

CHANGING APPROACHES TO THE NATIONALITY OF CLAIMS
IN THE CONTEXT OF DIPLOMATIC PROTECTION AND INTERNATIONAL
DISPUTE SETTLEMENT

Francisco Orrego Vicuña (*)

The well deserved series of colloquiums and studies organized to honor Doctor Ibrahim Shihata with occasion of his retirement as Vice President and Legal Counsel of the World Bank, have provided an important opportunity to examine the trends that international law has been following in the transition from the twentieth to the twenty-first century.

This contribution examines how the law relating to the nationality of claims has evolved in the context of diplomatic protection and to what extent it is today possible to suggest new principles or approaches in this respect. The salient issues of the matter, the rules prevailing under traditional international law and the changes that are intervening so as to establish trends will be examined to this end and, where appropriate, new answers will be suggested. These thoughts are in part based on the work undertaken by the author for the Committee on Diplomatic Protection of the International Law Association.¹

1.- Whose rights are asserted in international claims ?

The starting point of the discussion on the rules of nationality does not refer so much to nationality as such but to a more fundamental issue, namely the question of whose rights are asserted when bringing an international claim. Traditional rules on diplomatic protection undertaken

by the State are confronted in this context with the increasing access of the individual to dispute settlement mechanisms.

The classic rule on the matter was well established in the *Mavrommatis* concessions case, where the Permanent Court of International Justice ruled that "[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law".² As rightly explained by Bennouna, this conceptual approach led to a "transformation" of the claim, which passed from the individual to the spousing State of nationality, but in so doing the role of the State became paramount and eclipsed that of the individual which was at its origin.³

A number of consequences followed from this legal fiction which responded to the time when the State was the single and most important subject of international law. Discretionary spousal of claims, disposition of the compensation by the State, introduction of a type of damage different from that suffered by the individual, and the influence of political power are some of those consequences.⁴

A number of legal contradictions accompanied this approach since its outset. First, in cases where a direct injury to the State could be established international law provided for different rules of protection, such as measures of self-protection.⁵ This included situations in which the affected individual was a high officer of the State.⁶ The requirement of the continuity of nationality of the affected individual also involved a contradiction since "[i]t is also illogical to consider the State as the sole

holder of the international claim, yet at the same time to prevent the State from pursuing this claim because the 'nationality' of the underlying individual claim has changed".⁷ More importantly, while diplomatic protection was understood as the "procedural corollary to the legal responsibility of international law subjects"⁸, in many instances it does not appear to have followed the evolution that the law of state responsibility itself has experienced, particularly in respect of the operation of international mechanisms established to make states answerable to international wrongs.⁹

Besides the legal issues involved in this approach, there was a clear political connotation in the use of diplomatic protection as an instrument of power by States in international relations.¹⁰ Reactions such as the "Calvo Clause", aimed at the elimination of the role of diplomatic protection, were the inevitable consequence of the abuse of this form of protection in the early part of the twentieth century.

Legal and political issues, however, were not enough to prevent the consolidation of the classic rules on the matter,¹¹ nor did considerations of equity and logic have much influence on State practice for a long period of time.¹² But this discussion also reveals that various issues appear not to have met the required standards of support by state practice and *opinio juris* so as to become a rule of customary international law. One thing was the European and United States practice on diplomatic protection, but quite another was the view taken by many other countries that did not share the same legal understandings in this respect.

It would be the very structure of international law that prompted fundamental changes in the role of diplomatic protection. As

the State lost its position of exclusivity in the international legal order, and both international organizations and individuals acquired specific, albeit still limited roles of their own, new alternatives emerged for the assertion of international claims. The law of human rights, on the one hand, and that relating to the protection of foreign investments, on the other hand, have opened up a clear path for the direct access of the individual to international mechanisms for the assertion of claims, following a number of specific precedents established along the twentieth century.¹³ This trend is also present in a number of other developments taking place under contemporary international law in respect of the settlement of disputes.¹⁴ In this new context, many times it is the right of the individual affected and no longer that of the State of nationality which is asserted. To that same extent, diplomatic protection is no longer required to intervene and, furthermore, as in ICSID, it is expressly excluded to the extent that arbitration is resorted to and complied with.

The direct standing of the individual under international law will continue to expand for a variety of purposes, particularly in terms of access to dispute settlement mechanisms.¹⁵ It can therefore be expected that claims will be increasingly handled aside from the operation of diplomatic protection. This does not mean that the role of the State has lost its significance. It will still be necessary to espouse claims in the many areas where direct standing is not available, to enter into treaties and arrangements to ensure such direct access, to establish the legal framework under which individuals will operate and to make available its own judicial and administrative remedies for nationals and foreigners alike.

The essence of the evolution points towards the fact that in both the scenario of diplomatic protection and in that of direct standing of the individual, it is increasingly the right of the individual that is asserted in its own merits and no longer that of the sponsoring State. The State may still act as a conduit, an agent or on behalf of the individual, but no longer in substitution of his rights. This is not to say that the State may not consider that a wrong done to one of its nationals affects its own interest, but the latter will be the consequence of the rights of the individual and not the State's own right. While the transition from a legal fiction to a different reality takes place, the interesting thought that a claim may actually have a "dual nature" and represent the interest of both the individual and the state has been advanced.¹⁶

Because the protection of human rights has advanced significantly under contemporary international law, the argument that this area of the law is different from that relating to diplomatic protection has also been suggested.¹⁷ In this context diplomatic protection would rather be kept for the safeguard of the economic interests of the individual. While historically diplomatic protection has encompassed both the economic interests and the treatment of individuals abroad, it is quite true that the law of human rights has evolved beyond the framework of traditional diplomatic protection, following more liberal rules and allowing even for claims against the State of nationality. But it is also true that the same path is being followed by other areas of the law typically relating to economic interests, such as the case of investments, thereby evidencing that the evolution is not so much related to the nature of the rights but to the institution of diplomatic protection as a whole. Furthermore,

economic rights are also considered today to be a part of human rights, thus also justifying liberal mechanisms of protection. This does not exclude of course that different areas of the law might follow different rules and requirements as to their protection, which are essentially embodied in new treaty regimes, but the underlying premise is always the same, that is the assertion of the rights of the individual in their own merit. The fundamental changes taking place in this field have profound implications for the specific questions of nationality and the role of the State in the handling of claims.

2.- Alternatives to traditional diplomatic protection.

While the historic legal fiction underlying diplomatic protection might no longer always be necessary or justified, the key question, as has been aptly put by Lady Fox, seems to be which is the alternative solution to the traditional requirements of diplomatic protection.¹⁸ The existing system has the advantage of an orderly administration of claims by the State of nationality, including the handling of multiple claims, the availability of diplomatic channels for negotiations and settlement, and the intervention of that State in the implementation of legal rules.¹⁹ The disadvantages noted are also quite evident, particularly in terms of the political elements intervening in the governmental decision to spouse or not to spouse a claim, and the full discretionary nature that this decision has.

The option of abolishing diplomatic protection as a mechanism under international law, while justified in the context of specific treaty regimes, does not seem to be generally a reasonable one

at present since it would leave many individuals unprotected or left to their own action.

A residuary role for diplomatic protection seems more adequate to the extent that this mechanism might only intervene when there are no international procedures directly available to the affected individual.²⁰ It should be noted, however, that if direct access is available diplomatic protection would be excluded altogether, except perhaps in order to ensure the enforcement of an award or secure compliance with a decision favoring that individual; in particular there would be no question of diplomatic protection after the individual has resorted to international procedures or in lieu thereof.

There is still the possibility of a parallel operation in which a State may spouse a claim at the same time that the individual pursues direct remedies,²¹ but this alternative would result in various kinds of interference with the orderly conduct of the procedures and eventually the outcome of the decision.

One other aspect that needs to be considered in the context of alternative options is how to ensure that the element of discretion in the governmental decision to spouse a claim is to some extent subject to a legal scrutiny. On many occasions a government will simply refuse to accept the individual's request to have a claim spoused and no remedies will be available to this effect. An interesting historical solution to this problem is found in the Chilean legislation of the nineteenth century, where the request for diplomatic protection would be sent by the Ministry of Foreign Affairs to the Advocate General (Fiscal) of the Supreme Court for a legal opinion that was binding on the government.²² Might a solution

of this sort be adopted as an obligation under international law in the context of due process?²³

3.- An effective link of nationality.

The requirement that claims may be brought by a State on condition that the affected person possesses its nationality, has been well established under international law.²⁴ Moreover, the rule laid down by the International Court of Justice in the *Nottebohm* case²⁵ as to the requirements of a genuine and effective link of nationality with the sponsoring State has kept its importance in present international law. A number of efforts have been undertaken in order to strengthen the effectiveness of nationality, as is evident, for example, in respect of the nationality of ships and, more recently, of fishing vessels.²⁶

Notwithstanding the significance of this link, the very needs of the evolving legal order have led to changes in the rule to the extent that not always a link of nationality is today required to spouse an international claim. Departures from the rule agreed by treaty had allowed in a number of cases to sponsor claims of persons who did not have the nationality of the claimant State.²⁷ It has been also noted that since the claiming State had discretion as to the distribution of compensation, it could make payments to persons who did not meet the requirement of nationality.²⁸ A declaration of intention to acquire the nationality of the claiming State has also been considered enough to spouse the claim. Claims on behalf of non-nationals have not been unknown in the practice of international law.²⁹ Citizens of the European Unity are entitled to diplomatic and consular protection by the authorities of any member State in the territory of a third country in which the State of his

nationality is not represented, although this type of protection is related more to consular or diplomatic assistance *in situ* than to the possibility of presenting an international claim.³⁰

Two other situations need to be considered in this context. The first is the case of claims made on behalf of nationals of the defendant state. The early precedent set in this respect by the *I'm Alone*,³¹ has been recently expanded in the agreement between Chile and the United States in respect of the dispute concerning responsibility for the deaths of *Letelier and Moffitt*,³² where "[t]he Chilean nationality or dual nationality of some of the persons protected by the United States Government was not raised as a bar to the disposition of the corresponding claims...what in actual fact means that the humanitarian concerns have prevailed over the traditional requirements[of diplomatic protection]".³³ One of the Chilean nationals on whose behalf the United States claimed was even a sitting member of the Chilean Congress. This last case also evidenced that the United States did not substitute its interest for that of the families protected, acting only on their behalf;³⁴ consequently, it was the right of the individuals and not that of the claiming State that was enforced, the latter having been deprived of its discretionality as to the handling of compensation and of its surrogate capacity.³⁵ While this case might be quite unique in contemporary practice,³⁶ it nonetheless evidences some of the key new features of diplomatic protection in practice.

Under the rules of the United Nations Compensation Commission, a government may submit claims on behalf of its nationals and "at its discretion, of other persons resident in its territory".³⁷ The

latter are evidently not its nationals but only its residents, and may have the nationality of other State.³⁸ Trusteeship arrangements are also used to extend protection to persons who are not in a position to have their claims submitted by a Government; under the United Nations Compensation Commission rules a person, authority or body may be appointed to this effect by the Governing Council.³⁹

The second situation that must be considered is that not always the spousal of the State of nationality is required to submit a claim. Also under the Rules of the UNCC, a corporation whose State of incorporation has failed to submit a claim on its behalf, may itself make a claim to the Commission, explaining why such claim was not submitted by a government.⁴⁰ A foreign national is also many times allowed to claim before the courts of the defendant State or even in respect of claims against third States,⁴¹ a policy that has been encouraged on non-discriminatory terms under the OECD.⁴² In such cases the State of nationality would probably not be allowed to sue in domestic courts on behalf of the individual, as it could not sue on its behalf in regional courts such as that of the European Union when direct access has been recognized.

Special forms of protection have also been recognized in the case of stateless persons,⁴³ and special rules have also been provided under the Convention on the Nationality of Women⁴⁴ for situations of change of nationality because of marriage as in respect of military service in cases of double nationality⁴⁵ and other special situations.⁴⁶

The situations examined evidence that the link of nationality has lost to an extent its rigor in the context of international claims.

Moreover, to the extent that the intervention of the State is reduced or eliminated as a requirement for submission of international claims, the link of nationality will lose somewhat its relevance. This is particularly so in the field of human rights and related humanitarian concerns, where as noted direct access by the individual to international procedures is not only increasingly available but can also be exercised against his own State of nationality. While these trends cannot be taken to mean that the traditional requirements have been overturned, they certainly point towards a situation of greater flexibility and adaptation to changing needs.

4.- Continuance of nationality.

A second well established rule in respect of diplomatic protection is that of continuance of nationality. As proposed by Garcia Amador, the individual may be protected on condition that it possesses the nationality of the spousing State "at the time of sustaining the injury and conserves that nationality until the claim is adjudicated".⁴⁷ The continuance of nationality until the presentation of the claim has also been considered to meet the requirement of this rule,⁴⁸ an approach that seems to be favored by State practice.⁴⁹

It was pointed out above that in the light of the State substituting its rights for those of the individual under the traditional approach to diplomatic protection, the requirement of continuance of nationality lacked legal logic. If the rights of the individual were no longer upheld after suffering the injury, and only those of the State prevailed thereafter, there was an inherent contradiction in requiring that the individual's nationality should continue. While it is true that the traditional

rule provided criteria that was useful for the allocation of claims among various possible spousing States and helped to avoid conflicts of interest,⁵⁰ thereby eliminating the uncertainties that otherwise could affect the practice of international claims,⁵¹ these elements do not mean that a revision of the traditional rule should necessarily result in a situation of instability or uncertainty as to the handling of claims.

The important point to ask is whether the rule is justified in the context of the new approach to diplomatic protection, where it is increasingly the right of the individual and not that of the State acting on its behalf the one that is upheld and enforced. While in the view of some scholars there are strong reasons to favor the continuance of nationality,⁵² the opposite conclusion may be justified. In fact, if the right of the individual is affected the relevant critical date is that of the wrong, and the situation should not change simply because there has been a change of nationality intervening thereafter; the wrong follows in this perspective the affected individual.

As commented by Lowe, if the date of the injury is the critical date for questions of nationality there is a good reason for this also to be so in respect of questions of jurisdiction of the tribunal.⁵³ Lowe also points out that the prevalence of the traditional rule might be explained by the view of States that dispute settlement procedures are as much about present engagements as about past wrongs, therefore regarding the date at which the tribunal is seized as the critical date.⁵⁴ In this light there is also the possibility that the nationality be required at the time of injury and at the time the tribunal is seized, irrespectively of what happens in between,⁵⁵ but this alternative might introduce more

instability and encourage transfers of nationality for the sole purpose of securing diplomatic protection.

The need for stability and certainty might be ensured if the affected individual is given a choice that it could be either the State of nationality at the time of the critical date or that of a later nationality that could spouse his claim, since in both cases the State will be acting on behalf of the individual. It has also been suggested that only the "new" home State should be able to bring a claim but not the previous one.⁵⁶ Furthermore, it is quite evident that the new State of nationality should not be able to claim against the former State of nationality for wrongs that the individual might have suffered under the latter's jurisdiction. If the individual has a direct access to international mechanisms for making a claim, the need for State intervention might no longer be needed.

These alternatives were already hinted at by the Sohn and Baxter Draft Convention of 1961 when stating that "[a] State shall not be precluded from presenting a claim on behalf of a person by reason of the fact that that person became a national of that State subsequent to that injury".⁵⁷ Also a project prepared by the American Institute of International Law in 1925 had recognized the right of a State to accord diplomatic protection "to its native or naturalized citizens", being possible that the latter might have been injured before their naturalization.⁵⁸ A practical application of this solution is found in the *Helms-Burton Act* of 1996, which not only allows claims by United States nationals deprived of property in Cuba but also by such nationals who at the time of the expropriations were Cuban citizens.⁵⁹ Not only there is here an exception to the rule of continuance of nationality but the availability of claims

procedures to former nationals of the wrongdoing State, although the claims are directed in this context against governments, companies or individuals engaged in business relating to the confiscated properties.

The strict retention of the rule of continuance of nationality does not seem to find any longer justification in the light of the changing role of nationality as a requirement of diplomatic protection. There is here a need to revise or at any rate to adjust the operation of the rule to this new reality, a situation that becomes still more evident in the context of the transfer of rights and claims that will be discussed next.

5.- Transferability of claims.

As a consequence of the rule set out above, also the continuance of nationality has been generally required in respect of the transferability or assignability of claims. To this end, transfer of claims could only be done between persons having the same nationality of the spousing State. This has been the approach to questions such as succession on death, assignment, insurance subrogation and other.⁶⁰

However, again here the question of whether this rule is always justified in the light of a new approach to diplomatic protection and the enforcement of claims must be asked. If the right of the individual prevails, it would seem enough that the right to a claim be established at a critical date and changes of nationality intervening thereafter in the context of transfers or assignment should not be a bar to bringing a claim at some point in time.

To some extent this situation was recognized in claims to property beneficially owned by one person, the nominal title to which is vested in another person of a different nationality; it was usually the

nationality of the former that prevailed for the purposes of claims.⁶¹ The question is still more relevant in the insurance business, where the rights of the insured may pass to the insurer by way of subrogation.⁶² The continuance of nationality is probably not any longer justified in the light of a global market of insurance, in which insured and insurer will often have different nationalities. Investment insurance, such as that available under OPIC or MIGA, is also based on subrogation of rights.⁶³

Although the traditional rule on this point is still regarded as accepted, there are solid grounds justifying departure from it in given matters, or in any event for introducing the necessary flexibility. The globalization of financial and service markets will probably require such a departure. In fact, the application of the traditional rule in the context of globally structured financial markets where shares, bonds and other instruments change hands, and consequently nationality, constantly and speedily, can only be regarded as an anachronism that could amount in given instances to deprive legitimate owners and investors of protection on the part of States of nationality. In a recent ICSID case the question of international transfer of promissory notes was considered and the rules protecting a foreign investor as the transferee were upheld by the Tribunal in the light of the nature of global markets.⁶⁴

To the extent that the requirement of continuance of nationality might be moderated in this context, it might be appropriate to ensure that transfer of claims be made *bona fide* so as to prevent that a claim be transferred to a national of a stronger State in order to strengthen diplomatic protection, a concern that has been often expressed.⁶⁵

6.- Questions relating to double nationality.

The traditional rules relating to double nationality have been well explained in Articles 4 and 5 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.⁶⁶ These various situations have been aptly summarized in the following manner: (i) a State should not be allowed to present a claim on behalf of a national when such person is also a national of the respondent state and with which it is more closely connected; (ii) this claim should not be presented even where the national in question is more closely connected with the claimant State; (iii) if the national of the claimant State is also a national of a third State -not being the respondent- and is more closely connected with that State, the claim should not be allowed either; and (iv) if in this last situation the national is more closely connected with the claimant State than with the third State in question, then the claim could be brought against the respondent.⁶⁷

Although it has been suggested that these rules probably reflect customary international law,⁶⁸ the situation does not appear today to be quite consolidated.⁶⁹ In fact, it has been shown above that in a number of cases diplomatic protection has been exercised in respect of nationals of the defendant State or in respect of other non-nationals. The possibility that a State might accept by treaty the obligation to provide to all persons within its jurisdiction, regardless of nationality, a standard of protection required by that treaty has also been envisaged, a situation in which the issues of nationality will again lose significance, as happens often in treaties of economic integration or trade liberalization.⁷⁰ To the extent that these situations might reflect a trend, then the case explained

in (i) above will also be opened to a greater degree of flexibility. The same holds true of the situation considered in (ii) above since here the closer connection is given with the claimant State, having this departure from the rule been accepted in international decisions.⁷¹

In (iii) and (iv) the issue concerns a dual nationality involving a third State. Here again the rules explained rely on the effectiveness of the nationality link, based on which criteria they point to different answers. However, if flexibility of the rule or departure from it is allowed in cases involving the dual nationality of the respondent State, with every more reason this should the case of dual nationality involving third States. Also when the person has direct access to international claims the situation has been compared to that of a claim involving a dual nationality with a third State, so that the Tribunal may take into account the principle of "effective nationality".⁷² The practice of the Iran-United States Claims Tribunal, and the dissenting views expressed in that context, offer interesting insights into the new issues and problems relating to the rules on dual nationality.⁷³ The joint action by two States of nationality in respect of a third State has also been suggested as an alternative when both are willing to extend their diplomatic protection to the affected individual.⁷⁴

Two trends seem to emerge from the above discussion. The first is that the traditional rules of the 1930 Convention are being applied with a greater degree of flexibility, which will become particularly marked in connection with the approach to diplomatic protection relying on the rights of the individual as the prevailing element. The second trend is that in this context, like in other matters pertaining to nationality,

effectiveness offers an important guiding tool, particularly for decisions of tribunals. Criteria to evaluate effectiveness will depend on the circumstances of each case, where residence, family ties, property, taxation and many other elements will determine the "stronger social bond of attachment".⁷⁵

7.- Revising the rules on nationality of corporations.

Besides the obvious situation of a corporation incorporated under the laws of the claimant State and being the majority of its shareholders nationals of that State, in which case the entitlement to its diplomatic protection will not be questioned,⁷⁶ in every other conceivable situation there will probably be difficulties with the traditional requirements of nationality. Precisely because of this, nationality of corporations has been assimilated to that of individuals only in a limited way under international law and, in addition to incorporation, a number of other criteria have been used for the purpose of diplomatic protection, with particular reference to domicile, siège social or principal place of management and control.⁷⁷

These additional criteria have been rightly described not as conferring nationality, but as creating an equivalent connection⁷⁸ which on occasions is considered to provide enough ground for the exercise of diplomatic protection.⁷⁹ Questions of effectiveness of the connection will also arise in this context, particularly when a corporation having the nationality of the State of incorporation is owned by non-nationals of that State.

One of the most problematic aspects of the matter was that submitted to the International Court of Justice in the *Barcelona Traction*

case,⁸⁰ as to the right of a State to protect shareholders of its nationality in a foreign corporation affected by measures of a third State. While the *dictum* of the Court was in the negative and the right to diplomatic protection was recognized only in respect of the State of incorporation, criticism of this decision and subsequent practice evidence that the question was not really settled at the time.⁸¹ A number of earlier precedents were also invoked but were considered by the Court to be rather exceptions to the rule upheld.⁸² Some of this criticism has been based on the fact that the Court applied a too rigid standard "owing to an exaggerated fear of competing claims, thus neglecting the economic realities and leaving the real losers without protection".⁸³

As to the practice, it should be noted first that the Court itself recognized that a State may protect its shareholders in a foreign corporation when they have their rights as such directly infringed, independently from damage inflicted upon the company.⁸⁴ Also the Court considered cases in which shareholders may be protected by their State of nationality if the foreign company has ceased to exist or when the State of incorporation lacks the capacity to take action on its behalf, but did not find such situations applicable in the light of the facts of the case.⁸⁵ The protection of shareholders because of having suffered damage through damage to the company can always be agreed to between various States.⁸⁶ It has also been noted that agreements between States facilitating given forms of jurisdiction should not affect the rights and interests of a third State,⁸⁷ including therein the right to diplomatic protection of its nationals.

Recent practice is still more eloquent in the matter. In the *Eletronica Sicula* case,⁸⁸ the United States brought action before the International Court of Justice against Italy for damage suffered by an Italian company owned by two American companies; in this case the shareholders of a foreign company were protected by their State of nationality against the State of incorporation.⁸⁹ It is also interesting to note that in a number of treaties and claims arrangements provision has been made for protection of shareholders in affected partnerships or companies. A 50% interest in the total capital was required to this effect in British Claims against Mexico, as in United States claims against Peru and Hungary; a 20% was required in United States claims against Yugoslavia.⁹⁰

Also the Algiers Declaration on the settlement of Iran-United States claims⁹¹ includes as nationals corporations organized under the laws of one or other country if citizens of such country directly or indirectly have an interest in the corporation equivalent to 50% or more of its capital stock; in respect of other corporations, the Declaration refers to an interest of such nationals enough to control the corporation.⁹² A 49.8% of the shares owned by a United States company in a corporation organized in Iran, was considered sufficient for this purpose by the Iran-US Tribunal.⁹³ Proof of the controlling interest has also been evaluated with flexibility.⁹⁴ United States practice on diplomatic protection also relies on the concept of incorporation and of being the company owned at least in a 50% by United States citizens;⁹⁵ similarly, Switzerland grants diplomatic protection when a company is mainly owned by Swiss citizens.⁹⁶

The control of a company is also reflected in the ICSID Convention for the purpose of foreign investments dispute settlement. In terms of its Article 25 (2) (b) a juridical person which has the nationality of the State Party to the dispute may be a party to the proceedings if, because of foreign control, the parties have agreed that the juridical person should be treated as a national of another Contracting Party.⁹⁷ The practice under ICSID is, however, broader.⁹⁸ It has also been noted that under the Law of the Sea Convention an entity applying for a contract for seabed mining may be sponsored not only by the State of nationality but also by the State whose nationals effectively control it.⁹⁹

The rules governing the United Nations Compensation Commission have also included arrangements of interest in respect of corporate claims. It was noted above that corporations whose claims are not submitted by the State of incorporation may submit anyhow their claims directly together with an explanation. Also, if the governments concerned agree, one government may submit claims in respect of joint ventures on behalf of the nationals, corporations or other entities of other governments.¹⁰⁰ Most importantly, it is provided that shareholders of a corporation which is barred from making a claim because of its nationality, may claim for the losses with respect to that corporation.¹⁰¹ In the case of a partnership which has a separate legal personality and which because of its nationality is ineligible to claim for its losses, each of the eligible partners may claim *pro rata* for his proportionate interest;¹⁰² a similar rule is followed for partners in a partnership which has no separate legal personality.¹⁰³

Questions of nationality of corporations are compounded in their difficulty when the corporation has a multinational character, allowing eventually for a number of States to act on its behalf, a situation which is every passing day more common in a globalized economy. The concept of control and of prevalent nationality is also useful in this context so as to determine the prevailing national interest in the capital of the company, what would eventually allow for action by the State holding the greater interest or establish an order of priority to this effect. International registration of such companies would also be a helpful measure to overcome problems of concurrent nationalities, as it is done in respect of trademarks or has been proposed in respect of a "societas europaea".¹⁰⁴

Even if a number of these arrangements are done by treaty or special agreement, the aggregate of the practice evidences quite forcefully that the criteria of the *Barcelona Traction* no longer prevail and that shareholders are increasingly entitled to protection or action on their own merit. This trend is also strengthened by the fact noted that increasingly the right of the affected individual prevails today over that of the State in the context of diplomatic protection; if the fiction of State intervention on its own right has been curtailed, similarly the fiction of corporate personality should not preclude the rights of individual shareholders as to their protection.

8.- Emerging trends in respect of nationality in the context of diplomatic protection and international dispute settlement.

In the light of the above discussion, the following aspects may be summarized as reflecting current or prospective international trends in this matter.

1.- The right of the individual affected by a wrong is increasingly asserted and enforced by means of diplomatic protection as the prevalent interest. A parallel right of the claimant State can also be asserted and enforced in this context but it is not any longer usually substituted for the individual's own right.

2.- The discretion exercised by a government in refusing to espouse a claim on behalf of the individual might be appropriately subject to judicial review in the context of due process.

3.- Direct access by the individual to international claims settlement arrangements and dispute settlement procedures is increasingly available as an expression of the assertion of his own rights.

4.- In the context of such arrangements, the submission of claims by the State of nationality is increasingly dispensed with.

5.- Diplomatic protection can always be exercised in a residual manner when direct access by the individual to international claim procedures is not available. The availability of such procedures generally excludes diplomatic protection, except for the enforcement of decisions.

6.- The rule requiring that the link of nationality to the claimant State must be genuine and effective is well established.

7.- In exceptional circumstances claims are brought on behalf of non-nationals, of nationals of the defendant State or under trusteeship arrangements. Such exceptional circumstances are particularly related to

humanitarian concerns or where the individual would have no other alternative to claim for his rights.

8.- Continuance of nationality may acquire greater flexibility in the context of global financial and service markets and operations related thereto or other special circumstances.

9.- Transferability of claims ought to be facilitated so as to meet the realities of such global markets.

10.- Changes of nationality and transferability of claims should always be required to be made *bona fide*.

11.- In cases of dual nationality the effectiveness of the link appears on occasions to prevail over other considerations, allowing when justified for claims against the State of which the individual is also a national.

12.- Shareholders of a foreign company may be protected by the State of their nationality if their rights have been directly infringed, as well as in other special circumstances where they would otherwise be deprived of protection.

13.- Shareholders of a foreign company may also be protected by the State of their nationality for wrongs affecting such company if the State of nationality of the company is unable or unwilling to exercise such protection or is the defendant State.

14.- Control of a foreign company by shareholders of a different nationality, generally expressed in a 50% ownership of its capital stock or such other proportion needed to control the company, may entitle the State of nationality of such shareholders to exercise diplomatic

protection on their behalf or otherwise to consider the company as having its nationality.

15.- If a company or partnership is prevented from claiming because of its nationality, shareholders or partners not so affected may claim in proportion to their interest in such company or otherwise be entitled to diplomatic protection by the State of their nationality.

While some of these aspects are already a part of current arrangements for dispute settlement, other seem to be emerging as prospective trends. As international dispute settlement develops in the years ahead the law and practice relating to the requirements of nationality is likely to be one of those areas where major changes can be expected.

NOTES

(*) Professor of International Law at the School of Law and the Institute of International Studies of the University of Chile. Membre de l'Institut de Droit International. Judge and Vice President of the World Bank Administrative Tribunal. Member of the Panels of Conciliators and Arbitrators of ICSID by appointment of the President of the Administrative Council.

1.- International Law Association: First Report of the Committee on Diplomatic Protection, London, 2000. Comments on the Preliminary Report on nationality of claims were made by Richard B. Bilder, David J. Bederman, Bozo Cerar, Lady Hazel Fox, Juliane Kokott, Vaughan Lowe and Torsten Stein, to whom the author is grateful for their contributions and views.

2.- Mavrommatis Palestine Concessions , Permanent Court of International Justice, Series A. No. 2, 30 August 1924.

3.- International Law Commission: Preliminary Report on Diplomatic Protection, by Mohammed Bennouna, Special Rapporteur, A/CN. 4/484, 4 February 1998, at 5. See also Georges Scelle: "Droit de la Paix", Recueil des Cours de l'Academie de Droit International, Vol. 46, IV, 1933, at 660-661, as cited by Bennouna, doc cit., at 8, note 18.

4.- Bennouna, doc. cit., supra note 3, at 6-7.

5 .- Wilhelm Karl Geck: "Diplomatic Protection", in Encyclopedia of Public International Law, 1992, at 1046.

6 .- Ibid., at 1046.

7 .- Ibid., at 1056.

8 .- Ibid., at 1046.

9 .- Institut de Droit International: Resolution on Responsibility and Liability under International Law for Environmental Damage, 4 September 1997, Annuaire de l'Institut de Droit International, Session de Strasbourg, Vol. 67-II, 1998, at 487.

10 .- Encyclopedia cit., supra note 5, at 1048.

11.- Bennouna, doc. cit., supra note 3, at 8-9.

12 .- Encyclopedia cit., supra note 5, at 1056.

13.- Marek St. Korowicz: "The Problem of the International Personality of Individuals", American Journal of International Law, Vol. 50, 1956, 533-562.

14 .- Francisco Orrego Vicuña and Christopher Pinto: "Prospects of dispute settlement arrangements for the twenty-first century", Report for the Centennial Commemoration of the First Peace Conference, 1999.

15.- Ibid.

16.- Comments by Kokott, cit. supra note 1.

17 .- Comments by Bilder, cit. supra note 1, and comments by Cerar, cit. supra note 1.

18 .- Comments by Lady Fox, cit, supra note 1.

19 .- Ibid.

20 .- For a discussion of these options, see Fox, cit. supra note 1.

21 .- Ibid.

22 .- Francisco Orrego Vicuña: Report on "Chile", in Elihu Lauterpacht and John G. Collier: Individual Rights and the State in Foreign Affairs, 1977, 123-186, at 139-140.

23 .- For a suggestion in this respect see Comments by Lady Fox, cit, supra note 1.

24.- See the Revised Draft prepared by F. V. García Amador on State Responsibility for the International Law Commission, 1961, in F. V. García Amador: The Changing Law of International Claims, 1984, Vol. II, at 795, Art. 23; see also the Draft Convention on International Responsibility prepared by Professors Louis B. Sohn and Richard R. Baxter for the Harvard Law School, 1961, in García Amador, op. cit., at 858, Art. 22.

25.- International Court of Justice, Reports, 1955, at 23.

26.- United Nations Convention on the Law of the Sea, Art. 91; FAO: Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, November 24, 1993, International Legal Materials, Vol. 33, 1994, at 968, Art. III. 3.

27.- Oppenheim's International Law, Vol. 1, 1992, at 513.

28.- Ibid., at 513.

29.- Reparation for Injuries Suffered in the Service of the United Nations, International Court of Justice, Reports, 1949, where the Court stated that there are "important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality", at 181. For contemporary practice on diplomatic protection of foreign nationals see Rudolf Dolzer: "Diplomatic Protection of Foreign Nationals", in Encyclopedia of Public International Law, 1992, 1067-1070.

30 .- Art. 8 c of the European Community Treaty, as cited in comments by Kokott, cit, supra note 1.

-
- 31.- RIAA, iii, at 1609, and comments by Oppenheim's International Law, cit., supra note 27, at 513, note 8.
- 32.- Agreement between Chile and the United States of June 11, 1990, International Legal Materials, Vol. 30, 1991, at 412.
- 33.- Decision of the Chile-United States Commission with regard to the dispute concerning responsibility for the deaths of Letelier and Moffitt, January 11, 1992, Separate Concurrent Opinion of Commissioner Francisco Orrego Vicuña, International Legal Materials, Vol. 31, 1992, at 17-18.
- 34.- Separate Opinion cit., supra note 33, at 18.
- 35.- Ibid., at 18.
- 36.- Comments by Stein, cit., supra note 1.
- 37.- United Nations Compensation Commission, Provisional Rules for Claims Procedure, 1992, Art. 5, 1. a.
- 38.- It is also to be noted that United States law directs the President to afford the same protection to naturalized citizens as to native-born citizens, 22 USC Sec. 1731, and comment in Restatement of the Law Third, The Foreign Relations Law of the United States, Vol. 1, at 123.
- 39.- Provisional Rules cit., supra note 37, Art. 5. 2.
- 40.- Ibid., Art. 5. 3.
- 41.- Restatement cit., supra note 38, at 223.
- 42.- OECD, Recommendation of the Council for the Implementation of a Regime of Equal Right of Access and Non-discrimination in relation to Transfrontier Pollution, May 17, 1977, International Legal Materials, Vol. 16, 1977, at 977.
- 43.- Convention relating to the Status of Stateless Persons, and comments in Restatement cit., supra note 38, at 218.
- 44.- Convention on the Nationality of Women, T. S. No. 875 (1934), and comments in Restatement cit., supra note 38, at 118.
- 45.- Protocol relating to military obligations in certain cases of Double Nationality, 1930, T. S. No. 913.
- 46.- Convention establishing the Status of Naturalized Persons who again take up residence in the country of their origin, T. S. No. 575 (1908) and comments in Restatement cit, supra note 38, at 118.
- 47.- García Amador, Revised Draft cit., supra note 24, Art. 23; Sohn and Baxter, Draft Convention cit., supra note 24, Art. 23. 7.
- 48.- Oppenheim's International Law, cit, supra note 27, at 512. See also the discussion of the rule by G. Schwarzenberger: International Law: I International Law as applied by International Courts and Tribunals, 1957, at 597, and comments by García Amador, op. cit., supra note 24, at 504.

-
- 49 .- Encyclopedia cit., supra note 5, at 1055.
- 50 .- Comments by Lady Fox, cit., supra note 1.
- 51 .- Comments by Bederman, cit., supra note 1.
- 52 .- See supra notes 50, 51.
- 53 .- Comments by Lowe, cit., supra note 1.
- 54 .- Ibid.
- 55 .- Ibid.
- 56 .- Comments by Stein, cit., supra note 1.
- 57.- Sohn and Baxter, Draft Convention cit., supra note 24, Art. 23. 6.
- 58.- Projects on State Responsibility of the American Institute of International Law, 1925, Art. II, in García Amador, op. cit., supra note 24, at 826.
- 59.- United States House of Representatives, Report No. 104-202, at 31.
- 60.- Oppenheim's International Law, cit, supra note 27, at 514.
- 61.- Ibid., at 514.
- 62.- Ibid., at 514.
- 63.- Restatement cit., supra note 38, at 227.
- 64 .- ICSID: *Fedax. N. V. v. Republic of Venezuela*, July 11, 1997, International Legal Materials, Vol. 37, 1998, at 1378.
- 65 .- Encyclopedia cit, supra note 5, at 1056.
- 66 .- For a discussion of these provisions, see Encyclopedia cit., supra note 5, at 1050.
- 67.- Oppenheim's International Law, cit., supra note 27, at 516-517.
- 68.- Ibid., at 516.
- 69 .- In the Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations the International Court of Justice considered that the practice of a State not to protect a national against another State which also regards him as a national is "the ordinary practice", ICJ Reports, 1949, p. 174, at 186, as cited in Encyclopedia, cit., supra note 5, at 1050.
- 70 .- Comments by Lady Fox, cit, supra note 1.
- 71.- See in particular the Mergé Claim , International Law Reports, Vol. 22, 1955, at 443, and discussion of this and other cases in Oppenheim's International Law, cit., supra note 27, at 516; see also Restatement cit., supra note 38, at 218.
- 72.- Oppenheim's International Law, cit., supra note 27, at 516, with reference to the decision of the Iran-US Claims Tribunal in *Esphahanian v. Bank Tejarat*, 1983.
- 73 .- For a discussion of the issue of effective nationality in the context of dual nationality in the practice of the Iran-US Claims Tribunal, see

George H. Aldrich: The Jurisprudence of the Iran-United States Claims Tribunal, 1996, 54-79, and Charles N. Brower and Jason D. Brueschke: The Iran-United States Claims Tribunal, 1998, 32-42. See also the Comments by Lowe, cit., supra note 1.

74.- Comments by Kokott, cit., supra note 1, with reference to C. Warbrick: "Protection of Nationals Abroad", Current Legal Problems, International and Comparative Law Quarterly, Vol. 37, 1988, p. 1003, 1006.

75.- See generally the 1965 Resolution of the Institut de Droit International, Annuaire, Vol. 51-II, 1965, at 260.

76.- Oppenheim's International Law, cit., supra note 27, at 517-518.

77.- García Amador, op. cit., supra note 24, at 508-512.

78.- Restatement cit., supra note 38, at 213.

79.- On United States practice, see Restatement cit., supra note 38, at 126.

80.- Barcelona Traction case, International Court of Justice, Reports, 1970, at 4.

81.- For references to the legal literature on the decision see Oppenheim's International Law, cit., supra note 27, at 518, note 4.

82.- García Amador, op. cit., supra note 24, at 508.

83.- Encyclopedia cit., supra note 5, at 1053-1054.

84.- Oppenheim's International Law, cit., supra note 27, at 520.

85.- Ibid., at 519.

86.- Encyclopedia cit., supra note 5, at 1054.

87.- Comments by Lowe, cit., supra note 1.

88.- *Elettronica Sicula* case, International Court of Justice, Reports, 1989, at 15.

89.- Oppenheim's International Law, cit., supra note 27, at 520; and see generally Restatement cit., supra note 38, at 127.

90.- See the discussion of the cases and practice in Oppenheim's International Law, cit., supra note 27, at 521-522.

91.- Algiers Declaration, International Legal Materials, Vol. 20, 1981, at 230.

92.- See the discussion of these rules in the Restatement cit., supra note 38, at 127-128.

93.- *Sedco Inc. v. National Iranian Oil Co.*, Iran-US Claims Tribunal, 1985, as commented in the Restatement cit., supra note 38, at 128.

94.- Restatement cit., supra note 38, at 127-128.

95.- Encyclopedia cit., supra note 5, at 1053.

96.- Ibid., at 1053.

97.- Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, 575 UNTS 159, Art. 25. 2. b.

98 .- On the ICSID practice see generally Christoph Schreuer: "Commentary on the ICSID Convention", ICSID Review-Foreign Investment Law Journal, Vol. 11, 1996, 316, and following issues.

99.- Restatement cit., supra note 38, at 128.

100.- Provisional Rules cit., supra note 37, Art. 5. 1. b.

101.- United Nations Compensation Commission, Decision of the Governing Council on Business Losses of Individuals, S/AC. 26/1991/4, 23 October 1991, para. f.

102.- Ibid., para. d.

103.- Ibid., para. e.

104.- In respect of the "societas europaea" and its international registration, see the Restatement cit., supra note 38, at 131.