

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DE LA BARCELONA
TRACTION, LIGHT AND POWER
COMPANY, LIMITED

(NOUVELLE REQUÊTE: 1962)

(BELGIQUE c. ESPAGNE)

DEUXIÈME PHASE

ARRÊT DU 5 FÉVRIER 1970

1970

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
THE BARCELONA TRACTION, LIGHT
AND POWER COMPANY, LIMITED

(NEW APPLICATION: 1962)

(BELGIUM v. SPAIN)

SECOND PHASE

JUDGMENT OF 5 FEBRUARY 1970

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of its nationals' having suffered infringement of their rights as shareholders in a company not of Belgian nationality?

36. Thus it is the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of Belgium's capacity.

“This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged.” (*Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76, p. 16.*)

It follows that the same question is determinant in respect of Spain's responsibility towards Belgium. Responsibility is the necessary corollary of a right. In the absence of any treaty on the subject between the Parties, this essential issue has to be decided in the light of the general rules of diplomatic protection.

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37. In seeking to determine the law applicable to this case, the Court has to bear in mind the continuous evolution of international law. Diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign, a fact of which the general law on the subject has had to take cognizance in order to prevent abuses and friction. From its origins closely linked with international commerce, diplomatic protection has sustained a particular impact from the growth of international economic relations, and at the same time from the profound transformations which have taken place in the economic life of nations. These latter changes have given birth to municipal institutions, which have transcended frontiers and have begun to exercise considerable influence on international relations. One of these phenomena which has a particular bearing on the present case is the corporate entity.

38. 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 treat-

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ment 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. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights.

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39. 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. As such it has become a powerful factor in the economic life of nations. Of this, municipal law has had to take due account, whence the increasing volume of rules governing the creation and operation of corporate entities, endowed with a specific status. These entities have rights and obligations peculiar to themselves.

40. There is, however, no need to investigate the many different forms of legal entity provided for by the municipal laws of States, because the Court is concerned only with that exemplified by the company involved in the present case: Barcelona Traction—a limited liability company whose capital is represented by shares. There are, indeed, other associations, whatever the name attached to them by municipal legal systems, that do not enjoy independent corporate personality. The legal difference between the two kinds of entity is that for the limited liability company it is the overriding tie of legal personality which is determinant; for the other associations, the continuing autonomy of the several members.

41. Municipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them. Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction. So long as the company is in existence the shareholder has no right to the corporate assets.

42. It is a basic characteristic of the corporate structure that the company alone, through its directors or management acting in its name, can take action in respect of matters that are of a corporate character. The underlying justification for this is that, in seeking to serve its own best interests, the company will serve those of the shareholder too. Ordinarily, no individual shareholder can take legal steps, either in the

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name of the company or in his own name. If the shareholders disagree with the decisions taken on behalf of the company they may, in accordance with its articles or the relevant provisions of the law, change them or replace its officers, or take such action as is provided by law. Thus to protect the company against abuse by its management or the majority of shareholders, several municipal legal systems have vested in shareholders (sometimes a particular number is specified) the right to bring an action for the defence of the company, and conferred upon the minority of shareholders certain rights to guard against decisions affecting the rights of the company vis-à-vis its management or controlling shareholders. Nonetheless the shareholders' rights in relation to the company and its assets remain limited, this being, moreover, a corollary of the limited nature of their liability.

43. At this point the Court would recall that in forming a company, its promoters are guided by all the various factors involved, the advantages and disadvantages of which they take into account. So equally does a shareholder, whether he is an original subscriber of capital or a subsequent purchaser of the company's shares from another shareholder. He may be seeking safety of investment, high dividends or capital appreciation—or a combination of two or more of these. Whichever it is, it does not alter the legal status of the corporate entity or affect the rights of the shareholder. In any event he is bound to take account of the risk of reduced dividends, capital depreciation or even loss, resulting from ordinary commercial hazards or from prejudice caused to the company by illegal treatment of some kind.

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44. Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. Creditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss. In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.

45. However, it has been argued in the present case that a company represents purely a means of achieving the economic purpose of its members, namely the shareholders, while they themselves constitute in fact the reality behind it. It has furthermore been repeatedly emphasized

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that there exists between a company and its shareholders a relationship describable as a community of destiny. The alleged acts may have been directed at the company and not the shareholders, but only in a formal sense: in reality, company and shareholders are so closely interconnected that prejudicial acts committed against the former necessarily wrong the latter; hence any acts directed against a company can be conceived as directed against its shareholders, because both can be considered in substance, i.e., from the economic viewpoint, identical. Yet even if a company is no more than a means for its shareholders to achieve their economic purpose, so long as it is *in esse* it enjoys an independent existence. Therefore the interests of the shareholders are both separable and indeed separated from those of the company, so that the possibility of their diverging cannot be denied.

46. It has also been contended that the measures complained of, although taken with respect to Barcelona Traction and causing it direct damage, constituted an unlawful act vis-à-vis Belgium, because they also, though indirectly, caused damage to the Belgian shareholders in Barcelona Traction. This again is merely a different way of presenting the distinction between injury in respect of a right and injury to a simple interest. 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. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.

47. The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.

48. The Belgian Government claims that shareholders of Belgian nationality suffered damage in consequence of unlawful acts of the Spanish authorities and, in particular, that the Barcelona Traction shares, though they did not cease to exist, were emptied of all real economic content. It accordingly contends that the shareholders had an

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independent right to redress, notwithstanding the fact that the acts complained of were directed against the company as such. Thus the legal issue is reducible to the question of whether it is legitimate to identify an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights.

49. The Court has noted from the Application, and from the reply given by Counsel on 8 July 1969, that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it is not open to the Court to go beyond the claim as formulated by the Belgian Government and it will not pursue its examination of this point any further.

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50. In turning now to the international legal aspects of the case, the Court must, as already indicated, start from the fact that the present case essentially involves factors derived from municipal law—the distinction and the community between the company and the shareholder—which the Parties, however widely their interpretations may differ, each take as the point of departure of their reasoning. If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus 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. In referring to such rules, the Court cannot modify, still less deform them.

51. On the international plane, the Belgian Government has advanced the proposition that it is inadmissible to deny the shareholders' national State a right of diplomatic protection merely on the ground that another State possesses a corresponding right in respect of the company itself. In strict logic and law this formulation of the Belgian claim to *jus standi* assumes the existence of the very right that requires demonstration. In fact the Belgian Government has repeatedly stressed that there exists no rule of international law which would deny the national State of the shareholders the right of diplomatic protection for the purpose of seeking redress pursuant to unlawful acts committed by another State against the company in which they hold shares. This, by emphasizing the absence of any express denial of the right, conversely implies the admission that there is no rule of international law which expressly confers such a right on the shareholders' national State.

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52. International law may not, in some fields, provide specific rules in particular cases. In the concrete situation, the company against which allegedly unlawful acts were directed is expressly vested with a right, whereas no such right is specifically provided for the shareholder in respect of those acts. Thus the position of the company rests on a positive rule of both municipal and international law. As to the shareholder, while he has certain rights expressly provided for him by municipal law as referred to in paragraph 42 above, appeal can, in the circumstances of the present case, only be made to the silence of international law. Such silence scarcely admits of interpretation in favour of the shareholder.

53. It is quite true, as was recalled in the course of oral argument in the present case, that concurrent claims are not excluded in the case of a person who, having entered the service of an international organization and retained his nationality, enjoys simultaneously the right to be protected by his national State and the right to be protected by the organization to which he belongs. This however is a case of one person in possession of two separate bases of protection, each of which is valid (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 185*). There is no analogy between such a situation and that of foreign shareholders in a company which has been the victim of a violation of international law which has caused them damage.

54. Part of the Belgian argument is founded on an attempt to assimilate interests to rights, relying on the use in many treaties and other instruments of such expressions as property, rights and interests. This is not, however, conclusive. Property is normally protected by law. Rights are *ex hypothesi* protected by law, otherwise they would not be rights. According to the Belgian Government, interests, although distinct from rights, are also protected by the aforementioned conventional rules. The Court is of the opinion that, for the purpose of interpreting the general rule of international law concerning diplomatic protection, which is its task, it has no need to determine the meaning of the term interests in the conventional rules, in other words to determine whether by this term the conventional rules refer to rights rather than simple interests.

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55. The Court will now examine other grounds on which it is conceivable that the submission by the Belgian Government of a claim on behalf of shareholders in Barcelona Traction may be justified.

56. For the same reasons as before, the Court must here refer to municipal law. Forms of incorporation and their legal personality have