CASE CONCERNING THE BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED (SECOND PHASE)

Judgment of 5 February 1970

In its judgment in the second phase of the case concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium *v.* Spain), the Court rejected Belgium's claim by fifteen votes to one.

The claim, which was brought before the Court on 19 June 1962, arose out of the adjudication in bankruptcy in Spain of Barcelona Traction, a company incorporated in Canada. Its object was to seek reparation for damage alleged by Belgium to have been sustained by Belgian nationals, shareholders in the company, as a result of acts said to be contrary to international law committed towards the company by organs of the Spanish State.

The Court found that Belgium lacked *jus standi* to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain.

Judges Petrén and Onyeama appended a joint declaration to the Judgment; Judge Lachs appended a declaration. President Bustamante y Rivero and Judges Sir Gerald Fitzmaurice, Tanaka, Jessup, Morelli, Padilla Nervo, Gros and Ammoun appended Separate Opinions.

Judge *ad hoc* Riphagen appended a Dissenting Opinion.

Background of Events in the Case
(paras. 8–24 of the Judgment)

The Barcelona Traction, Light and Power Company, Limited, was incorporated in 1911 in Toronto (Canada), where it has its head office. For the purpose of creating and developing an electric power production and distribution system in Catalonia (Spain) it formed a number of subsidiary companies, of which some had their registered offices in Canada and the others in Spain. In 1936 the subsidiary companies supplied the major part of Catalonia's electricity requirements. According to the Belgian Government, some years after the first world war Barcelona Traction's share capital came to be very largely held by Belgian nationals, but the Spanish Government contends that the Belgian nationality of the shareholders is not proven.

Barcelona Traction issued several series of bonds, principally in sterling. The sterling bonds were serviced out of transfers to Barcelona Traction effected by the subsidiary companies operating in Spain. In 1936 the servicing of the Barcelona Traction bonds was suspended on account of the Spanish civil war. After that war the Spanish exchange control authorities refused to authorize the transfer of the foreign currency necessary for the resumption of the servicing of the sterling bonds. Subsequently, when the Belgian Government complained of this, the Spanish Government stated that the transfers could not be authorized unless it were shown that the foreign currency was to be used to repay debts arising from the genuine importation of foreign capital into Spain, and that this had not been established.

In 1948 three Spanish holders of recently acquired Barcelona Traction sterling bonds petitioned the court of Reus (Province of Tarragona) for a declaration adjudging the company bankrupt, on account of failure to pay the interest on the bonds. On 12 February 1948 a judgment was given declaring the company bankrupt and ordering the seizure of the assets of Barcelona Traction and of two of its subsidiary companies. Pursuant to this judgment the principal management personnel of the two companies were dismissed and Spanish directors appointed. Shortly afterwards, these measures were extended to the other subsidiary companies. New shares of the subsidiary companies were created, which were sold by public auction in 1952 to a newly-formed company, Fuerzas Electricas de Cataluña, S.A. (Fecsa), which thereupon acquired complete control of the undertaking in Spain.

Proceedings were brought without success in the Spanish courts by various companies or persons. According to the Spanish Government, 2,736 orders were made in the case and 494 judgments given by lower and 37 by higher courts before it was submitted to the International Court of Justice. The Court found that in 1948 Barcelona Traction, which had not received a judicial notice of the bankruptcy proceedings, and was not represented before the Reus court, took no proceedings in the Spanish courts until 18 June and thus did not enter a plea of opposition against the bankruptcy judgment within the time-limit of eight days from the date of publication of the judgment laid down in Spanish legislation. The Belgian Government contends, however, that the notification and publication did not comply with the relevant legal requirements and that the eight-day time-limit never began to run.

Representations were made to the Spanish Government by the British, Canadian, United States and Belgian Governments as from 1948 or 1949. The interposition of the Canadian Government ceased entirely in 1955.

Proceedings before the International Court and the Nature of the Claim
(paras. 1–7 and 26–31 of the Judgment)

The Belgian Government filed a first Application with the Court against the Spanish Government in 1958. In 1961 it gave notice of discontinuance of the proceedings, with a view to negotiations between the representatives of the private interests concerned, and the case was removed from the Court's General List. The negotiations having failed, the Belgian Government on 19 June 1962 submitted to the Court a new Application. In 1963 the Spanish Government raised four preliminary objections to this Application. By its Judgment of 24 July 1964, the Court rejected the first and second objections and joined the third and fourth to the merits.

In the subsequent written and oral proceedings the Parties supplied abundant material and information. The Court observed that the unusual length of the proceedings was due to the very long time-limits requested by the Parties for the preparation of their written pleadings and to their repeated requests for an extension of those limits. The Court did not find that it should refuse those requests, but it remained convinced that it was in the interest of the authority of international justice for cases to be decided without unwarranted delay.

The claim submitted to the Court had been presented on behalf of natural and juristic persons, alleged to be Belgian nationals and shareholders in Barcelona Traction, a company incorporated in Canada and having its head office there. The object of the Application was reparation for damage allegedly caused to those persons by the conduct, said to be con-

trary to international law, of various organs of the Spanish State towards that company.

The third preliminary objection of the Spanish Government, which had been joined to the merits, was to the effect that the Belgian Government lacked capacity to submit any claim in respect of wrongs done to a Canadian company, even if the shareholders were Belgian. The fourth preliminary objection, which was also joined to the merits, was to the effect that local remedies available in Spain had not been exhausted.

The case submitted to the Court principally concerned three States, Belgium, Spain and Canada, and it was accordingly necessary to deal with a series of problems arising out of this triangular relationship.

The Belgian Government's jus standi
(paras. 32–101 of the Judgment)

The Court first addressed itself to the question, raised by the third preliminary objection, which had been joined to the merits, of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

The Court observed that when a State admitted into its territory foreign investments or foreign nationals it was bound to extend to them the protection of the law and assumed obligations concerning the treatment to be afforded them. But such obligations were not absolute. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so.

In the field of diplomatic protection, international law was in continuous evolution and was called upon to recognize institutions of municipal law. In municipal law, the concept of the company was founded on a firm distinction between the rights of the company and those of the shareholder. Only the company, which was endowed with legal personality, could take action in respect of matters that were of a corporate character. A wrong done to the company frequently caused prejudice to its shareholders, but this did not imply that both were entitled to claim compensation. Whenever a shareholder's interests were harmed by an act done to the company, it was to the latter that he had to look to institute appropriate action. An act infringing only the company's rights did not involve responsibility towards the shareholders, even if their interests were affected. In order for the situation to be different, the act complained of must be aimed at the direct rights of the shareholder as such (which was not the case here since the Belgian Government had itself admitted that it had not based its claim on an infringement of the direct rights of the shareholders).

International law had to refer to those rules generally accepted by municipal legal systems. An injury to the shareholder's interests resulting from an injury to the rights of the company was insufficient to found a claim. Where it was a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorized the national State of the company alone to exercise diplomatic protection for the purpose of seeking redress. No rule of international law expressly conferred such a right on the shareholder's national State.

The Court considered whether there might not be, in the present case, special circumstances for which the general rule might not take effect. Two situations needed to be studied: (*a*) the case of the company having ceased to exist, and (*b*) the case of the protecting State of the company lacking capacity to take action. As regards the first of these possibilities, the Court observed that whilst Barcelona Traction had lost all its assets in Spain and been placed in receivership in Canada, it could not be contended that the corporate entity of the company had ceased to exist or that it had lost its capacity to take corporate action. So far as the second possibility was concerned, it was not disputed that the company had been incorporated in Canada and had its registered office in that country, and its Canadian nationality had received general recognition. The Canadian Government had exercised the protection of Barcelona Traction for a number of years. If at a certain point the Canadian Government ceased to act on behalf of Barcelona Traction, it nonetheless retained its capacity to do so, which the Spanish Government had not questioned. Whatever the reasons for the Canadian Government's change of attitude, that fact could not constitute a justification for the exercise of diplomatic protection by another government.

It had been maintained that a State could make a claim when investments by its nationals abroad, such investments being part of a State's national economic resources, were prejudicially affected in violation of the right of the State itself to have its nationals enjoy a certain treatment. But, in the present state of affairs, such a right could only result from a treaty or special agreement. And no instrument of such a kind was in force between Belgium and Spain.

It had also been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which had been the victim of a violation of international law. The Court considered that the adoption of the theory of diplomatic protection of shareholders as such would open the door to competing claims on the part of different States, which could create an atmosphere of insecurity in international economic relations. In the particular circumstances of the present case, where the company's national State was able to act, the Court was not of the opinion that *jus standi* was conferred on the Belgian Government by considerations of equity.

The Court's Decision
(paras. 102 and 103 of the Judgment)

The Court took cognizance of the great amount of documentary and other evidence submitted by the Parties and fully appreciated the importance of the legal problems raised by the allegation which was at the root of the Belgian claim and which concerned denials of justice allegedly committed by organs of the Spanish State. However, the possession by the Belgian Government of a right of protection was a prerequisite for the examination of such problems. Since no *jus standi* before the Court had been established, it was not for the Court to pronounce upon any other aspect of the case.

Accordingly, the Court rejected the Belgian Government's claim by 15 votes to 1, 12 votes of the majority being based on the reasons set out above.

Declarations and Separate and Dissenting Opinions

Judge *ad hoc* Riphagen appended to the Judgment a Dissenting Opinion in which he stated that he was unable to concur in the Judgment as the legal reasoning followed by the Court appeared to him to fail to appreciate the nature of the rules of customary public international law applicable in the present case.

Among the fifteen members of the majority, three supported the operative provisions of the Judgment (rejecting

the Belgian Government's claim) for different reasons, and appended Separate Opinions to the Judgment. Judge Tanaka stated that the two preliminary objections joined to the merits ought to have been dismissed, but that the Belgian Government's allegation concerning denials of justice was unfounded. Judge Jessup came to the conclusion that a State, under certain circumstances, had a right to present a diplomatic claim on behalf of shareholders who were its nationals, but that Belgium had not succeeded in proving the Belgian nationality, between the critical dates, of those natural and juristic persons on whose behalf it had sought to claim. Judge Gros held that it was the State whose national economy was adversely affected that possessed the right to take action but that proof of Barcelona Traction's appurtenance to the Belgian economy had not been produced.

Among the twelve members of the majority who supported the operative provision of the Judgment on the basis of the reasoning set out in the Judgment (lack of *jus standi* on the part of the shareholders' national State), President Bustamante y Rivero and Judges Sir Gerald Fitzmaurice, Morelli, Padilla Nervo and Ammoun (Separate Opinions) and Judges Petrén and Onyeama (joint declaration) and Judge Lachs (declaration) stated that nevertheless there were certain differences between their reasoning and that contained in the Judgment, or that there were certain observations which they wished to add.

(Judge Sir Muhammad Zafrulla Khan had informed the President at the beginning of the Preliminary Objections stage that, having been consulted by one of the Parties concerning the case before his election as a Member of the Court, he considered that he ought not to participate in its decision.)
