Notes and comments

Barcelona Traction and *Nottebohm Revisited*: Nationality as a requirement for diplomatic protection of shareholders in South African law

1 Introduction

The recent case of *Von Abo v Government of RSA*[1] indicates what would have been an unsettling shift, albeit in thinking which was overturned on appeal, from the decisions of the International Court of Justice in the *Nottebohm Case* (*Liechtenstein v Guatemala*),[2] *Barcelona Traction*, *Light and Power Company, Limited* (*Belgium v Spain*),[3] *Case Concerning Ahmadou Sadio Diallo* (*Republic of Guinea v Democratic Republic of Congo*),[4] as well as the work of the International Law Commission on Diplomatic Protection. The decision also strangely differs from and disregarded *Van Zyl v Government of RSA*,[5] a decision of a provincial division which was upheld by the Supreme Court of Appeal.

In *Von Abo*, the court *a quo* found that Von Abo was entitled to diplomatic protection[6] and awarded damages against the government of South Africa and the Minister of Foreign Affairs for failing to take sufficient steps to protect Von Abo. Both these orders were set aside on appeal.[7] The appeal court based its decision on the fact the there was no right to diplomatic protection in South African law, and therefore an award for damages was contrary to law.[8] Seeing that the decision of the court *a quo* went against the principles upheld in *Barcelona, Diallo* and *Van Zyl*,[9] it is necessary to investigate why the court

[1] 2009 2 SA 526 (T); 2010 3 SA 269 (GNP); (283/10) [2011] ZASCA 65 (unreported 4 April 2011). Reference to '*Von Abo*' in this study is to the 2009 judgment unless the 2010 judgment is specified. The 2011 decision will be referred to as the '*Von Abo Appeal*'.

[2] Judgment of 18 November 1953 1953 ICJ Rep 1953 par III (Preliminary Objections); Judgment of 6 April 1955 1955 ICJ Rep par 4 (Second Phase).

[3] Judgment of 24 July 1964 1964 ICJ Rep par 6 (Preliminary Objections); Judgment of 5 February 1970 1070 ICJ Rep 1970 par 3 (Second Phase).

[4] Judgment of 24 May 2007 ICJ General List 103 (Preliminary Objections); Judgment of 30 November 2010 ICJ General List 103 (Second Phase).

[5] 2005 4 ALL SA 96 (T) and 2008 3 SA 294 (SCA).

[6] See the comments on *Von Abo.*

[7] *Ibid.*

[8] See *Von Abo* (Appeal) at 11 13.

[9] See the comments on *Von Abo*.

saw fit to differ from these cases. In the same vein, the question of whether the appeal was correctly upheld will be considered.

As point of departure, it is submitted that the question to be posed and answered in looking at the *Von Abo* decision is: Does the state of nationality of a shareholder have a right to invoke diplomatic protection on behalf of the shareholder when a company of which he is a member is injured by the internationally wrongful acts of the foreign state in which the company is incorporated,[10] and the shareholder suffers loss as a result?[11]

In order to answer this question, it is necessary to look at what diplomatic protection is, and what requirements must be met for one to obtain it. The decisions in *Nottebohm*, *Barcelona* and *Von Abo* will then be analysed and conclusion drawn.

2 Diplomatic protection

Under international law, a state is presumed to afford its protection to the life, liberty and property of all persons within its jurisdiction.[12] If a state fails in this duty towards an alien, its wrongful acts will attract international responsibility.[13] This entails that the state of nationality of the alien can intervene and seek reparation for the injury caused to its national.[14]

The process by which the intervention is exercised is called diplomatic protection.[15]

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[10] As in the *Diallo*, *Van Zyl* and *Von Abo*.

[11] As was the case in *Diallo, Van Zyl* and *Von Abo*. This situation is as contemplated in art 11(b) of the ILC Articles.

[12] Borchard *The diplomatic protection of citizens abroad, or the law of international claims* (1970) 349; Amerasinghe *Diplomatic protection* (2008) (2 ed) 25; Hackworth *Digest of international law* vol 5 (1943) 471 available at www.heinonline.org; Dugard *International law: A South African perspective* (2011) (4 ed) 295 297; Malanczuk *Akerhurt's modern introduction to international law* (1997) (7 ed) 256.

[13] Amerasinghe n 12 above at 25; Borchard n 12 above at 349.

[14] Borchard n 12 above at 349. The scenario contemplated herein excludes circumstances wherein the alien can take remedial action in his own capacity, such as when he has *locus standi* to do so by virtue of a treaty or an investment agreement. In such a case diplomatic protection would be excluded. It must be borne in mind that an internationally wrongful act by a state may be either a breach of national law, customary international law, or of a treaty obligation. See Hackworth n 12 above at 471; arts 2, 12 18 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) International Law Commission available at http://untreaty.un.org/ilc/texts /instruments/english/draft%20articles/9 6 2001.pdf ('Draft Articles on State Responsibility').

[15] Amerasinghe n 12 above atb 1 and 26. For a full discussion of diplomatic protection see also Bennouna 'Preliminary Report on Diplomatic Protection' (1998) International Law Commission (A/C 4/484); Dugard 'First Report On Diplomatic Protection' (2000) International Law Commission (A/CN 4/506) at 10; Erasmus and Davidson 'Do South Africans have a right to diplomatic protection?' (2000) 25 *SAYIL* 115 120. Diplomatic protection is a centuries old concept founded upon the legal fiction that an injury to an alien is an injury to his home state. Borchard n

Article 1 of the International Law Commission's (ILC) Articles on Diplomatic Protection[16] defines diplomatic protection as:

> … the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an inter nationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Whether a person will have a right to diplomatic protection under the laws of his state of nationality depends on the municipal law of the state. He has no such right under international law.[17] When a state exercises diplomatic protection, it exercises its own right which it has in international law, to ensure that its nationals are treated according to the international minimum standard by other states.[18] In the process the state does not act on behalf of the national.[19] Rather, from the moment the national appeals to his home state for diplomatic protection, he loses his private rights in relation to the claim, which then moves into the domain of international law. From that point onwards, the claim becomes that of the state.[20]

Three requirements must be met before a claim for diplomatic protection can be asserted.[21]

These are: nationality, international wrong-doing,[22] and exhaustion of local remedies.[23]

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12 above at 351 quotes Emerec de Vattel who wrote in 1758: 'Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the latter sovereign should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation …'.

[16] Contained in GA res A/RES/62/67 of 8 January 2008 available at www.daccess dds ny.un.org/doc/UNDOC/GEN/N07/467/79/PDF/N0746779 pdf?OpenElement.

[17] Borchard n 12 above at 354; *Barcelona* at 44 par 78 79. Dugard n 12 above at 290 292; Erasmus and Davidson n 15 above at 113 114.

[18] Amerasinghe n 12 above at 23; *Barcelona* at 44 par 78; Borchard n 12 above at 357; Dinstein in Wellens (ed) *International law: Theory and practice. Essays in honour of Eric Suy* (1998) 505; Dugard n 12 above at 290; Hackworth n 12 above at 803; Leigh 'Nationality and Diplomatic Protection' (1971) 20 *ICLQ* 435; *Mavrommatis Palestine Concessions* case *(Greece v Britain)* 1924 PCIJ Series A 2 at 12; *Panevezys Saldutiskis Railway* case *(Estonia v Lithuania)* 1939 PCIJ Series AB 76 at 16 17.

[19] *Ibid.*

[20] Borchard n 12 above at 356 357. Wallace n 17 above at 206. For a discussion of the fiction by which an injury to an alien translates to a right of his home state to exercise diplomatic protection, see Vermeer Kunzli 'As if: The legal fiction in diplomatic protection' (2007) 18/1 *EJIL* 37; *Mavrommatis* case n 18 above at 12; Hackworth n 12 above at 486 492.

[21] See, eg, Dugard n 12 above at 282; *Van Zyl* at 32 par 93; *Von Abo* at 546 pars 66 68.

[22] See in this regard arts 2, 9 ,12 18 of the Draft Articles on the Responsibiility; Malanczuk n 12 above at 254 and 259 262; Dugard n 12 above at 269 and 274 276; Borchard n 12 above at 349; Hackworth n 12 above at 484, 498 499; *Van Zyl* at 129 par 71; *Von Abo* at 546 par 67; Borchard n 12 above at 349; 535 538; art 1 of ILC Articles; Elihu Root as quoted in Hackworth *ibid* at 472; Wallace at 206 208.

[23] Amerasinghe n 12 above at 142 148; Booysen n 22 above at 66 67; Borchard n 12 above at 817, also cited in Dugard 'Second Report on Diplomatic Protection' (2001) International Law Commis

Nationality is defined as:

> the status of an individual as subject or citizen in relation to a particular sovereign or state, and signifies membership in an independent political community.[24]

Nationality is central to diplomatic protection, as the court said in *Panevezys Saldutiskis*:

> … it is the bond of nationality alone which confers upon the state the right of diplomatic protection …[25]

Companies generally obtain their nationality through incorporation in accordance with the laws of a particular state.[26] As a general rule, the state of incorporation of a company has the right to exercise diplomatic protection in respect of an injury caused to the company by another state.[27] The state of nationality of a corporation is defined as:[28]

> … the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

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sion, A/CN 4/514) at 2 available at www.daccessddsny.un.org/doc/UNDOC/GEN/NO1/268/68/PDF /NO126868.pdf? OpenElement); art 22 Draft Articles on State Responsibility; ILC Report 14 15; Dugard Second Report at 2 4. *Panevezys Saldutiskis* at 22, *Case Concerning Electtronica Sicula SpA (USA v Italy)* 1989 ICJ Rep 15 at 42 par 50; *Interhandel* case *(Switzerland v United States of America)* (Preliminary Objections) Judgment of 21 March 1959 1959 ICJ Rep 6; art 14(2) of the Articles on Diplomatic Protection; art 44 of the Draft Articles on State Responsibility; ILC Report at 70 76. Local remedies include international remedies such as arbitration through the International Convention for Settlement of Investments Disputes ('ICSID') should these remedies apply to a contract between the host state and the national. If ICSID arbitration is available to a national, then he cannot resort to diplomatic protection. See Booysen n 22 above at 67; art 27(1) ICSID Conven tion; *Banco American Resources Inc and Société Aurifère du Kivu et du Maniema SARL v Democratic of Congo* ICSID case ARB/98/7, award of 1 September 2000 at 8 par 15. Local remedies need not be exhausted under certain circumstances. See art 15 ILC Articles; ILC Report at 76 86; Borchard n 12 above at 821 825; Dugard 'Third Report' at 6 38; Garcia Amador 'First Report' at 203 208 available at:www.daccessddsny.un.org/doc/UNDOC/GEN/NO2/276/03/PDF/NO227603 .pdf?Open Element; see Hackworth n 12 above at 501 522 for a discussion of the exceptions.

[24] Amerasinghe n 12 above at 91 141; Borchard n 12 above at 7; Whiteman *Digest of international law* vol 8 (1967) for an in depth discussion of nationality; available at www.Heinonline.org at 1 182; ILC Report at 13 51. See also the discussion of nationality in general in Dugard n 12 above at 282 290.

[25] At 17.

[26] Amerasinghe n 12 above at 122; art 9 ILC Articles; Dugard n 12 above at 287 289; ILC Report at 52 55. The court in *Barcelona* used this principle to find that the nationality of Barcelona was in Canada, the country of incorporation. See the discussion of the case below.

[27] See, eg, *Barcelona* par 70; Dugard n 12 above at 287 290; ILC Report at 52 53.

[28] Article 9 ILC Articles; ILC Report 52 55.

3 Case analysis

3.1 Nottebohm

3.1.1 Factual background

Friedrich Nottebohm was born in Germany in 1881.[29] He remained a German national until he acquired Liechtenstein nationality in 1939.[30] Earlier in 1905 he had moved to Guatemala where he obtained residence and established businesses. He resided there until 1943.[31] During October 1939 while visiting his brother Hermann in Valduz, Nottebohm applied for, and acquired Liechtenstein nationality by naturalization.[32] He was issued with a certificate of nationality during October 1939.[33] He set up neither a residence nor a business there. He then obtained a Liechtenstein passport and returned to Guatemala early in 1940.[34] There he continued to run his businesses. He subsequently registered as an alien with the Guatemala authorities, alleging that he was a national of Liechtenstein. In the meantime he had lost his German nationality when he obtained Liechtenstein nationality.

In due course his two-year registration as an alien expired. His re-application was unsuccessful. As a result, Nottebohm was arrested in November 1943 by Guatemalan authorities at the instance of the United States government. He was then sent to the United States for detention on grounds that he was an alien.[35] He was released after two and a quarter years and went to Liechtenstein as he was not allowed into Guatemala. During 1948 and 1949, Guatemala passed legislation which made the property of persons who were aliens as of 7 October 1938 liable for confiscation.[36] His property, then estimated at US$1,5 million, was sequestrated in 1949.[37]

During December 1951 the government of the Principality of Liechtenstein instituted proceedings for diplomatic protection against the Republic of Guatemala.[38] Liechtenstein claimed that the Government of Guatemala had acted contrary to international law and had incurred international responsibility by the unjustified detention, internment, and expulsion of Mr Nottebohm, and by the sequestration and confiscation of his property.[39] Liechtenstein also claimed compensation for the damages and losses incurred by Nottebohm.

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[29] *Nottebohm* at 13.
[30] *Ibid.*
[31] *Ibid.*
[32] *Nottebohm* at15.
[33] *Nottebohm* at 16.
[34] *Ibid*.
[35] *Nottebohm* (ICJ Pleadings vol 1) at 12.
[36] *Id* at 14.
[37] *Id* at 12 13.
[38] *Nottebohm* (Preliminary Objection) at 5.
[39] *Ibid*.

3.1.2 Decision

The court centred its approach on the fact that:

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.[40]

The court proceeded to say that as regards naturalisation:

> In order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him.[41]

On the facts it found that Nottebohm had no link or connection with Liechtenstein, other than the short visit he had made in 1939 when he obtained nationality.[42] He had no social or economic interests there. He had no residence.[43] Neither had he displayed an intention to acquire these interests.[44] He only returned to Liechtenstein in 1946 when Guatemala refused to admit him.[45] On the other hand, Nottebohm had his business, residence, and relatives in Guatemala from 1905 to 1943.[46] He therefore had a long-standing and close connection with Guatemala.

Most importantly, the court found that the Liechtenstein nationality was granted without regard to international relations, and that Nottebohm had sought the nationality as a way to protect his assets from confiscation by Guatemala by virtue of the war.[47]

3.1.3 Comment

The following comments may be made on this decision.

(a) By upholding Guatemala's objection to Liechtenstein's *locus standi* to

[40] *Nottebohm* (Second Phase) at 23.
[41] *Nottebohm* (Second Phase) at 24.
[42] *Id* at 26.
[43] *Id* at 25.
[44] *Ibid.*
[45] *Ibid.*
[46] *Ibid.*
[47] *Id* at 26. However, proof of these findings was not tendered before the court. See the comments on this case below.

exercise diplomatic protection in relation to Nottebohm, the court made a decision on issues which were not corroborated by evidence, such as whether Nottebohm's nationality was granted according to Liechtenstein law or international law, and whether Nottebohm intended to protect his Guatemala assets from the war-time confiscation.

(b) The court applied the 'real and effective link' theory. By the court's version, this theory has historically been applied in dual nationality situations, while the court did not at any point assert that *Nottebohm* had Gautemalan nationality.[48] It is submitted that on the facts, the theory was not applicable in the case because:

(i) there was no dual nationality situation in *Nottebohm*.[49] Nottebohm was never a national of Guatemala. He was merely resident there, and he was in fact refused entry into the country after his release from detention. Prior to 1939, he was a German national and a resident of Guatemala. After 1939 when he obtained Liechtenstein nationality, he lost the German nationality. When he returned to Guatemala in 1940, he registered as an alien. He remained a national of Liechtenstein and of no other country.

(ii) a strict application of the link theory will entail that Nottebohm became stateless, as internationally he 'lost' the only nationality he had, namely Liechtenstein.[50] This is an inequitable outcome and could not have been intended by the original proponents of the link theory, hence it is applied in dual nationality situations only.

(iii) to apply the link theory to a single nationality situation is circular and begs the question. A person is either a national of the state it is claimed he is, or he is not. The effective link theory as originally intended cannot validate or invalidate nationality, it is meant to weigh the competing valid nationality claims of two or more countries with a view to establishing which state has a stronger link to the person compared to the others.[51]

(iv) Nottebohm had no physical ties to Germany since he had at the

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[48] See the court's argument at *Nottebohm* (Second Phase) at 21 23.
[49] Judge Read dissenting at 42.
[50] See also Leigh n 18 above at 468.
[51] Article 7 of the ILC Articles recognised the effective link theory and shows that it is applied in dual or multiple nationality situations in favour of the state of dominant nationality: See ILC Report at 43 47; Dugard n 12 above at 287.

time left the country some fifty years earlier. Yet his German nationality was not questioned as being valid on grounds that he was not resident there.[52]

(v) The tribunal in *Flegenheimer*[53] cautioned on this matter. Firstly it restated the basis of the effective nationality link requirement as follows:[54]

> The theory of effective or active nationality was established … for the purpose of settling conflicts between two national States, or two national laws, regarding persons simultaneously vested with both nationalities, in order to decide which of them is to be dominant … It must allow one to make a distinction, between two bonds of nationality equally founded in law, which is the stronger and hence the effective one.

The tribunal then explained why the effective link requirement was not applicable to single nationality situations:[55]

> But when a person is vested with only one nationality, which is attributed to him or her either *jure sanguinis* or *jure soli,* or by a valid naturalization entailing the positive loss of the former nationality, the theory of effective nationality cannot be applied without the risk of causing confusion.

(c) No support was tendered for the argument that Nottebohm's nationality was not valid in domestic or international law.[56]

(d) No support was tendered for the allegation that it is a pre-requisite in international law, that Nottebohm had to obtain residence, set up business, or otherwise maintain a physical tie with Liechtenstein. In any event, it was for Liechtenstein to set such a condition, and it did not. Yet these arguments were used against him. It was not considered that mere allegiance without physical presence can be sufficient, as in the case of persons of dual nationality who have no physical connection to one of the states.[57]

(e) No support was tendered for the argument that nationality cannot be obtained for the purpose of avoiding war-time confiscation of property or other benefit, if indeed that was Nottebohm's motive,

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[52]Read dissenting at 42.
[53]*Flegenheimer* case *(USA v Italy)* 14 Reports of International Arbitration Awards at 327.
[54]*Id* at 376.
[55]*Id* at 377.
[56]Read dissenting at 36.
[57]Klaested dissenting at 30 par III; Read dissenting at 44.

which was not proven in the case.[58]

(f) Liechtenstein was not given the opportunity to prove that the nationality was properly granted. Similarly, Guatemala was not required to prove that the nationality was obtained through fraudulent intentions and was not genuine.[59]

(g) Nottebohm's property was expropriated in 1949, three years after he had returned to Liechtenstein. Since 1939, he has spent more time in Liechtenstein than anywhere else. Even if the link theory could be applied, it would indicate that at the time of the expropriation in 1949, he had a closer link to Liechtenstein than any state.[60]

(h) The case as decided precludes a further enquiry into Guatemala's conduct in relation to Nottebohm. It deprived Nottebohm of the last possible opportunity to see justice done, given what he has gone through during his detention, as well as the loss of his life's work and investments. The court ought to have accepted the certificate of nationalisation presented by Liechtenstein as *prima facie* proof of nationality, and thereafter it should have allowed the parties discharge their respective evidentiary burdens in the normal course.[61]

(i) The decision makes a mockery of the international law principle that a state has the right to determine according its own laws who its nationals are.[62] By not allowing Liechtenstein to prove that the naturalisation was in terms of both its domestic law and international law, the sovereignty of the state granting the nationality was undermined.[63]

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[58]Read dissenting at 48 49.
[59]Klaestad dissenting at 32 par VI.
[60]Klaestad dissenting at 31 par IV; Read dissenting at 45; See also Leigh n 18 above at 468.
[61]Read dissenting at 35.
[62]See, eg, Read dissenting at 39 where he quotes the Draft Hague Convention of 1930: 'It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.' He concludes from the above principle that:

> 'Applying this rule to the case, it would result that Liechtenstein had the right to determine under its own law that Mr Nottebohm was its own national, and that Guatemala must recognize the Liechtenstein law in this regard *in so far as it is consistent with international conventions, international custom ... generally recognized with regard to nationality.'*

See also Leigh n 18 above at 469.
[63]Klaestad dissenting at 28 29.

(j) The allegation that the naturalisation was not granted according to generally recognised principles suggests that Liechtenstein abused its right to grant nationality to Nottebohm. However, no abuse was proved, and no damage suffered by Guatemala as a result of the abuse was shown.[64] Furthermore, the 'recognised principles' which Nottebohm's naturalisation contravened are not defined.

(k) If one accepts that Nottebohm had German nationality until 1939 when he took Liechtenstein nationality, and further that at that time Germany was entitled to exercise diplomatic protection in relation to him, then it should follow without difficulty that Liechtenstein had the same rights Germany had. Similarly, Guatemala's obligations towards Liechtenstein should be the same as those it had towards Germany.[65]

(l) It is said that a strict application of the decision may lead to the exclusion of millions of persons from qualifying for diplomatic protection, thereby creating a new class of unprotected persons.[66]

(m) Despite the above criticism, the principle of effective nationality, which was established prior to *Nottebohm*,[67] has been incorporated into article 7 of the ILC Articles.[68] The genuine and effective link requirement was also given recognition in article 18(2) (a) of the European Convention on Nationality.

3.2 Barcelona

3.2.1 Factual background

The Barcelona Traction, Light and Power Company Limited was a Canadian holding company incorporated in Toronto.[69] The company established subsidiaries in Spain, where it became involved in power production and distribution.[70] Over time, Barcelona came to be controlled by a company called Sidro. Sidro was majority owned by Sofina, which in turn was majority owned by nationals of Belgium.[71] Barcelona had issued bonds in both Sterling and Pesetas.[72] The Sterling bonds were serviced by funds from the Spanish subsidiaries.[73] During 1936 the transfer of funds from the Spanish subsidiaries

[64]Read dissenting at 37.
[65]Read at 48.
[66]Dugard 'First Report' at 37.
[67]ILC Report at 44 n 77.
[68]See ILC Report at 44 47 for a discussion of the Article.
[69]*Barcelona* at 7 par 8.
[70]*Ibid.*
[71]*Ibid.*
[72]*Barcelona* at 8 par 10.
[73]*Ibid.*

to Barcelona was blocked due to the Spanish Civil War.[74]

As of 1945 Barcelona was still unable to service the interest on the Sterling bonds because it could not get the funds it needed out of the Spanish subsidiaries.[75] Further foreign exchange restrictions made it impossible for Barcelona to effect a proposed plan of compromise by way of buying back the Sterling bonds.[76] As a result, during 1948 three Spanish creditors petitioned for and obtained the liquidation of Barcelona in Spain due to failure to pay interest on the Sterling bonds.[77] Barcelona attempted, to no avail, to have the liquidation set aside.

During 1951, shares in Barcelona's Spanish subsidiaries were re-arranged, issued, and sold by public auction in 1952.[78] Barcelona and other parties including Sidro, challenged the sale without success.[79] The effect of the sale was that Sidro's shareholding in Barcelona was wiped out due to the loss of the underlying investments in the Spanish subsidiaries. Sidro together with other Belgian nationals controlled 88 per cent of the shares in Barcelona.[80] Belgium then brought diplomatic protection proceedings in 1958,[81] claiming that Spain must either annul the wrongful acts or pay compensation in the amount of US$ 88,6 million.[82]

3.2.2 Decision

The court indicated as a point of departure that:

> ... the Court should first address itself to what was originally presented as the subject matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.[83]

The court then said that in order to establish the law applicable to the case, regard must be had to municipal institutions of bearing in international law.[84] In this case, regard must be had to the corporate entity as a creation of municipal law. In the particular facts of the case, regard must be had to the fact

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[74] *Id* at 8 par 11.
[75] *Id* par 12.
[76] *Ibid.*
[77] *Id* at 8 par 13. The interest on the Peseta bonds was paid since 1940.
[78] *Id* at 10 par 17.
[79] *Id* at 10 par 18.
[80] *Id* at 12.
[81] *Id* at 10.
[82] *Id* at 13.
[83] *Id* at 32.
[84] *Id* at 33 par 37 38.

that Barcelona was a limited liability company whose capital is represented by shares.[85] The court noted that the concept of a company entails the separation of the personality of the company from its shareholders.[86] This then led the court to conclude that:

> Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation … Thus 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.[87]

Based on the above line of reasoning, the court said that only in the event that the direct rights of the shareholder are infringed, can there be action taken thereon on behalf of the shareholders.[88] The court noted that Belgium's claim was not based on the infringement of the direct rights of the shareholders it was representing.[89] The court rejected Belgium's various arguments, and proceeded to consider if there may be 'special circumstances' which may justify a deviation to the general rule.[90] These circumstances are: the company having ceased to exist, and the company's state of nationality having no capacity to act on the company's behalf. On the first point, the court said that only company's status in law is relevant, not its economic condition.[91] On the facts, the court found that Barcelona had not ceased to exist in law and therefore the hypothesis postulated was not applicable.[92] Belgium's claim was therefore dismissed.[93]

3.2.3 Comment

A few comments may be made about the case.[94]

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[85] *Id* at 34 par 40.
[86] *Id* at 34 par 41.
[87] *Id* at 36 par 44.
[88] *Id* at par 47. This *dictum* is now incorporated as art 12 of the ILC Articles.
[89] *Id* at 37 par 49.
[90] *Id* at 41 para 64.
[91] *Id* at para 66.
[92] *Id* at par 68. This was also the case in *Agrotexim v Greece* ECHR 15/1994/462/543 where the company was in liquidation, but the shareholders sought to claim damages in their capacity as such. The European Court of Human Rights refused to lift the corporate veil in favour of the shareholders, because the company was in existence (despite the liquidation) and the liquidators were active at the time the shareholders commenced their claim (at pars 69 70). The court rejected the claim. For a discussion of the case see Emberland 'The corporate veil in the case law of the European Court of Human Rights' (2003) Max Planck Institute at 945 969 (available at http://www.zaoerv.de/63 2003/63 2003 4 a 945 970.pdf).
[93] *Id* at 53.
[94] Dugard 'Fourth Report' at 2 12, contains a helpful analysis of the case and is a useful starting point to analysing the case. See also Dinstein n 18 above at 507 511; Dugard n 12 above at 287

(a) The court's interpretation and application of the traditional nationality rule is correct insofar as it is in line with the concept of the corporate veil. *Diallo* has recently confirmed that *Barcelona* was correctly decided and is settled law.[95]

(b) The controversy which *Barcelona* created by denying Belgium's claim has left a lasting legacy.[96] The ILC Articles on Diplomatic Protection codified the two 'special circumstances' postulated in *Barcelona*.[97] In terms of article 11 of the ILC Articles, shareholders may obtain diplomatic protection under the circumstances stated therein.[98] In this regard it is noteworthy that the court in *Diallo* considered, and would have applied article 11(b) had the circumstances permitted.[99]

(c) The codification of the *Barcelona* exceptions into article 11 should have the effect of stabilising the debate about the existence of those exceptions, as the focus should move to the Articles themselves. As such no further commentary will be made on the matter.

3.3 Von Abo

3.3.1 Factual background

Crawford Von Abo was a South African national who established a farming enterprise in Zimbabwe in the 1950s.[100] The farms he operated were owned via companies and a trust. The companies were incorporated in Zimbabwe.[101] He was the main person in charge of the management of the companies and the trust.[102] From 1997 to about 2000, Von Abo's farms were expropriated without compensation by the Zimbabwean government as part of their land reform process.[103] Von Abo exhausted whatever remedies he could in Zimbabwe, to no avail.[104] Von Abo therefore sought diplomatic intervention from the South African government, again to no avail.

He then brought the proceedings which led to this case in the North Gauteng

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288.

[95] See, eg, *Diallo (Preliminary Objections)* at 23 par 63, 30 par 86; Dugard 'Fourth Report' at 2 12 and ILC Report at 52 67.

[96] See Dugard 'Fourth Report' at 2 12.

[97] *Id* at 41 para 64.

[98] See ILC Report at 60 par 3. See also the commentary on arts 9 11 at ILC Report 52 67.

[99] *Diallo* (*Preliminary Objections*) at 31 par 91 94.

[100] *Von Abo* (TPD) at 530 par 3.

[101] *Von Abo* at 527.

[102] *Id* at 531 par 4. Von Abo was the managing director of the companies, and the sole trustee of the Trust (*Von Abo* at 527).

[103] *Id* at 531 par 9.

[104] *Id* at 531 par 10 11.

High Court in 2007. Von Abo sought relief, *inter alia,* declaring the conduct of the South African government in failing to assist him to be invalid, declaring him to have a right to diplomatic protection, and further declaring that the government had a constitutional obligation to grant him diplomatic protection.[105]

3.3.2 Decision

In what is a strange decision, the court admitted the arguments submitted on behalf of Von Abo without any meaningful analysis. The judge simply said: I find myself in respectful agreement with these submissions.

As a result, on 29 July 2008 the court found that Von Abo had a right to diplomatic protection, and ordered the respondents to take steps to ensure the protection of Von Abo's interest.[106] On the return date on 5 February 2010 the court ordered that the government of South Africa and the Minister of Foreign Affairs were liable to pay, jointly and severally, the one paying the other to be absolved, to Von Abo such damages as he may prove that he had suffered as a result of the violation of his rights by the government of Zimbabwe.[107] Subsequently, the respondents appealed both this order as well the 2008 one.[108] The Appeal Court set aside the order of 2008, save for paragraphs 1 and 7 thereof. It then set aside the order of 2010 in its entirety.[109] The Appeal Court based its decision on the fact that there is no right to diplomatic protection in South Africa, and further that the exercise of diplomatic protection rests in the sole discretion of the Executive. The court said in this regard that:

> The relief sought by the respondent in the court below and granted was an express declaration of rights and duties contrary to the law. The judgment by the court below contains extensive references to the judgment in *Kaunda*. Despite those references an incorrect conclusion was reached … The judgment in the court below contains no reference to *Van Zyl* in which the applicable legal principles were clearly re stated and helpfully explained …'[110]

3.3.3 Comment

A few comments may be made about *Von Abo* in view of the decisions in *Barcelona, Nottebohm*, as well as the recent cases of *Diallo* and *Van Zyl*.

(a) As a starting point it must be noted that the facts in this case are substantially similar to those in *Van Zyl* and *Diallo*, wherein a similar application was made. The similarity is as follows

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[105] *Id* at 533 534.
[106] This finding is in part 2 of the court order.
[107] Per part 1 of the order.
[108] *Von Abo Appeal* 7 8.
[109] *Von Abo Appeal* 21.
[110] *Von Abo Appeal* 12 par 23. See also at 13 par 24, and 16 par 31.

(i) the shareholder incorporated his companies in a foreign state. Therefore the companies were nationals of the foreign state;

(ii) The foreign state caused injury to the companies directly, and the shareholder suffered loss indirectly.

(iii) the shareholder sought diplomatic protection in his capacity as such. In *Van Zyl* and *Diallo*, the application for diplomatic protection in this manner was unsuccessful.

(b) The decision ignores article 11 of the ILC Articles. It is submitted that diplomatic protection by substitution can only be exercised on the grounds stated in article 11, because the court in *Diallo* held that there was no rule of customary international law allowing diplomatic protection by substitution.[111] The court said in no uncertain terms in *Diallo* (*Preliminary Objections*) that:

> The Court, having carefully examined State practice and decisions of international courts and tribunals in respect of diplomatic protection of *associés* and shareholders, is of the opinion that these do not reveal at least at the present time an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea.[112]

As such, it was unnecessary for the court to delve into the issue of the 'real and effective link', and the 'close connection.' It must be noted that the Articles on Diplomatic Protection had already been adopted by both the ILC and the General Assembly when *Von Abo* was decided.[113]

However, it is submitted that even if article 11(b) had been properly applied to the facts, it would not have assisted Von Abo because there was no proof to the effect that Von Abo was obliged to incorporate his companies in Zimbabwe. Similarly, no proof was tendered to the effect that Von Abo's companies had ceased to exist in circumstances which would render article 11(a) applicable.

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[111] See *Diallo* (Prelimiary Objections) at 26 pars 76 32; par 94. The court seems to have accepted what it was told about *Diallo* without itself having read the judgment. The court said: 'Moreover, Stemmet's legal response is contrary to a recent decision of the International Court of Justice in the *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo) Preliminary Objections*, decided on 27 May 2007. From the passage quoted by counsel, it appears that this court reaffirmed the principle described above, namely that the State of nationality of the shareholders in a corporation may exercise diplomatic protection on their behalf as already described.'

[112] *Id* at 30 par 89.

[113] The General Assembly resolution is dated 6 December 2007 and was published the following month: see the cover page to the resolution.

(c) The decision ignores *Barcelona* entirely. As indicated in the discussion of *Barcelona* above, *Barcelona* was correctly decided, as confirmed by *Diallo*.

(d) The decision ignores *Van Zyl* entirely, despite it being a decision of the Supreme Court of Appeal which is a higher court to *Von Abo*. In fact counsel for Von Abo included two counsel who brought the failed proceedings in *Van Zyl,* so they were aware of the decision and at least could have brought it to the court's attention.[114]

(e) The decision invokes *Nottebohm* as authority, while Nottebohm would not be applicable as the facts are different. In any event it is submitted that such reference was unnecessary, because the only issue for consideration in *Von Abo* was not the existence of a link, but rather whether the facts meet the requirements of article 11(a) or (b) (assuming that the court takes into consideration the decision in *Diallo* to the effect that there is no support in customary international law for diplomatic protection by substitution).

(f) The court also wrongly relied on the *Delagoa Railways* case.[115] While this case is often cited as authority for the argument that the state of nationality of a shareholder can exercise diplomatic protection if the state of incorporation is guilty of having caused injury to the company, it is submitted that the case is not authority for that argument.[116] This is because the only issue for decision by the tribunal in *Delagoa* was the amount of compensation to be paid by Portugal to Britain and America. This is evident from the terms of the Protocol establishing the arbitration tribunal in *Delagoa* which clearly stated:

> The mandate which the three governments have agreed to refer to the arbitration tribunal is, to fix, as it shall deem most just, the amount of the compensation due by the Portuguese Government to the claimants of the other two countries …[117]

In any event, even if *Delagoa* was ever authority for diplomatic protection by substitution, its value would by now be diluted and rendered nil by articles 11 and 12 of the ILC Articles, which set out the grounds on which a state can intervene on behalf of a shareholder.

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[114] Advocates Katz and Du Plessis. In *Van Zyl*, Dugard SC, the Special Raporteur for the ILC, was the lead counsel.
[115] At 545 par 7. See *Delagoa Railways Co* case in Moore *History and digest of the international arbitrations to which the US has been a party* vol 2 (1898) 1865.
[116] See, eg, *Diallo* (preliminary Objection) 30 31.
[117] Moore n 115 above at 1874.

(g) The court also incorrectly says that the ILC adopted the *Delagoa* principle.[118] No reference is made to a page or paragraph wherein such adoption is made. Instead an entire ten pages of the Fourth Report on Diplomatic Protection are cited as authority.[119] On the contrary, the Report said:

> Jones points to several disputes in which the United Kingdom and/or the United States asserted the existence of such an exception, notably the cases concerning the *Delagoa Bay Railway Company*, the *Tlahualilo Company*, the *Romano Americano* and the *Mexican Eagle (El Águila).* None of these cases, however, provides conclusive evidence in support of such an exception. In the *Delagoa Bay Railway* case the United Kingdom and the United States both strongly asserted the existence of such a principle when they intervened to protect their nationals who were shareholders in a Portuguese company injured by Portugal itself, but the arbitral tribunal that considered the dispute was limited to fixing the compensation to be awarded.[120]

(h) The court found that Von Abo had 'direct rights of control and management and/or shareholding'.[121] This finding misses the point, namely that it is not the existence of direct rights which founds diplomatic protection. Rather, it is the infringement of these direct rights which would do so.[122] Nowhere was it argued that the direct rights of Von Abo had been infringed, or how they had been infringed. *Barcelona, Diallo,* and article 12 of the ILC Articles on Diplomatic Protection are clear on the matter: if the direct rights of a shareholder are not injured as such, then diplomatic protection cannot be claimed on behalf of a shareholder.

4 Conclusion

International customary law is part of South African law.[123] As such it is submitted that:

(a) there is no right to diplomatic protection in South African law;

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[118] At 545 par 7.
[119] *Ibid.*
[120] *Id* at 29 par 69.
[121] The court agreed with all the submissions made on behalf of Von Abo including this one.
[122] See, eg, art 12 of the ILC Articles on Diplomatic Protection.
[123] Dugard at 47 80; *Kaunda* at 1017 18. In terms of s 232 of the Constitution of the Republic of South Africa, 1996, customary international law is part of the law of South Africa unless it is inconsistent with the Constitution or an Act of Parliament. Article 38(1)(b) of the Statute of the International Court of Justice described international custom as 'evidence of a general practice accepted as law'. Article 38(1)(d) states that judicial decisions and the writings of publicists shall be subsidiary sources of international law.

(b) there is no proof of the existence of an exception in international customary law allowing for diplomatic protection by substitution;

(c) as such, a shareholder who suffers loss by virtue of an injury having been caused to a company of which he is a member by a foreign state can only obtain diplomatic protection in his capacity as a shareholder under circumstances contemplated in articles 11 and 12 of the ILC Articles on Diplomatic Protection;

(d) in the premises *Von Abo* was correctly set-aside on appeal.

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