

SEPARATE OPINION OF JUDGE PADILLA NERVO

In its Judgment of 24 July 1964 the Court joined to the merits the third preliminary objection raised by the Spanish Government to the Application of Belgium.

The Court then stated that:

“the third objection involves 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 this stage in full confidence that it was in possession of all the elements that might have a bearing on its decision” (*I.C.J. Reports 1964*, p. 46).

In the present proceedings the Parties have dealt fully with questions of merits, in the course of their written and oral pleadings.

The Spanish Government contests the Belgian Government’s capacity to act, its *jus standi*, its right to intervene on behalf of Belgian nationals (natural or artificial persons) whom the Belgian Government claims to have been injured by a breach of international law, for which liability is attributed to the Spanish authorities.

The Belgian Government asserts that it is exercising protection *exclusively* and *directly* on behalf of persons of Belgian nationality and contends that the legal question which arises when examining its *jus standi* in the present case is that of the diplomatic judicial protection, “not of foreign trading companies, but of natural and artificial persons” who, having invested their funds in the said companies, suffered losses as shareholders in these companies, as a result of illegal actions committed against the companies.

The respondent Government contends that—

“international law does not recognize, in respect of injury caused by a State to a foreign company, any diplomatic protection of shareholders exercised by a State other than the national State of the company”.

The applicant Government asserts its right to intervene on behalf of Belgian nationals, shareholders in the company, and contends that such right is conferred on it in respect of its nationals by the rules of international law concerning the *treatment of foreigners*.

The real issue is whether international law recognizes for the shareholders in a company “a separate and independent right or interest in respect of damage done to the company by a foreign government”.

The Belgian Government, in its first submission, asked the Court to adjudge and declare that the Spanish State is under an obligation *towards Belgium* to make *reparation* for the damage caused to "*Belgian nationals, individual or legal persons, being shareholders of Barcelona Traction*".

In the second submission, it asks that the Court will—

"adjudge and declare that this *reparation* should, as far as possible, annul all the consequences which these acts, contrary to international law, have had for the said nationals, and that the Spanish State is therefore under an obligation to secure, if possible, the annulment by administrative means of adjudication in bankruptcy and of the judicial and other acts resulting therefrom, obtaining for the said injured Belgian nationals, all the legal effects which should result from this annulment . . .". (Application filed 19 June 1962, second submission.)

What is then the real meaning and scope of the present Belgian claim? The new Application presents as the object of Belgium's protection, not the Canadian commercial company of Barcelona Traction but Belgian nationals who are said to be shareholders of Barcelona Traction.

The Spanish Government disputes the Belgian Government's capacity to act—

"in view of the fact that the Barcelona Traction Company does not possess Belgian nationality and that, in the case in point, it is not possible to allow diplomatic action or international judicial proceedings on behalf of the alleged Belgian shareholders of the company on account of the damage which the company asserts it has suffered". (P.O., submissions on third objection.)

I do concur in the view that, in the present case, diplomatic action or international judicial proceedings on behalf of the shareholders in the company on account of damage which the company alleges it has suffered, *could not be allowed*.

It has not been proved that there exists a special customary rule which, by derogation of the basic principles of international law with regard to the status of aliens, would have helped the Belgian contention.

Nor has it been demonstrated that there exists an alleged general rule establishing, in all circumstances, the lawfulness of the protection of shareholders following damage caused to the company.

I believe it is right to say that international law does not recognize the right of diplomatic protection of shareholders as such if their rights *stricto sensu* have not been violated.

Nor does any rule of international law give support to the admissibility of a double diplomatic protection, one for the corporation and another for the shareholders in that corporation.

To say that the corporation and the shareholders have parallel interests does not make admissible a concurrent diplomatic intervention.

No State could be safe from the pressure and danger of a plurality of diplomatic interventions by States protecting their nationals, shareholders in a given corporation, if the right of diplomatic protection of shareholders were recognized.

For the time being, the principle which recognizes the capacity of a State to intervene, by way of diplomatic protection of a company of its own nationality, has proved to be a fair and well-balanced safeguard or insurance, both for the investor and for the State, where foreign companies operate.

This regime, whose consequences are well known, has no surprises and establishes a legal order which, so far, has proved to be generally adequate and satisfactory.

There seems to be no fundamental reason or essential need to depart from it. If a door is open to the intervention, by way of diplomatic protection of shareholders, of a plurality of States—as many as could claim to have shareholders of their nationality—a chaotic situation of the gravest international consequences would, in time, develop.

Private investments, needed for economic development, will be encouraged if the States receiving them are convinced that the national State of the investor will not use the so-called right of diplomatic protection as a pretext for political or economic pressure, dangerous to the sovereignty and independence of weaker or less developed States, who cherish more their national dignity than the speed of their development. In the relation between the investor and the State where the investment takes place, a just balance should be aimed at, for it is good for the international community that capital which goes abroad in search of gain should not be a potential threat to the essential values and dignity of States.

The lessons of history and past experience are, after all, the source of the law and of judicial precedents and must have place and weight in the conscience of the judge.

Mervyn Jones, in his work *Claims on behalf of nationals who are shareholders in foreign companies*, makes the following historic remarks by way of introduction:

“The era of foreign investment on a large scale reached its height during the fifty years or so preceding the First World War, when British and American capital poured into all parts of the world, financing railway and harbour construction, exploitation of mineral deposits and innumerable other projects in undeveloped countries. At the same time the institution of the joint-stock company with limited liability (which was of recent growth) made it possible for

small capitalists to invest their money in remote countries for a better yield than was obtainable at home. There is little doubt that, at first, those countries welcomed foreign capital, which was badly needed, and were not strict as to conditions of investment. It was but rarely, during these early days, that any necessity arose for diplomatic intervention by foreign powers on behalf of their nationals. With the turn of the nineteenth century, however, nationalist movements became directed against 'economic exploitation' by the foreigner. These movements emphasized economic, as well as political, sovereignty, and, as time went on, began to interfere more and more with the projects of foreign capital. The decay of liberal capitalism and *laissez-faire*, accompanied by the spread of socialist doctrine throughout the world, caused governments everywhere to assume greater control of the economic assets and resources of the nation: in certain countries foreign capital came to be regarded as an emblem of subordination, and not merely as a means of developing the country. Much, of course, had happened to justify such an attitude; the extent to which foreign capital held a grip on the economic life of many countries was considerable. Against this background the revolutions of 1911-20 in Mexico transformed the political and social outlook of the nation, as did the later revolutions in central Europe after the First World War, and those in eastern Europe after the Second. These revolutions were accompanied by measures of expropriation, which inevitably raised the question of the position under international law of individuals who had invested in companies carrying on business in the countries concerned." (*British Year Book of International Law*, 1949, p. 225.)

The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded.

Special agreements to establish arbitral tribunals were on many occasions concluded under pressure, by political, economic or military threats.

The protecting States, in many instances, are more concerned with obtaining financial settlements than with preserving principles. Against the pressure of diplomatic protection, weaker States could do no more than to preserve and defend a principle of international law, while giving way under the guise of accepting friendly settlements, either giving the compensation demanded or by establishing claims commissions which

had as a point of departure the acceptance of responsibility for acts or omissions, where the government was, neither in fact nor in law, really responsible.

In the written and in the oral pleadings the Applicant has made reference, in support of his thesis, to arbitral decisions of claims commissions—among others those between Mexico and the United States, 1923.

“These decisions do not necessarily give expression to rules of customary international law, as . . . the Commissions were authorized to decide these claims ‘in accordance with principles of international law, justice and equity’ and, therefore, may have been influenced by other than strictly legal considerations.” (Schwarzenberger, *International Law*, Vol. I, p. 201.)

In the Special Claims Commission: Mexico-United States, established by the convention of 10 September 1923, Article II states:

“. . . each member of the Commission . . . shall make and subscribe a solemn declaration stating that he will . . . examine and decide, according to the best of his judgment and in accordance with the principles of *justice and equity*, all claims presented for decision . . .”. (Italics are mine.)

The second paragraph of the same Article II reads as follows:

“The Mexican Government desires that the claims shall be so decided because Mexico wishes that her responsibility shall not be fixed according to the generally accepted rules and principles of international law, but *ex gratia* feels morally bound to make full indemnification and agrees, therefore . . .” (*U.N.R.I.A.A.*, Vol. IV, p. 780.)

Article VI of the same convention makes another exception to the *accepted* general rules, when it states:

“. . . the Mexican Government *agrees* that the Commission shall not disallow or reject any claim by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim”. (*Ibid.*, p. 781.)

Some of the decisions of claims commissions invoked during the pleadings are not, in my view, relevant precedents in respect to this case.

Now the evolution of international law has other horizons and its progressive development is more promising, as Rosenne wrote:

“There is prevalent in the world today a widespread questioning of the contemporary international law. This feeling is based on the

view that for the greater part international law is the product of European imperialism and colonialism and does not take sufficient account of the completely changed pattern of international relations which now exists. . . .

Careful scrutiny of the record of the Court may lead to the conclusion that it has been remarkably perceptive of the changing currents of internationalist thought. In this respect it has performed a major service to the international community as a whole, because the need to bring international law into line with present-day requirements and conditions is real and urgent." (Rosenne, *The Law and Practice of the International Court*, 1965, Vol. I, pp. 17-18.)

The law, in all its aspects, the jurisprudence and the practice of States change, as the world and the everyday requirements of international life change, but those responsible for its progressive evolution should take care that their decisions do, in the long run, contribute to the maintenance of peace and security and to the betterment of the majority of mankind.

In considering the needs and the good of the international community in our changing world, one must realize that there are more important aspects than those concerned with economic interests and profit making; other legitimate interests of a political and moral nature are at stake and should be considered in judging the behaviour and operation of the complex international scope of modern commercial enterprises.

It is not the shareholders in those huge corporations who are in need of diplomatic protection; it is rather the poorer or weaker States, where the investments take place, who need to be protected against encroachment by powerful financial groups, or against unwarranted diplomatic pressure from governments who appear to be always ready to back at any rate their national shareholders, even when they are legally obliged to share the risk of their corporation and follow its fate, or even in case of shareholders who are not or have never been under the limited jurisdiction of the State *of residence* accused of having violated in respect of them certain fundamental rights concerning the treatment of foreigners. It can be said that, by the mere fact of the existence of certain rules concerning the treatment of foreigners, these have certain fundamental rights that the State *of residence* cannot violate without incurring international responsibility; but this is not the case of foreign shareholders as such, who may be scattered all over the world and have never been or need not be *residents* of the respondent State or under its jurisdiction.

In the case of the *Rosa Gelbtrunk* claim between Salvador and the United States, the President of the arbitration commission expressed a

view which may summarize the position of foreigners in a country where they are *resident*. This view was expressed as follows:

“A citizen or subject of one nation who, in the pursuit of commercial enterprise, carries on trade within the territory and under the protection of the sovereignty of a nation other than his own, is to be considered *as having cast in his lot* with the subjects or citizens of the State in which he *resides* and carried on business.” (Italics added.)

“In this case”, Schwarzenberger remarks, “the rule was applied to the loss of foreign property in the course of a civil war. The decision touches, however, one aspect of a much wider problem: the existence of international minimum standards, by which, regarding foreigners, territorial jurisdiction is limited.”

As the Permanent Court of International Justice said in the *Lotus* case in 1927 (*P.C.I.J., Series A, No. 10, p. 19*)—

“all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty”.

The rules concerning the treatment of foreigners are a limitation of a State’s jurisdiction *ratione personae*. Schwarzenberger says in this respect:

“States generally exercise exclusive jurisdiction over their nationals within their territory, concurrent jurisdiction over their nationals abroad, and limited jurisdiction over, for example, individuals and groups *within their territory* who are protected by international customary or treaty law.” (Italics added.)

“While, in principle, territorial sovereignty applies to nationals and foreigners alike, the home State retains a concurrent jurisdiction over its nationals abroad. . . . Furthermore, the unrestricted exercise of territorial jurisdiction over foreigners on the part of the State of *residence* may be limited by rules of international customary law or treaties. If such exercise of territorial jurisdiction happens to come into conflict with international law, the question turns into an issue between the subjects of international law concerned. The home State is entitled to demand respect for international limitations of territorial jurisdiction, and the State of *residence* may have to answer for its interference ‘with the rights which each State may claim for *its national in foreign territory*’. As the World Court laid down in the case of the *Mavrommatis Palestine Concessions* (1924), ‘it is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to

international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels'." (Schwarzenberger, *International Law*, Vol. I, pp. 189-190.)

Much has been said about the justification for not leaving the shareholders in those enterprises without protection.

Perhaps modern international business practice has a tendency to be soft and partial towards the powerful and the rich, but no rule of law could be built on such flimsy bases.

Investors who go abroad in search of profits take a risk and go there for better or for worse, not only for better. They should respect the institutions and abide by the national laws of the country where they chose to go.

* * *

The main preliminary question on the merits in the present proceedings is that of the international diplomatic and legal protection of natural and artificial persons who, having invested funds in foreign trading companies, have suffered losses in their capacity as shareholders of those companies, as a result of acts contrary to international law of which a State has been guilty towards those companies.

This problem is of capital importance in the modern world, and pre-occupies the governments, economists and businessmen of numerous countries which are anxious to ensure the security of investments made abroad. Jurists, for their part, are actively concerned with it and are constantly examining it.

A necessary foundation of a valid international claim is that the national of the plaintiff State would have been *directly* injured in his *rights* by an act contrary to international law done by the State to whom the claim is addressed.

It is indispensable that the protected person be himself the possessor of a right which would entitle him to formulate a claim for damages in the internal judicial order.

If a debtor of a foreign creditor is affected in his rights by an act which violates international law, the national State of the foreign creditor is not authorized, by that fact, to the diplomatic protection of such creditor. This question has been submitted and decided in various instances by arbitral tribunals in the sense that "creditors do not have legal bases to plead for damages inflicted on their debtors".

In *U.S.A. (W. C. Greenstreet, Receiver) v. United Mexican States, General Claims Commission*, it was held that the *nationality* of the creditors of an insolvent corporation need not be shown, "the nationality

of the creditors being just as immaterial as is that of the stockholders of an insolvent company”.

The case of *Société civile des porteurs d'obligations du Crédit foncier mexicain*, before the French-Mexican Commission involved a claim on behalf of the shareholders of a bank. The bank held mortgages on rural property and damages were claimed because the security had been damaged by depredations of revolutionary forces. The Commission held that only the owners of the property might claim. (Feller, *The Mexican Claims Commission*, p. 122.) Arbitral jurisprudence confirms the thesis that international law does not authorize the protection of affected economic interests, but only of rights really violated.

The following arguments were made by counsel for the applicant State:

“The problem of the diplomatic protection of the shareholders practically only arises when the shareholders are of a different nationality from that of the company. Indeed, an infringement of the interests and rights of the company and of its shareholders might then in this case affect the rights possessed by two or even several States, and might consequently give rise to two or more rights to claim, in so far as the rules relating to the treatment of foreigners have not been respected. . . .

Indeed, if one disregards the fact that the shareholders are foreigners, if one admits that these foreign shareholders have no rights or interests distinct and independent from those of the company, that they are totally inseparable from the latter vis-à-vis the outside world, that they are entirely covered by the veil of the juristic personality, one must then conclude that, in this event too, the case is entirely outside the scope of international law.”

That line of argument leads up to saying that therefore:

“The national State of the shareholders cannot exercise any right conferred on it in favour of its *nationals* by the rules of international law concerning the treatment of foreigners.” (Hearing of 9 May 1969.)

I disagree with the above statements; of course, any State can exercise such rights in favour of its *nationals abroad*, but not because they happen to be in possession of bearer shares, but because and only *if* they have been injured in their own specific rights by the State of *residence* which has a duty to respect the rights of foreigners *under its jurisdiction*, according to the relevant rules of international law concerning the treatment of foreigners.

It is claimed by the Belgian side that the Spanish Government admitted "that there were certain cases in which diplomatic protection of the shareholders in the event of damage done to the company was allowed under international law", and quotes the Spanish admission as saying that such protection is allowed "solely in cases where the company possesses the nationality of the State against which the claim is made, so that diplomatic protection of the company as such is excluded".

The Spanish Government, in its Rejoinder, contends that in all the cases in which the protection of the shareholders was admitted, the complaints raised concerned damage done exclusively to the shareholders' "own rights", that is to say not affecting the company itself.

In the present case, for Belgium to be able to intervene, it would thus be necessary that there had been a violation of the rights of the Belgian shareholders.

Such a violation is excluded, if what is complained of is steps which were ostensibly directed against the company. It was admitted by the Applicant, during the oral proceedings, that the Belgian claim did not include damage resulting from an infringement of any of the recognized direct rights of a shareholder as such.

International law goes no further than imposing on States certain obligations towards other States, including the obligation to afford aliens certain treatment, for example, to give them access to their courts and to enable them to have their lawsuits impartially judged within reasonable time limits and without discrimination.

A careful distinction should be drawn, contends the Spanish Government, between two hypotheses which are mutually exclusive. Either there is a wrongful injury to the *rights* of the shareholders, in which case diplomatic protection of the latter is permissible and indeed is the only protection permissible, or else there is a wrongful injury to the rights of the company and only the company may be the subject of such protection. The contention is that it is utterly impossible to escape from this option.

To this contention the Belgian answer was:

"The Spanish Government really wishes to demonstrate by this argument that in cases of multiple claims, no one may bring action by relying on the right of another party. But is it necessary to take this extraordinary detour to reach a conclusion which nobody contests? Belgium is not concerned with the injury suffered by Barcelona Traction itself—that would be Canada's business; it is concerned with the damage suffered by its own nationals who held shares in the company."

* * *

If the owner of the right or rights which have suffered injury is the company and not the shareholder, it is beyond all doubt that the case is

one which falls entirely outside the sphere in which the diplomatic protection of shareholders by their national State can be admissible, or even conceivable.

The Respondent in its Rejoinder states:

“The international society of today is certainly not asking for a further reinforcement of the protection of certain capitalist groups already too powerful and only too capable of securing support for themselves, a reinforcement which would take the shape of the possibility of increased pressure on the weaker nations.” (Rejoinder, Part III, Chapter II, Section II, para. 43.)

It adds:

“Contemporary international law tends to concern itself more with the need to protect countries with a weak economy than to favour, as the Belgian Government would wish, ‘the financial needs of great modern undertakings’.” (*Ibid.*)

“Very many States insist, for very good reasons, that foreign capital must be invested in national companies. This is the case, in particular, in many countries in the course of development, but a certain number of highly industrialized countries impose similar conditions either *de facto* or *de jure*. What is more, foreign investors themselves frequently and spontaneously chose this legal formula which may in their view offer certain advantages.”

* * *

There is a case to which the Belgian side ascribe importance. This is the case of the American national, McPherson, who laid a claim before the U.S.-Mexican Commission in 1923 against the Mexican Government, which had refused to honour the postal money-orders which McPherson had bought through an agent from illegal authorities and which the latter had issued in the name of the agent. The decision in that case was delivered on the basis of a convention which, in several essential aspects and by its very spirit, manifestly derogated from general international law.

Which are the applicable principles of international law and what are the consequences of their application to the present case?

What follows expresses my views on the matter:

International law lays upon every State in whose territory foreign natural or juristic persons reside, remain, operate or even simply possess property, an obligation towards the State of which such persons are nationals: the obligation to afford them certain treatment. That treatment, which is defined most usually and in greater detail by the rules of treaty law, nevertheless has its minimum requirements laid down by cus-

tomary international law. Those minimum requirements consist essentially in the respect, within given limits and conditions, of certain rights of a personal or corporate nature, and in the granting, at the same time, of the possibility of making use, if necessary, of appropriate judicial or administrative remedies.

Correlative with that obligation, the State of which such persons are nationals has, at the international level, a right to require the State which is bound by the obligation to act in conformity therewith, and it has a right, if occasion arises, to submit a claim in proper form and through accepted channels, should that obligation fail to be discharged. That is precisely what is known as the exercising of diplomatic protection. It also includes protection by means of recourse to international jurisdiction.

The rights attributed to a State by international legal rules concerning the treatment of foreigners, on the one hand, and, on the other hand, the rights granted to individuals by the rules of municipal law, are situated at different legal levels.

The existence of the individual's right at the municipal level is the condition whereby a State is authorized, at the international level, to require that that right be not infringed. All that a State can require of another State for its own nationals is the respect of those rights which are accorded to them under the national legal system, as they are defined by that legal system.

When the foreigner in question is a juristic person, the case is no different, theoretically, from a case in which a natural person is involved. All legal systems agree in considering joint-stock companies (*sociétés de capitaux*) as independent legal entities. The latter represent autonomous beings to which rights and obligations may be ascribed; they are, in short, of themselves subjects in law.

International law, both customary and treaty law, recognizes precisely in respect of the treatment of foreigners, the existence of companies as entities which are separate from their members.

For juridical persons as for natural persons, "nationality" expresses a link of legally belonging to a specific State. The requirement for juridical persons as for natural persons, is that the existence of the link of legally belonging to a specific country must, if it is to serve as a plea at the international level, be accompanied by that of a "real" link with the same country. In general international law, a State is not entitled to require a specific treatment for a person who has not its nationality and it can thus not complain that such treatment has not been accorded to that person.

A State may present a claim on behalf of its national if it becomes apparent that there has been a breach of a right belonging to the latter; but no State may present a claim on behalf of a person of its nationality

on the ground that there was failure to respect a right belonging to another person, possessing another nationality.

The national State of the company can present a claim for the breach of a right of the company as such; the national State of the shareholder can present a claim for the breach of a right "*stricto sensu*" of the shareholder as such. The fact that there are relationships and links between different persons does not imply that they merge into a single person.

A claim by a State under the head of diplomatic protection of a national who is a shareholder of a commercial company is only admissible subject to a two-fold condition: the applicant State must be able to claim violation of a right of the shareholder as such; and it must be established that the State which was the author of the alleged violation was under an international obligation to the applicant State to ensure respect for the right in question. The receivability of a claim under that head is ruled out if it appears, firstly, that the right which is said to have been violated is a right of the company and not of the shareholder, and, secondly, that the international obligation to ensure respect for the said right was incumbent on the respondent State in respect of the national State of the company and not in respect of the national State of the shareholder.

It follows from the principles of international law that in order for a State to be able to submit a claim in behalf of a national, it must be able to claim that its national has suffered an infringement *of his own rights* by a foreign State, and that rights have been infringed for which the latter State was bound to ensure respect by virtue of an international obligation binding on it in respect of the claimant State.

There is nothing to prevent a State's submitting a claim in behalf of a national which relates to that national's position in his capacity as a shareholder in a company; but, in such a case, it must prove that the person in question has been injured in the rights conferred upon him himself *precisely on account of his capacity of being a shareholder*: that he has been injured in rights which are inherent in that capacity.

It is by no means sufficient that the claimant State rely upon an injury to the rights of the company as such, for no State may submit a claim in behalf of a person on the ground that there has been a failure to respect a right which belongs to another person, whether such latter person be a natural or a juristic person.

International law only authorizes a State to intervene by way of diplomatic protection if such State relies upon a complaint which is its own complaint: that is to say, if it complains of the infringement of a right of one of its nationals, committed in violation of an international obligation which binds to it the State which has committed the infringement.

If there has not been in the case at issue any infringement of any *right* of a shareholder, that fact cannot be altered simply by referring to *interests* as well as rights.

The situation of the shareholder as defined by the various legal systems, covers the rights which are defined in the decision on the *Brincart* case. No system of positive law confers on a shareholder in a limited company other subjective legal situations and, in particular, no system attributes to him any legal *interest* in the property of the company, as has been expressly acknowledged by both sides.

One cannot accept the transformation of a shareholder's hope for the prosperity of the company into a right or a legal interest, nor any possibility for a shareholder to claim that an infringement of the rights of the company constitutes an infringement of his own legal situation.

The rules of international law concerning the responsibility of the State regarding the treatment of foreigners would not make it possible to impute to a State an internationally unlawful act even in a case where the said State had only harmed an *interest* which was not protected by the municipal legal system of that State.

There has not been established, in respect of the alleged Belgian shareholders of Barcelona Traction, the existence of any juridical situation whatsoever attaching to their status as shareholders which suffered any internationally unlawful attack on the part of the Spanish administrative or judicial authorities.

* * *

Barcelona Traction is said to have been a "practically defunct" company.

Shareholders are not entitled to take the place of the company in defending the latter's own rights when it is these rights which have been affected, for so long at least as the company has not yet been dissolved and liquidated and the shareholders therefore have no right to its property and assets.

It is only when a company has been dissolved and consequently ceases to exist as a separate legal entity that the shareholders take its place and are entitled to receive the balance of its property, after the corporate debt has been deducted. Thus it is only the "legal death" of the corporate person that may give rise to new rights appertaining to the shareholders as successors to the company.

In 1925 the United States claimed the right, as against the Government of the United Kingdom, to intervene on behalf of American interests in a non-American corporation (the Romano-Americana).

In the United Kingdom answer to the American contention, it was said: "... it is not until a Company has ceased to have an active existence or has gone into liquidation that the interest of its shareholders ceases to be *merely the right to share in the Company's profits* and becomes

a right to share in its actual surplus assets" (Hackworth, *Digest of International Law*, Vol. V (1943), p. 843).

In the case of the Mexican Eagle, a company incorporated in Mexico, in which the shareholdings were 70 per cent. British and Dutch, 25 per cent. French and the remainder Swiss, Danish and other interests (as the shares were in bearer form it was impossible to state the exact proportion of each national interest), a dispute arose between the Mexican Government and the United Kingdom Government regarding claims by British shareholders arising from the expropriation of the properties of the Mexican Eagle Company.

The Mexican Government in a Note of 26 April 1938, maintained the view that a shareholder was not a co-owner of the property of the undertaking but "*merely* the possessor of a right in equity to represent a part of the liquid assets at the moment of the dissolution or liquidation of the company".

It was not until the moment of dissolution that it was possible to establish the damage and injuries sustained by shareholders as distinct from the company (Mervyn Jones, *British Year Book of International Law*, 1949, p. 241).

On that occasion the Mexican Government stated: "Mexico cannot admit that any State, on the pretext of protecting the interests of the shareholders of a Mexican company, may deny the existence of the legal entity of companies organised in Mexico in accordance with our laws."

I do *not* concur with the view that the national State of the shareholders may exercise diplomatic protection when the act complained of was done by the national State of the company, for this would be equivalent to admitting that any State, on the pretext of protecting the interests of the shareholders in a foreign company, may deny the existence of the legal entity of companies organized in accordance with the laws of the national State of such companies.

I have reservations about paragraph 92. of the Judgment. For the reasons stated above I am of the opinion that the so-called theory to which the paragraph refers does not have any validity. The fact that the Judgment ends the paragraph with the sentence: "*Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction*" should not be interpreted as an admission that such "theory" might be applicable in other cases where the State whose responsibility is invoked is the national State of the company.

This is a fundamental point in the field of intervention on behalf of nationals who are shareholders in foreign companies of limited liability.

Regardless of the numerous cases of protection which took place in the past—outside international law or contrary to it—by the use of economic, political or military pressure, it is worth recalling that—also in the past—

in other cases when a stand was taken within a legal point of view and respect for the sovereignty of other States, there has been a historical recognition of the separate entity of corporations of limited liability, and the opinions given in such instances did stress the independent existence of a company as juridical person.

For example, when the Government of the United States was approached in 1875 with a request that it should intervene on behalf of American stockholders in Chilean corporations, it refused to do so. It adhered to the view that a corporation formed under local law should have recourse to the local courts and that although the *good offices* of the Government might with propriety be exercised on behalf of American interests, there could be no official intervention¹ (Moore, *Digest of International Law* (1906), Vol. VI, p. 644). The practice of the United Kingdom followed similar lines. Thus Sir Robert Phillimore advised that the British Minister to Mexico should be instructed to limit himself to "good offices" on behalf of a British shareholder in a Mexican railway seized by the Mexican Government and that the British subject should be told that he must rely principally on local remedies. Years later both Governments found reason to depart from this practice.

I therefore cannot accept that this situation—which is not the one before the Court—should be considered as a limitation or exception to the strict application of the rule of international law, according to which the shareholders cannot be protected by their national State except in two instances: (a) when the company has been liquidated, and (b) when a right of the shareholder as such (right *stricto sensu*) has been violated by an illicit act entailing international responsibility.

The scope and increasing activities of powerful international corporations have had as their field of operation the exploitation of the natural

¹ The Secretary of State of the United States in a dispatch to the (American) Minister to Colombia, dated 27 April 1866, wrote as follows:

"It may well be that subjects of Great Britain, France and Russia are stockholders in our national banks. Such persons may own all the shares except a few necessary for the directors whom they select.

Is it to be thought that each of those Governments shall intervene when their subjects consider the bank aggrieved by the operations of this Government? If it were tolerated, suppose England were to agree to one mode of adjustment, or one measure of damages, while France should insist upon another, what end is conceivable to the complications that might ensue?

It is argued that there is no policy which requires us to encourage the employment of American capital abroad by extending to it any protection beyond what is due the strictest obligation. There is no wise policy in enlarging the capacity of our citizens domiciled abroad for purposes of mere pleasure, ease or profit to involve this Government in controversy with foreign powers." (*Loc. cit.*, pp. 645-646.)

resources of many countries in the process of development and have controlled the functioning of many of their public services over which the territorial States have come to be, notwithstanding their sovereignty, in a subordinated position, and their right to demand compliance with the prescription of their municipal law on the matter has in many cases been challenged and put in jeopardy. Faced with the structure and practice of capitalist society in regard to foreign investment, many countries have imposed the requirement on foreign capital of taking the legal form prescribed by local legislation. The exercise of the sovereignty of States in this matter cannot be legally construed as a device to deprive the eventual shareholders in corporations of limited liability (*sociétés anonymes*) of the diplomatic action of their national State. Nationalization and expropriation, in accordance with the law on the matter, have been the result of the essential need not to have public utilities and national resources subordinated to the private interests of foreign corporations.

I am also of the opinion that neither is a limitation to the rule—according to which it is the national State of the company who has the right of protection—the fact that the protecting State does not exercise its right or ceases to do it. The right of protection is a discretionary one and the national State of the company is not under a duty to protect.

In respect to paragraph 93 I must make the following observations.

The paragraph begins with the consideration that “in the field of diplomatic protection of shareholders as in all other fields . . . it is necessary that the law be applied reasonably”.

The phrase immediately following refers to a *suggestion* which might be interpreted as an example of reasonableness on the matter. The suggestion, or hypothesis, is to the effect that, “if in a given case it is not possible to apply the general rule” . . . then, “considerations of equity might call for the possibility of protection of the shareholders in question by their own national State”. The last sentence in this paragraph states: “*This hypothesis does not correspond to the circumstances of the present case.*”

I am of the opinion that there is no need for the Judgment to include reference to an irrelevant hypothesis. It is difficult to imagine a case in which it would be impossible to apply the general rule that the right of diplomatic protection of a company belongs to its national State.

It might be argued that in case the company is liquidated and therefore ceases legally to exist its national State loses the subject of its right and the general rule cannot be applied. In such eventuality the shareholders can undertake the defence of their interest before the courts of the State whose responsibility is invoked and exhaust the local legal remedies open to them. If a denial of justice is claimed, then the national State of the person whose rights are violated may intervene according to the rules concerning the protection of foreigners, but in such hypothesis the State of the shareholders exercises a right of its own (whether or not such right

is qualified as "secondary") and if so its action is not based on "considerations of equity".

The whole Judgment is based on the ground that according to international law the national State of the company, and only and exclusively it, has the right of diplomatic and judicial protection of such company. Therefore it is a contradiction of a legal nature to state even as an irrelevant hypothesis that there might be a circumstance when that State which, by definition, has the *legal capacity* to act could be legally or juridically incapacitated—the State concerned is free to exercise its right or not but its abstention to pursue an action does not affect its right to take it. It cannot lose its legal capacity and a hypothesis based on the *impossibility to apply the general rule* is a juridical contradiction and has no reasonable explanation even as a whimsical hypothesis. It is also inconceivable that if Canada does not exercise its discretionary right of protection then this fact gives birth to the right of the shareholders' State.

* * *

Therefore on those hypothetical limitations it is not possible to build a Belgian *ius standi*.

In respect of the attitude in this case of the national State of Barcelona Traction, the Respondent describes as follows the three successive phases of the Canadian Government's action, resulting from the examination of the diplomatic correspondence and relevant documents:

"The first, going up to the time of the Tripartite Statement, was the phase in which, misinformed by the interested parties, it accused Spain of having violated obligations in general international law with regard to the treatment of foreigners and, on that ground, requested the Spanish Government to intervene with a view to the annulment of the acts of the judicial authorities.

The second phase, which followed upon the Tripartite Statement and did not last long, was characterized by the definite abandonment of that request and of any allegation of a breach by Spain of obligations under general international law. The Canadian Government, on the other hand, raised the particular complaint that certain clauses of the treaties in force between the two countries had been broken. It proposed the settlement of the differences on that point by arbitration.

In the third phase, after expressing regret that the Spanish Government had not accepted the proposal to submit the specific point about the treaties to arbitration, the Canadian Government, which had meanwhile become better acquainted with the facts, definitely

opted for endeavouring to get the dispute settled on an amicable basis through direct negotiations between the private parties concerned.

It is thus once again clearly confirmed that the famous exceptional circumstances of 'the absence of protection by the national government of the company', which the Belgian Government has relied on so often and in so many forms in order to justify its claim to have *jus standi* in the case to act under the head of the protection of the Belgian 'shareholders' in Barcelona Traction, quite apart from the fact that even theoretically it cannot constitute any valid justification, is not in fact by any means present in the case."

* * *

In my view the right of diplomatic protection of shareholders in a company of a nationality other than that of the protecting State, is not in accordance with the principles of international law in force, i.e., the rule of the diplomatic protection of companies by the State of which they are nationals.

Nor is such protection recognized by any special customary rule in international practice. The arbitral decisions rendered on the basis of special bilateral conventions are not norm-creating, nor have constituted the foundation of, or generated a rule of customary international law which is now accepted as such by the *opinio juris*.

There are not, in the present case, exceptional circumstances justifying any departure from the strict application of the general rule of international law on the matter.

The right of diplomatic protection, like any other right, has to be understood as a right which a particular State has against another particular State. To which State does that right pertain in the present case? Does it pertain to the Applicant? Is Spain under an international obligation towards Belgium?

Has the respondent State committed a breach of an international obligation owed to the applicant State by the measures taken in respect to Barcelona Traction? Is the person affected by the measures of which Spain is accused linked to the applicant State by a bond of nationality?

In my opinion all those questions ought to be answered in the negative and, if so, the international liability alleged by the Applicant does not exist.

Towards the eventual and sporadic possessor of a bearer share there is not a direct and immediate obligation from the State accused of having violated the rights of a private foreign national (natural or juristic person) by an unlawful act damaging the corporation (*société anonyme*) which has issued the bearer shares.

The fact that theoretically there is not (or there need not be) continuity

of ownership of a bearer share, the nationality of the eventual possessor does not give to his State a right towards the Respondent, who is not under an international obligation owed to every State which might have, or has, at a given date, some nationals in the possession of bearer shares in the corporation alleged to be injured by an illicit international act, unless specific rights of the shareholders as such were violated.

It is not justifiable to create an *ad hoc* rule in disregard of existing and generally accepted ones to fit a particular case which could and should be decided by the application of the rules of general international law governing the matter.

The claim in the present case and its characteristics are in the nature of a request to go around or avoid the strict application of the relevant rules of international law which "does not recognize, in respect of injury caused by a State to a foreign company, any diplomatic protection of shareholders exercised by a State other than the national State of the company".

The shareholders in commercial limited liability companies (*sociétés anonymes*) do not have a separate and independent right in respect to damage done to the company by a foreign government.

The rules of international law concerning the treatment of foreigners are not rightly invoked in respect of shareholders as such.

This question ought to be considered in relation to the protection of citizens abroad and taking into account the jurisdiction of the State where the foreigner resides.

The following concepts contained in Borchard's *Diplomatic Protection of Citizens Abroad* are relevant in this respect:

"The bond of citizenship implies that the State watches over its citizens *abroad*, and reserves the right to interpose actively in their behalf in an appropriate case. Too severe an assertion of territorial control over them by the State of *residence* will be met by the emergence of the protective right of the national State, and the potential force of this phenomenon has largely shaped the rights assumed by States over *resident* aliens."

"The principles of territorial jurisdiction and personal sovereignty are mutually corrective forces. An excessive application of the territorial principle is limited by the custom which grants foreign States certain rights over their citizens *abroad*, sometimes merely the application of foreign law by the local courts, sometimes, in acknowledgment of the principle of protection, a certain amount of jurisdiction."

“Each State in the international community is presumed to extend complete protection to the life, liberty and property of all individuals *within its jurisdiction*.”

“Not every injury warrants immediate interposition by the State. In the first place, reparation is demanded only for such injuries as the State in its discretion deems a justification for diplomatic protection. Factors which enter into consideration in determining the State’s interposition are the seriousness of the offence, the indignity to the nation, and the political expediency of regarding the private injury as a public wrong to be repaired by national action—in short, the interests of the people as a whole, as against those of the citizen, receive first consideration before State action is initiated.”

“The individual has in fact sustained no injury in international law, until the State of *residence* or its authorities have in some way connected themselves with the original act or have declined to afford him legal means of redress.”

* * *

In the present case, it is not Belgium but Canada who is the one entitled to protect its national, Barcelona Traction, in accordance with the existing recognized rule of protection of a company *only* by its national State.

Regarding the question: “. . . whether international law recognizes the right of a State to protect its nationals, natural or juristic persons, as shareholders in a foreign company, for the damage they might have suffered as a consequence of an internationally illicit act done to the company by a third State”, the answer, as a matter of law, should be in the negative.

As regards the facts and circumstances of the particular case, they do not constitute a juridically valid ground to justify an exception to the existing rule.

* * *

The shareholders of bearer shares in a *société anonyme* do not have responsibility and they are unknown. If the alleged right of diplomatic and judicial protection of shareholders in a *société anonyme* were recognized, any State investor of capital abroad could buy, in the stock market, the capacity to present claims in the name of its nationals to the territorial State who admitted in its territory a foreign company whose nationality it *knew*, and who was also aware that, according to the

existing and accepted rules on the matter, the national States of the numerous and unknown shareholders did not have, in international law, a right of diplomatic protection independent from that of the national State of the company.

Such recognition would be a derogation of the relevant principles of international law and would entail unexpected complications and unnecessary conflicts in modern commercial and financial international relations.

If the different States, whose nationals were shareholders in the same corporation, were empowered to undertake, each one in his own right, acts of diplomatic protection on behalf of their respective nationals, the admission and operations of foreign commercial corporations of limited liability (*sociétés anonymes*) would constitute a great risk to the territorial States in need of investments who admit them.

Such recognition will create distrust, insecurity and unforeseen potential danger of pressures from unforeseen quarters. It will, besides, hinder the activities of modern commercial enterprises eager to invest capital abroad.

Mervyn Jones, in regard to the law on the subject, states:

“If a State of which the corporation is not a national could normally take up a claim in respect of an injury to the corporation merely because there are shareholders who are nationals of that State, and who have suffered loss, the results would be just as chaotic on the international plane as they would be under municipal law if any group of shareholders were allowed to sue in any case where the company has sustained damage.

If a State could intervene without restriction on behalf of its individual nationals who were shareholders in a foreign corporation, the position of Governments whose national the corporation was and that of the State against whom the claims were brought, would be rendered intolerable. It might well be, in such circumstances, that the number of possible State claimants in respect of an injury to one large company could comprise half the world. Again, shareholders are not infrequently corporations themselves, and the process of identifying individual shareholders might be prolonged *ad infinitum*; such a process is in any case difficult in practice.” (“Claims on behalf of Nationals who are Shareholders in Foreign Companies”, *British Year Book of International Law*, 1949, pp. 234-235.)

* * *

The Court did not examine the merits regarding the fourth preliminary objection. Nevertheless the written and oral pleadings did show that

the local remedies in respect to the alleged wrongs and damages were not exhausted.

There are no grounds to say that a miscarriage of justice took place or that the bankruptcy was fictitious. There is no question that the bankruptcy declaration was made in accordance with Spanish law on the subject.

There are no legal bases to state that Spain is responsible internationally for the *standard* of its laws and for the *quality* of the justice administered by its courts.

By which *criterion* is the Court to measure the standard of Spanish laws in order to decide if it is high or low, good or bad? And by which *test* could the Court make a finding regarding the *quality* of the justice administered?

Which principles of international law, recognized by all nations, give the Court authority to pass judgment on those matters?

* * *

After careful consideration of the arguments from both sides contained in their pleadings, I conclude that there is not convincing evidence of a predominant Belgian interest in natural or juristic Belgian persons, having the character of shareholders of Barcelona Traction at the critical dates, even if it is admitted that those critical dates are 1948 and 1962. Namely the date of the bankruptcy declaration and the date of the filing of the present Application.

It has not been proved that the majority of shareholders in Barcelona Traction had the Belgian nationality at the critical dates, nor that the capital in the Belgian corporations alleged to be shareholders of Barcelona Traction, was a capital invested or belonging to Belgian nationals or necessarily linked to the *national wealth of the Applicant*.

The unfavourable impact on the wealth of a nation cannot be the legal foundation of a claim when a State considers that its nationals have lost money abroad, due to an act of the territorial State which is alleged to be a breach of an international responsibility.

If the defence of the national wealth could be the legal foundation of the State's own right to diplomatic or judicial intervention, the rules concerning the treatment of foreigners would be, in fact, substituted by vague and undefined concepts regarding non-existing duties of the territorial State to guarantee against loss, the investment, by a person, of money which the national State could, arbitrarily, claim was originally part of its national wealth when the investor sent his money abroad.

The national wealth is affected, maybe, when any resident takes or

sends his money abroad, rather than the moment he loses such money, or his interests, dividends, or hopes of pecuniary gains from his investment.

If the defence of the national wealth would entail the right to intervene, the violation of a duty towards a foreigner would not be the foundation of the claim, but the so-called harm to the wealth of a State as an automatic consequence of the pecuniary losses eventually suffered by its nationals abroad. Such losses could be traced to events in the territorial State regardless of its international responsibility, or the existence of any legal duty towards the success of business enterprises, or speculative ventures of foreign nationals.

* * *

I agree with the Judgment of the Court that the Belgian claim be dismissed.

(Signed) Luis PADILLA NERVO.
