CASE CONCERNING THE BARCELONA TRACTION, LIGHT AND POWER COMPANY LIMITED (BELGIUM V. SPAIN), ICJ REP. 1970, 3FF.

Case Summary: *ANDREAS F. LOWENFELD, International Economic Law, New York, 2nd ed., 2008, p. 433 s.*

The *Barcelona Traction* Case (1970)[1]

Barcelona Traction, Light and Power Company Limited was a holding company incorporated in Toronto, Canada in 1911 to develop a system to produce and distribute electric power in Catalonia (Spain). According to the government of Belgium, the shares of the company came to be very largely held by Belgian nationals - both natural and juristic persons. Barcelona Traction issued a series of bonds payable in British pounds and Spanish pesetas, secured by mortgages on assets of various subsidiaries in Spain. In 1948 three Spanish holders of bonds of Barcelona Traction petitioned a Spanish Court for a declaration of bankruptcy for Barcelona Traction. A judgment of bankruptcy was entered several days later, and the Court ordered seizure of the assets of Barcelona Traction. The Spanish court appointed a receiver, and the Traction Company lost the capacity to administer any of its properties.[2] The principal managers of the company were dismissed, new directors were appointed, new shares were issued of the Spanish subsidiaries of Barcelona Traction, and these shares were sold by public auction to a newly founded Spanish company.

Following several years of diplomatic representations on behalf of Barcelona Traction, also by Canada, Great Britain, and the United States, Belgium initiated proceedings against Spain in the World Court, alleging essentially 'creeping expropriation' and claiming some $90 million in reparations, or 88 percent of this sum representing the Belgian share interest in the company. Belgium asserted jurisdiction on the basis of a 1927 Treaty of Conciliation, Judicial Settlement and Arbitration between Spain and Belgium. Spain objected to the Court's jurisdiction, on the basis that the Barcelona Traction Company was not a Belgian company, and that Belgium had no right to exercise diplomatic protection, including standing in the World Court, on behalf of mere shareholders. The Court began its analysis by distinguishing among the obligations of host states:

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole,

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[1] Case concerning the Barcelona Traction, Light and Power Company Limited (New Application: 1962) (Belgium v. Spain) Second Phase, [1970] I.C.J. Rep. 3. For a summary of the decision and the arguments made to the Court, see Herbert W. Briggs, 'Barcelona Traction: The Jus Standi of Belgium', 65 Am.J. Int'l L. 327 (1971).

[2] For a discussion of the significance of the bankruptcy proceedings, which the Court did not address, see F. A. Mann, 'The Protection of Shareholders' Interests in the Light of the Barcelona Traction Case', 67 Am.J. Int'l L. 259 (1973).

and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights

involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes.*

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination . . .

Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish the right to do so. . . . In the present case it is therefore essential to establish whether . . . a right of Belgium [has] been violated on account of its nationals having suffered infringements of their rights as shareholders of a company not of Belgian nationality.[3]

The Court sought the answer to its question in corporate law:

Seen in historical perspective, the corporate personality represents a development brought about by new and expanding requirements in the economic field, an entity which in particular allows of operation in circumstances which exceed the normal capacity of individuals.

. . .

It is a basic characteristic of the corporate structure that the company above, through its directors or management acting in its name, can take action in respect of matters that are of a corporate character. . . . Ordinarily, no individual shareholder can take legal steps, either in the name of the company or in his own name.[4]

If the shareholders had no rights independent from the company, it followed, as the Court saw it, that a state with links only to the shareholders had no rights of diplomatic protection, and therefore no standing before the International Court. The Court conceded that the measures complained of, although taken with respect to Barcelona Traction and causing it direct damage, also caused damage to the Belgian shareholders.

But, as the Court has indicated, evidence that damage was suffered does not *ipso facto* justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation.[5]

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[3] Barcelona Traction Judgment, paras. 33-5.

[4] Id., paras. 39,42.

[5] Id., para.46

Canada, of course, could have exercised diplomatic protection on behalf of Barcelona Traction, and as the Court pointed out, it had done so for several years. The fact that no link of compulsory jurisdiction existed between Canada and Spain did not confer standing on Belgium.

It follows from what has already been stated above that where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim.[6]

One might have thought that the Court would stop there, having found that the claimant lacked standing. But the Court seems to have felt that something more should be said about the substance of protection for foreign investments, in view of the wide attention given to the *Barcelona Traction* case in twelve years of litigation.

What the Court said could hardly have pleased those who were looking for an affirmative pronouncement from the World Court about protection of foreign investment.

Considering the important developments of the last half century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests . . .

[I]n the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. . . . No such instrument is in force between the Parties to the present case.[7]

In other words, special agreements could provide substantive protections or avenues for dispute settlement. But customary law would not be built from these arrangements, or at least had not been built. Like the United States Supreme Court six years earlier,[8] the International Court of Justice saw 'an intense conflict of systems and interests' and decided to get out of the way.

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[6] Id., para. 88.

[7] Id., paras. 89-90.

[8] See Introduction to this Part VI, pp. 387-9 supra.