SEPARATE OPINION OF JUDGE SIR GERALD FITZMAURICE

I

INTRODUCTORY

1. Although (if with some reluctance) I agree and have voted with the majority of the Court in finding the Belgian claim in this case to be inadmissible, and broadly for the principal reason on which the Judgment is based—namely that in respect of an injury done to a company, prima facie the company's government alone can sustain an international claim—I have a somewhat different attitude on various aspects of the matter, which I wish to indicate. In particular *(a)* I would go considerably further than does the Judgment in accepting limitations on the principle of the "hegemony" of the company and its government;—furthermore *(b)*, though I have felt bound to vote as I have, I nevertheless hold it to be an unsatisfactory state of the law that obliges the Court to refrain from pronouncing on the substantive merits of the Belgian claim, on the basis of what is really—at least in the actual circumstances of this case—somewhat of a technicality.

2. In addition, there are a number of particular matters, not dealt with or only touched upon in the Judgment of the Court, which I should like to comment on. Although these comments can only be in the nature of *obiter dicta*, and cannot have the authority of a judgment, yet since specific legislative action with direct binding effect is not at present possible in the international legal field, judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development. I agree with the late Judge Sir Hersch Lauterpacht [1] that it is incumbent on international tribunals to bear in mind this consideration, which places them in a different position from domestic tribunals as regards dealing with—or at least commenting on—points that lie outside the strict *ratio decidendi* of the case.

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[1] The necessary references and citations are given in the opening paragraphs of the separate Opinion of my colleague Judge Jessup in the present case (q.v.),—and I associate myself with the views he expresses in this connection.

3. In the next part (II) of this opinion (paragraphs 4-34) I propose to indicate the criteria on the basis of which I have felt obliged to concur in the main conclusion reached by the Court, but I shall do so in the light of my view that certain of the considerations of law which compel that conclusion prove, in the international field, to be unserviceable as soon as they are applied to any situation which is out of the ordinary. In the succeeding part (III—paragraphs 35 and 36), I state the conclusions which I believe ought to be drawn from part II as to the place of equitable considerations in the international legal field, and the growing need there for a *system* of Equity. In the next two parts (IV and V) I propose, as indicated *supra* in paragraph 2, to comment on a certain number of matters (also of a more or less preliminary character) which, though not relevant to the particular point on which the Court's decision turns, formed part of the long series of questions debated by the Parties in the course of their arguments, and which accounted, or could have accounted, for individual rejections of the Belgian claim by certain Members of the Court. Part IV (paragraphs 37-65) will deal with matters affecting the nationality of the Barcelona Traction Company's shareholders, and Part V (paragraphs 66-83) with certain other matters having a preliminary character,—viz. the question of jurisdiction in bankruptcy, and a particular aspect of the local remedies rule. Finally, in the concluding part (VI—paragraphs 84-90)—since the subject has evidently given rise to some misunderstanding—I discuss the philosophy of the joinder of preliminary objections to the merits. There is finally a Postscript on the question of the length of the proceedings in this and other cases, and certain related matters.

II

The Question of Belgium's Locus Standi in Judicio [2]

4. Although, as I have said, I reach the same final conclusion as in the Judgment of the Court, my approach is different. In particular I do not base myself as does the Judgment to some extent (*vide* its paragraphs 33-36), and as figured fairly prominently in the arguments of the Parties, on any consideration turning on the question of to whom, or to what entity, was the obligation owed in this case, not to act in a manner

[2] Although I now agree with my colleague Judge Morelli's view that the question of Belgium's right to claim on behalf of the Barcelona Traction Company's shareholders, in so far as Belgian, is really a question of substance not of capacity (because the underlying issue is what rights do the shareholders themselves have), it is convenient for immediate purposes to treat the matter as one of Belgian Government standing.

contrary to international law. This does not seem to me to be the right question to ask where the issue involved is not one of treaty or other particular obligations, but of general international law obligations in the sphere of the treatment of foreigners. If in the latter area a State, either directly or through its agencies or authorities, acts illicitly, it stands in breach of international law irrespective of whether any other State is qualified to take the matter up. For instance if an individual were concerned, he might be stateless. If in the present case there have been contraventions of international law, they are in no way legitimized, nor do they become any the less illicit, because Canada has not (or even possibly could not [3]) pursue the matter, and because Belgium is held to possess no *locus standi in judicio* for doing so. Nor is the question of the entity to which the obligation is due helpful even for the purpose of identifying the party entitled to claim, for such entity would itself previously need to be identified, and the discussion would turn in a circle.

5. The material and only pertinent question is who or what entity, if, any is entitled to claim in respect of damage accruing to *shareholders* in consequence of illicit treatment of the *company*;—and in order to answer this since the matter concerns a company and its shareholders—it is above all necessary to have regard to the concept and structure of companies according to the systems of their origin, which are systems of private or domestic law,—and furthermore to insist on the principle that when private law concepts are utilized, or private law institutions are dealt with in the international legal field, they should not there be distorted or handled in a manner not in conformity with their true character, as it exists under the system or systems of their creation. But, although this is so, it is scarcely less important to bear in mind that conditions in the international field are sometimes very different from what they are in the domestic, and that rules which these latter conditions fully justify may be less capable of vindication if strictly applied when transposed onto the international level [4]. Neglect of this precaution may result in an opposite distortion,—namely that qualifications or mitigations of the

[3] i.e., if it were held that no "genuine link" existed between Canada and the Barcelona Traction Company on the basis of the principle of the *Nottebohm* case (*vide infra*, paragraphs 26-32).

[4] In this respect I fully associate myself with the views expressed by Lord McNair in his *South West Africa* case (1950) Opinion when, speaking of the United Nations Trusteeship System, he said (*I.C.J. Reports 1950*, at p. 148) that private law institutions could not be imported into the international field "lock, stock and barrel", just as they were, and that private law rules could only serve as indications of principle and not as rigid injunctions in the international domain. However, in the present case there is no question of international law setting up a new international institution analogous to the private law institution of the limited liability company. The latter remains a purely private law creation, which international law must take as

rule, provided for on the internal plane, may fail to be adequately reflected on the international,—leading to a resulting situation of paradox, anomaly and injustice.

6. This is what seems to have occurred in the field of the corporate entity at the international level. Since the limited liability company with share capital is exclusively a creation of private law, international law is obviously bound in principle to deal with companies as they are,—that is to say by recognizing and giving effect to their basic structure as it exists according to the applicable private law concepts [5]. Fundamental to the structure of the company is the ascription to it, *qua* corporate entity, of a separate personality over and above that of its component parts, viz. the shareholders, with resulting carefully drawn distinctions between the sphere, functions and rights of the company as such, acting through its management or board, and those of the shareholder. These distinctions must obviously be maintained at the international level: indeed to do otherwise would be completely to travesty the notion of a company as a corporate entity. Thus it is that, just as in domestic courts no shareholder could take proceedings in respect of a tort or breach of contract committed in respect of the company, but only the latter could do so, through the action of its management with whom the decision would lie—a decision which, broadly speaking, the shareholder must accept,—so also if an illicit act injurious to the company or infringing its rights takes place on the international plane, it is not the government of the shareholder but, in principle, that of the company alone, which can make an international claim or bring international proceedings;—the decision whether to do so or not lying with the latter government—a decision which again the foreign shareholder must accept, in the sense that neither he nor his government can require (still less compel) the company's government to take action.

7. In neither case does it make any difference that the wrong done to the company recoils or "repercusses" onto the shareholder [6], e.g., by

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it finds it. The complaint I am making in this Opinion is that international law has indeed taken it as it has found it over *part* of the ground, but not over the rest, thereby introducing an unjustified distortion.

[5] It is inevitable that these concepts should be referred to herein in very broad and general terms. The details vary from country to country, and some things may not be true or may need considerable qualification for certain countries.

[6] Suppose that by the tortious negligence of a third party the company's warehouses are burned down,—the shareholder may indirectly be seriously affected, but he can have no right of action: the property was not his but the company's. It is the same if his interest is affected by the failure of a third party to carry out a contract with the company, for he himself is not a party to the contract. It is quite another matter if the act complained of is directed against, or directly infringes, his specific

causing the market value of his shares to fall or the profits of the company to be diminished—whence lower dividends; or by causing difficulty as to disposing of the shares—(for want of ready buyers),—for while the shareholder has a legal right not to have his shares cancelled or confiscated without compensation, he has no legal right that they shall have, or be maintained at, any particular market value,—and while the shareholder has a right to receive a dividend if a dividend is declared, he has no right that it *shall* be declared, or (if declared) be for any particular amount [7],—and again, while he has a right freely to dispose of his shares [8], the law does not guarantee him either a buyer or a price.

8. But at this point it becomes clear that something has gone wrong,—that the analogy has broken down,—because certain qualifications or modifications, it might be said mitigations, which, in the domestic field, affect and as it were alleviate the situation just described, are not, in the present state of the law, reflected, or not adequately so, in the international domain;—for whereas at that level this situation is one which, as the law now seems to stand, may leave the shareholder powerless to protect his interests, this is not the case on the domestic plane, where the principle of the "hegemony" of the company is accompanied by certain balancing elements, acting as a counterweight, which are only up to a point reflected in the present condition of international law—(*vide infra*, paragraph 11 and the footnotes thereto).

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9. In order to understand this matter, it is necessary to have regard to the underlying *rationale* of the "hegemony principle". This resides in something more than the purely juridical situation resulting from the separate legal personality of the company, and the fact that, in the type of case now in question, the rights infringed are those of the company, not of the shareholder—though his pocket may be affected, actually or potentially—(*vide supra*, paragraph 7 and footnote 6). Nor does it reside in the practical considerations which, on the domestic plane, at least, must in all normal circumstances rule out the possibility of separate and independent action by shareholders in respect of the treatment of the company, as such, by third parties.

10. The true *rationale* (outside but underlying the law) of denying to

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rights as a shareholder,—if for instance his right freely to dispose of his shares were illicitly interfered with, or if resolutions duly passed at the general meeting of shareholders were declared null and void, etc.

[7] Except of course in the case of fixed interest securities of various kinds.

[8] As a general rule, that is. Under wartime or other emergency conditions, owners of certain kinds of securities (e.g., those expressed in foreign currency) might be required to dispose of them to, or only to, the government or central bank.

the shareholder the possibility of action in respect of infringements of *company* rights is that, normally, he does not need this. The *company* will act and, by so doing, will automatically protect not only its own interests but those of the shareholders also. That is the assumption;—namely that the company is both capable of acting and will do so unless there are cogent reasons why, in the interests of the company and, hence, indirectly of the shareholders, it should refrain [9],—the decision involved being one of policy, prima facie for the determination of the management. (It is precisely here, however, that the beginnings of a profound difference between the domestic and the international situations can be discerned, for if and when a government declines or fails to intervene on behalf of a company of its nationality detrimentally affected by illicit foreign action, the reasons will be the government's not the company's [10], and will normally have nothing to do with the company's interests, which indeed are likely to be adversely affected still further by the government's refusal or failure, so that no contingent or long-term advantage, or avoidance of disadvantage, will result, as might be expected if the decision were the company's. The motivations involved are quite distinct. But all this is to anticipate.)

11. The assumption that the company will act, or will have good reasons for not doing so—(reasons which will be in the eventual interests of the shareholders also)—underlies equally the variously expressed axiom, on the presumed truth of which so much of the applicable law is based—namely that the fate of the shareholder is bound up with that of the company; that his fortunes follow the latter's; that having elected to throw in his lot with the company, he must abide by the consequences, be they good or bad, so long as he maintains his connection with it, etc., etc. The idea has been well expressed in a recent work [11] as follows (my translation):—

> "If, in principle, the shareholders must suffer the fate of the company, this is because the corporate entity is a legal person capable by its corporate action of protecting the interests which the shareholders have entrusted to it . . . transferring to the corporate

[9] Because, e.g., too expensive, or likely to have undesirable repercussions, to offend some powerful interest, interfere with some other objective, involve some awkward revelation, etc.

[10] These may, but just as probably may not, have to do with the actual merits of the claim. For instance a government may well not wish to press a private claim against another government with which it is conducting difficult negotiations on a matter of overriding national importance. Many other instances could be given.

[11] Paul De Visscher, "La Protection Diplomatique des Personnes Morales"—(Diplomatic Protection of Corporate Entities)—*Recueil* [i.e., *Collected Courses*] *of the Hague Academy of International Law*, 1961, Vol. I, at p. 465.

> entity a part of their personality and rights, with the object of thereby obtaining a better return and a more effective safeguard. But on that account, if such is the justification for the indivisibility of the corporate entity, such is also its limit."

The nature and extent of this limit on the international plane will be considered later. In the domestic sphere it takes two main forms, the external and the internal—the latter being action within the company itself by means of its own processes and procedures (*vide infra*, paragraph 12). As to the former, most developed systems of law contain provisions which have been described in very general terms as being

> "intended to protect the interests of shareholders if the company's officers are considering their own interests rather than the interests of the company, and also to protect the interests of minorities of shareholders" [12].

Such provisions of course differ from country to country but, without attempting to particularize, their broad effect is either to enable shareholders to bring an action in their own names against a third party, in a variety of circumstances involving fraud, malfeasance, negligence or

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[12] Beckett, "Diplomatic Claims in Respect of Injuries to Companies", *Transactions of the Grotius Society*, Vol. 17 (1932), at p. 193, footnote (7), citing (and see also at p. 192) Dutch, English, French and German law. Beckett also cites a passage from *Halsbury's Laws of England*. The same passage as it figures in the later (1954) edition, after stating that normally only the company not shareholders can sue third parties, continues as follows:

> "Where, however, the persons against whom relief is sought hold and control the majority of the shares, and will not permit an action to be brought in the company's name, shareholders complaining may bring an action in their own names and on behalf of the others and they may do so also where the effect of preventing them so suing would be to enable a company by an ordinary resolution to ratify an improperly passed special resolution."

See also Mervyn Jones, "Claims on behalf of Nationals who are Shareholders in Foreign Companies" in *British Year Book of International Law*, Vol. XXVI (1949), at pp. 232-234, citing American, Austrian, Belgian, English, French, Italian, Norwegian, Swedish and Swiss law.

See further as to German law in "La Personnalité Morale et ses Limites"—(The Corporate Entity and its Limits), published by Pichon & Durand-Auzias for the Institute of Comparative Law of the University of Paris in *Librairie Générale de Droit et de Jurisprudence*, 1960, at pp. 43-44 (*per* Dr. Ulrich Drobnig); and, in *ibid.*, at p. 150, the following statement of Swiss law (*per* Prof. J. M. Grossen—my translation): "There are fortunately other [sanctions] which enable [the shareholders] to compel the corporate entity—or more exactly its management—to change its attitude."

For analogous provisions of French law see paragraph 11 of my colleague Judge Gros' separate Opinion.

other improper refusal or failure on the part of the management to act for the protection of the company's interests, or else to enable shareholders to bring proceedings against the management itself to compel it so to act. In short, generally speaking, domestic law makes at least some provision for the case where the basic assumption of action by the company, rendering action by the shareholders unnecessary, ceases to hold good [13].

12. The other type of possibility which private law affords to shareholders (or at least to a majority of them; and often even to a minority) if dissatisfied with the policies of the company—including therefore such a thing as a failure to proceed against a third party in the protection of the company's interests—is to take action on the internal plane within the confines of the company itself, and through its normal procedures (shareholders' meetings, voting of resolutions, etc.), directed to influencing and if necessary changing, those policies or even, in the last resort, modifying or changing the management itself. In certain circumstances, reconstructions constitute another possibility.

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13. The question that now has to be asked is how far these domestic law limitations on the exclusive power of the management, allowing of independent action by the shareholders, are reflected at the international level, so as correspondingly to qualify the principle of the exclusive right of the government of the company to intervene, and admitting the possibility of intervention by that of the shareholders, even though the injury is to the company as such, rather than to any independent *stricto sensu* shareholding right. This question has to be asked because, if it is

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[13] In addition to the passage from *Halsbury's Laws of England* cited in the first paragraph of footnote 12 *supra*, the following sections from the same work also indicate the position under English law (*loc. cit.*, pp. 222-223, omitting references to footnotes):

> "458. *Statutory right of members collectively.* The members of a company collectively have statutory rights, some of which are exercisable by a bare majority, as, for instance, a resolution at the statutory meeting; others by a particular majority, as in the case of a reconstruction; and others by a minority, as in the case of a requisition for a meeting of shareholders, or of an application to the Board of Trade to appoint an inspector to investigate the company's affairs, or of an application by an oppressed minority to the court for relief.
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> Statutory rights cannot be taken away or modified by any provisions of the memorandum or articles [i.e., of the company]."
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> "461. *Rights under the general law.* The rights of a member under the general law include his right . . . to restrain directors from acting *ultra vires* the company or in excess of their own powers or acting unfairly to the members."

not right that international law should distort the structure of the company (an essentially private law concept) by failing to give all due effect to the logic of its separate personality, distinct from that of the shareholders,—it is no less wrong, and an equal distortion, if international law fails to give due effect to the limitations on this principle recognized by the very system which, *mutatis mutandis*, it is sought to apply on the international plane. In short, such application should be integral, not partial. But is it?—or is it not rather the case that international law, while purporting to base itself on, and to be guided by the relevant features of municipal law, really does so only to a certain extent, departing from it at precisely that point where, under municipal law the management of the company can in certain circumstances be compelled by the shareholders to act?

14. It seems that, actually, in only one category of situation is it more or less definitely admitted that intervention by the government of foreign shareholders is allowable, namely where the company concerned has the nationality [14] of the very State responsible for the acts or damage complained of, and these, or the resulting circumstances, are such as to render the company incapable *de facto* of protecting its interests and hence those of the shareholders [15]. Clearly in this type of case no intervention or claim on behalf of the *company* as such can, in the nature of things, be possible at the international level, since the company has local not foreign nationality, and since also the very authority to which the company should be able to look for support or protection is itself the author of the damage. Consequently, the normal rule of intervention only on behalf of the company by the company's government becomes not so much inapplicable as irrelevant or meaningless in the context. The efficacity of the corporate entity and its capability of useful action has broken down, and the shareholders become as it were substituted for the management to protect the company's interests by any method legally open to them. If some of them have foreign nationality, one such way is to invoke the intervention of their government, and in the circumstances this must be regarded as admissible. Thus the same

[14] For present purposes I am taking the nationality of a company to be that of the country of incorporation, the laws of which govern the company's constitution and functioning. However, *vide infra* paras. 33 and 34.

[15] If the wrong done to the company, or breach of contract with it, comes not from another private party but from the authorities of the country, it is again in principle only the company which can take legal action, to the extent that the local law allows the government to be sued. If however, as happened for instance in the *El Triunfo* case (*United Nations Reports of International Arbitral Awards*, Vol. XV, p. 464), the action taken against the company by the authorities has the effect of completely paralyzing it, then the shareholders can act and, if they are unable to obtain redress locally, but have foreign nationality, can, according to the view here discussed as being now more or less generally recognized, invoke the aid and intervention of their government.

authority as was cited in paragraph 11 above continues (translation) [16]:

> ". . . From this it necessarily results that if the rational justification for the mechanism of the corporate entity is brought to a collapse by the act of the very State whose law governs the status and allegiance of the corporate entity, its personality is no longer anything but a fiction void of all meaning, in which there can now be seen nothing but a bundle of individual rights."

15. Notwithstanding these cogent considerations of principle, the validity of this exception to or limitation on the rule of non-intervention by the government of the shareholders in respect of wrongs done to the company, is contested on a variety of grounds. It is said for instance that this type of intervention on behalf of foreign shareholders ought only to be permissible where the company itself is also essentially foreign as to its management and control, and the nature of the interests it covers, and where its local nationality did not result from voluntary incorporation locally, but was imposed on it by the government of the country or by a provision of its local law as a condition of operating there, or of receiving a concession. In such cases, it is said, the company's nationality is an artificial one that does not correspond with the underlying realities, and for this reason (but for this reason only) the local government should not be able to avail itself of the obstacle of its nationality which it has designedly insisted on interposing between itself and those realities—possibly for the express purpose of preventing foreign intervention. Where however the local nationality was deliberately assumed by the company as a matter of choice, then, so it is said, there is no reason for making any such departure from the basic rule of the company screen.

16. It is doubtless true that it is in the case of such "enforced" local nationality that situations leading to foreign shareholders in the company invoking the intervention of their government are most liable to arise. Nevertheless, there does not seem to be any sufficient reason of principle for drawing the distinction involved. The *fact* of local incorporation, but with foreign shareholding, remains the same in both types of case, whatever the motivations or processes that brought it about. Nor are the motivations which lead foreign interests to seek or not seek local nationality always easy to assess: they may be very mixed. Nor again is it always the case that companies with a large foreign shareholding, and mainly controlled from abroad, do not *voluntarily* obtain local incorporation: they often do, and there may be sound business reasons for it. Yet they are just as liable in practice to be regarded locally as

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[16] *Loc. cit.* in footnote 11 *supra.*

basically foreign, and to suffer from action which may prevent them, as *companies*, from acting for themselves.

17. Another objection to be urged was that in so far as the doctrine of a right of intervention on behalf of foreign shareholders in a locally incorporated company unable to act for itself, or rendered incapable of so doing, may depend on a number of precedents deriving from cases decided by international tribunals, it will be found on a careful examination of those cases that the "company" that was concerned was usually more in the nature of a firm, partnership, or other similar association of persons, than of a true separate corporate entity distinct from those persons. Hence, it is objected, in so far as the latter were admitted, to claim and their governments to support their claims, they were acting in respect of damage to specific *stricto sensu* rights of their own in the association concerned, and not of the rights of the association as such. Where on the other hand, so it is said, a corporate entity really was involved, the capacity to claim on behalf of shareholders resulted from the express terms of the treaty, convention or "compromis" submitting the case to the tribunal,—consequently these cases cannot be cited as implying recognition of any general principle of law allowing of such claims.

18. It may be true that the exact *rationale* of a number of the decisions concerned is not very easy to determine precisely, and lends itself to much controversy, as the course of the written and oral proceedings in both phases of the present case have amply demonstrated. Any thorough determination would however take up a disproportionate amount of space here: nor is it necessary,—for the considerations of principle invoked in previous paragraphs of this Opinion, based on domestic law analogies, are quite sufficient in themselves to justify the doctrine of a right of intervention on behalf of shareholders "substituted" for a moribund or incapable company of local nationality, in order to protect its interests and their own.

19. It is my view therefore, that the legal position is correctly stated in the following two paragraphs from the same source as was previously cited [17]:

> "In sum, in order to weigh the admissibility of the protection of shareholders, it is necessary to adhere essentially to the idea of the effectiveness of the corporate entity. It matters little whether, according to internal law criteria, the corporal personality subsists or not. Even where it does, an international tribunal can admit the

[17] *Loc. cit.* in footnote 11 *supra*, at p. 477.

diplomatic protection of shareholders from the moment when it finds as a fact that the damage caused to the corporate entity has had the effect of paralysing or sterilising the usefulness that the mechanism of corporate personality ought normally to bring about for the benefit of the shareholders.

In that case, an international tribunal, not being bound by internal law criteria, 'pierces the corporate veil', as it is said, [but] it would be more accurate to say that it registers the absence of all effective personality, of any effectual intermediary between the shareholders and the rights infringed."

These two paragraphs moreover, even if only in general terms, almost exactly describe the situation of the Barcelona Company which, though still subsisting and formally in existence [18] has, as to its functioning *in Spain*, been entirely paralyzed and rendered incapable of further useful action—a situation not only admitted but, for their own purposes, considerably insisted upon by the Spanish side. The Company was indeed crippled to the point where, deprived of all its Spanish assets and sources of income, it could no longer find the funds for its legal defence, these having to be supplied by the very same shareholders whose right to invoke the diplomatic protection of their Government, Spain denies.

20. In consequence, had the Company been Spanish by incorporation, instead of Canadian, I should have had no hesitation in holding that a claim by Belgium on behalf of the Belgian shareholders in the Company was admissible;—and it is indeed one of the ironies of this case (but not the only one [19]) that the Belgian Government would have been in a much stronger position as regards the admissibility of its claim had the Company been Spanish rather than Canadian.

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[18] I share the view expressed in the passage just cited that the formal keeping alive of the company does not affect the realities of the matter. However, the Belgian position would (ironically) have been stronger if the Spanish events had resulted not merely in the "hispanicization" of the undertaking in *Spain*, but in forcing the liquidation or winding up of Barcelona Traction itself,—for it would then have been much more difficult to maintain, through the fiction of the Company's continued existence, that only the Canadian Government could claim.

[19] See previous footnote. It may also be thought (see the separate Opinion of my colleague Judge Gros, paragraph 12) that the Company would have fared better through an open and avowed nationalisation or expropriation of its Spanish undertaking, accompanied by the payment of adequate compensation, than it did through the process of the bankruptcy. But this would have depended on the nature and amount of the compensation.

21. Must the Canadian nationality of the Company then rule out the Belgian claim? In the present state of the law it would seem that it must. In connection with this conclusion, however, a number of points have to be considered in order to show why, although it is correct on the basis of extant law, this law itself, as it now stands, is in this respect unsatisfactory.

22. The first of these points is that, as required by the logic of the considerations indicated in paragraphs 5 to 13 *supra*, if on the domestic plane there are circumstances in which some action is open to the shareholders notwithstanding that it is prima facie the company's position, rather than (directly) their own, that is in question,—then in corresponding circumstances the *government* of the shareholders should, on the international plane, be entitled to intervene and claim. One such case has already been discussed *supra* in paragraphs 14-20: the company is defunct or paralyzed and there can be no question of intervention or claim by *its* government, for the latter is itself the tortfeasor government, if wrong there has been. Similarly, if international law is to remain faithful to the concept of the company and, in dealing with the latter on the international plane, is to give due effect to its essential elements, then it must provide for the case where the company's government—not being the tortfeasor government (but also not being the government of the majority of the shareholders)—for reasons of its own *that have nothing to do with the interests of the company* (see *supra* paragraph 10) refuses or fails to intervene, even though there may be a good, or apparently good case in law for doing so, and the interests of the company require it. Just as on the domestic plane an analogous failure or refusal on the part of the management of the company would normally enable the shareholders to act, either (if the element of *dolus* or *culpa* were present) by legal action against the management, or against the tortfeasor or contract-breaking third party,—or else through the internal processes of the company;—so also, on the international plane, ought the inaction of the company's *government* enable that of the shareholders to act—(and obviously there would be ways of resolving the practical difficulties of the company's government subsequently changing its mind—if the servants of the law cared to work them out;—I think that in this respect paragraphs 94-98 of the Court's Judgment make too much of this matter).

23. In fact, international law does not at present allow of this—except possibly in the one case of the company's government being actually disqualified at law from acting (as to which see *infra*, paragraphs 26-32). The reasons for this insufficiency—for such it is—may be perfectly understandable, but this does not alter the fact that international law is in this respect an under-developed system as compared with private law, and that it fails to provide the recourses necessary for protecting

on the international plane the interests not merely of the shareholders *but of the company itself.* What are these reasons? They are of course that a government is not in the same position as a company and cannot be made subject to the same constraints. The management of a company owes a duty, not only to the company but to the shareholders, and is bound to act in the best interests of the company, and hence of the shareholders, basing itself on an informed and well-weighed estimate of what these are. A government is under no such duty. It is perfectly free on policy grounds to ignore the interests of the company or even to act in a manner it knows to be contrary to these; and if it does this, there are no international means of recourse against it, such as there would be against the management of a company so acting on the internal plane. There is no means, internationally, of proceeding against a government which refuses to intervene on behalf of, or support, the claim of one of its nationals or national companies [20],—nor could such a refusal conceivably entail the breach of any general international law obligation. Still less of course is there any means of changing or replacing a government which refuses or fails to act as, internally, the shareholders may be able to do as regards the company's management.

24. All this at present provides an excuse for saying, as the law now does, that if the company's government does not act no other one can. Instead, it should constitute a reason for coming to precisely the opposite conclusion. An enlightened rule, while recognizing that the national government of the company can never be *required* to intervene, and that its reasons for not doing so cannot be questioned even though they may have nothing to do with the merits of the claim, would simply provide that in such event the government of the shareholders may do so [21]—particularly if, as is frequently the case, it is just because the shareholding is mainly foreign that the government of the company feels that no sufficient national interest exists to warrant intervention on its own

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[20] Theoretically, the *internal* law of the country concerned might provide a means of recourse against the government in such circumstances: and political action might be possible. But in neither case would the essential point be affected.

[21] I am not greatly impressed by the point which comes up in several connections that the Belgian position, with a big block of majority shareholding, is peculiar, and that in other cases there might be foreign shareholders of several nationalities and a consequent multiplicity of claims. This would only go to the *quantum* of reparation recoverable by the various governments,—and once the principle of claims on behalf of shareholders had been admitted for such circumstances, it would not be difficult to work out ways of avoiding a multiplicity of *proceedings*, which is what would really matter.

part [22]. The law's present attitude is based on predicating for the company's government not merely a prima facie right (which would be understandable) but an exclusive one (which is not). There is no reason of principle why, if the law so wills, failure to utilize a right of action by the party prima facie entitled to do so should not sanction its exercise by another party whose material interest in the matter may actually be greater. Practical difficulties there might be; but this is not a serious objection where no inherent necessity of the law stands in the way. That such a situation of primary and secondary (or latent) entitlement to act can work, if properly regulated, seems to be indicated by the shareholders' possibilities of action on the domestic plane, as earlier described.

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25. International law must in consequence be regarded as deficient and underdeveloped in this field because, while retaining the rule of the "hegemony" of the company and its government, it fails to provide those safeguards and alternatives which private law has instituted for preventing the hegemony of the company's management leading to abuse. More exactly, what the law enjoins, and the Judgment of the Court therefore inevitably endorses (see its paragraphs 66-68, 77-83 and 93), is the by-passing of the difficulty by a sort of "ostrich-act"—a hiding of the face in the sands of the fiction that so long as it remains theoretically possible for the company's government to act (and however little reality there may be about this possibility), no other government can do so. Thus the law allows the company's government eternally to dangle before the foreign shareholder the carrot of a hypothetical protection that will never be exercised, and tells the hungry fellow that he must be satisfied with this because, although he will never be allowed to eat that carrot, it will always remain there to be looked at [23]! International law has of course to accept the fact that governments cannot

[22] This is or has been the settled policy of a number of governments. I am not impressed by the argument that those who acquire shares in companies not of their own nationality must be deemed to know that this risk exists. That does not seem to me to affect the principle of the matter.

[23] Or, like the nymph pursued by the ephebus, as depicted in the timeless stasis of the attic vase that inspired the poet Keats' celebrated *Ode on a Grecian Urn* (verse 2, lines 7-10):

> "Bold Lover, never, never canst thou kiss,
> Though winning near the goal—yet, do not grieve;
> She cannot fade, though thou hast not thy bliss,
> Forever wilt thou love, and she be fair!"

be compelled to act or be changed. But it does not have to accept (and even positively decree) that nevertheless no other government can ever act—that the carrot must be eternally dangled but never eaten—the maiden ever pursued but never attained!—(see footnote 23 above).

* * *

The Nottebohm case

26. There remains however a quite different order of point, which is in my view by far the most important to arise on the question of Belgian *locus standi*, namely what the situation would be if Canada, instead of having merely failed to pursue the case, were actually to be unable to do so because of a legal disability created by international law itself, disqualifying Canada from acting. It is one thing for the law to predicate, on the basis of an exclusive right of action for one government, that even in the event of its not being exercised, no other government may exercise it. Such a position may be regrettable, for the reasons I have indicated, but is at least tenable. What would be totally inadmissible would be for the law simultaneously to confer a right, yet disqualify the indicated government from exercising it in certain circumstances, and then, when these arise and the disqualification operates, continue to maintain the rule of exclusivity and the consequent incapacity of the governments of other parties whose interest in the matter is undeniable. Implicitly the Judgment takes the same view because an important part of it (see preceding paragraph) rests on the basis that so long as it is *possible* for the company's government to claim (whether it chooses to do so or not) the shareholders are not, at least in *law*, deprived of all chance of protection.

27. These aspects are particularly important if consideration is given to what the ground of Canada's possible disqualification would be, namely (on the basis of certain previous decisions and other elements [24]) that there was an absence of a sufficiently close link between the Canadian Government and the Barcelona Company to give the former an actionable interest at law. Moreover, a major factor would precisely be the absence of any Canadian shareholding or share capital in the Company and the fact that most of it was Belgian. In my view, a disqualification—

[24] In particular the decision of the Court in the *Nottebohm* case (merits)—*I.C.J. Reports 1955*, p. 4 *et seq.*; and the Report of the Commission of Arbitration in the "*I'm Alone*" case (*U.N. Reports of International Arbitral Awards*, Vol. III, p. 1614). The same sort of questions also arise over the use of flags of convenience; supposed head-offices that are no more than an address and a letter-box; etc.

at least if it takes place on those grounds—must in logic and in law *ipso facto* imply legal capacity for the government of the shareholders whose non-Canadian status has brought the disqualification about.

28. Having regard to the importance of this issue and, consequently, of the possible applicability to the situation of Canada of the Court's decision in the *Nottebohm* case [25], which obviously could affect the whole outcome of this part of the case, I consider that it should not have been side-tracked on the basis that neither of the Parties contested the existence of a Canadian right of intervention and claim. In my view they should have been asked, in the exercise of the Court's power to act *proprio motu*, to present full argument on the matter; and the intervention of the Canadian Government under Article 62 of the Court's Statute should have been sought, in order that its views might be made known. If for various reasons, it would not have been practicable to do this during the normal course of the oral hearing, I consider that the Parties should have been recalled later for the purpose, after such interval as might have been thought appropriate for any necessary written exchanges on the subject. This was not done: yet the Court's Judgment (see paragraph 70 and, generally, paragraphs 70-76) not only touches on the matter, but gives the reasons why the Court did not believe that it need consider the *Nottebohm* case, viz. that there was no true analogy between the situation in that case and this one. At the same time, the Court does in fact find affirmatively that there is a sufficient link between Canada and the Barcelona Company to qualify Canada to sustain a claim if it chooses to do so,—and the Court does so without going into the counter arguments to be derived from the *Nottebohm* case. In these circumstances, and without myself attempting to pronounce on the substance of the matter, I feel obliged to indicate why the *Nottebohm* decision unquestionably *does* have a bearing on this—one of the main issues dealt with in the Judgment of the Court; and why indeed there is a strikingly close analogy between the two cases, so that the principle of the *Nottebohm* decision could well be regarded as very neatly applying to the situation obtaining in the present case.

29. In the *Nottebohm* case, in which Liechtenstein was claiming against Guatemala, the three main grounds on which the Court found against Liechtenstein's capacity to put forward the claim of Mr. Nottebohm were:

(i) that this Liechtenstein nationality—acquired by naturalization just before the outbreak of war in 1939, he being then a German

[25] See reference in footnote 24 above.

national—was purely artificial, in the sense that he had not acted from any real desire to identify himself with Liechtenstein and its fortunes, but with the ulterior object of endeavouring to divest himself of enemy character by acquiring neutral status;

(ii) that his true connection by residence, domicile and business interests was Guatemalan; and

(iii) that it was precisely against Guatemala that the claim was being brought.

In these circumstances the Court held that although Mr. Nottebohm was undoubtedly of Liechtenstein nationality under the law of that State, such nationality could not be regarded as entitling Liechtenstein to make a claim on his behalf against *Guatemala* [26];—or in other words his claim was not "opposable" to Guatemala at the instance of Liechtenstein, which meant that Liechtenstein was in those particular circumstances disqualified.

30. If these tests were now to be applied to the case of the Barcelona Company, it could very cogently be contended that a similar, if not almost identical pattern emerged: that the Company obtained Canadian incorporation not in order to do business in Canada (on the contrary), but on account of certain particular advantages, fiscal and other, that this might bring;—that the Company's entire undertaking was in Spain where, through its subsidiaries, it carried on its sole business, none being transacted anywhere else;—and finally that it would be precisely against Spain that the Canadian Government would be claiming if it decided to intervene. The analogy is clearly striking,—and if to this is added the shareholding situation in the Barcelona Company's case—namely that it was not Canadian, thus rendering the link with Canada still weaker—it becomes manifest that there was here something that required to be gone into,—all the more so if it is correct to say that a finding of Canadian *disqualification* (if such had been the outcome [27]) should automatically have entailed a recognition of Belgian capacity to claim

[26] The Court was extremely careful to limit its finding to the case of a claim against *Guatemala*. It did not postulate a general incapacity for Liechtenstein to claim on behalf of Nottebohm—i.e., against some other country. To have done so would have been virtually to relegate Nottebohm to the category of a stateless person so far as international claims were concerned.

[27] There are of course arguments *contra*,—but this only underlines the need for a full consideration of the matter. It could be asked for instance whether the *Nottebohm* case itself was rightly decided, exchanging as it does the certainties of nationality for the uncertainties of less well-defined criteria?—see Brownlie on the *Flegenheimer* case in *The Principles of Public International Law* (Oxford, 1966) at p. 328 (case heard before the Italo-United States Claims Commission, *International Law Reports*, 25 (1958—I), p. 91;—and see Brownlie's whole discussion of the *Nottebohm* decision in *loc. cit.*, pp. 334-347. It can also be queried whether that decision is in any event properly

on behalf of any person or entity who, at the material times, was both of Belgian nationality and a shareholder in the Barcelona Company.

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31. I have already indicated (paragraph 28 above) that the Court was not in my opinion absolved from going into these very fundamental issues merely because the Parties did not raise them, and did not *for the purposes of these particular proceedings* challenge the *ius standi* of the Canadian Government. It is true that in the *Nottebohm* case the Court relied to some extent on the fact that Guatemala had never admitted Liechtenstein's right of intervention,—whereas it can be argued that Spain has admitted that of Canada, and would now be precluded from denying it. This may be correct, but the notion does not appear to be self-evidently well-founded. In the first place it rests on mere Spanish *non-objection* to *diplomatic representations* made by Canada on behalf of Barcelona Traction some 20 years ago,—whereas it must be at least doubtful how far this could operate as a positive *admission* of a Canadian right now to present a diplomatic *claim* on behalf of the Company (if that occurred), in such a way as formally to preclude any Spanish right of objection under this head. In this context, diplomatic representations—which need not necessarily be based on or imply a claim of right, but are often admitted or received in the absence of any such claim or pretension to it—belong to a different order of international act from the presentation of a formal claim before an international tribunal.

32. More important is the fact that, if any preclusion operated as a result of past Spanish non-objection to Canadian intervention (as it quite possibly might), it could only operate as against *Spain* in proceedings brought by *Canada* against the former. It could not possibly operate against *Belgium* in proceedings brought by the latter against Spain. In contrast to the case of Belgium, Spanish non-objection was at least significant, for Spain at all times had an *interest* in objecting to Canada's intervention, if there were possible legal grounds for so doing. Belgium did not have any such interest; on the contrary, the true interest of the Belgian shareholders at all times lay in Canadian intervention on behalf of the *Company*: it is precisely the lack of such intervention since about 1952 that has placed the Belgian shareholders in the position in which

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applicable to corporate entities as well as to individuals. These questions, and others, needed to be gone into.

they now find themselves. Consequently no inference adverse to Belgium can be drawn from the Belgian non-objection to Canada's *ius standi*, for this could not be expected in the circumstances, and was not called for in proceedings in which the Belgian position essentially was (see paragraph 46 *infra*) that *irrespective* of any Canadian right, Belgium had a right of claim. It was for the Court, acting *proprio motu*, as it has the power to do, to go into this cardinal issue, the silence of the Parties notwithstanding.

* *

33. While on this part of the case, another question which in my opinion needed to be considered was whether, in all the circumstances, the very "nationality" of the Barcelona Company itself should not be held to be Belgian rather than Canadian. There has, doctrinally, been much discussion and controversy as to what is the correct test to apply in order to determine the national status of corporate entities; and although the better view is that (at least for public as opposed to private international law and some other purposes) the correct test is that of the State of incorporation, there is equally no doubt that different tests have been applied for different purposes, and that an element of fluidity is still present in this field [28]. This being so, it is surely a highly tenable proposition that the very circumstances which might lead to the State of incorporation being held to be disqualified from claiming,—because of the absence of a "genuine link" due to the company's ownership and control and main business interests being elsewhere,—might equally tend to suggest that in such a case a different test of nationality should be applied [29]. There are also certain other aspects of the matter considered in the opening paragraphs of my colleague Judge Gros' separate Opinion which are highly pertinent to the question of the national status of companies.

34. I am of course aware that there are difficulties about this view

[28] See the discussions in Beckett, "Diplomatic Claims in respect of Injuries to Companies", *Transactions of the Grotius Society*, Vol. 17 (1932), at pp. 180-188; Paul De Visscher in *Hague Recueil*, 1961, Vol. I, pp. 446-462; van Hecke, "The Nationality of Companies Analysed" in *Netherlands International Law Review*, 1961, Issue 3, pp. 223-239; and Ginther, "Nationality of Corporations" in the *Austrian Public International Law Review*, 1966, Vol. XVI 1-2, pp. 27-83.

[29] Or else that the proper test of the right to claim internationally should be that of where the real weight of interest lies. On this matter I associate myself (*de lege ferenda* however) with much that is contained in paragraphs 57-70 of my colleague Judge Jessup's Opinion.

which would doubtless have been brought out had the matter been properly argued. My purpose here is to indicate that this is what I think should have occurred. The Parties should have been requested to present a full argument on the subject. It was not enough, in my opinion, to proceed on the basis that since neither Party had contested the Canadian nationality of the Barcelona Company, and both had proceeded on the assumption that the Company was Canadian, the Court was not called upon to speculate otherwise. Such an attitude may be quite in order in domestic courts where, normally, appeals or alternative procedures exist. It is not appropriate to international proceedings in which, almost always, there are no possibilities of appeals or other recourses. In this field the principle of *caveat actor* can be carried too far, when the point involved is not at all merely incidental but could be of major importance for the outcome of the case.

III

Equitable Considerations and Equity as a System

35. The general conclusion to be drawn from the considerations set out in part II *supra*, is that in cases of this kind, the results to which a strict view of the law leads—as it stands *de lege lata*—are not satisfactory. By means of a partial application of domestic law principles connected with the inherent structure of the corporate entity, necessary and correct so far as it goes, but one-sided, international law may give rise to situations that cannot, or at any rate do not occur in corresponding circumstances on the domestic plane; or which, if they did, would certainly result in remedial legislative action. By failing to take account of various other domestic law principles directed to enabling the shareholders to act in certain kinds of cases where the action of the company is unavailable or not forthcoming, or to influence or change the management or its policy, or by taking account of this situation only to a somewhat limited extent, the present state of international law leads to the inadmissible consequence that important interests may go wholly unprotected, and that what may possibly be grave wrongs will, as a result not be susceptible even of investigation. As my colleague Judge Jessup reminded me, it was stated in the award in the *Cayuga Indians* case (*U.N. Reports of International Arbitral Awards*, Vol. VI, at p. 179) that:

> "The same considerations of equity that have repeatedly been invoked by the courts where strict regard to the personality of a corporation would lead to inequitable results . . . may be invoked here. In such cases courts have not hesitated to look behind the legal person and consider . . . who were the real beneficiaries."

This is consequently surely a situation that calls for the application of the well-known dictum of President Huber in the much cited *Ziat, Ben Kiran* case [30], where what was involved was an entity of the nationality of the defendant State—a type of case in which the idea of admitting foreign intervention is really much more startling, conceptually, than it is in the present type of case. Yet there is a resemblance, and Huber's dictum is equally apt (my translation):

> "International law which, in this field, draws its inspiration essentially from the principles of equity, has not laid down any formal criterion for granting or refusing diplomatic protection to national interests linked to interests belonging to persons of different nationality."

In the present context the equitable considerations to which the Court refers in paragraphs 92-101 of the Judgment, stress the need for a less inelastic treatment of certain of the issues of admissibility involved.

36. The matter can however be put on a broader basis than that merely of the requirements that may exist in this particular field. As an old authority (Ménignhac) said in terms even more applicable today—"international law is to be applied with equity". There have been a number of recent indications of the need in the domain of international law, of a body of rules or principles which can play the same sort of part internationally as the English system of Equity does, or at least originally did, in the Common Law countries that have adopted it. Deciding a case on the basis of *rules* of equity, that are part of the general system of law applicable, is something quite different from giving a decision *ex aequo et bono*, as was indicated by the Court in paragraph 88 of its Judgment in the *North Sea Continental Shelf* case (*I.C.J. Reports 1969*, at p. 48), when introducing the considerations which led it to found its decision in part on equitable considerations, as it might well have done in the present case also. Be that as it may, I should like to take this opportunity of placing on record in a volume of the Court's *Reports* a classic short statement of the way in which, historically, the need for a system of Equity makes itself felt,—taken from a standard work [31] current in the country in which Equity as a juridical system originated,—and in language moreover that might almost have been devised for the case of international law:

> "Equity is that body of rules or principles which form[s] an appendage or gloss to the general rules of law. It represents the

[30] *U.N. Reports of International Arbitral Awards*, Vol. II, p. 729.

[31] *Snell's Principles of Equity*, 26th edition by R. L. Megarry and F. W. Baker, 1966, pp. 5-6.

> attempt ... of the ... legal system to meet a problem which confronts all legal systems reaching a certain stage of development. To ensure the smooth running of society it is necessary to formulate general, rules which work well enough in the majority of cases. Sooner or later, however, cases arise in which, in some unforeseen set of facts the general rules produce substantial unfairness. When this occurs, justice requires either an amendment of the rule or, if ... the rule is not freely changeable, a further rule or body of rules to mitigate the severity of the rules of law."

It would be difficult to find words more apt to describe the sort of impasse that arises in circumstances such as those of the present case, which a system of Equity should be employed to resolve: and, as the author of the passage cited points out subsequently, equity is not distinguishable from law "because it seeks a different end, for both aim at justice ...". But, it might be added, they can achieve it only if they are allowed to complement one another.

IV

NATIONALITY OF THE SHAREHOLDERS AND CONTINUITY OF SHAREHOLDING

37. Since in this and the next part (V) of this Opinion, I shall be discussing certain matters (described in the second half of paragraph 3 *supra*) which, having regard to the particular basis of the Judgment of the Court, did not arise for *decision* by it, I should like to state what effect I am intending to give to my observations concerning these matters. Evidently it would be impossible to comment on them in total abstraction from the facts and surrounding circumstances of the case itself. But although I shall be expressing a judicial *view* on the points of law involved, and possibly also on some points of fact, I do not wish to be understood (even though I may use the language of it) as making any judicial *pronouncements* or findings on them. These were matters which, although the Court considered them, it did not need for the particular purposes of the Judgment to go into fully. Had a more ample collegiate discussion taken place I might have been led to form a different opinion on some points, and therefore it is by way of analysis that I now give my views.

* * *

(A) Nationality of Shareholding Claims

38. The third preliminary objection, really had two aspects. The first, namely whether, in the particular circumstances of this case, a claim is sustainable at all on behalf of shareholders, whatever their nationality may be, has been answered in the negative by the Judgment, and this accordingly disposes of the whole claim. Had the answer been in the affirmative, however, it would still have been necessary, before the third preliminary objection could be dismissed and the claim be held to be admissible (so far as this ground of objection was concerned), that its national character should be established as being that of the claimant State. The two classic *dicta* of the Permanent Court may be recalled:

> "... it is the bond of nationality which alone confers upon the State the right of diplomatic protection . . . [32]"

and

> "By taking up the case of one of its subjects and by resorting to diplomatic action or international proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its subjects respect for the rules of international law [33]."

A true question of capacity as such is here involved [34], for without the "bond of nationality" and what it entails, the claimant State would lack the necessary qualification for intervention and claim, since it could not then be "taking up the case of one of its subjects", in whose person alone it could be "asserting its own right . . . to ensure . . . respect for the rules of international law".

39. In terms of the present case, this means establishing in respect of the private parties concerned that, at all the material dates, and with the necessary degree of continuity, they were both *(a)* Belgian and *(b)* shareholders in the Barcelona Traction Company. Implied in this, there figured in the present case such questions as (i) whether it sufficed for a shareholder to be a *company* having Belgian nationality by incorpora-

[32] *Panevezys-Saldutiskis Railway* case (*P.C.I.J., Series A/B, No. 76* (1939), at p. 16).

[33] *Mavrommatis Palestine Concessions* case (*P.C.I.J., Series A, No.* 2 (1924), at p. 12). The passage quoted was repeated in almost identical language in the *Panevezys* decision, q.v., *loc. cit.*

[34] As was observed in footnote 2 *supra* (part I), the aspect of the third preliminary objection dealt with in the Judgment of the Court is not really one of the *capacity* of the claimant State, but of substance: have shareholders any substantive rights at all where the injury is to the company as such? But veritable questions of capacity and admissibility are involved where the nationality, and the status *as* shareholders, of the private parties concerned are in issue.

tion, or must it also be shown that the individual *shareholding* in *that* company was equally Belgian, or at least predominantly so?—also (ii) whether a beneficial owner of shares actually vested in nominees or trustees of non-Belgian nationality, with whom *pro tem* lies the legal ownership, still ranks as a "shareholder" while that situation continues; and, if not, whether this does not entail such a break in the "ownership of the claim" as to disqualify the private party concerned, and hence his government;—and finally (iii) what are the material times at which the necessary shareholding status and nationality must exist, and did the latter in fact do so at these times? Clearly, however, the present discussion must be confined only to those points that were of especial prominence in the case.

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(1) Onus of proof, question of quantum, *etc.*

40. It was naturally maintained on the Spanish side that presumptions of share-ownership, even if in themselves strong, do not suffice, and that affirmative proof is required. This is doubtless true in principle, but requires some qualification in the light of the particular circumstances. There was never any real doubt about the existence over the years, and probably since at least 1920, of a substantial Belgian shareholding, or at least interest of some kind, in the Barcelona Company. What was controversial was, rather, such matters as *(a)* was the interest concerned strictly one of shareholding as such, or was it more a mere beneficial interest in shares the legal ownership of which was vested in non-Belgian hands?—*(b)* how big an interest was it,—did it amount to the 88 per cent. claimed on the Belgian side?—*(c)* did it exist at the two crucial dates of the original Spanish declaration in bankruptcy of the Barcelona Company, and the date when proceedings were started before the Court,—and not merely before or after each or either of these dates?

41. Much of the argument was rendered irrelevant by a failure to distinguish clearly between whether, on the one hand, a basis of claim existed in principle, and, on the other hand, what would be the *quantum* of damage or reparation recoverable by the claimant State if such a basis did exist and the claim was shown to be good. In theory, if it appeared that there was even *one single* private party or entity which, at the material times, both was a shareholder in the Company and had the nationality of the claimant State, then that State would, in principle, be entitled to claim, since the validity of the claim—its legal merits in itself—could not depend on the size of it in terms of the numbers of shareholders, or of the financial values involved. The latter could, in law, only affect the *quantum*

of reparation or damages recoverable if the claim should be made good[35]. This situation, while it does not exactly shift the burden of proof entirely, does place it in a different light by suggesting that in some circumstances, in claims of this kind, the defendant State could only validly contest the standing of the claimant party if it could show that there was no evidence of the existence of *even one* indubitable shareholder of the latter's nationality, and no reasonable presumption of there being any. This is just the sort of situation which arises where, as in the present case, the claimant Party has, over a long period of years, possessed what might be called a "historic interest" in a case, the existence of which is and always has been a matter of common knowledge, constantly acted upon by both parties, implicitly recognized, and scarcely contested, at least formally, until international legal proceedings are started. In such circumstances there is an almost irresistible inference that a substantial body of private interests exists belonging to the State concerned. But as will be seen in a moment (*infra*, paragraph 43) the matter does not in any way depend on inferences or presumptions.

42. In the present case the attempt to maintain that the Belgian nationality of the shares had not been established, took a particular form, which involved not so much denying the existence—or proved existence—of any Belgian shareholding at all,—as maintaining that the apparent, or ostensible, Belgian shareholding did not have the requisite character. Here it is material to note that the shares in the Barcelona Company fall into three main categories,—the bearer shares; the registered (i.e., non-bearer) shares standing in the names of various private persons and entities other than a Belgian incorporated company known as Sidro [36] for short; and finally the shares registered in the name of this same Sidro, a company the principal interest in which is owned by another Belgian registered and incorporated company—Sofina [37]. Since this last category, which it will be convenient to designate as the Sidro-(Sofina) interest, comprised not far short of two-thirds of the entire issued share capital of the Barcelona Company, and about five-eighths of the shares allegedly in Belgian hands,—then, on the basis of the principle of the sufficiency of "even a single shareholder", the only practical issue becomes that of deciding on the character and status of the Sidro-(Sofina) holding;—whereas, the status of the other shares—the bearer shares and the non-Sidro registered

[35] Clearly the fact that in practice a government would not normally put forward a claim in this class of case unless the interests involved were substantial, has no relevance to the merits of the argument here stated.

[36] Standing for "Société Internationale d'Energie Hydro-Electrique, S.A.".

[37] Standing for "Société Financière de Transports et d'Entreprises Industrielles, S.A.".

shares—would be a secondary matter which, except as to *quantum* of damage, would become important only if the Sidro-(Sofina) holding could be shown to lack the necessary status and character adequate in itself to sustain a Belgian claim. It is therefore to this question that I shall now address myself. It has two aspects, first what was and is the true national character of Sidro-(Sofina)?—and secondly, was this entity at the material dates the actual shareholder?

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(2) Status of Sidro-(Sofina)

43. Even if it could not otherwise be established, Sidro-(Sofina's) original ownership of over 1 million of the Barcelona registered shares (this block was registered in the name of Sidro), constituting a more than majority holding of the entire Barcelona share issue, is conclusively proved by the fact that in 1939, in expectation of the outbreak of war, Sidro transferred the entire block first to an American firm of brokers as nominees, then to an American Trustee Company known as "Securitas Ltd." and, after the end of the war, to another American nominee firm, by whom they were eventually re-transferred to Sidro [38]. Since "*nemo dare potest quod non habet*", and the validity of these transfers has never been questioned—(indeed the assumption of such validity was basic to the Spanish argument on this part of the case)—it follows that Sidro-(Sofina) must, at least originally, have been Barcelona shareholders. The allegation is, however, that by these transfers Sidro-(Sofina), though retaining as a matter of law the beneficial interest in the shares, divested themselves of the *legal* ownership—in fact ceased to be the actual shareholders, so that thenceforth, and until the eventual re-transfer to Sidro (which however is alleged to have come only after the main critical date in the case [39]) the shareholding in the Barcelona Company was non-Belgian so far as this block of shares was concerned; and so no Belgian claim could now be based on them. This matter I consider *infra* in paragraphs 48-59, and in the meantime turn to the first question indicated at the end of paragraph 42 *supra*—that of the true national character of Sidro-(Sofina).

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[38] Thus it seems that during the "Securitas" period (as to which see paragraphs 55-59 *infra*) the nominees held for that Company, not Sidro-(Sofina).

[39] This was 12 February 1948, the date of the original declaration by a Spanish court of the bankruptcy of the Barcelona Traction Company. There is a certain difficulty as to the date at which the damage to the Company occurred as it took several years to complete. However I agree with what Judge Jessup says in paragraph 75 of his separate Opinion.

44. It was never at any time contended that Sidro and Sofina were other than Belgian entities in the sense that they were companies incorporated under Belgian law, having their registered head offices in Belgium, and therefore that, according to the most generally received canons [40], not disputed by either Party, they were companies invested with Belgian nationality. The objection advanced—a curious one to receive Spanish sponsorship—was that although Sidro-(Sofina) were Belgian by incorporation, yet if the corporate veil was lifted, it would be found that the *shareholding* interest in Sidro-(Sofina) itself was largely non-Belgian. The relevance of this contention was maintained as existing on two levels, one of these being that it revealed as being quite unfounded the Belgian contention that the savings of numerous humble Belgian individuals, channelled into the Barcelona Company via Sidro-(Sofina), had been detrimentally affected by the Spanish treatment of the Company,—for, so it was alleged on the Spanish side, the ultimate interests in Sidro-(Sofina) were not Belgian, or at least it had not been established that they were.

45. I do not find it necessary to consider this particular aspect of the matter since the Belgian contention that the savings of hundreds of small Belgian shareholders were injuriously affected through their interest in Sidro-(Sofina) goes largely to the moralities rather than the legalities of the issue. The essential legal question is different—namely whether (the Belgian status by incorporation of Sidro-(Sofina) itself, being established and not contested)—there are nevertheless grounds upon which it can be maintained that the corporate veil must be lifted in order to see what is the character of the ultimate interests lying behind this veil. It would certainly seem that whoever else can adopt such an attitude it cannot be Spain,—that Spain is indeed precluded from doing so,—because it is precisely Spain which, in relation to the Barcelona Traction Company maintains that the Canadian nationality of the Company, *by incorporation*, is conclusive, and that its corporate veil cannot be lifted in order to take account of the non-Canadian shareholding lying behind it. Yet, paradoxically [41],—that is just what Spain has sought to maintain in relation to Sidro-(Sofina),—but not Barcelona. On what basis does this attempt proceed?

46. The argument was that it was *Belgium* which was precluded from contesting the lifting of the Sidro-(Sofina) veil, since it was precisely Belgium which maintained, in relation to the Barcelona Company, that the veil must be lifted in order to reveal the true Belgian interests underlying the Company. But at this point it becomes clear that the rival positions, like two mathematical negatives that make a positive, cancel each other out and leave the objective question of the legitimacy, and

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[40] See footnote 14 in part I, *supra*.

[41] This, however, is only one of the many instances of "having it both ways" in this most paradoxical of cases.

occasions, of lifting the veil still to be determined. Let it be assumed, notwithstanding, that a purely "*tu quoque*" argument might have some validity on a sort of preclusive basis. Accordingly, it is said, the Belgian case must concede what it claims: just as it claims that the Canadian nationality of the Barcelona Company is not conclusive, so must it also concede that the ostensibly Belgian nationality of Sidro-(Sofina) is not conclusive as to that entity's true character, which must in consequence be established by reference to the underlying shareholding interests in it. This seems to me to involve a misunderstanding of the Belgian position, which does not imply any denial of the Canadian nationality of the Barcelona Company or the right of the Company and its Government to claim, but merely asserts (failing such a claim) a "parallel" right of Belgium also to claim on behalf of any shareholders who are Belgian. If amongst these shareholders there are companies of Belgian nationality by incorporation, then Belgium asserts a right to claim on their behalf as Barcelona shareholders. According to this "parallel right" position, what would have to be conceded by Belgium is something quite different from what the Spanish argument maintains. Belgium does not have to concede that, if it appears that most of the shareholding in Sidro-(Sofina) itself is non-Belgian, then Belgium is disqualified from claiming on behalf of Sidro-(Sofina) as an entity,—for she makes no such assertion as regards Canada's right to claim on behalf of the Barcelona Company, despite its non-Canadian shareholding. What Belgium *would* have to concede, and presumably would have difficulty in conceding, is that if Belgium *refused* to claim on behalf of Sidro-(Sofina)—it might be because of non-Belgian interests in that entity, just as it may be that Canada does not claim on behalf of Barcelona because of the non-Canadian interest—*then* it would become legitimate, on the "parallel right" basis, for *yet other* governments—those of the non-Belgian shareholders in Sidro-(Sofina)—to make a claim on behalf of *those* shareholders, in the absence of any Belgian claim on behalf of Sidro-(Sofina) as such. This is the true analogy, and only in this sense, and in such circumstances, would Belgium's position over Barcelona oblige her to concede a lifting of the veil of Sidro-(Sofina).

47. It is of course an entirely different question whether Belgium's "parallel right" position is good in law. According to the Judgment of the Court (which, *de lege lata* I agree), it is not. But within the four corners of its premisses, the argument is entirely logical, and it operates to absolve Belgium from the charge of inconsistency in asserting a right to claim on

behalf of Sidro-(Sofina) as an entity of Belgian nationality by incorporation, irrespective of its detailed composition. In consequence, the result is the same whichever way the matter is looked at: namely if a claim on behalf of shareholders is permissible at all, a Belgian claim on behalf of Sidro-(Sofina) is permissible;—for according to the basic Spanish position the veil of a company can never be lifted save in exceptional circumstances not here admitted to exist,—while according to Belgium the veil can be lifted if the company's government refuses to claim on its behalf,—but Belgium, as the Government of Sidro-(Sofina), is not refusing to claim on that entity's behalf, so here also there is no occasion to go behind the corporate façade.

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(3) Question of nominees, trustees, etc.

48. The second main challenge to the standing of Sidro-(Sofina) as owners of the greater part of the Barcelona Traction shares, was based on objections, not as to the Belgian national character of these entities but as to their character *qua* Barcelona shareholders. Over certain periods, it was pointed out, covering dates material to the validity of the Belgian claim, the Sidro-(Sofina) shares were vested in nominees and/or trustees of American nationality. The fact is admitted. The effect, according to the Spanish argument, was that Sidro-(Sofina) while retaining the beneficial ownership, or the beneficial interest, ceased to be the legal owners of the shares, or rather, ceased to be the actual *shareholders*. Consequently, at the time when the Belgian claim arose—that is to say at the date when the alleged injury to the Barcelona Company was inflicted—the shareholders were not Belgian, but American, and therefore the "bond of nationality" postulated by the Permanent Court (*supra*, paragraph 38) as being necessary to found a right to claim, did not exist so far as Belgium was concerned, at least on the basis of this block of shares [42].

49. This Spanish contention is in part related to the "continuity" question: the transfer of the shares to non-Belgian nominees or trustees caused a break, covering a material date, in the Belgian ownership or status. In the next section (B) below certain comments are made on the continuity requirement for international claims, namely the requirement that the claim must be "owned" by a national of the claimant State

[42] And as regards all the other shares—i.e., the bearer shares and non-Sidro-(Sofina) registered shares, the Spanish position was that their alleged Belgian ownership rested on presumptions and had not been proved.

both at the time when the act complained of occurred, and continuously up to the date when an international claim is put forward and proceedings are commenced—(and indeed, strictly, according to one view, up to the date of judgment or award). At this moment I shall only discuss what, in relation to a claim of the present kind, is the correct effect to be attributed to the transfer of shares to foreign nominees, or to foreign trustees, as the case may be. In either case, does it deprive the transferor of his status as shareholder in relation to the claim, and hence deprive his government of the right (if right otherwise exists) to make the claim on his behalf?

50. It should be noted in the first place that from the Belgian standpoint in the case—which was throughout that the realities must be looked to rather than the form—the whole question of the nature of the interest acquired by the American nominees or trustees was irrelevant, since in any event (and this was common ground between the Parties) the *beneficial* ownership of or interest in the shares remained with Sidro-(Sofina) and, according to the Belgian contention, this was sufficient *per se* to found a Belgian claim. However, it was also maintained on the Belgian side that in any event the effect of the transfers was *not* to divest Sidro-(Sofina) of the status of shareholder, and it is this aspect of the matter that I wish to consider here.

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51. I need not set out the facts concerning the vesting of the Sidro registered shares in American nominees and in the trustee company "Securitas Ltd.", except to say that the object was of course (in view of war and probable enemy occupation) to avoid their falling into enemy hands. The details of the various transactions are fully set out in paragraphs 90 *et seq.* of Judge Jessup's separate Opinion,—and although I do not draw the same conclusion as he does on the question of the effect of the "Securitas" transaction, I can associate myself with his statement of the facts. I will however start with the question of the effect of *the nominee* transactions.

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(a) Nominees

52. The Spanish contention was that the effect of putting the shares into the names of nominees was to vest in the latter the legal ownership, and moreover that this result was not affected by the special juridical position of a nominee, whereby his ownership is, in law, conditioned in various ways—so that he cannot deal with the shares except by direction

of the "real" owner; but equally, must do so upon such direction, etc. This, it was said, did not alter the fact that it is the nominee who appears on the books of the company as the registered owner of the shares, and therefore, if he is thus the registered shareholder, how can someone else also be the shareholder? Insistence that the real question at issue was not who "owned" or was the "owner" of the shares, but who was, or was registered as, the "shareholder", became increasingly prominent during the course of the oral hearing; but I share Judge Jessup's view (paragraphs 99 *et seq.* of his Opinion) that the distinction is unreal. If a nominee shareholder were in truth "the shareholder", he would be entitled to exercise the normal rights of a shareholder,—but in fact he is not so entitled: he is even, by law, expressly forbidden from doing so. His is in fact merely a sort of "twilight" status, according to which he is no more than a pipe-line through which the supposedly merely beneficial owner continues to exercise all the rights of legal ownership. In this context the following propositions of Anglo-American-Canadian law (which is the system constitutive of the nominee position), and which have not been disputed—have indeed been admitted on the Spanish side—are pertinent:

(i) a shareholder can freely dispose of his shares: a nominee can do so only with the consent of the beneficial owner (in effect his "principal") [43] and at his direction;
(ii) a shareholder can exercise his voting rights at General Meetings according to his own views: a nominee is obliged to vote as directed by his principal;
(iii) a shareholder has the right to receive any dividends that are declared: a nominee must pass these on to the principal, who also pays the tax on them;
(iv) shares held by a nominee, as nominee, do not figure in any statement of his assets;
(v) the prin cipal can direct the nominee to take any steps necessary for the protection of the shares and, under some systems of law, can himself initiate proceedings for that purpose;

(vi) the principal can at any time replace or eliminate the nominee, by directing the latter to have the necessary changes made in the company's register of shareholders (add to this that, in the case of the transfers made by Sidro, no transfer fee was payable under the relevant law, because no change of ownership was deemed to occur).

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[43] There is not of course in the formal sense a relationship of principal and agent, but the use here of the term "principal" is convenient and seems justified by the realities of the situation.

53. The only possible conclusion must be that even if, as was contended, the matter is to be considered not on the basis of who "owns" the shares but of who is the share*holder*, the true shareholder throughout is the principal, the nominee being shareholder in name only, i.e., as the very term "nominee" implies, his shareholding is nominal only. He has no real control over the shares, this remaining with the principal at whose direction the nominee is bound to act. It follows that apart from disguising the identity of the real owner (which is one of the main purposes of the nominee device), a nominee is the shareholder only for the purpose of carrying out his principal's directions,—so that what alters upon transfer to a nominee is not the control over the shares, but the manner of its exercise. It is little more than a question of mechanics. It equally follows that, if for any purpose the nominee had to establish the existence of a "genuine link" between himself and the shares—i.e., of something going beyond the bare fact that the shares are registered in his name, he would, according to all the cannons accepted in other fields as to what constitutes a genuine link, be unable to do so.

54. Furthermore, the comparison sometimes made between the position of a nominee and that of a trustee is quite illusory, but is for that reason illuminating,—for a trustee has real rights over the trust property, which he can assert *even against the beneficiary of the trust*. Subject to any specific term of the trust, and of the general law of trusts, not only is the trustee under no obligation to carry out the instructions or conform to the directions of the *cestui que trust* (beneficiary): it is often his legal duty *not to*, and to act in a manner quite different from what the latter wants. The *cestui que trust* can take legal steps to compel the trustee to conform to the terms of *the trust* but, within the scope of those terms, and of the relevant provisions of trust law, the trustee is completely independent, and free to act at his own discretion.

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(b) "Securitas" Ltd.

55. This brings me to the question of the vesting of the Sidro-(Sofina) shares in "Securitas" under the various trust deeds described in Judge Jessup's Opinion. According to the logic of the view just expressed *supra* in paragraph 54, I ought to hold (as he does) that the vesting in "Securitas" did indeed transfer the legal ownership, Sidro-(Sofina) retaining merely the beneficial interest; especially as the object of the whole transaction was to put "Securitas" in a position of being legally

entitled to *refuse* to comply with Sidro-(Sofina's) *own instructions* if they judged that these were given under enemy pressure. Furthermore, as Judge Jessup points out, no positive evidence (despite several requests for it) was produced to show that the trust relationship was determined before the crucial date of 12 February 1948 (when the first step that led to the eviction of the Barcelona Company from its Spanish interests was taken),—although it appears that the relationship was duly determined only two or three months later when (acting on a request from Sidro) "Securitas" sent the share certificates that had been deposited with them to the New Jersey firm of nominees henceforth holding for Sidro-(Sofina). On this basis therefore the shares would, in the absence of the necessary evidence to the contrary, have to be presumed still to have been American, not Belgian owned, at the crucial date of 12 February 1948.

56. It seems to me however that, even if one accepts the view (which, for reasons to be stated later, I do not) that the effect of the "Securitas" transaction was to deprive Sidro-(Sofina) *pro tem* of the status of being a Barcelona shareholder, a radical change came over the situation about, or shortly after the middle of 1946, when the war in Europe had been over for somewhat more than a year. Although the trust deeds entered into with "Securitas" were, as Judge Jessup describes, never produced during the case, they were preceded in time, or at least in operative effect, by something that was produced, namely a "custodian" agreement between Sidro and "Securitas" dated 6 September 1939 (the war having then broken out, but Belgium not yet being involved), which figures as Appendix 2 to Annex 3 of the Belgian Memorial in the case. It is absolutely clear from the terms of this agreement that its object was merely to get the securities it covered physically out of harm's way, and that it had no effect whatever on Sidro's status as shareholder. This came later with the two Trust Deeds,—one also dated 6 September 1939, but evidently with suspensive effect pending Belgium's actual involvement in the war; and the other dated February 1940. *Because of its inherent probability*, I see no reason to doubt the Belgian affirmation that these Trust Deeds were not to become operative unless and until the Brussels area should pass into enemy occupation, for only then would the danger of enemy pressure to surrender or procure the surrender of the shares arise. It is also I think unimportant that the modifications effected in the first Trust Deed by the second have never been revealed. I see no reason to doubt the Belgian assurance that they were technical in character, intended to take account of certain contemporary Belgian war legislation, which again seems to me *inherently probable*. But it does not really matter, because for present purposes one is in any case "assuming the worst", viz. that between them these two Deeds did transfer the legal ownership of the shares to "Securitas", for the duration of the war so to speak.

57. This brings me to the third of the *inherent probabilities* affecting this matter, namely that the Trust Deeds would (as Belgium asserts they did) have contained a clause providing for the termination of the situation they created, so soon as an agreed period after the end of the war had elapsed,—for it is hardly credible that Sidro-(Sofina) would, even to avoid enemy seizure, have signed away all future control over their shares without some such guarantee of eventual retrocession. That there was such a clause, and that it duly operated in the second half of 1946, seems to me indeed, even apart from inherent probabilities, to be an inference that can reasonably be drawn from the facts given in Judge Jessup's paragraph 92. The result was the change in the situation to which I referred at the beginning of paragraph 56 *supra*,—namely that "Securitas"—who in a letter of 14 April 1947 to Sidro described themselves as having from 31 December 1946 held the shares "in custody for your account" (not the language of a Trustee)—now reverted to their original status of being merely custodians, and Sidro-(Sofina) reverted to being the legal owners and actual shareholders—(that the shares were still in the name of nominees is immaterial for the reasons given in paragraphs 52-54 *supra*). Accordingly, if this view is correct, the shares were again Belgian owned on the crucial date of 12 February 1948. There would have been a break in the continuity of their status as such, from 1939-1946, but as this occurred before the earliest possible crucial date, it would not signify.

58. It has to be admitted that in the absence of the relevant instruments, the foregoing conclusion can only be conjectural. But it is I believe a reasonable conjecture, warranted by those facts that are known, and by the probabilities involved. Of course the Trust Deeds would, if produced, constitute what is known in Common Law *parlance* as the "best" evidence, and unless they could be shown to have been lost or destroyed, it is unlikely that a municipal court would admit secondary evidence of their contents. International tribunals are not tied by such firm rules, however, many of which are not appropriate to litigation between governments. It is by no means in the nature of an inescapable inference that the reason why the Deeds were not produced was because they contained material that would have been prejudicial to the Belgian case. Documents drawn up in contemplation of war, and in the situation which confronted countries such as Belgium at that time, may well have contained provisons, or phraseology, which after the lapse of nearly 30 years—or for other reasons—a government would be reluctant to make public. In my opinion, weighing the whole matter up, and having regard to what seems to be a very reasonable presumption as to what

occurred, Belgium should be given the benefit of the doubt.

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59. And this brings me to a point which I consider more important than any yet mentioned on this particular matter. It is not in my opinion possible to regard instruments drawn up in emergency circumstances, for the protection of property in contemplation of war, and of a singularly predatory enemy (I am of course speaking of the nazified Reich, not of Germany or Germans under any normal circumstances) in the same light as instruments entered into at other times and in the ordinary way of business. Certainly an international tribunal should not do so. In my opinion such transactions in shares as those now in question, whatever the effect that would be given to them in municipal courts for internal or private law purposes, must, on the international plane, be regarded as creating between the parties a relationship of a special character, neither divesting the shares of their pre-existing national character, nor debarring the transferor's government from sustaining a claim in respect of them in subsequent international proceedings. Outside of a mediaeval disputation, if ever there was a case for having regard to the reality rather than the form, this is surely it.

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(B) The "Continuity" of Claim Requirement

60. I do not propose to consider here whether it was in fact established that there were Barcelona shares which were continuously in Belgian hands [44] up to at least the date when the present proceedings were commenced. As Judge Jessup, who goes into the matter in some detail, says, the case rests largely on a series of presumptions, even though it may be difficult to believe that no shares at all were continuously Belgian held; and according to the view propounded earlier (*supra* paragraph 41) even one such share would, as far as the theory of the matter goes, suffice to constitute a basis of claim. I want rather to comment on the continuity doctrine itself.

61. Clearly the "bond of nationality" between the claimant State and the private party for whom the claim is brought (see *supra*, paragraph 38) must be in existence at the time when the acts complained of occurred, or it would not be possible for the claimant State to maintain that it had suf-

[44] It is generally accepted that this requirement does not involve continuity in the same *individual* person or entity, but only in successive persons or entities of the same *nationality*.

fered a violation of international law "in the person of its national",—and although this doctrine has been called the "Vatellian fiction", it nevertheless seems to constitute an indispensable foundation for the right of international claim on behalf of private parties (unless there is some alternative, e.g., functional, foundation—as when an international organization claims in respect of a member of its staff). It is however less clear why, as a matter of principle, if the private claimant is duly a national of the claimant State at the date of the injury, he must remain so, or the property concerned must do so, or the claim must not pass into the hands of a national of another State, even *after* that date,—for the wrong done to the State in the person of its national arises, and the consequent right "to ensure . . . respect for the rules of international law" accrues, *at the moment of injury*, so that, as was pleaded in the *Stevenson* case [45] (though unsuccessfully [46]), the claim then becomes indelibly impressed *ab initio* with the national character concerned: in short, the injury to the claimant State is not, so to speak, "*de*-inflicted" by the fact that the individual claimant or company ceases to have its nationality, or that the property involved passes into the hands of a national of another State [47];—and the position becomes even slightly absurd when the continuity rule is interpreted as even excluding such claims though they subsequently return to their nationality of origin after a comparatively short interval, as might well be the case with, precisely, shares.

62. In his dissenting opinion in the *Panevezys* case [48], Judge van Eysinga clearly thought that the continuity rule, though a reasonable stipulation to be inserted by agreement in *treaties* about claims—(or to be read into them in consequence of provisions limiting their application to persons having the nationality of the claimant State at the treaty date)—was not a rule of *customary* international law, in which sphere it could lead to unreasonable results. Thus a rigid application of it, though justified where necessary to prevent abuses [49], should be eschewed where it would work injustice, and this view has received support in recent writings contending for a more eclectic application of the rule, so as not to "leave a

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[45] *U.N. Reports of International Arbitral Awards*, Vol. IX, p. 494.

[46] But in this case the beneficiaries resulting from the change in the nationality of the claim, not only had *ex hypothesi* a *different* nationality from that of the original claimant, but had the nationality of the *defendant* State—which created a special situation. In other ways also the Umpire's finding did not constitute an outright rejection of the "*ab initio*" thesis.

[47] If value was received in respect of the transfer concerned, the question might arise whether the "damage" had not been made good—but this is another matter.

[48] *P.C.I.J., Series A/B, No. 76* (1939) at pp. 33-35.

[49] For instance, if, as suggested by Judge van Eysinga, the object were to found compulsory jurisdiction, where none would otherwise have existed, by seeking out a State able to invoke a treaty clause to that effect.

substantial body of . . . rights without a practical remedy . . . [50]". A clear case of this would be where the change in nationality was *involuntary*, e.g., because of a re-alignment of State boundaries, or because the successor in title to the affected property, e.g., under a will, happened to have a different nationality from that of the original claimant or owner. Or again, why should the fact that a former dependent territory attains independence and becomes a separate State deprive whole categories of claimants in that State of all possibility of redress? Such would however be the effect of the continuity rule, for there would technically have been a change in the claimant's nationality, and the former sovereign or protecting State could no longer sustain the claim, while the new one also could not or, according to the doctrines involved, should not be able to do so, because the private claimant was not, at the time of the injury, its national,—or alternatively because, since the latter State did not then exist as a separate State, it could not itself, *qua* what it now is, have suffered any wrong in the person of its national [51]. (This was in fact more or less the situation that arose in the *Panevezys* case. The matter ought of course to be provided for by a rule of the law of State Succession, but it is somewhat doubtful whether this is yet the case—see the detailed discussion in O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, 1967), Vol. I, pp. 537-541).

63. In short, too rigid and sweeping an application of the continuity rule can lead to situations in which important interests go unprotected, claimants unsupported and injuries unredressed, not on account of

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[50] O'Connell, *International Law* (Stevens-Oceana, 1965), Vol. II, p. 1120;—and Professor R. Y. Jennings in *Hague Recueil* (General Course of 1967), Vol. II, pp. 476-477, citing Sinclair, *British Year Book* for 1950, at p. 127 says, that Judge van Eysinga's view "is in accord with what Mr. Sinclair has shown to be the history of the development of the rule of nationality of claims: that it was evolved in the 19th century in the context of the interpretation of treaties setting up claims commissions and was a product of the ordinary rule that such treaties must be interpreted strictly"—i.e., it was not really a rule of *customary* international law.

[51] This last point is essentially the same as the one which arose in the *Cameroons* case *(I.C.J. Reports 1963)* under the head of the "objection *ratione temporis*" which I felt obliged to uphold *de lege lata* in my separate Opinion, for the reasons given in Part V of it (*I.C.J. Reports 1963*, pp. 127-130). The particular point material in the present context is dealt with in the first paragraph on p. 129 of the Volume. But I failed then to take account of the possibility that the matter might be regarded as covered by the law of State Succession, though this is still uncertain—see end of paragraph 62 *supra*.

anything relating to their merits, but because purely technical considerations bring it about that no State is entitled to act [52]. This situation is the less defensible at the present date in that what was always regarded as the other main justification for the continuity rule (and even sometimes thought to be its real *fons et origo*), namely the need to prevent the abuses that would result if claims could be assigned for value to nationals of powerful States whose governments would compel acceptance of them by the defendant State, has largely lost its validity. Even powerful States are not now in a position to act in this way: indeed, for reasons that need not be gone into here, they are in these days at a positive disadvantage in such matters.

64. Nor can it plausibly be contended that, if the continuity rule were *not* strictly applied, legal objections would arise because, if the claim were successful, the damages or compensation would be payable to the claimant State, although the private party concerned was no longer its national, or the affected property no longer belonged to one of its nationals;—for on the basis that the State is asserting its own right in making the claim, it is always the position, and it is well recognized internationally, that any compensation due is paid to the claimant *State*, and belongs to it, for use at its discretion. This was implicit in the view expressed by the Permanent Court in the *Chorzów Factory* case, when it said that the damage suffered by the individual could "only afford a convenient scale for the calculation of the reparation *due to the State*"—(my italics) [53]. If there are any fetters on the State's discretion as to what it does with the compensation awarded, they are imposed by the domestic law concerned. So far as international law goes, the claimant State can use this compensation as it pleases: it can keep it for itself (though this naturally is not normally done) or it can pay it to the private party who was injured, whether (as it will usually be the case) he is still its national, or has since become the national of another State, or to the national owner of the affected property, or to a foreign owner who may have bought it, or the claim, off the former, etc. There is, internationally, neither legal nor practical difficulty here.

65. If these considerations are applied here, the conclusion would be that, provided Belgian shareholding existed on 12 February 1948, the

[52] This would be a situation even worse than the present one regarding the Barcelona Company, for that Company has a government which did formerly act, could have continued to act, and still could in theory act: whereas according to the continuity rule, it may result that *no* government can act.

[53] *P.C.I.J., Series A, No. 17* (1928), p. 28.

claim then became once and for all indelibly impressed with Belgian national character, and that any subsequent dealings in the shares were immaterial, affecting only the *quantum* of the damages eventually payable if Belgium were successful, or affecting only the identity of the actual persons or entities whom the Belgian Government would eventually select to become the recipients of a due share of any damages recovered.

V

Issues Connected with the Fourth Preliminary Objection

66. The Judgment of the Court does not deal with the fourth preliminary objection that had been advanced on the Spanish side and which, together with the third, was joined to the merits by the Judgment which the Court gave in the preliminary (1964) phase of the case—namely the question of the exhaustion of local remedies. On the other hand, this question has had its importance for certain Members of the Court, and it was always possible that individual rejections of the Belgian claim might be based not on Belgium's lack of *ius standi* but on the view that the Barcelona Company did not adequately avail itself of the means of recourse open to it in the Spanish courts. In these circumstances, without attempting to discuss the fourth preliminary objection generally, I consider it legitimate to make certain limited comments on one or two aspects of the matter to which I attach special importance (and which are also of importance for the clarification of the law—see paragraph 2 *supra*,—recalling however, as being equally, if not even more applicable here, what I said in paragraph 37 above.

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(1) The issue of jurisdiction

67. While the question of Spanish jurisdiction to conduct bankruptcy proceedings in respect of Barcelona Traction, a Canadian company, is not technically part of the fourth preliminary objection, which concerns the exhaustion of local remedies, it is related to it in an important way, as will be seen; and since it too has a certain preliminary character, it may properly receive some consideration here.

68. It appears to me probable that, *considered at the international level* [54], the declaration of bankruptcy made in respect of the Barcelona

[54] The question whether there was jurisdiction under *Spanish* law, in the circumstances appertaining to the Barcelona Company, is irrelevant or inconclusive for

Company did involve an excess of legitimate, or at least normal, Spanish jurisdiction—internationally. This view is not of course based on the non-Spanish nationality of the Company,—still less because of doubts (though these certainly subsist) as to whether the Company did, in the proper sense of these notions, carry on business in Spain, or own property or have a domicile or seat there [55]. It is based on the nature of the alleged default on which the petition in bankruptcy was based, and acceded to by the court. The point may be illustrated by reference to Barcelona's subsidiary, Ebro [56], which, although equally a Canadian company, did undoubtedly carry on business in Spain, owning property, occupying offices, etc., there. Consequently, had it been Ebro that was bankrupted, and for non-payment of commercial debts arising out of its local activities, no question of any excess of jurisdiction could have arisen despite Ebro's Canadian nationality—for such matters would have been legitimately of Spanish concern. (It was indeed noticeable that it was expressly admitted on the Belgian side that the bankrupting of *Ebro* (had that occurred) would have been quite proper, *jurisdictionally*.) But Barcelona was not bankrupted for anything of that kind, as is clear from the bankruptcy judgment itself. It was bankrupted exclusively for the non-payment of the interest on its sterling bonds, issued outside Spain, and also held outside Spain except in so far as certain private Spanish parties had recently acquired a few of them, apparently for the express purpose of bringing the bankruptcy proceedings. Yet in respect of these same bonds, issued under Canadian law, all the necessary machinery for the guaranteeing and enforcement of the obligation, through a well-known Canadian institution, the National Trust, had been set up, and existed for utilization in Canada, where also, in the last resort, the Company could have been made the subject of proceedings for the appointment of a receiver.

69. Clearly, if the real object had been to obtain payment of the arrears of interest on the bonds, action would have been taken in Canada,—and not merely would but *should*, for the step taken by the Spanish bankruptcy petitioners was in clear breach of the important "no action" provisions of both the trust deeds—(clauses 44 of the Prior Lien deed and 35 of the First Mortgage deed—Annex 28 to the Memorial, Vol. I). These provisions were of course conditions of the bond obligation, by

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international purposes, since the very question at issue in international proceedings is whether the jurisdiction which a State confers upon its own courts, or otherwise assumes, is internationally valid.

[55] Barcelona was a *holding* company, and a holding company is *by definition* not an *operating* company. This has been brought out in several decided cases, but is too often lost sight of.

[56] Standing for "Ebro Irrigation and Power Co. Ltd."

which the petitioners automatically became bound on acquiring the bonds. They provided that no proceedings to obtain payment should be taken by any bondholder until after the (Canadian) Trustee had, upon a request to act, refused or neglected to do so.

70. In these circumstances the *primary* jurisdiction was clearly Canadian, and the Spanish courts should have declined jurisdiction,—at least in the first instance and until the remedies available through the Canadian National Trust had been invoked. It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction in such matters (and there are of course others—for instance in the fields of shipping, "anti-trust" legislation, etc.), but leaves to States a wide discretion in the matter. It does however *(a)* postulate the *existence* of limits—though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and *(b)* involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State.

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71. These considerations apply equally, not only to the initial Spanish assumption of jurisdiction in bankruptcy, but to various later stages of the bankruptcy proceedings themselves, and in particular (as part of the process of finally disposing of the Barcelona Company's Spanish undertaking) to the purported cancellation of its shares in Ebro (a Canadian company)—these being at the time under the control of the Canadian National Trust or of a receiver appointed by the Canadian courts—and the "replacement" of these by scrip issued in Spain, and subsequently sold to the new and specially formed Spanish company, Fecsa [57], without any reference to the competent Canadian authorities or any action to procure the enforcement of these measures in Canada, so that there (and everywhere outside Spain) the original scrip remained and remains perfectly valid. The same observations apply to the purported transfer of Ebro's Canadian share register, its Canadian registered offices, and its very seat itself (also Canadian), to the city of Barcelona,—in disregard of the fact that these things, which could not *physically* be transferred without Ebro's consent or enforcement action in Canada, remained where they were, and are still there today, not only in actuality but in law,

[57] Standing for "Fuerzas Eléctricas de Cataluña, S.A."

seeing that Ebro is a Canadian company whose status, seat and location of share register and registered offices are all governed by Canadian law. In short what really took place appears to have had the character of a disguised expropriation of the undertaking.

72. If therefore it were necessary to reach a conclusion on this matter, it could in my view only be in the sense that the whole bankruptcy proceedings were, for excess of jurisdiction, internationally null and void *ab initio*, and without effect on the international plane.

* *

(2) Exhaustion of local remedies: the question of notification

73. The conclusion just indicated would also be of importance as regards the question of exhausting local remedies, in so far as it might tend to suggest that, strictly, this question did not arise at all,—for there should be no necessity to exhaust such remedies in respect of proceedings which, for excess of jurisdiction were, internationally, a nullity and void *ab initio*. At least, in respect of the *substance* of the proceedings, there could be no such obligation if—internationally—the proceedings were vitiated from the start.

74. Be that as it may, there are other considerations which suggest that the whole issue of the exhaustion of local remedies may be irrelevant in such circumstances as those of the present case;—for if it is the fact (as to which, *vide infra*) that the Barcelona Company was never, according to the applicable international standards, properly *notified* of the original bankruptcy declaration, so that, on the international plane, the bankruptcy procedure never began to run against it, the correct conclusion might well be that no obligation to exhaust local remedies could ever have been generated;—in much the same way that (even if the case is not entirely on the same plane) a person entitled to diplomatic immunity does not lose that immunity through ignoring proceedings brought against him in the local courts,—nor is it a condition of his government's right to complain that he should have exhausted local means of recourse in the assertion or defence of his immunity. Again, the possibility, and even probability, that the management of the Company did *de facto* become aware of the proceedings, in sufficient time to put in an opposition within the prescribed period, is clearly irrelevant;—for if a certain kind of notification is required *by law*, and this is not given, then any time-limits dependent on it simply do not, as a matter of law, begin to run,—and once again the whole procedure is vitiated and rendered void.

75. In this connection a clear distinction must be drawn between proceedings which, if invalid, are so *ab initio*, and proceedings the complaint as to which concerns their *outcome*, e.g., that they *resulted* in a denial of justice. As regards the latter kind of proceedings, it is evident that, in principle at least, local remedies must be exhausted. The case is different, at any rate as regards the substance of the issues involved, where the alleged vice relates not to the outcome but to the very inception of the proceedings.

76. In considering what kind and, so to speak, degree of notification is legally requisite, it is clearly not sufficient, in cases involving a foreign element, merely to apply domestic law standards, or to rely on, or rest content with, the fact that the requirements of the local law concerned were duly complied with,—if such was indeed the case. Internationally, it is necessary to consider whether—objectively—in the case of a foreign company having its seat and management abroad—a "notice" which takes the form of nothing more than a simple press publication of the adjudication in bankruptcy, suffices,—particularly if this publication is local only, and not effected in the country of the company's management and seat. There is here a direct connection with the question of excess of jurisdiction already discussed above; and it is important to remember (see paragraph 68) that it was not anything to do with the conduct of the Barcelona Company's Spanish undertaking that was in question in the bankruptcy proceedings, or which formed the basis of the bankruptcy adjudication, but a primarily extra-Spanish matter, the servicing of the sterling bonds—which was directly the concern of the Company in Canada, and of the bondholders' trustee, the Canadian National Trust. The very fact that, as was expressly recognized in relation to the Company's domicile, by the bankruptcy petition itself, namely that "it [the Company] does not have [a domicile] in Spain, any more than it has any specific commercial establishment there", must logically lead to the conclusion that, on the international plane, a notification effected in Canada, or by Canadian means of some kind, was called for. It is difficult to see how the apparently admitted non-Spanish domicile of the Company could possibly lead to the conclusion suggested in the bankruptcy petition, and accepted by the judge, that in these circumstances it would be "necessary to limit publication to the Official Bulletin of Tarragona"—which the judge extended to the Official Bulletin of the province of Barcelona, but no further.

77. I fully appreciate that Spanish law, like certain other historic and highly developed legal systems, approaches the subject of bankruptcy mainly from the standpoint of the creditors, and with the object above all or at any rate in the first instance, of safeguarding their rights, and hence of avoiding so far as possible any premature disposal, dispersal or concealment of the debtor's assets, in such a way as to prejudice those rights. I

therefore discount the natural reactions of a jurist trained in the common-law school when confronted with a situation in which a debtor can be declared bankrupt, or a company liquidated or wound-up, on the basis of proceedings, of which no previous notice has been or will be given, and at which the debtor is not represented or afforded an opportunity to appear—and this although the declaration takes immediate effect, and that effect involves for the bankrupt a complete loss of commercial status and of legal capacity to act. I also accept the fact that according to the philosophy of this point of view, only a very short interval is allowed in which the bankruptcy can be challenged with a view to its cancellation and the reversal of its effects.

78. But for these very reasons, it appears to me to be an essential counterpart of the considerable stringency of such a system that, at the very least, the debtor, having been declared bankrupt, should receive actual notice—judicial notice—of the declaration of bankruptcy, and should do so in a form which must ensure that it is brought directly to the attention of the person or entity concerned [58]. Unless this is done, the process, viewed as a whole, comes very near to constituting, if not a species of concealment, at least a serious obstacle to the possibility of a timely challenge to the bankruptcy;—so that a procedure already highly favourable to the creditor interest, becomes loaded against that of the debtor to an extent difficult to reconcile with the standards of the administration of justice required by international law. More especially is this the case when the only period within which the bankruptcy can be challenged is a period of eight days running not from the date of *notice* but from that of the press publication of the bankruptcy declaration itself, and failure to observe it apparently has, thenceforth, a permanently preclusive effect.

79. The pertinence and force of these considerations is of course greatly increased where, as in the present case, a foreign element is involved,—where the bankrupt is a foreign entity, with its seat and management abroad, and where the occasion of the bankruptcy is not the local commercial activities of that entity, but one affecting its (chiefly non-local) bondholders. In such circumstances, mere publication in the local press, and then not in the ordinary newspapers but in journals of a highly specialized kind, normally little read except by persons having a

[58] Under English law—to cite the system I am most familiar with—in the case of the winding-up of a company on the basis of a petition, not only must the existence of the petition be advertised (and not merely in the official *London Gazette* but in one of the ordinary daily newspapers also) at least seven clear days before the petition is due to be heard,—but, in addition, notice of it must be served on the company at its registered head office, equally before the hearing of the petition, at which of course the company is entitled to be represented (*Halsbury's Laws of England, loc. cit.*, in notes 12 and 13 *supra*, pp. 544-549). In the case of foreign companies, notice must no less be served, and, if this cannot be effected at an address for service or place of business in England leave will be given to effect service abroad (*ibid.*, pp. 842-843).

particular reason to do so, can not be regarded as sufficient. It is in fact doubtful whether press publication suffices at all, if it is the only measure taken. But it should at least be effected not only in the local press but also in that of the country or city where the bankrupt resides or (if a company) has its seat;—and, although the point was never finally resolved, there is some reason to think that this was in fact what Spanish law itself really required.

80. However, in my opinion, in the circumstances of cases such as the present one, even publication of the latter kind is hardly adequate. Something in the nature of judicial notice is necessary and, as mentioned in the statement of facts given in the early part of the Court's Judgment (paragraph 15), no such notice was given at the time: indeed it was not until 15 years later, in June 1963, that the Barcelona Company's long-standing request for an official copy of the bankruptcy judgment was acceded to. The reason given in that judgment for publication in the official bulletins of Tarragona and Barcelona only, namely that the domicile of the Company was "unknown", is difficult to reconcile with the fact that the seat of the company was shown as "Head Office, 25 King Street West, Toronto, Canada" on one of the most important documents which, together with a translation into Spanish, was furnished to the bankruptcy judge by the petitioners, as Nos. 3 and 3*bis* in the dossier of the case, namely the report of the council of administration (Board of Directors) of the Company, covering its balance sheet for 1946, the figures of which were cited in support of the bankruptcy petition (Annexes to the Memorial, Vol. II, p. 258).

81. Even if Spanish law did not *require* action to be taken in Toronto in such a case (see end of paragraph 79 above), it certainly in no way prohibited this. Indeed, such action would have been entirely consistent with the relevant provisions of that law, and it had been taken by the Spanish courts in other cases, particularly the *Moncayo* and *Niel-on-Rupel* cases, and was to be taken again in an analogous context in the *Namel* case a year later by the actual judge who was then in charge of the Barcelona bankruptcy. There existed at least three or four ways of doing this: by publication in the Toronto newspapers; through the registered letter post, with postal certificate of delivery; by personal service through a Spanish consulate in Canada, if Canadian law so allowed; or in the last resort by service effected through the Canadian authorities themselves.

82. It was contended that service or publication in Canada would have constituted an internationally impermissible act of *imperium* carried out in foreign territory. But in fact such acts take place every day, and constitute indeed the usual ways in which persons resident or domiciled in one country are formally apprised of proceedings affecting them, instituted in another country. Local publication, or service by post, at least,

can involve no act of *imperium*; and the other forms of service mentioned above have the actual concurrence, general or specific, of the local authorities. The Spanish cases cited in the preceding paragraph show that the Spanish courts themselves, in other cases, made use of the method of publication in foreign papers. The truth is that in the present case no attempt to notify the Barcelona Company in Canada was made.

83. In my opinion this omission—and even if it could have been the result only of inadvertence or oversight—was of such a character as to vitiate the whole proceedings on the international plane, and to render them void or inoperative *ab initio*. Relative to the Company, the proceedings were never properly initiated at all. Consequently (recalling the observations made in paragraph 75 above)—in the presence of a nullity, the question of exhausting legal remedies did not arise.

VI

THE PHILOSOPHY OF JOINDER TO THE MERITS

84. When, in the earlier (1964) phase of the present case, the Court joined the third and fourth preliminary objections to the merits, it made a number of observations both on the general philosophy of joinder as a judicial act, and also as regards the particular reasons for effecting it on that occasion (*I.C.J. Reports 1964*, pp. 41-46). On the present occasion the Court has not thought it necessary to supplement these observations. But I believe there are certain additional points that can usefully be made—except however as regards the fourth preliminary objection, for it was always clear that this objection, relating to the exhaustion of local remedies, was intimately connected with the ultimate issues of substance involved by the claim, and could not even be considered except in relation to these,—and so could not be pronounced upon without in large measure prejudging the merits—a situation that has generally been viewed as eminently calling for a joinder.

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85. As regards the third preliminary objection, on which the Court's present Judgment is mainly founded, the situation—though fully explained on pages 44-46 of the *Report* of the Court's earlier Judgment—was perhaps not so obviously clear although, as was pointed out in that Judgment, matters relating to the merits had been discussed in the written and oral proceedings in that phase of the case, in connection with this objection. It may therefore be desirable to point out that, apart from the doubt (see *loc. cit.*, pp. 44-45) whether the objection had an exclusively

preliminary character, and did not at least in part appertain to the merits, the Court could not, without hearing the merits, regard itself as adequately informed on what was evidently one of the key questions in the case,—namely whether, in addition to the alleged infringements of the Barcelona Traction Company's rights, there had not also been infringements of the specific rights, *stricto sensu*, of the shareholders, caused either by the same acts as had affected the Company, or by separate acts affecting only shareholding rights as such. It was indeed this very point which, *inter alia*, the Court had in mind in the two following passages from its earlier Judgment, more than once cited or referred to in the course of the oral pleadings in the present phase of the case, but which appear to have been misunderstood to a certain extent, namely (*I.C.J. Reports 1964*, p. 44):

> "It can be asked 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; and if so to what extent and in what circumstances and, in particular, whether those circumstances (if they exist) would include those of the present case"

and (*ibid.*, p. 45):

> "In short, the question of the *jus standi* of a government to protect the interests of shareholders as such, is itself merely a reflection, or consequence, of the antecedent question of what is the juridical situation in respect of shareholding interests, as recognized by international law."

86. These observations no doubt indicated that there *could* be shareholding interests recognized and protected by law, which therefore amounted to rights, and that there might be circumstances in which an infringement of the company's rights would also infringe the separate rights of the shareholders. But what the Court said in no sense warranted the view that prejudice caused to the shareholders through illicit damage done to the company, necessarily and of itself gave the former a basis of claim which their government could legitimately put forward on the international plane—this being, broadly speaking, the proposition advanced on behalf of Belgium.

87. This matter was not the only one in respect of which a hearing of the merits was necessary in order to enable the Court to deal with the third preliminary objection,—for in addition to the question of the legal status of shareholders and the nature of their rights and interests, this objection also involved that of the nationality of those concerned. It was contended by Spain, not only that in principle no claim at all could be made on behalf of shareholding interests in respect of damage caused, not

to those interests as such, but to the company,—but also that, even if such a claim could be made, these particular shareholding interests were not really Belgian, or were not in Belgian hands at the material times. The Court felt it necessary to hear the merits in order to ensure that it was sufficiently informed as to the character and relative weight of the interests involved in the Barcelona Traction Company and its affiliates: indeed it was not until the merits were reached (even if then) that all the facts were fully brought out regarding this matter; and it was in this context, rather than that of the status of shareholders, that, according to one current of opinion in the Court, the Belgian claim should be regarded as inadmissible.

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88. There are other ways in which the implications of a joinder are liable to be misunderstood—particularly if, as in the present case, the objection is eventually upheld and the merits, though heard, are not pronounced upon. There may be a tendency to assume that an international tribunal which effects a joinder is already half-way to dismissing the objection and will eventually do so and give a decision on the merits. Even if the present case, and others before it, did not demonstrate the unwarranted nature of such an assumption, this would result as a matter of principle from the fact that if the assumption were correct, the whole process of joining preliminary objections to the merits would be rendered meaningless—a mere futile (and unjustified) postponement, not a genuine suspension, of judgment on the objection.

89. Equally unjustified, as other cases show, is the opposite assumption,—that a joinder indicates a favourable attitude to the objection on the part of the tribunal concerned—a theory that only needs to be stated for its implausibility to be manifest. There may indeed be cases in which, on various grounds that seem good to it, a tribunal will hesitate to take, at the preliminary stage of a case, a decision the effect of which would be permanently to shut out, then and there, all possibility of a hearing and decision on the merits. But, although the task of evaluating the factors involved must be left to the tribunal concerned, adequate grounds for the joinder must always exist,—for the process is one that can never be other than a simple suspension of judgment on the objection, effected because the tribunal, for one reason or another, considers that it cannot pronounce upon it at that stage, consistently with giving their due weight to all the various aspects of the case, and to holding the scales of justice even between the parties. A joinder can never be interpreted as foreshadowing a conclusion already half arrived at.

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90. No less unwarranted would be any attempt to draw from the upholding of a preliminary objection inferences as to what the attitude of the tribunal was, or would have been, in regard to the substantive merits of the claim. No such inferences—*in whatever sense*—could possibly be justified by reason of the fact that, on the basis simply of a preliminary objection as such, the tribunal holds the claim to be inadmissible.

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POSTSCRIPTUM

I entirely approve of the initiative taken by the Court in paragraph 27 of the Judgment (and for the first time in a *judgment* *) of drawing attention to the length of the proceedings in the present case,—so as to indicate where the responsibility for this lies. If the parties in a litigation before the Court think it necessary to take several years to prepare and deliver their written and oral arguments, that is their affair,—and, having myself formerly, on a number of occasions, been in the same position, I can understand the reasons for it.

Strong objection exists however when the blame for such delays is publicly ascribed to the supposed dilatoriness or procrastination of the Court itself,—in evident ignorance, or else heedlessness, of the true facts **.

Nor is this by any means the only way in which the Court has been misrepresented in a manner detrimental to the dignity and good order of its functioning as an independent judicial institution.

(Signed) G. G. FITZMAURICE.

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* A previous *Order* of the Court as to time-limits in the present proceedings drew attention to the matter.

** Some indication of the real facts will be found, for instance, in footnote 14 on p. 447 of a review article contributed by me to the *Kansas Law Review*, Vol. 13, No. 3, March, 1965. Since this was written, periods requested by the parties have grown to 4-5 years for the written proceedings, and 3-6 months for the oral hearing. See also for a much more complete statement, Professor Leo Gross, "The Time Element in Contentious Proceedings in the International Court of Justice", *American Journal of International Law*, 1969, Vol. 63, p. 74.