CASE CONCERNING THE BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED (PRELIMINARY OBJECTIONS)

Judgment of 24 July 1964

Proceedings in the case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium *v.* Spain) were instituted by an Application of 19 June 1962 in which the Belgian Government sought reparation for damage claimed to have been caused to Belgian nationals, shareholders in the Canadian Barcelona Traction Company, by the conduct of various organs of the Spanish State. The Spanish Government raised four Preliminary Objections.

The Court rejected the first Preliminary Objection by 12 votes to 4, and the second by 10 votes to 6. It joined the third Objection to the merits by 9 votes to 7 and the fourth by 10 votes to 6.

President Sir Percy Spender and Judges Spiropoulos, Koretsky and Jessup appended Declarations to the Judgment.

Vice-President Wellington Koo and Judges Tanaka and Bustamante y Rivero appended Separate Opinions.

Judge Morelli and Judge *ad hoc* Armand-Ugon appended Dissenting Opinions.

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First Preliminary Objection

In its Judgment, the Court recalled that Belgium had on 23 September 1958 filed with the Court an earlier Application against Spain in respect of the same facts, and Spain had then raised three Preliminary Objections. On 23 March 1961 the Applicant, availing itself of the right conferred upon it by Article 69, paragraph 2, of the Rules of Court, had informed the Court that it was not going on with the proceedings; notification having been received from the Respondent that it had no objection, the Court had removed the case from its List (10 April 1961). In its first Preliminary Objection, the Respondent contended that this discontinuance precluded the Applicant from bringing the present proceedings and advanced five arguments in support of its contention.

The Court accepted the first argument, to the effect that discontinuance is a purely procedural act the real significance of which must be sought in the attendant circumstances.

On the other hand, the Court was unable to accept the second argument, namely that a discontinuance must always be taken as signifying a renunciation of any further right of action unless the right to start new proceedings is expressly reserved. As the Applicant's notice of discontinuance contained no motivation and was very clearly confined to the proceedings instituted by the first Application, the Court considered that the onus of establishing that the discontinuance meant something more than a decision to terminate those proceedings was placed upon the Respondent.

The Respondent, as its third argument, asserted that there had been an understanding between the Parties; it recalled that the representatives of the private Belgian interests concerned had made an approach with a view to opening negotiations and that the representatives of the Spanish interests had laid down as a prior condition the final withdrawal of the claim. According to the Respondent what was meant by this was that the discontinuance would put an end to any further right of action, but the Applicant denied that anything more was intended than the termination of the then current proceedings. The Court was unable to find at the governmental level any evidence of any such understanding as was alleged by the Respondent; it seemed that the problem had been deliberately avoided lest the foundation of the interchanges be shattered. Nor had the Respondent, on whom lay the onus of making its position clear, expressed any condition when it indicated that it did not object to the discontinuance.

The Respondent Government then advanced a fourth argument, having the character of a plea of estoppel, to the effect that, independently of the existence of any understanding, the Applicant had by its conduct misled the Respondent about the import of the discontinuance, but for which the Respondent would not have agreed to it, and would not thereby have suffered prejudice. The Court did not consider that the alleged misleading Belgian misrepresentations had been established and could not see what the Respondent stood to lose by agreeing to negotiate on the basis of a simple discontinuance; if it had not agreed to the discontinuance, the previous proceedings would simply have continued, whereas negotiations offered a possibility of finally settling the dispute. Moreover, if the negotiations were not successful and the case started again, it would still be possible once more to put forward the previous Preliminary Objections. Certainly the Applicant had framed its second Application with a foreknowledge of the probable nature of the Respondent's reply and taking it into account but, if the original proceedings had continued, the Applicant could likewise always have modified its submissions.

The final argument was of a different order. The Respondent alleged that the present proceedings were contrary to the spirit of the Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927 which, according to the Applicant, conferred competence on the Court. The preliminary stages provided for by the Treaty having already been gone through in connection with the original proceedings, the Treaty could not be invoked a second time to seise the Court of the same complaints. The Court considered that the Treaty processes could not be regarded as exhausted so long as the right to bring new proceedings otherwise existed and until the case had been prosecuted to judgment.

For these reasons, the Court rejected the first Preliminary Objection.

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Second Preliminary Objection

To found the jurisdiction of the Court the Applicant relied on the combined effect of Article 17 (4) of the 1927 Treaty between Belgium and Spain, according to which if the other methods of settlement provided for in that Treaty failed either party could bring any dispute of a legal nature before the Permanent Court of International Justice, and Article 37 of the Statute of the International Court of Justice, which reads as follows:

> "Whenever a treaty or convention in force provides for reference of a matter . . . to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

As the principal aspect of its objection, the Respondent maintained that although the 1927 Treaty might still be in force, Article 17 (4) had lapsed in April 1946 on the dissolution of the Permanent Court to which that article referred. No substitution of the present for the former Court had been effected in that article before the dissolution, Spain not being then a party to the Statute; in consequence, the 1927 Treaty had ceased to contain any valid jurisdictional clause when Spain was admitted to the United Nations and became *ipso facto* a party to the Statute (December 1955). In other words, Article 37 applied only between States which had become parties to the Statute previous to the dissolution of the Permanent Court, and that dissolution had brought about the extinction of jurisdictional clauses providing for recourse to the Permanent Court unless they had previously been transformed by the operation of Article 37 into clauses providing for recourse to the present Court.

The Court found that this line of reasoning had first been advanced by the Respondent after the decision given by the Court on 26 May 1959 in the case concerning the *Aerial Incident of 27 July 1955* (*Israel* v. *Bulgaria*). But that case had been concerned with a unilateral declaration in acceptance of the compulsory jurisdiction of the Permanent Court and not with a treaty. It thus had reference not to Article 37 but to Article 36, paragraph 5, of the Statute.

As regards Article 37, the Court recalled that in 1945 its drafters had intended to preserve as many jurisdictional clauses as possible from becoming inoperative by reason of the prospective dissolution of the Permanent Court. It was thus difficult to suppose that they would willingly have contemplated that the nullification of the jurisdictional clauses whose continuation it was desired to preserve would be brought about by the very event the effects of which Article 37 was intended to parry.

Only three conditions were actually stated in Article 37. They were that there should be a treaty in force; that it should contain a provision for the reference of a matter to the Permanent Court; and that the dispute should be between States parties to the Statute. In the present case the conclusion must be that the 1927 Treaty being in force and containing a provision for reference to the Permanent Court, and the parties to the dispute being parties to the Statute, the matter was one to be referred to the International Court of Justice, which was the competent forum.

It was objected that this view led to a situation in which the jurisdictional clause concerned was inoperative and then after a gap of years became operative again, and it was asked whether in those circumstances any true consent could have been given by the Respondent to the Court's jurisdiction. The Court observed that the notion of rights and obligations that are in abeyance but not extinguished was common; States becoming parties to the Statute after the dissolution of the Permanent Court must be taken to have known that one of the results of their admission would be the reactivation by reason of Article 37 of certain jurisdictional clauses. The contrary position maintained by the Respondent would create discrimination between States according as to whether they became parties to the Statute before or after the dissolution of the Permanent Court.

As regards Article 17 (4) more particularly, the Court considered that it was an integral part of the 1927 Treaty. It would be difficult to assert that the basic obligation to submit to compulsory adjudication provided for in the Treaty was exclusively dependent on the existence of a particular forum. If it happened that the forum went out of existence, the obligation became inoperative but remained substantively in existence and could be rendered operative once more if a new tribunal was supplied by the automatic operation of some other instrument. Article 37 of the Statute had precisely that effect. Accordingly, "International Court of Justice" must now be read for "Permanent Court of International Justice".

As a subsidiary plea, the Respondent contended that if Article 37 of the Statute operated to reactivate Article 17 (4) of the Treaty in December 1955, what came into existence at that date was a new obligation between the Parties; and that just as the original applied only to disputes arising after the Treaty date, so the new obligation could apply only to disputes arising after December 1955. The dispute was accordingly not covered since it had arisen previous to December 1955. In the opinion of the Court, when the obligation to submit to compulsory adjudication was revived as to its operation, it could only function in accordance with the Treaty providing for it and it continued to relate to any disputes arising after the Treaty date.

For these reasons the Court rejected the second Preliminary Objection both in its principal and in its subsidiary aspects.

Third and Fourth Preliminary Objections

The Respondent's third and fourth Preliminary Objections involved the question of whether the claim was admissible. The Applicant had submitted alternative pleas that these objections, unless rejected by the Court, should be joined to the merits.

By its third Preliminary Objection the Respondent denied the legal capacity of the Applicant to protect the Belgian interests on behalf of which it had submitted its claim. The acts complained of had taken place not in relation to any Belgian natural or juristic person but in relation to the Barcelona Traction Company, a juristic entity registered in Canada, the Belgian interests concerned being in the nature of shareholding interests in that company. The Respondent contended that international law does not recognize, in respect of injury caused by a State to the foreign company, any diplomatic protection of shareholders exercised by a State other than the national State of the company. The Applicant contested this view.

The Court found that the question of the *jus standi* of a government to protect the interests of shareholders raised an antecedent question of what was the juridical situation in respect of shareholding interests, as recognized by international law. The Applicant thus necessarily invoked rights which, so it contended, were conferred on it in respect of its nationals by the rules of international law concerning the treatment of foreigners. Hence a finding by the Court that it had no *jus standi* would be tantamount to a finding that those rights did not exist and that the claim was not well-founded in substance.

The third Objection had certain aspects which were of a preliminary character, but involved a number of closely interwoven strands of mixed law, fact and status to a degree such that the Court could not pronounce upon it at the present stage in full confidence that it was in possession of all the elements that might have a bearing on its decisions. The proceedings on the merits would thus place the Court in a better position to adjudicate with a full knowledge of the facts.

The foregoing considerations applied *a fortiori* to the fourth Preliminary Objection, wherein the Respondent alleged failure to exhaust local remedies. This allegation was in fact inextricably interwoven with the issues of denial of justice which constituted the major part of the merits of the case.

Accordingly, the Court joined the third and fourth Preliminary Objections to the merits.
