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Foreign Investors, Diplomatic Protection and the International Court of Justice's Decision on Preliminary Objections in the Diallo Case

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Cover Page Footnote

International Law; Commercial Law; Law

Foreign Investors, Diplomatic Protection and the International Court of Justice's Decision on Preliminary Objections in the *Diallo* Case

Alberto Alvarez-Jiménez[†]

I.	Introduction	437
II.	The Concept of Diplomatic Protection	438
III.	The Facts of the <i>Diallo</i> Dispute.....	439
IV.	The ICJ's Decision on Preliminary Objections in <i>Diallo</i> ..	442
	A. The Use of Specific Domestic Legislation by the ICJ to Decide on Claims of Diplomatic Protection of Corporations and Shareholders.....	442
	B. <i>Diallo</i> and the Exhaustion of Local Remedies Rule ...	444
	C. Diplomatic Protection of Corporations.....	450
V.	Conclusion.....	453

I. Introduction

Important issues of interest for foreign investors are involved in the ongoing *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* before the International Court of Justice (ICJ). The decision on the Preliminary Objections¹ has already introduced changes to the Court's prior jurisprudence that have had mixed impacts on foreign investors, host States, and even on the cost of the Court when conducting proceedings of this nature. In general, this decision clarifies the municipal law applicable to claims of diplomatic protection of corporations and shareholders; introduces changes to the burden of proof regarding the exhaustion of local remedies, both for the benefit of foreign investors and the Court itself; and restricts which States may be able to seek diplomatic

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¹ Case Concerning Ahmadou Sadio Diallo. (Rep. of Guinea v. Dem. Rep. Congo) (Preliminary Objections) (Judgment of May 24, 2007), *available at* <http://www.icj-cij.org/docket/files/103/13856.pdf> (last visited Jan. 29, 2008).

protection of corporations, thereby benefiting host States.

This paper is divided into four parts. The first part briefly introduces the concept of diplomatic protection in public international law. The second part presents the facts of the *Diallo* dispute between the Democratic Republic of the Congo (DRC) and the Republic of Guinea. The third part analyzes the ICJ *Diallo* decision on Provisional Objections, highlighting its most important innovations for the future of diplomatic protection in international law. Finally, the fourth part presents the conclusions of the paper.

II. The Concept of Diplomatic Protection

Diplomatic protection is a principle of customary international law,² first defined by Emmerich de Vattel in 1758 when he stated that “whoever ill-treats a citizen indirectly injures the State, which must protect that citizen.”³ A contemporary notion is provided in Article 1 of the Draft Articles on Diplomatic Protection of the International Law Commission.⁴ The article defines diplomatic protection as an alien’s home state seeking to intervene to protect his rights when infringed upon by the “internationally wrongful act” of another state.⁵ This may be accomplished through the exercise of “diplomatic action or other means of peaceful settlement.”⁶

While diplomatic protection is a concept of customary international law, the violation of aliens’ rights does not impose a duty on their home States to seek the diplomatic protection of their injured nationals. Instead, the State has the discretion to use this tool as the ICJ held in *Case Concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, *Second*

² See *id.* para. 39.

³ EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND SOVEREIGNS*, VOL. III, at 136 (James Brown Scott ed., Charles Fenwick trans., Carnegie Institution of Washington 1916).

⁴ International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries* 24 (2006), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf (last visited Jan. 29, 2008) [hereinafter *ILC Commentaries*].

⁵ *Id.*

⁶ *Id.*

Phase.⁷ This point is reiterated by the International Law Commission in Articles 2 and 19 of its recent Draft Articles on Diplomatic Protection, adopted in 2006.⁸

Diplomatic protection was the first instrument aimed at protecting foreign investors affected by decisions of their host States,⁹ and it may still be considered a useful tool for this purpose.¹⁰ The relevance of the ICJ decisions in this case is that they will play a significant role in how diplomatic protection is deployed by States in future judicial proceedings and non-judicial scenarios.

III. The Facts of the *Diallo* Dispute

The facts of the *Diallo* dispute before the ICJ can be summarized as follows. Ahmadou Sadio Diallo is a Guinean businessman who lived in the DRC, formerly known as Zaire, for 32 years.¹¹ Ten years after settling in the DRC in 1964, Diallo became the founder and manager of a company called Africom-Zaire.¹² In 1979 Africom-Zaire (Africom), along with two partners, created Africontainers-Zaire (Africontainers). However, in 1980 the two partners withdrew from the company, leaving its capital owned 60% by Africom and 40% by Mr. Diallo, who also became Africontainers's manager.

Both Africom and Africontainers confronted problems with

⁷ Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5). The Court said: "The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. ..." *Id.* para. 79.

⁸ *ILC Commentaries*, *supra* note 4, at 29, 95.

⁹ See generally RICHARD B. LILlich, *INTERNATIONAL CLAIMS: POSTWAR BRITISH PRACTICE* (Syracuse University Press 1967); BURNS H. WESTON, *INTERNATIONAL CLAIMS: POSTWAR FRENCH PRACTICE* (Syracuse University Press 1971); *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (Richard B. Lillich ed., University Press of Virginia 1983).

¹⁰ Certainly, today, protection of foreign investors is guaranteed through bilateral investment treaties (BITs), but these instruments add to and do not necessarily replace diplomatic protection as a readily available instrument at the disposal of foreign investors to solve disputes with their host States.

¹¹ Diallo, *supra* note 1, at para. 1.

¹² *Id.* para. 14.

major Congolese public institutions and private companies in the 1980s. Africom has debts recognized by the DRC for contracts celebrated and performed between 1983 and 1986¹³ and another dispute with a private company called Plantation Lever au Zaïre.¹⁴ Africontainers, for its part, accumulated disputes with Zaïre Shell, Zaïre Mobil Oil and with the Congolese Office National des Transport and Générale des Carrières et des Mines.¹⁵ Both Africom and Africontainers started judicial proceedings to resolve their disputes, which remain unresolved to date.¹⁶ Both companies are claiming damages that amount to \$36 billion against Congolese public entities, an amount that is three times the DRC's foreign debt.¹⁷ In one of these disputes, a DRC court ruled in favour of Africontainers and against Zaïre Shell; however, the DRC Minister of Justice stayed proceedings for the enforcement of the ruling. The stay was later lifted and Zaïre Shell's property was attached, but the attachments were revoked upon instructions from the Minister.¹⁸

Relations between Mr. Diallo and the above-mentioned private Companies continued to deteriorate, and in 1995 the companies asked the Congolese government to intervene "to warn the courts and tribunals about Mr. Amadou Sadio Diallo's conduct in his campaign to destabilize commercial companies."¹⁹

On October 31, 1995, the Prime Minister of Zaïre, today the DRC, ordered the expulsion of Mr. Diallo on the grounds that his "presence and conduct have breached public order in Zaïre, especially in the economic, financial and monetary areas, and continue to do so."²⁰ The order was mistakenly labeled as a "refusal to entry" rather than as a formal expulsion, and according

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Diallo, *supra* note 1, at para. 19.

¹⁸ *Id.* para. 18. The DRC recognized the stay, but it is considered as a normal proceeding in some African countries, under their understanding of the separation of powers. *Id.* para. 20.

¹⁹ *Id.* para.18.

²⁰ *Id.* para.15.

to Congolese legislation, the order had no appeal.²¹ Prior to his expulsion, Mr. Diallo had been arrested and imprisoned.²²

In the case before the ICJ, Guinea argued that Mr. Diallo's detention and expulsion violated the Vienna Convention on Consular Relations²³ and sought to exercise its diplomatic protection on behalf of Mr. Diallo as an individual and as *associé*²⁴ of Africom and Africontainers and, specifically, his rights to oversee, control, and manage the companies. Guinea also asked to exercise its right to diplomatic protection, by substitution, of both companies in order to recover the debts owed to them.²⁵ According to Guinea, the DRC violated the Vienna Convention on Consular Relations,²⁶ the Universal Declaration of Human Rights of 10 December 1948, and the International Covenant on Civil and Political Rights of 19 December 1966. Finally, Guinea claimed that the DRC failed to grant Mr. Diallo treatment according to "a minimum standard of civilization."²⁷

In response to these claims, the DRC presented two preliminary objections: first, that Mr. Diallo had not exhausted the local remedies available to him, and second, that Guinea lacked standing to seek the diplomatic protection of Africom and

²¹ *Id.* para. 36, 7.

²² *Id.* para. 18. There are discrepancies between the parties' versions regarding Mr. Diallo's detention before his expulsion. Guinea argues that he was imprisoned for 75 days (*Id.* para.17), while the DRC claims that the imprisonment lasted only eight days (*Id.* para.19).

²³ See *id.* para. 29. This claim surely refers to Article 36.1(b) of the Vienna Convention on Consular Relations which provides: "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph." Vienna Convention on Consular Relations art 36.1(b), Apr. 24, 1963, 596 U.N.T.S. 261. This precept has been the subject of a series of ICJ judgments in the recent years, paramount among them the *LaGrand* case. *LaGrand Case* (Germany v. U.S.), Judgment of 27 June 2001, [2001] I.C.J. Rep. 466.

²⁴ The term *associé* is used by the Court in its decision. Diallo, *supra* note 1, at para. 25.

²⁵ *Id.* paras. 27 – 29.

²⁶ *Id.* para. 29.

²⁷ *Id.* para. 28.

Africontainers, since these companies were not incorporated under its laws.²⁸ The ICJ rejected the first objection²⁹ and upheld the second.³⁰

IV. The ICJ's Decision on Preliminary Objections in *Diallo*

The ICJ's decision on preliminary objections in *Diallo* ratified its previous judgment in *Barcelona Traction* on a number of issues and put in place new features regarding diplomatic protection that will provide a clearer framework for the use and application of this legal institution by States, foreign investors, and the ICJ itself.

A. The Use of Specific Domestic Legislation by the ICJ to Decide on Claims of Diplomatic Protection of Corporations and Shareholders

The use of domestic legislation by the ICJ is important to ascertain who can exert diplomatic protection of rights on behalf of corporations and shareholders or *associés* and the scope of these rights. In *Barcelona Traction*, the Court recognized the need to consider municipal legislation when adjudicating disputes involving diplomatic protection of corporations and shareholders,³¹ but a passage in the judgment left doubts regarding what municipal law should be assessed in the identification and scope of the rights the claiming State was seeking to protect. In effect, the

²⁸ *Id.* para. 32.

²⁹ *Id.* para. 48.

³⁰ *Diallo*, *supra* note 1, at para. 94. For practical purposes the DRC virtually won the case in economic terms. The Court will not deal with the diplomatic protection of Africom and Africontainers, and therefore, it will neither decide on nor award damages regarding the contractual claims that these companies have against Congolese public entities and private companies.

³¹ The Court pointed out in *Barcelona Traction*:

"In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law." *Barcelona Traction*, *supra* note 7, at para. 38.

Court stated rather confusingly:

[T]hus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. 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.³²

The Court seems to be suggesting that it would assess corporate municipal laws and infer from them general principles of law applicable to the international realm of diplomatic protection. Determining whether there are general principles of law regarding corporations, and if it appears that there are, defining their content with sufficient precision to make them workable for foreign investors, States, and adjudicators is a daunting task, full of practical obstacles and uncertainty. A much clearer method was required, and the ICJ rectified its approach in *Diallo* by considerably simplifying the use of municipal law. The Court can refer to the municipal law of a specified State and does not need to seek out general principles. In effect, the Court said that it was necessary to determine whether the laws of the State of incorporation give companies “a legal personality independent of their members.”³³ If a corporation has an “independent corporate personality,” the implication is that the corporation has property rights that it can alone protect.³⁴ To determine if an independent corporate personality exists, the Court established that international law must defer to “the rules of the relevant domestic law.”³⁵ By applying this standard the ICJ found that under the relevant law, that of the DRC, corporations do have a separate legal personality.³⁶

But the most important progress made by the ICJ in *Diallo* deals with the use of municipal law for the determination of the shareholders’ rights whose integrity is pursued through the exercise of diplomatic protection. The Court determined that such rights and their content are determined by the municipal law of the

³² *Id.* para. 50.

³³ *Diallo*, *supra* note 1, at paras. 61, 2.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* para. 61.

respondent State only. The ICJ manifested, "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 relation to a legal person, direct rights that are defined by the domestic law of the State, as accepted by both parties."³⁷

To resort to the law of the State of incorporation of legal persons and to the law of the injuring host State to determine the extent of shareholders' rights protection is clearly a more predictable, efficient, and easy-to-administer criterion in the realm of diplomatic protection than to search for general principles of law in the domain of corporations. The Court deserves credit for such progress.

B. Diallo and the Exhaustion of Local Remedies Rule

Under customary international law, diplomatic protection is available only once an alien has exhausted the local remedies available to her or him. This customary law provision is reflected in Article 14 of the International Law Commission (ILC) Draft Articles on Diplomatic Protection, which indicates:

A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.

'Local remedies' means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.³⁸

The ILC makes clear that the exhaustion of remedies rule requires a foreign national to "exhaust all the available judicial remedies provided for in the municipal law of the respondent State," even to the extent of appealing to the highest court available.³⁹ The ILC further notes that the "highest court available" may be either an ordinary or special court since "the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective

³⁷ *Id.* para. 64.

³⁸ *ILC Commentaries*, *supra* note 6, at 70.

³⁹ International Law Commission, Report of the Fifty-Fifth Session (2003), A/58/10 at 87, available at <http://untreaty.un.org/ilc/reports/2003/2003report.htm>.

and sufficient means of redress.”⁴⁰ Furthermore in addition to judicial remedies, aliens must exhaust any administrative remedies available which would have a binding effect on the parties involved.⁴¹ The ILC explicitly states that a foreign national is “not required to approach the executive for relief in the exercise of its discretionary powers” in order to fulfill the requirement of having exhausted all local remedies.⁴²

The arbitral tribunal in *Ambatielos* clearly set out the scope of the rule: “It is the whole system of legal protection, as provided by municipal law, which must have been put to the test.”⁴³ The reason for the existence of this rule, as the Court stated in *Interhandel (Switzerland v. United States of America)*, is to ensure that “the State where the violation occurred... ha[s] an opportunity to redress it by its own means, within the framework of its own domestic legal system.”⁴⁴

In *Diallo* the Court had the opportunity to assess two issues related to the exhaustion of the local remedies rule. The first was whether remedies that give the injuring State total discretion to respond to investors must be exhausted by them. The second issue dealt with the practical application of the rule allocating the burden of proof in cases where exhaustion of local remedies is at issue.

The first issue arose from the DRC argument that Mr. Diallo had not exhausted local remedies, since he had not requested the Prime Minister to reconsider, as a matter of grace, his decision refusing Mr. Diallo entry into the DRC.⁴⁵ The Court held that although all local legal remedies must be attempted before international remedies are sought, only remedies “aimed at

⁴⁰ *Id.*

⁴¹ *Id.* at 88.

⁴² *Id.*

⁴³ *ILC Commentaries*, *supra* note 4, at 72 n.177 (quoting *Ambiatelos Claim of 6 Mar. 1956*, 12 UNRIAA 83, 120).

⁴⁴ *Diallo*, *supra* note 1, at para. 42 (quoting *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 27).

⁴⁵ *Diallo*, *supra* note 1, at para. 37. The expulsion of Mr. Diallo was mistakenly made by means of a refusal to entry order, which, as was mentioned, lacked any appeal under Congolese law. The DRC argued that, when some foreigners had asked for reconsideration as a matter of grace, the decisions affecting them had been resolved favourably. *See id.* paras. 36, 37.

vindicating a right and not at obtaining a favour" should be considered, unless requesting a favour "constitute[s] an essential prerequisite for the admissibility of subsequent contentious proceedings" within local jurisdiction.⁴⁶ Thus Mr. Diallo's failure to ask the Prime Minister to reconsider, when such reconsideration was not a recognized legal avenue of appeal, did not amount to a failure to exhaust all local remedies.⁴⁷ There has been wide consensus regarding this finding, which contains a ratification of established international law.⁴⁸

The second dimension of the *Diallo* decision on preliminary objections regarding the exhaustion of local remedies dealt with who bears the burden of proof of such exhaustion. In a general statement, the Court allocated this burden first on the claimant and then on respondent States by declaring:

In matters of diplomatic protection, it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies... It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted.⁴⁹

Despite this statement of the rule, it is not the rule that was applied by the Court. According to the formulation of this allocation of burden of proof, the claiming State must demonstrate that its nationals exhausted all the local remedies available in order for its claim to be admissible. Once this is done, if the respondent State is to prevail in its objection, it must demonstrate that the aliens had at their disposal a remedy that they did not exhaust. However, the experience of the Court in *Barcelona Traction* and in the *Case Concerning Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)*, in which all the complexities of the application of this rule were made evident,⁵⁰ apparently compelled

⁴⁶ *Id.* para. 47

⁴⁷ *Id.*

⁴⁸ This is not to say that this finding is unimportant; it saves foreign investors' time and money in not having to pursue such remedies.

⁴⁹ Diallo, *supra* note 1, at para. 44.

⁵⁰ See *Barcelona Traction*, *supra* note 7, pt. VII; *Elettronica Sicula S.P.A. (ELSI) (US v. Italy)*, 1989 I.C.J. 15, at paras. 55 – 63 [hereinafter *ELSI*].

the Court to design a more efficient way to verify the fulfillment of this requirement. The Court will not verify on its own whether the claimant effectively exhausted all the remedies. Instead, the respondent State must raise the issue of the alien's failure to exhaust remedies available and prove this objection. The respondent's silence is understood, for practical purposes, to mean that the alien effectively exhausted the remedies. The Court stated:

[A]s the Court has already noted . . . the DRC has for its part endeavoured... to show that remedies to challenge the decision to remove Mr. Diallo from Zaire are institutionally provided for in its domestic legal system. By contrast, the DRC did not address the issue of exhaustion of local remedies in respect of Mr. Diallo's arrest, his detention or the alleged violations of his other rights, as an individual, said to have resulted from those measures and from his expulsion or to have accompanied them. In view of the above, the Court will address the question of local remedies solely in respect of Mr. Diallo's expulsion.⁵¹

This is a very efficient way of applying the rule. After all, the Court cannot be required to be an expert in the domestic law of the respondent State and be able to verify on its own whether the alien had exhausted all the local remedies available, thus making the claim of diplomatic protection admissible.⁵² It is more efficient and less costly for the Court to leave the burden of demonstrating that not all the available remedies were tried in the hands of the respondent, which as a matter of course knows its own domestic legal system well.⁵³ The respondent State's silence may then be properly understood to mean that the alien exhausted such remedies.⁵⁴

⁵¹ Diallo, *supra* note 1, at para. 45.

⁵² The Court implicitly recognized such difficulty in its judgment in *ELSI* where it said: "It is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been 'exhausted'. *ELSI*, *supra* note 50, at para. 63.

⁵³ This is certainly not to say that the ICJ would not be in a position to arrive at a conclusion in this regard, since, among other tools, it has the possibility of requiring the assistance of legal experts, pursuant to Article 50 of the Statute, to produce an analysis independent of that offered by the parties. But the use of these tools and the assessment of the report rendered by the experts imply costs that the Court avoids with the presumption.

⁵⁴ This also means that if the respondent State does not raise the preliminary

The Court took this method of applying the allocation of burden of proof to its limits regarding the exhaustion of local remedies in relation to Mr. Diallo's rights as a shareholder. Guinea did not adduce evidence regarding any remedy that Mr. Diallo used to protect his rights as a shareholder, nor did the DRC adduce evidence showing that he had remedies available that he did not exhaust. Instead, both parties concentrated on a general discussion of the effectiveness of any remedy he could have had at his disposal. The Court declared, however, that the DRC had not proved its objection, despite the fact that Guinea had not proved the requirement as to this sort of right. The ICJ stated:

The Court... observes that at no time has the DRC argued that remedies distinct from those in respect of Mr. Diallo's expulsion existed in the Congolese legal system against the alleged violations of his direct rights as *associé* and that he should have exhausted them. The Parties have indeed devoted discussion to the question of the effectiveness of local remedies in the DRC . . . without considering any which may have open to Mr. Diallo as *associé* in the companies. Inasmuch as it has not been argued that there were remedies that Mr. Diallo should have exhausted in respect of his direct rights as *associé*, the question of the effectiveness of those remedies does not in any case arise.

The Court concludes from the foregoing that the objection as to inadmissibility raised by the DRC on the ground of the failure to exhaust the local remedies against the alleged violations of Mr. Diallo's direct rights as *associé* of the two companies Africom-Zaire and Africontainers-Zaire cannot be upheld.⁵⁵

objection of lack of exhaustion of local remedies, the ICJ will not assess whether the claiming State has met any standard of proof regarding the exhaustion of these remedies by its national. Absent such objection, the Court assumes on its face that the remedies were exhausted by the alien. For evaluation of the standard of proof regarding the exhaustion of local remedies in other areas of international law, see Bernard Robertson, *Exhaustion of Local Remedies in Human Rights Litigation. The Burden of Proof Reconsidered*, 39 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1991 (1990).

⁵⁵ Diallo, *supra* note 1, at paras. 74, 75. This is not to say that Mr. Diallo had local remedies available to protect his rights as *associé* against the DRC's decision to expel him, which was affecting those rights. As was said before, the order that materialized such determination did not have any appeal; therefore, there was no remedy to exhaust to protect Mr. Diallo's rights. Oddly, Guinea framed the issue not with the lack of remedy to exhaust but with the ineffectiveness of any remedy he could have had at his disposal, and so did the DRC, as the ICJ stated in the quoted passage. (For Guinea's arguments, see *id.* paras. 73, 3. For DRC's arguments, see *id.* paras. 69 – 71).

This is certainly not an example of the well-established rule recognized by the Court according to which "[I]t is the litigant seeking to establish a fact who bears the burden of proving it."⁵⁶ In practical terms, what the Court is applying is a presumption of exhaustion of local remedies by aliens or foreign investors, which the respondent State has to refute in order to prevail in its objection to admissibility.

The *Diallo* decision thus contains an important development in this regard for the benefit of aliens and foreign investors, which is also useful and economically rational for the Court. Obviously, the fact that the Court presumes for practical purposes that the local remedies were exhausted does not mean that that this requirement has disappeared. Aliens still have to exhaust local remedies to prevent States from prevailing in their objection later in judicial proceedings by demonstrating that there were some remedies that the former did not utilize.

The one important area that the Court is subject to criticism is that this presumption does not exactly correspond to the allocation of burden of proof of the exhaustion of local remedies previously articulated. If it is going to apply this presumption, the Court should state it clearly for the benefit of host States, which otherwise may be caught by surprise. For example, if the claimant State does not adduce proof of the exhaustion of local remedies and, due to this silence, the respondent State assumes that the Court will declare the claim inadmissible and so fails to raise the objection, the Court's application of the presumption would result in a ruling against the respondent for not having refuted it.

In sum, the foregoing presumption is an adequate way of dealing with the exhaustion of local remedies requirement, but it is regrettable that the Court decided to allocate the burden of proof in one way and then apply it in another. The oft-quoted saying, according to which one has to look at what judges do instead of at what they say, suggests that respondent States should be aware that the safest course of action in any diplomatic protection dispute is to always attempt to refute the presumption by alleging and proving that the alien had local remedies that he or she did not exhaust.

⁵⁶ Military and Paramilitary Activities. (Nicar. v. U.S.), Decision on Jurisdiction of the Court, 1986 I.C.J. 392, 437.

C. Diplomatic Protection of Corporations

In *Diallo*, the ICJ ratified and further strengthened the rule set in *Barcelona Traction*, holding that the State in which a company is incorporated is the only one that can seek its diplomatic protection.⁵⁷ After this judgment, however, debate arose regarding State practice. The central issue was whether, in addition to this State, the State of the *siège social* or of that of the nationality of the majority shareholders of corporations could also exercise diplomatic protection on behalf of corporations.⁵⁸ In *Diallo*, the ICJ ratified its approach in *Barcelona Traction*, but it departed to a certain extent regarding exceptions to the aforementioned rule. In *Barcelona Traction*, the ICJ, in *dictum*, stated that for equity reasons, the State of the nationality of the shareholders could invoke the diplomatic protection of the company. It said in this judgment:

[T]he Court considers that, in the field of diplomatic protection as in all others 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.⁵⁹

Guinea invoked *Barcelona Traction* and relied on bilateral agreements for the promotion of foreign investments and on arbitral awards rendered upon them to demonstrate that the States of nationality of shareholders could also seek the diplomatic

⁵⁷ See *Diallo*, *supra* note 1, at paras. 88-89. The Court held in *Barcelona Traction*, "The traditional rule attributes the right 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. ..." *Barcelona Traction*, *supra* note 7, at para. 70. One of the policy reasons for this decision was to prevent the Court from receiving multiple claims from different States, since this would open the door for States of nationality of any shareholder to potentially exercise the diplomatic protection of the corporations in which they have invested. See *ILC Commentaries*, *supra* note 4, at 59.

⁵⁸ United States and European practice supported this debate. For an analysis of this practice, see D. Christopher Ollis, *A Functional Analysis of Claimant Eligibility*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS*, *supra* note 9, at 281, 294-99.

⁵⁹ *Barcelona Traction*, *supra* note 7, at para. 93.

protection of their corporations.⁶⁰ The Court sought to establish whether there was an exception to the general rule that would allow the States of the shareholders to exercise diplomatic protection on behalf of their companies on the basis of equity, and concluded that it did not:

The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in customary rules of diplomatic protection; it could equally show the contrary. The arbitrations relied on by Guinea are also special cases, whether based on specific international agreements between two or more States, including the one responsible for the allegedly unlawful acts regarding the companies concerned... or based on agreements concluded directly between a company and the State allegedly responsible for the prejudice to it...⁶¹

Thus Guinea's suggested argument of diplomatic protection by substitution was rejected. The Court considered State practice and international court decisions dealing with diplomatic protection of shareholders and concluded that there does not currently exist an exception that would allow shareholders' States to exercise diplomatic protection.⁶² In consequence, the equitable exception provided in *Barcelona Traction*, which favored foreign investors, disappeared in *Diallo*. Once again, in the field of diplomatic protection, the trend of the Court seems to be to put in place criteria whose application by the Court is considerably easier than those existing before.

But the Court did not stop there in its efforts to definitely set the rule that only the State of incorporation of an entity can seek its diplomatic protection. The Court established a high threshold for the application of an exception contemplated by the ILC in its draft Articles on Diplomatic Protection. According to ILC draft

⁶⁰ *Diallo*, *supra* note 1, at para. 54.

⁶¹ *Id.* para. 90.

⁶² *Id.* para. 89.

Article 11(b):

A 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:...

(b) The corporation had, at the time of injury, the nationality of the State alleged to be responsible for causing injury and incorporation in that State was required by it as a precondition for doing business there.⁶³

The Court found that, given that Mr. Diallo had not been compelled by Congolese legislation to constitute Africom and Africontainers, the exception was not applicable.⁶⁴ But in its apparent quest for not allowing the existence of exceptions to the basic rule, the Court subjected the ILC exception to such a high threshold that it is very unlikely that this exception will ever be applied. In effect, the Court established that such application required the demonstration that the Article 11(b) exception had become customary international law.⁶⁵ In its Commentaries to the draft Articles, the ILC based this exception on very limited State practice, a few arbitral awards and doctrine,⁶⁶ and it is unlikely that such sources support the customary character of this exception.⁶⁷

⁶³ *ILC Commentaries*, *supra* note 4, at 58.

⁶⁴ See Diallo, *supra* note 1, at paras. 91 – 93.

⁶⁵ See *id.* para. 93. The Court said: “The Court concludes on the fact before it that the companies, Africom-Zaire and Africontainers-Zaire, were not incorporated in such a ways that they would fall within the scope of protection by substitution in the sense of Article 11, paragraph (b), of the ILC draft Articles on Diplomatic Protection referred to by Guinea. Therefore, the question of whether or not this paragraph of Article 11 reflects customary international law does not arise in this case.” *Id.*

⁶⁶ *ILC Commentaries*, *supra* note 4, at 62-65.

⁶⁷ The ILC’s analysis is similar to the one carried out by Belgium in the *Case Concerning the Arrest Warrant of 11 April 2000* in an attempt to demonstrate that there was an exception provided for by customary international law to the rule of criminal immunity of Ministers for Foreign Affairs. The ICJ declared that such analysis was insufficient to prove the existence of international customs:

“The Court has carefully examined State practice, including national legislation and those few decision of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.” *Case Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgment, 2002 I.C.J. 3, 24 (Feb. 14).

In addition to offering a clearer rule of diplomatic protection of legal entities, the ICJ decision in *Diallo* has narrowed the scope of this protection of entities by reducing the number of States that are allowed to invoke it. Under the criteria set by *Barcelona Traction*, the State of incorporation, under the basic rule, and the State of shareholders, under the equity exception, could exercise diplomatic protection on behalf of corporations. Under the new rule, only the former can do it.⁶⁸

In sum, the Court in *Diallo* ratified the rule according to which only the State of incorporation of a legal person can invoke its diplomatic protection and strengthened this rule by suppressing the previous exception, on the basis of equity, of *Barcelona Traction* and set such a high threshold for the application of the other proposed by the ILC in Article 11(b) that, for practical purposes, this exception is simply a recommendation.

V. Conclusion

As has been shown, the ICJ decision on preliminary objections in the *Diallo* case has important implications for foreign investors, States and the Court itself. Investors are favored by the ICJ decision to define shareholders' rights according to the law of the host State. This finding is not only logical, but it also makes it easier for foreign investors and their States to raise claims of diplomatic protection, when it is required, because this definition determines with clarity the legal framework applicable. Additionally, the *de facto* rule of presumption of local remedies also may also benefit investors by allowing the claim of diplomatic protection to continue, whether or not all the local remedies were exhausted, should the respondent host State fail to raise the objection.

On the other hand, the ICJ decision is unfavourable to foreign

⁶⁸ It is important not to ignore the fact that State practice still can seek to protect corporations due to their nationals' involvement as shareholders. See, e.g., *ILC Commentaries*, *supra* note 4, at 65 n.160 (noting that the UK 1985 Rules Applying to International Claims state, "where a United Kingdom national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, Her Majesty's Government may intervene to protect the interest of the United Kingdom national."). However, such States will not be able to seize the ICJ to solve the dispute in the event of the given host State's refusal to end the dispute, provided that the Court has jurisdiction on the dispute.

investors by having lowered the number of States that can protect the legal persons in which such investors have invested. In fact, this lowering has favoured host States' interests. No doubt, States, other than those of incorporation, raising claims of diplomatic protection of legal persons must rely on their power of persuasion (or on the persuasion of their power), but may not rely on the law as it has been declared by the Court in *Diallo*. For their part, host States are forced, by the presumption of exhaustion of local remedies, to be active in adducing proofs to refute the presumption in order to avoid a claim that they did not have the full opportunity to address from going straight to the decision by the Court on the merits of the case.

From the Court's viewpoint, its decision in *Diallo* sets clear applicable criteria for who can exercise diplomatic protection on behalf of legal persons and under which concrete legal regimes shareholders' rights will be protected. Finally, the *de facto* presumption of exhaustion of local remedies by aliens, while preserving the requirement, saves the Court's costs of monitoring compliance with the requisite by transferring them mainly to respondent host States. From the Court's perspective, "pragmatic" could be an appropriate label for the *Diallo* decision on preliminary objections.