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that, apart from obligations undertaken by treaty, a state is entitled to treat both its own nationals and stateless persons at discretion and that the manner in which it treated them was not a matter with which international law, as a rule, concerned itself.

However, the need for international rules to protect individuals from inhuman treatment by states, even if the state is that whose national the individual still opens to question, the present scope of rules of international law which serve to protect the individual from treatment which denies the basic rights of a human being has involved a fundamental change in this area of international law. Thus, first, a state is bound to respect certain fundamental rights of aliens resident within its territory although it might be said that the rights in question are not international rights of the aliens, but of their own state. Secondly, the various treaties for the protection of religious and linguistic minorities signified the tendency to extend recognition, by means of international supervision and enforcement, to the elementary rights of at least some sections of the population of the state. Finally, the principle and practice of humanitarian intervention, and, in more recent years, an imposing array of treaties of a humanitarian character, such as those for the abolition of slavery, of the slave trade, and of forced labour, for the protection of stateless persons and refugees, for safeguarding health and preventing abuses injurious to it, for securing humane conditions of work, and for the protection of human rights generally, have testified to the intimate connection between the interests of the individual and international law. The Charter of the United Nations, with its repeated recognition of 'human rights and fundamental freedoms', inaugurated a new and decisive departure with regard to this abiding problem of law and government. In some instances - as, for example, in the European Convention on Human Rights, and the two United Nations Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights - that development has assumed the complexity of explicit rules legally binding upon states.

NATIONALITY


§ 378 Concept of nationality Nationality of an individual is his quality of being a subject of a certain state. It has origins in the notion of allegiance (1)
owed by the subject to his king, and traces of that underlying notion remain. In principle, and subject to any particular international obligations which might apply, it is not for international law but for the internal law of each state to determine who is, and who is not, to be considered its national. However, in its Advisory Opinion in the case concerning Nationality Decrees Issued in Tunis and Morocco the Permanent Court of International Justice emphasised that the question whether a matter was solely within the jurisdiction of a state was essentially a relative question, depending on the development of international relations, and it held that 'in the present state of international law questions of nationality are ..., in principle, within this reserved domain'. The Court added that even in respect of matters which in principle were not regulated by international law, the right of a state to use its discretion may be restricted by obligations which it may have undertaken towards other states, so that its jurisdiction becomes limited by rules of international law. Further, as stated in Art 1 of the Hague Convention of 1908 on Certain Questions Relating to the Conflict of Nationality Laws (see § 395), it is for each state to determine under its own law who are its nationals, such law must be recognised by other states only 'in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'.

Thus, although nationality is essentially an institution of the internal laws of states, and the international application of the notion of nationality in any particular case must be based on the nationality law of the state in question, the determination by each state of the grant of its own nationality is not necessarily to be accepted internationally without question. In the Nottebohm case the International Court of Justice said that:

'the State cannot claim that the rules [pertaining to the acquisition of nationality] which it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.'

For the conclusion that accepting the protection of a state involves owing allegiance to it, and thus becoming a subject of it, see Logan v. Styer (1959), ILR, 27, p 239. See also § 78, n 12 and 385, n 7, as to common allegiance to the Crown in Commonwealth countries, and § 404, n 4, as to an alien's local allegiance; and, for an earlier consideration of the role of allegiance in relation to nationality law, Fraser, Grotius Society, 16 (1992), p 275. The idea of nationality being subject to control by the state is by no means new, and the term 'national' in relation to Denmark is defined as including certain nationals of Norway and Sweden (see § 418, n 2). This practice has been followed by other Nordic States, see Art 2 of the Swedish-Isreali Extradition Treaty 1963 (UNTS, 516, p 16); and see also the declaration of Nordic States to the European Convention on Extradition 1957 (§ 418, n 2).

For the meaning of the term 'nationals' when used in relation to the UK in the European Community Treaties see the declaration made by the UK Government on signature of the Treaty of Accession 1972 (TS No 1 (1973), p 282); the declaration was replaced by an amended text in 1982: see TS No 67 (1982), and Sammon, CML Rev, 21 (1984), pp 675-86. See also the text of the 'Genuineness of Nationality', § 383, n 3. Many agreements for the settlement of claims contain clauses specifying the definitions of the nationals whose claims are being settled.

See the Advisory Opinion of the PCIJ in 1923 on the Nationality Decrees Issued in Tunis and Morocco (French Zone), Series B, No 4, at p 24; the Nottebohm case, ICJ Rep (1955), pp 22 (and note the passage from the judgment quoted at n 12 of this §); Storey v Public Trustee (1958) 2 Ch 67; Re Chamberlain's Settlement [1921] 1 Ch 533; Oppenheimer v Cattermole (1976) AC 249. Articles 1 and 2 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930, provides that 'it is for each State to determine under its own law who are its nationals' and 'Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State'.

As an example of treaty obligations conferring on questions of nationality an international character, see the examples below, to be exclusively a matter for the state concerned, see the arbitration between Germany and Poland concerning the Acquisition of Polish Nationality (1924), RIAA, 1, p 401. Note also the decision of the Inter-American Court of Human Rights that while the concept and regulation of nationality fell within the jurisdiction of the state, this principle was limited by the requirements imposed by international law for the protection of human rights: see the proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (1984), ILR, 79, p 283.
The Court regarded nationality (at least as a concept applicable on the international plane) as:

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

The Court found that there was no bond of attachment between Nottebohm and Liechtenstein, and that there was a standing and close connection between him and Guatemala, a link which his naturalisation in Liechtenstein had in no way weakened; that naturalisation had been granted without regard to the concept of nationality adopted in international law. Accordingly, the Court held that Guatemala was under no obligation to recognise Nottebohm's Liechtenstein nationality, and that Liechtenstein could not institute proceedings against Guatemala in respect of damage suffered by him.

Similarly, notwithstanding the general principle that it is for each state to determine who are its nationals, a state's assertion that in accordance with its laws a person possesses its nationality is not conclusive evidence of that fact for considerable discussion, much of it critical. The general lines of criticism have included one or more of the following arguments: (i) the 'link' theory was not argued by the parties before the Court; (ii) the Court transferred the requirement of an 'effective connection' from the context of dual nationality to a situation involving only one nationality; (iii) the Court did not in its judgment adequately consider the implications of its adoption of the 'link' theory in matters of diplomatic protection (to what extent can the state of which a person possesses purely formal nationality protect him against a state other than that of which he enjoys effective nationality) or in other matters (eg can the state of formal nationality exercise jurisdiction over the person or in other countries, and does the 'link' principle apply only to the acquisition of nationality by naturalisation?). In the Flegenheimer Claim, ILR, 25 (1958-I), pp 91, 147-50, it was considered that a person who had only one nationality was not to be regarded as disinclined to rely on it against another state because he had no effective link with the state of nationality but only with a third state. See also § 395, n 2. On the Nottebohm case see Brownlie, BY, 39 (1963), at pp 245-6; Parry, Hug, 90 (1956), ii, pp 704-12; Makarov, ZOV, 16, pp 407-26; de Visscher, RG, 50 (1956), pp 238-66; Lowenstein, Gratiai Society, 42, pp 5-22; M Jones, ICLQ, 5 (1946), pp 147-78; Pearson, Recueil d'études de droit international on hommage à Paul Guggenheim (1968) pp 833-87; Judge Fitzmaurice (Separate Opinion) in Barcelona Traction Case, ICJ Rep (1970) p 798; Donner, The Regulation of Nationality in International Law (1983), Ch III, Wel, Nationality and Statelessness, pp 176-81 with a comprehensive bibliography of literature on the Nottebohm case; ICJ Rep, 1955, p 4, at 23. The last part of this passage does not entirely reflect the situation which exists in cases of dual nationality: see § 392 f. Cf. the definition in the Harvard Draft Convention on Nationality, that nationality is "the status of a natural person who is attached to a State by the ties of allegiance" (AJ, 23 (1929), Special Suppl., p 223).

13 ICJ Rep, 1955, p 26. A nationality which is that of an unrecognised 'state' is not a true nationality in the international sense, and need not be recognised in other countries: Hunt v Gordon (1984), NZLR 160 (concerning Samoan nationality).

15 See also on the Nottebohm case, §§ 150 and 387.

16 An international tribunal called upon to apply rules of international law based upon the concept of nationality has the power to investigate the state's claim that a person has its nationality. However, this power of investigation is one which is only to be exercised if the doubts cast on the alleged nationality are not only not manifestly groundless but are also of such gravity as to cause serious doubts with regard to the truth and reality of that nationality.

Furthermore, it is not only international tribunals which may question the grant of nationality by a state to an individual. Even the national courts of other states may, although usually reluctant to do so, in certain circumstances feel it right to inquire into the justication and lawfulness of a state's grant of its international purposes.
nationality. This is likely particularly to be the case where the grant of nationality is questioned because of alleged non-conformity with international law. 

Despite such limitations on the international effects of nationality granted by a state to an individual, a state's own determination that an individual possesses its nationality is not lightly to be questioned. It creates a very strong presumption both that the individual possesses that state's nationality as a matter of its internal law and that that nationality is to be acknowledged for international purposes. Furthermore, even where the effects in international law of a state's grant of nationality are limited, the individual will still be a national of that state for purposes of its own laws. 

In general, it matters not, as far as international law is concerned, that a state's internal laws may distinguish between different kinds of nationals - for instance, those who enjoy full political rights, and are on that account named citizens, and those who are less favoured, and are on that account not named citizens. In some Latin-American countries, for example, the expression 'citizenship' has been used to denote the sum total of political rights of which a person may be deprived, by way of punishment or otherwise, and thus lose citizenship, without being divested of nationality as understood in international law.

In the United States, while the expressions 'citizenship' and nationality are often used interchangeably, the term 'citizen' is, as a rule, employed to designate persons endowed with full political and personal rights within the United States, while some persons - such as those belonging to territories and possessions which are not among the states forming the Union - are described as 'nationals'. They owe allegiance to the United States and are United States nationals in the contemplation of international law; they do not possess full rights of citizenship in the United States. It is their nationality in the wider sense, not their citizenship, which is internationally relevant. In the Commonwealth it is the citizenship of the individual states of the Commonwealth which is primarily of importance for international law, while the quality of a 'British subject' or 'Commonwealth citizen' is primarily relevant only as a matter of the internal law of the countries concerned.

'Nationality', in the sense of citizenship of a certain state, must not be confused with 'nationality' as meaning membership of a certain nation in the sense of race.

§ 379 Function of nationality

Nationality is the principal link between individuals and international law. This function of nationality becomes apparent with regard to individuals abroad, or to property abroad belonging to individuals who are themselves within the territory of their home state, especially on account of one particular right and one particular duty of every state toward all other states. The right is that of protection over its nationals abroad which every state holds, and occasionally vigorously exercises, against other states; it will be discussed in detail below. The duty is that of receiving on its territory such of its nationals as are not allowed to remain on the territory of other states.

Note: The matter arose in several courts in connection with the imposition of German nationality (under a law made in 1938 pursuant to the German-Czech Agreement of 1938) on certain individuals in the Sudetenland, in violation of the provisions of the Munich Agreement of 1938. See Ratz-Lienert and Klein v Nederlands Beheers-Instituut, ILR, 24 (1957), p 536; Weber and Weber v Nederlands Beheers-Instituut, ibid., p 435. Yet others regarded the German law of 1938 as effective to confer German nationality: Nederlands Beheers-Instituut v Nieuwenhuyzen, ILR, 18 (1951), No 63; In re Baroness van Scharberg, ibid., No 67; German Nationality (Annexation of Czechoslovakia) Case, ILR, 19 (1952), No 36. In the last case the Federal German Constitutional Court accepted that while as a rule every state was entitled to provide in its own discretion how its nationality was acquired and lost, that discretion was circumscribed by the general rules of international law according to which a state may confer its nationality only upon persons who have some factual contact with it. See also North Transvaal Nationality Case (1963), ILR, 43, p 191. See also § 386, nn 10-14 as to forced nationalisations.

Thus in the Nottebohm case the ICJ did not question that Nottebohm was, as a matter of the law of Liechtenstein, a national of that country.

Unless the state concerned has restricted its liberty of action with regard to these questions by treaty or otherwise, the following are also Advisory Opinions of the Permanent Court, Senato 4 (Nationality Decrees in Tunisia and Morocco) and No 7 (Acquisition of Polish Nationality), and the ensuing arbitration between Germany and Poland (noted by Garner, AJ, 20 (1926), pp 130-35, RIAA, 1, p 401).

Note the use, in this context, of the term 'citizen' in Art 25 of the Covenant on Civil and Political Rights 1966 (on which, see generally § 440).

See, for instance, Arts 39 and 42 of the Constitution of Bolivia (1967); Arts 19 and 22 of the Constitution of Ecuador (1962), which provides for loss of nationality in some cases, and suspension of rights of political membership in other cases; Arts 30 and 34-46 of the Constitution of Surinam (as amended in 1966), and see also Art 37(3)(D), which provides for loss of citizenship (so distinguished from loss of nationality) for such causes as accepting titles of nobility which imply submission to a foreign government, for voluntarily serving a foreign government or accepting foreign decorations without permission of Congress, and for rendering assistance to a foreigner or to a foreign country against the nation in any diplomatic claim or, before an international tribunal. The distinction between nationality and citizenship was also referred to in
no state is obliged by international law to allow foreigners to remain within its boundaries, it may, for many reasons, happen that certain individuals are expelled from all foreign countries. The state of nationality of expelled persons is bound to receive them on its territory. Article 12.4 of the International Covenant on Civil and Political Rights 1966 provides that "no one shall be arbitrarily deprived of the right to enter his own country."

This duty played an important part in the reception by the United Kingdom of many thousands of persons of Asian origin expelled from Uganda in 1972; these persons, while in many cases having lived in Uganda most of their lives and having little or no substantive connection with the United Kingdom, had retained British nationality after the independence of Uganda and, no other state being willing to receive them, the British government felt obliged to do so.

In addition to its functions in connection with individuals abroad, nationality is important as a basis of jurisdiction.

§ 380 Corporations Just as international law can normally only apply in relation to an individual by virtue of his bond of nationality linking him with a particular state, so too is it often necessary, in order that international law can apply in relation to a corporation, to attribute it to a state. It is only in exceptional circumstances that it may be possible to attribute a corporation to the state under the laws of which it has been incorporated and to which consequently it owes its legal existence; to this initial condition is often

103-25. It is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing to an individual within its territory the right of entry or residence: see 
240. See also § 413, on the right to expelled aliens.

In R v Home Secretary, ex parte Tshakhr [1974] 2 All ER 261, the Court of Appeal held that the obligation to receive nationals into the state's territory was an obligation in international law. However, it is a duty imposed by the state of nationality of the expelled alien to receive him. The United Kingdom, in the circumstances involved in the expulsion of a Ugandan from Uganda, failed to take back its former nationals, see the special Protocol Concerning Statelessness 1951.

In a state composed of different territories, it is uncertain whether a state is under a duty to receive nationals who have been expelled from the latter in circumstances including a breach of its international obligation owed to the former state: see Huggins, International Affairs, 49 (1973), at p 346.

There is probably no duty on a state to take back its former nationals: see the special Protocol Concerning Statelessness 1951 (see n 5, and § 389, n 7) and Weiss, Nationality and Statelessness, p 53f. But a state may do so, if it wishes: see, eg, the announcement by the US State Department in 1987: AJ, 82 (1988), pp 336-7.

In a state composed of different territories, it is uncertain whether a state is under an obligation to receive one of its nationals back into wherever part of the state's territory, to which it has an international obligation if it refuses to return him to the part with which he has stronger connections. By virtue of the expulsion of an alien under the Immigration Act 1971 and subsequent Acts, certain British nationals had no right of entry into the UK, see also § 385, n 5, for the position as at 1983. The distinction between a right of entry into different territories of the same state is important as a basis of jurisdiction.

§ 381 Corporations Just as international law can normally only apply in relation to an individual by virtue of his bond of nationality linking him with a particular state, so too is it often necessary, in order that international law can apply in relation to a corporation, to attribute it to a state. It is only in exceptional circumstances that it may be possible to attribute a corporation to the state under the laws of which it has been incorporated and to which consequently it owes its legal existence; to this initial condition is often

4 Thus the Lord Chancellor said, in the House of Lords, that the Attorney-General advised the UK Government that: 'In International Law a State is under a duty as between other States to receive the nationals of its citizens who have nowhere else to go. If a citizen of the United Kingdom is expelled, as I think illegally from Uganda, and is not accepted for settlement elsewhere, we could be required by any State where he then was to accept him': Parliamentary Debates (Lords), vol 335, col 497 (14 September 1972). But when one of those expelled from Uganda was, under the Immigration Act 1971, refused leave to enter the UK, and the lawfulness of that refusal was tested before the Court of Appeal, it was held by that court that the expulsion was in breach of its international obligation owed to the former state. See also § 385, n 7, for the position as at 1983. The distinction between a right of entry into different territories of the same state is important as a basis of jurisdiction.
added the need for the corporation's head office, registered office, or its siège social to be in the same state. By way of analogy with the position of individuals, a corporation is referred to as having the 'nationality' of the state to which it is thus attributed.

The analogy between the nationality of individuals and the nationality of corporations, while sometimes convenient, may often be misleading; those rules of international law which are based upon the nationality of individuals are not always to be applied without modification in relation to corporations. Various considerations militate against attributing to the nationality of corporations the same consequences as attach to the nationality of individuals: these include the manner in which corporations are created, operate and are brought to an end,

place where the entity has its real seat (siège réel). See also the Convention on the Mutual Recognition of Companies and Other Bodies Corporate concluded in 1968 between the original six members of the EEC: it provides for the recognition of companies and bodies corporate established in accordance with the law of one of the contracting states and having their statutory registered office in any of the territories to which the Convention applies; but it permits a contracting state to derogate from this obligation if the central administration of the company is in its own territory, or it is outside the territories to which the Convention applies and the company has no genuine link with the economy of one of those territories.

Thus in the context of determining the nationality of a company for purposes of diplomatic protection the ICJ said: "The traditional rule attributes the rights of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist."

Thus in the Baró de Fer de Baghdad case the ICJ observed: "In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals". (ICJ Rep (1970), p 42).

6 Although in principle a company's continued existence will depend on the law of the state in which it was originally incorporated, where the state has brought the company's existence to an end, particularly in circumstances amounting to insolvency without compensation, the company may nevertheless be regarded by other states as continuing to exist, at least for purposes connected with the company's property outside the territory of its state of incorporation. This practice of recognizing the continued existence of a company in such circumstances is particularly developed in the Federal Republic of Germany: see decision of the Supreme Court of the Federal Republic of Germany of 5 May 1960, AJ, 55 (1961), p 997; K Gmbh v DZGK, ibid, p 1003; Hungarian Aircrft Company Case (1971), ILR, 73, p 87; Società Azienda di Trasporti di Liguria v Società di Trasporti della Toscana (1973), ILR, 73, p 238; and (1974), ILR, 74, p 1135 (with comment by Sedi-Hohenfelden, Corporation in and under International Law, 1987, pp 29-38, 81-84). For certain limited purposes a foreign company may continue to have a legal existence in English law even if already dissolved under the law of its place of incorporation: see Russian and English Bank v Drob (1936) AC 405 (liquidation of UK branch of dissolved foreign company), and generally Dicey and Morris, pp 1128-30. And see §5 112 and 113 as to the recognition of foreign laws, particularly where they may be contrary to international law, and §144ff as to foreign confiscatory laws.

5 The concept of nationality in relation to companies does not have the legislative basis in national laws which exists in the case of individuals, and is thus much more open to a pragmatic assessment on the basis of the extent of a company's attachment to a state. While the traditional rule is still to regard the state of incorporation as the state whose nationality the company has, there is

Note also the extensive litigation in several states relating to the competing claims of Carl Zeiss Halle (in the Federal Republic of Germany) and Carl Zeiss Jena (in the German Democratic Republic), both claiming trademark rights of the former Carl Zeiss Foundation (see § 407, n 21). However, this litigation can be distinguished from that relating to 'split' or 'remained' companies in that the competing companies each had been separately established under the law of two different states, rather than being two separate companies claiming a single company's attachment to a state. The issues raised by the litigation concerned primarily the effect at certain material times of non-recognition (followed later by the recognition) of the German Democratic Republic, and the effect to be given to foreign expropriatory laws.

It is not usual for a state to attach to a state's internal law expressly to provide that a corporation has that state's nationality, but sometimes this is done, as in Art 5 of the Mexican Nationality Law 1934.

In addition to the numerous exceptions which a company may take within the various national legal systems, mention should also be made of the varying degrees of possible state involvement in a company's affairs. The creation of public corporations which are agencies of the state (many examples of this are referred to at §109, n 18f, in connection with claims to sovereign immunity), and of those bodies set up pursuant to a treaty but nevertheless operating as bodies subject to municipal law, eg Eurofima, set up by treaty, UNTS, 378, p 159; and the Channel Tunnel Companies, operating under a treaty between the UK and France concluded in 1986 (Cmnd 9475); see §314, n 7. See F A Mann, Statuts in International Law (1974), pp 553-90, as to corporations set up by treaty and operating under international law; and Sedi-Hohenfelden, Corporations in and under International Law (1987), pp 109-22, as to common inter-state enterprises. See also n 15, as to multinational companies.

See, eg Spies v C Ibor Co & Co (America) Inc, AJ, 74 (1980), p 195; Samitomo Shii America Inc v Asagiaio, ILR, 21 (1982), p 790. As to the impact of the relationship between a company and its subsidiaries, for purposes of jurisdiction, see §137, n 10, and as to the right to protect companies and their subsidiaries, see §152.
now little hesitation in looking behind the fact of incorporation in order to determine the substantive national connection of a company. In matters of diplomatic protection and international claims, the right of an international tribunal to investigate the realities of national control and ownership of a company has long been acknowledged. However, such inquiries usually have as their purpose the need to support a claim to nationality based on incorporation, rather than to elevate some alternative criterion to the position where it could be relied on in the absence of incorporation in the claimant states. States have also tended to restrict the exercise of their discretion in taking up claims of companies to cases in which there is some substantial connection with the state over and above the mere fact of incorporation. Because of the difficulties and uncertainties in this area it is increasingly the practice of states, when negotiating claims settlement agreements, to define the eligible claimants in such a way as to clarify by cases in which there is some substantial connection with the state over and above diplomatic protection and international claims, the right of an international tribunal to investigate the realities of national control and ownership of a company.

Similarly, in other fields in which the rights and obligations of 'nationals' have to be laid down, it is now usual to make express provision for the position of companies, in order to determine whether they may enjoy the benefits of treaty provisions conferring, for example, rights of establishment, fiscal advantages, or various commercial rights. It is not unusual in such treaties to define 'national companies' that an element of connection with the state in addition to mere incorporation is required. Such definitions, while they may be indicative of certain trends, are nevertheless strictly only relevant for the purposes of the treaties in which they are included.

For purposes of the operation of their own national laws, states frequently attribute to companies a national character which is determined not solely on the basis of their place of incorporation. Thus, for purposes of laws restricting trading with the enemy, many states attribute enemy character to a company even if it is not incorporated under the laws of the enemy state, as where a company incorporated in a non-enemy state is controlled by enemy nationals. There is nothing contrary to international law in such a practice. Also, for taxation and other similar purposes, states often adopt particular definitions determining the attribution of a national character to a company for those particular purposes. The tests of nationality of corporations for purposes of private international law may again be different.

This diversity of practice underlines the absence for international purposes of any rigid notion of a company's nationality. In many cases a company will have considerable links with several states, and any attempt to assess with which of the Settlement of Investment Disputes between States and Nationals of Other States 1965 (see § 407, 419) covers disputes between a state and a company incorporated in its own territory if the parties have agreed that it should be treated as a foreign national for purposes of the Convention; see Art 25(2)(b), and Liberian Eastern Timber Corp v Government of the Republic of Liberia, ILM 26 (1987), pp 647, 652–4. See also § 152, n 25.

But there a treaty simply uses the term 'nationals' in relation to each contracting party, without further specification as to the position of companies, a court will have little guidance in how to apply the treaty to a company. So, in applying the Franco-Spanish Convention of 1862, a French court regarded as not being a Spanish 'national' a company set up under Spanish law and operating in France, but 95 per cent owned by a Spanish national: Re Société Mayol, Annales de l'Ordre des Avocats de Paris, 39 (1960), ILM 39, p 430.

Similarly, companies as often not a matter strictly of nationality but of residence or control. See also Bonnar v United States (1971), ILM, 54, p 550; United Oriental Steamship Co Karachi v Starbac Co (1972), ILM, 52, p 487.


See also § 152, n 25, and turn on questions of municipal law. By way of illustration one may compare the decisions of two French courts, in Société Béarnaise d'Assurance et de Reassurance and Société de l'Aiguille, ILM, 19 (1952), No 63 and Administration d'Enregistrement et de Société M, ILM, 20 (1953), p 263, both holding nationality (for purposes of, respectively, security for costs and fiscal law) to be determined by the company's place of incorporation and not, with the decisions of two US courts, in Re Burlington and Occidental Steamship Co, ILM, 26 (1958–1959), p 222 and Bokova et al v Compagnie Panamena Maritima San Gerasio, ibid, p 236, both holding nationality (for purposes of labour law) to be determined by looking behind the formal foreign incorporation of the company and having regard to the reality of the company's ownership and operation for the benefit of nationals of the forum state. See also Case C-117/81, Saferstrasse C-117/81, Saferstrasse v Studer, ILM, 21 (1982), p 353, and Case C-117/81, Saferstrasse v Studer, ILM, 21 (1982), p 353, and Case C-117/81, Saferstrasse v Studer, ILM, 21 (1982), p 353.

The position of so-called 'multinational companies' has been much considered in recent years. See Lados-Lederer, 'International Non-Governmental Organisations and Economic Entities' (1963); Mann, BT, 42 (1967), pp 145–74; Angello, Haii R, 125 (1968), iii, pp 443–600; Rolle and Damien, 'European Convention on Establishment of Companies 1966 (European TS No 57), Art 1.1 of which requires only that companies be constituted under the law of the state in question and have their registered offices in that state's territory. The Convention for
those states the company has sufficient links to be able to be treated as a national of that state for a particular purpose will involve a balancing of the various factors. Although the attribution of nationality to a company on the basis of its place of incorporation and location of its registered office may well be regarded as the traditional rule, it is perhaps no more than a prima facie presumption which affords a convenient starting point for inquiry in any particular case.

§ 381 Nationality and emigration

Emigration involves the voluntary removal of an individual from his home state with the intention of residing abroad, but not necessarily with the intention of renouncing his nationality, which he may well therefore retain. Emigration is in principle entirely a matter of internal legislation of the different states.1 Every state can fix for itself the conditions under which emigrants may leave,2 and under which they lose or retain their nationality, as it can also prohibit emigration altogether, or can at any moment request those who have emigrated to return, provided the emigrants have retained their former nationality. Customary international law does not, as yet, require a right of emigration to be granted to every individual, although it has been frequently maintained3 that it is a 'natural' right of every individual to emigrate from his own state. However, a right of emigration has been recognised in a number of general international instruments. Thus Art 13.2 of the Universal Declaration of Human Rights, 1948,4 provided that 'Everyone has the right to leave any country, including his own, and to return to his country'. A fully legally binding provision is included in the International Covenant on Civil and Political Rights 1966,5 Art 12(2) of which provides that 'Everyone shall be free to...

1 Thus in 1972 and the next following two years measures were taken by the Soviet Union having the effect of making difficult the emigration from the Soviet Union of Soviet citizens of the Jewish faith: these measures included the requirement that they should pay considerable sums to the Soviet Government (see ILM, 12 (1970), pp 427-8). Although these measures attracted critical comment in other countries and led to the enactment of retaliatory legislation (see Art 402 of the Trade Act 1974, enacted in the USA: ILM, 14 (1975), pp 181, 220, and see also pp 248-50), the fact that the persons affected were Soviet citizens prevented direct and formal approaches to the Soviet Government on the matter; see, eg Parliamentary Debates (Comments), vol 834, cols 773-4 (25 October 1972): informal representations were however made. See also Mehl and Rappon, ICLQ, 27 (1978), pp 876-89. For the Soviet Union's law on entry into and exit from the USSR see ILM, 26 (1987), p 425. For a Romanian Decree of 1982 laying down financial conditions for and consequences of emigration see ILM, 22 (1983), p 667.

2 For treaties of more limited scope see, eg Art 48ff of the Treaty Establishing the EEC, providing for freedom of movement within the territory of the member states (see further § 400, n 4); and the Convention of 27 November 1919 between Greece and Bulgaria providing that the subjects of each Party belonging to racial, religious or linguistic minorities might freely emigrate to the territory of the other: Misc No 3 (1920), Cmd 589. See also the Advisory Opinion of the PCIJ on the Exchange of Greek and Turkish Populations (1925), Series B, No 10.

3 See § 437.

4 See also Art 2.2 of Protocol No 4 of 1963 to the European Convention on Human Rights: Art 5(4) of the International Convention on the Elimination of All Forms of Racial Discrimination 1966 (see § 439); and the provisions of the Final Act of the Conference on Security and Co-operation in Europe 1975 (see § 442) concerning Human Rights, in which the participating states made it 'their aim to facilitate freer movement and contacts ... among persons ... of the participating States'.

5 The right of emigration was considered by a sub-committee of the UN Commission on Human Rights. In 1963 the sub-committee, in its Res 2 (XV), adopted draft principles on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country. In 1973 the Economic and Social Council formally drew these principles to the attention of governments: Res 1768 (LVII); UNYB, 1973, pp 567-79. The comments of governments and non-governmental organisations on the draft principles (UN Docs E/CN 4/869, and Add 1-5, of 1963-70; E/CN 4/1042, and Add 1, of 1970-71) showed a tendency to accept in principle a freedom to emigrate, subject to a number of restrictions. States have a legitimate interest in preventing, eg fugitives from justice or people who constitute a danger to their security or public order from leaving their territory: see, eg Rapson (1970), IILR, 73, p 391; Venturi, RG, 92 (1988), p 740. See also Public Prosecutor v Ernst M and Hildergard S (1970), IILR, 71, pp 251, 257; Public Prosecutor v Janos V (1973), IILR, 71, pp 229, 230 ("there is absolutely no right to freedom of emigration protected by..."