21. Free movement of corporations: *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*

21.1 CASE BACKGROUND

One of the challenges European law has had to face in recent years involves the harmonisation of company law. Practised by a significant number of Member States, the 'real seat theory' prevented the growth of an internal market for corporate charters analogous to the one which thrives (albeit under the dominance of Delaware) in the United States. According to this theory, company executives do not have the liberty to freely choose a charter – laws governing the constitution and internal management of the corporate entity – other than that of the place of its seat (defined as the centre of corporate decision-making, at least as far as it appears as such to third parties). In practice, this meant that a company with a seat in France cannot choose to incorporate in Germany. Doing so would be seen as invalid in both countries; either for noncompliance to French formal and substantive requirements for incorporation, or for not having its corporate seat in Germany. By contrast, when a country practises the 'theory of incorporation', companies are free to create their own rules, or corporate charter, regardless of the place of its seat. Under this system, companies are much more mobile: they may transfer their headquarters from one place to any other practising the same criterion (it takes two to tango!), without having to re-incorporate under that country's laws. Certain Member States applied the 'theory of incorporation' as opposed to the 'real seat theory.'

The change came in 1999, in the name of free movement. In *Centros*, the Court of Justice held that the companies incorporated in one Member State enjoyed the freedom to set up a branch in another Member State; that regardless of the place of incorporation, a Member State was free to conduct its operations in another Member State without having to comply with the legal requirements demanded by the 'real seat theory.'

The facts of the *Centros* case are as follows. Centros Ltd was a private limited company registered in England and Wales on 18 May 1992 and owned by two Danish nationals, Mr. and Mrs. Bryde, who both resided in Denmark. Since English law does not impose any requirements for minimum share capital on limited liability corporations, Mr. and Mrs. Bryde had not made a payment on the share capital of Centros. At the time, Centros' share capital cost £100 per share. However, in accordance with English law, the registered office of Centros was situated in the United Kingdom, at the home of a friend of Mr. Bryde. In 1992, Mrs. Bryde requested Erhvervs-og Selskabsstyrelsen, the Danish Trade and Companies Board, to register a branch of Centros in Denmark. The Board refused registration on the grounds that Centros, which did not trade in the United Kingdom, was in fact seeking to establish in Denmark, as its place of principal establishment and not simply a branch. It considered that Centros tried to circumvent the national rules concerning the payment of the minimum capital fixed at DKK 200 000. Centros brought an action before the Danish Courts, which upheld the decision of the Board. Upon appeal, it argued that since the company was lawfully formed in the United Kingdom, it was entitled to set up a branch in Denmark, pursuant to Articles 52 and 58 of the EC Treaty. The Court stayed proceedings and referred this issue to the ECJ, which held that by reason of furthering the integration of the internal market and for free movement across the market, Centros should be permitted to set up a branch in Denmark.

Centros was the first in an initial trilogy *Centros – Uberseering – Inspire Art* (followed since by many others) of rulings by the ECJ that changed the landscape of European company law, affecting a number of aspects to relevant private international rules.

Case: C-127/97 *Centros Ltd v. Erhvervs-og Selskabsstyrelsen* [1999] ECR

21.3 ECONOMIC INTEGRATION, CORPORATE PLANNING AND CORPORATE NATIONALITY AT THE CROSSROADS

*Régis Bismuth**

The *Centros* case concerns, primarily, the relationship between, on the one hand, the freedom of establishment recognised in Articles 49 and 54 of the Treaty on the Functioning of the European Union (TFEU), and, on the other hand, the private international law issue of the law applicable to the internal affairs and the status of corporations. Understanding the interactions between these two sets of rules and, in particular, the extent to which the former has affected the latter, requires a brief reminder of the two main models of determination of applicable law adopted by the Member States.[34] Some (United Kingdom, Ireland, Denmark, etc.) follow the incorporation theory, according to which the applicable law is that of the State in which the corporation was constituted. Others (Germany, Austria, France, Belgium, etc.) have

[31] Germany drew the consequences of such case-law by enacting a statutory provision (*Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbrauchen*) dropping the requirement, previously imposed to limited companies formed in Germany to establish their real seat on its territory.

[32] Supra, n 10 and n 26.

[33] Heymann (n 27).

* Contribution originally written in French, translated into English by Camille Fromentin.

[34] Marc-Phillippe Weller and Chris Thomale, 'Companies' in Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law* (Cheltenham, Edward Elgar 2017) 405; Andra Cotiga, *Le droit européen des sociétés – Compétition entre les systèmes juridiques dans l'Union européenne* (Brussels, Larcier 2013) 151.

adopted the real seat theory, according to which the applicable law is that of the State on whose territory the real seat is located (or 'workforce').

These two theories are grounded on significantly different conceptions. The real seat theory is based on an 'objective and realistic' connecting link of the corporation and has an institutional dimension in the sense that it seeks to make the applicable law coincide with the legal system and the economy of the State in which the company is integrated. That of incorporation leaves the determination of the *lex societatis* to the free choice of the founders. It reflects a contractual conception where party autonomy prevails.

The real seat theory is likely to hinder the international mobility of corporations. A corporation willing to transfer its headquarters abroad while retaining its social form may face a refusal from the authorities of the State of incorporation (or 'State of origin'). Also, the legal existence of a corporation that establishes its headquarters abroad may be denied by the authorities of the host State on the ground that the separation between the head office (located in the State of origin) and the actual headquarters (located in the 'host State') constitutes a manoeuver designed to circumvent the application of the *lex societatis* (that is, the law of the host State'). A cross-border transfer may therefore require the creation of a new corporation in the host State (operation referred to as 'reincorporation') or the respect of certain mandatory rules (for example minimum capital requirement) by a company seen to be 'pseudo-foreign'. It is in the light of these elements that the *Centros* case and its progeny can be understood.

The construction of the internal market has revolved around four freedoms of movement (goods, services, capital and people). Free movement of persons (designated 'right of establishment') benefits to 'nationals' of the Member States (Article 49 TFEU), including 'companies established in accordance with the law of a Member State' that 'are assimilated ... to the natural persons who are nationals of the Member States' (Article 54 TFEU). Companies willing to transfer their real seat from one Member State to another but facing obstacles raised both by the State of origin (requiring a dissolution prior to the transfer) and the host State (requiring reincorporation or the respect of certain mandatory rules) have invoked the right of establishment. This has generated two types of disputes. One concerns the compatibility with the right of establishment of the restrictions imposed by the State of origin on the 'emigration' of the real seat (*Daily Mail*[35] and *Cartesio*[36] cases in particular), the other the restrictions imposed by the host State of the 'immigration' of the actual seat (business constituting the trilogy *Centros*,[37] *Überseering*[38] and *Inspire Art*[39]).

[35] Case 81/87 *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.* [1988] ECR I-5505.

[36] Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641.

[37] Case C-212/97 *Centros Ltd v. Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

[38] Case C-208/00 *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.

[39] Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd* [2003] ECR I-10155.

The Court of Justice drew a distinction between the two situations.[40] On the one hand, in a logic somewhat reminiscent of that of *Cassis de Dijon*,[41] it has censored the restrictions imposed by the host States on the basis of freedom of establishment (reincorporation, capital requirement, non-recognition of legal personality, imposition of specific rules of directors' liability). On the other hand, it has nonetheless refused to recognise an infringement of freedom of establishment in emigration situations. In the *Cartesio* case, the Court stressed that 'companies are creatures of national law and exist only by virtue of the national legislation which determines its incorporation and functioning'[42] and emphasised that it is thus the province of national law to define 'the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State'.[43] Consequently, the law of the State of origin has the possibility of no longer recognising as its own a company willing to transfer its seat to another Member State, 'thereby breaking the connecting factor required under the national law of the Member State of incorporation'.[44]

This case law has produced an asymmetrical situation. In emigration cases, freedom of establishment does not generally restrict the right of the State of origin to control the transfer of the real seat. In immigration cases, the freedom of establishment compels the receiving State to recognise the foreign company willing to transfer its seat without being able to impose the requirements stemming from the mandatory rules of its company law, except for 'imperative requirements in the general interest' which have not been successfully invoked in *Centros*, *Überseering* and *Inspire Art*. The freedom of establishment has thus significantly affected the possibility for host States to apply the real seat theory in order to manage the personal status of foreign companies.

The *Centros* judgment has a quasi-iconic dimension in the narrative of EU law[45] and the European discourse on company law.[46] Beyond its EU law or private international law aspects relevant to the mobility of companies, alternative readings of the *Centros* judgment are available. Indeed, this case, both in respect of its outcome and as a symbol, is particularly rich and can be viewed from the perspective of other disciplines.

[40] On those aspects, see Cotiga (n 34) 175; Otto Sandrock and Jean J. du Plessis, 'The Impact of European Developments on German Codetermination and German Corporate Law' in Jean J. du Plessis, Bernhard Großfeld, Claus Luttermann, Ingo Saenger, Otto Sandrock and Matthias Casper (eds) *German Corporate Governance in International and European Context* 2nd edn (New York, Springer 2012) 204.

[41] Andrew Johnston, *EC Regulation of Corporate Governance* (Cambridge, Cambridge University Press 2009) 146. The author refers in particular to '(t)he extension of Cassis to companies' (p. 152).

[42] *Cartesio* (n 36) [104].

[43] Ibid., [110].

[44] Ibid.

[45] See in particular, Martin Gelter, '*Centros*, the Freedom of Establishment for Companies and the Court's Accidental Vision for Corporate Law' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories – Contextual and Critical Histories of European Jurisprudence* (Cambridge, Cambridge University Press 2017) 309.

[46] Ibid., 332–34. The author shows that it is following the *Centros* case that certain reviews concerning European or comparative company law were created (*European Business Organization Law Review* created in 2001, *European Company and Financial Law Review* and *European Company Law* both created in 2004, etc.).

Three such perspectives can be explored. The first consists in evaluating what the *Centros* case can teach us about the different models of economic integration (1), the second relates to the (social) functions of company law from the point of view of host States' interests (2) and the last is related to current debates concerning the nationality of corporations in public international law (3).

1. THE 'ECONOMIC INTEGRATION' PERSPECTIVE

As they concern the relations between liberalisation and regulation, the *Centros* case and its progeny involve issues of economic integration, particularly those relating to the distinction between two different models of integration, positive and negative.

Economic integration aims at creating a space of economic free movement and implies the removal of barriers to trade. It is not surprising therefore that different integration processes are based on similar disciplines (e.g. the principle of non-discrimination) even while they fall under distinct legal frameworks. This is, to a certain extent, the case of EU law and WTO law, that can be studied from a comparative perspective.[47] However, these two instruments are distinguished by the fact that WTO law is part of a negative integration process (removal of barriers to trade), whereas EU law is broadly part of a positive integration dynamic (removal of barriers to trade coupled with the implementation of common policies and regulatory harmonisation through supranational instruments).[48] The first one relies on a dissociation between the spaces of liberalisation and regulation, while the second works to make the two coincide. However, not all national regulations are subject to harmonisation initiatives and there are pockets of negative integration in the European context. This is the case with certain aspects of company law; *Centros* can be understood from this perspective.

By controlling national restrictive measures on matters not harmonised in EU law with regard to European economic freedoms (in this case, the refusal by the Danish authorities to register the branch of a company incorporated under UK law in order to circumvent the Danish national minimum capital requirements), the *Centros* judgment is part of a logic of 'negative integration'.[49] What is striking about this decision, however, is that the intra-European dimension of the situation (the establishment of a British company in Denmark) is not the result of a genuine economic flow between these two areas but rather the sole result of the Danish founders' wish to benefit from the foreign system of company law, considered to be the most advantageous. In essence, the only flow that can be observed between the two Member States is that of

[47] See, Sanford E. Gaines, Birgitte Egelund Olsen and Karsten Engsig Sørensen (eds), *Liberalising Trade in the EU and the WTO – A Legal Comparison* (Cambridge, Cambridge University Press 2012).

[48] Federico Ortino, *Basic Legal Instruments for the Liberalisation of Trade – A Comparative Analysis of EC and WTO Law* (Oxford, Hart 2004) 16.

[49] Christian Joerges 'Sur la légitimité d'européaniser le droit privé – Plaidoyer pour une approche procédurale' (2004) 2 *Revue Internationale de Droit Economique* 142; Johnston (n 41) 152.

British company law! As such, the Court has not only made it possible 'to transform a purely internal situation into an intra-Community situation',[50] but has also, in a way, permitted the free circulation of company law in the European internal market as an extension of the freedom of establishment. The Court has indeed clearly assumed this form of *law shopping*, emphasising that it is possible for any European national to choose to form a company 'in the Member State whose rules of company law seem to him the least restrictive'.[51] Therefore, by refusing to subject the benefit of the more advantageous regulatory regime to a real economic flow within the internal market, and by disregarding the intention of the persons concerned to circumvent the rules of the host State, the Court thus introduced direct competition between national systems of company law.

This competition manifested itself in the years following the *Centros – Überseering – Inspire Art* trilogy through the expansion of a pan-European incorporation market, in which the British limited liability company was particularly popular. It was the case in Germany, where new intermediaries were created in charge of completing the incorporation formalities.[52]

This has generated a debate about the risk that this competition would generate a regulatory race to the bottom and dismantle the protections of corporate law for the sole benefit of shareholders or other stakeholders.[53] It should be noted that these ECJ decisions have triggered reforms to simplify the law of limited liability companies in many Member States willing to ensure the competitiveness of their company law, such as Germany, France, Spain or the Netherlands – noting that, in the latter case, the reform explicitly mentioned the case-law of the Court.[54]

These developments make it possible to return to the considerations relating to the models of economic integration. This case law has generated what some people refer to as a 'defensive regulatory competition'[55] through which several Member States have sought to align certain aspects of their limited liability company law on the UK model. The position of the Court, through its interpretation of the right of establishment, thus favoured a process of convergence of national laws, in other words a form of positive (albeit imposed or coerced) integration in an area where Member States had until now refused to harmonise domestic regulations.

50 Horatia Muir Watt 'Aspects économiques du droit international privé (Réflexions sur l'impact de la globalisation économique sur les fondements des conflits de lois et de juridictions)' (2004) 307 *Recueil Des Cours* 108.

51 *Centros* (n 37) [27].

52 Marco Becht, Luca Enriques and Veronika Korom '*Centros* and the Cost of Branching' (2009) 9 *Journal of Corporate Law Studies* 171; Gelter (n 45) 326; Martin Höpner and Armin Schäfer 'A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europe' (2010) 33 *West European Politics* 360.

53 Gelter (n 45) 327. See also *infra* s 2.

54 Ibid., 328–29.

55 Ibid., 328; Johnston (n 41) 183.

2. THE (SOCIAL) FUNCTIONS OF CORPORATE LAW FOR THE HOST STATE

The Court's approach in *Centros* and subsequent cases is to require the host State to justify any restriction on the freedom of establishment resulting from additional requirements imposed on foreign companies. Such restrictions may be compatible with the freedoms of movement since, as the Court indicates, they respect four conditions: 'they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it'.[56] The Court has thus controlled the means employed by host States to ensure the achievement of certain objectives and the protection of certain interests through the rules of company law. This liberal jurisprudence appears to be rather strict for States and moreover short-sighted if one tries to place it in a more general framework of the functions of corporate law.

In the context of the *Centros* case, the rules at stake related to the constitution and the release of a minimum capital for limited liability companies, minimum that had been circumvented since Danish law required a minimum of approximately 20,000 euros, while the incorporation process in the UK for the same type of company was only about £100. The Danish authorities emphasised that these minimum capital requirements had the objective of protecting both public creditors (who cannot secure those debts by means of guarantees) and private creditors against a risk of fraudulent bankruptcy resulting facilitated by inadequate capitalisation.[57]

The Court rejected these arguments expeditiously. In particular, it pointed out that the minimum capital requirements are clearly not aimed at protecting the creditors, because if the UK company had had a real activity in the State of origin, the Danish branch would have nonetheless been registered. In this respect, a foreign company having a real activity in the State of origin could not be treated more favourably than a company that was incorporated abroad for the sole purpose of circumventing national rules relating to minimal capital! It further indicated that the protection of creditors is ultimately guaranteed insofar that they are informed that their debtor is a foreign law company.[58] In *Inspire Art*, the Court reiterated that the information concerning the foreign origin of the company was sufficient for the protection of creditors, noting, in passing, that it did not need 'to consider whether the rules on minimum share capital constitute in themselves an appropriate protection measure'.[59]

The requirements of company law are nonetheless not confined to the interests of creditors alone, and the *Überseering* case provided an opportunity for the German Government to emphasise that the real seat theory is also necessary for the protection of minority shareholders and employees.[60] Germany was particularly worried about the future of its co-management system allowing employees to be represented in the organs

56 *Centros* (n 37) [34].

57 Ibid., [32].

58 Ibid., [35–36].

59 *Inspire Art* (n 39) [135].

60 *Überseering* (n 38) [88–89].

of certain types of companies.[61] If the Court has considered, in a very cautious way, that 'it is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of ... employees ... may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment',[62] it nevertheless pointed out that the German measures aimed at pseudo-foreign companies (in this case, the deprivation of a local forum) amounted to 'an outright negation of the freedom of establishment'.[63]

Beyond the question of the proportionality of the national measures implemented by the host State in order to sanction the breach of mandatory national requirements (necessity of reincorporation, non-recognition of the legal personality of the foreign company, etc.), this case-law leads implicitly to an assessment of the merits of the corporate structures on aspects that it would be unthinkable to question on other grounds. Indeed, it is hardly conceivable to challenge minimum capital requirements or co-management rules on the basis of freedom to conduct a business by asserting that they constitute an unnecessary obstacle to the conduct of an economic activity in a given national system. However, these very same requirements do not withstand the logic of the freedom of establishment, which can thus be seen ultimately to be very invasive.[64]

The *Centros* ruling and those that have followed it have more fundamentally opened the breach of a disembodied or off-shore company law by enabling the unravelling of certain models of capitalism (for example Rhenish capitalism) that are also the result of a historical process.[65] It is also not excluded that this case-law will lead Member States to ensure that the requirements of company law censored under the freedom of establishment (minimum capital requirement or joint and several liability of the directors in *Inspire Art*) following an *ex ante* logic, are later reconstituted in another form according to an individualized *ex post* approach. This would be the case for instance through insolvency law proceedings, or through the standards relevant to the lifting of the corporate veil, in order to engage the liability of the shareholders in the event of insolvency of an underfunded company.[66]

The Court's analysis also raises other questions. By holding that the rules on minimum capital are not necessary for the protection of creditors because they are informed that the company is foreign,[67] the Court identifies, to be sure, a less restrictive measure available to the host State, but such a measure is based on a very different conception of the creditors' protection policy.

A minimum capital requirement can be considered as a discipline intended to preserve the interests of professional and non-professional co-contractors, as well as those of persons incurring the tort liability of the company. Relying solely on the

61 Ibid., [89].
62 Ibid., [92].
63 Ibid., [93].
64 Meanwhile underlying that there exists a debate on the real questioning of the German co-management system on the basis of the freedom of establishment. On those issues, see Sandrock and du Plessis, *supra* note 40.
65 Höpner and Schäfer (n 52) 344.
66 Gelter (n 45) 335.
67 *Centros* (n 37) [35]; *Inspire Art* (n 39) [135].

information provided to creditors, the Court assumes that they all have similar capacities to analyse the risk to which they are exposed – and in the same breath, it also ignores cases of tort liability. This approach runs counter to the more 'paternalistic' creditors' protection mechanisms of continental Europe that assume the limited rationality of certain vulnerable actors.[68] To a certain extent, the *Centros* doctrine also implicitly acknowledges the primacy of private autonomy in contractual matters, the very concept that is at the heart of the theory of incorporation in respect of the determination of the law applicable to companies.

3. THE ISSUE OF THE NATIONALITY OF CORPORATIONS IN PUBLIC INTERNATIONAL LAW

In its approach to the nationality of corporations and the effectiveness of their connection to a given State, the *Centros* case echoes several well-known problems of public international law, which also offers an interesting angle to read the position taken by the ECJ.

In an approach similar to the *Centros* case, it may be useful to determine the nationality of a company in order to know whether it enjoys specific rights or protections, for example in order to identify the State entitled to exercise diplomatic protection or the conventional regime granting certain protections to foreign investments. With regard to diplomatic protection, the *Barcelona Traction* decision of the International Court of Justice considered that the criteria of incorporation and head office 'have been confirmed by long practice and by numerous international instruments'.[69] These criteria are generally those used in international investment agreements, which refer essentially to the criterion of incorporation[70] and very rarely to that of the seat alone.[71] It is worth emphasising that, in the case of connection through the criterion of incorporation, there is no requirement in customary international law to establish the existence of an effective link between the company and the State of incorporation,[72] whereas this is required for natural persons.[73]

68 Gelter (n 45) 335.
69 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Judgment of 5 February 1970, ICJ Reports 3 [70].
70 For example, the Energy Charter Treaty indicates that an investor can be 'a company or other organization organized in accordance with the law applicable in that Contracting Party' (article 1(7)(a)(2)).
71 For the sole criteria of the seat, see article I(4) of the Italian model of bilateral treaty indicating that an investor can be a 'legal person of a Contracting Party', and this 'shall mean any entity having its head office in the territory of one of the Contracting Parties and recognized by it' (UNCTAD, *International Investment Instruments: A Compendium – vol. XII* (2003) 296).
72 As regards companies, the ICJ has refused to transpose, by analogy with natural persons, the criterion of the effective link from the *Nottebohm* case. It had nevertheless, in the *Barcelona* Traction case, recognised that 'Barcelona Traction's links with Canada are ... manifold' (n 69 [70–71]).
73 While the nationality of natural persons most often results from factual elements (birth or ancestry), it can also proceed, for example in the context of a naturalisation, from a choice of the

The wide recognition of the criterion of incorporation therefore offers several opportunities for investors. The formation of companies in States with an investment agreement allows the granting of certain economic rights and freedoms (for example admission and treatment of investments) and certain procedural safeguards, such as investor/State dispute settlement mechanisms (for example the Convention on the Settlement of Investment Disputes (ICSID)). These opportunities are amplified when they are combined with the freedom of establishment under EU law, since a company incorporated in a Member State can benefit from the mobility deriving from the *Centros* case-law, even when it is owned by nationals of a third State.[74]

This phenomenon of treaty shopping then gave rise to several cases in which the respondent State (the host State of the investment) challenged the investor's right to be placed under the protection of the treaty, given the lack of effective link between the investor and the State of incorporation (the State of origin of the investment).[75] In general, the case-law distinguishes the situation of 'legitimate corporate planning'[76] from cases of abuse in which the applicant has specifically manoeuvered in order to resort to arbitration as a mode of dispute resolution. In fact, the courts have held that 'it is not uncommon practice and … not illegal to locate one's operation in a jurisdiction and to provide for a proper regulatory and legal environment, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT'.[77] However, a corporate restructuring will be considered an abuse if it was exclusively motivated by the desire to benefit from the procedural safeguards of the investment regime.[78] This is particularly the case when it is proved that the restructuring was carried out after the dispute had arisen or when it was foreseeable.[79]

person concerned, taking the form of an internal administrative act. This link of nationality is enforceable against other States in the context of an action for diplomatic protection only if it is based on an 'individual's genuine connection with the State' and is 'the exact juridical expression of a social fact' (*Nottebohm (Liechtenstein v. Guatemala)*, Judgment of 6 April 1955, ICJ Reports 4, 23–24). The nationality of companies as well as ships, aircraft and space objects also depend on such a voluntary choice of shareholders or owners and is based on an internal administrative act of incorporation or registration. However, this connection is not conditional on the existence of an effective link, thus restricting neither mailbox companies nor flags of convenience.

[74] Case C-299/02 *Commission v. Netherlands* [2004] ECR I-9761. See also, from Anna De Luca 'The Legal Framework for Foreign Investments in the EU: The EU Internal Market Freedoms, the Destiny of Member States' BITs, and Future European Agreements on Protection of Foreign Investments' in Leon E. Trakman and Nicola W. Ranieri (eds) *Regionalism in International Investment Law* (Oxford, Oxford University Press 2013) 129.

[75] See Jorun Baumgartner, *Treaty Shopping in International Investment Law* (Oxford, Oxford University Press 2016) 202.

[76] *Mobil Corporation et al. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 [191].

[77] *Aguas del Tunarie v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005 [330(d)].

[78] *Philip Morris Asia Limited v. Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015 [584].

[79] Ibid., [566].

Beyond such a case of abuse, arbitral case-law, in the wake of customary international law, shows little interest in the links that unite the investor to the State of origin. By retaining a very formal reading of the treaties that use the criterion of incorporation, tribunals have held that there is no abuse when the incorporated company in the State of origin is a 'letterbox company',[80] or even in so-called 'round-tripping' situations when the company is almost exclusively controlled by nationals of the host State. In this configuration, internationality is purely formal, and is distinctly reminiscent of the situation encountered in the *Centros* case.

It is only through an evolution of treaty practice that States have worked to better regulate this situation and to avoid that the benefit of the treaties extends to economic operators who do not have an effective link with one of the parties. Beyond the now frequent 'denial of benefits' clause,[81] some of the more recent treaties contain much more restrictive definitions of the investor. This is the case of the CETA, concluded between the EU and its Member States on the one hand, and Canada on the other hand. This instrument indicates that an investor can be 'an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party'.[82] To some extent an anti-*Centros* formula, one could say, or a moment of normative reflux, designed to neutralise the effects of an overly formal reading of the theory of incorporation.

[80] Baumgartner (n 75) 108.

[81] See for example article 1113(2) of NAFTA indicating that a party may refuse to grant the benefits of the treaty to 'an investor of another Party that is an enterprise of such Party … if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized'.

[82] CETA, Article 8.1.