Corporate Nationality and the Diplomatic Protection of Multinational Enterprises: The Barcelona Traction Case

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I. Introduction

When Secretary of State William P. Rogers linked the *Barcelona Traction Case*¹ to the *South West Africa Case*² and castigated those decisions for having "eroded confidence in the Court,"³ he may well have had in mind several criticisms of the International Court of Justice. He referred specifically only to the delays involved in the handing down of the decisions—five years in the former case, seven in the latter—and hoped "that the court will take steps to prevent such delays in the future by deciding preliminary questions promptly without joining them to the merits of the dispute."⁴ Although the court, in anticipation of such criticism, attributed "the unusual length of the present proceedings" to "the very long time-limits requested by the Parties,"⁵ it did not explain the necessity of hearing argument on the merits of the case to decide the particular "preliminary question" upon which its decision was eventually based.⁶

The court inevitably had to cope with one of the more intractable problems of modern international economic relations, the extent to which

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⁴ Id.


⁶ As to the nature of the preliminary question, see text accompanying note 20 *infra*. Cf. Higgins, *supra* note 1, at 342-43; Briggs, *supra* note 1, at 328-30.
there may or ought to be limitations on the manner in which a state deals
with investments made within its jurisdiction by foreigners. This is a
topic that has engaged the energies of politicians, economists and lawyers.
The political issues raised go to the perceived affront to sovereignty
posed by foreign control of a state's economic destiny. The perceptions
stem from foreign investment generally and in certain industries, such as
natural resources extraction, specifically. Other affronts may be perceived
in suggestions that the organs of government may be held to a standard
of behavior imposed from outside or by demands that compensation be
paid for various kinds of domestic interference with the investment. The
economists argue whether foreign investment, particularly in the less
developed world, is helpful or detrimental to economic and social pro-
gress; they also concern themselves with the impact on the flow of
capital of various kinds of interference with such investments. Mean-
while, international lawyers, buffeted by the storm of these contro-
versies, try to determine where, if it exists, the area of reconciliation
lies. Viewing the problem in terms of the right to diplomatic protection of
nationals abroad, they strive to define the limits of that right in relation
both to those whose interests are injured and to the particular interests
capable of being protected diplomatically.

Clearly, the emergence of multinational enterprises, with their world-
wide financial, industrial, distributive and transportational interests, has
come to have a decisive impact on this debate. Their stake in its outcome
is sizable. The holding of the World Court in the Barcelona Traction
Case will have major repercussions for multinational enterprises, especial-
ly with regard to choosing the place of incorporation for holding com-
panies that will control operating subsidiaries and branches abroad. Such

7. An example of the political controversy is to be found in the famous United
States-Mexico discussions on expropriation, 3 G. Hackworth, International Law
655-65 (1942). Couched partly in legal terms, it illustrates the difficulty of finding an
impartial, juridical vocabulary within which to confine the controversy.


9. The principal post-war monographs by lawyers are S. Friedman, Expropriation in International Law (1953); L. Forgie, Nationalization (1957); B. Worton, Expropriation in Public International Law (1959); G. White, Nationalization of Foreign Property (1961); A. Fatouros, Government Guarantees to Foreign Investors (1962); R. Lilliec, The Protection of Foreign Investment (1965). On the question of shareholders and nationality, see Jones, Claims on Behalf of Nationals who are Shareholders in Foreign Companies, 26 Brit. Y.B. Int'l L. 225 (1949).

10. These are the only persons entitled to seek the espousal of their claims by
a particular state.
decisions will no longer be based upon purely economic or fiscal convenience.

It was not until February, 1970 that the International Court of Justice handed down its long-awaited opinion in the *Barcelona Traction Case*. The court had first considered the matter in 1958, the case being removed from the court's General List in 1961. The present application was filed in June, 1962. Four preliminary objections were raised by Spain, but the court rejected the first two of these in its judgment of July 24, 1964. The latter two were joined to the merits and proceedings continued until July 1, 1968. Twelve of the fifteen judges who concurred in the court's decision in favor of Spain, on the ground of Spain's third preliminary objection, did so for the reasons set out in the judgment. Of these, five felt called upon to append separate opinions amplifying their views of the controversy. The three other judges filed concurring opinions, citing their reasons, different from those in the official judgment, for reaching the same decision. Judge ad hoc Riphagen, chosen by Belgium, appended the sole dissenting opinion.

The student of international law cannot but be thankful that, despite this tumultuous outpouring of judicial self-expression, he is able to find in the judgment common ground reached by a majority. The judgment can be relied upon in seeking the *ratio decidendi* as well as for clues to other matters stated *obiter*. Actually, some of the dicta may become of greater import than the actual holding.

II. THE FACTS, THE LEGAL ISSUES AND THE DECISION

*Barcelona Traction, Light & Power Co., Ltd.*, a Canadian corporation allegedly owned predominantly by Belgian corporate and individual interests, operated an electric power enterprise in Catalonia (Spain) through several wholly, or almost wholly, owned Canadian and Spanish subsidiaries. Spanish exchange control regulations prevented the

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12. President Bustamante y Rivero, Vice President Koretsky, Judges Ammoun, Bengzon, Fitzmaurice, Forster, Lachs, Morelli, Onyeama, Padilla Nervo, Petren and Judge ad hoc Armand-Ugon.
13. President Bustamante y Rivero, Judges Fitzmaurice, Morelli, Padilla Nervo and Ammoun. Additionally, Judge Lachs appended a "declaration," while Judges Petren and Onyeama filed a "joint declaration."
14. Judges Gros, Jessup and Tanaka. Further, although Judge Fitzmaurice describes himself as agreeing with the judgment, "if with some reluctance" ([1970] I.C.J. at 65), his reservations are by no means peripheral.
15. See the acerbic comment of Briggs, *supra* note 1, at 344, n. 78, and the critical observation of Higgins, *supra* note 1, at 329, n. 5.
subsidiaries from transferring funds to Barcelona Traction, which needed the funds to service debt obligations. Certain Spanish creditors, owners of bonds establishing their title to such obligations, successfully instituted bankruptcy proceedings in the Spanish courts against Barcelona Traction. As a result of these proceedings a new Spanish corporation gained control of the enterprise, thus effectively displacing Barcelona Traction from any remunerative participation in the electric power enterprise.

In bringing the matter before the World Court, Belgium, espousing the claims of her shareholders, argued that Spain had:

1. Through arbitrary and discriminatory treatment by Spanish authorities, committed an abuse of rights;
2. By its courts' purporting to adjudge bankrupt a Canadian corporation, usurped its jurisdiction;
3. By a process of expropriation in violation of Spanish law, caused a denial of justice *lato sensu*;\(^\text{17}\)
4. By preventing Barcelona Traction and its subsidiaries from being heard, caused a denial of justice *stricto sensu*.\(^\text{18}\)

Spain initially met Belgium's claim for damages and reparation with four preliminary objections, two of which, as noted earlier, were rejected by the court in 1964. Spain also asserted both that Belgium had no *jus standi* to bring a claim essentially involving protection of a Canadian corporation and that Barcelona Traction had not exhausted local remedies before commencing the action. It was on the basis of the former of these two latter assertions that the court, which had joined these objections to the merits, dismissed Belgium's complaint. Accordingly the court was unable to consider the other issues directly, though it did shyly reveal something of its approach to the protection of aliens' interests.

### III. The Role of Nationality in the Diplomatic Protection of Economic Interests—The Ratio Decidendi

In assessing Belgium's *jus standi* to bring the claim, the court was essentially confronted by three questions:

1. Can the country whose nationals are shareholders of a third country corporation exercise diplomatic protection in respect of the interests of those nationals?
2. If not, is there an exception in a situation where the corporation is no longer in existence?

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17. *Lato sensu* means "in a broad sense."
18. *Stricto sensu* means "in a strict sense."
3. If so, is such non-existence, for the purpose of diplomatic protection of shareholders, evidenced by bankruptcy and the appointment of a receiver?

The court gives a negative answer to the first question and refrains from pronouncing on the second, on the ground of a negative answer to the third. Thus, according to the court, since the corporation was still in esse and since Canada was the state of its nationality, it was Canada's sole right to exercise diplomatic protection as it saw fit. The contention concerning Belgium's right to protect the shareholders of the "practically defunct" corporation is considered by the court to lack "all legal precision." The court states that "[o]nly in the event of the legal demise of the company," which would deprive the shareholders of "the possibility of a remedy available through the company," could "an independent right of action for them and their government . . . arise." Drawing on general principles of bankruptcy law as it relates to the status of juridical persons and on the actual status of Barcelona Traction in Canadian and Spanish law, the court finds that the company continued to exist. Under this analysis two interrelated questions arise:

1. What are the elements of diplomatic protection which lead international law to choose between the company's national state and that of the shareholder?

2. How is corporate nationality determined for the purposes of diplomatic protection?

In dealing with the former question, the court begins by drawing a distinction between the bilateral obligations involved in the field of diplomatic protection and the multilateral "obligations erga omnes" comprised in such areas as aggression, genocide and human rights. This distinction does not advance us very far and the importance of this passage may well lie elsewhere.

19. The court considered as a fourth question whether the state of the shareholders might exercise diplomatic protection when the state of incorporation lacks capacity to bring a claim before the court. The court dismissed this objection on the correct ground that a "link of compulsory jurisdiction" is irrelevant since "[i]nternational judicial proceedings are but one of the means available to States in pursuit of their right to exercise diplomatic protection." With respect to other aspects of Canada's alleged lack of capacity, see the discussion of corporate nationality, text accompanying note 49 et seq., infra.


21. Id.

22. Id. at 33. Erga omnes means "against all."

23. It would seem, for example, that the court is coyly apologizing for the South West Africa decision. If Belgium's jus standi was rejected because of the bilateral nature of diplomatic protection, then the court presumably erred in its reasoning in the
The question remains as to which particular state is owed an obligation when foreign property is not accorded the requisite legal protection. In pursuit of an answer, the court examines the nature of the corporation in municipal law. It does this not in an attempt to derive an international analogy for the domestic corporation, but rather to seek "general principles of law" which might be applicable in determining the allocation of rights as between companies and shareholders. This examination leads to several none-too-controversial conclusions—that the corporation is a separate juridical entity created to operate "in circumstances which exceed the normal capacity of individuals," that there is a separation of property rights denying the individual access to the corporate assets as long as the company is in existence, that the company serves the shareholders' best interests by acting in its own right, and that by protecting its own rights it will secure the interests of the shareholders. While the court does not deny that certain rights accrue to shareholders in their capacity as such, it holds that since Belgium had not based its claim on an infringement of the shareholders' direct rights, the question was whether Belgium could act to protect the rights of the corporation.

The apparent intention of drawing this dichotomy between the rights and interests of shareholders is to suggest that states may only extend diplomatic protection on behalf of their nationals when their actual rights are infringed. In support of this conclusion, the court relies upon two lines of argument. The first is that the burden was on Belgium to show that it had a collateral right to that of Canada in the exercise of their case, since that involved a question of human rights. As Dr. Higgins puts it, in the South West Africa Case the court "rejected the much more limited and modest contention that two African states had a legal interest in the fulfillment of South Africa's obligations, including a possible obligation of non-discrimination, in respect of the mandate territory of South West Africa." Higgins, supra note 1, at 330.

24. Id.
25. The court does not actually use the expression "general principles of law" in the applicable paragraph of its judgment. Para. 38, [1970] I.C.J. at 34-35. This seems to be a perfectly reasonable use of a source of law that essentially permits the court to "fill the gaps in international law" and to adopt a "law-developing role," even though it falls short of invoking "notions of equity." Higgins, supra note 1, at 331. After all, the entity for which protection is sought is a legal creation whose nationality somehow has to be determined. Reliance on generally recognized principles of municipal company law appears most appropriate to solve this particular moot international legal problem.
27. The company, by acting in its own right, serves the best interests of the stockholders.
29. Id. at 36.
of diplomatic protection. But the Belgian Government had formulated its position in negative terms, namely, that "there exists no rule of international law which would deny the national State of the shareholders the right of diplomatic protection for the purpose of seeking redress pursuant to unlawful acts committed by another State against the company in which they hold shares." As the court correctly notes, this formulation carried the implicit "admission that there is no rule of international law which expressly confers such a right on the shareholders' national State." In keeping with the long tradition of reluctance in permitting states to challenge the acts of other states without establishing a positive rule supporting such a challenge, and in keeping with a general tendency to recognize new customs more when they constitute extensions of national sovereignty rather than restrictions thereof, the court feels that "[s]uch silence scarcely admits of interpretation in favour of the shareholder."

The second line of argument flows from the proposition that claims made on behalf of a state's national are the claims of the state itself. Here the court expressly cites and reaffirms the dictum of its predecessor, the Permanent Court of International Justice:

The question, therefore, whether the . . . dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint.

But merely to state the principle begs the very question requiring elucidation, whether or not the rights of Belgium are infringed when investments of its nationals abroad are prejudicially affected.

The court thereupon refers to Belgium's argument that "since such investments are part of a State's national economic resources, any prejudice to them directly involves the economic interest of the State." Its reply is as follows:

30. Id. at 38.
31. Id.
32. Id.
35. [1970] I.C.J. at 39. Dr. Higgins understandably chafes at such judicial timidity (Higgins, supra note 1, at 334), but its occurrence is hardly a source of surprise.
Governments have been known to intervene in such circumstances not only when their interests were affected, but also when they were threatened. However, it must be stressed that this type of action is quite different from and outside the field of diplomatic protection. When a State admits into its territory foreign investments or foreign nationals . . . it is . . . bound to extend to them the protection of the law. However, it does not thereby become an insurer of that part of another State's wealth which these investments represent. Every investment of this kind carries certain risks. The real question is whether a right has been violated, which right could only be the right of the State to have its nationals enjoy a certain treatment guaranteed by general international law, in the absence of a treaty applicable to the particular case. On the other hand it has been stressed that it must be proved that the investment effectively belongs to a particular economy. This is, as it is admitted, sometimes very difficult, in particular where complex undertakings are involved. Thus the existing concrete test would be replaced by one which might lead to a situation in which no diplomatic protection could be exercised, with the consequence that an unlawful act by another State would remain without remedy.

It is difficult to follow this chain of reasoning, but the court seems to be saying essentially three things:

1. While in previous cases states not directly involved in an economic dispute have shown interest in its outcome, such interest has not been related to the defense of specific legal rights. While this distinction is valuable, it is not relevant to the situation presented to the court; i.e., where the economic interests of the state are directly concerned. Nor is it persuasive to argue that because some types of diplomatic intervention are not properly called "diplomatic protection," this is so in the instant case.

2. The host state is not responsible for all risks that may befall foreign investments. No issue can be taken with this statement, but it does not appear how the question of the form of investment relates to the question of risk in the first place.

3. The difficulty of establishing the geographical situs of the economic enterprise makes it preferable to retain the established rule of

39. Id.
40. The United Kingdom and the United States are in that position in the present case, for example.
looking merely to the corporate nationality for diplomatic protection. To the extent that the court is restating the criterion for determining corporate nationality for the purposes of diplomatic protection, this is unexceptionable. But it is not very helpful to determine whether the established rule denies to the state whose shareholders are its nationals the right to exercise diplomatic protection on their behalf, simply on the ground that it is the established rule.

Therefore, the first line of argument, regarding Belgium's failure to bear its burden of proof, is the more persuasive. This seems especially so when it is read together with the court's earlier remarks on the three lines of precedents cited in support of Belgium's position. The first line concerned the treatment of enemy and allied property during and after the First and Second World Wars. In rejecting as precedents for the instant case the many occasions on which the corporate veil had been pierced to determine the real national link of economic interests, the court confines itself to stating that these occurrences constituted measures undertaken ex necessitate as a means of economic warfare, while the relevant provisions of peace treaties which continued the process were aimed at securing reparations. These special principles would not normally be applicable.

The second line of precedents was "the treatment of foreign property consequent upon the nationalizations carried out in recent years by many States." Here too the court, considering the arrangements "resulting from structural changes in a State's economy" as stemming from a lex specialis, feels that the specific agreements embodying the arrangements were sui generis, providing "no guide in the present case." The implications of this distinction between expropriation in cases of economic-structural changes and other types of expropriation will be noted later. The point to note presently is the unwillingness of the court to derive general principles of legal behavior from such patterns of state practice as may be found in these precedents.

This is particularly true of the third line of precedents which the

41. Professor Briggs, in his strong support of the judgment, also emphasizes that Belgium had not shown the existence of a breach of obligation against her. Briggs, supra note 1, at 334-37.

43. Id. at 41.
44. Id. at 40.
45. Id. at 41.
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court characterizes as "the general arbitral jurisprudence which has accumulated in the last half-century." The court takes a very restrictive view of the importance of such precedents:

However, in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case.

While one may be inclined to favor the court's judicial caution in recognizing general developments in the sensitive field of confrontation of competing sovereign interests, some elaboration of why the court chooses so to inhibit itself would have been welcome.

Having traced the court's reasoning in concluding that Canada's right to exercise diplomatic protection was superior to that of Belgium, the question of how Canada was itself chosen to be the state of corporate nationality may now be considered. The importance of the question is illustrated by the controversy disclosed between the joint declaration of Judges Petren and Onyeama and that of Judge Lachs. While Judge Lachs feels called upon to reassert the right of protection of the Canadian Government, stressing that "the existence of this right is an essential premise of the Court's reasoning," the former two judges deny the relevance of the court's finding with respect to the nationality of the corporation. They maintain both that the matter was not for the court to determine (since both parties had recognized the corporation's Canadian nationality and Canada's right to protect it) and that the question merely concerned the existence of Belgium's collateral right of protection. Accordingly, they argue:

[T]he Court has not in this case to consider the question whether the genuine connection principle is applicable to the

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46. Id.
47. Id.
48. For example, it may well be asked how arbitral tribunals, empowered by compromis to deal with shareholders' claims, have been able to determine the compensable injury to the rights of shareholders when purporting to apply an international law that apparently recognizes none, except where the company is legally defunct or, perhaps, where the state of incorporation is the tortfeasor state. Indeed, it may be asked why a state would agree to a compromis that purports to protect nonexistent rights.
50. Id.
51. Id. at 54.
52. Id. at 53.
diplomatic protection of juristic persons, and, still less, to speculate whether, if it is, valid objections could have been raised against the exercise by Canada of diplomatic protection of Barcelona Traction.\textsuperscript{58}

While, as will be seen, there is some ambiguity in the judgment concerning this question, it would seem that the position stated in the joint declaration should be considered to be a minority one.

The court deals with the matter of whether Canada, as a matter of law, was the national state of Barcelona Traction in the course of its treatment of Belgium’s contention that Canada lacked capacity to bring an action.\textsuperscript{54} It states:

In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments.\textsuperscript{55}

After referring to the practice of some states not to grant diplomatic protection except “when it has its seat (\textit{siège social}) or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned,” the court then concludes that “no absolute test of the ‘genuine connection’ has found general acceptance.”\textsuperscript{56} Here the court tangentially refers to the \textit{Nottebohm}\textsuperscript{57} case, declaring that the case presents no analogy. However, it then proceeds to indicate factors that indeed suggest “a close and permanent connection” of the company with Canada.\textsuperscript{58} This is followed by a documentation of the general recognition of the company’s Canadian nationality\textsuperscript{59} as well as of the specific recogni-

\begin{itemize}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} \textit{Id.} at 42-43.
\item \textsuperscript{55} \textit{Id.} at 43.
\item \textsuperscript{56} \textit{Id.}
\item \textsuperscript{58} [1970] I.C.J. at 43. Examples included the duration of fifty years of incorporation under Canadian law; the maintenance there of its registered office, accounts and share registers; the holding of board meetings there for many years and listing in the records of Canadian tax authorities.
\item \textsuperscript{59} \textit{Id.} at 43-44.
\end{itemize}
tion by Belgium of the company's "Canadian character" and of Canada's actual exercise of diplomatic protection. At this point, the court goes to some pains to indicate that the reasons for Canada's termination of proceedings are of no concern to it since this was a matter solely within Canada's discretion, and that Canada's right of protection in respect of the Barcelona Traction Company "remains unaffected by the present proceedings." It concludes this aspect of its reasoning curiously:

Though, having regard to the character of the case, the question of Canada's right has not been before it, the Court has considered it necessary to clarify this issue.

The court here seems to be saying that its words are obiter dicta, as Judges Petren and Onyeama maintain. Yet, even if these words are not an "essential premise" of the court's overall reasoning, as Judge Lachs suggests, they still form the basis for the rejection of Belgium's contention that Canada lacked capacity to bring a claim. It may be that even if Canada lacked such capacity, Belgium would have no better right. After all, there was no state capable of protecting Nottebohm either. But the court avoids this question in its treatment of Belgium's argument by the reasoning outlined above. Accordingly, it is submitted, Canada's right of protection has to be seen as being an integral part of the ratio decidendi. The effect of the court's words establishing the actual con-

60. Id. at 44.
61. Id.
62. Id. at 45-46.
63. Id. at 46.
64. Id.
65. See Briggs, supra note 1, at 343: "[T]he [jus standi] of one state cannot arise merely from the lack of [jus standi] in another." The court's distinction between rights and interests also presents a problem. While a shareholder's interests may be metamorphosed into rights upon the legal demise of the company, the legal basis for that qualitative change is not expounded by the court. Thus, Judge Fitzmaurice's suggestion that the law should contain an "enlightened rule" ([1970] I.C.J. at 77) that the shareholder's government may intervene, where that of the company declines to do so, seems inconsistent with the theory that the shareholder has no comparable rights capable of protection.
66. Indeed poor Nottebohm was, for the purposes of diplomatic protection against Guatemala, effectively denied a nationality, effectively denied a nationality, despite Article 15 of the Universal Declaration of Human Rights [G.A. Res. 217, U.N. Doc. A/810 at 71 (1948)], which reads:

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

If an individual could be so treated, it is not difficult to imagine the same fate befalling a juridical entity.
67. Accordingly, Professor Briggs unfairly chastises Judges Fitzmaurice, Gros and Jessup for their Nottebohm-induced reservations to the judgment:

The devotion of these judges to the link theory falls short of finding a link
nection between Barcelona Traction and Canada would suggest that while a corporation's nationality is that of the country of incorporation, a closer connection may need to be demonstrated for the purposes of diplomatic protection.

Whatever may be the difficulties with the court's reasoning, it remains clear from the decision that the corporate or individual shareholders of a corporation have no recourse to diplomatic protection separate from that of the corporation itself so long as the corporation legally exists. The company itself must look to the state of incorporation for any such protection. Although this position of general international law can, of course, be varied by treaty stipulations or special agreement, in their absence those responsible for establishing a corporation may well have to take into consideration the willingness of the country of incorporation to espouse the claims of companies whose shareholders are aliens. Indeed, if Nottebohm has any application to this kind of situation, it may be well to suggest the importance of incorporating in a state where there is a genuine economic link with the shareholders.

IV. THE LAW RELATING TO THE EXPROPRIATION OF THE ECONOMIC INTERESTS OF ALIENS—OBITER DICTA

While the court distinguishes the situation in Barcelona from those in the chain of legal reasoning which would justify Belgian jus standi to protect shareholders or Belgian economic interests against a state which has violated no legal right of Belgium. Unable . . . to prove the existence of Belgian jus standi, they have sought to presume it on the basis of irrelevant emanations from Nottebohm.

Note 1 supra, at 343.

68. Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the State in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures. No such instrument is in force between the Parties to the present case.


69. It may also be observed that enterprises already in existence will be affected by the decision. An obvious example is that of the recently nationalized assets of the International Petroleum Company, a 99.9% American-owned subsidiary of Standard Oil Company (New Jersey), incorporated in Toronto and operating, prior to the nationalization, in Peru. The United States' firm espousal of the IPC's claims against Peru is severely weakened by this decision. Peru may quite reasonably insist that only
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nationalizations involving "structural changes in a State's economy," it nevertheless gives some indication of its attitude in this area. Indeed, this very distinction suggests that the court will be disinclined to treat all uncompensated takings in the same manner. The judgment contains the further hint that the legal consequences of expropriation may vary depending upon the degree of agreement on economic philosophy between disputing states. As noted earlier, the court draws a distinction between bilateral obligations and obligations erga omnes. At a later point in the opinion it develops the thought:

[T]he law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned.

What the court seems to be saying is that the previously assumed consensus regarding the illegality of expropriation without compensation has so broken down that there may now be no international law rules of general applicability, at least where the expropriations take place in the setting of a structural reordering of the economy. The wording is general enough, in fact, to include the kind of partial restructuring found in recent Peruvian legislation, as well as the more thorough rearrangements of the post-World War I socialist experience.

That the court may not be expected to view with favor the claims of states whose nationals' property has been expropriated is also indicated by three references to so-called non-business risks. At one point it refers to the fact that the promoters of a company, in making their calculations, take into consideration the possibility of "prejudice caused to the company by illegal treatment of some kind." In other words, the suggestion seems to be that its projected or actual profitability may well reflect the added risk. At a later point in its opinion, in alluding to the various

Canada has a right to speak for the company. See The Peruvian Nationalization of the International Petroleum Company Holdings, a paper presented by the author to the American Society of International Law, Regional Conference on Problems of International Law in the Western Hemisphere, held at the Graduate Faculty, New School for Social Research, April 2-3, 1971 and on file with the author.

71. See note 22 supra.
73. Id. at 36.
advantages accruing to foreign investment, the court finds it in no way inequitable that these advantages "should be balanced by the risks arising from the fact that the protection of the company and hence of its shareholders is thus entrusted to a State other than the national State of the shareholder." Finally, as noted earlier, the opinion specifically denies the obligation of the host state to be an insurer of the wealth represented by foreign investments. It is difficult to avoid asking what legally compensable damage could result to an enterprise whose accounts reflect the possibility of expropriation or other detrimental action by a host government.

A subsequent paragraph of the decision strengthens this interpretation. Although the language refers specifically to the protection of shareholders, its applicability is more general, referring as it does to bilateral and multilateral treaty relationships. Within its terms seem to fall such agreements as the treaties of friendship, commerce and navigation concluded by the United States with several countries, the World Bank Convention on the Settlement of Investment Disputes between States and Nationals of Other States and such "wider economic arrangements" as the European Economic Community. Here the court seems to be going far towards suggesting the possibility of an international law of regional applicability. In any event, the court's recognition of the need for treaties to regulate these problems of expropriation should not be overlooked.

V. THE IMPLICATIONS OF THE DECISION FOR THE LAW RELATING TO MULTINATIONAL ENTERPRISES

The so-called "multinational enterprise" or "multinational corporation" has come to play a sizable role in the sphere of international economic relations. On the one hand, it is considered to be a necessary adjunct to governmental assistance in the economic development process. On the other hand, it is seen as a powerful and elusive agent of Western economic imperialism. It would seem that proponents of either position might agree that these vast economic machines, operating all over the world, must be effectively harnessed to the legal order of the peoples they affect, both

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74. Id. at 51.
75. See text accompanying note 39 supra.
despite and because of the fact that the controlling beneficial ownership is generally located in another country. International law is clearly not up to such a task, and until it becomes so, it would seem wisest to suggest that the best course for the court is to leave as much latitude as possible to states affected by these institutions. In reply to the argument that such an attitude might only create hostility by investors toward foreign investment, it can be maintained both that investors rely more on their perceptions of the investment climate in a country than on the protection of international law and that many such investors have to continue to invest abroad for a variety of reasons, including the need to secure a strong market position and, in the case of natural resources extraction, to exploit the resources where they can be found. 79

The court makes two references to the multinational corporation. Early in the opinion it states:

From its origins closely linked with international commerce, diplomatic protection has sustained a particular impact from the growth of international economic relations, and at the same time from the profound transformations which have taken place in the economic life of nations. These latter changes have given birth to municipal institutions, which have transcended frontiers and have begun to exercise considerable influence on international relations. One of these phenomena which has a particular bearing on the present case is the corporate entity. 80

Since, as noted earlier, the court takes a traditional view of corporations in reaching its conclusions, the implication is that corporations must be controlled by the municipal law of the countries through whose frontiers they pass. The court’s traditional respect for state sovereignty is unlikely to mitigate this view.

The second reference provides the setting for the court’s statement regarding the “intense conflict of systems and interests” 81 that had characterized the period of legal evolution. The court observes:

Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the

79. Their apparent need to find areas of investment in order to dispose of their "surplus capital" may well be another factor. See P. BARAN & P. SWEENEY, MONOPOLY CAPITAL (1966).
81. Id. at 48.
way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. 83

This statement, apart from strengthening the suggestions made earlier, carries the added inference that international law will be reluctant to interfere with a state's attempt to exert jurisdiction over the maneuvers of multinational corporations.

The judgment seems, then, to stand for the following principles:

1. Multinational enterprises may not shop for multiple bases of diplomatic protection.

2. Multinational enterprises must be content with that of the country where they have chosen to be registered, with some uncertainty as to whether even that country will be permitted to espouse a claim without some effective connection.

3. Shareholders' rights are no better than those of the corporation, except perhaps where the substance of the matter is one where general principles of municipal law would also give special rights to shareholders.

4. General international law is no longer adequate to challenge the jurisdiction of host states as against those enterprises which themselves constitute a challenge to sovereign jurisdiction.

5. This whole area of the law, if it can be settled, must be settled by treaty.

It may be predicted that many developing countries will applaud this decision.

82. Id.