A RATIONALIZATION OF THE POST-NOTTEBOHM LAW OF THE NATIONALITY OF CLAIMS

PETER KINCAID*

When Papua New Guinea becomes independent one of the aspects of statehood with which it will rapidly become familiar is that of state responsibility for injury to individuals and companies. This responsibility arises from injuries by a state (as opposed to injuries by one of its inhabitants acting in a private capacity) to a "foreigner."

In a country like Papua New Guinea this concept is likely to b particularly important. Many foreign-owned companies operate here and many foreigners live here. Changing economic and political goals and experimentation in means of achieving these goals are bound to create conflicts with these foreign elements. The policy of keeping a greater share of the wealth from the Bougainville copper project in Papua New Guinea and the restrictive definition of citizenship proposed by the Constitutional Planning Committee are examples. Sometimes these conflicts will lead to allegations of breaches of international law.

There are four situations in which the problem may arise:

1. Mr X, a resident of Port Moresby, is beaten by a policeman in Sydney.

2. Mr W, a resident of Sydney, is injured in a riot in Port Moresby which the police take inadequate steps to control.

3. Z Pty Ltd, a company based in Port Moresby, complains that the Commonwealth government has broken a contract with it giving the company the exclusive right to exploit the copper resources of the Cape York Peninsula and that it has suffered an injustice at the hands of biased and drunken judges in its attempt to obtain redress in the High Court.

4. Y Pty Ltd, a company based in Sydney, complains that some of its assets in Papua New Guinea have been confiscated by the Papua New Guinea government without adequate compensation.

---

* Lecturer in Law, University of Papua New Guinea.

In situations 1 and 3, Papua New Guinea would be a plaintiff in an international claim and in situations 2 and 4 it would be a defendant. My object in this paper is to examine the degree of connection required between an individual or company and a state in order for the state to have the right to bring a claim before the International Court against another state with respect to injuries inflicted upon the individual or company by the second state.

I. *The Law before Nottebohm*

Before the *Nottebohm* case,[1] it was a generally accepted principle of international law that a state could claim only in respect of injury to its *national*, either natural of juridical. In addition, the injury must have been one classified as an international wrong. That is, the wrong must have been a wrong to a state as well as to the individual or company. Only if the injured person were a national of state A could it be said that an injury had been done to state A. A corollary of that idea was that a state incurred no international liability for injury to its own nationals.

The nationality of an individual was determined in international law by reference to the municipal law of the state seeking to claim on his behalf. Therefore, in example No. 1 above, the court would look to the law of Papua New Guinea. If X were a citizen of Papua New Guinea by Papua New Guinea law, then he would be so regarded in international law and Papua New Guinea's status to claim on X's behalf would be established. On the other hand, if X were not a citizen, Papua New Guinea could not claim. So, for example, if the citizenship recommendations of the Constitutional Planning Committee are adopted, X, although born here of a Papua New Guinean mother and a foreign father, brought up by his mother in the village, and educated here, would not be a citizen and thus Papua New Guinea would not be able to claim on his behalf.

The fiction of granting to companies a personality comparable to that of a natural person meant that a similar notion of "nationality" was applied to claims on behalf of injured companies. In common law countries a company's nationality was that of the law under which it was incorporated. In Continental countries,

---

1. The *Nottebohm* case (*Liechtenstein v. Guatemala*) [1955] ICJ Rep 7, extracted in W. Holder and G.A. Brennan, *The International Legal System* (1972) 474.

it was the law of the *siege social*, or the place of the head office. In other words, nationality of companies was also a matter for municipal law, different systems basing nationality on different factors just as with individuals.

The status of a state claiming on behalf of an individual was, then, determined by an easy formula. If X were a national of Papua New Guinea by Papua New Guinea law, then the state's status would be established, but if he were not, then no other degree of connection between X and Papua New Guinea would suffice. Similarly with companies: if Y Pty Ltd were incorporated in Papua New Guinea that was enough, but if not, then the fact that the company was owned by Papua New Guineans, paid taxes here, and carried on most of its business here would not be enough to give Papua New Guinea status before the International Court. The test required a formal connection between the individual or company and the plaintiff state and the connection was determined by the municipal law of the plaintiff state. It was only in the case of a conflict between two municipal systems that substantial connection became relevant. Conflicts could arise only where the injured person or company had dual nationality. An individual may have dual nationality by being born in a state which grants nationality according to place of birth, of parents whose national state granted nationality at birth according to nationality of the father. For example, a person born in the United States of a British father will be a national of both states. If an international dispute occurred between Britain and the United States over him, then traditional law provided two possible solutions. The first held that neither state of a dual national had *locus standi* against the other. This left the individual with no state able to seek an international law solution on his behalf. This is the view still held by England, although most states have adopted the theory of dominant nationality which holds that only the state with which the individual has the most substantial connection has *locus standi*.[2] If the minor state objects to treatment of its national by the major state, international law will, in this conflict situation, regard that injury as one by a state to its own national and therefore not an international wrong.

However, in a case where X is a national of states A and B and the dispute arises between A and C could C dispute A's *locus standi* by arguing that X's substantial connection was with B, not A? The answer was no: as long as X was a national of the plaintiff it had *locus standi* against a non-national state,

---

2 M. Akehurst, *A Modern Introduction to International Law* (1970) 124.

regardless of any more substantial connection with a third state.[3] Substantial connection as a basis for determining *locus standi* was limited to real conflicts between states of a dual national; in all other cases nationality as determined by the relevant municipal law was sufficient to give standing. International law did not impose any objective standards which could render nationality, valid by municipal law, invalid in international law.[4]

It is possible for a company to have dual nationality, too. If it is incorporated in A (a common law state) but has its head office in B (a civil law state) then A will regard the company as its national by incorporation and B will regard it as its national by the *siege social*. It is possible, also, for a company to be incorporated in more than one state. In both kinds of conflict between states the same rules applied as for individuals: some authorities held that neither state had status against the other, and some held that the dominant nationality had status.

International law, then, was in general agreement that nationality in itself gave a state status to claim, without any substantial connection except in the case of a direct conflict between the two states of a dual national. There was also agreement that no amount of substantial connection without nationality could give a state status.

However, these legal rules did not always reflect practice. Although claims on behalf of non-nationals were never recognized, it was common practice for a state to refrain from claiming with respect to a national with insufficient substantial connection. For example, if a naturalized individual had lived abroad for a long time in such a way that he could be said to have severed all but formal ties with his national state, then the state would normally not exercise its right to claim on his behalf.[5] In the case of companies, the United States has adopted a policy of refusing to claim on behalf of companies incorporated in the United States in which American citizens have less than a 50% shareholding.[6]

---

3. D.W. Greig, *International Law* (1970) 406.

4. A qualification to this statement is that international law did not recognize a blanket imposition of A's nationality upon the nationals of B.

5. *The Nottebohm* case [1955] ICJ Rep 4.

6. Harris, "The Protection of Companies in International Law in Light of the Nottebohm Case" (1969) 18 *ICLQ* 275 at 279.

Britain's practice is also restrictive but emphasizes, not nationality of shareholding, but place or nationality of control. A company incorporated in the United Kingdom has sufficient connection with that country if the seat of control is there (i.e., the controlling decisions are taken there) or, if not, then if most of the directors are British.[7] Nationality of shareholding is irrelevant in Britain, just as place or nationality of control is irrelevant in the United States.

Although states have followed these limiting policies, they have repeatedly affirmed their right to bring a claim on behalf of any national, regardless of lack of substantial connection. It is arguable that the sense of obligation necessary for the formation of a new customary rule of international law is thus lacking. This argument is strengthened by inconsistencies in practice. For example, when Britain makes a global agreement with another state for the compensation of all British nationals suffering expropriation by the other state, the right to share in the proceeds extends to all companies concerned as long as they are incorporated in Britain, regardless of place or nationality of control.[8]

II. *The Nottebohm Case*

In 1955 the International Court of Justice rendered its decision in the *Nottebohm* case between Liechtenstein and Guatemala.[9] The decision changed the law in the particular area of Nottebohm's facts and introduced confusion into the whole subject of the nationality of claims, a part of international law which had been remarkable for being reasonably settled and clear.

Nottebohm was a German national, born in Hamburg in 1881, who took up residence in Guatemala in 1905. Although he retained German nationality and returned to Germany occasionally on business, Guatemala became the "centre of his interests and of his business activities" and remained so for the 38 years he lived there.[10] In 1939, immediately after the outbreak of the war, Nottebohm went to Liechtenstein and was granted Liechtenstein citizenship, the condition of three years' residence being dispensed with, as was possible under Liechtenstein law.

---

7 *Ibid.*, 305.

8 *Ibid.*, 279.

9 *Supra* at footnote 1.

10 W.E. Holder and G.A. Brennan, *The International Legal System* (1973) 478.

Nottebohm had no other connection with Liechtenstein and stayed there for only three weeks after his naturalization. He then returned to Guatemala where he stayed until 1943 when, in pursuance of measures directed against enemy nationals, he was expelled from Guatemala and his property confiscated, or so it was alleged. It was on the basis of this alleged breach of international law and wrong to Nottebohm's national state (Liechtenstein) that this action was commenced by Liechtenstein against Guatemala. The latter objected that the plaintiff state had no status to pursue a claim for an injury to Nottebohm because, although he was a national of Liechtenstein, he had no substantial connection with that state. The court accepted that argument, holding that although the conferring of nationality by naturalization is a matter to be determined by reference to the municipal law of the state claiming that the individual is its national, yet that state will only have status to claim internationally on his behalf if he has a substantial connection with the state.

The narrowest *ratio* to be derived from *Nottebohm* is that a plaintiff state, when claiming on behalf of a *naturalized* national, must show a more substantial link between the individual and the plaintiff than exists between the individual and the defendant. The decision on the fact need be expanded no further. Nevertheless, the introduction of the idea of substantial connection or genuine link as a qualification upon nationality may be the tip of an iceberg on which the whole concept of nationality as the basis for status may eventually founder. Many wider possibilities may be derived from the case. For example, would Nottebohm's substantial ties with Guatemala, as compared to Liechtenstein, have prevented the latter's claim against a third state with whom Nottebohm had no ties? At one point the court said that nationality constitutes "the juridical expression of the fact that the individual upon whom it is conferred...is in fact more closely connection with the population of the State conferring nationality than with that of *any other State*"11 (my emphasis). However, Harris concludes that the court in fact applied a test comparing Nottebohm's degree of connection with the plaintiff and defendant states only.12

---

11. *Ibid.*, 477.

12. Harris, *op. cit.*, 281.

A. *The Effects of Nottebohm*

The International Court's decision did not affect the validity of Nottebohm's Liechtenstein nationality for other purposes. It did not purport to say that he had somehow reverted to his German nationality because the Liechtenstein grant did not accord with international law. When Nottebohm became a citizen of Liechtenstein he ceased, by German law to be a citizen of Germany. The effect of the decision for Nottebohm himself was that no state could claim on his behalf. Liechtenstein couldn't do it because of his insufficient connection; Germany was not capable because he was not a national. As an individual, Nottebohm could not bring an international claim himself, so there was no way for him to have the merits of his case adjudicated internationally.[13]

To what extent has the idea of a genuine link, as advanced in *Nottebohm*, brought about changes in the role of nationality of entities other than individuals? The 1958 *Convention on the High Seas* provides in Article 5,"Each state shall fix the conditions for the grant of its nationality to ships.... Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship..."[14] This provision seems to reflect *Nottebohm* thinking, although the real reason for its inclusion was probably political, an attempt by the traditional maritime states to bring pressure against the "flag of convenience" states like Liberia and Panama.[15] But nationality is here being referred to in its jurisdictional aspect, not that relating to international claims. In other words, a possible result of this convention is that a ship without a genuine link with her state of registration would have no nationality and no one would be able to exercise jurisdiction over her. The convention prohibits a ship from having dual nationality, which makes the likelihood of creating stateless ships even greater. It is interesting to note that the "genuine link" referred to in the convention appears to be assessed by an absolute standard: the ship's links with the state must be greater than a certain level below which nationality cannot be claimed. The test in *Nottebohm*, on the other hand, appeared to be relative. In the narrow view, the links had to be greater than those with the defendant; in the broader view the links had to be greater than those with any other state, whether a party or not.

---

13 The ways in which the position of the individual could be affected by extensions of the *Nottebohm* theme are considered below.

14 (1963) 450 *UNTS* 82.

15 Greig, *op. cit.*, 310.

What about companies? It is possible for the narrow rule of *Nottebohm* to be applied directly to companies. The result would be that nationality (i.e., incorporation or *siege social*) would not in itself give the national state status to claim if there were insufficient connection between it and the company. The consensus of opinion seems to be that the rule has not been extended to companies. The evidence is only of a negative sort, but in cases where the issue could have been raised, it has not been. Harris gives an example:

> In the *Interhandel Case 16*, neither Switzerland nor the United States referred to anything resembling a "genuine connection" requirement in their pleadings; on both sides it was apparently assumed that Switzerland could protect Interhandel because it was its national. This is particularly interesting since the case was very largely concerned with the question of the control of Interhandel and it could be imagined that had the United States considered that any requirement beyond that of nationality had to be satisfied it would have referred to it. It is also noticeable that the Court did not *proprio motu* in its judgment on the preliminary objections refer to any question of *locus standi* in this respect.[17]

The conclusion seems to be justified, then, that *Nottebohm* has been confined to individuals, with the peculiar exception of its extension to the nationality of ships. However, state *practice* with respect to claims on behalf of companies has long reflected a *Nottebohm*-type idea that companies should only be afforded protection if they have a substantial connection, however that might be defined.

B. *Evaluation of the Present Law*

The present law has gone either too far in the introduction of a substantial connection test or not far enough. Nottebohm himself was a victim of the shortcomings of the rule. Germany couldn't protect him because that right was reserved to the national state. Liechtenstein was his national state but couldn't protect him because of the lack of a substantial connection. It may be argued that this result is consistent with the ideas underlying *Nottebohm:* since Nottebohm's substantial connection was with Guatemala, that country's injury to him did not create an international wrong. That reasoning would be acceptable if his connection with Guatemala gave Guatemala standing to protect him, for example, had he been injured by Costa Rica. But it did not. The court assumed throughout that

---

16. [1959] ICJ Rep 6.

17. Harris, *op. cit.*, 287.

substantial connection was a qualification on nationality, not an alternative to it. Because substantial connection can be used as a shield but not as a sword, an individual may find himself under the protection of no state. The severity of this disability will depend upon the nature of the test of connection used. If an absolute level is required, then an individual with a single nationality, but whose connection with his national state is below that level, would never have a protector. If a relative test is used, but one which requires that the individual's connection with his national state be greater than with any other state, then, if he is more closely connected with some other state, he will be without a protector against injury by a state with whom he has a substantial connection, but his national state will be able to protect him against states with whom he has no connection. The logical result of this test would have been that Liechtenstein could have claimed on Nottebohm's behalf against Costa Rica but not against Germany. The potential injustice to the individual in this third situation is increased by the fact that it is, of course, the states with whom an individual has some connection who are most likely to injure him, for example, by confiscating property.

Nevertheless the third alternative seems to be the better one and it is this test which Harris suggests the court adopted in *Nottebohm*. Certainly the decision on its facts can be confined to this rule, although the language used by the court suggests it had in mind the second alternative, that the connection must be greater with the plaintiff national state than with any other state:

> the Court must ascertain whether the factual connection between Nottebohm and Liechtenstein ... appears to be ... so preponderant in relation to any connection which may have existed between him and any other state, than it is possible to regard the nationality conferred upon him as real and effective....[18]

These criticisms assume that the court's objective ought to be to protect the individual, who has no international status of his own by which he can obtain international adjudication. Without such status, his only legal possibilities of redress are proceedings in the courts of the defendant state or proceedings in the municipal courts of some other state. The first alternative is useless to him, since it is only after the individual has exhausted his local remedies or the judicial system has denied him justice that the matter goes to international adjudication anyway. The second alternative is, in most cases,

---

18. Holder and Brennan, *op. cit.*, 477.

made useless by the doctrine of sovereign immunity which prohibits domestic courts from taking jurisdiction over a foreign sovereign unless he submits. Individual protection is, of course, not the historical or formal basis of claims by a state for injury to its national. The theory is that the state itself is wronged and is claiming not on *behalf* of its national but in *respect* of him. In the *Panevezys-Saldutiskis Railway* case[19] the court said that "by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law."[20] But the measure of damages is that suffered by the individual or company and, though the matter is in the discretion of the state, these are normally turned over to the injured national.

If the law concentrates solely upon injury to the state, then a system which allows certain injuries to foreigners to go unremedied is acceptable, because by this reasoning no cause of action in favour of a state has arisen. But if the law is expected to protect individuals, then a system that fails to provide remedies to certain persons is unacceptable. It appears that the real object of the law of claims for injuries to foreigners is to provide them, not their states, with a remedy when one cannot be obtained at the municipal level, but statements like those made in the *Panevezys-Saldutiskis case*[21] indicate that the formal object of the law of claims clings to the idea that an international wrong is one to a *state*. The *Nottebohm* decision was an attempt to rationalize the formal theory by allowing a state to claim only if its connection with its national was such that injury to him could be said to be in some real sense an injury to the state. If the formal theory is accepted, then *Nottebohm* probably accomplishes its purpose, although the nature of the injury a state suffers by injury to its national individual is vague at best. To "ensure in the person of its nationals respect for the rules of international law" is a pretty insubstantial objective. Is it an injury to its pride that is to be redressed? If so, then by such a formal notion of injury, the state's pride is as much hurt by damage to a national with whom it has only the formal connection of nationality. The courts are certainly not talking about economic loss to the plaintiff state, or a non-taxpayer would not deserve protection. The idea of injury

---

19 (1939) PCIJ Ser. A/B No.76.

20 See D.P. O'Connell, *International Law*, vol.II (1965) 1118.

21 *Supra* at footnote 19.

to the state itself appears to be an ill-defined concept necessitated by logical consistency. Thus, if the real basis for international claims is redress of an injury to the national himself, *Nottebohm* is a regressive step because it reduces the instances in which such redress may be obtained.

III. *Suggestions for Reform*

The root of the inequities in this area of the law is that individuals and companies have no status to proceed internationally on their own behalf. The most obvious solution would be the development of a third body of law and third level of courts, in addition to international and municipal, which would allow direct international adjudication of disputes between persons and states. An example of the *ad hoc* use of this solution is the *Abu Dhabi* case in which an arbitrator was appointed for the resolution of a dispute between an oil company and a state.[22] The arbitrator employed neither international law nor municipal law as such, but "general principles common to civilized nations." Such a system, if organized on a permanent and general basis, would achieve two objectives. First, it would give persons and companies the necessary status to seek redress on their own. Second, it would expand the subject matter which could be adjudicated internationally. For example, a state's breach of a contract between itself and a multinational company is not now an international wrong unless it is followed by a denial of justice. However, the application of municipal law (particularly that of the defendant state which may have legislated the breach) will often be inappropriate for the resolution of the dispute. The "transnational" system would provide a court and body of law for the resolution of disputes which are neither purely municipal nor truly international.[23]

However desirable such a solution might be, it would represent a radical departure from the existing order of things. It is perhaps more realistic to look at the ways in which the law can be adjusted within the present framework to better achieve the objective of redress of wrongs by states to persons, natural or conceptual. Two alternatives suggest themselves: either an erasure of *Nottebohm* and a return to simple nationality as the

---

22 (1951) 18 ILR 144. See remarks on this case in Greig, *op. cit.*, 429.

23 A term coined by Jessup in his *Transnational Law* (1956) 3; see also Holder and Brennan, *op. cit.*, 297.

test of status, or an extension of *Nottebohm's* idea of substantial connection so that substantial connection, even without nationality, gives a state sufficient status to claim on behalf of a person. Both these alternatives would mean that in any given situation at least one protecting state would exist, unlike the present situation where it is quite possible that no state has status.[24]

The alternative of returning to simple nationality, determined by municipal law, has a number of points in its favour. It makes status easily determinable. It is easy for an individual to know which state he should approach for protection. The state, too, will seldom be in doubt as to which persons it has the capacity to protect. The evidentiary problem for courts will be correspondingly simple. A second advantage is that little change is required in court practice, since the old law relied on nationality by naturalization. The principle has not yet been extended to require a substantial connection between the individual and his state of nationality by birth. It is a fallacy to assume that birth in a country implies any more substantial a connection than naturalization. A state using the place of birth theory will grant nationality to a baby born in an aeroplane or ship of that nationality, even over or on the high seas. A state using the father's nationality theory may grant nationality to a baby born abroad to a father of that nationality, even though the father may have lived abroad since early childhood. And yet nationality is still sufficient to give status to the country of a born national, even in the absence of substantial connection. As pointed out above, the *Interhandel* case indicates that *Nottebohm* has not spread to companies, so that, in their case nationality is still apparently sufficient in law without any connection test.[25] It would thus only be the area of the law dealing with naturalized individuals that would need to be erased.

How easily could *Nottebohm* be overcome? The decision is not based upon strong reasoning. The court characterized protection of the individual as the "defence of the rights of the state."[26] Such a characterization is legalistic and artificial. A recognition by a court of the real objective of this area of the law could entitle it to disregard *Nottebohm* on that basis. A second weakness of the decision is that the only legal precedents

---

24 It is true that under a simple nationality test, stateless persons would have no protection, an argument in favour of the substantial connection idea.

25 *Interhandel* [1959] ICJ Rep 6.

26 *Supra* at footnote 1.

to which the court refers for its idea of substantial connection is a series of cases on dual nationality. The rule holds that in a dispute between the two states of a dual national the state with the more substantial connection has status. This rule is a special exception to solve a problem of conflicting claims to status. It does not leave the individual without a protector; it simply decides, as between those two states, whether the individual has been injured by his "own" national state (a domestic matter) or by a "foreign" state, in which case international adjudication will be possible. The function and effect of this application of the substantial connection test are quite different from those of the *Nottebohm* rule and do not constitute a convincing precedent for it.[27] One final and obvious technique for dispensing with *Nottebohm* is provided by Article 59 of the *Statute of the International Court of Justice*, which states that "The decision of the Court has no binding force except between the parties and in respect of that particular case."

The simple nationality test has some disadvantages, including the practical problem that a state with little connection with its national may feel little interest in pursuing a claim on his behalf. As far as the national is concerned, it is not much use having a law which assures him that his state has status to pursue a claim on his behalf, if the state in practice is unwilling to do so. To overcome this difficulty it would be necessary for states to regard protection as a duty rather than a privilege.

Also, a pure nationality test can lead to irrational results. A person may acquire one nationality by birth but have all his connections with another state. For example, many people of British nationality live in Argentina. Some families have lived there for generations. An individual may never have been to England but have acquired British nationality by birth through registration within a specified period after birth as the child of a British national. Could England claim on behalf of such a person against Argentina? The case does not fall within the *Nottebohm* rule and the answer appears to be yes. The objection to this result is that such a person's dealings with Argentina are in reality a domestic matter, and British nationality should not give him special international protection unavailable to his fellow permanent residents of Argentina who happen to be Argentine nationals.

The main advantage of the substantial connection test is that it prevents the inequity of an Anglo-Argentine situation. But

---

27 O'Connell, *op. cit.*, 739.

in order to achieve the objective not only of rationality but of rational *protection*, adoption of the substantial connection test must be accompanied by abandonment of the nationality requirement. The application of this test would result, not only in Britain being unable to claim on behalf of her insubstantially connected nationals in Argentina, but would also mean that their "most substantial connection" with Argentina would give that country status to claim on their behalf. It is in this respect that *Nottebohm* is deficient: it does not advance far enough into substantial connection to abandon nationality. Probably, states will be more likely to act on behalf of a substantially-connected non-national than on behalf of an insubstantially-connected national, so the practical likelihood of an individual obtaining international redress will be greater.

The chief disadvantage of this test is its vagueness. What criteria are to be applied to determine substantial connection, and, in any given situation, what weight will a court give to each criterion? Individuals, and the states involved, will be uncertain which state will have the right to protect them, and this uncertainty may lead to an unwillingness to intervene. The *Nottebohm* case mentions a number of criteria for individuals. These are the habitual residence of the individual, his centre of interests, his family ties, his participation in public life, the attachment shown by him for a given country and inculcated in his children, "etc." The "etc." shows that substantial connection in any given case will depend upon a subjective assessment of many aspects of the person's life and personality. Many other criteria could be included in the "etc.", such as place of education, languages spoken, and possibly domicile, the intention to reside permanently.

The practical difficulties of applying the substantial connection test are illustrated by a hypothetical case. Imagine a man born in Poland, who was made stateless at the age of 22 by revocation of his citizenship when he left the country. Most of his family have emigrated to the United States, but some are still in Poland. He goes to Canada for two years as a student, then takes a job in Papua New Guinea for three years. At the end of that time he is granted Canadian citizenship, having been technically resident in Canada during his stay in Papua New Guinea. He then takes a permanent University job in Australia, but frequently travels to Noumea, New Caledonia, where he had invested money. His children are sent to school in Canada but live during the holidays with his parents in the United States. His wife is a Papua New Guinean citizen. He sends a lot of money to relatives in the United States and Poland, mostly from his business interests in New Caledonia. He plans to retire to a village in the Central District of Papua New Guinea at the end of his academic career in Australia. He is beaten up by a policeman in Djakarta and seeks international redress for his injury.

By the substantial connection test, which state can claim on his behalf?

In a rational set of criteria, nationality would be relevant but not conclusive. It is possible that a non-exclusive test of connection could be adopted. That would mean that any country with which he had any connection greater than that with the defendant could claim. In this example, Poland, Canada, Papua New Guinea, Australia, France (New Caledonia), and possibly the United States could claim against Indonesia. The likelihood of his getting some state to plead his case is perhaps greater, but the disadvantage is that with so many possible states, none of them will feel any responsibility to claim on his behalf. But if an exclusive connection test is adopted, the situation is worse, because each country may assume that, with so many possibilities,status is held by one of the others, and each may leave it to another. Difficulty of determination is not of itself a reason for discarding a legal test, but it must be put into the balance.

With respect to claims on behalf of companies, there are also three possible approaches to determine status of the protecting state. One is nationality, but as O'Connell points out, this word does not have the precise meaning it does for individuals, but is an analogy to individuals applied to companies.[28] It should perhaps be replaced by "national character," but in any case nationality or national character of a company is determined by different criteria in different countries, using either place of incorporation or *siege social*. The second possible alternative for the determination of status is a *Nottebohm* test: nationality (determined by municipal law) with a rider requiring substantial connection. This alternative is unacceptable because it leaves some companies without protection, as in the case of individuals. The third possibility is a pure substantial connection test, but again we are faced with the problem of what criteria to use. Nationality, as the term is presently used, would be an obvious factor. Others could be the place of control and management, the place where taxes are paid, the place where business is carried on, the nationality of the directors, or the nationality of the shareholders. However, it is technically inconsistent to talk about nationality of shareholders or directors, for if the character of the shareholders is being used to indicate a connection of the company with a state, then one should find what state each shareholder is most closely connected with, his nationality being simply a factor in this sub-test. Application of the substantial connection test for the company is

---

28 *Ibid.*, 1124.

becoming a trifle complex.

Another difficulty is the weighting of criteria. For example, if it is assumed that a company's economic connection with a state should give it status to claim, does that mean the company's actual contribution to the economy by payment of taxes, or contribution through carrying on business there and providing services and employment, or contribution by paying dividends to national shareholders? This raises again the subsidiary problem of the nationality of shareholders. To be economically significant, dividends paid to national shareholders should be spent in the national country, so that residence becomes an element in deciding the substantial connection of the individual.

The *Interhandel* case shows that even after *Nottebohm* nationality alone is still sufficient to give a state status to claim on behalf of a company.[29] A true substantial connection test would allow a state to claim on the basis of substantial connection even without incorporation. In the *Barcelona Traction, Light, and Power Co Ltd* case (*Belgium v. Spain*) this possibility was raised and rejected.[30] A company incorporated in Canada was allegedly denied justice by Spain, where it operated. Eighty-eight per cent of the shareholders were Belgians, so that by the nationality of shareholders test the company had a very substantial connection with Belgium. Canada's interest was small, and as it did not choose to press the claim, Belgium tried to do so. The International Court of Justice held by 15 votes to one (the Belgian *ad hoc* judge being the sole dissenter) that even though Belgium was the national state of a majority of the shareholders it did not have a right of protection or *jus standi* before the court.[31] The court denied any right in a state to claim on behalf of national shareholders unless the injury could be characterized as an injury to their rights as shareholders rather than one to

---

29 [1959] ICJ Rep. 6.

30 [1970] 46 ILR 1.

31 See [1970] 46 ILR 1 at 8. *Ad hoc* judges apparently behave more like advocates than judges as they usually decide in favour of their state. The idea that the court should have access to an expert acquainted with the peculiarities of the national law and conditions of a party seems wise, but this function could as well be carried out by advocates. If *ad hoc* judges give as much of an impression of disguised partiality generally as they do to me, the institution can hardly help the reputation of the court as an impartial judicial body.

the company as a separate person:

> Yet even if a company is no more than a means for its shareholders to achieve their economic purpose, so long as it is *in esse* it enjoys an independent existence. Therefore the interests of the shareholders are both separable and indeed separated from those of the company, so that the possibility of their diverging cannot be denied.[32]

The status of Canada, the state of incorporation, to sue was expressly recognized, the court rejecting any analogy in this case with the issues raised in *Nottebohm*. Whilst recognizing that the practice of states is often to withhold protection from national corporations without some substantial connection, the court said "...no absolute test of the 'genuine connection' has found general acceptance."[33] It concluded that Barcelona Traction's incorporation in Canada for fifty years was adequate substantial connection, although its activities and shareholders were abroad. Although the court says, "Barcelona Traction's links with Canada are thus manifold,"[34] and thus appears to adopt the language of substantial connection, it is clear from the context that the court is in fact reaffirming that incorporation itself provides adequate connection. Incorporation alone is sufficient to give status, and only the state of incorporation (or *siege social*) can have that status.

There are several criticisms that can be made of the incorporation test for companies. One problem might arise if a country requires incorporation there as a prerequisite to carrying on business, and so creates, in effect, a sort of cast-iron Calvo Clause, for the company has no recourse to an international forum in a dispute with its own state. However, it is possible to give a company dual nationality by incorporating it elsewhere as well, and in some instances, incorporation in the state will not protect the state from international responsibility, even in the absence of dual nationality. If the harm is to the shareholders as such, their national state may claim, for example, if shares are confiscated, or if all the assets of the company are seized, reducing it to an impotent shell with no viability as an

---

32 *Ibid.*, 210.

33 *Ibid.*, 216.

34 *Ibid.*

economic entity.[35]

As an attempt to rationalize the law of status to claim on behalf of a person or company, *Nottebohm* has failed in two ways. First, it leaves naturalized individuals without protection in some instances. Second, it has not been applied to companies and it is not clear whether it applies to nationals by birth. Rationalization of the law can take place by regressing to a test of simple nationality or by advancing to a test of substantial connection. The inequities inherent in the nationality test are more than compensated by the simplicity and clarity of the test. The rational appeal of the substantial connection test is more than neutralized by the difficulty of its application and the resulting unpredictability. I conclude, therefore, that on balance the objective of providing international protection for individuals and companies unable, under the present system, to initiate action themselves, can best be achieved by giving the national state status to claim regardless of substantial connection, confining use of the connection test to the resolution of conflicts between the two states of a dual national.

I concede that one is still left with the shortcomings of state practice. The right of a person's national state to claim on his behalf is meaningless if it is unwilling to do so, but the answer to this difficulty is political rather than legal. The remedy lies in convincing states that they have a responsibility to afford opportunity for redress to any individual or company who is their national and who alleges he or it has been injured by the act of another state. This right to support from one's state is analagous to the right to counsel in municipal law, but more basic since in international law a person does not have the option of arguing the case himself. State responsibility to provide this service for their nationals, regardless of lack of substantial connection, could I suggest best be emphasized by a United Nations resolution.

---

35 See *Delagoa Bay Railway Company* case (1893) 5 Brit Dig 535; Greig, *op. cit.*, 417. At 313, Greig notes that it is reasonable to give status to the state of incorporation, because it is that state which determines the creation and extinction of the company.