

On Diplomatic Protection of Corporation from the Perspectives of the 1970 ICJ Judgment in the Barcelona Traction, Light, and Power Company Case

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Abstract

ICJ Judgment in Barcelona Case 1970 held that only national State of corporation can exercise diplomatic protection, national State of majority shareholders may not do so. Thirty nine years later, international regulations in this regard basically remain unchanged. ICJ Judgment in ELSI Case 1989 went straight to substantive issues without discussing if national State of shareholders has legal capacity to do so. The question whether ICJ has since changed its position deserves examination.

Nevertheless, recent international practices seemed to have changed slightly. Some treaties have defined nationals to include companies organized under the laws of a particular state, and natural persons who are citizens of such country hold, directly or indirectly, an interest in such company equivalent to 50% or more of its capital stock. The latest Draft Articles on Diplomatic Protection by UNILC provided that when the company is controlled by nationals of another State, has no substantial business activity in the State of incorporation, and when the seat of management and financial control of the company are both located in another State, that State shall be regarded as the State of nationality. Such inclusion of “genuine connection” will certainly impact upon development of customary international law. Many recent Bilateral Investment Treaties also seemed to confirm this point.

**Keywords: National State of Corporation , Diplomatic Protection of Corporation,
Barcelona Traction Company Case (1970) , Lifting No corporate Veil**

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從一九七〇年國際法院對巴塞隆納牽引、光、電 公司案判決探討國際法上對公司之外交保護

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摘 要

國際法院 (ICJ) 一九七〇年對巴塞隆納公司案之判決，認定公司本籍國才得為公司提出外交保護，公司大多數股東之本籍國不得提起。判決至今卅九年，國際法有關這方面的規範，基本上並未改變。一九八九年 ICJ 對西西里電子公司案之判決，卻直接審理實質問題，而未提到股東本籍國是否當事人適格。ICJ 是否變更見解，值得研究。

然而國際社會之實踐，最近似乎有些改變。若干條約對國民之解釋，包括依該國法律登記成立，且具該國國籍之自然人直接或間接持有資本總額一半以上之公司。聯合國國際法委員會通過之最新的「外交保護條款草案」認為，若公司在本籍國以外營業，受他國國民控制，而且其管理及財務控制地也在本籍國外時，則可將實際營業掌控地國視為公司本籍國。將「真實聯繫」納入考慮，當然會影響習慣國際法之發展。晚近許多投資條約，似乎也與此種看法一致。

關鍵字：公司本籍國，公司之外交保護，1970年巴塞隆納牽引公司案，不得揭開公司面紗

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