Kunhardt Case* (*United States v. Venezuela*),[161] the United States-Venezuelan Commission decided that a Venezuelan corporation with three American shareholders had been put *ipso facto* into liquidation.[162] The Commission felt that the claimants had standing, but due to lack of proof of discriminatory treatment, the case was dismissed.[163] Thus, while the claim was defeated, the extinct firm exception was bolstered.

The *El Triunfo Case* (*United States v. Salvador*)[164] concerned a concession by Salvador to a Salvadorian corporation which had two American and two Salvadorian shareholders. The majority of the shares were owned by a United States corporation. Noting that the Salvadorian government was involved in a conspiracy to harm the corporation, the shareholder's state was given standing[165] consistent with the *Delagoa* theory that the wrongdoing state cannot also be a protecting state.

The *Ziat Ben Kiran Case* (*Great Britain v. Spain*)[166] developed out of a 1921 riot in the Spanish Zone of Morocco. It concerned a Spanish firm, one of whose members was a British subject. Although the claim was dismissed for failure to show negligence on the part of the Spanish government, the arbiters stated, "[i]t is necessary to examine whether the person on whose behalf the claim is brought forward is directly affected by the damage or whether he is merely the creditor of the juridical person directly affected by the damage."[167] This language certainly helps to clarify the extent of an interest which must be present to merit the prosecution of an international claim.

The *Deutsche Amerikanische Petroleum Gesellschaft Case* (*United States v. Germany*)[168] took a different tack. There the ships of D.A.P.G. were to be turned

158. Id. at 906.
159. Jones 245.
160. Ralston, supra note 155, at 909-10.
161. Id. at 63.
162. Id. at 67; Jones 246.
163. Ralston, supra note 155, at 68; Jones 247.
164. 6 J. Moore, International Law Digest 649 (1906); [1902] Foreign Rel. U.S. 859.
165. Bagge, supra note 39, at 173; Bishop 672-75; Jones 248-49.
166. [1924] Ann. Dig. 190 (no. 102).
167. Id.; Jones 249.
168. An arbitration between the United States and the Reparation Commission, under a Special Agreement: Date of award, August 5, 1926. 2 Rep. Int'l Awards 779 (1949).

over to the Allied powers by the German government under a cession agreement of the Versailles Treaty. Standard Oil Company of New Jersey intervened claiming beneficial ownership of the vessels through stock and debenture ownership of D.A.P.G. On the basis that shareholders have no positive property right in assets[169] the indirect interest of debenture holders was deemed insufficient to merit international protection.

3. Claims Convention

Early treaties did not handle corporate claims,[170] but the multitude of claims arising out of the First World War would have proved too great for a case by case approach.[171] The treaties of World War I made specific provision for the espousal of claims of shareholders in foreign corporations.[172] The treaty approach was to minimize the need for formal diplomatic intervention. The wholesale approach allowed for "more direct and expeditious settlement of claims."[173]

Certain conventions also allowed nationals to bring claims arising out of harms sustained by corporations in which they were shareholders.[174] "[I]n most cases the . . . provisions were interpreted as meaning that the claim was a claim by the *company*, and that the *national character* of the claim was determined by the nationality of the majority of the shareholders or of the controlling interests."[175]

In 1923 the United States and Mexico entered into an agreement providing for a General Claims Commission.[176] Under this agreement, the state of which a shareholder was a national would espouse the claim of a shareholder with respect to which there was an interest of a "substantial and bona fide nature."[177] One commentator has noted that these agreements are of importance since "'[p]iercing the corporate veil' in the interest of elementary justice had become thoroughly acceptable in domestic law; the concept was now to be formally recognized in international law."[178]

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169. Id. at 795.

170. Jones 251.

171. Clay 12.

172. Jones 251.

173. Clay 12.

174. Treaty of Versailles, June 28, 1919, art. 297(e), [1919] 11 G.F. Martens Nouveau Recueil (ser. 3), 323, 559 (1922); Peace with Austria: Treaty of St. Germain, Sept. 10, 1919, art. 249(e), [1919] 11 G.F. Martens Nouveau Recueil (ser. 3) 691, 788 (1923); Peace with Bulgaria: Treaty of Neuilly, Nov. 27, 1919, art. 177(e), [1919] 12 G.F. Martens Nouveau Recueil (ser. 3), 323, 381 (1924); Peace with Hungary: Treaty of Trianon, June 4, 1920, art. 232(e), [1920] 12 G.F. Martens Nouveau Recueil (ser. 3), 423, 516 (1924).

175. Jones 252 (footnote omitted).

176. Claim Convention with Mexico, Sept. 8, 1923, 43 Stat. 1730 (1925), T.S. No. 678 (effective Mar. 3, 1924).

177. Christenson 18; Clay 11.

178. Clay 13. Jones says that the study of "international practice and arbitral jurisprudence shows that, in spite of many uncertainties and doubts as to the exact scope of intervention on behalf of nationals who are shareholders in foreign corporations, the ad-

Some later treaties gave shareholders an independent claim in a company which was of a different nationality than the shareholders.[179]

The treaties at the close of World War II[180] were also of great importance since they recognized the idea of going behind the corporate entity in allowing claims of individuals who held any stock or other security in companies not organized under the laws of the party nations.[181] They also accepted the "entity concept" by allowing corporate claims based simply on organization in one of the party nations despite the nationality of those who owned the corporation.[182]

The agreement of December 5, 1947 among Canada, Netherlands, Belgium, Luxemburg and the United States allowed for penetration of the corporate veil in order to do substantial justice.[183] In a lump sum settlement agreement in 1948 between Yugoslavia and the United States, specific recognition was given to shareholder interests.[184]

British practice after World War II showed the attitude of the government to various shareholder claims. There was a distinction between direct interests (shareholders holding shares directly in the corporation harmed) and indirect interests (shareholders holding shares in a corporation which in turn held shares in the corporation harmed).[185] There are then four possible combinations:

1. Direct interest where the corporation is harmed by the state of incorporation.
2. Direct interest where the harm is by a state other than that of incorporation (the *Barcelona* situation).
3. Indirect interest where the corporation is harmed by the state of incorporation.

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missibility of such intervention has in principle been recognized by a substantial body of authority." Jones 251.

179. Jones 252. Claim Convention with Mexico, Sept. 8, 1923, 43 Stat. 1730, 1735, T.S. No. 678 (effective Mar. 3, 1924); Claim Convention between Germany and Mexico, Mar. 16, 1925, 52 L.N.T.S. 93 (1926); Claim Convention between Great Britain and Mexico, Nov. 19, 1926, 85 L.N.T.S. 51 (1929); see A. Feller, The Mexican Claims Commissions 1923-1934 at 414, 445, 521, 467; Jones 253.

180. Treaty of Peace with Italy, Feb. 10, 1947, art. 78, para. 4(b), 61 Stat. 1245, 1404 (1947), T.I.A.S. No. 1648 (effective Sept. 15, 1947); Treaty of Peace with Rumania, Feb. 10, 1947, art. 24, para. 4(b), 61 Stat. 1757, 1810 (1947), T.I.A.S. No. 1649 (effective Sept. 15, 1947); Treaty of Peace with Bulgaria, Feb. 10, 1947, art. 23, para. 4(b), 61 Stat. 1915, 1963 (1947), T.I.A.S. No. 1650 (effective Sept. 15, 1947); Treaty of Peace with Hungary, Feb. 10, 1947, art. 26, para. 4(b), 61 Stat. 2065, 2122 (1947), T.I.A.S. No. 1651 (effective Sept. 15, 1947); Treaty of Peace with Finland, Feb. 10, 1947, art. 25, para. 4(b), 48 U.N.T.S. 228, 244 (1950).

181. Clay 14.

182. Id.

183. Jones 254. Jones calls this an "international rule of equity." Id.

184. Claims Agreement with Yugoslavia, July 19, 1948, 62 Stat. 2658, T.I.A.S. No. 1803. Implemented by the International Claims Settlement Act of 1949, 64 Stat. 12 (1950), as amended, 69 Stat. 562 (1955).

185. Lillich 41.

4. Indirect interest where the corporation is harmed by a state other than that of incorporation (the *Barcelona* situation).[186]

As to situation one, the British would espouse a claim under the conventions and treaties.[187] Under situation two there are more problems but commentators have said that they should be allowed.[188] One commentator stated that the distinctions above are too formalistic.[189] Another found that "[w]hen the state of incorporation refuses to give diplomatic protection, then the shareholders may rightfully look to their own Governments for diplomatic assistance."[190]

The second type claim was allowed in British practice under the Yugoslavian and Czechoslovak Orders in Council when two conditions were met.[191] The state of incorporation must have concluded a lump sum settlement with the transgressor state and the settlement must have excluded the shareholders' interest.[192]

The claims of the third type are uniformly allowed, while those of the fourth have been permitted only where type two have been permitted.[193] It would seem that, in practice, by means of treaty convention, "piercing the veil" is becoming more and more acceptable.

4. Piercing the Veil

There is a distinction between piercing the veil of a corporation for the benefit of creditors and doing so to give the shareholders a claim. In the first case the object is to punish corporate wrongdoers. In the second it is to benefit the corporate shareholders. While the law is reluctant to pierce for the benefit of those with internal corporate interests, it should be recognized that on the international level the veil is pierced only to determine the nationality of shareholders. The veil is not pierced to give the shareholders a new standing but rather to allow them to use the standing which they already have. As Bagge stated:

> On the international plane, the condition for a claim by the intervening State is that the subject has suffered damage by the act committed by the foreign State and not that the subject himself is the bearer of the right to lodge a claim for damages. The conclusion ought then to be that if the shareholder has suffered damage by the act committed by the foreign State and this act constitutes a breach of international law, there is, according to the international rule . . . sufficient ground for an intervention by the State whose subject the shareholder is.[194]

Other prominent commentators have joined Bagge in calling for an exception

186. Id. at 42.
187. Id.
188. Id. at 43.
189. Nial, Selected Problems of Private International Law, 101 Recueil Des Cours 255, 320-21 (1960-III). See also B. Wortley, Expropriation in Public International Law 144 (1959).
190. Wortley, supra note 189, at 144.
191. Lillich 43.
192. Id.
193. Id. at 48-49.
194. Bagge, supra note 35, at 170.

to the rule concerning claims by the nation of incorporation.[195] While accepted by both the national and international courts, as well as by prominent writers, the precedents for piercing the veil have not been too convincing.[196] "This is a field in which international practice may well in certain respects be rather ahead of doctrine and arbitral jurisprudence, and in other respects behind them."[197]

IV. Barcelona Traction

The Barcelona Traction, Light and Power Company, Limited was a holding company which was incorporated in Canada in 1911. Its administrative offices were also situated in Canada. The purpose of this corporation was to provide electricity in Spain through its subsidiaries,[198] also incorporated and registered in Canada. The preponderating ownership in Barcelona fell to Belgians sometime after World War I.[199] Stock interests were transferred to Americans for protection in the event Belgium was invaded during World War II. Belgium alleged the trust ended in 1946; Spain argued to the contrary.[200]

Barcelona Traction had issued several series of bonds, one of which was serviced by Barcelona through funds transferred by the subsidiaries. During the Spanish Civil War the servicing of the bonds was suspended. In 1940, although the payment was resumed on bonds payable in pesetas, those based on sterling were not resumed since Spain would not allow transfer of the necessary foreign currency. Belgium proposed several compromise plans, but the Spanish government would not allow transfer "unless it was shown that the foreign currency was to be used to repay debts arising from the genuine importation of foreign capital into Spain . . . ."[201]

In 1948 three Spanish holders of recently acquired sterling bonds moved to place the company in bankruptcy for failure to pay interest on the bonds. The action was commenced without notice having been given to Barcelona Traction. Barcelona's objection to the subsequent declaration of bankruptcy was overruled after lengthy proceedings and resulted in the cancellation of shares outside of Spain and the sale of new shares to Spanish buyers.[202] Barcelona, among others, protested, but to no avail.

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195. Beckett, Diplomatic Claims in Respect of Injuries to Companies, 17 Grotius Soc'y 175 (1931); de Visscher, Revue de droit international et de legislation comparee 624 (3d ser. 1934).

196. Bagge, supra note 35, at 171.

197. Jones 256.

198. Ebro Irrigation & Power Co., Catalonian Land Co., and the International Utilities Finance Corp., [1970] I.C.J. at 8.

199. The majority of the Belgian interest was held by Societe Internationale d'Energie Hydro-Electrique (Sidro). Id. Societe Financiere de Transports et d'Entreprises Industrielles (Sofina), itself a company with predominant Belgian interests, held the major interest in Sidro. Id. Belgium claimed it had 88 percent ownership. Id. at 25.

200. Id. at 8-9. This fact becomes important in later concurring opinions which might have allowed intervention had share ownership been conclusively shown; see Part V infra.

201. [1970] I.C.J. at 9.

202. Id. at 11. This is a form of "creeping" expropriation.

The Canadian government made representations in diplomatic notes between 1948 and 1952. Subsequent attempts on less official levels were made by Canada to reach a settlement between 1952 and 1955.[203] Between 1948 and 1951 the Belgian government also made representations. When Spain became a member of the United Nations in 1955, a treaty dealing with compulsory jurisdiction[204] was rendered operative. After another Spanish settlement rejection, Belgium unilaterally referred the dispute to the International Court of Justice in 1958.[205] The case was removed from the court's calendar in 1961 in the hope of settlement through negotiation. Negotiation failed, and a second application was filed in 1962.

In its pleadings Belgium articulated four instances of alleged violations by Spain of international law:

1. Abuse of rights, arbitrary and discriminatory attitude of certain administrative authorities;[206]
2. In adjudging a Canadian corporation bankrupt, usurpation of jurisdiction;[207]
3. Denials of justice *lato sensu* (by a process of expropriation in violation of Spanish Law);[208]
4. Denials of justice *stricto sensu* (by preventing Barcelona and its subsidiaries from being heard).[209]

Spain raised several threshhold objections—jurisdiction, capacity, exhaustion of remedies, and estoppel. In 1964 two of the objections were overruled and those concerning capacity and exhaustion of remedies were joined to the merits.[210] Judge Wellington Koo felt at that time that the objection concerning capacity should not have been joined since the *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations*[211] overruled the old laws as to state of incorporation determining the state which could espouse a claim.[212] In fact, it had been stated at the time that, "there [was] no good reason why the national state of the shareholders should be precluded from exercising its own right to intervene on their behalf for effective protection."[213] Indeed, most

203. Id.

204. Id. at 12. The Treaty was entitled 1927 Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration. Id.

205. Id.

206. Id. at 18.

207. Id. at 18-19.

208. Id. at 19-23.

209. Id. at 23-24.

210. Barcelona Traction, Light and Power Co., Preliminary Objections, Judgment, [1964] I.C.J. 4, 14-45.

211. [1949] I.C.J. 4.

212. [1964] I.C.J. at 53-62.

213. Flemming, Case concerning the Barcelona Traction, Light and Power Company Limited, 3 Can. Y.B. Int'l L. 306, 313 (1965).

observers, as Koo, felt that the "genuine link" test[214] would have been applicable to corporations, and fully expected the Court to pierce the international veil and apply such test.[215]

A. *The Decision*

The decision of the International Court of Justice was based on Spain's third preliminary objection that, even if the court had the necessary competence, the claim was inadmissible because Belgium had no *jus standi* to intervene on behalf of a Canadian company even if Belgian interests owned it. Belgium argued that acts and omissions of Spain had "rendered the company practically defunct and directly and immediately injured the rights and interests attaching to the legal situation of shareholder as it is recognized by international law . . . ."[216] They also contended that the Belgian State had separate and independent rights and interests to assert. The court was faced with the task of deciding whether international law recognized a right in the national state of shareholders.

1. International Law and Shareholders

The International Court of Justice completely ignored the words of Judge Koo[217] and determined that international law was silent as to the rights of the

214. Nottebohm Case [1955] I.C.J. 4. The Nottebohm case illustrates the split principle of nationality. That is, a state has jurisdiction over its nationals. In all internal questions the determination of the state as to who its nationals are is conclusive. On the international plane, as in an international claims dispute, the state's determination is not necessarily conclusive. Nottebohm was a German who resided in Guatemala for 34 years prior to World War II. At that time he sought and obtained naturalization in Liechtenstein while there on a short visit. He returned to Guatemala, and subsequently, during the war years he was interned as an enemy alien. At the completion of the war he was forbidden to live in Guatemala and proceeded to Liechtenstein. Relying upon the nationality they had previously conferred on Nottebohm, Liechtenstein instituted a claim against Guatemala for the confiscation and other economic reprisals taken against their national. Guatemala refused to recognize Nottebohm as a Liechtensteinian, and the claim went to the International Court of Justice for adjudication. The court held against Liechtenstein declaring that there was a limitation on the obligation of one state to recognize nationality although it was validly granted under the municipal laws of another state. That is, there must be a genuine link between the person and the granting state which evidences that the granting state's action was not an arbitrary one. The court explained what should be taken into consideration when it stated: "Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc." Id. at 22.

215. Kerley, Nationality of Claims—A Vista, 1969 Proc. Am. Soc'y Int'l L. 35, 40-42; Flemming, supra note 213, at 314.

216. [1970] I.C.J. at 26-27.

217. "[T]here is seen a substantial body of evidence of State practice, treaty arrangements and arbitral decisions to warrant the affirmation of the inexplicit existence of a rule under international law recognizing such a right of protection on the part of any State of its nationals, shareholders in a foreign company, against another wrongdoing State,

shareholder. Since there was no international law on the matter, the court felt compelled to go to municipal law to construct a rule relating to shareholder claims.[218] The court stated, "whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law."[219] In looking to municipal law the court determined that the corporate entity is separate from the shareholders. The court distinguished between shareholder "rights" and "interests."[220] The rights are those which a shareholder has directly in his capacity as a shareholder. Belgium was not, however, seeking to protect shareholder's direct rights. The court stated that Belgium was seeking to protect the corporation. In seeking to protect a corporate right, the shareholder had an interest. The court held that an "interest" is not enough to give rise to a claim on the international level.[221] The court stated that Belgium had to show a collateral right existed for the protection of shareholders. This, the court held, was a negative attack and an admission that no rule existed permitting espousal.[222]

It is truly confusing to consider why the court felt compelled to turn to municipal law to determine the place of the corporation in international law. In 1970, the place of the corporation in the spheres of national and international law was vastly different.[223] Even if forced to accept municipal law it would seem that the court should have taken into consideration the demands of international law.[224] "The Court surely has the authority, indeed the duty, to fill the gaps in international law . . . . To assume that because a municipal law creation, a company, is concerned, municipal law necessarily has to be applied where there presently are gaps in international law, is both to deny any law-developing role to the Court and to assume that the functions of international law are the same as those of municipal law."[225] It is submitted that even if the court had properly accepted the theory of municipal law it should have gone all the way and accepted the growing exceptions to the corporate entity theory.[226] In failing to do so, the court accepted the stringent bindings of nineteenth century

irrespective of whether that other State is the national State of the company or not, for injury sustained by them through the injury it has caused to the company." Barcelona Traction, Power and Light Co., Preliminary Objections, [1964] I.C.J. at 61 (opinion of Koo, J.).

218. [1970] I.C.J. at 34-35.

219. Id.

220. Id. at 36.

221. Id. at 37-38.

222. Id.

223. Brownfield, International Law—Corporations—Who Represents the Interests of the Shareholder in an International Corporation?, 5 J. Int'l L. & Econ. 239, 243-48 (1971).

224. Lillich, Two Perspectives on the Barcelona Traction Case: The Rigidity of Barcelona, 65 Am. J. Int'l L. 522, 524 (1971).

225. Higgins, Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd., 11 Va. J. Int'l L. 327, 331 (1971).

226. See notes 96-115 supra and accompanying text.

traditional corporate theory. It ignored the developments of modern business concerning rights of shareholder redress even at the municipal level.

2. Refusal to Pierce

In connection with the next step in the opinion the court may have perpetuated an error by failing to articulate the criteria of customary international law.[227] Belgium maintained that if no collateral right of protection of the corporation existed, the court should pierce the veil of the Barcelona Traction Company, citing cases where piercing had been allowed.[228] The International Court of Justice, in less than a full page dismissed one hundred years of international practice and concepts articulated by statesmen, judges, arbiters, historians, and international scholars.[229] The court held that under certain circumstances the veil might be pierced—disappearance of the corporate entity or wrongdoing by the state of incorporation.[230] As to the treatment of alien corporations during wars for the defense of the nation, the court held these *ex necessitate*, and inapplicable of consideration.[231] As to the practices of states concerning nationalization of foreign property, the court held that they only concern specific situations and are thus *sui generis*.[232] The court considered the aforementioned practices *lex specialis* and of no reference to the international law.[233] As to the developments of one hundred years of arbitral jurisprudence, the court noted that they were entered under the terms of instruments establishing their jurisdiction and determining what rights were to be protected.[234]

One is baffled by the conclusions reached by the court. On the surface one must wonder what worth has the court's own decision, since it also was fashioned of instruments and specifically outlined rights. There is a deeper problem however. The court considered that its own prior silence on shareholder claims precluded it from considering the "many instances where such claims have been allowed by other international decision-makers."[235] While it is true that *stare decisis* is no principle of international law and the development of customary international law is difficult to determine, the court "must be faulted for the perfunctory fashion in which it sought to ascertain and apply customary prescriptions."[236] The court totally failed to explain how it determined international customary law and apparently has taken a most conservative stand on those sources which are available for precedent.[237]

Customary international law has been termed:

> [A] process of continuous interaction, of continuous demand and response, in which

227. Lillich, supra note 224, at 523.
228. [1970] I.C.J. at 39-40.
229. Id.
230. Id. at 40-45.
231. Id. at 40-41.
232. Id. at 41.
233. Id.
234. Id. See also note 154 supra.
235. Lillich, supra note 224, at 524.
236. Id. at 525.
237. Id.

the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character . . . , and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants . . . .[238]

The suggestion that past internationally settled disputes are not indicative of developing international law is "a parochial view of international law."[239] The court in *Barcelona* dismissed the history of treaties as *lex specialis*. It is accepted that "[a] series or a recurrence of treaties laying down a similar rule may produce a principle of customary international law to the same effect. Such treaties are thus a step in the process whereby a rule of international custom emerges."[240] It is contended, therefore, that the determination by the court that international law is silent with respect to the recovery of shareholders is a complete abandonment of the court's role as interpreter of customary international law under its own duties as to the sources to be utilized in the decisional processes of the court.[241]

3. Canadian Capacity

On the basis of the stated exceptions to the general rule, the court felt compelled to show Canadian capacity to sue. Before reaching that point the court held that Barcelona Traction was not completely defunct, and therefore the first exception relating to nonexistent corporations did not come into play.[242] The court next determined that Canada did not lack capacity to sue. Canada was both the place of incorporation and the place of its *siege social*.[243] The court held that the *Nottebohm* "genuine connection" test was not at all applicable.[244] The court continued, nevertheless, in an attempt to prove a "genuine connection" between Barcelona and Canada,[245] concluding that Canada had the capacity to protect Barcelona, and in fact still had such power.[246]

The court next handled the Belgian allegation that apart from the claim of its shareholders it had its own claim for damages suffered to its economy.[247] The court recognized that some nations intervened not only when interests were affected, "but also when they were threatened."[248] However, when a state admits

238. McDougal, The Hydrogen Bomb Tests and the International Law of the Sea, 49 Am. J. Int'l L. 356, 357 (1955).

239. Dawson & Weston, "Prompt, Adequate and Effective": A Universal Standard of Compensation?, 30 Fordham L. Rev. 727, 750 (1962).

240. Starke, Treaties as a 'source' of International Law, 23 Brit. Y.B. Int'l L. 341, 344 (1946).

241. Stat. Int'l Ct. Just. art. 38, ¶ 1(b): The court shall apply "international custom, as evidence of a general practice accepted as law . . . ."

242. [1970] I.C.J. at 42.

243. Id. at 43.

244. Id. at 42. See also note 214 supra.

245. [1970] I.C.J. at 44-45.

246. Id. at 45-46.

247. Id. at 47.

248. Id.

a foreign investment, it does not guarantee the part of the investor's state's wealth that the investment represents. Thus the court dismissed the Belgian government's claim.[249]

4. Equitable Principles

The Belgian government lastly relied on the court's equitable jurisdiction, which requires a prior agreement by the parties. The court felt that such a rule of equity allowing representation of shareholders would cause confusion,[250] and open the door to competing diplomatic claims.[251] Thus, the court feared to open the flood gates, and with good reason. How could a reasonable person expect the world arbiter of justice to effectively dole out justice on a moderate scale when it has been incapable of doing so in a minimal program encompassing less than 50 cases in not much more than forty years? As one commentator has noted, the International Court of Justice's "record has been somewhat less than inspiring; and its impact as an organ for the settlement of disputes has been anything but spectacular."[252]

V. The Future

In predicting the future course of the International Court of Justice in connection with the right of third party states to espouse claims for shareholders, it is helpful to examine the concurring opinions in the *Barcelona* case. Judge Tanaka was in fact confident of the existence of such a right. He declared the existence of the right of protection in the state of incorporation and in the shareholder's state as well. Tanaka was the only judge to reach the merits of the case. In doing so Judge Tanaka found no denials of justice on the part of Spain, but did afford the hope of a more liberal decision in the future.[253]

Judges Nervo and Ammoun stated that neither the shareholders nor the creditor nation needed protection.[254] Rather, they felt it was the weaker capital-importing group of states which needed the protection. Idealistically, it is hard to fault an opinion calling for equality of living standards and protection of weaker states. It is difficult, however, to see how the replacement of the larger and exploiting capitalist state's corporation with an equally exploitative but local capitalist corporation goes very far to raise the position of the masses.

Of the remaining opinions, those of Judges Petren and Onyeama, and of Fitzmaurice and Jessup are the most interesting and relevant to hopes for the future, since they referred to the "genuine link" test. Judges Petren and Onyeama said that any references made in the majority opinion to the *Nottebohm* case were dicta.[255] They felt that it is still to be determined whether or not the "genuine link" approach would apply to juristic persons.[256]

249. Id. at 49.
250. Id. at 50.
251. Id.
252. Dalfen, The World Court: Reform or Re-Appraisal, 6 Can. Y.B. Int'l L. 212 (1968).
253. [1970] I.C.J. at 115-161 (opinion of Tanaka, J.).
254. Id. at 244-67, 287-334 (opinions of Nervo and Ammoun, J.J.).
255. Id. at 53 (opinion of Petrén and Onyeama, J.J.).
256. Id.

The Jessup opinion referred to "charters of convenience."[257] Jessup acknowledged the practices of modern corporations in seeking favorable climates in which to incorporate[258] and therefore felt that the "genuine link" test would be more appropriate. Jessup felt, however, that Belgium did not satisfy its quantum of proof as to continuous ownership and therefore concurred in the majority holding, if not the majority opinion.[259]

Judge Fitzmaurice based his opinion on stubborn application of the continuity of nationality rule. He alluded to the same theory as Jessup in finding in this case that no state can act and the shareholders have no remedy.[260]

It would seem, by examining the court's past performance, that there is little hope for new vitality in the adjudication of international claims of this nature. There is, however, a potentially powerful organization which has been newly created and which may well perform where the International Court of Justice has not.

The World Bank, in 1965, submitted a proposed Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[261] This Convention became effective on March 18, 1965, and presently boasts the membership of 63 states.[262] Articles 18-29 of the Convention establish the International Centre for Settlement of Investment Disputes. The purpose of the Centre is to provide facilities for conciliation and arbitration of investment disputes. The actual adjudications will be handled by Conciliation Commissions and Arbitral Tribunals constituted in accordance with the provisions of the Convention. The jurisdiction of the Centre is based upon the consent of the parties, which once given in writing cannot unilaterally be withdrawn.[263] Consent may be given in a *comprimis*, in an investment agreement, or simply by joining the Convention.[264]

Article 25(1) states that the disputes must be "legal dispute[s] arising directly out of an investment." Further, article 25(1) states that for a dispute

257. Id. at 168 (opinion of Jessup, J.).

258. Id. at 162-222. This analogy to "flags of convenience" may be only superficially helpful. Each state determines which ships shall be permitted to fly its flags and the conditions under which it may be flown. In a move which seemed directed to check indiscriminate allowance of flag granting, Article Five of the High Seas Convention sought to impose a "genuine link" concept. That is, states, would be limited in allowing ships to fly the state's flag, to ships with a "genuine link." The "genuine link" is then seen as a guidance to the flag granting state. Apparently, a third party state has no standing to challenge the grant, even though there may be a violation of the Convention; United Nations Conference on the Law of the Sea, Convention on the High Seas, Apr. 29, 1958, [1962] 13 U.S.T. 2312, T.I.A.S. No. 5200; see H. Meyers, The Nationality of Ships (1967).

259. [1970] I.C.J. at 162-222.

260. Id. at 65-114 (opinion of Fitzmaurice, J.).

261. Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 3-5 (1965).

262. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, [1966] 17 U.S.T. 1270, T.I.A.S. No. 6090.

263. Id. at 1280, T.I.A.S. No. 6090 at 11.

264. See Report of the Executive Directors, supra note 261, at 9-10.

to be within the jurisdiction of the Centre, one of the parties must be a contracting state, and the other must be a "national of another Contracting State."[265] A national of a contracting state may either be a natural or juridical person. The Centre may well present a viable means of protecting shareholder investments in the future. The opportunity to present the dispute to a group of arbiters who are aware of the necessity for an effective forum augers well for the favorable settlement of investment disputes.

VI. Conclusion

The *Barcelona* opinion will surely have an effect upon the operations of multinational corporations. They will be wise to prepare their agreements to insure that jurisdiction to the Centre is available, as well as to incorporate in the contracting states. As for the International Court of Justice, its continued avoidance of those problems which are of importance to the majority of the members of the world community can only hasten its obsolecence. *Barcelona* may indeed mark the sounding of the death knell for the International Court of Justice.

265. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, [1966] 17 U.S.T. 1280, T.I.A.S. No. 6090 at 11.