CASE NOTE

AHMADOU SADIO DIALLO

REPUBLIC OF GUINEA v DEMOCRATIC REPUBLIC OF THE CONGO*

CLARIFYING THE SCOPE OF DIPLOMATIC PROTECTION OF CORPORATE AND SHAREHOLDER RIGHTS

CONTENTS

I Introduction 1
II Facts 4
III Decision on Preliminary Objections 5
A Diallo's Expulsion from Congolese Territory 5
B Diallo's Rights as an *Associé* 6
C Claims on behalf of Africom-Zaire and Africontainers-Zaire 8
IV Comment 9
A Consideration of the *Draft Articles* 10
B Burden of Proving Exhaustion of Local Remedies 11
C The Source of Shareholder Rights 12
D Substituting the State of Nationality of the Company for the State of Nationality of Shareholders 15
V Conclusion 19

I INTRODUCTION

On 24 May 2007, the International Court of Justice handed down its decision on the preliminary objections raised in *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*.[1] The case concerned a claim of diplomatic protection by the Republic of Guinea ('Guinea'), which alleged that the Democratic Republic of the Congo ('DRC') had violated the rights of Guinea's national, Mr Diallo, by expelling him from the DRC and confiscating property from Congolese companies that Diallo owned and controlled. As Higgins has noted, it was 'a classical case, perhaps, in the Western context, but somewhat unusual as an intra-African case'.[2]

The diplomatic protection of shareholders and corporations has been a controversial issue in international law since the Court's seminal decision in *Barcelona Traction*.[3] In that case, the Court held by majority that the state of a

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* *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* [2007] ICJ <http://www.icj-cij.org> at 23 May 2008 ('*Diallo*').

1 Ibid.

2 H E Rosalyn Higgins, President of the International Court of Justice (Speech delivered at the 59th Session of the International Law Commission, 10 July 2007) 11 <http://www.icj-cij.org> at 23 May 2008 ('Speech delivered at the 59th Session of the ILC').

3 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3 ('*Barcelona Traction*').

shareholder who has invested in a foreign company could not, in the circumstances of that case, diplomatically protect the company's shareholders.[4] This was because, if the company possessed its own separate legal personality,

> although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed … an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.[5]

This decision severely restricted the diplomatic remedies available to the states of shareholders in foreign companies operating in foreign jurisdictions. Kubiatowski has stated that

> the judgment of *Barcelona Traction* remains a nearly insurmountable barrier to foreign shareholders hoping to protect their investment based on general principles of international law. Since the *Barcelona Traction* Court concluded that shareholders' interests constitute indirect interests which do not warrant international legal protection, a claimant state cannot espouse the claim of its nationals who have invested in foreign corporations absent treaties or agreements specifying otherwise.[6]

Whilst this statement captures the popular perception of the decision in *Barcelona Traction*, it is not completely accurate. The Court identified three limited exceptions to the general rule.[7] First, the Court recognised that shareholders' state of nationality may be able to diplomatically protect those shareholders where the corporation has the same nationality as the state responsible for causing injury to the corporation.[8] Second, the Court recognised that an exception existed where the corporation had ceased to exist in its place of

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4 Ibid 51. See Francis Mann, 'The Protection of Shareholders' Interests in the Light of the Barcelona Traction Case' (1973) 67 *American Journal of International Law* 259, 272–3; 'Corporations — Shareholder Suit — Belgian Nationality of Shareholders in Canadian Corporation Held Insufficient to Give Belgium Standing to Sue on behalf of Those Shareholders in the International Court of Justice' (1970) 3 *New York University Journal of International Law and Politics* 391, 393; Stephen Kubiatowski, 'The Case of *Elettronica Sicula SpA*: Toward Greater Protection of Shareholders' Rights in Foreign Investments' (1991) 29 *Columbia Journal of Transnational Law* 215, 223; Ian Laird, 'A Community of Destiny — The *Barcelona Traction Case* and the Development of Shareholder Rights to Bring Investment Claims' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005) 77, 81–3.

5 *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 36–7.

6 Kubiatowski, above n 4, 226. See also Mann, 'Protection of Shareholders' Interests', above n 4, 268.

7 See Laird, above n 4, 81.

8 *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 48. See also at 72–5 (Separate Opinion of Judge Fitzmaurice), 134 (Separate Opinion of Judge Tanaka), 191–3 (Separate Opinion of Judge Jessup); *Barcelona Traction (Preliminary Objections)* [1964] ICJ Rep 6, 58 (Separate Opinion of Vice-President Wellington Koo). Cf *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 257–9 (Separate Opinion of Judge Padillo Nervo), 240–1 (Separate Opinion of Judge Morelli), 318 (Separate Opinion of Judge Ammoun); John Dugard, *Fourth Report on Diplomatic Protection*, UN Doc A/CN.4/530 (13 March 2003) [57]; International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, as contained in *Report of the International Law Commission Fifty-Eighth Session*, UN GAOR, 61st sess, Supp No 10, UN Doc A/61/10 (2006), art 11(b) and commentaries thereto ('*Draft Articles*').

incorporation.[9] Third, the Court held that shareholders' state of nationality could take action where the shareholders' direct rights in the corporation, such as the right to receive a dividend or attend general meetings, had been infringed.[10]

The precise scope of these exceptions has, however, remained uncertain. Many commentators have suggested that the decision of a Chamber of the Court in *ELSI*,[11] whilst distinguishable, signalled a more favourable approach to the protection of foreign investors' interests.[12] The absence of any further specific guidance from the Court, coupled with the proliferation of bilateral investment treaties allowing investors to bring claims directly against states, has led to claims that the decision of the Court in *Barcelona Traction* no longer reflects customary international law.[13] For example, in *CMS Gas (Jurisdiction)*,[14] a tribunal convened under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID') stated:

> the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and increasingly in respect of other matters. To the extent that customary international law or generally the traditional law of international claims might have followed a different approach — a proposition that is open to debate — then that approach can be considered the exception.[15]

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9 *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 40–1. See also *Agrotexim v Greece* (1996) 330 Eur Court HR (ser A) 1; Dugard, above n 8, [57]; *Draft Articles*, above n 8, art 11(a) and commentaries thereto.

10 *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 36.

11 *Elettronica Sicula SpA (US v Italy) (Judgment)* [1989] ICJ Rep 15 ('*ELSI*').

12 See Kubiatowski, above n 4; Stanimir Alexandrov, 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *Ratione Temporis*' (2005) 4 *Law and Practice of International Courts and Tribunals* 19, 27; Sean Murphy, 'The *ELSI* Case: An Investment Dispute at the International Court of Justice' (1991) 16 *Yale Journal of International Law* 391, 393; Peter Trooboff, 'International Decisions: *Elettronica Sicula SpA (ELSI) (United States v Italy)*' (1990) 84 *American Journal of International Law* 249, 257; Francis Mann, 'Foreign Investment in the International Court of Justice: The *ELSI* Case' (1992) 86 *American Journal of International Law* 92, 95–8; Robert McCorquodale, 'Expropriation Rights Under a Treaty — Exhausted and Naked' (1990) 49 *Cambridge Law Journal* 197, 199; Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (9th ed, 1992) 520.

13 Laird, above n 4, 77. See also Francisco Orrego Vicuña, Rapporteur, 'Interim Report on the "Changing Law of Nationality of Claims"' in Committee on Diplomatic Protection of Persons and Property, International Law Association, *First Report* (Report of the London Conference, 2000) 42. In 2006, the International Law Association concluded that 'practice evidences quite forcefully that the criteria of the *Barcelona Traction* [sic] no longer prevail and that shareholders are increasingly entitled to protection or action on their own merit': Committee for the Diplomatic Protection of Persons and Property, International Law Association, *Final Report* (Report of the Toronto Conference, 2006) [90].

14 *CMS Gas Transmission Company v Republic of Argentina (Decision on Objections to Jurisdiction)* ICSID Case No ARB/01/8 (17 July 2003) [48] ('*CMS Gas (Jurisdiction)*'), affirmed in *CMS Gas Transmission Company v Republic of Argentina (Annulment Proceeding)* ICSID Case No ARB/01/8 (15 September 2007).

15 *CMS Gas (Jurisdiction)* ICSID Case No ARB/01/8 (17 July 2003) [48] (citation omitted). Similarly, another ICSID tribunal has recently commented that 'there is nothing contrary to international law or the *ICSID Convention* in upholding the concept that shareholders may claim independently from the corporation concerned': see *Enron Corporation and Ponderosa Assets, LP v The Argentine Republic (Decision on Jurisdiction)* ICSID Case No ARB/01/3 (2 August 2004) [39].

In *Diallo*, the DRC raised two preliminary objections. The first was that Guinea lacked standing to diplomatically protect Diallo's property because that property had been owned by companies not possessing Guinean nationality.[16] The second was that neither Diallo's companies nor Diallo himself had exhausted the local remedies available in the DRC.[17] These preliminary objections provided the Court with the opportunity to revisit the principles it had established in *Barcelona Traction* and to consider, for the first time, the *Draft Articles on Diplomatic Protection* adopted in 2006 by the International Law Commission ('ILC').[18] Before examining how the Court dealt with these issues, it is necessary to briefly summarise the events that set Guinea and the DRC on the road to the Hague.

II FACTS

Mr Ahmadou Sadio Diallo settled in the DRC in 1964 when it was still known as the Congo.[19] The Congo was renamed 'Zaire' in 1971.[20] In 1974, Diallo founded an import-export company, Africom-Zaire, as a *société privée à responsibilité limitée*, or a private limited liability company ('SPRL'), under Zairean law and became its *gérant*, or manager.[21] In 1979, Diallo expanded his activities and with two private partners founded a second SPRL named Africontainers-Zaire.[22] In 1980, the two partners withdrew and Diallo became the sole manager of the new company.[23] Toward the end of the 1980s, the relationships between Diallo and his business partners deteriorated and Diallo initiated a number of court actions seeking to recover alleged debts from these partners, which included Zaire Fina, Zaire Shell and Zaire Mobil Oil, and to recover debts from certain instruments of the Zairean state.[24] The Prime Minister of Zaire issued a formal expulsion order against Diallo in October 1995.[25] Diallo was deported from Zaire and returned to Guinea in January 1996,[26] some 18 months before the fall of the government of Mobutu Sese Seko and the subsequent renaming of Zaire as the DRC.[27]

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16 *Diallo (Preliminary Objections)* [2007] ICJ [11] <http://www.icj-cij.org> at 23 May 2008.

17 Ibid.

18 *Draft Articles*, above n 8.

19 *Diallo (Preliminary Objections)* [2007] ICJ [14] <http://www.icj-cij.org> at 23 May 2008.

20 Georges Nzongola-Ntalaja, *From Zaire to the Democratic Republic of the Congo* (Current African Issues No 28, Nordiska Afrikainstitutet, 2nd rev ed, 2004) 7, available from <http://www.nai.uu.se> at 23 May 2008. A reference to 'Zaire' in this case note should be read as a reference to the DRC and vice versa.

21 *Diallo (Preliminary Objections)* [2007] ICJ [14] <http://www.icj-cij.org> at 23 May 2008.

22 Ibid.

23 Ibid.

24 Ibid.

25 Ibid [15].

26 Ibid.

27 See US Department of State, *Background Note: Democratic Republic of the Congo* (2008) <http://www.state.gov/r/pa/ei/bgn/2823.htm> at 23 May 2008. For a detailed summary of the political situation in the DRC around the time of the events giving rise to *Diallo*, see Guy Fiti Sinclair, 'Don't Mention the War (on Terror): Framing the Issues and Ignoring the Obvious in the ICJ's 2005 *Armed Activities* Decision' (2007) 8 *Melbourne Journal of International Law* 124, 125–8.

Guinea alleged that Diallo's deportation was the final step in the implementation of a concerted DRC policy to prevent him from recovering various debts owed to his companies by the state.[28] Guinea claimed that, among other things, Diallo had been subject to arbitrary detention and improper interference by the DRC government with Diallo's actions in the DRC courts, including the implementation by the DRC's Minister of Justice of a direct stay on court orders obtained by Diallo.[29] The DRC contended that it had acted appropriately at all times and that Diallo's deportation was justified in the Zairean public interest.[30]

III DECISION ON PRELIMINARY OBJECTIONS

A *Diallo's Expulsion from Congolese Territory*

The first issue for the Court to consider was the objection made by the DRC that Diallo had not exhausted the available local remedies in relation to his expulsion from Congolese territory.[31] The Court began by noting that neither party disputed that the rule regarding the exhaustion of local remedies was as stated in *Interhandel*.[32] That rule is:

> Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.[33]

The Court then considered the onus of proof and observed that both parties had obligations in this regard. Referring to its previous decision in *ELSI*,[34] the Court stated:

> Guinea must establish that Mr Diallo exhausted any available local remedies or, if not, must show that exceptional circumstances justified the fact that he did not do so; it is, on the other hand, for the DRC to prove that there were available and effective remedies in its domestic legal system against the decision to remove Mr Diallo from the territory and that he did not exhaust them.[35]

The main point of dispute between the parties was whether the action taken against Diallo by the DRC was an expulsion or a refusal of entry decision. The importance of this distinction was that Congolese law explicitly declared refusal of entry decisions, but not expulsions, to be unappealable.[36] The DRC argued that, being an expulsion, the decision was subject to the general principle of Congolese law that the subject of a decision could always ask for that decision to

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28 *Diallo (Preliminary Objections)* [2007] ICJ [18] <http://www.icj-cij.org> at 23 May 2008.
29 Ibid.
30 Ibid [19].
31 Ibid [35].
32 *(Switzerland v US) (Judgment)* [1959] ICJ Rep 6.
33 Ibid 27.
34 *ELSI (Judgment)* [1989] ICJ Rep 15, 43–4.
35 *Diallo (Preliminary Objections)* [2007] ICJ [44] <http://www.icj-cij.org> at 23 May 2008.
36 Ibid [36].

be reconsidered by the original decision-maker or by the superior of the original decision-maker.[37] The Court rejected this argument and held that:

> the DRC cannot now rely on an error allegedly made by its administrative agencies at the time Mr Diallo was 'refused entry' to claim that he should have treated the measure as an expulsion. Mr Diallo … was justified in relying on the consequences of the legal characterization thus given by the Zairean authorities.[38]

The Court went on to point out that, even if it were an expulsion decision, the ability to plead for a reconsideration of such a decision by the decision-maker was not sufficient because

> while the local remedies that must be exhausted include all remedies of a legal nature, judicial redress as well as redress before administrative bodies, administrative remedies can only be taken into consideration for purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings.[39]

The Court concluded that the DRC's objection to admissibility based on Diallo's failure to exhaust local remedies could not be upheld because the DRC could not prove that Diallo had neglected to exhaust any effective judicial or administrative remedies that had been available to him.[40] Guinea's claim regarding Diallo's personal rights was therefore admissible. The Court then turned to consider the admissibility of Guinea's claims in relation to the alleged wrongs done to Diallo's companies and his rights in relation to those companies.

B *Diallo's Rights as an* Associé

The DRC raised two objections to the admissibility of Guinea's claims in relation to the alleged infringement of Diallo's rights as an *associé* in Africom-Zaire and Africontainers-Zaire. The first was that Guinea lacked standing to bring those claims.[41] The second was that Diallo had not exhausted the local remedies available to him in the DRC in relation to his companies.[42]

The DRC accepted that a state has the right to diplomatically protect its nationals when there is an injury to the direct rights such persons have as *associés* or shareholders in a corporate entity.[43] Guinea had based its argument on the comments made by the Court about the direct rights of shareholders in *Barcelona Traction*, claiming the comments were reflected in art 12 of the *Draft Articles*,[44] which provides that:

> To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself,

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37 Ibid.
38 Ibid [46].
39 Ibid [47].
40 Ibid [48].
41 Ibid [32].
42 Ibid.
43 Ibid [50].
44 Ibid [54].

> the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.[45]

The DRC contended, however, that the nature of the claims made by Guinea revealed that Guinea was in fact seeking compensation for alleged violations of rights possessed by Diallo's companies. While the infringement of these rights may have caused damage to Diallo's interests, the DRC argued that his direct rights had not been violated.[46] The DRC also argued that, even if the rights that Guinea sought to protect could be characterised as Diallo's own, the only kind of shareholder rights capable of diplomatic protection were those concerning relations between the company and the shareholder.[47]

The Court began by reiterating that it was only necessary to consider the derivative rights of a member of a corporate entity such as an *associé* or shareholder if the corporate entity had a legal personality separate from that of its members under municipal law. This was because

> [c]onferring independent corporate personality on a company implies granting it rights over its own property, rights which it alone is capable of protecting. As a result, only the State of nationality may exercise diplomatic protection on behalf of the company when its rights are injured by a wrongful act of another State.[48]

The Court held, however, that this did not prevent the state of nationality of a shareholder or *associé* from diplomatically protecting rights possessed by that person in the same manner as any other right possessed by one of its nationals. This was because

> [t]he exercise by a State of diplomatic protection on behalf of a natural or legal person, who is *associé* or shareholder, having its nationality, seeks to engage the responsibility of another State for an injury caused to that person by an internationally wrongful act committed by that State. … On this basis, diplomatic protection of the direct rights of *associés* of a SPRL or shareholders of a public limited company is not to be regarded as an exception to the general legal régime of diplomatic protection for natural or legal persons, as derived from customary international law.[49]

As a result, the Court dismissed the DRC's objection to Guinea's claims regarding its standing to protect Diallo's direct rights.[50] The question of what those rights actually were and whether they had been infringed by the DRC was held over to be considered with the merits.[51]

The Court also dismissed the DRC's objection that Diallo had failed to exhaust local remedies on the basis that the DRC had failed to argue that there were any additional remedies available to Diallo apart from those that the Court had already held were not effective in relation to Diallo's expulsion.[52]

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45 *Draft Articles*, above n 8, art 12.
46 *Diallo (Preliminary Objections)* [2007] ICJ [51] <http://www.icj-cij.org> at 23 May 2008.
47 Ibid.
48 Ibid [61].
49 Ibid [64].
50 Ibid [67].
51 Ibid [66].
52 Ibid [74].

C *Claims on behalf of Africom-Zaire and Africontainers-Zaire*

Guinea also sought to make a claim directly against the DRC for damage sustained by Diallo's companies, Africom-Zaire and Africontainers-Zaire. The DRC raised the same two objections: that Guinea lacked standing to make any claim on behalf of Diallo's companies[53] and that the companies had not exhausted the local remedies available in the DRC.[54]

In making its claim on behalf of Africom-Zaire and Africontainers-Zaire, Guinea acknowledged the Court's statement in *Barcelona Traction* that 'an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected'.[55]

Guinea argued, however, that considerations of equity *infra legem* gave it a mandate to bring an action on behalf of these companies since the state of wrongdoing was the state of nationality of the two companies.[56] It noted that the importance of these considerations had been recognised in *Barcelona Traction*, where the Court said that:

> in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State.[57]

Guinea cited arbitral awards,[58] decisions of the European Commission of Human Rights, art 11(b) of the *Draft Articles* and the *Washington Convention* establishing the ICSID,[59] as well as ICSID and Iran–United States Claims Tribunal jurisprudence to argue that customary international law permitted the state of nationality of a shareholder to diplomatically protect the shareholder from infringement of the company's rights where the company has the nationality of the wrongdoing state.[60]

The DRC argued that an exception based on customary law would be contrary to the basic rationale of diplomatic protection since diplomatic protection is

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53 Ibid [76].

54 Ibid.

55 *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 36.

56 *Diallo (Preliminary Objections)* [2007] ICJ [82] <http://www.icj-cij.org> at 23 May 2008.

57 *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 48.

58 *Diallo (Preliminary Objections)* [2007] ICJ [90] <http://www.icj-cij.org> at 23 May 2008. Guinea cited *Delagoa Bay Railway (US and Great Britain v Portugal)* reproduced in John Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party* (1898) 1865–99; *Salvador Commercial Company (US v Republic of Salvador)* in US Department of State, *Papers relating to the Foreign Relations of the United States* (1903) 859–73; *Biloune v Ghana Investment Centre* (1993) 95 ILR 183, 207–10.

59 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature March 18 1965, 575 UNTS 159 (entered into force October 14 1966) ('*Washington Convention*').

60 *Diallo (Preliminary Objections)* [2007] ICJ [83] <http://www.icj-cij.org> at 23 May 2008.

premised on the idea that any violation of the rights of a foreign national is a violation of the rights of their state of nationality.[61]

The Court found that Guinea's materials did not establish any general exception in customary international law allowing for protection by substitution.[62] Bilateral investment treaties and the *Washington Convention* were considered insufficient to establish a new customary norm and, indeed, were possibly evidence of a contrary customary norm.[63] The Court also considered that decisions of international tribunals did not establish the customary rules contended for by Guinea.[64] The Court therefore did not need to consider the question of whether all local remedies had been exhausted.

Notably, the Court did not resolve the question of whether customary international law recognised a more limited rule whereby a state may diplomatically protect a shareholder in substitution for a company that had been required to incorporate in the wrongdoing state in order to do business there.[65] The Court considered it unnecessary to decide this issue because there was no evidence that any law of the DRC required Diallo to incorporate either of his two companies in the DRC rather than operate under his own name or via a company incorporated in another country.[66]

IV COMMENT

This case was the Court's first opportunity to consider issues of diplomatic protection since the release of the ILC's *Draft Articles*. The Court made several important comments about the extent to which the *Draft Articles* codify customary international law. It also considered the question of which party bears the burden of proof in relation to local remedies. More importantly, however, the Court made several notable observations on the source and nature of the direct rights of shareholders. For the first time since *Barcelona Traction*, the Court gave significant consideration to the question of whether customary international law allows the state of nationality of a shareholder to diplomatically protect the rights of the company in which the shareholder has an interest.

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61 Ibid [77]–[78].

62 Ibid [89].

63 Ibid [90].

64 Ibid. For an exploration of some of the differences between the protection of foreign investments under customary international law and treaty regimes, see William Dodge, 'Investor–State Dispute Settlement Between Developed Countries: Reflections on the Australia–United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1, 5–14; Alexandrov, above n 12, 27–34.

65 *Diallo (Preliminary Objections)* [2007] ICJ [91] <http://www.icj-cij.org> at 23 May 2008.

66 The Supreme Court of Appeal in South Africa has interpreted the Court's decision in *Diallo* as concluding that *Draft Articles* art 11(b) does not reflect customary international law: see *Van Zyl v Government of the Republic of South Africa* [2007] SCA 109, [84]. This view is difficult to accept given that the Court stated that 'the question of whether or not [art 11(b)] reflects customary international law does not arise in this case': *Diallo (Preliminary Objections)* [2007] ICJ [93] <http://www.icj-cij.org> at 23 May 2008.

A *Consideration of the* Draft Articles

The purpose of the ILC is to undertake the codification and progressive development of international law.[67] It does this, at least in part, by providing a forum for 'ascertaining what the rules are or ought to be, and then reaching agreement upon them'.[68] The ILC's objective is for its rules to be accepted as representative of customary international law.[69] Crawford has noted that where the body of law being interpreted by the ILC contains 'secondary rules' that are only indirectly applicable in national courts and do not require legislative implementation, 'the ILC's work is part of a process of customary law articulation'.[70] For this reason, the ILC's attempt to codify the rules of international law relating to diplomatic protection in the *Draft Articles* is significant.

The Court in *Diallo* explicitly recognised that certain aspects of the *Draft Articles* reflect customary international law. The first reference to such a development was the definition of 'diplomatic protection' contained in art 1 of the *Draft Articles*, which provides that

> [d]iplomatic protection consists of 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 internationally 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.[71]

As the commentary to the *Draft Articles* notes, art 1 'makes no attempt to provide a complete and comprehensive definition of diplomatic protection'.[72] The wording of art 1 shows that the ILC considers diplomatic protection 'a procedure for securing the responsibility of the state for injury to the national [of the protecting state] flowing from an internationally wrongful act'[73] that can be pursued using 'diplomatic action or other means of peaceful settlement'.[74] In

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67 *Statute of the International Law Commission*, adopted by *Establishment of an International Law Commission*, GA Res 174 (II), UN GAOR, 2nd sess, 23rd plen mtg, UN Doc A/CN.4/4/Rev.2 (21 November 1947), art 1(1). Previously, in 1924, the Council of the League of Nations appointed a Committee of Experts for the Progressive Codification of International Law: see Guenter Weissberg, 'United Nations Movements Toward World Law' (1975) 24 *International and Comparative Law Quarterly* 460, 460.

68 Sir Arthur Watts, *The International Law Commission 1949–1998* (1999) 2. For an insight into the internal workings of the ILC see generally Robert Quentin-Baxter, 'The International Law Commission' (1987) 17 *Victoria University of Wellington Law Review* 1.

69 Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (5th ed, 2001) 69.

70 James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 *American Journal of International Law* 874, 890. For another example of a case in which the Court was asked to determine whether the work of the ILC codifies customary international law see *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7. Secondary, or 'trans-substantive' rules, as understood in the context of state responsibility, are 'a set of rules present in state responsibility independently of the particular substantive obligation in question': David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 *American Journal of International Law* 857, 871.

71 *Draft Articles*, above n 8, art 1.

72 Ibid 24.

73 Ibid.

74 Ibid art 1.

Diallo, the Court confirmed that the definition in art 1 of the *Draft Articles* reflects the position at customary international law.[75]

The Court also made the general comment that the scope of diplomatic protection has now expanded beyond violations of the minimum standard for the treatment of aliens to encompass 'internationally guaranteed human rights'.[76] The Court had previously stated in its judgment in *LaGrand* that 'individual rights' are capable of diplomatic protection.[77] This statement was quoted with approval by the Court in *Avena*.[78] The statement made by the Court in *Diallo*, however, goes further than this by identifying 'internationally guaranteed human rights' as a subset of the 'individual rights' it had previously identified as being capable of founding a claim for diplomatic protection.[79]

Finally, the Court also appeared to confirm the approach adopted by the *Draft Articles* in relation to administrative remedies. The ILC had concluded that the only administrative remedies that must be exhausted are those that result in a binding decision.[80] The ILC accepted, on the authority of *De Becker v Belgium*,[81] that the category includes remedies designed to vindicate an existing right, but not those designed to obtain a favour.[82] This approach has been consistently adopted in a number of decisions of the European Commission of Human Rights.[83] The Court's parallel statement in *Diallo* that 'administrative remedies can only be taken into consideration … if they are aimed at vindicating a right and not at obtaining a favour'[84] suggests that this rule may now be considered settled at international law.

B *Burden of Proving Exhaustion of Local Remedies*

In the course of responding to the DRC's objection that Diallo had failed to exhaust local remedies, the Court addressed the issue of which party bore the burden of proof as follows:

> Guinea must establish that Mr Diallo exhausted any available local remedies or, if not, must show that exceptional circumstances justified the fact that he did not do so; it is, on the other hand, for the DRC to prove that there were available and effective remedies in its domestic legal system against the decision to remove Mr Diallo from the territory and that he did not exhaust them.[85]

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75 *Diallo (Preliminary Objections)* [2007] ICJ [39] <http://www.icj-cij.org> at 23 May 2008.
76 Ibid.
77 *(Germany v US) (Judgment*) [2001] ICJ Rep 466, 494 ('*LaGrand*').
78 *Avena and Other Mexican Nationals (Mexico v US) (Judgment)* [2004] ICJ Rep 12, 36.
79 *Diallo (Preliminary Objections)* [2007] ICJ [39] <http://www.icj-cij.org> at 23 May 2008.
80 *Draft Articles*, above n 8, 72.
81 (1962) 4 Eur Court HR (ser A) 1.
82 *Draft Articles*, above n 8, 72.
83 See Henry Schermers, 'Exhaustion of Domestic Remedies' in Nisuke Ando, Edward McWhinney and Rüdiger Wulfrum (eds), *Liber Amicorum Judge Shigeru Oda* (2002) 947, 952.
84 *Diallo (Preliminary Objections)* [2007] ICJ [47] <http://www.icj-cij.org> at 23 May 2008.
85 Ibid [44].

The Court's description of the burden of proof is similar to that provided in Cançado Trindade's text that:

> Individual applicants have to prove that they have exhausted local remedies, or that they have not exhausted them either because they were relieved from doing so by special circumstances or because the remedies did not exist or were ineffective. On the other hand, the respondent government is bound to prove that local remedies existed and were adequate and effective.[86]

Such formulations do not make clear the time that each party bears responsibility for discharging their burden. As a result, they leave unanswered 'the fundamental question which the burden of proof should resolve, namely: who will lose if the matter is evenly divided?'[87] The *Draft Articles* do not address that question. Schermers has suggested that the true position is that

> [w]hen an applicant claims to have exhausted all domestic remedies, it is for the government that claims domestic remedies have not been exhausted to demonstrate that the applicant did not make use of a remedy at his disposal.[88]

In *Diallo*, the Court decided that the DRC had failed to establish its objection to Guinea's claim on the grounds of failure to exhaust local remedies because the DRC did not prove that available and effective remedies allowed Diallo to challenge his expulsion.[89] This approach is consistent with that adopted by the Court in *ELSI*, where it concluded that 'it was for Italy [the respondent] to show, as a matter of fact, the existence of a remedy which was open to the US stockholders and which they failed to employ'.[90] The conclusion to be drawn is that, if an applicant asserts that local remedies have been exhausted and the respondent is unable to prove anything to the contrary, any objection by the respondent to admissibility that alleges a failure to exhaust local remedies will usually be dismissed.

C *The Source of Shareholder Rights*

The DRC's objection to Guinea's claim of diplomatic protection over Diallo's rights as *associé* provided the Court with the opportunity to revisit one of the most controversial aspects of international law: the direct rights of shareholders.

Although the Court declined to make a finding on the nature and content of Diallo's direct rights, its determination of whether Guinea had standing to diplomatically protect Diallo's rights reflects a faithful adherence to, and approval of, the reasoning in *Barcelona Traction*. The Court affirmed the 'fundamental rule' that '[s]o long as the company is in existence, the shareholder has no rights to the corporate assets'.[91] In doing so, the Court emphasised the

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86 A A Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983) 170.

87 Bernard Robertson, 'Exhaustion of Local Remedies in International Human Rights Litigation — The Burden of Proof Reconsidered' (1990) 39 *International and Comparative Law Quarterly* 191, 191.

88 Schermers, above n 83, 954. See also Jennings and Watts, above n 12, 526.

89 *Diallo (Preliminary Objections)* [2007] ICJ [48] <http://www.icj-cij.org> at 23 May 2008.

90 *ELSI (Judgment)* [1989] ICJ Rep 15, 47.

91 *Diallo (Preliminary Objections)* [2007] ICJ [63] <http://www.icj-cij.org> at 23 May 2008.

same distinction between the rights of shareholders and the rights of companies that underpinned its decision in *Barcelona Traction*.

By adhering so faithfully to *Barcelona Traction*, the Court retreated from the broader view of shareholder rights that appeared to colour its decision in *ELSI*. In *ELSI*, a Chamber of the Court allowed the US to bring a claim against Italy for damage suffered by an Italian company, Elettronica Sicula SpA, whose shares were wholly owned by two American companies, Raytheon and Machlett.[92] In his separate judgment, Judge Oda applied *Barcelona Traction* and held that it precluded any direct claim being made on behalf of the two American companies.[93] The judgment of the Chamber, on the other hand, did not mention *Barcelona Traction* and its silence was interpreted as an implicit rejection of that approach.[94] Instead, the Chamber was prepared to assume that the US had standing to bring a claim for damage to foreign companies wholly owned by its nationals.[95] Given that the Chamber could have reached the same conclusion by applying the 'state of incorporation' or 'direct shareholder rights' exceptions from *Barcelona Traction*, its approach indicates that the Court was turning away from the framework it had previously adopted in that case.[96] As Dugard has said:

> Although the failure of *ELSI* to apply the rule expounded in *Barcelona Traction* may be explained, the incontestable fact is that the Chamber declined to follow the rule, reasoning and philosophy of *Barcelona Traction*.[97]

The same logic can be applied to the Court's treatment of *ELSI* in *Diallo*. By reaffirming that *Barcelona Traction* establishes the fundamental rule governing the diplomatic protection of shareholders, without mentioning *ELSI*, the Court has signalled a shift back to the framework it adopted in *Barcelona Traction*.

The Court also clarified an unresolved point in its jurisprudence and the *Draft Articles*, namely, the precise source of a shareholder's direct rights. Prior to *Barcelona Traction*, the dominant view was that shareholders' direct rights were determined by the municipal law of the state of incorporation rather than by general principles of international law.[98] In *Barcelona Traction* the Court

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92 *ELSI (Judgment)* [1989] ICJ Rep 15, 20.

93 Ibid 87–8 (Separate Opinion of Judge Oda).

94 At least, that is how the dissenting judge, Judge Schwebel, interpreted it: ibid 94–5. Although Judge Schwebel was in dissent, his comment is noteworthy since all Judges, including dissenting ones, participate in the drafting of the judgment: see Sir Robert Jennings, 'The Collegiate Responsibility and Authority of the International Court of Justice' in Yoram Dinstein and Mala Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 343, 345.

95 See Kubiatowski, above n 4, 231.

96 See Murphy, above n 12, 422–3. But see Kubiatowski, above n 4, 231–4; Vaughan Lowe, 'Shareholders' Rights to Control and Manage: From Barcelona Traction to ELSI' in Nisuke Ando, Edward McWhinney and Rüdiger Wulfrum (eds), *Liber Amicorum Judge Shigeru Oda* (2002) 269, 274.

97 Dugard, above n 8, [26]. See also Martin Dixon, 'Case Concerning Elettronica Sicula SpA (ELSI) (*United States of America v Italy*)' (1992) 41 *International and Comparative Law Quarterly* 701, 708; Murphy, above n 12, 418–20; Mann, 'Foreign Investment in the International Court of Justice', above n 12, 97–9; McCorquodale, above n 12, 199; Kubiatowski, above n 4, 234; Laird, above n 4, 85.

98 Algot Bagge, 'Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders' (1958) 34 *British Yearbook of International Law* 162, 169; Kubiatowski, above n 4, 221–2.

seemed to affirm this when it stated that shareholders' direct rights were to be determined with reference to the 'relevant institutions of municipal law'.[99] However, the Court introduced an element of ambiguity when it went on to state that:

> It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers.[100]

It is difficult to reconcile these two statements. In the first, the Court suggests that the municipal law of the state of incorporation is the sole source of shareholder rights. On the other hand, the Court's second statement suggests that the only shareholder rights that are able to be diplomatically protected are those generally recognised by the municipal law of states that allow for the incorporation of limited liability companies. In his separate opinion in *ELSI*, Judge Oda appeared to consider that shareholders' rights may derive from either source, referring in the context of shareholders' rights to both the municipal law of the state of incorporation and 'the general principles of law concerning companies'.[101]

The distinction between the two approaches is important. Under the first approach, the rights of the shareholder will usually be clearly articulated in a state's municipal law. Under the second approach, a shareholder may have more or fewer rights than the municipal law of the state of incorporation provides. This can only result in uncertainty as to the precise scope of a shareholder's rights. It also seems unreasonable that shareholders could be expected to determine their rights under general principles of international law prior to investment in a foreign state.

In its *Draft Articles*, the ILC attempted to reconcile these two conflicting approaches, stating in its commentary to art 12 that

> [i]n most cases [the direct rights of shareholders are] a matter to be decided by the municipal law of the State of incorporation. Where the company is incorporated in the wrongdoing State, however, there may be a case for the invocation of general principles of company law in order to ensure that the rights of foreign shareholders are not subjected to discriminatory treatment.[102]

The Court in *Diallo* adopted the first approach and determined that the municipal law of the state of incorporation was the source of shareholder rights, stating that:

> what amounts to the internationally wrongful act, in the case of *associés* or shareholders, is the violation by the respondent State of their direct rights in

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99 *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 37.

100 Ibid. For a critique of the Court's use of municipal law, see Rosalyn Higgins, 'Aspects of the *Case concerning the Barcelona Traction, Light and Power Company, Ltd*' (1970–71) 11 *Virginia Journal of International Law* 327, 331–42; Richard Lillich, 'Two Perspectives on the *Barcelona Traction* Case: The Rigidity of Barcelona' (1971) 65 *American Journal of International Law* 522.

101 *ELSI (Judgment)* [1989] ICJ Rep 15, 87–8 (Separate Opinion of Judge Oda).

102 *Draft Articles*, above n 8, 67. See also Dugard, above n 8, [92].

> relation to a legal person, *direct rights that are defined by the domestic law of that State*, as accepted by both Parties.[103]

The Court did not explicitly refer to the quasi-exception suggested by the ILC. However, its approach leaves little room for acceptance of the operation of that exception at customary international law since *Diallo*'s case addressed the very circumstances of such a quasi-exception, as Diallo's companies were incorporated in the DRC, the wrongdoing state.

One consequence of this finding was that the Court was prepared to consider the argument that Diallo possessed shareholder rights beyond those described in *Barcelona Traction*. There, the Court suggested that such rights might include the right to a declared dividend, the right to attend and vote at general meetings and the right to share in the residual assets of the company on liquidation.[104] In his separate opinion, Judge Tanaka also mentioned as further examples the right of minority shareholders to sue directors, the right to transfer shares and the right to request share certificates.[105]

In *Diallo*, Guinea claimed that the commercial corporations legislation in the DRC conferred on Diallo a series of 'property rights' including: the right to receive a dividend; a series of 'functional rights', including the right to control, supervise and manage corporate affairs; and other 'additional rights' in relation to each of his companies.[106] These rights are considerably broader than the examples given in *Barcelona Traction*. The Court in *Diallo* did not conclude that, as a matter of law, Diallo could not possess rights of this kind. The Court implicitly rejected the submission made by the DRC that shareholder rights were limited *ejusdem generis* to those of the kind described in *Barcelona Traction*.[107] The Court will not determine whether Diallo actually possessed rights of the kind claimed under the relevant laws of the DRC until the merits stage of the case. The important point, however, is that the Court accepted that Diallo *could* possess such rights.

D *Substituting the State of Nationality of the Company for the State of Nationality of Shareholders*

The doctrine of substitution holds that a state of nationality of shareholders of a company should have the right to diplomatically protect the rights of the company itself where the state responsible for the injury suffered by the company is the state of incorporation.[108] The existence and extent of this doctrine has long been a contentious issue in international law because it is

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103 *Diallo (Preliminary Objections)* [2007] ICJ [64] <http://www.icj-cij.org> at 23 May 2008 (emphasis added).

104 *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 36.

105 Ibid 125. Neither this list nor the list prepared by the Court was intended to be exhaustive and it was unnecessary for the Court to consider the issue further as Belgium did not base its claim on an infringement of shareholder rights: see Dugard, above n 8, [88]; *Draft Articles*, above n 8, 67.

106 *Diallo (Preliminary Objections)* [2007] ICJ [55] <http://www.icj-cij.org> at 23 May 2008.

107 Ibid [52].

108 See also Susan Notar, 'International Court of Justice: *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*' (24 May 2007) *American Society of International: International Law in Brief* <http://www.asil.org/ilib/2007/06/ilib070605.htm> at 23 May 2008.

contrary to the fundamental premise of diplomatic protection, that a state may only diplomatically protect the rights of its nationals.[109] The doctrine seeks to allow the state of the shareholders to substitute itself as the plaintiff in place of the state of nationality of the company, the legal entity whose rights have in fact been infringed. Its basis appears to lie in 'considerations of equity',[110] particularly a concern that a shareholder could otherwise be left without recourse.[111]

The substitution doctrine was recognised in *Barcelona Traction* where the Court stated that 'a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company'.[112] It was also supported by four judges,[113] but opposed by three,[114] in their separate opinions. However, the issue did not have to be resolved since Spain was not the national state of the Barcelona Traction, Light and Power Company. The Court in *Diallo* recognised that the Court has not considered the issue since that obiter dictum in *Barcelona Traction*.[115]

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109 See *Panevezys-Saldutiskis Railway Case (Estonia v Lithuania) (Judgment)* [1939] PCIJ (ser A/B) No 76, 16; W E Beckett, 'Diplomatic Claims in Respect of Injuries to Companies' (1931) 17 *Transactions of the Grotius Society* 175, 177–8; Mervyn Jones, 'Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies' (1949) 26 *British Yearbook of International Law* 225, 227. This is based on the premise that a violation of a national's rights is a violation of the rights of their state of nationality: *Draft Articles*, above n 8, 25; Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Charles Fenwick trans, 1916 ed) 136 [trans of: *Le Droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*]; *Mavrommatis Palestine Concessions (Greece v UK) (Judgment)* [1924] PCIJ (ser A) No 2, 12; Yoram Dinstein, 'Diplomatic Protection of Companies under International Law' in Karel Williams (ed), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (1998) 505, 505–6. Note that the ILC suggests that this premise is a fiction: *Draft Articles*, above n 8, 25. On this final point, see also Lawrence Lee, '*Barcelona Traction* in the 21st Century: Revisiting Its Customary and Policy Underpinnings 35 Years Later' (2006) 42 *Stanford Journal of International Law* 237, 239–40; Dodge, above n 64, 7. Regardless, the idea that a state can only diplomatically protect the rights of its own nationals has not been called into question.

110 The Court's reasoning in *Barcelona Traction* arguably reflects an appreciation of the common law equitable maxim that 'equity will not suffer a wrong to be without a remedy': see Margaret White, 'Equity — A General Principle of Law Recognised by Civilised Nations?' (2004) 4 *Queensland University of Technology Law and Justice Journal* 103, 114.

111 Where a right of the company has been infringed, the shareholder must look to the state of nationality of the company to vindicate the shareholder's interests: see *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 36–7. Of course, 'it is entirely a matter for the State to decide whether, for juridical or political reasons, the case shall be taken up or not': Bagge, above n 98, 164. See also Jones, above n 109, 231–2; *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 44; *Kaunda v President of the Republic of South Africa* (2004) 5 SALR 191, 200–1.

112 *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 48. For an example of where this theory had been discussed prior to the decision in *Barcelona Traction* see Bagge, above n 98, 171–4.

113 See *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 72–5 (Separate Opinion of Judge Fitzmaurice), 134 (Separate Opinion of Judge Tanaka), 191–2 (Separate Opinion of Judge Jessup); *Barcelona Traction (Preliminary Objections)* [1964] ICJ Rep 6, 58 (Separate Opinion of Vice-President Wellington Koo).

114 See *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 257–9 (Separate Opinion of Judge Padilla Nervo), 240–1 (Separate Opinion of Judge Morelli), 318 (Separate Opinion of Judge Ammoun).

115 *Diallo (Preliminary Objections)* [2007] ICJ [87] <http://www.icj-cij.org> at 23 May 2008.

Although the Court had not ruled on the substitution exception since *Barcelona Traction*, it was before the Court in *ELSI*.[116] The *Diallo* judgment distinguished *ELSI* from *Barcelona Traction* on the basis that it concerned rights under a treaty.[117] However, it is clear that the proposed exception was before the Chamber in *ELSI*, having been submitted by Professor Gardner on behalf of the US.[118] The ILC has taken the position that it is possible to infer from the Chamber's silence that it supported the exception.[119] It is unfortunate that the *Diallo* court decided to distinguish *ELSI* on the basis that it involved a treaty without any further exploration of the implications of that decision for customary international law.[120]

Although the ILC in its *Draft Articles* did not adopt the broad substitution doctrine Guinea proposed, its position is that there is sufficient practice to sustain a general exception in favour of the right of the state of nationality of shareholders to intervene if the state of incorporation is responsible for injuring the corporation.[121] The ILC cited the opinion of Vice-President Wellington Koo in *Barcelona Traction (Preliminary Objections)*,[122] three separate opinions from *Barcelona Traction (Judgement)*[123] and the decision of the Chamber of the Court in *ELSI*[124] in support of this view.[125]

The Court in *Diallo* concluded that these authorities did not establish that the substitution doctrine was customary international law.[126] In particular, it noted that the practice associated with international arbitration of claims brought directly by foreign investors against states did not necessarily indicate that there had been any evolution in the customary international law concerning diplomatic protection.[127] In doing so, the Court reinforced the existence of a distinction between the substitution doctrine as a *lex specialis* and as customary

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As Higgins subsequently noted,

> [i]n the four decades since *Barcelona Traction*, the Court has not had occasion to rule on whether, in international law, there is indeed an exception to the general rule 'that the right of diplomatic protection of a company belongs to its national State', which allows for protection of the shareholders by their own national State 'by substitution', and on the reach of any such exception.

See Higgins, 'Speech delivered at the 59th Session of the ILC', above n 2, 15.

116 *ELSI (Judgment)* [1989] ICJ Rep 15.

117 *Diallo (Preliminary Objections)* [2007] ICJ [87] <http://www.icj-cij.org> at 23 May 2008.

118 *Elettronica Sicula SpA (US v Italy) (Oral Pleadings of the US)* (27 November 1987) 3 ICJ Pleadings 108–10.

119 *Draft Articles*, above n 8, 64–5. See also Dinstein, above n 109, 512; Christoph Schreuer, 'Shareholder Protection in International Investment Law' in Pierre-Marie Dupuy et al (eds), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (2006) 601, 603–4.

120 See *Diallo (Preliminary Objections)* [2007] ICJ [87] <http://www.icj-cij.org> at 23 May 2008.

121 *Draft Articles*, above n 8, 62–5.

122 [1964] ICJ Rep 6, 58.

123 [1970] ICJ Rep 3, 72–5 (Separate Opinion of Judge Fitzmaurice), 134 (Separate Opinion of Judge Tanaka), 191–2 (Separate Opinion of Judge Jessup).

124 [1989] ICJ Rep 15.

125 *Draft Articles*, above n 8, 62–5.

126 *Diallo (Preliminary Objections)* [2007] ICJ [89] <http://www.icj-cij.org> at 23 May 2008.

127 Ibid [90].

international law.[128] This move has been welcomed on the basis that it 'does much to dispel the fallacy that mixed arbitration in this context is a morphed form of delegated diplomatic protection'.[129] Unfortunately, the Court did not take the opportunity to explain precisely why the growth of this *lex specialis* has not contributed to a change in the position under customary international law in the way suggested in arbitral decisions such as *CMS Gas (Jurisdiction)*.[130]

There are at least two possible explanations for the distinction drawn by the Court between developments in the context of mixed arbitrations and developments in the customary law of diplomatic protection. First, while an action for diplomatic protection involves a state asserting a right on behalf of one of its nationals, international arbitration allows investors to bring claims directly and in their own names against the state of alleged wrongdoing. This was recognised by an ICSID Tribunal in the concurrent proceedings of *Camuzzi International SA v Argentina* and *Sempra Energy International v Argentina*, where it was stated that

> whatever may have been the merits of *Barcelona Traction*, that case was concerned solely with the diplomatic protection of nationals by their State, while the case here disputed concerns the contemporary concept of direct access for investors to dispute resolution by means of arbitration between investors and the State.[131]

Second, in order for a state bringing a claim of diplomatic protection to have *jus standi*, it is crucial to establish that a right of its national has been violated. In contrast, in mixed arbitrations the question is not whether a national's rights per se have been infringed, but whether a breach of an investment treaty by a state has caused loss or damage to an investment 'with sufficient directness'.[132]

In any event, while hostile to a general concept of substitution, the Court in *Diallo* has left open the possibility that a more limited substitution rule exists, allowing protection by substitution where incorporation in the state of wrongdoing was required as a precondition to doing business there.[133] As the Court recognised,[134] the ILC's art 11(b) provides only that:

> The State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless … [t]he corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and

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128 This distinction has also been recognised by an arbitral tribunal: see *Camuzzi International SA v Argentina (Jurisdiction)* ICSID Case No ARB/03/2 (11 May 2005) [145].

129 Kate Parlett, 'Role of Diplomatic Protection in the Protection of Foreign Investments' (2007) 66 *Cambridge Law Journal* 533, 535. An ICSID Tribunal has also recently commented that the Court in *Diallo* 'clearly recognised' the distinction between customary international law and the *lex specialis* of treaty-based investor–state arbitration: see *CMS Gas Transmission Company v Argentina (Decision on Annulment)* ICSID Case No ARB/01/8 (25 September 2007) [69], fn 56.

130 ICSID Case No ARB/01/8 (17 July 2003) [48].

131 *Camuzzi International SA v Argentina (Jurisdiction)* ICSID Case No ARB/03/2 (11 May 2005) [141]; *Sempra Energy International v Argentina (Jurisdiction)* ICSID Case No ARB/02/16 (11 May 2005) [153].

132 *GAMI Investments Inc v United Mexican States (Final Award)* UNCITRAL Arbitration (15 November 2004) [33] <http://www.state.gov/s/l/c7119.htm> at 23 May 2008.

133 *Diallo (Preliminary Objections)* [2007] ICJ [93] <http://www.icj-cij.org> at 23 May 2008.

134 Ibid [91].

> incorporation in that State was required by it as a precondition for doing business there.[135]

Similarly, in *Barcelona Traction*, Judges Fitzmaurice[136] and Jessup[137] stated the need for the rule is particularly strong where incorporation was required for the conduct of business in the wrongdoing state.[138]

Consistent with past authority, both the Court and the ILC treated the requirement to incorporate in a state in order to do business there as potentially giving rise to different legal rights. Logically, it is difficult to see why this would be so. In both cases, the investor has made a choice to conduct business in the state and has thereby assumed the risk that it will be subject to regulatory or other intervention. When both investors freely choose to conduct business in a foreign state, thereby assuming risk of regulation, why should one investor be denied diplomatic protection simply because they incorporated in the wrongdoing state? If 'considerations of equity' necessitate a substitution rule, there appears to be no good reason why the rule should benefit only those legally required to incorporate in a state as a prerequisite to doing business there. A cynical view might be that the distinction has arisen because it will reduce the number of diplomatic protection claims brought. Perhaps this is not surprising when the very existence of the doctrine is premised on 'considerations of equity' rather than any logical consistency with the principles of diplomatic protection.

V CONCLUSION

In 1992, Francis Mann noted that decisions in international commercial litigation rarely favoured investors and described the Court's approach in cases such as *Barcelona Traction* as 'particularly chilling'.[139] It cannot be said that *Diallo* has altered or affirmed that trend until the release of the Court's decision on the merits.

What can be taken from the Court's decision on the preliminary objections in *Diallo*, however, is a clearer picture of the type of shareholder rights that may be the subject of a claim for diplomatic protection. This is useful and important because, while disputes today are more likely to be resolved through arbitrations in which private parties bring their own claims than on the traditional

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135 *Draft Articles*, above n 8, art 11(b). In deciding that art 11(b) did not apply in *Diallo*, the Court 'chose a very narrow interpretation both of the facts and of the application of Draft Article 11, as Judge ad hoc Mahiou has pointed out in his declaration': Annemarieke Vermeer-Künzli, '*Diallo* and the Draft Articles: The Application of the Draft Articles on Diplomatic Protection in the *Ahmadou Sadio Diallo* Case' (2007) 20 *Leiden Journal of International Law* 941, 948–9.

136 *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 72–5 (Separate Opinion of Judge Fitzmaurice). Judge Fitzmaurice's preferred position was that 'the motives behind local incorporation were not something the Court should examine': John Merrills and Sir Gerald Fitzmaurice, *Judge Sir Gerald Fitzmaurice and the Discipline of International Law: Opinions on the International Court of Justice, 1961–1973* (1998) 44.

137 *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 191 (Separate Opinion of Judge Jessup).

138 For the view of the Judges in *Barcelona Traction* who denied the existence of the rule, see *Barcelona Traction (Judgment)* [1970] ICJ Rep 3, 257–8 (Separate Opinion of Judge Padillo Nervo), 240–1 (Separate Opinion of Judge Morelli), 318 (Separate Opinion of Judge Ammoun).

139 Mann, 'Foreign Investment in the International Court of Justice', above n 12, 92.

state-to-state basis,[140] seeking diplomatic protection via substitution remains available to foreign investors as a 'very last resort'.[141] As Pechota has observed, 'there are few if any treaty rules that are permitted to operate in complete derogation from general international law'.[142]

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140 Dodge, above n 64, 5.

141 *Diallo (Preliminary Objections)* [2007] ICJ [88] <http://www.icj-cij.org> at 23 May 2008.

142 Vratislav Pechota, 'The Limits of International Responsibility in the Protection of Foreign Investments' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 171, 175. See also Parlett, above n 129, 534.

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