

STANDING TO REPRESENT CORPORATE CLAIMS IN THE INTERNATIONAL COURT OF JUSTICE: *The Barcelona Traction Case*

Barring a special agreement, a private party may not seek redress before an international tribunal; only national states may bring international claims.¹ Therefore, when a state's treatment of a foreign national violates international law, the foreigner's recovery depends on his national government asserting diplomatic protection in his behalf.²

Since a state can only protect its own nationals, questions often arise concerning a nation's right of *jus standi*, or standing, to press a particular claim. Most frequently the standing question involves a determination of (a) what nationality an injured party possesses, or (b) which of several parties with different nationalities has been injured by the state's violation of international law.

While the standing question can be troublesome when the party alleging injury is an individual,³ the difficulty increases when it is a corporation. Thus, when a corporation is incorporated in Canada, operates primarily in Spain, and is owned primarily by Belgian interests, which states have standing to allege violations of international law by Spain harmful to the corporation? If the corporation itself is deemed to have a particular nationality different from that of the owners of the corporation's stocks and bonds, does the owners' state also have standing to assert the injury?

These questions were presented to the International Court of Justice (I.C.J.) in the recent case of *Barcelona Traction, Light and Power Co.*⁴ Because the resolution of these questions generated nine separate opinions, this comment will serve as an attempt both to synthesize these opinions and consider their impact on international law. After a survey of the facts it will consider the court's determination of (1) corporate nationality, (2) standing of a corporation's national state, and (3) standing of a foreign shareholder's national state. Lastly, the policy justifications for the decision will be analyzed.

I. THE FACTS

Barcelona Traction was a holding company, incorporated in Canada,⁵ which formerly conducted extensive business activities in Spain through Canadian and Spanish subsidiaries.⁶ The company allegedly was controlled by a Belgian corporation⁷ having substantial international operations. In 1948,

¹ L. OPPENHEIM, INTERNATIONAL LAW § 291 (Lauterpacht 8th ed. 1955); see, e.g., I.C.J. STAT. art. 34, para. 1.

² *Mavrommatis Palestine Concessions*, [1924] P.C.I.J., ser. A, Nos. 2, 6, 12.

³ See, e.g., *Nottebohm Case*, [1955] I.C.J. 4.

⁴ [1970] I.C.J. —, 9 INT'L LEGAL MAT'LS 227 (1970).

⁵ The company was incorporated in Canada in 1911, and maintains its head offices in Toronto. *Id.* at para. 8, 9 INT'L LEGAL MAT'LS at 232.

⁶ The subsidiaries formerly provided most of the electricity in Catalonia, the northeast region of Spain. *Id.* at para. 8, 9 INT'L LEGAL MAT'LS at 232.

⁷ Belgium alleged that its nationals owned approximately 80% of all Barcelona Traction stock

the Spanish courts, in an action alleged to have resulted in a gross denial of justice under international law,⁸ declared the company bankrupt and ordered seizure and sale of its holdings in Spain.⁹ Since Canada had ceased all diplomatic representations on behalf of the company,¹⁰ Belgium sued Spain in

when the bankruptcy proceedings began in 1948. Approximately 75% of the shares were purportedly held by Sidro, a Belgian corporation. Sidro was alleged to be largely owned by an international conglomerate incorporated in Belgium and predominantly owned by Belgians. *Id.* at paras. 9, 25, 9 INT'L LEGAL MAT'LS at 233, 251.

Evidently, Belgium could not conclusively prove Belgian nationals' control of Barcelona Traction from 1948, when the bankruptcy proceedings began, through 1962, when the application to the I.C.J. was filed. Consequently, Belgium did not establish sufficient "links" to give it standing even if the court had ruled Canada ineligible to represent the claim under the *Nottebohm* test. See note 30 *infra*. Judges Jessup and Gros concurred in dismissal of the Belgian claim for failure to show the requisite links, rather than accepting the majority view that a state may never represent shareholder nationals in asserting harm to a corporation. *Id.* at paras. 73-77, 80, 81, 87, 105, 9 INT'L LEGAL MAT'LS at 322-33 (Jessup, J., concurring); *id.* at paras. 26, 27, 9 INT'L LEGAL MAT'LS at 349 (Gros, J., concurring).

⁸States are responsible under international law for injuries resulting from a denial of justice. See J. BRIERLY, *THE LAW OF NATIONS* 286 (6th ed. H. Waldock 1963). Belgium alleged, *inter alia*, that Spain had denied justice by intentionally frustrating all attempts to pay interest on the sterling bonds, usurping jurisdiction in declaring a Canadian company bankrupt, arbitrarily breaching numerous provisions of Spanish Law by declaring a solvent company bankrupt and hastily selling its assets. Barcelona Traction, Light & Power Co., [1970] I.C.J. ____, 9 INT'L LEGAL MAT'LS 227, 241-46 (1970).

⁹To finance its operations in Spain, Barcelona Traction had issued several series of bonds. Some of the series required payment of the interest in pesetas, but most required payment in sterling. When the Spanish civil war broke out in 1936, the company stopped servicing all bonds. The companies in Spain. *Id.* at paras. 10-17, 9 INT'L LEGAL MAT'LS at 233-35. refused to authorize the transfer of foreign currency to the company which it needed to pay interest on the sterling bonds. Consequently, servicing on sterling bonds has never been resumed.

On February 9, 1948, three Spanish holders of recently-acquired Barcelona Traction sterling bonds petitioned a Spanish court to declare Barcelona Traction bankrupt for failure to pay interest on the sterling bonds. Proceeding under Spanish law, the court issued a judgment declaring the company bankrupt two days later. Although Barcelona Traction had eight days to appeal the judgment under local law, it received no judicial notice of the proceedings, and did not appear to contest them.

Under the terms of the bankruptcy judgment, the company's interim receiver seized all assets of Barcelona Traction and two of its subsidiary companies in Spain. Since all stock of the companies was held outside Spain, the court allowed the receiver "constructive civil possession" of the stock. As a result, the receiver was able to fire the principal officers and all directors of the companies and convene a meeting of creditors, who elected trustees. The trustees cancelled all the stock of the companies, including that held outside Spain, and sold new certificates in January 1952. A Spanish company purchased all the assets and acquired complete control of the companies in Spain. *Id.* at paras. 10-17, 9 INT'L LEGAL MAT'LS at 233-35.

¹⁰Although, as the Court emphasized, Canada's right of representing Barcelona Traction remains unaffected, by the instant case, *id.* at para. 83, 9 INT'L LEGAL MAT'LS at 271, Canada had in fact ceased its efforts prior to Belgium's initiation of the present suit. Canada did intervene occasionally between 1948 and 1955, but confined its efforts to promoting a settlement by the parties. *Id.* at para. 21, 9 INT'L LEGAL MAT'LS at 235.

The Court rejected the suggestion that Canada may have refused to intervene because it had no means of obtaining compulsory jurisdiction over Spain for a preceeding before the I.C.J., and

the I.C.J. for damages¹¹ caused to Belgian shareholders.

The present suit began in 1962 after fourteen years of representations and negotiations between the governments and the private parties concerned.¹² Spain filed four preliminary objections to the claim.¹³ In 1964, the Court dismissed two of the objections and joined the other two to the merits.¹⁴ In its latest judgment, the Court in effect sustained Spain's third preliminary objection by holding that Belgium had no standing to represent Belgian shareholders in a Canadian corporation alleging injury to the corporation by Spain.

II. CORPORATE NATIONALITY

Both Belgium and Spain agreed that Canada was the national state of Barcelona Traction.¹⁵ Nevertheless, the I.C.J. found it necessary, in ruling on the standing question, to articulate its test of corporate nationality.

Authorities have differed for many years on which test should determine corporate nationality under international law.¹⁶ The United States and the United Kingdom, in time of peace,¹⁷ have consistently followed the common

noted that Spain had never refused to accept the jurisdiction of the I.C.J. in a suit by Canada in behalf of Barcelona Traction. *Id.* at paras. 82-83, 9 INT'L LEGAL MAT'LS at 270-71. However, Canada's only real interest in Spain's bankruptcy proceedings was obtaining payment on the company's sterling bonds held by a Toronto trust company. When these were discharged from the proceeds of the bankruptcy sale, "Canadian interest declined." *Id.* at para. 37, 9 INT'L LEGAL MAT'LS at 305-06 (Jessup, J., concurring). For a statement by the Canadian Secretary of State for External Affairs indicating his government's lack of interest, see Barcelona Traction, Light & Power Co. (Preliminary Objections), [1964] I.C.J. 6, 62 (Koo, Vice President, separate opinion).

¹¹Belgium was seeking substantial damages, including: (1) \$78 million, the net value in 1948 of 88% of the company's property seized by Spain, (2) 6% interest on the \$78 million since 1948, (3) \$3,800,000 representing expenses incurred by Belgians in protecting their rights, (4) principal and interest on Belgian-held Barcelona Traction sterling bonds, and (5) principal and interest owed by the subsidiaries. Barcelona Traction, Light & Power Co., [1970] I.C.J. —, para. 25, 9 INT'L LEGAL MAT'LS 227, 238 (1970).

¹²In addition to the diplomatic negotiations between 1948 and 1962, extensive litigation occurred in Spanish courts. According to Spain, some 494 judgments were given by lower and 37 by higher courts. *Id.* at para. 18, 9 INT'L LEGAL MAT'LS at 235.

¹³The preliminary objections were as follows: (1) Since Belgium had submitted a claim involving Barcelona Traction Co. in 1958, and had withdrawn it in 1961, the case was closed; (2) Spain had not submitted to the jurisdiction of the court; (3) Belgium lacked *jus standi* to represent the claim of a Canadian corporation; and (4) Barcelona Traction had not exhausted remedies available in Spain. See Barcelona Traction, Light & Power Co. (Preliminary Objections), [1964] I.C.J. 6, 11-12.

¹⁴The court dismissed objections (1) and (2), and joined (3) and (4) to the merits. *Id.* at 47.

¹⁵Barcelona Traction, Light & Power Co., [1970] I.C.J. —, paras. 74, 83, 9 INT'L LEGAL MAT'LS 227, 269, 271 (1970).

¹⁶See generally 2 E. RABEL, CONFLICT OF LAWS 31-68 (2d ed. 1960); 1 G. SCHWARZENBERGER, INTERNATIONAL LAW 387-412 (3d ed. 1957); Beckett, *Diplomatic Claims in Respect of Injuries to Companies*, 17 TRANSACT. GROT. SOC'Y 175 (1932); Harris, *The Protection of Companies in International Law in the Light of the Nottebohm Case*, 18 INT'L & COMP. L.Q. 275, 295-301 (1969); Kronstein, *The Nationality of International Enterprises*, 52 COLUM. L. REV. 983, 985-90 (1952).

¹⁷See note 21 *infra*.

law approach of representing only companies incorporated under local law.¹⁸ Practice in civil law countries, on the other hand, has been to represent companies whose *siège social*, or seat of control, is located within their borders.¹⁹ When a nation is determining not whether to represent a corporation injured by a foreign nation but whether to seize a corporation's property under an Alien Property Act, a "control" test may instead be employed.²⁰ Most nations²¹ have found the control test impractical in

¹⁸See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 27 (1965) [hereinafter cited as RESTATEMENT]; Beckett, *supra* note 16, at 185; 1961 *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, art. 21, para. (3)(d), 55 AM. J. INT'L L. 545, 578 (1961).

¹⁹See, e.g., 2 E. RABEL, *supra* note 16, at 33; cf. I G. SCHWARZENBERGER, *supra* note 16, at 393-95.

Siège social has different meanings in the various civil law countries which adopt it as the test of corporate nationality. In some states "seat of control" refers to the place named by incorporators to satisfy a statutory requirement. This "seat" therefore, would generally correspond to the "place of incorporation," and the effect of the common and civil law tests would be the same. Beckett, *supra* note 16, at 186-88.

France, however, imposes the stricter requirement that a company's *siège social réel et sérieux* be located within France. This "seat" is the place where corporate decisions are made rather than the formal "seat of control." See Harris, *supra* note 16, at 300. The French approach parallels the "nerve center" test used in some domestic United States jurisdictions to pinpoint a corporation's principal place of business for purposes of diverse citizenship. See *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959). Other United States jurisdictions determine corporate citizenship by the place of operation; this test is concerned less with the state where top management is located than where assets, employees and overall business operations can be found. See *Kelly v. United States Steel Corp.*, 284 F.2d 850 (3d Cir. 1960).

²⁰In wartime, common and civil law countries have found the place of incorporation and *siège social* irrelevant for determining whether an apparently friendly corporation is in fact enemy controlled and its property should be seized. These countries instead have utilized a test of corporate nationality based on economic realities (e.g., the nationality of directors, shareholders). The English House of Lords seems to have originated the control test in the case of *Daimler Co. v. Continental Tyre & Rubber Co.*, [1916] 2 A.C. 307. See 2 E. RABEL, *supra* note 16, at 58 n.99; Domke, *The Control of Corporations—Application of the Enemy Test in the United States of America*, 3 INT'L L.Q. 52, at 52 n.1 (1950). Some application of the test was made by the mixed arbitration commissions in interpreting the treaty of Versailles. 2 E. RABEL, *supra* note 16, at 59.

The United States Supreme Court was unwilling to recognize the control test. In *Behn, Meyer & Co. v. Miller*, 266 U.S. 457 (1925), the Court refused to permit seizure of assets belonging to a company incorporated in a British colony even though the company was largely enemy owned. This result was later overturned by statute. Trading with the Enemy Act, 12 U.S.C. § 95a (1958). Following Congress' lead, the Court overruled *Behn, Meyer* in *Clarke v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-89 (1947), and allowed seizing a corporation's assets after piercing the corporate veil (in this case, the place of incorporation) to find enemy control.

See generally 2 E. RABEL, *supra* note 16, at 57-63; Domke, *supra*; Fink, *That Pierced Veil—Friendly Stockholders and Enemy Corporations*, 51 MICH. L. REV. 651 (1953).

²¹Although some French writers encouraged adoption of the control test in peacetime situations, their view was not widely adopted and was later rejected. See 2 E. RABEL, *supra* note 16, at 60-61.

peacetime because ownership of stock constantly changes and often no single nation represents a majority of the shareholders.

Without discussing the relative merits of the corporate nationality tests the majority in *Barcelona Traction* adopted the place of incorporation test:

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.²²

III. RIGHTS OF THE CORPORATION'S STATE

Many nations, including the United States, refuse to represent the claims of a corporation which under the applicable corporate nationality test would be a domestic corporation, unless its nationals would derive benefits justifying such representation.²³ Until recently, though, the standing of a state to represent the claim of a national, whether an individual or a corporation, was never questioned.²⁴ While a state had no international duty to provide diplomatic protection when it had no reason to do so,²⁵ it had an unquestioned right to represent its nationals who were injured by a foreign state's violation of international law.²⁶

This sovereign option was qualified by the I.C.J. in the *Nottebohm Case*.²⁷ There, Leichtenstein presented the claim of a naturalized citizen. Prior to the outbreak of World War II, Nottebohm, a German national living in Guatemala, convinced Leichtenstein to naturalize him in return for his promise to pay taxes in Leichtenstein for life. Guatemala, lifting the veil of naturalization, seized his property during World War II because of his ties with the enemy, Germany. The court denied the claim. It held that Nottebohm did not have a sufficient connection with Leichtenstein to establish that nation's right to represent him before an international tribunal.²⁸

Given that the rules of diplomatic protection applicable to corporations germinated from those applicable to individuals, there has been speculation as to whether the "genuine connection" required by *Nottebohm* would limit the right of states to represent corporations.²⁹ Two judges concurring in *Barcelona Traction* argued that *Nottebohm* should apply. Judge Jessup found that

. . . the existence of a link between a corporation holding a "charter of

²²*Barcelona Traction, Light & Power Co.*, [1970] I.C.J. —, para. 70, 9 INT'L LEGAL MAT'LS 227, 268 (1970).

²³See S. G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 839 (1943) (American State Department position); Harris, *supra* note 16, at 301-10.

²⁴See Harris, *supra* note 16, at 275-85.

²⁵See J. MOORE, DIGEST OF INTERNATIONAL LAW § 987 (1906); I. L. OPPENHEIM, *supra* note 1, at § 319.

²⁶*Mavrommatis Palestine Concessions*, [1924] P.C.I.J. ser. A, No. 2, at 12.

²⁷[1955] I.C.J. 4.

²⁸*Id.* at 26.

²⁹See Harris, *supra* note 16, at 285-89.

convenience" and the State granting the charter, is the key to the diplomatic protection of multinational corporate interest³⁰

Using as his test the "economic reality of the relevant transactions," he identified as the "overwhelmingly dominant feature in the affairs of Barcelona Traction" the "influence of far-flung international financial interests" controlled by the Sofina group.³¹ This resulted in the conclusion that "Belgium remains the only identifiable claimant against Spain."³²

The majority, however, clearly rejected the requirement of a close "link" between the corporation and its national state, finding that,

. . . in the particular field of the diplomatic protection of corporate entities, no absolute test of the genuine connection has found general acceptance. . . .³³

The majority³⁴ thus implied that the *Nottebohm* rationale should be limited to the diplomatic protection of individuals. The effect of this holding is that the state of incorporation can choose to represent a corporate claimant without establishing the "genuine connections" between the company and the state which would justify the effort of representing the company.

IV. RIGHTS OF THE SHAREHOLDERS' STATE

While the corporate state has a right to protect its nationals, it may refuse to represent claims having an insubstantial potential benefit to its state.³⁵ The question then arises whether the state of the shareholders may pursue the corporate claim.

International law is unclear on the right of nations to espouse the claims of their shareholder nationals. Many writers have argued that shareholder states are entitled to present claims in some circumstances,³⁶ but they do not

³⁰Barcelona Traction, Light & Power Co., [1970] I.C.J. ____, para. 42, 9 INT'L LEGAL MAT'LS 227, 310 (1970) (Jessup, J., concurring).

³¹*Id.* at para. 17, 9 INT'L LEGAL MAT'LS at 302.

³²*Id.* at para. 37, 9 INT'L LEGAL MAT'LS at 307.

³³*Id.* at para. 70, 9 INT'L LEGAL MAT'LS at 268.

³⁴The Court was far from unanimous in rejecting the *Nottebohm* analogy. Judge Jessup's endorsement of it, *supra* notes 30-32 and accompanying text, was echoed by Judge Gros. [1970] I.C.J. ____, para. 24, 9 INT'L LEGAL MAT'LS 210, 347 (1970) (Gros, J., concurring). Judges Petren and Onyeama state that the applicability of the "genuine connection" principle to corporations need not be decided because of the majority's recognition that Canada had standing to protect the corporation's interests. *Id.*, 9 INT'L LEGAL MAT'LS at 277 (Petren & Onyeama JJ., concurring). Judge Tanaka evidently believed the "link" theory to be correct. *See id.*, 9 INT'L LEGAL MAT'LS at 289-300 (Tanaka, J., concurring). In dissent, Judge Riphagen applied the "link" theory and found a sufficient bond with Belgium to allow its representation of Barcelona Traction. *Id.* at paras. 15, 23, 9 INT'L LEGAL MAT'LS at 355 (Riphagen, J., dissenting).

³⁵The United States, while maintaining the right in certain circumstances to represent any domestic corporation, generally will represent an American corporation only if at least 50% of all classes of stock are beneficially owned by United States interests. *See Harris, supra* note 16, at 302; *cf. R. LILlich, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS* 89 (1962).

³⁶*See generally* Bagge, *Intervention on the Ground of Damage Caused to Nationals, with*

agree on what are those circumstances. Most of the writers do, however, agree on the appropriateness of the following two circumstances: (1) where the company is defunct and cannot act for itself,³⁷ and (2) where the state of incorporation is the state which has harmed the company.³⁸ Some writers have urged that shareholder states have standing whenever the foreign corporation fails to protect itself.³⁹ Other writers, following the lead of some international agreements and treaties, would allow representation by the shareholder state when the corporate state fails to act.⁴⁰

The various opinions in *Barcelona Traction* adopted or at least considered each of these approaches.⁴¹ The majority of the Court noted that "there may

Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders, 34 BRIT. Y.B. INT'L L. 162 (1958); Beckett, *supra* note 16; Harris, *supra* note 16; Jones, *Claims on Behalf of Nationals who Are Shareholders in Foreign Companies*, 26 BRIT. Y.B. INT'L L. 225 (1949); Note, *Piercing the Corporate Veil under International Law*, 16 SYRACUSE L. REV. 770 (1965).

³⁷Baasch & Romer Claim (Netherlands v. Venezuela), RALSTON, VENEZUELAN ARBITRATIONS OF 1903, 906 (1904); 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1269 (1967); Beckett, *supra* note 16, at 189-90; Jones, *supra* note 36, at 236.

³⁸Delagoa Bay Ry. Case (Great Britain v. Portugal, 1889), 2 J. MOORE, INTERNATIONAL ARBITRATIONS 1965 (1898); 6 J. MOORE, *supra* note 25, at 647-69; RESTATEMENT § 172; 8 M. WHITEMAN, *supra* note 37, at 1284; Beckett, *supra* note 16, at 190; Jones, *supra* note 36, at 236, 257.

³⁹This approach is patterned after the shareholder derivative suit in which the shareholders may sue in behalf of the corporation when the officers, directors, or majority shareholders wrongfully fail to assert the corporation's claim. 8 M. WHITEMAN, *supra* note 37, at 1284-85; see Jones, *supra* note 36, at 236; 1961 *Harvard Draft Convention on International Responsibility*, *supra* note 18, at art. 20, para. 2(c); Note, *supra* note 36, at 790.

⁴⁰RESTATEMENT § 173 (1965); cf. Jones, *supra* note 36, at 236-37.

⁴¹Judge Sir Gerald Fitzmaurice would grant standing to the shareholder state when the state of incorporation is the tortfeasor, or the company's government refuses to act. He acknowledges, however, that, at least in the latter case, the law does not grant standing to the shareholder state. *Barcelona Traction, Light & Power Co.*, [1970] I.C.J. ____ paras. 22, 23, 9 INT'L LEGAL MAT'L 227, 279-80 (1970) (Fitzmaurice, J., concurring).

Judge Tanaka found no justification in international law for limiting the standing of a shareholder state to the two well recognized exceptions (see text with notes 37 and 38), and urged that a shareholder's state should always be allowed to protect its interests. *Id.*, 9 INT'L LEGAL MAT'L 294-96 (Tanaka, J., concurring).

Judges Gros and Jessup would recognize Belgium's standing in the instant case because of its substantial links with the company. *Id.* at para. 19, 9 INT'L LEGAL MAT'L 346 (Gros, J., concurring); *Id.* at paras. 57-58, 9 INT'L LEGAL MAT'L 314-15 (Jessup, J., concurring).

Judge Nervo finds the standing of a shareholder state more limited than the other judges. He accepts the right of representation when the company has been liquidated or the direct rights (e.g., share in liquidation) of the shareholders are involved. However, in terms redolent of sovereign immunity, he vigorously dissents from the majority's dictum that a shareholder state can represent a corporate claim in the tortfeasor. *Id.*, 9 INT'L LEGAL MAT'L 337-38 (Nervo, J., concurring).

In 1964, Vice President Wellington Koo, who did not sit in the instant decision on the merits, dissented from the joinder to the merits of Spain's preliminary objection that Belgium lacked standing. At the time he urged standing for the shareholder states whenever the state of incorporation refused to sue or unsuccessfully pursued diplomatic protection of the company. *Barcelona Traction, Light & Power Co. (Preliminary Objections)*, [1964] I.C.J. 6, 53, 59 (Koo, Vice President, separate opinion).

in principle be special circumstances which justify the lifting of the veil in the interest of shareholders."⁴² But, depending on a distinction between rights and interests,⁴³ the majority ruled that in most instances only the corporation's national state could intervene:

. . . Whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.⁴⁴

The majority reasoned that since the injury was to Barcelona Traction, only its rights were infringed. The shareholders had only an "interest" in the claim. Thus only Canada, not Belgium, had *jus standi* in the I.C.J. to assert the violation of a right.

V. THE POLICY

From the standpoint of the shareholders, *Barcelona Traction* yielded a harsh result. The Belgian owners of the company lost millions of dollars because of acts by the Spanish government which quite possibly were violative of international law. Nonetheless, there are sound policy reasons which support the Court's decision. First, the I.C.J., as an extremely limited forum, must exercise far more judicial restraint than a domestic tribunal. Second, the rule that only the state of incorporation may press a corporate claim adds needed certainty to international law.

The I.C.J. is a court with narrowly limited jurisdiction. It has only the power which sovereign states have specifically granted to it.⁴⁵ The Court must, therefore, exercise extreme caution in order that it not overstep its bounds. If nations should come to believe that the Court is deciding questions beyond the scope of its jurisdiction, they could easily terminate their consent to future jurisdiction, and thereby strip the Court of its usefulness as a judicial agency for the settlement of international disputes.⁴⁶

In the present case, it is highly doubtful that Spain consented to be sued by Belgium for denying justice to a company which it considered to be Canadian. In addition, none of the circumstances⁴⁷ in which shareholder states have been previously allowed to present claims were evident. Therefore, the Court was correct in disallowing the claim by relying on customary international law.

⁴²*Barcelona Traction, Light & Power Co.*, [1970] I.C.J. —, para. 58, 9 INT'L LEGAL MAT'LS 227, 265 (1970).

⁴³. . . Not a mere interest affected, but solely a right infringed, involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected." *Id.* at para. 46, 9 INT'L LEGAL MAT'LS at 263.

⁴⁴*Id.* at para. 44, 9 INT'L LEGAL MAT'LS at 262.

⁴⁵*Mavrommatis Palestine Concessions*, [1924] P.C.I.J. ser. A., No. 2, at 16.

⁴⁶*Cf. H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 91 (1958).

⁴⁷See notes 37-40 *supra*, and accompanying text.

Moreover, the Court's decision will have a positive long range effect upon developing international law. By designating the state of incorporation as the only state which may represent a corporate international claim, the Court created certainty in a previously unsettled area of law. Any of the proposed alternative tests for choosing the corporation's claimant state would have had the opposite effect. Thus, if Judge Jessup's "link" test⁴⁸ had been adopted, the Court would have had to decide, in each particular case, which state had the closest connection⁴⁹ with the corporation involved in the dispute: the state of incorporation, the state of *siège social*, or one of the three or four states containing a significant percentage of the company's shareholders, bondholders, or creditors. In the I.C.J., where jurisdiction is only by consent, this kind of uncertainty is intolerable.

The state of incorporation test is clearly not the most equitable means for determining which state should press an international claim.⁵⁰ A modified "link" test may eventually prove to be much fairer to all the parties involved. It is evident, however, that such a test, to be workable, must be concrete. Thus, long-range reform of the judicial process should come from such quasi-legislative bodies as the International Law Commission and the United Nations General Assembly.

Barcelona Traction does not create the best of all possible rules. It does state a positive, concrete rule. The decision thus enhances the restrained image of the I.C.J., and furthers the cause of voluntary state submission to the processes of international law.

W.B.S. III

⁴⁸See notes 30-32 *supra*, and accompanying text.

⁴⁹The "link" test is analogous to the modern American rule for choice-of-law in tort:

The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379(1) (Tent. Draft No. 9, 1964); see *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

It is interesting to note, however, that an explanation of the "significant relationship" test occupies seventy-nine pages in the proposed draft of the RESTATEMENT. The test involves a great amount of judicial discretion. It is therefore not appropriate for use in the I.C.J. See text accompanying notes 45-46 *supra*.

⁵⁰For example, Canada has no interest in representing *Barcelona Traction's* claim. See note 10 *supra*. The real interest is in Belgium and an advanced legal system would probably allow Belgium to press the claim. Cf. note 49 *supra*.