SEPARATE OPINION OF JUDGE TANAKA

I

Although I subscribe to the Court's conclusion in dismissing the Belgian claim that Spain violated an international obligation and incurred responsibility vis-à-vis Belgium, I regret to have to say that my view differs from that of the Court in its reasoning. The majority opinion reached its conclusion by deciding the question of the *jus standi* of Belgium in the negative, i.e., by upholding the third preliminary objection of the Spanish Government, whereas my position would be to proceed to examine the question of the merits after the third and fourth (non-exhaustion of local remedies) preliminary objections. An examination of the merits, however, leads to the same result as that reached by the majority opinion, namely the dismissal of the Belgian claim.

Such preliminary remarks are made necessary in order to determine the scope and limit of individual, separate or dissenting opinions. By reason of the complexity of the instant case, we are confronted with a need to make judges' rights, as provided by Article 57 of the Statute, clearer.

A question may arise as to whether judges' opinions should be limited to those matters which have been dealt with in the majority opinion or whether they are not subject to some limitation.

Here, I do not go deeper into the study of this question. I simply wish to say that my view favours a liberal attitude which would not allow any limitation to be imposed on judges' statements, other than considerations of decency.

That this issue was taken up in some of the opinions of judges in the Judgment of the *South West Africa* case *(South West Africa, Second Phase, Judgment, I.C.J. Reports 1966)* is still vivid in our memory. So far as the detail is concerned I should like to refer to a declaration of President Sir Percy Spender (*ibid.*, pp. 51 ff.) representing a restrictive theory and my contrary view on this issue as stated in my opinion (*ibid.*, pp. 262-263), appended to that Judgment.

For the above-mentioned reason my following statement is not obliged to remain within the framework of the majority opinion. I feel that I must follow a logical process of my own which, according to my conscience, I believe to be just. If the question of Belgium's *jus standi* is resolved in the affirmative, the question of the exhaustion of local remedies will remain to be examined. If given an affirmative answer, then the question on the

merits, namely the denial of justice allegedly committed by the Spanish authorities vis-à-vis the Barcelona Traction Company and its subsidiaries should be taken up. This logical process cannot be interrupted in the middle.

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The Judgment of 24 July 1964 rejected the first and second preliminary objections and joined the third and fourth preliminary objections to the merits.

Considering that the joinder of these two preliminary objections would not cause them to lose their preliminary character, we must first deal with these objections before examining questions relating to the merits, though bearing the latter in mind.

We shall begin with the third preliminary objection.

The object of the Belgian Government's Application of 14 June 1962 is reparation for the damage allegedly caused to a certain number of its nationals, including juridical persons, in their capacity as shareholders of the Barcelona Traction Company, by the conduct, allegedly contrary to international law, of various organs of the Spanish State toward that company and various other companies in its group.

The Spanish Government, on the other hand, denies by the third preliminary objection that the Belgian Government possesses *jus standi* either for the protection of the Barcelona Traction Company of Canadian nationality (Application filed on 23 September 1958) or for the protection of alleged Belgian "shareholders" of that company (present case).

The third preliminary objection involves questions of both law and fact. The question of law, which is a most important one in deciding this case, is concerned with whether a State has a right to protect its nationals who are shareholders in a company of a nationality other than that of the protecting State. More concretely, the question may be formulated as follows: has the Belgian Government *jus standi* to protect its nationals, namely Sidro and others, who are shareholders in the Canadian Barcelona Traction Company?

Within the framework of diplomatic protection, the third preliminary objection involves other issues concerning protégés, in particular the question of the nationality of shareholders, their identification and the question concerning the separation of legal and beneficial owner—which of them is to be treated as the true shareholder from the viewpoint of diplomatic protection?—in shareholding, which also involves a legal question.

First, let us deal with the question concerning the diplomatic protection of shareholders in a company of a nationality other than that of the protecting State. Assuredly it constitutes a most fundamental question underlying the third preliminary objection and is logically prior to other ques-

tions, so that a decision on the former in the negative would make a decision on the latter unnecessary. Therefore the question of diplomatic protection of shareholders may be recognized as constituting the core of the third preliminary objection.

Here, it is not necessary to emphasize the spirit of a universally recognized rule of customary international law concerning every State's right of diplomatic protection over its nationals abroad, that is, a right to require that another State observe a certain standard of decent treatment to aliens in its territory. The spirit of the institution of diplomatic protection is clearly declared by a Judgment of the Permanent Court of International Justice:

> "... in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, ... it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged." (*Panevezys-Saldutiskis Railway* case, *P.C.I.J.*, *Series A/B*, *No. 76*, p. 16.)

Briefly, the idea of diplomatic protection does not seem to be a blind extension of the sovereign power of a State to the territory of other countries; the spirit of this institution signifies the collaboration of the protecting State for the cause of the rule of law and justice.

Now, in the present case, we are confronted with concrete questions of whether a national who is a shareholder in a company other than that of the protecting State, is covered by diplomatic protection and whether the interest involved in the shares is susceptible of being protected by the national State of the shareholders. In other words, can the rule of diplomatic protection be extended to a shareholder in a company of a nationality which is not that of the protecting State, and to an interest which is characterized by many corporative particularities? This is a question of interpretation of customary international law regarding the diplomatic protection of the nationals of a State.

To solve these questions, we shall start from the examination of the nature and characteristics of a shareholder in a corporation (joint-stock company). For that purpose we shall consider the concept of a corporation, legal relations between a corporation and its shareholders, and more particularly the legal significance of the juridical personality of a corporation. We can easily understand the importance of the consideration of

this last issue, if we see that many questions discussed in the course of the proceedings on the preliminary objections and on the merits appear to be centred round the question of the juridical personality of a corporation, especially the question of whether in particular matters an interpretation of the "piercing of the veil of the corporate personality" is to be admitted or not.

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We shall first make some observations on the characteristics of corporations.

The corporation, which is a product *par excellence* of the capitalistic economic system, possesses in many points remarkable characteristics compared with other forms of commercial entities such as partnership and limited partnership which are called in continental countries "société de personnes" or "Personalgesellschaft", as distinguished from the corporation, designated as "société de capitaux" or "Kapitalgesellschaft". As these nomenclatures indicate, the partnership is an association which presents itself as a combination of individuals who have personal confidence in one another in moral as well as in economic aspects and who, in many cases, as the name "société en nom collectif" indicates, are united usually on the basis of a family tie, whereas the corporation is nothing other than an aggregation of strangers, passers-by, who become united only from an economic motive, namely the desire for possible increased dividends.

In a partnership the members of a partnership retain their own legal and economic individuality. In internal relations, they are bound by a contractual nexus (between the members *qua* individuals and between the members and the partnership) and in external relations they have an unlimited liability toward the creditors of the partnership. On the contrary, in the case of a corporation, its members, the shareholders, stand in no legal relationship either to one another or to outsiders, i.e., the creditors of the corporation. The shareholders, different in that from partners whose entire personality and individuality is absorbed into the business of the partnership, do not and cannot participate in the activities of the corporation save by way of exercising their voting rights in the general meeting. Even this kind of participation of the shareholders in the corporate business is reduced to a minimum by the natural tendency to indifference and "absenteeism" on the part of shareholders. Their only obligation consists in the payment of a sum of money for the shares subscribed by them and their only risk is the impossibility of reimbursement of their invested sum in case of liquidation or bankruptcy of the corporation.

Thus the legal position of shareholders lacks the individuality which is

found in the case of partners. It is characterized by its abstractness and makes the existence of shareholders something passive.

The typical corporation, considered from the point of view of those characteristics in which it differs from the partnership, is designated as a "société anonyme". This term is used in contrast with the "société en nom collectif". The anonymity relates of course to the corporation itself, but we may assert that this character is derived from the anonymity of each shareholder in the corporation. The anonymity can be said to be a characteristic not only of a bearer share but of a registered share as well.

The anonymity of corporations as well as of shareholders makes possible and facilitates the establishment among several corporations of dependent relationships and concentrations of diverse kinds and degrees such as the cartel, the "Interessengemeinschaft", "concerns", mergers *(fusion)*, etc. Particularly, it tends to produce at the national and international levels the phenomenon of the mammoth pyramidal structure in which innumerable enterprises, crowned by a controlling holding company at the top, are affiliated with one another in links of parent-and-child relationships, by means of holding, subsidiary and sub-subsidiary companies.

The concentration due to the aforesaid anonymity disregards national frontiers and may cover many countries. In this way international investments are facilitated. The case of the Barcelona Traction Company offers an excellent example of the concentration of enterprises and international investment.

The relationship existing among innumerable companies possessing separate juridical personality is commonly called a "group".

The anonymity of shareholders manifests itself in the recent tendency to separate power or management from the ownership by mechanisms such as life insurance companies, pension trusts, and mutual funds, as pointed out by Professor Adolf A. Berle Jr. (*Power Without Property*, 1959, pp. 160 ff.). The separation of nominee and beneficial owner of shares, one of the issues with which the third preliminary objection in the present case is concerned, may be considered an example of the manifestation of this tendency.

Anonymity of shareholders and separation of control from ownership in corporative life necessarily exercise a profound influence upon the character of a corporation as a juridical entity. In contrast with the partnership, where autonomy among members or contractual freedom largely prevails and consequently the corporative regulation by the articles of incorporation is limited to a minimum, matters concerning corporations are, even in regard to their internal relations, minutely prescribed by *jus cogens* in company law and a very narrow sphere is left to the autonomy of the general meeting as the highest organ of the corporation. The degree of the rule of law in commercial societies is in

inverse proportion to the importance which law attaches to the individual member. In the partnership it is minimal; in the corporation maximal.

From what has been stated above, we may conclude that the tie of the juridical personality is, in the case of a corporation, far stronger than in the case of a partnership. In a corporation juridical personality plays the role of holding together incoherent individuals by a compact legal frame, while in the case of a partnership, even under some legal systems recognizing its juridical personality, the partners are directly liable to creditors of the partnership in the event of its insolvency and accordingly the function played by its juridical personality is extremely limited.

The above-mentioned characteristics of a corporation are very succinctly indicated by the following description:

> "Dans les sociétés de capitaux . . . le lien de la société avec la personne de ses membres est moins marqué; le concept de personnalité morale est donc pour elles plus nécessaire. Les associés ne sont pas normalement responsables des dettes de la société; l'actif social seul en répond. La durée de la société ne dépend pas de la vie des associés, qui ne se connaissent souvent pas, et ont réuni leurs capitaux, non leurs personnes; les actions, qui représentent les parts sociales, sont, en principe, librement négociables et ainsi appelées à changer continuellement de mains." (Professeurs Henri et Léon Mazeaud et Conseiller Jean Mazeaud, *Leçons de droit civil*, tome I, 3e éd., 1963, pp. 602, 603.)

If we recognize these observations as right, the natural conclusion therefrom would be that the object of diplomatic protection in the case of a corporation should be the corporation itself and not its shareholders.

From the viewpoint of emphasizing the significance of the juridical personality of the corporation, it appears that it must be the company as juridical person which is capable of enjoying the protection and not the shareholders, since they are excluded from the protection by the screen of juridical personality of the company.

The traditional doctrine on this matter has been based on the theory of the juridical personality of a corporation, which holds that "a corporation is a juridical person distinct from its members". J. Mervyn Jones stated:

> "Assuming, therefore, that corporations may be nationals, it follows that only the state of which they are nationals may intervene on their behalf, and this notwithstanding the fact that most of the members may be nationals of another state." ("Claims on behalf of nationals who are shareholders in foreign companies", *British Year Book of International Law*, 1949, p. 227.)

The argument of the Spanish Government which denies the right of diplomatic protection of shareholders in favour of the national State of the Barcelona Traction Company, namely Canada, is precisely based on the above-mentioned theory of a juridical personality recognized as being distinct from its members.

The Belgian Government on the contrary, wishes to advocate its position by arguing from a fundamental theory concerning the juridical person. It intends to defend its viewpoint on the strength of the doctrine of fiction, which denies the real existence of the juridical person by reducing it to a simple conglomeration of its constituent members and minimizing the juridical person as being a mere legal technique that makes it possible for plural individuals to own property or conclude a transaction.

In order to assert its view, the Belgian Government has repeatedly referred to a figurative concept of "piercing the veil" of corporate personality. So far as this slogan is concerned, however, it simply means that the shareholders must be protected by their national State regardless of the juridical personality of the corporation. It is a *petitio principii* and nothing more.

The Belgian Government, basing itself on the fiction theory, insists that the real existence of a corporation is its shareholders and that accordingly the subject to be protected is not limited to the Barcelona Traction Company, but includes its shareholders who are Belgian nationals.

The argument developed by the Spanish Government to deny the protection of shareholders is, as indicated above, based on the role attributed to the juridical personality of corporation.

The viewpoint of the Spanish Government is not in itself wrong. As we have seen, in a corporation the role of the juridical personality is at a maximum and that of shareholders is reduced to a minimum. Never can the shareholders come in contact with a third person through the wall of the corporate personality. This wall seems too solid to be penetrated. It appears that diplomatic protection cannot reach to shareholders, consequently the Spanish view on this point seems to be well founded.

In short, both Governments, the Belgian and the Spanish as well, appear to base their respective positions on a theory of juridical personality: either on the theory of fiction or on the realistic theory, either disregarding or emphasizing the functional importance of juridical personality.

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However, we must approach the issue in question from a different angle. The question should be considered on quite another plane. What we have seen above and what the Spanish Government has put forward are arguments concerned with the juridical concept of corporation in the

meaning of municipal law, private law and particularly commercial law, and they deal with this concept only.

Law relating to corporations is concerned with matters of private law, namely private interests, relationships between corporation, shareholders and third parties. Company law in respect of incorporation, formation, *ultra vires*, capital, its increase and reduction, organs, the rights and duties of shareholders (particularly limited liability), the transfer of shares, accounts, the issuing of bonds, dissolution, liquidation, etc., is above all related to internal matters of corporations, or business transactions with outsiders and belongs to the plane of municipal law. The principles prevailing in these matters are directed, on the one hand, to the protection of third parties, namely the creditors of a company, and on the other hand, to the protection of the shareholders in the company itself. These principles are not in themselves connected in any way with international law. The protection of shareholders is intended to be guaranteed in corporation law mainly by provisions concerning the limited liability of shareholders, the maintenance of enterprises, the principle of publicity, liability of corporate organs, etc.; it belongs to an entirely different plane of law the prevailing principle of which is quite extraneous to that of diplomatic protection.

The Spanish concept of the impenetrability of a company's wall of juridical personality is based on a principle of private law, and therefore it cannot be applied to the question of diplomatic protection of shareholders.

Since the matter of diplomatic protection of shareholders belongs to an entirely different plane, namely to the field of international law, the juridical personality created from the necessity of the viewpoint of private law or commercial law cannot be recognized as an obstacle for the protection of shareholders on the plane of international law.

For this reason the fact that a corporation has juridical personality under the law of a State does not necessarily justify diplomatic protection by that State only.

This conclusion is based on recognition of the relativity of the validity of each legal principle and concept.

Every branch of law, for example, private law, procedural law, administrative law, fiscal law, private international law, law concerning enemy character in wartime, etc., has its own purpose and accordingly, the sphere which it governs is necessarily limited. Certain legal principles and concepts may have a relative validity in the specific sphere to which they belong. Each legal system or institution has its own objective; to attain this objective, a system of norms, i.e., principles, rules and provisions, is developed. The system is teleologically constructed. The meaning of the norms and concepts included in it will be relative to the objective of the system itself and limited by it, although the existence of

common principles and concepts underlying diverse systems cannot be denied. To give an example: we cannot help recognizing the difference between the legal position of seller and purchaser and that of parties each playing a specific role with regard to a bill of exchange, although both cases belong to the law of obligations. We may cite another example, namely the difference between the legal relationship governing a company and its shareholders and that involved in an ordinary commercial transaction.

What we want to emphasize is that each branch of law, each system and institution, each provision belonging to it, possesses a specific character from the viewpoint of its objective and is susceptible of or requires a different interpretation. This phenomenon is what a distinguished commercialist, Rudolf Müller-Erzbach more than 55 years ago ingeniously pointed out in an article ("Relativität der Rechtsbegriffe und ihre Begrenzung durch den Zweck des Gesetzes", *Jherings Jahrbücher für die Dogmatik des heutigen Römischen und Deutschen Privatrechts*, Bd. 61, 1912, ss. 343-384).

On the matters we are interested in, a concept such as nationality, which is concerned with both municipal and international law, may have a different content according to the objective of each branch of law and its interpretation and application may be relative. Even if the nationality of an individual is established by municipal law, it may not necessarily have validity in international law. It is possible that one may not be entitled to diplomatic protection from one's national State by reason of lack of effectiveness, as the *Nottebohm* case indicates (*I.C.J. Reports 1955*, p. 23). The fact that the effectiveness is questioned, implies that the concept of nationality may vary in meaning according to whether it is interpreted by municipal law or by international law.

The viewpoint mentioned above may be stressed further with regard to the question of the nationality of a corporation in relation to its juridical personality. To begin with, the concept of nationality as applied to a physical person differs from that applied to a juridical person. In regard to the latter, the relationship of allegiance originating from the natural tie between physical persons and their national State may be lacking. Furthermore, the meaning implied in the nationality of corporations may not be identical according to different branches of law, for example, law concerning the treatment of foreign corporations, conflict of laws, diplomatic protection of nationals, law on enemy character, etc. (Prof. Paul Reuter, *Droit international public*, 1958, pp. 164, 165.)

Hypothetically, a corporation obtains juridical personality by being incorporated in a State under the law of that State and acquires the nationality of that State, but the corporation may possess a foreign

character in other respects: preponderance of foreign participation in the capital stock, nationality of members of boards of directors, place of control, place of business activities, etc. In such cases it may become controversial whether the national State of the corporation can claim diplomatic protection on its behalf solely because the corporation has its nationality; in any event, the national State of the corporation, even if it is entitled to diplomatic protection, may hesitate to exercise its right.

It is not without reason that Rabel renounced his attempt to seek a uniform content for the concept of nationality of corporations and declared that each rule should be interpreted separately (Ernst Rabel, *The Conflict of Laws*, 1947, Vol. II, p. 21).

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We may quote an example for the purpose of demonstrating the non-application of a rule of municipal law to a matter of international law.

The so-called principle of equal treatment of shareholders, we believe, is considered one of the most fundamental principles governing the law of corporations. According to this principle, all shares in a corporation—or, if several categories of shares exist, all shares in the same category—are, from the viewpoint of the rights and duties incorporated in them, equal (with the exception of quantative differences proportionate to the degree of participation), and therefore shareholders are to be treated equally. This principle is perhaps derived from the fact of anonymity or lack of individuality where the position of shareholders is concerned, in contrast with that of partners; the idea may go back to canon law and, further, to the Aristotelian notion of *justitia distributiva*.

The principle of equal treatment of shareholders, however important it may be, nevertheless has its limitation. The limitation may come from municipal law, but in any case it comes from outside commercial law. It may take the form of a restriction of the rights of foreign shareholders in public law. Or it may be based on international law where the latter recognizes the protection of shareholders in a foreign company who are nationals of the protecting State. Unequal treatment arising as the result of a discretionary exercise of diplomatic protection cannot be avoided when there are shareholders of different nationalities. A situation wherein some of the shareholders enjoy effective protection and the rest do not is inevitable. Whether such situation is desirable or not is a different matter.

What we meant above is that a principle such as equal treatment of shareholders, being of municipal law character, is not *ipso jure* applicable to matters belonging to the plane of international law, including matters concerning diplomatic protection of shareholders. The shareholders who have been excluded from diplomatic protection cannot protest against

diplomatic protection of other shareholders by their respective national States by referring to the principle of equal treatment of shareholders, which is valid only in municipal law and not in the matter of international law to which the rule of diplomatic protection belongs.

What has been said concerning the principle of the equality of shareholders can be applied *mutatis mutandis* to the question of the juridical personality of a corporation. Juridical personality is, as stated above, conferred on a corporation primarily for the purposes of maintaining the enterprise, owning property, concluding transactions with outsiders and limiting or denying the liability of shareholders in regard to creditors of the company. Accordingly, juridical personality possesses meaning only as a legal technique to serve and guarantee the corporate existence in respect of private and commercial law. Its validity is relative and therefore limited.

The Spanish Government conceives the juridical personality of a corporation as an impenetrable wall lying between corporation and shareholders as far as diplomatic protection is concerned, so that it can prevent protection of the shareholders and monopolize it in favour of the corporation itself. In other words, the framework of juridical personality should involve in itself the susceptibility of diplomatic protection of the company and at the same time the exclusion of shareholders from the protection. The question of diplomatic protection could not be distinguished from the conclusion of ordinary transactions, where the corporation itself was represented and the shareholders excluded.

Such a construction, however, would fall into the error of conceiving the juridical personality of a corporation as an aim in itself, whereas it is nothing but a means in the interest of its constituent members.

Professor (at that time Judge) Charles De Visscher said:

> "L'intérêt de l'individu, l'intérêt de l'homme est toujours le but du droit et sa fin suprême. Il en est ainsi alors même que la poursuite de cet intérêt s'effectue sous le couvert du régime de la personnalité civile." ("De la protection diplomatique des actionnaires d'une société contre l'Etat sous la législation duquel cette société s'est constituée": *Revue de droit international et de législation comparée*, Vol. 61, 1934, p. 639.)

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By what is set forth above, we have tried negatively to remove an important obstacle to the recognition of diplomatic protection in favour of shareholders. Next, we shall demonstrate positively the necessity and *raison d'être* of protection of shareholders and establish the reason why the shareholders should be protected independently of the company to which they belong.

We shall solve the question of whether the shareholders' rights and interests are included in the subject-matter of diplomatic protection

according to the universally recognized customary rule of international law, the existence of which does not admit of any doubt; we are confronted with the interpretation of this customary rule of international law, i.e., whether diplomatic protection covers the position, namely rights and interests, of shareholders in a corporation or not.

Roughly speaking, international law places no qualification on "property", "rights" and "interests", and consequently it seems that the position of shareholders can be recognized as involving property, rights or interests, and is able to be covered by diplomatic protection. Before we reach a definite conclusion, however, we must examine the nature of the shareholders' legal position and their rights and interests, because some aspects of the legal position of shareholders have appeared to be an obstacle to the recognition of its diplomatic protection and, therefore, much discussion has taken place between both Parties concerning this issue.

Let us examine what are usually indicated as shareholders' rights in books on corporation law of many countries: the right to dividends, the right to surplus assets in case of liquidation, the right to vote in general meetings, the right of minority shareholders to sue for the liability of directors, the right to transfer shares, the right to request certificates, etc.

Examining these so-called shareholders' rights we can distinguish two categories of rights: the one includes those rights which are enjoyed by shareholders themselves, namely the right to dividends, the right to surplus assets and the right to transfer shares; and the other includes the right of voting and all those rights the aim of which constitutes the common interest of the corporation itself and not the individual interest of the shareholders. Some German scholars of corporation law call the rights in the first category *eigennützige Rechte* (rights for self-interest) and the rights in the second category *gemeinnützige Rechte* (rights for common purpose). The latter category constitutes rights of shareholders *sensu lato*; however they are not exercised by them as shareholders but as an organ composing the general meeting, and therefore this kind of right cannot be classified in a category of rights of shareholders in *sensu stricto*. Of course a preponderant shareholding in the general meeting would confer on the shareholder right of control, but this so-called right cannot be said to be a "right" in the proper sense, but mere "interest".

As to the rights of shareholders to request dividends or surplus assets, we cannot deny them the nature of a right *sensu stricto*; nor do we hesitate to classify shares in the categories of "property", "rights" or "interests" which may be covered by diplomatic protection.

This conclusion, we consider, cannot be denied on the ground that the realization of the right to dividends or surplus assets presupposes the

existence of profits or surplus assets on the balance sheet, and is therefore conditioned by the future financial circumstances of the company. It is true that the position of shareholders is, in this respect, more uncertain than the position of creditors and bondholders, but a conditional right cannot be excluded from diplomatic protection simply because it involves uncertainty; nor can the fact that shareholders do not possess any right as regards corporate property—its formal owner being the company itself—be used to deny diplomatic protection.

In short, whatever construction may be put on the rights of shareholders each constituent element of a share can be characterized as a "right" or "interest". Furthermore, we can conceive rights and interests as a whole, as a conglomeration of diverse rights, duties and interests. Perhaps we can consider them as *Mitgliedschaft* or *Mitgliedschaftsrecht*, which is nothing else but a kind of legal position possessed by a shareholder. That this legal position can be and will be considered an object of diplomatic protection, is easily understood by the fact that the legal position as a whole, being incorporated in the share certificate, becomes negotiable as a movable and quoted in stock-exchange operations.

In this context, we shall clarify the distinction between protection of shareholders from the viewpoint of the material content of shares and protection of shareholders as owners of the share certificates. What we are concerned with is only the former case in which alleged wrongful acts vis-à-vis the company are involved and consequently the intrinsic value of shares is affected, while in the latter case the question of protection is concerned with an owner or possessor of a particular share certificate as a *titre-valeur* as in the case of *rei vindicatio*, where a share certificate has been stolen or damaged; the latter case therefore, is not concerned with the protection of shareholders which is what we are dealing with here.

In sum, the legal position of shareholders can itself be considered to be the object of diplomatic protection by their national State. From the viewpoint of diplomatic protection it does not matter whether this position can be conceived as "property", "a right" or "interests". Even if it cannot be recognized as property or a right, it constitutes "interest".

The share can be said to be a new type of property which is a product of modern capitalism; although, unlike copyright, patents and trademarks, it has its origin in municipal law, it has acquired a highly international character owing to its anonymity and transferability. There is no other movable property comparable with the share which is furnished with the highest degree of negotiability through the mechanism of international exchange markets.

Parallel with the development of international investment, the necessity of its protection becomes acute. It will be recognized that absence of a uniform law relative to companies and the highly imperfect state of private international law on this matter increasingly require diplomatic protection of shareholders in a way that supplements the measures provided by municipal law.

Briefly, we should approach the customary rule of diplomatic protection from a teleological angle, namely from the spirit and purpose of diplomatic protection, without being bound by municipal law and private law concepts, recognizing its relative validity according to different fields and institutions. The concept of juridical personality mainly governs private law relationships. It cannot be made an obstacle to diplomatic protection of shareholders. Concerning diplomatic protection, international law looks into the substance of matters instead of the legal form or technique; it pays more consideration to ascertaining where real interest exists, disregarding legal concepts. International law in this respect is realistic and therefore flexible.

Judge Wellington Koo in his separate opinion appended to the 1964 Judgment concerning the third preliminary objection in the present case says:

> "International law, being primarily based upon the general principles of law and justice, is unfettered by technicalities and formalistic considerations which are often given importance in municipal law . . . It is the reality which counts more than the appearance. It is the equitable interest which matters rather than the legal interest. In other words it is the substance which carried weight on the international plane rather than the form." (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, pp. 62 and 63.)

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Even if the existence of an interest (in a broad sense) in diplomatic protection is recognized, however, the State concerned would have the discretion to exercise the power of diplomatic protection on certain matters. Here, we must distinguish two questions: the one is whether diplomatic protection is, from the viewpoint of the nature of the object of protection, legally possible or not; the other is whether, in a specific case, intervention for the purpose of diplomatic protection by a State on behalf of its national, is appropriate or not. The former question is of a legal nature, to be distinguished from the latter which constitutes nothing else but the political evaluation of the fact from various aspects (above all, economic considerations). The two questions should not be confused.

These two questions arise from the existence of the two kinds of interest pertaining to the diplomatic protection of shareholders: one is the original interest of shareholders which requires the protection of their national State, the other is the interest which the national State of the shareholders possesses and which may become a deciding factor in the exercise of a discretionary power of intervention. These two interests must not be confused either.

In this respect, we shall consider the meaning of the percentage of participation of shareholders to be protected in the capital stock of a company. This matter has been repeatedly discussed between the Parties in the present case relative to the preponderance of percentage of Sidro's participation in the capital stock of Barcelona Traction. It has been claimed that this preponderance constitutes an essential condition for the existence or exercise of the right of diplomatic protection of shareholders. But we consider that the preponderance of percentage does not appear to constitute a condition of diplomatic protection. It seems that the percentage itself possesses no relevance to the legal possibility of diplomatic protection. Even the holding of one share would jusify—theoretically—the right of diplomatic protection. Whether this right will be exercised or not, is a matter belonging to the discretion of the national State. What is essential is the existence of an interest worthy of protection by the shareholders' national State. In this sense the total value of the shares to be protected should be considered objectively without regard to the percentage which it occupies in the total capital stock. A holding of 25 per cent. in a big company may be sufficient for the exercise of diplomatic protection; contrariwise, a 99 per cent. holding in an insignificant company may be excluded from the consideration of diplomatic protection. Of course other factors may come into consideration. This is a matter of political expediency, belonging to the discretion of the protecting State, which presupposes the possibility of protection, and not a matter of law which is concerned with the legal possibility of protection.

We presume that the discussion concerning the percentage of the participation of Sidro in the capital stock of Barcelona Traction is motivated by the idea of protection of the Barcelona Traction Company itself, on which viewpoint the Belgian Application of 1958 stood. Controversy around the percentage of participation, so far as the third preliminary objection is concerned, may be understood as a residuum of the viewpoint of protection of the company represented by the initial Application; therefore, it seems that it is not relevant to the question with which we are dealing now.

The question of whether a State is entitled to exercise a right of diplomatic protection of a foreign corporation is entirely another matter. It seems that it must be decided in the negative sense, by reason of the fact that the corporation itself does not possess the nationality of the protecting State. However, some State practice recognizes the protection of a foreign corporation, if substantial interest in the corporation

is owned by its nationals (see Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad*, 1915, p. 622). This is not the case which we are now considering. Here we are concerned with the issue of the protection of shareholders and not the company itself. But much progress has been made such that through protection of a foreign company the protection of shareholders is attained. It is quite natural that, so long as the standpoint of protection of a company itself is defended, the percentage of the participation of the protected shareholders does come into consideration. However, since we refuse to recognize an obstacle to diplomatic protection in the juridical personality of a company and attribute to shareholders an independent status which may be an object of diplomatic protection, the fact of Sidro's holding a certain fairly large percentage of the Barcelona Traction Company must be deemed to be one of the factors to be taken into consideration in exercising diplomatic protection but not one legally required as a condition for the right of protection.

* * *

It is true that the internationally wrongful acts allegedly committed by the Spanish administrative or judicial State organs, such as refusal of the transfer of foreign currency, the bankruptcy judgment of 12 February 1948, etc., are directed to the Barcelona Traction Company, which possesses Canadian nationality. Accordingly, the Spanish Government argues that only Canada, the national State of the company, is entitled to exercise its diplomatic protection. This argument is based on the municipal law concept of the corporation on which we made observations above and according to which only the corporate personality prevails regarding external matters. According to this concept, since only the company could be the victim of a wrongful act, the damage suffered by the shareholders should be indemnified through the company indirectly. In short, only the national State of the company would be entitled to exercise diplomatic protection and not the national State of the shareholders.

It is also true that the national State of a company is entitled to take measures of diplomatic protection on behalf of the company, assuming that the bond of nationality is effective, and that the national State is materially interested in the protection of the company. But there are many cases where the nationality of the company is not effective, where the bond between the national State of the company and the shareholders is lacking and, accordingly, the national State is not inclined to exercise the right of protection. There may exist another circumstance for the national State of the company, such as the fact that between this State and the State responsible for the wrongful acts a nexus of compulsory jurisdiction is lacking; or the former State, for some political or other reasons may not wish to pursue diplomatic protection against the latter

State; or diplomatic protection by the former State might not bring a satisfactory result, etc. Under these circumstances there remains no other remedy than that the national State of the shareholders should take the initiative for the purpose of the protection of its nationals. A vacuum with respect to protection should not be tolerated: otherwise shareholders would be left in an entirely helpless condition and the result would be injustice and inequity which would be harmful for the healthy development of international investment.

As one of the objections raised to the above-mentioned argument in favour of diplomatic protection of a national State of shareholders, we may point out the difficulty which would be produced by the cumulative existence or competitive concurrence of rights of several States concerning the same object of diplomatic protection. It follows that in the case of multinational composition of capital, more than one national State of shareholders might intervene on the condition that the jurisdictional basis exists, either by the way of intervention as provided for in Articles 62 and 63 of the Statute or by special agreement or application (Article 40 of the Statute). Each of those entitled to diplomatic protection would be able to exercise its right of protection according to its discretion without prejudicing the rights of protection of other States concerned.

Such competitive existence of rights of diplomatic protection of diverse States appears an extraordinary phenomenon, but we consider that the same kind of legal phenomenon can be found in contractual or delictual matters where the same contract or wrongful act gives rise to a claim for compensation by diverse persons concerned. In such a case, concurrent plural claims may serve a common purpose; if one of them were exercised and satisfied, the remaining rights would be extinguished, having attained their purpose.

Accordingly, in the present case, there does not exist any contradiction between, on the one hand, the right of diplomatic protection of the Barcelona Traction Company by its national State, namely Canada and, on the other hand, the right of diplomatic protection of its shareholders by their national State, namely Belgium. The existence of the former right does not exclude either the existence of the latter right or its exercise.

Since the two rights of diplomatic protection—that of Canda and that of Belgium—co-exist in parallel but independently, it is not a necessity for Belgium's right of diplomatic protection that Canada should finally waive its right of protection in regard to the Barcelona Traction Company. Such a fact is not relevant to the existence of the right of diplomatic protection of Belgium in favour of its shareholders.

We cannot deny the possibility of a cumulative existence of rights of diplomatic protection in the case of a company just as a natural person may have dual nationality. If a claim of one State is realized,

the claim of the other State will be extinguished to this extent by losing its object. Accordingly, the defendant State cannot be compelled to pay the damage twice over.

Of course, we recognize that the fear of complication which would be caused by plural or multiple interventions of several governments has some justification. But if we deny them, the legitimate interests of shareholders might be left without protection by their national States. These phenomena would represent some of the defects inherent in the present institution of diplomatic protection, which might be related to the non-acceptability of individuals to international tribunals. Practically complication and confusion might be avoided to a considerable degree by negotiations and "solutions inspired by goodwill and common sense ..." (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 186) between the States concerned. Or it would be a task of international legislative policy to provide means to guarantee the protection of private investments and to find appropriate solutions in order to overcome the difficulties arising from the multiple intervention of several governments. We should not refuse the necessary remedies to protect legitimate shareholders by conjecturing extreme cases.

It is true that there is no rule of international law which allows two kinds of diplomatic protection to a company and its shareholders respectively, but there is no rule of international law either which prohibits double protection. It seems that a lacuna of law exists here; it must be filled by an interpretation which emanates from the spirit of the institution of diplomatic protection itself.

* * *

From what is stated above, we can conclude that whether Canada is entitled to diplomatic protection of the Barcelona Traction Company as its national State or whether the Canadian Government once wanted to intervene in the dispute but finally gave up the original intention, is not legally relevant to solve the question of the right of diplomatic protection of shareholders by their national State. This right exists independently of the right of the national State of the company. The history of the comparatively short-lived Canadian intervention (1948-1952 or 1955), however, would prove the *raison d'être* of the right of diplomatic protection of shareholders by their national State.

The above-mentioned protection of the shareholders themselves is based on the concept which characterizes relationships between the company and its members, namely the shareholders. Although an inde-

pendent juridical personality is conferred on a company, this personality does not present itself as an end, but simply as a means to achieve an economic purpose, namely a maximum degree of pecuniary interest by a limited sum of investment

A company in the sociological sense belongs to the category of the "Gesellschaft", and presents itself as a pure means to achieve the economic purpose of its members, namely the shareholders; the shareholders constitute the substance of its existence; they are the sovereign of the company like the citizens in a democratic State. Who require, in the material sense, diplomatic protection in the case of a company? No-one other than the shareholders in the company, although in some cases the company itself, may appear as a formal protégé on the scene, having its cause espoused by its national State. Therefore in a company, the shareholders, as being its real substance, and the subject of interests, must be considered as the object of diplomatic protection; not the company itself which has nothing but a fictive existence and can only play the role of a technique for the purpose of protection of the shareholders who are the real owners of the corporate property and enterprise.

From what has been said above, we can conclude that there exists between a company and its shareholders a relationship of community of destiny which has been repeatedly emphasized, particularly in the oral arguments by the Belgian Government, in order to justify its right of diplomatic protection on behalf of its shareholders in the present case. The alleged internationally wrongful acts, it is true, are directed against the company itself and not against the shareholders, but only in a formal sense; in reality both are inseparably connected to each other in such a way that prejudicial acts committed against a company necessarily produce an effect detrimental to its shareholders by reduction of the sum of dividends or surplus assets. In a company, we can recognize the existence of unity between company and shareholders in the sense that profit and loss are in the final instance attributed to the shareholders —of course under the condition that the liability of each shareholder is limited to the sum of shares which he has subscribed.

Therefore, the alleged internationally wrongful acts directed against a company can be conceived as directed against its shareholders themselves, because both can be considered, in substance, i.e., economically, identical.

Accordingly, one cannot deny to the national State of shareholders the right of diplomatic protection of its nationals on the ground that another State may possess or exercise the same right on behalf of the company itself. Consequently, in the present case, the recognition of the right of diplomatic protection of Canada, which is the national State of the Barcelona Traction Company, does not exclude the same right of Belgium, the national State of the shareholders of that company on their behalf; hence Belgium may be entitled to exercise its original

right of protection of her shareholders independently of the protection of the company itself by Canada. Therefore, the Belgian Government cannot be regarded as substituting the Canadian claim to the protection of the company.

It might be said in passing that by this assertion we do not go so far as to maintain that the interest of the company coincides perfectly with the totality of the shareholders' interests. We must recognize that originally a company is no more than a means for its shareholders to achieve their lucrative purpose; but so long as the company continues as a going concern it would enjoy in some measure an independent existence free from the arbitrary decision of the shareholders. So long as a company exists for a considerable space of time and fulfils its corporate purpose it acquires an objective existence (the idea of so-called "Unternehmen an sich" of Walther Rathenau) which, owing to its important social role the shareholders would not dare dissolve arbitrarily, even if it were legally possible, by the prescribed majority vote. We know that many contemporary big and influential corporations are extending their activities to fields of an educational, scientific and philanthropic nature and are contributing to the solution of social and cultural problems for the welfare of humanity (A. A. Berle, *The 20th Century Capitalist Revolution*, 1954, pp. 164, 188). Accordingly, even in the case of a corporation created for the egoistic purposes of shareholders, there may exist a common interest of the company distinct from the individual interest of the shareholders, and therefore we cannot deny the possibility of conflict between these two interests.

However, the possibility of common interest does not preclude the fact that between the company and the shareholders a relationship of community normally exists and wrongful acts done to and damage inflicted on the former can be considered also as being directed against the latter.

We recognize that an adequate connection of cause and effect may exist between the wrongful acts done to the company and the damage inflicted on the shareholders, but we can explain this fact, as is mentioned above, by the existence of a community of destiny or a substantial economic identity between them.

* * *

From what has been stated above, we consider that we can demonstrate the *raison d'être* of the right of diplomatic protection by a State of its nationals who are shareholders in a company of a nationality other than that of the protecting State.

The Parties have argued by quoting international arbitral precedents, the practice of States and the writings of authoritative publicists to defend their standpoints. Although cases concerning the protection of shareholders exactly analogous to the present case cannot be found,

international practice and doctrine do not seem to deny the protection of shareholders by their national State to which the company itself does not belong.

The Spanish Government admits the protection of shareholders by their national State (1) where, following the general tendency of international practice and doctrine, the company possesses the nationality of the State responsible for the damage, and (2) where the foreign company has been dissolved or is practically defunct. In these cases there exists the circumstance that the protection of the shareholders by the national State of the company cannot be expected, either factually or legally. This is why in these cases the protection of shareholders directly by their national State is justified. The question is whether these two instances are to be considered as a manifestation of a more general principle in favour of the protection of shareholders or as an exception to the main principle which does not admit their protection.

The principle of customary international law concerning diplomatic protection by the State of its nationals, however general and vague it may be, does not prohibit the rights or the legal position of shareholders being included in "property, rights and interests" as an object of protection. This conclusion can be justified as a correct interpretation of customary international law concerning diplomatic protection, particularly taking into account the above-mentioned necessity of international investment in the past as well as in the future. The nature of the interest of shareholders is to be interpreted as a legitimate one worthy of protection by their national State.

Next, customary international law does not prohibit protection of shareholders by their national State even when the national State of the company possesses the right of protection in respect of the latter.

The Spanish Government denies the right of protection of shareholders by their national State. It admits diplomatic protection of shareholders only in the two above-mentioned exceptional cases. Protection of shareholders from this viewpoint is considered only as a substitute for the protection of the company itself which has become impracticable through the circumstances indicated above. From our viewpoint, the protection of the shareholders possesses a meaning independently of the protection of the company itself. Accordingly, it can exist regardless of circumstances which might make the exercise of the right of protection of a company and the intervention of its national government impossible or difficult. There does not appear to exist in international law any restriction to the effect that the protection of shareholders in a foreign company by their national State must be limited to the above-mentioned two cases. The national State of shareholders, in the present case Belgium, is entitled to protect them just as in the cases where a company possesses the nationality of the responsible State, or a company has been dissolved or is practically defunct.

In short, the contention of the Spanish Government is based on the

municipal law concept of corporate personality and that of shareholders which is its corollary. The two protections, we consider—protection of the company and that of the shareholders—may co-exist and on equal terms; the latter is not supplementary to the former.

For the foregoing reasons, we conclude that Belgium has an independent right to protect the Belgian shareholders in Barcelona Traction in conformity with the interpretation of customary international law concerning the diplomatic protection of nationals.

II

So far we have been concerned with the question of the legal, that is to say, the theoretical basis for the *jus standi* of the Belgian Government: the question whether a State has a right to protect its nationals who are shareholders in a company of a nationality other than that of the protecting State. This question having been answered in the affirmative, we must now consider some questions from the viewpoint of the identification of individual shareholders with reference to the present case.

These questions are concerned of course with the existence of shareholders who are entitled to receive diplomatic protection by their home State. Not all so-called "shareholders", but only those who are qualified from the functional and temporal viewpoint to receive protection. (It goes without saying that proof of their status as shareholders must be furnished as a matter of principle either by the register in the case of registered shares or by possession in the case of bearer shares.)

From the viewpoint of functional differentiation a question arises when shares are owned by two persons: the one, a nominee, whose name is entered in the share register and who exercises rights as *alter ego* of the real owner; the other, the beneficial owner, who enjoys rights as the real or economic owner of the shares. By what criterion shall it be decided which of those two is entitled as shareholder to be the object of protection: the nominee or the beneficial owner?

In the present case, the register of the shareholders of the Barcelona Traction Company kept by the National Trust Company of Toronto gives successively as from 7 November 1939 the names of the Charles Gordon Company, a partnership of New Jersey and Newman & Company, a partnership of New York—the two are of American nationality—and does not give the name of Sidro which is of Belgian nationality. It is contended by the Belgian Government that a contractual nominee-beneficial-owner relationship exists between the two American partnerships and Sidro. The purpose of the establishment of such a relationship

seems to have been a wartime necessity of German-occupied Belgium to protect Sidro's participation in the capital and management of Barcelona Traction against an enemy power. Under such relationships a question arises: which of the nationalities—American or Belgian—prevails, in deciding the national character of Sidro's shares?

The Spanish Government denies the effect of the Belgian nationality of Sidro by regarding the nominees, who are of American nationality, as the true shareholders. We consider that the beneficial ownership, and, accordingly, in the present case, Sidro's position as beneficial owner, must be the criterion for deciding this question. The reason therefor is as follows: diplomatic protection depends upon where the real interest resides; it is not concerned with a legal mechanism of private law such as corporate personality, nominee relationship, etc. As we have seen in another context, just as the rule of diplomatic protection should disregard the legal veil of the corporate personality of the company in favour of its real substance, namely the shareholders, so it should disregard the legal veil of the nominee in favour of the beneficial owner. The existence of a nominee relationship does not exercise any influence upon the diplomatic protection of shareholders. Sidro loses neither its shareholding in the Barcelona Traction Company nor its Belgian nationality. It is quite unthinkable that the conclusion of the nominee contract which was motivated by a wartime necessity could exercise any influence upon the status of Sidro as a shareholder of the Barcelona Traction Company.

In short, the fact that the two above-mentioned partnerships are of American nationality has no relevance for the purpose of establishing the *jus standi* of the Belgian Government. What is relevant for the *jus standi* of Belgium is the fact that Sidro is the beneficial, that is to say, the real owner of Barcelona Traction's shares in respect of which the American partnerships are nominees.

* * *

Next, we shall consider the question of the existence of a bond of nationality between the shareholders and the protecting State as a condition of protection in the present case.

The object of the Belgian Government's Application of 14 June 1962 is reparation for the damage allegedly caused to a certain number of its nationals in their capacity as shareholders of the Barcelona Traction, Light and Power Company. In the shareholders are included both natural and juridical persons.

The contention of the Belgian Government concerning its *jus standi* is based on the preponderance of the Belgian interest in the Barcelona Traction Company. The preponderance of the Belgian interest is evident, the Belgian Government argues, from the fact that the majority of the shareholders in that company are of Belgian nationality and that it

amounted to 88 per cent. of Barcelona Traction's capital stock. The most important shareholder in the Barcelona Traction Company, according to the Belgian Government, is admitted to be Sidro, S.A. (Société Internationale d'Energie Hydro-Electrique), whose holding is said to amount to 75 per cent. of the shares of the Belgian holding.

The preponderance of the Belgian participation in Barcelona Traction at the time of its adjudication in bankruptcy is indicated by the Belgian Government (Memorial, paragraphs 1-10) by the following figures:

Registered shares issued	1,080,446
Bearer shares issued	718,408
Total shares issued	1,798,854
Shares owned by Belgian nationals (minimum)	1,607,845
Shares not owned by Belgian nationals (maximum)	191,009

Belgian participation in the capital of Barcelona Traction at the date of the adjudication in bankruptcy of that company therefore amounted to not less than 89.3 per cent. of the capital issued.

Of this figure of 89.3 per cent., 75.75 per cent. belonged to Sidro, so that 13.55 per cent. at least of the capital of Barcelona Traction belonged to other Belgian nationals.

The figures given above come from three main sources of information, namely:

1. Information derived from the register of Barcelona Traction registered shares.

A statement drawn up by the National Trust Company of Toronto, which keeps the register of the shares of Barcelona Traction, gives the following figures:

Total issued shares	1,798,854
Registered shares	1,080,446
Registered shares owned by Sidro	1,012,688
Registered shares owned by shareholders other than Sidro	67,758
	1,080,446

The total number of registered shares in Belgian hands was 1,013,108 in which 420 shares belonging to Belgian shareholders other than Sidro are included.

The shares mentioned above as belonging to the Sidro Company had been entered in the list of registered shares since 7 November 1939 in the name of Charles Gordon & Company as nominee.

2. Information derived from the accounts of Sidro.

The above information is confirmed and supplemented by the accounts of Sidro, for the certificate drawn up by the firm of chartered accountants, Deloitte, Plender, Giffiths & Co., dated 6 May 1959 shows that, as at 12 February 1948, Sidro owned 1,012,688 Barcelona Traction registered shares and 349,905 bearer shares, i.e., in all 1,362,593 shares out of a total of 1,798,854 shares issued, which represented 75.75 per cent. of the capital of the company.

3. Facts derived from the information gathered by the Institut belgo-luxembourgeois du change (Belgo-Luxembourg Exchange Institute).

At the time of adjudication in bankruptcy of Barcelona Traction, this company had issued 1,798,854 shares, of which at least 1,607,845 were owned by Belgian nationals; that is to say, 1,362,593 shares owned by Sidro (1,012,688 registered and 349,905 bearer shares), and at least 245,252 shares (420 registered and 244,832 bearer shares) owned by other Belgian nationals.

Belgian participation amounted therefore to at least 89.3 per cent. of the capital of the company.

Next, we shall see Belgian interests in Barcelona Traction at the time of the institution of international proceedings (14 June 1962) (Memorial, paras. 11-19). This is shown by the following figures:

Registered shares issued	1,472,310
Bearer shares issued	326,544
Total shares issued	1,798,854
Shares owned by Belgian nationals	1,588,130
Shares not owned by Belgian nationals	210,724

Proof of the preponderance of Belgian participation at that date will be given with the help of information furnished by:

1. The register of registered shares of Barcelona Traction.

The statement drawn up by the National Trust Company of Toronto gives the following facts:

Total issued shares	1,798,854
Registered shares	1,472,310
Registered shares owned by Sidro	1,354,514
Registered shares owned by shareholders other than Sidro	117,796
Total	1,472,310

The total number of registered shares in Belgian hands was therefore 1,356,902 in which 2,388 shares belonging to Belgian shareholders other than Sidro are included.

As to the registered shares owned by Sidro, the nominee this time was the firm of Newman & Co., New York, which had succeeded Charles Gordon & Co.

2. Information derived from the accounts of Sidro.

A certificate drawn up by the firm of Deloitte, Plender, Griffiths & Co., dated 23 August 1962, shows that on 14 June 1962 Sidro owned 1,354,514 Barcelona Traction registered shares, and 31,228 bearer shares, that is to say, a total of 1,385,742 shares out of 1,798,854 shares issued, which represented 77 per cent. of the total capital of Barcelona Traction.

3. Information concerning bearer shares owned by Belgian nationals.

As at 1 April 1962 there were in circulation 326,554 Barcelona Traction bearer shares of which 31,228 shares were owned by Sidro.

When the proceedings were instituted the number of Barcelona Traction shares in circulation was 1,798,854 of which at least 1,588,130 were owned by Belgian nationals. Of these 1,385,742 shares were owned by Sidro (1,354,514 registered and 31,228 bearer shares) and at least 202,388 (2,388 registered and 200,000 bearer shares) were owned by other Belgian nationals.

From the facts given above, it can be concluded that more than 88 per cent. of the Barcelona Traction shares were in Belgian hands both at the time of the adjudication in bankruptcy of that company and at the time the present proceedings were instituted.

This Belgian participation is made up as follows: 10 to 15 per cent. of the capital of Barcelona Traction is owned by the general public in Belgium, whilst 75 to 77 per cent. of the capital is owned by Sidro, a company under Belgian law.

The foregoing is the demonstration on the part of the Belgian Government concerning the preponderance of the Belgian participation in the capital of Barcelona Traction.

Are the figures of 88 per cent. of the Belgian participation and 75 per cent. of Sidro's participation at a critical date in Barcelona Traction correct? It depends on the reliability of information furnished by the National Trust Company of Toronto, the firm of chartered accountants, Deloitte, Plender, Griffiths & Company, and the Institut belgo-luxembourgeois du change.

It is argued that these three main sources being on the Belgian side, one cannot therefore expect unprejudiced information from them. But it is also not just to deny absolutely their evidential value in such circumstances. Each case should be valued according to its own merits.

Particularly, the matter in question is that of degree. The figure for Belgian participation may not be correct to the last digit. It may be 90 or 80 per cent. instead of 88 per cent. But one cannot deny the evidential value of a statement simply because it may involve some minor incorrectness or mistake. Whether the percentage is 80 or 10 per cent. the question of the *jus standi* of the Belgian Government is entirely the same.

* * *

Next, we are confronted with the question as to whether Sidro can be said to have Belgian character. It is quite a different question from that of whether the 75 per cent. participation of Sidro in the Barcelona Traction's capital stock really existed. It is concerned with the constitution of Sidro as a corporate body which may include natural and juridical persons as its constituent elements. In the case where a shareholder of Sidro is a company, the Belgian character of Sidro might depend on the nationality of individual shareholders of that company. If a shareholder of this latter company is a company the same process should be repeated, and would go on *ad infinitum*. Under such circumstances the national character of Sidro could only be decided by the nationality of ultimate individual shareholders who were natural persons.

The Spanish Government denies the Belgian character of Sidro by contending that Sofina, the principal shareholder of Sidro, is very limited in its Belgian holding. However, to establish the Belgian character of Sidro, which is required for its protection, we need not go to such excessive lengths of logical formalism.

The fact that Sidro is of Belgian nationality can be recognized without the slightest doubt. This company was formed under Belgian law and it has its seat *(siège social)* in Belgian territory, namely in Brussels. Its Belgian nationality has never been denied by the Spanish Government. Sidro, accordingly, is entitled to receive diplomatic protection from the Belgian Government, being qualified therefor by the facts of its formation and seat. These facts are sufficient to justify the connecting link between Sidro and Belgium. Just as the Barcelona Traction Company can enjoy the diplomatic protection of the Canadian Government by reason of similar factors, so Sidro is entitled to receive diplomatic protection from the Belgian Government by reason of its Belgian nationality.

It is possible that Sidro may be susceptible of two protections which are compatible with each other: on the one hand, it might be protected indirectly by the Canadian Government as a shareholder of a Canadian company, Barcelona Traction, on the other hand, it might be protected directly by the Belgian Government owing to its Belgian nationality. In this latter respect Sidro is subject to Belgian protection as a shareholder of Barcelona Traction, by virtue of having Belgian nationality and as a company as such.

In this context we must add a few words concerning a Judgment of the International Court of Justice in the *Nottebohm* case (*Second Phase, I.C.J. Reports 1955*, pp. 16, 17, 25, 26). This Judgment denied the extension of the right of diplomatic protection of Liechtenstein to Mr. Nottebohm vis-à-vis Guatemala on the ground that his nationality of Liechtenstein lacked effectiveness. That Judgment was concerned with the effectiveness of nationality of a natural person and not that of a company. That Judgment is not germane to the present case, however, because here the nationality of Sidro is undoubtedly established.

In short, the *jus standi* of the Belgian Government can be founded on the Belgian nationality of Sidro, even if the Belgian nationality of the majority of the shareholders ultimately cannot be proved.

The percentage of Sidro and other Belgian holdings in the whole capital stock of the Barcelona Traction Company has no particular relevance for the question of the *jus standi* of the Belgian Government, but it would become an important factor for the assessment of damage allegedly incurred by Belgian shareholders.

The question of continuity of nationality, that is, identification of shareholders from the temporal viewpoint, can be decided in the affirmative. Sidro's continued existence since 1923, covering the two critical dates, is sufficient to prove this continuity.

As to the question of bearer shares, this does not seem relevant to a decision concerning *jus standi* and continuity.

For the above-mentioned reasons the third preliminary objection raised by the Spanish Government should be rejected.

We shall proceed to examine the fourth preliminary objection raised by the Spanish Government against the Belgian Application.

III

In the fourth preliminary objection the Spanish Government holds that the Belgian Application of 14 June 1962 is inadmissible by reason of the non-exhaustion of local remedies by the Barcelona Traction Company and those concerned, as required by international law.

The Spanish Government invokes not only the rule of customary international law on local remedies, but Article 3 to the Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927, which provides as follows:

> "In the case of a dispute the occasion of which, according to the municipal law of one of the Parties, falls within the competence of the national courts, such Party may require that the dispute shall not be submitted to the procedure laid down in the present Treaty until a judgment with final effect has been pronounced within a

reasonable time by the competent judicial authority." [English text from *League of Nations Treaty Series*, Vol. LXXX, pp. 28 ff. *Note by the Registry.*]

That the local remedies rule constitutes "a well-established rule of customary international law" and that "the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law", is clearly declared by the International Court of Justice (*Interhandel, Judgment, I.C.J. Reports 1959*, p. 27).

The International Court of Justice continues:

"Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system." (*Ibid.*, p. 27.)

The provision of Article 3 of the said Treaty is nothing else but the recapitulation of this already existing rule, the spirit and principle of which are found amplified in the Court's decision and implemented in conventions providing for the compulsory jurisdiction of international tribunals.

Before examining the well-foundedness or otherwise of the fourth preliminary objection, we must consider the relationship between two concepts, namely exhaustion of local remedies in detail and denial of justice, which is regarded as the main or central issue arising from the alleged internationally wrongful acts imputed by the Belgian Government to the Spanish authorities.

We cannot understand the position of the Court, which ordered the joinder of the fourth preliminary objection to the merits, without considering the relationship of the exhaustion of local remedies to denial of Justice.

The Court decided as follows:

"As regards the fourth Preliminary Objection, the foregoing considerations apply *a fortiori* for the purpose of requiring it to be joined to the merits; for this is not a case where the allegation of failure to exhaust local remedies stands out as a clear-cut issue of a preliminary character that can be determined on its own. It is inextricably interwoven with the issues of denial of justice which constitute the major part of the merits. The objection of the Respondent that local remedies were not exhausted is met all along the line by the Applicant's contention that it was, *inter alia*, precisely in the attempt to exhaust local remedies that the alleged denials of justice were suffered." (*Barcelona Traction, Light and Power Company Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 46.)

Therefore, before deciding whether the fourth preliminary objection is to be upheld or not, we shall make some observations on the complicated relationship existing between the exhaustion of local remedies and the denial of justice.

There can be no doubt that the local remedies rule possesses a procedural character in that it requires the person who is to be protected by his government to exhaust local remedies which are available to him in the State concerned, before his government espouses the claim before an international tribunal.

What is the *raison d'être* of this rule?

In the first place, the consecutive existence of two procedures—municipal and international—would guarantee and promote the justness of a decision. (It goes without saying that the procedure of an international tribunal is not comparable to that of, for instance, the Cour de Cassation.)

Secondly, so long as local remedies are not exhausted, and some other remedies remain, the condition is not fulfilled. The exhaustion means the existence of a "judgment with final effect" or analogous circumstances. In such situation recourse to international remedies will be justified.

Thirdly, this procedural rule appears to express a higher conception of equilibrium or harmony between national and international requirements in the world community. The intention of this rule is explained as follows by Professor Charles De Visscher: "Il s'agit donc ici avant tout d'une règle de procédure propre a réaliser un certain équilibre entre la souveraineté de l'Etat recherché et, d'autre part, les exigences supérieures du droit international ..." ("Le déni de justice en droit international", 52 *Académie de droit international, Recueil des cours*, 1935, II, p. 423), or, as Judge Córdova said:

> "The main reason for its existence lies in the indispensable necessity to harmonize the international and the national jurisdictions—assuring in this way the respect due to the sovereign jurisdiction of States—by which nationals and foreigners have to abide and to the diplomatic protection of the Governments to which only foreigners are entitled" (separate opinion, *Interhandel, Judgment, I.C.J. Reports 1959*, p. 45).

The procedural requirement of the exhaustion of local remedies presupposes the existence of a high degree of confidence by the claimant in the judicial system and in its application, and this constitutes one of the fundamental conditions to be fulfilled in the matter of the exhaustion of remedies in the State concerned.

* * *

Next, we shall consider the concept of denial of justice.

Although the exhaustion of local remedies belongs to the plane of procedural law, denial of justice belongs to the plane of substantive law. In the present case, the latter constitutes the fundamental concept applied to all the allegedly internationally wrongful acts imputed by the Belgian Government to the Spanish authorities. The former, on the contrary, is nothing other than a condition for the obtaining of reparation for the damage suffered by the Barcelona Traction Company's shareholders through denial of justice.

We shall examine, in the first place, the concept of denial of justice, and next the logical relationship between this latter and the local remedies rule.

The term "denial of justice" in its loose sense means any international delinquency towards an alien for which a State is liable to make reparation. It denotes in its ordinary meaning an injury involving the responsibility of the State committed by a court of justice. As far as acts of a court which would involve the State in responsibility are concerned, a very narrow interpretation practically does not admit the existence of a denial where decisions of any kind given by a court are involved, but seeks to limit the application of this institution to the case of the denial to foreigners of access to the courts. This view would virtually mean by denial the exclusion of foreigners from all actions instituted in courts of law; therefore this concept cannot be accepted. Another more moderate and generally approved view which can be considered as acceptable is that denial of justice occurs in the case of such acts as—

> "corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it, ... But no merely erroneous or even unjust judgment of a court will constitute a denial of justice, ...". (Brierly-Waldock, *The Law of Nations*, 6th ed., 1963, p. 287; see also Sir Gerald Fitzmaurice, "The meaning of the term 'denial of justice' ", *British Year Book of International Law*, 1932, p. 93.)

* * *

Now we shall consider the logical relationship between the two concepts: exhaustion of local remedies and denial of justice, and proceed to examine the admissibility of the fourth preliminary objection.

As we have seen above, the exhaustion of local remedies is a condition of a procedural nature, which is imposed on an individual whose interests his national State wants to protect by international proceedings. But to be able to fulfil this condition there must exist in the State concerned a judicial situation such as to make the realization of exhaustion possible. Consequently, we must recognize that some cases constitute exceptions

in regard to the application of the local remedies rule. Instances of such cases are given in the following passage:

> "La réclamation internationale n'est pas subordonnée à l'épuisement préalable des recours quand ceux-ci sont absents, inadéquats ou a priori inefficaces. Il en est ainsi quand l'organisation judiciaire de l'Etat ne fournit aucune voie légalement organisée, quand les voies légales n'ouvrent aux intéressés aucune perspective raisonnable de succès, ou enfin quand, au cours même de la procédure, le plaideur étranger est victime de lenteurs ou d'obstructions équivalant à un refus de statuer et qui l'autorisent à abandonner une voie qui se révèle sans issue." (Charles De Visscher, *op. cit.*, pp. 423-424.)

Under these circumstances respect for and confidence in the sovereign jurisdiction of States which, as indicated above, constitute the *raison d'être* of the local remedies rule, do not exist. The rule does not seem to require from those concerned a clearly futile and pointless activity, or a repetition of what has been done in vain.

It is said that "a claimant cannot be required to exhaust justice in a State when there is no justice to exhaust" (Charles De Visscher, *op. cit.*, p. 424); and again "A claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust". (Statement by Mr. Fish, Secretary of State, quoted in Moore, *International Law Digest*, Vol. VI, 1906, p. 677.) If a state of denial of justice prevails in the country concerned, there can be no possibility of exhausting local remedies. In the above-mentioned extreme cases, it is impossible for the interested parties to comply with the condition concerning the exhaustion of local remedies; accordingly this condition must be dispensed with for them.

We must limit the application of the local remedies rule to cases and circumstances where its fulfilment is possible. Thus it may be said that this rule is not of an absolute character in its application.

In the light of the above considerations, we shall examine whether the exhaustion of local remedies can be required from the Belgian Government and whether in the case of an affirmative answer it has been observed or not.

It is clear that the claim put forward by the Belgian Government is based on the alleged internationally wrongful acts imputed to the Spanish Government and that these acts are characterized globally as a denial of justice.

According to the Belgian Application (paragraph 43) they—

> "relate to a whole series of positive measures, acts or omissions which are often contradictory, which overlap and are interrelated, and of which the unlawful character from the point of view of the law of nations is seen particularly in the final result to which they have led".

The Belgian Government classifies these measures, acts and omissions into administrative measures manifestly arbitrary or discriminatory, and conduct on the part of the courts revealing a lack of impartiality, contempt for the principle of the equality of parties before the court, and other defects amounting to a denial of justice from the point of view of international law. As to the conduct of the courts, the Belgian Government contends that a large number of decisions of the Spanish courts are vitiated by gross and manifest error in the application of Spanish law, arbitrariness or discrimination in international law, denials of justice *lato sensu*. Furthermore, the Belgian Government contends that in the course of the bankruptcy proceedings the rights of the defence were seriously disregarded (denials of justice *stricto sensu*). (Final submissions of the Government of Belgium filed on 14 July 1969.)

In sum, the claim of the Belgian Government is based on the alleged denials of justice, *sensu stricto* as well as *sensu lato*, committed by the Spanish authorities in regard to the Barcelona Traction Company and others concerned. In the circumstances of the present case, however, we cannot recognize that so serious a situation of denial of justice has in general prevailed that the interested party should be exempted from the obligation to exhaust local remedies. But concerning this particular case it is conceivable that, from the Applicant's viewpoint, the contention of the alleged denial of justice would imply the uselessness of the exhaustion of local remedies.

If the facts of collusion and connivance of the Spanish courts or judges with the March group really existed in dealing with the proceedings of the Barcelona Traction bankruptcy case, as contended by the Belgian Government in the written and oral pleadings, we can conclude with reason that, under such circumstances, to expect a successful outcome of the exhaustion of local remedies by those concerned would be simple nonsense.

The two concepts—exhaustion of local remedies and a denial of justice—are in contradiction so far as the latter is meant in *sensu stricto*. The former is based on a positive viewpoint, namely the expectation of the realization of a certain result by the courts; the latter on a negative viewpoint, namely its renouncement.

Hypothetically, if a denial of justice really existed, there would be justification for believing that the local remedies rule would have become useless to that extent, as in the case of lack of an appropriate legal and judicial system and organization.

Briefly, in the concept of a denial of justice there seems to be inherent the contradiction of denying the possibility of the fulfilment of the exhaustion of local remedies. It seems that, in a case where the "original wrong" consists in a denial of justice, the fulfilment of the exhaustion

of local remedies cannot be expected, unlike the case of other internationally wrongful acts (for instance, murder, confiscation of property, etc.) where independent fulfilment of the exhaustion rule can be required.

If there is an element in the denial of justice which makes the fulfilment of the exhaustion rule impossible, then the Belgian Government would be dispensed to that extent from the observance of this rule. Despite the contentions by the Belgian Government concerning alleged facts of a denial of justice in the bankruptcy proceedings against the Barcelona Traction Company, the Belgian Government does not insist that "there is no justice to exhaust" in Spain and that Belgium should exceptionally be exempt from the obligation to exhaust local remedies. The Belgian Government does not contend that the Spanish judiciary as a whole is paralyzed and corrupt or that the fulfilment of the exhaustion rule is impossible; its complaints are concerned only with some of the judges and courts.

* * *

Now let us see whether the obligation of exhaustion of local remedies was fulfilled by the Barcelona Traction Company and those concerned.

First, we must consider what kind of remedies should be exercised and to what degree these remedies have been pursued. Owing to the highly complicated structure and proceedings of this dispute, it is extremely difficult to answer these questions. Everything depends on the circumstances of the case and the issues and, in particular, on the effectiveness of the available remedies (such as revision by the supreme court). Sometimes, complication arises from a difference of interpretation of law between the Parties. For instance, the Spanish Government insists that, as a result of the Barcelona Traction Company's failure to observe the time-limit of eight days for a plea of opposition to the Reus judgment of 12 February 1948, the case became *res judicata* and, consequently, all actions of the Barcelona Traction Company and its subsidiaries should be null and void. The Belgian Government, on the contrary, basing itself on the nullity of the publication in Spain of the judgment, argues that the time-limit of eight days did not begin to run and therefore it did not expire. If the former argument is right, the Barcelona Traction Company and its subsidiaries would lose the means of redress by becoming unable to exhaust local remedies, the result of which would be highly inequitable.

We are led to the conclusion that in the matter of the exhaustion of local remedies the same spirit of flexibility should exist which, as indicated in another context, prevails in matters of diplomatic protection in general. If we interpreted the provision of Article 3 of the Treaty of Conciliation,

Judicial Settlement and Arbitration of 1927 and the customary international rule on the matter of local remedies too strictly, possible minor errors in the technical sense would cause those concerned to be deprived of the benefit of diplomatic protection, particularly in such an affair as the Barcelona Traction case the complexity and extensiveness of which, from the substantive and procedural viewpoints, appear to be extremely rare in the annals of judicial history.

The guiding principle for resolving the questions concerning exhaustion of local remedies should be the spirit of diplomatic protection according to which, in addition to a juristic, technical construction, practical considerations led by common sense should prevail. The decision as to whether legal measures offer any reasonable perspective of success or not, should be flexible in accordance with the spirit of diplomatic protection. Even if, for instance, institutionally an administrative or judicial remedy exists whereby an appeal may be made to higher authority, this remedy may be ignored without being detrimental to the right of diplomatic protection, if such an appeal would be ineffective from the point of view of common sense.

From what has been said above, "exhaustion" can be seen to be a matter of degree. Minor omissions should not be imputed to the negligence of those concerned. It is sufficient that the main means of redress be taken into consideration. The rule of exhaustion does not demand from those concerned what is impossible or ineffective but only what is required by common sense, namely "the diligence of a *bonus paterfamilias*".

* * *

Next, let us enumerate some of the main measures alleged to have been taken by the Barcelona Traction Company and those concerned (according to the final submissions filed on 14 July 1969 by the Government of Belgium, Section VII).

(1) Concerning the Reus court's lack of jurisdiction to declare the bankruptcy of Barcelona Traction:

opposition proceeding of 18 June 1948;
application of 5 July 1948 (for a declaration of nullity); its pleading of 3 September 1948;
a formal motion of National Trust in its application of 27 November 1948;
Barcelona Traction Company entered an appearance (23 April 1949) in the proceedings concerning the Boter *declinatoria*; its formal adherence to that *declinatoria* (11 April 1953).

(2) Concerning the bankruptcy judgment and the related decisions:

application of 16 February 1948 on the part of the subsidiary companies, Ebro and Barcelonesa to have the bankruptcy judgment set aside;

the bankrupt company itself entered opposition to the judgment by a procedural document of 18 June 1948, confirmed on 3 September 1948;

incidental application for a declaration of nullity submitted by the Barcelona Traction Company (5 July 1948).

(3) Concerning the blocking of the remedies:

numerous proceedings taken by the Barcelona Traction Company, beginning with the incidental application for a declaration of nullity (5 July 1948).

(4) Concerning the failure to observe the no-action clause:

clause referred to by National Trust in its application for admission to the proceedings (27 November 1948).

(5) Concerning the conditions of sale:

the conditions of sale were attacked by Barcelona Traction in an application to set aside and on appeal, in an application of 27 December 1951 for a declaration of nullity containing a formal prayer that the order approving the conditions of sale be declared null and void, and in an application of 28 May 1955;

the same challenge was expressed by Sidro in its action of 7 February 1953 and by other Belgian shareholders of the Barcelona Traction Company in their application of 26 May 1955.

These facts which have not been contested by the Spanish Government and whose existence may be considered as being of judicial notice, prove that the case was effectively pursued before the Spanish courts or judges and that local remedies were exhausted as a condition for diplomatic protection by the Belgian Government.

Whether local remedies have been exhausted or not must be decided from a consideration of whether the most fundamental spirit of this institution has been observed or not. Now, this spirit, as is indicated above, constitutes a means of ensuring the respect and confidence due to the sovereign jurisdiction of a State. The important point is that this spirit has been respected.

The aim of the rule of exhaustion of local remedies is a practical one and its application should therefore be elastic. Each situation, being different, requires different treatment. We must beware of the danger to which this rule is exposed because of its procedural and technical nature, lest it make necessary diplomatic protection futile by an excessive raising of the objection of non-exhaustion.

Moreover, the fact that in this case, which was pending for more than

14 years, from 12 February 1948 (date of the bankruptcy judgment against the Barcelona Traction Company by the Reus judge) to 14 June 1962 (date of the Application by the Belgian Government), 2,736 orders and 494 judgments by lower courts and 37 by higher courts had been delivered, according to the Spanish Government. Even if these figures are not correct in every detail, we can none the less recognize from them as a whole the fact that the condition of exhaustion of local remedies was indeed satisfied by the Barcelona Traction Company or its subsidiary companies. Accordingly, the argument contrary thereto by the Spanish Government is unfounded.

Therefore, the fourth preliminary objection raised by the Spanish Government must be rejected.

IV

The third and fourth preliminary objections having been decided in favour of Belgium, we must now consider a basic question on the merits, namely whether Spain is responsible for internationally wrongful acts allegedly committed by Spain which constitute "a denial of justice".

First it must be made clear that the charge of a denial of justice imputed to Spain by the Belgian Government does not denote a very narrow interpretation, namely the denial to foreigners of access to the courts. What the Belgian Government contends is not only not limited to a denial in such a formal sense, but includes a denial of justice in a wider material sense, in which, generally speaking, gross injustice, irregularities, partiality, flagrant abuse of judicial powers, unwarranted delay, etc., are included, as we indicated in another context.

The judgment of the Reus judge of 12 February 1948 declaring the bankruptcy of Barcelona Traction, its consequences and the successive acts of the Spanish courts constitute the main complaints of the Belgian Government. But the complaints include acts not only of a judicial nature but also of an administrative nature, since it is alleged that some acts and omissions of the Spanish administrative authorities, particularly of the Institute of Foreign Exchange, had caused the adjudication in bankruptcy of the Barcelona Traction Company.

From the lengthy arguments in the written and oral proceedings, we can guess the existence of antagonism between the two economic and financial groups: the one, the Mr. Juan March group and the other, the Barcelona Traction group. While the Belgian Government emphasizes the financial and political ambition and the collusion with the Spanish administrative and juridical authorities of the former group, the Spanish Government contends that there was abuse of the pyramidal structure of the latter group and stresses the tax evasion and financial irregularities

committed by that group, such as the creation of fictitious debts and the sacrifice of creditors by means of auto-contracts between Barcelona Traction and its subsidiaries.

The Spanish Government contends that the Barcelona Traction Company had been constantly in a state of "latent bankruptcy" owing to its financial methods detrimental to creditors and bondholders; the Belgian Government on the contrary insists that the financial situation of Barcelona Traction had been normal or even prosperous except in the period of the Spanish Civil War and the Second World War.

The Belgian Government also contends that individual judicial and administrative measures which constitute separate subjects of complaint, were combined into an integral whole to bring about the "hispanicization" of a prosperous foreign enterprise. According to the Belgian Government, the adjudication in bankruptcy of Barcelona Traction is nothing other than the result of the machinations of Juan March in collusion with Spanish judicial and administrative authorities. This is the reason why the Belgian Government, alongside of individual complaints, advanced an overall complaint which unites and integrates numerous separate complaints.

The main complaints put forward by the Belgian Government focus on the irregularities allegedly committed by the Spanish courts in the bankruptcy judgment and the judicial acts following this judgment. These alleged irregularities are included in the concept of denial of justice *lato sensu*. The usurpation of jurisdiction may come within denial of justice in this sense.

The usurpation of jurisdiction by the Spanish courts is alleged on the ground that Barcelona Traction was a company under Canadian law with its company seat in Canada, having neither company seat nor commercial establishment in Spain, nor possessing any property or carrying on any business there.

Also, disregard for the territorial limits of acts of sovereignty is pointed out in the measures of enforcement taken in respect of property situated outside Spanish territory, without the concurrence of foreign authorities. Furthermore, irregularities are said to have been committed by conferring upon the bankruptcy authorities, through the device of "mediate and constructive civil possession"—not physical possession—the power of exercising in Spain the rights which attached to the shares located in Canada of several subsidiary and sub-subsidiary companies and on which, with the approval of the Spanish judicial authorities, they relied for the purpose of replacing the directors of those companies, modifying their articles of association, etc.

It is to be noted that Canada did not protest against the Spanish Government's usurpation of Canadian jurisdiction which was alleged by the Belgian Government.

As denials of justice *lato sensu* the Belgian Government complains that a large number of decisions made by the Spanish courts are vitiated by

gross and manifest error in the application of Spanish law, by arbitrariness or discrimination, in particular:

(1) flagrant breach of the provisions of Spanish law which do not permit that a foreign debtor should be adjudged bankrupt if that debtor does not have his domicile, or at least an establishment, in Spanish territory;
(2) adjudication in bankruptcy when the company was not in a state of insolvency, was not in a state of final, general and complete cessation of payment either, and had not ceased its payments in Spain;

(3) the judgment of 12 February 1948 failed to order the publication of the bankruptcy by announcement in the place of domicile of the bankrupt, which constitutes a flagrant breach of Article 1044 (5) of the 1829 Commercial Code;
(4) the decisions failing to respect the separate estates of Barcelona Traction's subsidiaries and sub-subsidiaries, in that they extended to their property the attachment arising out of the bankruptcy of the parent company, and thus disregarded their distinct juridical personalities;
(5) the judicial decisions which conferred on the bankruptcy authorities the fictitious possession (termed "mediate and constructive civil possession") of securities of certain subsidiary and sub-subsidiary companies have no legal basis in Spanish bankruptcy law and were purely arbitrary.
(Final Submissions filed on 14 July 1969 by the Agent of the Belgian Government, Section III.)

There are other items which are concerned with the alleged violation of the provisions on bankruptcy and which include among others: the bestowal on the commissioner of power to proceed to the dismissal, removal or appointment of members of the staff, employees and management, of the companies all of whose shares belonged to Barcelona Traction or one of its subsidiaries; ignoring the separate legal personalities of the subsidiary and sub-subsidiary companies in the matter of the attachment of their property in Spain; irregularities concerning the convening of the general meeting of creditors of 19 September 1949; violation of the provisions concerning the sale of the property of the bankrupt company; authorization of the sale based on the allegedly perishable nature of the property to be sold; in violation of the legal provisions the commissioner fixed an exaggeratedly low upset price on the basis of an expert's opinion submitted by one side only; numerous irregularities in the General Conditions of Sale.

Next, the Belgian Government alleges that various denials of justice *stricto sensu* (Final Submissions, Section IV) were committed by the Reus court in the course of the bankruptcy proceedings, the Spanish

courts disregarding the rights of the defence; in particular: insertion by the Reus court in its judgment on an *ex parte* petition of provisions which went far beyond finding the purported insolvency of or a general cessation of payments by the bankrupt company (particularly in respect of the attachment of the property of the subsidiary companies without their having been summonsed and without their having been adjudicated bankrupt); the applications for relief presented by subsidiary companies directly affected by the judgment of 12 February 1948 were rejected as inadmissible on the grounds of lack of *jus standi*; it was impossible to develop or argue the complaints against the General Conditions of Sale because the order which had approved the General Conditions of Sale was regarded as a matter of mere routine.

The Belgian Government considers that "many years elapsed after the bankruptcy judgment and even after the ruinous sale of the property of the Barcelona Traction group without either the bankrupt company or those co-interested with it having had an opportunity to be heard on the numerous complaints put forward against the bankruptcy judgment and related decisions in the opposition of 18 June 1948 and in various other applications for relief". It continues that "those delays were caused by the motion to decline jurisdiction fraudulently lodged by a confederate of the petitioners in bankruptcy and by incidental proceedings instituted by other men of straw of the March group . . .". Furthermore, it concludes: "that both general international law and the Spanish-Belgian Treaty of 1927 regard such delays as equivalent to the denial of a hearing".

* * *

From what we have seen above, we can recognize that the alleged ground for complaint on the merits consists essentially of a denial of justice for which the Belgian Government blamed the Spanish State. It is one of the cases in which a State may incur responsibility through the act or omission of any of its organs (legislative, administrative, or judicial). But whether a State incurs responsibility or not depends on the concrete circumstances of each case; in particular, the characteristics of the three kinds of State activities—legislative, administrative and judicial—must be taken into consideration. Mechanical, uniform treatment must be avoided.

The case before the Court is concerned mainly with the acts and omissions of some judicial organs, particularly of the Spanish judges and courts, which, the Belgian Government alleges, constitute denials of justice.

Whether the above-mentioned acts and omissions allegedly constituting denials of justice would entail international responsibilities as constituting infringements of international law, must of course be decided from the nature of each act and omission in question; but we must consider also

the characteristics of the judicial function of a State as a whole and the judiciary in relation to the executive in particular.

One of the most important political and legal characteristics of a modern State is the principle of judicial independence. The independence of the judiciary in a formal sense means the guarantee of the position of judges, and in a material sense it means that judges are not bound except by their conscience.

Although judges possess the status of civil servants, they do not belong to the ordinary hierarchy of government officials with superior-subordinate relationships. They are not submitted to ordinary disciplinary rules, but to rules *sui generis*.

As to the institutional independence of courts as a whole, differences exist among various countries. In the first category of countries a system is adopted whereby the highest court or the lower courts, or both, have conferred upon them the power of judicial review, namely the power to pass judgment on the constitutionality of laws, ordinances and official acts. In these countries, as a corollary of this system, the independence of courts and judges vis-à-vis the government is outstanding. But in other countries where the whole body of courts and judges is under the authority of the Minister of Justice who is a member of the Cabinet, this does not seem to create much difference, so far as judicial independence is concerned, from the former group of countries. What is required from judges by judicial ethics does not differ in the two systems.

The judicial independence of courts and judges must be safeguarded not only from other branches of the government, that is to say, the political and administrative power, but also from any other external power, for instance, political parties, trade unions, mass media and public opinion. Furthermore, independence must be defended as against various courts and as between judges. Courts of higher instance and judges of these courts do not function as superiors exercising the power of supervision and control in the ordinary sense of the term vis-à-vis courts of lower instance and their judges.

This is a particularity which distinguishes the judiciary from other branches of government. This distinction, we consider, seems to be derived, on the one hand, from consideration of the social significance of the judiciary for the settlement of conflicts of vital interest as an impartial third party and, on the other hand, from the extremely scientific and technical nature of judicial questions, the solution of which requires the most highly conscientious activities of specially educated and trained experts. The independence of the judiciary, therefore, despite the existence of differences in degree between various legal systems, may be considered as a universally recognized principle in most of the municipal and international legal systems of the world. It may be admitted to be a

"general principle of law recognized by civilized nations" (Article 38, paragraph 1 *(c)*, of the Statute).

The above-mentioned principle of judicial independence has important repercussions in dealing with the question of the responsibility of States for acts of their organs internally as well as internationally.

In the field of municipal law, we have, in the matter of responsibility of States for acts of their judiciary, the following information furnished by the Max-Planck Institute in *Haftung des Staates für rechtswidriges Verhalten seiner Organe*, 1967. So far as the judiciary is concerned, it concludes:

> "In the overwhelming majority of the legal systems investigated, the State is not liable for the conduct of its judicial organs." (*Op. cit.*, p. 773.)

In addition, it must be pointed out that those countries exceptionally recognizing State responsibility limit its application to criminal matters under specific circumstances (in particular, the compensation of innocent persons who have been held in custody).

As to the international sphere, an analogous principle exists. Unlike internationally injurious acts committed by administrative officials, a State is, in principle, not responsible for those acts committed by judicial functionaries (mainly judges) in their official capacity. The reason for this is found in the fact that in modern civilized countries they are almost entirely independent of their government.

We shall take into account the above-mentioned characteristics of the judiciary to resolve the question of whether the Spanish State incurs responsibility by reason of alleged internationally wrongful acts and omissions of the Spanish courts and judges, because their activities constitute the main grounds for the complaints which are presented as charges of denials of justice.

The question may be whether the acts and omissions mentioned here (in the final submissions) really constitute an international wrong for which the Spanish State is responsible for reparation in respect of the damage.

If judicial organs function quite independently of the government, it may be impossible for a State to incur responsibility by reason of any judicial act or omission on the municipal as well as on the international plane. But, in the case of some serious mistakes in judicial actions, a State is made responsible, by special legislative measures, for the reparation of damage; grave irregularities committed by the municipal judiciary may involve a State's responsibility on the plane of international law.

In short, on the one hand, a State by reason of the independence of the

judiciary, in principle, is immune from responsibility concerning the activities of judicial organs; this immunity, on the other hand, is not of an absolute nature. In certain cases the State is responsible for the acts and omissions of judicial organs, namely in cases where grave circumstances exist. That is the reason why denial of justice is discussed by writers as a matter involving a State's responsibility.

The concept of a denial of justice, understood in the proper sense, is that of an injury committed by a court of justice involving the responsibility of the State. A difference of views—narrower and broader interpretations—exists concerning acts of this kind, as we have seen in other contexts. The view which we consider as acceptable is the broader one, which covers cases of denial of justice, such as "corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it". But from the latter viewpoint, as a principle, no erroneous or even unjust judgment of a court will constitute a denial of justice.

Justification for this interpretation can be found in the independence of the judiciary (Oppenheim-Lauterpacht, *International Law*, Vol. I, 8th ed., 1955, p. 360). Brierly-Waldock says:

> "It will be observed that even on the wider interpretation of the term 'denial of justice' which is here adopted, the misconduct must be extremely gross. The justification of this strictness is that the independence of courts is an accepted canon of decent government, and the law therefore does not lightly hold a state responsible for their faults. It follows that an allegation of a denial of justice is a serious step which states . . . are reluctant to take when a claim can be based on other grounds." (*Op. cit.*, p. 287.)

* * *

Next, we shall consider the content and character of a denial of justice allegedly committed by the Spanish judicial authorities.

It is to be noted that the various complaints raised by the Belgian Government are mainly concerned with the interpretation of municipal law, namely provisions of the Spanish commercial code and civil procedure code in the matter of bankruptcy, and provisions of Spanish private international law on the jurisdiction of Spanish Courts concerning bankruptcy. Questions relating to these matters are of an extremely complicated and technical nature: they are highly controversial and it is not easy to decide which solution is right and which wrong. Even if one correct solution could be reached, and if other contrary solutions could be decided to be wrong, we cannot assert that incorrect decisions constitute in themselves a denial of justice and involve international responsibility.

For instance, the attachment of the property of the subsidiary com-

panies by the Reus judge in disregard of their juridical personalities and relying on the doctrine of "piercing the veil", even if it might be deemed illegal, could not be recognized as a denial of justice. As a legal question, this issue involves an element similar to the question of whether the Belgian Government can base its *jus standi* for the purpose of the diplomatic protection of Belgian shareholders on the doctrine of "piercing the veil". The controversies concerning the alleged failure to order the publication of the bankruptcy in the place of domicile of the bankrupt and the validity of decisions failing to respect the separate estates of Barcelona Traction's subsidiary and sub-subsidiary companies or conferring on the bankruptcy authorities the fictitious possession (termed "mediate and constructive civil possession") of securities of certain subsidiary and sub-subsidiary companies, should be considered in themselves irrelevant to the question of the existence of a denial of justice also.

These questions which are concerned with the interpretation of the positive law of a State and which are of a technical nature, cannot in themselves involve an important element which constitutes a denial of justice. Questions of the kind mentioned above may constitute at least "erroneous or unjust judgment" but cannot come within the scope of a charge of denial of justice.

The same can be said concerning the validity of the bankruptcy judgment from the viewpoint of the existence or non-existence of a cessation of payments or a state of insolvency. Even if any error in fact-finding or in the interpretation and application of provisions concerning bankruptcy exists, it would not constitute in itself a denial of justice.

The question of valuation of the property of the Barcelona Traction Company as a going concern is a very complicated matter; various methods are conceivable, diverse proposals have been made and experts' opinions are divided. It is difficult to conclude that one method is absolutely right and the other wrong and, therefore, that a judge by adopting one alternative instead of the other would commit a denial of justice.

Arguments developed on the question as to whether the rights incorporated in negotiable securities may be exercised without possession of the securities, in other words on the question of the temporal separability or non-separability of right and instrument as regards the share may be considered to have no relevance to the question of a denial of justice.

The innumerable controversies concerning the details of the bankruptcy proceedings may also be considered as possessing no relevance from this point of view.

In short, since these issues are of a technical nature, the possible error committed by judges in their decisions cannot involve the responsibility of a State. That the above-mentioned doctrine precludes such an error from being a constituent element in a denial of justice as an internationally wrongful act is not difficult to understand from the other viewpoints also. The reason for this is that these issues are of a municipal law nature and

therefore their interpretation does not belong to the realm of international law. If an international tribunal were to take up these issues and examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a "cour de cassation", the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs. Now, as we have seen above, the actions and omissions complained of by the Belgian Government, so far as they are concerned with incorrectness of interpretation and application of municipal law, cannot constitute a denial of justice. This means that in itself the incorrectness of a judgment of a municipal court does not have an international character.

A judgment of a municipal court which gives rise to the responsibility of a State by a denial of justice does have an international character when, for instance, a court, having occasion to apply some rule of international law, gives an incorrect interpretation of that law or applies a rule of domestic law which is itself contrary to international law (Brierly-Waldock, *op. cit.*, p. 287). Apart from such exceptionally serious cases, erroneous and unjust decisions of a court, in general, must be excluded from the concept of a denial of justice.

* * *

Now, excluding allegedly erroneous or unjust decisions of the Spanish judiciary as constituent elements of a denial of justice, it remains to examine whether behind the alleged errors and irregularities of the Spanish judiciary some grave circumstances do not exist which may justify the charge of a denial of justice. Conspicuous examples thereof would be "corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it", which were quoted above. We may sum up these circumstances under the single head of "bad faith".

Two questions arise. Does the Belgian Government contend that there existed such circumstances as bad faith in order to justify its complaints based on a denial of justice? If this question is answered in the affirmative, has the existence of aggravating facts been sufficiently proved?

Here we must be aware that we are confronted with questions belonging to a dimension entirely different to the one which we have dealt with above: it is not a municipal or legal-technical, but an international and moral dimension. An ethical valuation of the conduct of national judicial organs has been introduced. It is not the correctness or incorrectness of the interpretation or application of the positive law of a country which is in question, but the conduct of judicial organs as a whole which must be evaluated from supra-positive, transnational viewpoints (Philip C. Jessup, *Transnational Law*, 1956). We would say that we should consider the

matter from the viewpoint of natural law which is supra-national and universal. An ethical valuation such as a condemnation for bad faith, abuse of powers or rights, etc., would become a connecting link between municipal and international law and the two jurisdictions—municipal and international—in respect of a denial of justice, and would cause the alleged acts to involve responsibility on the plane of international law.

It is true that the Belgian Government maintains the existence of bad faith in actions and omissions of the Spanish judiciary. However, most of its arguments concentrate on pointing out the simple irregularities in each measure. As stated above, this does not differ very much from controversies concerning the interpretation and application of Spanish bankruptcy law—matters which in themselves cannot justify the existence of bad faith on the part of the Spanish judiciary.

Although the Belgian Government insists on the existence of bad faith on the part of the Spanish judiciary and puts forward some evidence concerning the personal relationship of Mr. Juan March and his group with some governmental personalities, the use of henchmen in instituting and promoting bankruptcy proceedings, etc., we remain unconvinced of the existence of bad faith on the part of Spanish administrative and judicial authorities. What the Belgian Government alleges for the purpose of evidencing the bad faith of the Spanish judges concerned does not go very much beyond surrounding circumstances; it does not rely on objective facts constituting collusion, corruption, flagrant abuse of judicial procedure by the Spanish judiciary, etc. If corruption of a judge were considered to have been committed, the Barcelona Traction Company and its group should have had recourse to the measure of revision and, if it was upheld, the fact of proving a denial of justice in the present case could have been established.

Despite this, the Belgian Government did not choose this measure. Instead of producing concrete objective facts to evidence the bad faith of the Spanish authorities, the Belgian Government put forward an "overall complaint" consisting of an agglomeration of circumstances which do not appear to be relevant to the issue. The relying upon such an "overall complaint" would mean in itself a weakness in the standpoint of the Belgian side, and it would have no reinforcing or supplementing effect on the cause of the latter.

We consider that aggravating facts, namely those of bad faith, have not been sufficiently proved.

It is not an easy matter to prove the existence of bad faith, because it is concerned with a matter belonging to the inner psychological process, particularly in a case concerning a decision by a State organ.

Bad faith cannot be presumed.

It is an extremely serious matter to make a charge of a denial of justice vis-à-vis a State. It involves not only the imputation of a lower international standard to the judiciary of the State concerned but a moral condemnation of that judiciary. As a result, the allegation of a denial of justice is considered to be a grave charge which States are not inclined to make if some other formulation is possible.

In short, for the reasons indicated above, the Belgian allegation that Spain violated an international obligation and incurred responsibility vis-à-vis Belgium is without foundation. Therefore, the Belgian Government's claims must be dismissed.

(Signed) Kotaro TANAKA.