SEPARATE OPINION OF JUDGE JESSUP

1. I agree with the majority of the Court that the Belgian claim must be dismissed, but since I reach that conclusion by different lines of reasoning, I feel it is incumbent on me to explain what my reasons are.

2. I regret that the Court has not considered it appropriate to include in its Judgment a wider range of legal considerations. For my part, I share the view of the late Judge Sir Hersch Lauterpacht, "that there are compelling considerations of international justice and of development of international law which favour a full measure of exhaustiveness of judicial pronouncements of international tribunals" (Lauterpacht, *The Development of International Law by the International Court*, Revised Edition, 1958, Chapter 3, p. 37). Sir Hersch went on to say (at p. 39):

> "The administration of justice within the State can afford to rely on purely formal and procedural grounds. It can also afford to disregard the susceptibilities of either of the parties by ignoring such of its arguments as are not indispensable to the decision. This cannot properly be done in international relations, where the parties are sovereign States, upon whose will the jurisdiction of the Court depends in the long run, and where it is of importance that justice should not only be done but that it should also appear to have been done."

3. Six months after he wrote the Preface to that important book, Judge Lauterpacht put his preachment into practice in his separate opinion in the *Certain Norwegian Loans* case, wherein he wrote (*I.C.J. Reports 1957*, p. 9 at p. 36):

> "In my opinion, a Party to proceedings before the Court is entitled to expect that its Judgment shall give as accurate a picture as possible of the basic aspects of the legal position adopted by that Party. Moreover, I believe that it is in accordance with the true function of the Court to give an answer to the two principal jurisdictional questions which have divided the Parties over a long period of years and which are of considerable interest for international law. There may be force and attraction in the view that among a number of possible solutions a court of law ought to select that which is most simple, most concise and most expeditious. However, in my opinion such considerations are not, for this Court, the only legitimate factor in the situation."

4. In *Interhandel* (*I.C.J. Reports 1959*, p. 6), the Court had before it four preliminary objections advanced by the United States. (One notes in passing that *Interhandel*, like *Barcelona Traction*, was a case involving a holding company and complicated corporate stock interests.) In its Judgment, the Court found it appropriate to record its view on all four preliminary objections. By nine votes to six, the Court upheld the third preliminary objection to the effect that Switzerland had not exhausted the local remedies available to it in the United States. Since the case was disposed of on this ground, it could be argued that the Court should not have ruled in its Judgment on the other three preliminary objections. However, the Court held: by ten votes to five, that it rejected the first preliminary objection; unanimously, that it rejected the second preliminary objection; by ten votes to five, that it was not necessary to adjudicate on part *(a)* of the fourth preliminary objection; by fourteen votes to one, that it rejected part *(b)* of the fourth preliminary objection.

Judge Sir Percy Spender, in his separate opinion, and President Klaestad and Judge Sir Hersch Lauterpacht in their dissenting opinions, felt it necessary also to deal with part *(a)* of the fourth preliminary objection on which the Court declined to rule, because that objection dealt with the important issue of the self-serving or automatic reservation of the United States to its declaration accepting the jurisdiction of the Court.

5. In the *Arbitral Award Made by the King of Spain on 23 December 1906* (*I.C.J. Reports 1960*, p. 192), Judge Moreno Quintana in his declaration (p. 217) stated that while he was in agreement with the decision, he believed that a number of "legal questions which are of particular concern . . . should have been dealt with in the first place". He listed the questions which he had in mind and on which the judgment failed to pronounce.

6. In the *Temple of Preah Vihear* case (*I.C.J. Reports 1961*, p. 17), the Court in its Judgment said that the reasons it gave for upholding its jurisdiction made it unnecessary to consider Cambodia's other basis for asserting jurisdiction or Thailand's objection to that basis. In the joint declaration of Judges Sir Gerald Fitzmaurice and Tanaka (pp. 36, 38), one reads:

> "As regards the second preliminary objection of Thailand—whilst we are fully in agreement with the view expressed by Sir Hersch Lauterpacht in the *South West Africa—Voting Procedure* case (*I.C.J. Reports 1955*, at pp. 90-93) to the effect that the Court ought not to refrain from pronouncing on issues that a party has argued as central to its case, merely on the ground that these are not essential to the substantive decision of the Court—yet we feel that this view is scarcely applicable to issues of jurisdiction (nor did Sir Hersch imply otherwise). In the present case, Thailand's second

preliminary objection was of course fully argued by the Parties. But once the Court, by rejecting the first preliminary objection, has found that it has jurisdiction to go into the merits of the dispute . . . the matter is, strictly, concluded, and a finding, whether for or against Thailand, on her second preliminary objection, could add nothing material to the conclusion, already arrived at, that the Court is competent."

7. In *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, I.C.J. Reports 1964*, p. 4, Judge Tanaka in his separate opinion said (at p. 65):

"The more important function of the Court as the principal judicial organ of the United Nations is to be found not only in the settlement of concrete disputes, but also in its reasoning, through which it may contribute to the development of international law."

8. One of the great jurists of the Permanent Court of International Justice, Judge Anzilotti, also shared the Lauterpacht philosophy of the nature of the international judicial process, as is shown in his dissenting opinion in *Diversion of Water from the Meuse* (*P.C.I.J., Series A/B, No. 70*, p. 4 at 45):

"The operative clause of the judgment merely rejects the submissions of the principal claim and of the Counter-claim. In my opinion, in a suit the main object of which was to obtain the interpretation of a treaty with reference to certain concrete facts, and in which both the Applicant and the Respondent presented submissions indicating, in regard to each point, the interpretation which they respectively wished to see adopted by the Court, the latter should not have confined itself to a mere rejection of the submissions of the Applicant: it should also have expressed its opinion on the submissions of the Respondent; and, in any case, it should have declared what it considered to be the correct interpretation of the Treaty.

It is from the standpoint of this conception of the functions of the Court in the present suit that the following observations have been drawn up."

9. The specific situations in each of the cases cited can be distinguished from the situation in the instant case, but all of the quoted extracts are pervaded by a certain "conception of the functions of the Court" which I share but which the Court does not accept. Article 59 of the Statute indeed provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case." But the influence of the Court's decisions is wider than their binding force.

The instant case, however, presents its own particularity. In its decision in 1964 the Court joined to the merits two of Spain's preliminary objec-

tions. Whatever the legal interpretation of the character of those preliminary objections at this stage of the proceedings, it remains true that the Belgian claim must be dismissed if either of the objections is well founded. Since one of them is sustained by the Court (and on different grounds in this opinion), it can be said that the Court would reach out too far if it made a judicial finding on the basic question of the existence of a denial of justice—an issue which it has decided Belgium has no right to bring before the Court. Under these circumstances, I agree that it would be excessive for a separate opinion to analyse and pass upon the voluminous proceedings before the Spanish administrative and judicial authorities. There are situations in which the logical must yield to the practical; this is such a situation.

I associate myself with Judge Gros' allusion, in paragraph 28 of his separate opinion, to the problem of the exhaustion of local remedies.

I would also observe that the procedural processes of the Court happily facilitate an informal but nonetheless fruitful division of labour when some judges feel obliged to file separate opinions. Having had the benefit of a preview of the separate opinions of Judges Sir Gerald Fitzmaurice and Gros, I feel content to leave to their opinions, and to other separate opinions as well, the amplification of certain juridical considerations which I do not treat, even as they have been willing to rely on some of my factual summaries. In neither case does it necessarily follow that I or they reach the same conclusions on each point of law or fact.

* * *

10. In adjudicating upon the *Barcelona Traction* case the Court must apply rules from one of the most controversial branches of international law. The subject of the responsibility of States for injuries to aliens (otherwise referred to as the diplomatic protection of nationals), evokes in many current writings recollections of political abuses in past eras [1]. The Court is not involved here in any conflict between great capital-exporting States and States in course of development. Belgium and Spain are States which, in those terms, belong in the same grouping. I do not agree with the Spanish contention on 20 May 1969 that Belgium was merely trying to get the Court to internationalize a private litigation, but it is true that basically the conflict was between a powerful Spanish financial group and a comparable non-Spanish group. This case cannot be said to evoke problems of "neo-colonialism".

[1] The writer may be excused for mentioning that he described and deplored such abuses, more than two decades ago: *A Modern Law of Nations*, 1947, Chapter V. Happily, the days of "gun-boat diplomacy" are now lost in limbo.

Moreover, the Court is not here in the least concerned with such provocative problems as State sovereignty over natural resources or the rules applicable to compensation in case of nationalizations or expropriations. Professor F. V. García Amador, in his sixth report as Special Rapporteur of the International Law Commission on State responsibility (*Yearbook of the International Law Commission*, 1961, Vol. II, p. 2 at p. 46), set forth an admirable attitude:

> "... his purpose was to take into account the profound changes which are occurring in international law, in so far as they are capable of affecting the traditional ideas and principles relating to responsibility. The only reason why, in this endeavour, he rejected notions or opinions for which acceptance is being sought in our time, is that he firmly believes that any notion or opinion which postulates extreme positions—whatever may be the underlying purpose or motive —is incompatible and irreconcilable with the idea of securing the recognition and adequate legal protection of all the legitimate interests involved. That has been the policy followed by the Commission hitherto and no doubt will continue to be its policy in the future."

11. The institution "of the right to give diplomatic protection to nationals abroad was recognized in ... the Vienna Convention on Diplomatic Relations, 1961", as Mr. Gros (as he then was) reminded the sub-committee of the International Law Commission (*Yearbook of the International Law Commission*, 1963, Vol. II, p. 230). The institution of the right to give diplomatic protection is surely not obsolete although new procedures are emerging.

With reference to diplomatic protection of corporate interests, the customary international law began to change in the latter half of the nineteenth century [1]. As Jennings writes, in somewhat picturesque and Kiplingesque language:

> "It is small wonder that difficulties arise when 19th century precedents about outrageous behaviour towards aliens residing in outlandish parts are sought to be pressed into service to yield principles apposite to sophisticated programmes of international investment." (121 *Hague Recueil* 1967, II, p. 473.)

Since the critical date in this case is 1948, developments in the law

[1] Paul De Visscher sees the change developing after the decision in the *Ruden* case in 1870; 102 *Hague Recueil* 1961, II, at pp. 467-468.

and procedures during the ensuing last two decades are not controlling.

12. Any court's application of a rule of law to a particular case, involves an interpretation of the rule. Historical and logical and teleological tools may be used by the judge, consciously or unconsciously. If the Court in the instant case had decided to include more factors in its Judgment, it could have clarified the traditional system in the light of clearer understandings of business practices and forms of corporate organization, as these were already well developed two decades ago when the events called into question in this case transpired. Legal norms applicable to those events should not be swept aside on the assumption that they have already become mere cobwebs in the attics of legal history. Corporations today and tomorrow may well utilize other methods of financing and controlling foreign enterprises, and governments will have adapted or will adapt their own laws and practices to meet the realities of the economic factors which affect the general interests of the State. The "law of international economic development" will mature. Thus joint business ventures, State guarantees of foreign investment, the use of international organizations such as the IBRD and UNDP, may in the course of time relegate the case of *Barcelona Traction* to the status now occupied by *Delagoa Bay*—a precedent to be cited by advocates if helpful to the pleading of a cause, but not a guiding element in the life of the international business community.

Nevertheless, the Court has the duty to settle a specific dispute between Belgium and Spain which arose out of Spain's exercising jurisdiction over a complex of foreign corporate enterprises.

13. There is a trend in the direction of extending the jurisdictional power of the State to deal with foreign enterprises which have contact with the State's territorial domain; ". . . all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty [1]. But what are the limits placed by international law? Do the courts of the United States, for example, go too far in applying its anti-trust laws to foreign enterprises, following the statement of principle by Judge Hand in *Alcoa* [2]? But that principle is accepted in at least six other countries [3]. Are the jurisdictional limits on national jurisdiction exceeded in the cases dealing with product liability of a

[1] *Lotus, Judgment No. 9*, 1927, *P.C.I.J., Series A, No. 10*, p. 19.

[2] 148 Fed. 2d 416 (1946). Cf. Jessup, *Transnational Law*, 1956, pp. 73 ff.

[3] Drachsler, "American Parent and Alien Subsidiary: International Anti-trust Problems of the Multinational Corporation", *Bulletin of the Section of International*

"giant octopus corporation" with multiple subsidiaries abroad? Rules valid enough for inter-state conflicts within the constitutional system of the United States, may be improper when placing a burden on international commerce [1]. The Committee on International Law of the Association of the Bar of the City of New York concluded that ". . . the extension of the regulatory and penal provisions of the Securities Exchange Act of 1934 . . . to foreign corporations which have neither listed securities in the United States nor publicly offered securities within the United States is a violation of international law [2]".

14. In States having different types of economic and financial problems, international law has become increasingly permissive of actions involving nationalizations. In place of what used to be denounced as illegal expropriation, the issues now turn largely on the measure of compensation, since even the famous General Assembly Resolution on Permanent Sovereignty Over Natural Resources [3], provides that compensation is due.

To whom, in such cases is compensation due? If in the anti-trust, product-liability and other situations, the corporate veil is freely pierced to assert the State's jurisdictional power, why should it not also be pierced to determine the State's responsibility to the interests actually injured by action damaging to a foreign enterprise? In the instant case, Spain asserted its power to deal with Barcelona Traction's subsidiaries in Spain, disregarding the Canadian nationality of Ebro and others. The equitable balance of legal interests permits Belgium to pierce the veil of the Canadian "charter of convenience" and to assert the real interests of the shareholders—assuming of course that their continuous Belgian character is established. In so far as there has been an increase in the permissible limits of the exercise of State authority over foreign corporate enterprises, there must be an accompanying realistic liberalisation of rules identifying the State or States which may, in case of abuse, invoke the right of diplomatic protection.

15. The legal rights which are vindicated through the international

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and Comparative Law of the American Bar Association, July 1964, pp. 29 and 48, and authorities there cited.

[1] Mecsas, "Personal Jurisdiction over Foreign Corporations in Product Liability Actions: *Forum Non Conveniens* and Due Process Limitations on *In Personam* Jurisdiction over Foreign Corporations", 50 *Cornell Law Quarterly*, p. 551 at p. 563 (1965). Cf. American Law Institute, *Restatement of the Law, Second,—Conflict of Laws*, Title C (1967 ed.).

[2] *The Record* of the Association, Vol. 21, No. 4, April 1966, p. 240 at p. 252.

[3] G.A. 1803 (XVII), 14 December 1962. Cf. Mughraby, *Permanent Sovereignty Over Oil Resources* (1966), p. 30.

procedure of diplomatic protection, are not identical with rights derived from the applicable municipal law; the rights are on different planes. There are situations in which no right under municipal law exists because that law does not provide or permit legal action to enforce the claim, but international law does afford a remedy. The obvious cases are those where an injury is inflicted by a State instrumentality or agent which is immune from suit. If, for example, a naval vessel of State A negligently rams and sinks a merchant vessel of State B, and the law of State A does not permit any legal action against the State or its instrumentality, State B, on the international plane, may press a claim for damages on behalf of the vessel which possesses its nationality [1]. Of course if there are no local remedies, the international rule for exhaustion of such remedies is not applicable and a State may incur international liability for the very reason that there is no local remedy [2]. Although statutes now provide in many countries a cause of action for damages caused by the death of a person, no such cause of action existed at common law. The subject was discussed by Umpire Parker in the *Lusitania* cases ((1923) VII *U.N.R.I.A.A.*, pp. 32, 34 ff.), in holding that international law and practice support the presentation of claims of heirs and widows (where the nationality requirements are met), irrespective of the question whether under the law of the State charged with responsibility for wrongful death, the heir or widow has a right to damages.

16. In connection with the instant case, the question arises from the argument that there can be no international right to damages for shareholders indirectly injured by damage to the company in which they hold shares, since no such right is generally established in municipal law. Much reliance is placed upon the proposition that under most systems of municipal law, shareholders have no rights in or to the assets of the corporation until after it is dissolved or wound up. Shareholders' suits are indeed provided by law in the United States and somwhat less extensively in Great Britain. In the United States "The derivative stockholder-plaintiff is not only a nominal plaintiff, but at the same time a real

[1] Under the British-United States Claims Convention of 1853, the umpire awarded damages to the owners of the British collier *Confidence*, which had been run down by the United States frigate *Constitution*; III Moore, *International Arbitrations*, 3063. Cf. *The Lindisfarne*, in the United States-Great Britain Claims Commission under the 1910 Treaty, VI *U.N.R.I.A.A.*, 21.

[2] So in *Ruden's* case and in *Johnson's* case, in the United States-Peruvian Claims Commission 1870, awards were made to the claimants when a circular of the Minister of Justice forbade the judges to receive suits of the type in question. Moore, *International Arbitrations*, Vol. III, pp. 1653 and 1656.

party in interest. He sues not solely upon a corporate cause of action but also upon his own cause of action". See Koessler, "The Stockholder's Suit: A Comparative View", 46 *Columbia Law Review* 1946, pages 238 and 242. The provisions for shareholder suits in the European countries seem to be somewhat less favourable to the shareholder. But the trend in France is toward more protection of shareholders, as Judge Gros points out in paragraph 11 of his separate opinion.

17. Although the concept of corporate personality is a creature of municipal law, none of the theories evolved in that frame of reference can be relied on universally to explain the legal relations surrounding that "technical legal device".

> "Gierke's theory was based upon Germanic village communities, medieval guilds and similar truly corporate entities. But such a theory hardly fits the modern holding company . . . The result is that those who administer the law, whether as judges, revenue authorities, or as administrators, in civilian and common law systems alike [and I would add in the international law system] have had to discard all known theories of corporate personality, and to relativise the conception of juristic personality, respecting it for some purposes [1], disregarding it for others, in accordance with the nature of the problem before them." (Friedmann, *Legal Theory*, 5th ed. 1967, pp. 522-523. See also p. 571.)

I would paraphrase and adapt a dictum from a recent decision of the Supreme Court of the United States in an anti-trust case: the International Court of Justice in the instant case is "not bound by formal conceptions of" corporation law. "We must look at the economic reality of the relevant transactions" and identify "the overwhelmingly dominant feature" [2]. The overwhelmingly dominant feature in the affairs of Barcelona Traction was not the fact of incorporation in Canada, but the controlling influence

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[1] Thus, for example, where a corporation carries on a purely commercial activity, international law does not "pierce the veil" to grant it the sovereign immunity attaching to the State by which it is wholly owned and managed; see Harvard Research in International Law, *Report on Competence of Courts in Regard to Foreign States*, 1932, Art. 12, p. 641.

[2] Mr. Justice Marshall delivering the opinion of the Court in *United States* v. *The Concentrated Phosphate Export Assn. Inc. et al.*, 89 S. Ct. p. 361 at pp. 366-367, 1968. Cf. the statement of a leading member of the New York Bar: "To give any degree of reality to the treatment, in legal terms, of the means for the settlement of international economic disputes, one must examine the international community, its emerging organizations, its dynamics, and relationships among its greatly expanded membership." (Spofford, "Third Party Judgment and International Economic Transactions", 113 *Hague Recueil* 1964, III, pp. 121-123.)

of far-flung international financial interests manifested in the Sofina grouping.

It may well be that the new structures of international enterprise will be increasingly important [1], but any glance at the world-wide picture today shows that non-governmental corporations still have a major role to play [2]. That is why so many new States, and the United Nations itself, encourage the investment of private capital [3].

* * *

The Right to Extend Diplomatic Protection to Corporate Enterprises

18. The decision of the Court, in this case, is based on the legal conclusion that only Canada had a right to present a diplomatic claim on behalf of Barcelona Traction which was a company of Canadian nationality. My own conclusion is that, for reasons which I shall explain, Canada did not have, in this case, a right to claim on behalf of Barcelona Traction. As a matter of general international law, it is also my conclusion that a State, under certain circumstances, has a right to present a diplomatic claim on behalf of shareholders who are its nationals. As a matter of proof of fact, I find that Belgium did not succeed in proving the Belgian nationality, between the critical dates, of those natural and juristic persons on whose behalf it sought to claim. The Belgian claim must therefore be rejected.

The Record of Actual Diplomatic Representations

19. If a State extends its diplomatic protection to a corporation to which it has granted a "charter of convenience" while at the same time

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[1] See Friedmann et al., *International Financial Aid*, 1966; Kirdar, *The Structure of United Nations Economic Aid to Underdeveloped Countries*, 1966.

[2] See Friedmann, *The Changing Structure of International Law*, 1964, Chap. 14; Hyde, "Economic Development Agreements", 105 *Hague Recueil* 1962, I, p. 271.

[3] Blough, "The Furtherance of Economic Development", *International Organization*, 1965, Vol. XIX, p. 562, and especially, Dirk Stikker's report to UNCTAD on "The Role of private enterprise in investment and promotion of exports in developing countries" (1968), UN Doc. TD/35/Rev.1, and "Panel on Foreign Investment in Developing Countries", Amsterdam, 16-20 February, 1969, E/4654, ST/ECA/117.

similar diplomatic assistance is being extended by another State whose nationals hold 100 per cent. of the shares, the situation might be considered analogous to cases of dual nationality of natural persons [1]. In those cases, international jurisprudence supports the principle that preference should be given to the "real and effective nationality", as was held by this Court in the *Nottebohm, Second Phase, Judgment* (*I.C.J. Reports 1955*, pp. 4, 22), which will be discussed later in this opinion.

If Canada could be considered the State of the "real and effective nationality" of Barcelona Traction and if Canada assumed and maintained the role of Barcelona Traction's diplomatic protector, such facts would militate against the Belgian posture that Belgium was the State entitled to press the claim. The arguments of the Parties followed some such theory; Counsel for Spain called it an "essential point" and examined at length the record of Canadian diplomatic activity in the case (20 June 1969). The lack or failure of Canadian diplomatic protection is distinctly relevant to an analysis of the so-called "exceptions" to the alleged general rule that only the State of which the company has the nationality is entitled to claim on its behalf. Such "exceptions" will be discussed later. The facts relative to the positions as claimant Governments of Canada and Belgium—and of Great Britain and the United States as well—must accordingly be taken into account. The record throws light on the nature and extent of the several national interests.

In the instant case, Spain was at one time confronted by diplomatic representations of Great Britain, Canada, the United States and Belgium. But at that stage of multiple diplomatic activity, specific claims for damages were not being advanced; Spain was being asked to take steps to halt what were considered to be destructive actions against Barcelona Traction. Spain's replies in the early stages rested on the proposition that the Government could not interfere with the normal functioning of the Spanish courts.

Great Britain

20. The first British Note was dated 23 February 1948 and asserted an interest due to the dismissal of high-ranking British officers in the Barcelona Traction company and to the position of bondholders "resident in the United Kingdom". (A.P.O. (1960), Vol. III, pp. 193 ff. for this and subsequent démarches, except as otherwise noted.) In the next British Note, of 27 March, there was support for the Canadian representations

[1] The analogy may be drawn even though the nationality of shareholders is not the test of the nationality of a corporation for purposes of international law.

"on behalf of the United Kingdom bondholders". On 28 September 1951, the British Note speaks on behalf of the protection of (unidentified) "shareholders and bondholders". Thereafter, aside from correspondence about the failure of Spain to reply to the British Notes and about the committee of experts and its report in 1951, the British position seemed to be merely one of supporting Canada. Throughout this period, Canada had no embassy in Madrid and its notes were transmitted through the British Embassy. But the Receiver and Manager of Barcelona Traction, in a memorandum submitted to the Supreme Court of Ontario, on 24 December 1951, reported a conference with British Treasury officials in London on the preceding 25 July, during which Mr. Eggers, a representative of the Treasury, "stated that Great Britain had taken no action independent of Canada. He insinuated that the British had merely followed the Canadian lead *which we know to be untrue*". (Emphasis supplied.) (Receivership Docs., Vol. 5, p. 772.) The basis for this last conclusion is not clear.

Canada

21. The aid of the Canadian Government was originally requested by National Trust, as trustee for certain Barcelona bond issues, which made representations to the Canadian Government when it learned of the developments in Spain following the bankruptcy judgment of 12 February 1948. Counsel for National Trust informed the Supreme Court of Ontario that:

> "The Government of Canada as a result of such representations made a demarche to the Government of Spain through appropriate diplomatic channels with regard to the matter . . . [1]" (Receivership Docs., Vol. 1, p. 16. A memorandum in *ibid.*, Vol. 4, p. 585, indicates that Barcelona Traction joined National Trust in its representations.)

22. The first Canadian Note—like the first Belgian Note and the second British Note—was dated 27 March 1948. (The Belgian Note will be cited later to A.M., Vol. IV, Annex 250.) Canada made an official protest, alleging a denial of justice to Barcelona Traction, Ebro and National Trust, because of a lack of proper notice and an absence of jurisdiction under the principles of private international law. Passing over some of the Canadian notes, one finds that on 21 July 1949 a long

[1] This statement was made by Counsel on 9 July 1948 in connection with National Trust's application for the appointment of a receiver and manager, an application which was granted by the Court on 15 July 1948.

note of protest alleges discrimination against Canadian interests and against "foreign investments in Spain"; the emphasis is on Ebro, a Canadian corporation.

23. In February of 1950, there was close collaboration between the Canadian and Belgian Governments; they proposed to urge the Spanish Government to agree to the appointment of a committee of experts composed of representatives of Spain, Canada and Belgium to study certain financial aspects of the Barcelona case. The Governments of Great Britain and of the United States were also consulted by Canada and it was planned that those governments would support the démarche. Canadian drafts of the proposed note to Spain were submitted to the three other Governments. Throughout, Canada stressed its appreciation of the large financial interest of Belgian nationals in Barcelona Traction. A text provisionally approved, stated that the Governments of the United Kingdom and of the United States "are interested in this matter as it relates to the security of foreign investments generally". The phrasing of the quoted clause was suggested by the United States. Before the final text could be co-ordinated with all the four Governments, the Spanish Government took the initiative by a Note of 16 March 1950 to the British Embassy in Madrid, proposing a similar commission, but composed of Spanish, Canadian and British representatives; Belgium was omitted [1].

24. There is some question whether the Canadian and British participation in the Tripartite Committee of Experts in 1950-1951 should be considered as an aspect of diplomatic protection. The Receiver and Manager on 16 November 1950 sent a memorandum to the Ontario Court informing him that the Canadian Department of External Affairs had asked him to put up $20,000 to cover the fees and expenses of Mr. Norman, the Canadian member of the Commission. The Receiver and Manager asked for authority to pay that amount and said:

> "It is my opinion that the intervention of the Government of Canada in this matter has been of the utmost importance and that the continued support of the Government of Canada is essential if the integrity of the portfolio held by the plaintiff [National Trust] is to be restored and the properties presently under seizure in Spain are to be recovered." (Receivership Docs., Vol. 4, p. 585.)

[1] The documentation is in A.R., Annexes 37 and 38. Mr. Heineman, the directing personality of Barcelona Traction, on 24 February 1950, was apparently confident that the Canadian Note was about to be delivered with the support of the other three Governments; telegram Heineman to Brosens in Buenos Aires, 24 February 1950, O. & S., New Docs. 1964, App. 8.

In its pleading, Spain took the position, on 20 June 1969, that when the Canadian and British members of the Committee joined in signing an Agreed Minute which supported the Spanish contention that foreign exchange had been denied to Barcelona Traction because the company refused to furnish the information demanded by the Spanish authorities, this was an indication that the Canadian Government was satisfied that there was no basis for Barcelona's complaints. However, Mr. Glassco, the Receiver and Manager, informed the Ontario Court through his memorandum of 24 December 1951 that he had attended a conference in the Department of External Affairs in Ottawa together with representatives of National Trust and Barcelona Traction. He said they—

> ". . . were advised that the Canadian and British Governments had signed the Agreed Minute in order to prevent the issuance of a much stronger unilateral statement by the Spanish Government; that the statements in the Agreed Minute with respect to foreign exchange had been agreed with a view to saving the face of the Spanish Government as regards the non-provision of foreign exchange to the subsidiaries of the defendant [Barcelona Traction] in the past; and that the Canadian and British Governments hoped that the atmosphere created by the Agreed Minute would be such that the private interests concerned could work out a settlement of their differences in the expectation that a suitable modus operandi for the future could be achieved with the Spanish Government". (*Ibid.*, Vol. 5, p. 756.)

25. The next Canadian Note of 26 July 1951 reflects a continuing Canadian interest since it objects to the issuance of new share certificates of the subsidiaries which "would be to render valueless the previously issued shares". Ebro, National Trust and Barcelona Traction bondholders are mentioned. The Canadian Note of 28 September 1951 stresses both Ebro and Barcelona Traction and says Canada "feels bound to renew its representations . . . for the protection of the interests of these companies". A long Note of 22 December 1951 invokes Canadian rights under a treaty between the United Kingdom and Spain concerning respect for corporate personality and offers to arbitrate that issue. The Note reserves the "right to make any claim under international law which may be open to it if the sale of the assets takes place on the 4th January, 1952, since it is advised that this would constitute a denial of justice". In this Note, Barcelona Traction, Ebro, Catalonian Land, International Utilities and National Trust as trustee for the bonds, are all mentioned. (A.C.M., Vol. VI, Annex 1, No. 28 [1].)

[1] Consequent upon certain enquiries and observations from the Bench, Belgium

26. On 12 February 1952, the Belgian Ambassador in Madrid reported a conversation with the Spanish Minister for Foreign Affairs, Mr. Artajo, in which the latter told him that the Spanish Consul in Ottawa had talked about the Barcelona case with the Canadian Secretary of State for External Affairs who said: (tr.) "The Canadian interests in this case are so small that it interests us very little." Such a view does not seem to be quite in line with the Canadian Note of 21 April 1952 which was produced as a new document by Belgium in May 1964. The Note repeats the Canadian view of the mistreatment of the companies in Spain, especially Ebro; invokes again the treaty of 1922 and willingness to resort to arbitration; but concludes that no further exchange of Notes was apt to help reach a settlement and that private negotiations might be the best way to a solution. In sending a copy of this Note to the Belgian Ambassador in Ottawa, the Canadian Government noted that it was much shorter than a draft which had previously been shown to the Belgian Government—there was no use reiterating legal arguments. (K. J. Burbridge to Vicomte du Parc, 7 May 1952.) It was not until 10 May 1969 that Mr. Artajo, in a letter in reply to an enquiry from the Spanish Agent in the *Barcelona Traction* case before this Court, flatly denied the accuracy of the Belgian Ambassador's report. (Spanish New Docs., 16 May 1969, Vol. III, p. 181.) The lapse of time in securing such a denial was not explained.

27. Canada's further activity in the case was moderate. On 15 February 1955, Mr. Arthur Dean, American attorney for Sidro, suggested to Wilmers in Brussels that it would be helpful if Canada would join in a démarche in Madrid, although he doubted whether Canada could be convinced that they had sufficient interest other than in the rights of the Canadian trustee for the bonds. (O. & S., New Docs., 1964, App. 13.) Canada had by this time established its own embassy in Madrid and it appears that the Canadian Secretary of State for External Affairs had paid a personal call on the Foreign Office in Madrid in connection with the Barcelona case in 1954 (A.C.M., Vol. VI, p. 109). On 21 March 1955 the Canadian Government had commended Mr. Dean's visit, saying that Canada "continues, of course, to be deeply interested in the affair of Barcelona Traction". (A.C.M., Chap. II, Ann. 1, Doc. No. 30.) On 1 July 1955, Mr. Dean wrote at length to Mr. Pearson, Canadian Secretary of State for External Affairs, reporting on his visit in Madrid. He hoped Canadian Ambassador Pope would be instructed to join in energetic representations

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produced additional documentation in 1964 and in 1969: see e.g., Distr. 64/72 and 64/74 and 1969 New Docs. 42-45.

to Foreign Minister Artajo. (New Docs., 1964.) Mr. Pearson replied on 19 July that Canada believed that the best hope lay in private negotiations.

> "The Canadian Government has not been prepared actually to intervene in this matter or to make representations to the Spanish Government as to the measures which ought to be taken toward a settlement."

The requested instructions to Ambassador Pope would not be sent. *(Ibid.)* In 1957, Belgium informed Canada that they intended to resort to the International Court of Justice. The Canadian official merely expressed his appreciation for the courtesy of keeping him informed. Belgium similarly notified Ottawa in 1964 and 1965. (Belgian New Docs., Nos. 42 *et seq.*)

Finally, further questions from the Bench were conveyed by the Belgian Ambassador in Ottawa on 23 June 1969, to the Canadian Secretary of State for External Affairs, who replied on the following day that the correspondence which had passed between the Canadian and Spanish Governments was in the dossier before the Court and was self-explanatory.

> "As was suggested in a communication of 21 April 1952, the Government of Canada was of the opinion that there was little chance of settling this dispute by means of additional diplomatic representations. The Government of Canada has acted accordingly." (My trans., New Docs. Nos. 44-45.)

It is a fair conclusion that Canadian diplomatic protection of Barcelona Traction ceased in April 1952.

United States

28. Apparently the first diplomatic démarche by the United States Government on behalf of Barcelona Traction was a Note from the Chargé in Madrid to Foreign Minister Artajo on 22 July 1949. The Note stated that:

> ". . . the Government of the United States lends its support to and is in concurrence with the Note of 21 July 1949, submitted to your Ministry by the British Embassy on behalf of the Canadian Government, the Note in question relating to the treatment which has been and is currently being accorded to the Canadian company, Barcelona Traction, Light and Power Company Limited, a company in which American citizens have interests . . .
>
> The treatment which had been accorded this company, in which

> foreign capital is so heavily invested, has had an adverse effect in foreign banking and investment circles . . ." (A.P.O., 1960, Vol. III, p. 247.)

Attention has already been called to the co-operation of the United States with Canada in February 1950, where American interests were described as arising from "the security of foreign investments generally".

In June and July 1951, the United States Embassy requested complete copies of the reports of the Spanish experts on the international tripartite committee and "reiterates its deep interest in the issues involved in the case of the Barcelona Traction Company . . ." (*ibid.*, pp. 249 and 251). It seems that the United States Secretary of Commerce, when in Madrid in October 1954, brought up with some officials of the Spanish Government the possibility of that Government's intervention in the judicial proceedings; he was told this was hardly possible. (Spanish New Docs., 1969, Vol. III, p. 174.)

29. In 1955, United States Ambassador John Lodge in Madrid lent his assistance to Mr. Arthur Dean in connection with his efforts on behalf of Sidro. An office memorandum of the Spanish Ministry of Foreign Affairs, 30 March 1955, recorded that Ambassador Lodge had phoned to support Mr. Dean's request for an interview with Minister for Foreign Affairs Artajo.

> "The United States Ambassador stressed the *extraordinary interest* —he insisted that it be put that way—which the State Department attributes to a rapid and satisfactory solution of that matter about which the aforesaid Department continues to be concerned. He suggests the opportuneness of a solution by direct negotiations between the parties." *(Loc. cit.)*

The interview was granted—the request having been supported by the Canadian Embassy also—and Mr. Dean in writing to Mr. Artajo to express his thanks, stated:

> "Our inability to arrive at an appropriate settlement of this matter is naturally a matter of very great concern to the management and shareholders of Sofina, in which there is now a substantial American interest . . ." (Spanish New Docs., 1969, Vol. III, p. 178.)

Mr. Dean informed Mr. Lester Pearson, the Canadian Secretary of State for External Affairs, about his visits as already noted.

30. But despite the warmth of Ambassador Lodge's message to the Spanish Foreign Office, it is clear that the interest of the United States was of a general nature and that its support did not amount to diplomatic protection of the Barcelona Traction company or of any identified

shareholders in that company or in Sidro or in Sofina. In a cable of 15 February 1955, before the visits to Madrid which have just been described, Mr. Dean advised Wilmers, President of Barcelona Traction and then in Brussels, that he had—

> "... received request from our Department [*sc.* Department of State] suggesting they have never considered operating company in question [*sc.* Barcelona Traction] American and have treated this matter not as a protection case but on more general grounds of principle regarding treatment and encouragement of international investment and would appreciate extent to which U.S. capital now participating in company". (O. & S., New Docs. 1964, App. 13.)

It is not known what information was given to the State Department concerning the extent of the United States capital participation at that time [1]. It seems clear from the record that the placing of Barcelona Traction shares in the names of American nominees did not require any investment of United States capital. But Mr. Dean apparently represented both Sidro and Sofina and on 1 February 1955 he informed the Spanish Ambassador in Washington that Sofina was "the majority common shareholder" in Barcelona Traction, and informed the Spanish Foreign Minister that there was a "substantial American interest" in Sofina. (The letter to the Ambassador is in the New Documents presented by Spain on 16 March 1964.)

31. There were references by Spain to Amitas, a Delaware corporation which financed the National Trust receivership, as if it represented a United States interest, but the real interest there seems to have been Belgian. The Canadian Receiver and Manager of National Trust borrowed at least $980,000 from Amitas by selling to Amitas Receiver's 5 per cent. certificates. In his request to the Ontario Court for authorization to borrow the first $100,000 on 25 August 1949, the Receiver and Manager referred to this—

> "American Intercontinental Trade & Service Company (Amitas) Inc., a Delaware corporation which is understood to be associated or affiliated with a Belgian corporation which holds bonds and the majority of the outstanding shares"

of Barcelona Traction. (Receivership Docs., Vol. 2, p. 273.) On 3 August he had written to the Canadian Foreign Exchange Control Board about

[1] As indicated elsewhere, the evidence offered concerning certifications and payments of coupons does not seem persuasive despite the argument of counsel for Belgium on 8 July 1969 citing A.M., Vol. I, Annexes 18 and 20, pp. 133 and 142.

the anticipated dollar transaction, and made a more definite statement. He stated that Amitas is—

> "controlled, I believe wholly owned, by the Belgian interests, commonly referred to as 'Sofina', who are the majority owners of the equity stock of the Barcelona company and who also hold a substantial quantity of its bonds".

He explains that if his receivership is successful, he will have plenty of United States dollars to repay the loan but:

> "Looking at the darkest side of the picture, should the portfolio prove unsaleable, the position would simply be that Amitas would be unable to collect anything upon the Receiver's certificates as there is no personal liability attached thereto." (*Ibid.*, p. 277. The last receiver's request to the Court for authority to borrow, which is recorded in the Receivership Documents filed with this Court by Spain, was on 19 March 1963; Vol. 8, p. 1356.)

This evidence supports the Belgian assertion that the Receiver was financed by Sofina, but of course there were American interests in Sofina. The Receiver in his numerous requests did not refer to nominees or to the trust agreement of Sidro with Securitas which will be discussed later in this opinion.

32. On 25 May 1967, the Belgian Embassy in Washington enquired of the United States Department of State whether the first United States Note of 22 July 1949, concerning American interests in Barcelona Traction, had in mind Americans interested as owners or beneficial owners of shares or whether it included also American citizens acting as trustees or nominees for third persons not having American nationality. The State Department's reply of 5 June 1967 stated that the 1949 Note was inspired by questions of principle relative to the equitable treatment of foreign investments in order to preserve the confidence of foreign investors in the security of their investments in Spain. The interests of American citizens which were mentioned in the 1949 Note, referred only to those who had rights of property or beneficial ownership in the company. (Belgian New Doc. 5 presented 7 April 1969.)

Belgium

33. The first Belgian Note concerning the Barcelona Traction case is dated 27 March 1948 (A.M., Vol. IV, Annex 250). The Note stresses the importance of Belgian interests in Barcelona Traction by asserting that Sidro owns more than 70 per cent. of the shares of Barcelona Traction and other Belgian individuals own enough to bring the total to 80 per

cent. In addition, the Belgian State had 50,000 shares of Sidro received as a capital tax, and 40 to 45 per cent. of the First Mortgage bonds of Barcelona Traction were also held by Belgians. Like the British Government, the Belgian Government notes that some of the higher ranks of the personnel of the companies have been discharged, especially Mr. William Menschaert, a Belgian national, President and sole legal representative of Ebro in Spain. The proceedings in Spain are summarized and declared improper or illegal. The note concludes with the statement that there has been a series of denials of justice which cannot help but gravely injure legitimate Belgian interests in the companies involved. The Spanish reply as usual indicated that the Government could not interfere with the courts.

The next Belgian Note on 22 July 1949 touched on the refusal of foreign exchange, reviewed the further steps in the Spanish proceedings and repeated that the denial of justice continued to injure very important Belgian interests (*ibid.*, Annex 252). Spain sent a reasoned rebuttal on 26 September 1949 but did not challenge Belgium's right to speak for the Belgian interests (*ibid.*, Annex 253).

34. As already noted, in February 1950 Belgium was actively cooperating with Canada on the project for establishing a tripartite committee of experts. When this démarche was frustrated by the Spanish proposal, Belgium vigorously objected to being left off the Committee of Experts. Belgium's next diplomatic protest was on 13 July 1951 (*ibid.*, Annex 254). Stress was laid on the effect of the measures in Spain on the Belgian investors. It was said that in equity, note should be taken of the interest of Barcelona Traction in Ebro and of the interest of Sidro in Barcelona; the interest of the Belgian investors in Sidro was given at 40 to 45 per cent., without counting the participation of Sofina which was 35 per cent. After there had been some conversations on the subject, the Belgian Note of 7 November 1951 again stressed their concern in the protection of very important Belgian interests and enclosed a memorandum on Spanish law (*ibid.*, Annex 256).

35. The Spanish reply of 14 November 1951 now insisted that diplomatic intervention in the *Barcelona Traction* case was the exclusive function of the Canadian and British Governments, whose representatives had been asked to join in the expert committee to examine the question of the refusal of foreign exchange (*ibid.*, Annex 257). Belgium replied on 6 December, discussing the merits of the matter and asserting that the importance of the Belgian interests in the capital of Barcelona Traction justified Belgium being represented on the Committee of Experts. On the same date, Belgium proposed arbitration under the treaty of 19 July 1927;

the issue would be the damage to Belgian interests caused by the bankruptcy of Barcelona (*ibid.*, Annex 258). The Spanish reply of 22 December 1951 argued that Belgium had not complied with the 1927 treaty since it had not presented a formal claim, had not proved the Belgian nationality of the shareholders in a Canadian company, and had not shown that Belgian interests had been injured by an illegal act on the part of Spain (*ibid.*, Annex 259). Belgium replied in rebuttal on 31 December 1951, and Spain countered on 3 January 1952 (*ibid.*, Annexes 260 and 261). At this stage the issue concerning the right of Belgium to interpose in connection with a Canadian company, comes sharply into focus.

36. A Belgian Note of 21 March 1955, indicating the possibility of private negotiations which were then in train, and mentioning the visits of Mr. Dean, is not printed in the Annexes to the Belgian Memorial but as Annex 66, Document No. 2, of the 1963 Preliminary Objections. Then, on 31 December 1956, Belgium sent a long Note summarizing the whole affair (A.M., Vol. IV, Annex 262). On 16 May 1957, a further Belgian Note refers to certain personal conversations of their Ambassador in Madrid and broaches the possibility of a judicial settlement (*ibid.*, Annex 263). The Spanish Note of 10 June 1957 and the Belgian Note of 8 July deal extensively with the question of the right of Belgium to act in this case (*ibid.*, Annexes 264 and 265). The last Note puts more stress on the 50,000 shares held by the Belgian State and summarizes again the extent of the interests of Sidro. It seems unnecessary to follow the ensuing correspondence which involves the actual Application to this Court, the discontinuance and the new Application of 1962.

37. It is hard to explain the apparent reluctance of the applicant Government to place this entire record before the Court in a composite and coherent form especially in view of their recent initiative in eliciting the information from the Government of the United States as noted above. But the conclusion emerges that although in 1948 the Canadian Government, like the other three Governments involved, was disturbed by the judicial proceedings which overtook Barcelona Traction in Spain, the chief Canadian interest was in the securities of which National Trust was trustee and that when the bonds were paid off after the assets were sold in Spain, Canadian interest declined. This was the conclusion reached by counsel for Belgium in his pleading in 1964. (Oral Proceedings, 13 May 1964.) It must be borne in mind that the securities pledged under the Barcelona Traction Prior Lien and First Mortgage bonds held by National Trust Co., Ltd., as trustee, included bonds and shares of Ebro and of Catalonian Land Co., Ltd., and other subsidiaries. Of Ebro, for example, there were some £11 million face value, of bonds and some 300,000 shares of stock. (In another connection, it is interesting that many of the shares had blank powers of attorney attached to the certificates.

See Receivership Documents, Vol. 1, p. 54.) But Canada apparently had no deep abiding interest either in Canadian shareholdings in Barcelona Traction, for they were not large, or in the company itself which (at least after the payment of the bonds) was linked to Canada only by the "charter of convenience" and the receivership proceedings [1]. The latter were not of a nature to stimulate Canadian diplomatic action, although, under the supervision of the Ontario court, the Receiver and Manager took an active part in trying to promote a settlement through negotiations of the private interests involved. (See Receivership Documents, Vol. 5, p. 774.) I do not find it credible that Canada can be considered to be competing with Belgium in diplomatic protection of the interests clustered around Barcelona Traction.

The interests of the United States and Great Britain were those of governments of States which contain great financial capitals—New York and London. Neither of them pressed claims on behalf of specific persons whether natural or juristic. Both Governments have a general interest in the welfare of international "banking and investment circles" which are closely linked with their national economies.

Belgium remains the only identifiable claimant against Spain in connection with the bankruptcy of the Barcelona Traction Company.

If, under international law, a State is not entitled to extend its diplomatic protection to large shareholder interests of its nationals in circumstances such as those in the instant case, none of the equity interests in the Barcelona Traction enterprise would be entitled to diplomatic protection. I do not believe international law requires that such a conclusion be reached.

* * *

38. There is no question that, under international law, a State has in general a right to extend its diplomatic protection to a corporation which has its nationality, or national character as it is more properly called. The proposition raises two questions:

(1) What are the tests to determine the national character of a corporation?

(2) Assuming the appropriate tests are met, must that national char-

[1] Belgian counsel's argument on 30 June 1969 about the "violation of Canadian sovereignty" and interference with the functions of the receiver as a Canadian "public authority" does not seem to reflect the actual thinking of the Canadian Government.

acter be "real and effective" as shown by the "link" between the corporation and the State, just as, in the *Nottebohm* case, this Court decided that a certain claim to nationality is not enough in all situations to justify a State in extending its diplomatic protection to a natural person?

39. There are two standard tests of the "nationality" of a corporation. The place of incorporation is the test generally favoured in the legal systems of the common law, while the *siège social* is more generally accepted in the civil law systems. (See Kronstein, "The Nationality of International Enterprises", 52 *Columbia Law Review* (1952), p. 983.) There is respectable authority for requiring that both tests be met [1].

It is not possible to speak of a single rule for all purposes. The tests used in private international law have their own character, as well brought out by Caflisch, "La nationalité des sociétés commerciales en droit international privé", *Annuaire suisse de droit international*, Vol. XXIV, 1967, page 119.

Commercial treaties and claims conventions often contain their own definitions of which companies shall be considered to have the nationality of a State for *purposes of the treaty*. (Cf. Walker, "Provisions on Companies in United States Commercial Treaties", 50 *American Journal of International Law*, 1956, p. 373; Wilson, *United States Commercial Treaties and International Law*, 1960; and, for a more comprehensive survey, Ginther, "Nationality of Corporations", *Österreichische Zeitschrift für Öffentliches Recht*, Vol. XVI, 1966, p. 28 at pp. 31-59.) The tests used for such purposes may be quite different—even in the practice of the same State—from the tests used for other purposes. For example, the "control" test was widely used to determine the enemy character of property during war, but it is not established in international law as a general test of the nationality of a corporation [2]. On the other hand, *control* may constitute the essential link which, when joined to nationality, gives the State the right to extend diplomatic protection to the corporation. It is a familiar fact that the laws of certain States provide favourable conditions for companies incorporating therein, especially in relation to taxation. Canada is one such State, Liechtenstein is another. In the United States, many companies find it advantageous, for various reasons, to incorporate in Delaware or New Jersey [3]. Charters secured for such reasons may be called "charters of convenience".

40. The Judgment of the Court in *Nottebohm, Second Phase*, in 1955

[1] There is ample coverage of the literature in the excellent study by Ginther, *op. cit., infra.*

[2] See the observations of the Permanent Court of International Justice on the control test in *Certain German Interests in Polish Upper Silesia (Series A, No. 7*, at p. 70).

[3] Cf. Cahill, "Jurisdiction over Foreign Corporations and Individuals who Carry on Business within the Territory", 30 *Harvard Law Review*, 1917, p. 676.

(*I.C.J. Reports 1955*, p. 4), has been widely discussed in the subsequent literature of international law, particularly with reference to the so-called "link theory" by which the effectiveness of nationality may be tested [1].

It has been argued that the doctrine is equally applicable in the case of ships flying "flags of convenience" and in relation to the diplomatic protection of corporations. I have maintained the view that it should apply in both those situations [2].

41. In the instant case the Parties did not debate the applicability of the link principle to the Barcelona Traction Company, but they were certainly aware of the question. The Spanish side stated:

> ". . . the Spanish Government never disputed the effective character of Barcelona Traction's Canadian nationality, because a number of factors were present which were sufficient proof of the existence of a real link between the company and the economic life of Canada". (P.O., 1963, p. 190.)

Counsel for Belgium argued on 4 July 1969 that "if the Canadian Government had been able to espouse in international judicial proceedings the cause of Barcelona Traction, its action could have been challenged on the ground of the lack of sufficient true Canadian interest". Counsel for Spain responded directly to this remark on 21 July.

42. I am in full agreement with the proposition that the decisions of the International Court of Justice should not be based upon a legal rule or principle which has not been considered by the parties [3]—indeed, I believe that the failure to heed that proposition is the only criticism which can properly be directed at the Court's decision in *Nottebohm*. When, however, both Parties have revealed a full awareness of the fact that the "link" principle might be applied to test the national quality of Barcelona Traction, the fact that they did not choose to develop their arguments on the ground of legal principle, rather than of fact, cannot operate to prevent the Court from dealing with the principle. Of course

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[1] The wide range of unfavourable comments is reflected in the text and citations in Grossen, "Nationalité et protection diplomatique", *Ius et Lex*, Festgabe zum 70. Geburtstag von Max Gutzwiller, 1959, p. 489. Brownlie, *Principles of Public International Law*, 1966, has a full treatment at pp. 323 ff. His position is generally favourable to the Court's judgment.

[2] Jessup, "The United Nations Conference on the Law of the Sea", 59 *Columbia Law Review*, 1959, pp. 234, 256. Meyers, *The Nationality of Ships*, 1967, fully covers the question of flags of convenience, and the applicability of the rule to corporations is treated in Harris, "The Protection of Companies in International Law in the Light of the Nottebohm Case", 18 *International and Comparative Law Quarterly*, April 1969, p. 275.

[3] The proposition has been admirably expounded in Carsten Smith, *The Relation Between Proceedings and Premises, a Study in International Law*, 1962.

the question whether the link principle does apply to juristic persons is a question of international law and *jura novit curia*. The implication in the pleading of Belgian counsel just cited, intimated a conclusion that the link principle does apply to juristic persons.

It is indeed true that since Spain admitted that Canada had a right to extend diplomatic protection to Barcelona Traction, it may be argued that Spain is estopped to deny such a right although the elements of true estoppel may be lacking and such estoppel could be claimed (if at all) by Canada and not by Belgium. Aside from the fact that I believe the jurisprudence of the Court has tended to rely too heavily on estoppel or preclusion, the question posed here is in the first place a question of the Court's finding a rule of law. The Court in its Judgment does not accept the application of the link theory to juristic persons. Since I have reached the conclusion that the existence of a link between a corporation holding a "charter of convenience" and the State granting the charter, is the key to the diplomatic protection of multinational corporate interests, I cannot avoid the problems of law and fact on any such basis as the application of the doctrine of estoppel in this particular case.

43. It has also been argued that the Court should not pass judgment on the question whether there existed the necessary link between Canada and Barcelona Traction without hearing argument on behalf of Canada. Canada might have sought to intervene in the instant case under Article 62 of the Statute, but it did not do so. It is said that after judgment is pronounced in this case of *Belgium* v. *Spain*, Canada might find some jurisdictional ground to found an application to institute a case of *Canada* v. *Spain*. It is known that no such jurisdictional ground now exists. It seems quite unreal to suppose that Spain would now agree with Canada upon a compromis submitting to the Court a Canadian claim on behalf of Barcelona Traction, thus exposing Spain to the new hazard of being required to pay some two hundred millions of dollars of damages. But if the Court were properly seised of an application by Canada, it would have to take cognizance of the fact that following Article 59 of the Statute, "The decision of the Court has no binding force except between the parties and in respect of that particular case". Had the Court endorsed the application of the link principle to juristic persons, in its present decision in *Belgium* v. *Spain*, Canada could have argued against that conclusion in the hypothetical case of *Canada* v. *Spain*, or might have relied on Spanish admissions that Canada was entitled to protect the company.

The "Link" Concept

44. It seems to be widely thought that the "link" concept in connection with the nationality of claims, originated in the International Court of Justice's Judgment in *Nottebohm*. I do not agree that in that instance the Court created a new rule of law. Indeed the underlying principle was already well established in connection with diplomatic claims on behalf of corporations. To look for the link between a corporation and a State is merely another example of what is now the familiar practice of "lifting the veil". See, for example Cohn and Simitis "'Lifting the Veil' in the Company Laws of the European Continent", 12 *International and Comparative Law Quarterly* (1963), page 189; Drachsler in *Report of the Section of International and Comparative Law of the American Bar Association*, July 1964, page 29. The practice of such States as the United States and Switzerland had already given weight to the proposition that a corporation would not be protected solely because it was incorporated in the State, i.e., had the State's nationality; some other link was required and that link usually was related to the ownership of shares. Such abstention, being as it were "against interest", has special probative value [1].

Three years after the decision in *Nottebohm*, the Italian-United States Conciliation Commission, under the presidence of the late Professor Sauser Hall, in the *Flegenheimer* case stated:

> "The right of challenge of the international court, authorizing it to determine whether, behind the nationality certificate or the acts of naturalisation produced, the right to citizenship was regularly acquired, is in *conformity with the very broad rule* of *effectivity* which dominates the law of nationals entirely and allows the court to fulfill its legal function and remove the inconveniences specified." (Emphasis supplied.) (53 *American Journal of International Law*, 1959, p. 944.)

That the link concept represents a general principle of law and not merely an *ad hoc* rule for the decision of a particular case, is indicated also by its applicability to the test of the nationality of ships which fly "flags of convenience". These maritime situations are comparable to the corporate situations just discussed since they involve corporate decisions to register their ships under the flags of States which offer special advantages in connection with tax, labour and other laws.

45. The Judgment in *Nottebohm, Second Phase*, was pronounced on 6 April 1955. At that time, the International Law Commission, which was preparing its projects on the law of the sea, had not yet developed

[1] State practice is noted *infra*, paras. 60 *et seq.*

the concept of a "genuine link" as a requisite for the recognition of the nationality of a ship. But the link theory was thereafter actively argued in the Commission and at length in the Geneva Conference of 1958 on the Law of the Sea. Article 5 of the Convention on the High Seas was adopted in the following terms:

> "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. *There must exist a genuine link between the State and the ship*; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." (Emphasis supplied.)

46. In 1959, governments were submitting to the International Court of Justice views on the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* case. The influence of the link concept was apparent. (Meyers, *The Nationality of Ships*, 1967, pp. 227 ff.) When the Court gave its Advisory Opinion on the above case in 1960, it clearly confined itself to a particular question of treaty interpretation and declined to examine general customary law on "a genuine link". (*I.C.J. Reports 1960*, p. 171.) It made a passing reference to Article 5 of the "*unratified* Geneva Convention on the High Seas". In his dissenting opinion, Judge Moreno Quintana said that the provision in Article 5—

> ". . . by which international law establishes an obligation binding in national law, constitutes at the present time the *opinio juris gentium* on the matter". (*Ibid.*, p. 178.)

The *Nottebohm* case itself was not discussed at length in connection with the law of the sea in the International Law Commission but Dr. García Amador, Special Reporter for the International Law Commission on State Responsibility, in his Sixth Report, noted that he had added a paragraph to his earlier draft "in order to incorporate the rule laid down by the International Court of Justice in the *Nottebohm* case". (*Yearbook of the International Law Commission*, 1961, Vol. II, p. 53; see Article 23 of his revised draft at p. 49.) Although the "link" concept was much discussed at the Geneva Conference, only a few governments or delegates referred to the *Nottebohm* case (Meyers, *op. cit.*, pp. 269 ff.). Four States—Netherlands, Norway, Liberia and the United Kingdom—in their pleadings in the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* case made some reference to the Court's statements in *Nottebohm, Second Phase*, about "unilateral acts" of States. (*I.C.J. Pleadings*, pp. 357-359; 365-366; 374;

404-405.) The important point is that there was growing recognition of the rule that if a State wishes to have its "unilateral acts" recognized and given effect by other States, those acts must conform to the principles and rules of international law. If a State confers its nationality on a person who has no genuine link with it, another State may not need to recognize the person as such national. Such nationality has been styled "a citizenship of convenience" [1]. If a State purports to confer its nationality on ships by allowing them to fly its flag, without assuring that they meet such tests as management, ownership, jurisdiction and control, other States are not bound to recognize the asserted nationality of the ship [2]. As a matter of principle and logic—supported by State practice—a comparable rule is applicable to corporations. A State may, by extending diplomatic protection to a corporation, hold out that corporation as having its "nationality", because the State had granted it its charter of incorporation. But if in fact there is no "genuine link" between the corporation and the State in question, the State to which diplomatic representations are made may, on that ground reject them. Perhaps one makes here an analogy to stateless persons but the stateless individual has nothing behind him and cannot be protected until the present imperfect law of human rights is fully developed [3]. On the other hand, the corporation which has a nominal connection with a State of incorporation but whose shares are all owned by nationals of another State in which latter State the actual management and control of the company are carried on, has behind it the shareholders who represent the real interest. No rule of law, no principle, forbids that latter State to extend its diplomatic protection to those interests.

47. It is true that the Court in the *Constitution of the Maritime Safety*

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[1] *Uebersee Finanz-Korporation A.G., Liestal, Switzerland, Plaintiff, Fritz von Opel, Intervener-Plaintiff* v. *Herbert Brownell, Jr., Attorney General*, et al., 133 F. Supp. 615, 619 (1955), affd. 244 F. 2d 789 (1957). This case, decided by the United States District Court, District of Columbia, in the same year as the decision of the International Court of Justice in *Nottebohm*, also involved a consideration of the validity of the naturalization of a German in Liechtenstein during the Second World War. The question was in part whether the intervener was an innocent stockholder in a company vested by the Alien Property Custodian as enemy alien property. The United States Court did not cite the *Nottebohm* case.

[2] There are, however, situations in which national courts still find it appropriate to recognize "the law of the flag"; see *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 83 S. Ct. (U.S.) 671 (1963).

[3] And query whether the term "man" in "The Rights of Man" includes a corporation!

The Court's decision in *Nottebohm, Second Phase*, has been criticized as creating a new group of *apatrides*; see Bindschedler-Robert, "La protection diplomatique des sociétés et des actionnaires", *Revue de la Société des juristes bernois*, Vol. 100, 1964, p. 141.

Committee of the Inter-Governmental Maritime Consultative Organization case, as a matter of treaty interpretation, and taking into account the *travaux préparatoires*, stated that:

> ". . . it is unlikely that it was contemplated [in drafting the Convention which established IMCO] that the test should be the nationality of stock-holders and of others having beneficial interests in every merchant ship; facts which would be difficult to catalogue, to ascertain and to measure. To take into account the names and nationalities of the owners or shareholders of shipping companies would . . . 'introduce an unnecessarily complicated criterion' . . . On the other hand, the criterion of registered tonnage is practical, certain and capable of easy application." (*I.C.J. Reports 1960*, p. 169.)

It would be unsound to transpose some of these words from their context, where persuasive reasons are set out for the particular issue before the Court, to support an argument that it is not practical to ascertain the existence of preponderant, majority or substantial stock interests in corporations. In particular it will be shown that in at least certain cases, international law does not exclude the protection of shareholders on the ground that it is difficult to identify them, e.g., in the case where international law permits the protection of foreign shareholders in a corporation which is the victim of unlawful destructive acts performed by the State of incorporation. Nor can the rule which permits the protection of shareholders in certain circumstances be discarded because company management may sometimes find it inconvenient to reveal the exact position in regard to the ultimate ownership of the shares.

48. One of the reasons for the rule on continuity of nationality of claims is the avoidance of assignments of claims by nationals of a small State to nationals of a powerful State. If a powerful State should seek to attract corporations to incorporate under its laws so that it could claim them as its nationals even though the corporations had no further connection with that State, this Court should not "regard itself as bound by the unilateral act" of that State. The same conclusion must be reached when less powerful States attract the incorporation of companies or the registration of ships by providing "charters of convenience" or "flags of convenience".

It has been noted that Canada is one of the States which attracts the incorporation of companies through favourable tax laws, etc. Counsel for Spain called attention to the fact that a corporation called the San Antonio Land Company was incorporated in Toronto in the same year—1911—as Barcelona Traction by Mr. Pearson, "the promoter and first president of Barcelona Traction". The identity of some of the personalities in the two companies, as well as their London agents, was stressed. The

business of the Land Company was carried on in Texas. Counsel quoted from the report of the Special Master of the Federal District Court in New York [1]:

> "It is perfectly clear that the Toronto office, the Board of Directors, etc., was maintained only in pursuance of the requirements of the statutory existence of the corporation under the laws of the Dominion of Canada. *The effective control of the affairs of the corporation plainly was lodged elsewhere than in Toronto* and followed the peregrinations of Dr. Pearson, the master mind [2]." (Hearing of 27 May 1969.)

49. The evidence shows that counsel for Spain was correct in asserting that the situation in Barcelona Traction was parallel. Throughout, one finds that the important decisions, the vital planning, was done by such persons as Heineman, Wilmers, Speciael, Hubbard and Lawton, whose instructions issued from Great Britain, the United States and Belgium and Spain itself, but rarely if ever from Canada. The general meetings of shareholders held in Toronto seem to have been *pro forma* affairs. It is true that in 1948 a "Receiver and Manager" of Barcelona Traction was appointed in Canada and operated out of Toronto, but since the operating companies in Spain had passed into the control of the bankruptcy officials there, the Receiver and Manager could merely try to encourage a settlement; he did not have the power to *make* a settlement.

Counsel for Belgium, in the same pleading in which he rebutted some of the Spanish contentions about the *San Antonio Land Co.* case, quoted from a judgment of Mr. Justice Roxburgh in the English High Court of Justice, the following passage which strongly confirms the fact that Barcelona Traction's management was not centred in Toronto:

> "Barcelona was a holding and not an operating Company. Sterling was its life blood. It also borrowed pesetas but it had little interest in Canadian dollars. London was its financial seat. . . . There were in Canada, so far as I know, or rather so far as I have been told, nothing but a registered office of undisclosed size with a staff of undisclosed dimensions, and share registers."

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[1] The nature of the litigation in question is not relevant to the point being discussed here.

[2] The rebuttal of counsel for Belgium, on 27 June 1969, while correctly pointing to some errors in the Spanish analysis of the *San Antonio Land Co.* case, did not affect the point here under consideration.

Counsel noted that on the final point the judge had not had discovery, but counsel did not deny the truth of the judge's comment.

It is true that Roxburgh J. was dealing with a period of time anterior to the bankruptcy proceedings in Spain, but I find nothing in the record to suggest that there was later a material change whereby the principal power centre of Barcelona Traction was located in Toronto [1].

* * *

50. There are three situations in which there is wide agreement that a State may extend its diplomatic protection to shareholders who are its nationals, although the company whose shares they hold has the nationality of another State. These three situations are sometimes considered "exceptions" to a general rule allowing protection of the corporation itself.

51. The first of these situations is where the corporation has been incorporated in the State which inflicts the injury on it without legal justification, and where the shareholders are of another nationality.

It is in such situations that one finds the widest agreement that a State may extend diplomatic protection to shareholders who are its nationals [2]. The rationale seems to be based largely on equitable considerations and

[1] In the same court proceeding, the testimony of Mr. Hubbard, Chairman or President of Barcelona Traction during several years, is not wholly clear. He testified that all meetings of the Directors of the Company were held in Canada; that he attended some but not all such meetings; that neither he nor his predecessor or successor as President or Chairman was resident in Canada; that Mr. Speciael, as President *may* have gone to Canada from New York to attend some directors' meetings; it was not necessary for the President or Chairman of the Board to preside over directors' meetings. (According to the company law of Canada, it seems that the directors present may elect a chairman of the meeting if neither the President nor vice-president is present; Fraser and Stewart, *Handbook on Canadian Company Law*, Fifth Ed. 1960, p. 134.) Mr. Hubbard indicated that some decisions were made in London, with notice to the office in Toronto and that in other cases "instructions came from Canada". Mr. Hubbard testified that "There was a very strong Board in Canada" but of the directors listed as residing in Canada (according to a list submitted to the Court in the same proceeding) the only one appearing in the list of registered shareholders in 1948 (A.M., Ann. 2) held one share. (The records of the Court proceedings are in A.C.M., Vol. I, Annex 13, especially Document No. 6.) This was a Mr. Merry who is listed as Secretary of the Company (but not a director) in 1918. (A.P.O., Ann. 22, Doc. No. 2. This is the only extract from minutes of directors' meetings which lists those present, so far as I have been able to ascertain; three directors were present.)

[2] The Respondent here shares in this agreement. Bindschedler-Robert (*op. cit.*, p. 174), writing in 1964, considered that this view was being accepted in international law. She cites the well-reasoned and well-documented study by Kiss, "La protection

the result is so reasonable it has been accepted in State practice. Judge Charles De Visscher says this result is required by "des considérations impérieuses de justice". ("De la protection diplomatique des actionnaires d'une société contre l'Etat sous la législation duquel cette société s'est constituée", 61 *Revue de droit international et de législation comparée*, 1934, p. 624.) By hypothesis, the respondent State has committed an unlawful act from which injury results. The corporation itself cannot seek redress and therefore the State whose nationals own the shares may protect them *ut singuli*. The equities are particularly striking when the respondent State admits foreign investment only on condition that the investors form a corporation under its law. These points are clearly made by Petrén, 109 *Hague Recueil*, 1963, II, pages 506 and 510. Petrén refers with approval to the earlier lectures by Paul De Visscher, 102 *Hague Recueil*, 1961, I, page 399; see especially pages 478-479.

Judge Wellington Koo, in his separate opinion in this *Barcelona* case in 1964 asserted emphatically:

> "... the original simple rule of protection of a company by its national State has been found inadequate and State practice, treaty regulation and international arbitral decisions have come to recognize the right of a State to intervene on behalf of its nationals, shareholders of a company which has been injured by the State of its own nationality, that is to say, a State where it has been incorporated according to its laws and therefore is regarded as having assumed its nationality" (*I.C.J. Reports 1964*, p. 58).

Judge Wellington Koo considered it immaterial whether this rule should or should not be considered as an "exception".

52. It is curious that this "exception" should have been so widely accepted since it ignores the traditional rule that a State is not guilty of a breach of international law for injuring one of its own nationals. It rebuts also the notion that an injury to a corporation is not a direct

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diplomatique des actionnaires dans la jurisprudence et la pratique internationale", in *La personalité morale et ses limites* (1960), p. 179. Kiss indeed cites abundant authority for even broader rights to protect shareholders; he refers to Borchard, Ch. De Visscher, Sibert, Ralston, Fitzmaurice, Pinto, Paul De Visscher, Perry, Séfériades, Jones, Guggenheim, Battagliani, Bindschedler, but query whether all these carry their conclusion as far as does Kiss. See also in support of the broader rule allowing protection of shareholders, Agrawala, "State Protection of Shareholders' Interests in Foreign Corporations", *The Solicitor's Quarterly*, 1962, p. 13; Nial, "Problems of Private International Law", 101 *Hague Recueil*, 1960, III, p. 259.

injury to the shareholders. Moreover, if the foreign shareholders may be protected in such a situation, it is also necessary to choose one horn of a dilemma: either one admits that the right of the shareholders existed at the moment when the injury was done to the corporation, which means that the rights of shareholders may be damaged by an injury to the corporation, or, if that right came into existence subsequently, then one ignores the rule of international law that a claim must be national in origin. Moreover, the admission of this "exception" negates the argument, sometimes advanced against the diplomatic protection of shareholders, to the effect that such claims expose an accused State to a vast variety of claims on behalf of persons of whose existence it was ignorant. Since customary practice has, however, accepted this "exception", other arguments against protection of shareholders are correspondingly weakened, especially since the doctrine in question generally does not insist that the life of the corporation must have been extinguished so that it could be said the shareholders had acquired a direct right to the assets.

53. The second situation in which it is widely agreed that a State may claim on behalf of its shareholders in a foreign corporation, is where the State of incorporation has liquidated or wound up the corporation after the injury was inflicted by some third State.

This situation differs from that just considered in that the respondent State has committed its unlawful act (let us say total confiscation) against a foreign corporation. Here some doctrine would say that ordinarily State A, the State of incorporation, should be the one to extend diplomatic protection. But by hypothesis the corporate life has been extinguished by State A, so that—just as in the first situation—a claim can not be pressed for the corporation. Brownlie states the situation as follows:

> "Where the State under the law of which the company is incorporated terminates the existence of the company in law, or other circumstances make the company practically defunct, the shareholders remain as the interests affected by government act: intervention on their behalf would seem to be justified in such a case." (Brownlie, *Principles of Public International Law*, 1966, p. 401.)

Here it may be said that after liquidation and payment of creditors, the shareholders—under an applicable system of municipal law—have a property interest in the assets and for that reason may be protected. But at the time of the unlawful act ("confiscation") they did not have such a property interest and therefore under the rule of continuity the claim did not have in origin the appropriate nationality on that basis.

54. But Brownlie equates the case of the termination of the existence of the company with the case where it is "practically defunct". This is a term which was used by the British Government in the *Delagoa Bay* case and used a good deal by the Parties in their pleading in the instant case. Its exact meaning is not clear but Barcelona Traction did have some life in Canada even after the practical annihilation in Spain. From 1948 on it was under a receivership, but the "appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company . . ." (Kerr, *On the Law and Practice as to Receivers*, 13th ed. by Walton, 1963, p. 232). As already noted, the Receiver and Manager of Barcelona Traction concerned himself only with promoting negotiations for a settlement between the private parties; none of the public utility enterprises in Spain were under his direction or within his control; and he had to borrow the money for his operations from an affiliate or subsidiary of the Belgian company, Sidro.

It is true that after 1948 there was some trading in Barcelona Traction shares on the Brussels Bourse (Verbatim Record for 7 July 1969), and according to *Moody's Manual of Investments*, for years ranging from 1952 to 1967, there were sales in New York, Canada and London. No information is available to make it possible to say whether the transactions were merely speculative, but it may be noted that in 1961, when the first Belgian application was withdrawn from this Court in expectation of a private negotiated settlement, the quoted price was somewhat higher.

55. It is true that so far as Canadian law is concerned, the shareholders had not yet acquired a direct right to the assets but since I do not base my conclusion on this factor, I do not pursue it further.

56. I also find it unnecessary to consider in detail what is considered the third "exception" where shareholders may admittedly be protected, namely where the injury is inflicted directly on the shareholders and not indirectly through damage to the company.

* * *

57. It is now possible to turn to the question which is crucial for the instant case, namely whether the three situations just mentioned are the only ones in which international law permits a State to extend diplomatic protection to shareholders who are its nationals.

I find no evidence or reasoning which precludes such protection in other situations, but the question can be answered only by analysing the fundamental principles underlying the right of diplomatic protection.

The Basic Principle of State "Interest"

58. In this opinion traditional language has been used, for example in speaking of injuries to a corporation as such, but this is really a bit of anthropomorphism since, as Sir Edward Coke remarked, corporations "have no souls" (case of *Sutton's Hospital*, 10 Rep. 32) and as stated by more recent jurists, the corporation "is not a thing. It is a method." (Douglas and Shanks, "Insulation from Liability through Subsidiary Corporations", 39 *Yale Law Journal*, 1929, pp. 193, 194.) That corporations have a nationality, is a legal fiction [1]. In legal principle and practice, the situation is that in relations with other States, a State is entitled to treat a corporation as if it were one of its nationals, provided the corporation is connected with it by certain links.

> "Indeed, it is at least arguable that all cases of apparent protection of corporations are in reality cases of protection of the shareholding interest of nationals of the protecting State." (Clive Parry, "Some Considerations upon the Protection of Individuals in International Law", 90 *Hague Recueil*, 1956, II, p. 657 at p. 704.)

It is customary also to speak about "claims of individuals" or "of natural persons" and about "corporate claims" or "claims of corporations". Such language is convenient, but it conceals the fact that in international relations, the claims in question are always the claims of a State, not of a natural or juristic person. A citizen has no *right* to diplomatic protection; it is wholly within the discretion of the government whether it will or will not extend its diplomatic protection.

59. A State takes up a claim against another State when it considers that its own interests have been affected. As the Court said in *Nottebohm, Second Phase* (p. 24) "Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State". In *Mavrommatis Palestine Concessions* (*P.C.I.J., Series A, No. 2*, p. 12) the Court identified the State's "own rights" as "its right to ensure in the person of its subject respect for the rules of international law". Almost the identical words were repeated by the Court in *Panevezys-Saldutiskis Railway* (*P.C.I.J., Series A/B, No. 76*, p. 16), although in this latter case the Court went on to elaborate the importance of "the bond of nationality".

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[1] "Legal fiction", according to Morris Cohen, "is the mask that progress must wear to pass the faithful but blear-eyed watchers of our ancient legal treasures. But though legal fictions are useful in thus mitigating or absorbing the shock of innovation, they work havoc in the form of intellectual confusion." Quoted in *Transnational Law*, p. 70.

In explaining the basis for a State's right to give diplomatic protection, the rather simplistic notion that a State was injured when an injury was inflicted abroad upon the least of its nationals, has come to be superseded by the realization of the national economic importance of foreign investments as State interests.

This is one reason why it is not now pertinent to stress the difference in municipal law between private "rights" and "interests", as Judge Gros shows so clearly in his separate opinion.

> ". . . States protect their corporations chiefly on the basis of the real national interest and not, in fact, on the basis of nationality. In such a situation, it seems necessary to allow the State of the nationality of these shareholders to present their claims to the limit of their interest in the corporation. . . .
>
> Since the protection of national interest in foreign corporations is based on protecting an economic or pecuniary interest, it matters little whether the party in whose behalf the protection is exercised is a shareholder or a bondholder, or even if the national interest is held indirectly; e.g., if a national corporation controls another corporation which holds bonds or shares in a third corporation sustaining an injury." (Khalid A. Al-Shawi, *The Role of the Corporate Entity in International Law*, 1957, pp. 55 and 59.)

"In three countries—Italy, Britain and France—all proposals for foreign investment must clear government agencies before they can be carried out, whether or not government sources of credit are used . . . The Government of Japan, through the Ministry of Finance (and when required, through such additional agencies as the Ministry of International Trade and Investment and the Ministry of Agriculture), must approve all foreign investments . . ." (Friedmann and Kalmanoff, *Joint International Business Ventures*, 1961, pp. 188 and 190.)

60. No survey of State practice can, strictly speaking, be comprehensive and the practice of a single State may vary from time to time—perhaps depending on whether it is in the position of plaintiff or defendant. However, I am not seeking to marshal all the evidence necessary to establish a rule of customary international law. Having indicated the underlying principles and the bases of the international law regarding diplomatic protection of nationals and national interests, I need only cite some examples to show that these conclusions are not unsupported by State practice and doctrine.

61. The primacy of the general economic interests of the State in protecting private investments abroad, and the minimizing of any one es-

sential test justifying diplomatic protection, are strikingly brought out in the message of the Swiss Conseil fédéral of 29 October 1948 to the Assemblée fédérale, concerning the negotiation of agreements with Yugoslavia on trade, payments, and a global settlement of Swiss claims for nationalized property:

> "*Article 5* indicates what must be considered as Swiss assets, holdings or claims. This question presents no difficulty when the assets belong to natural persons; in that case the nationality of the owner or creditor serves as the criterion. So far as corporate persons and companies are concerned, the seat, which must be in Switzerland, has not been made the only test, but the question is also raised as to whether there is a substantial Swiss interest in the corporate person or company. In most cases the substantial Swiss interest will be shown to exist when the effective majority of the capital is in Swiss hands. If there is no such majority, it is the minority exerting a decisive influence on the company which is to be taken into account; this is particularly easy to discern when there is a compact minority on one side and a scattered majority on the other. The composition of the board of directors and senior management may also be a determining factor when it belongs to them to shape the will of the corporate person and decide on its behalf. Lastly, in certain cases the creditors ought not to be overlooked either, for they too may exert a certain influence on the undertaking. But it is always necessary to consider the real circumstances and not trust in purely legal constructions, whose sole aim may be to dissimulate the true facts." (*Feuille fédérale de la Confédération suisse*, 100e année 1948, Vol. III, p. 672 at 686. *[Translation from French by the Registry.]*)

62. In its note of 20 April 1938 to the Mexican Government, in regard to the case of Mexican Eagle Oil Company, a Mexican corporation, the British Government said:

> "But the fact remains that the majority of shareholders who are the ultimate sufferers from the action of the Mexican Government are British, and the undertaking in question is essentially a British interest.
>
> For this reason alone His Majesty's Government have the right . . . to protest against an action which they regard as unjustified." (8 Whiteman *Digest of International Law*, p. 1273.)

In a section of the *British Digest of International Law*, entitled "Protection of British Interests in Foreign-Incorporated Companies", one finds a number of passages in which the stress is on the British "interests" rather than on the nationality of the company. (See Vol. 5, Part VI, pp. 535 ff.)

63. In regard to the practice of the United States, it has already been noted that that Government maintains that it is entitled under international law to protect substantial American shareholder-interests in foreign corporations and that it declines to protect American companies in which the substantial interest is alien-owned. Thus, in 1912, the Department of State declined to make representations on behalf of an American company in which Americans owned only $100 worth of shares out of a total of $450,000. (V. Hackworth, *Digest of International Law*, p. 845.) In 1965, the same Department informed an American embassy: ". . . the Government of the United States has the right under principles of international law to intervene or espouse a claim on behalf of nationals of the United States who own a substantial interest in a corporation organized under the laws of . . . [a foreign country]". (8 Whiteman *Digest*, p. 1272.)

The Restatement of Foreign Relations Law of the American Law Institute (1965) in Section 173 provides that a State is liable for damage to alien stockholder interests in a corporation of a third State if "a significant portion of the stock" is alien-owned, the corporation fails to obtain reparation, for reasons which the shareholders can not control, and the corporation has not waived or settled its claim.

> "In international law, as in the domestic law of the United States, there has been a gradually increasing tendency to disregard the separate corporate entity when necessary to avoid injustice. Originally the United States, like Great Britain, refused to intervene on behalf of its national shareholders in a foreign corporation . . . Since late in the 19th century, a number of such claims have been presented to and allowed by international tribunals. In most of these, the international responsibility of the State with respect to the injury to the alien shareholder as such was not squarely presented as a question of international law, since this point was settled by the terms of the international agreement establishing the tribunal or by the *compromis* under which the case was submitted to it . . . [citing *Delagoa Bay*]. However, the practice of providing for such cases in international arbitration agreements has apparently come to be regarded as a reflection of customary international law, and it now seems to be recognized that, at least under some circumstances, the State is responsible for the injury to alien shareholders owning a significant interest in the injured corporation." (Reporter's Notes to S. 172; cf. II, Hyde, p. 904.)

64. In the *Hannevig* case, Norway espoused against the United States, the claim of Hannevig, a Norwegian national, on the ground that he had a

substantial interest in certain American corporations alleged to have been damaged by action of the United States Government. (The case is described in 32 *American Journal of International Law*, 1938, p. 142.) The United States did not assert the American character of the corporations as a basis for resisting the claim.

65. This section of the opinion may close with the words of Judge Huber in the familiar *Ziat, Ben Kiran* claim:

> "International law, which in this field, is in the main based on principles of equity, has laid down no formal criterion for granting or refusing diplomatic protection to national interests bound up with interests belonging to persons of different nationalities." (8 Whiteman *Digest*, p. 1283.)

* * *

The Question of Double or Multiple Protection

66. Counsel for the Respondent made numerous statements to the effect that diplomatic protection could never be extended by more than one State in any one case. Such an argument is advanced against the possibility that more than one large shareholding interest might be protected, it being alleged that if the State of which the company has the nationality is the only State entitled to extend diplomatic protection, impermissible double protection would be avoided. That position is not correct since there are various situations in which international law recognizes the right of more than one State to interpose in connection with the same allegedly wrongful act.

67. In an ordinary case of dual nationality, both of those States of which claimant is a national may extend protection although in case of conflict an international tribunal may apply the doctrine of effective nationality. This Court said in the *Reparation for Injuries Suffered in the Service of the United Nations* case: "International Tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case." (*I.C.J. Reports 1949*, pp. 174, 186.) In that case, the Court was asked by the General Assembly to consider, and it did consider, whether a claim might be brought both by the State of which the injured person was a national and by the United Nations. The Court said that "there is no rule of law . . . which compels either the State or the Organization to refrain from bringing an international claim". The General Assembly thereafter recognized that two claims might be presented, and authorized the Secretary-General to negotiate agreements to reconcile action by the United Nations with the rights of the State of which the victim was a national. (UN General Assembly Res. 365 (IV), 1 Dec. 1949, para. 2.)

68. The situation is not so simple when one considers the condition of artificial or juristic persons. International law has not developed a clear rule of dual nationality for such entities although different criteria are employed for determining nationality. Respondent indicated that a company may have dual nationality because both criteria are acceptable (Preliminary Objections, 1963, p. 191), but it insisted only one of the two States may make a claim. Yet in cases which are now very common in the commercial life of the world, the corporation may have various links with more than one State—links just as real as those which may connect a natural person with two different States whose nationality he possesses. International law cannot be oblivious to these corporate links. As already indicated above, they include the place of incorporation, the place of management, the place of operation (probably including employment of labour and payment of taxes), the nationality of the persons (natural or artificial) who exercise control, whether through the board of directors and management, or through stock interests, which not infrequently may exercise control even when a relatively small minority.

69. I shall not go over all the cases but merely note the double or joint diplomatic interposition in *Delagoa*, *Mexican Eagle* and *Tlahualilo*. (Cf. Paul De Visscher, 102 *Hague Recueil*, 1961, I, pp. 477-478.) In the case of Barcelona Traction, diplomatic representations, some perhaps only in the nature of good offices, were made by Canada, the United Kingdom, United States of America and Belgium.

In the case of two different but simultaneous justifiable diplomatic interpositions regarding the same alleged wrongful act, the Respondent can eliminate one claimant by showing that a full settlement had been reached with the other. If, in this case, Spain made a settlement with Canada for Barcelona Traction, the Belgian claim for the shareholders might be considered moot.

70. With all respect to the Court, I must point out the irrational results of applying a rule which would provide that only the State in which a company is incorporated may extend diplomatic protection in case of damage inflicted under circumstances in which the State inflicting the damage incurs liability under international law, as illustrated by the organization of the Iranian Oil Consortium. In September 1954 an agreement was concluded between eight oil companies on the one side and, on the other side, the Government of Iran and the Government-owned National Iranian Oil Company; it was ratified by the Iranian Parliament.

The agreement gives to the Consortium the exclusive rights in a defined area for the production, refining and processing of crude oil and natural gas, together with other facilities. The eight participating oil companies include the former Anglo-Iranian Oil Company, now British Petroleum Company, which participates to the extent of 40 per cent.; five American oil companies also having 40 per cent.; the one Dutch company having 14 per cent. and the French company having 6 per cent. To carry out the operations, the Consortium caused to be incorporated in the Netherlands, two Dutch companies, one a Producing company and the other a Refining company. All the shares of the Dutch Producing company and of the Refining company are owned by an English holding company, Iranian Oil Participants Limited, with offices in London. The shares of the "Holding Company" are owned by the members of the Consortium in the percentages indicated above [1]. The two operating companies were incorporated in the Netherlands because of the liberal provisions of its commercial code which permit the companies to have their head offices and board of directors and management overseas, in this case, in Iran. The code also permits "one-man" companies, which makes it possible for all their shares to be held by the "Holding Company" in London. Fortunately, the Iranian Oil Consortium agreement was so skilfully drawn in a co-operative spirit, that one does not anticipate the likelihood of any diplomatic claims, quite aside from the fact that the agreement includes notable arrangements for arbitration of any disputes [2]. But should there be any question in the future of representations by any government, it would be absurd to maintain that the Netherlands Government would be the sole government entitled to make such representations. Nor would it seem rational to assign an exclusive role to the British Government on the ground that the Holding Company was incorporated in Great Britain and has its office in London. Perhaps a stronger link between the enterprise and Great Britain would be the extent of British Government participation in holding shares in British Petroleum.

* * *

[1] Actually, in 1955 nine independent American companies were admitted to participate and each of the original American participating companies surrendered 1 per cent. of their shareholdings to the new group. For the purposes of this illustrative example, it is not necessary to explain further the position of another British company, Iranian Oil Services Ltd. This account of the organization of the companies is based upon "History and Constitution of Iranian Oil Participants and Iranian Oil Services", a talk by Mr. J. Addison, General Manager of Iranian Oil Participants Ltd. to Staff Information Meeting, Tehran, 21 August 1961.

[2] See "The Oil Agreement Between Iran and the International Oil Consortium: The Law Controlling", by Abolbashar Farmanfarma, of the Tehran Bar, in 34 *Texas Law Review*, 1955, p. 259.

71. The Court could logically have begun its analysis of the case by examining the proof of the nationality of the physical or juristic persons whom Belgium asserts the right to protect. If it found that such nationality was not proved, the Belgian claim must be dismissed without regard to the rule concerning the diplomatic protection of shareholders in a corporation chartered in a third State.

72. The burden of proof was clearly on the Applicant to prove the Belgian nationality of the shareholders on whose behalf Belgium claims. The Belgian argument (7 May 1969) that Spain was estopped or precluded from contesting the Belgian character of Sidro and Sofina, is not persuasive.

The Continuity Rule

73. The two dates on which the nationality had to be proved, are determined by the rule of continuity. As the term implies, the rule requires that the nationality remain unchanged between those two dates. Sir Gerald Fitzmaurice makes a forceful argument against any "too rigid and sweeping" application of the continuity rule, but I believe his illustrative situation in paragraph 62 of his separate opinion may be covered by another rule deriving from the law of State succession, and on that basis would escape the application of the continuity rule for international claims which I consider to be generally binding—*specialia generalibus derogant*.

74. Although the phraseology varies, there is general agreement on the principle that the claim must be national in origin, that is to say that the person or persons alleged to have been injured must have had the nationality of the claimant State on the date when the wrongful injury was inflicted. One might well admit that there is a certain artificiality in the whole notion since it rests basically on the Vatelian fiction, but I do not think the Court can change a long established practice on this matter. (But cf. 1932 *Annuaire de l'Institut de droit international*, Vol. 37, pp. 479 ff., and Jessup, *A Modern Law of Nations*, 1947, p. 116.)

75. There was a fleeting attempt by Belgium to identify the origin of the claim as the refusal of foreign exchange, which indeed started the toboggan down the slide in terms of the Belgian contentions. (See especially the statement by counsel for Belgium on 18 April 1969: "Belgium rests its case on the illegality in international law of Mr. Suanzes's rulings in October and December 1946 and the circumstances surrounding them.")

This position was abandoned (it would have weakened the Belgian case in terms of the continuity rule), and throughout much of the written pleadings and oral argument it seems to have been taken for granted

that the critical date, when the injury complained of was inflicted, was that of the Reus decree declaring Barcelona Traction bankrupt, namely 12 February 1948 [1]. I think the Court is entitled to accept that date, at least to the extent of saying that if the claim was not Belgian on that date, the claim must be dismissed.

76. The terminal date under the continuity rule is more controversial. Historically, many international claims have been settled through the diplomatic channel and never were presented to an international tribunal. In many mixed claims commissions, claims were heard long after the events complained of because the commissions were established *ad hoc* after a certain number of claims had accumulated. For a moderate example, the British-American Mixed Claims Commissions established under a treaty concluded in 1910, decided in 1920 a claim based on events which took place in 1898. (VI, *U.N.R.I.A.A.*, p. 42.) This diplomatic practice supported the view that the nationality of the claim had to be proved up to the time when it was *espoused by the State*. Thereafter, it was argued, the claim could be regarded as statal and, for the purposes of the continuity rule, the status of the individual on whose behalf the claim was made, became immaterial.

Now the first Belgian representation in regard to the bankruptcy proceedings involving Barcelona Traction, was dated 27 March 1948 (A.M., Vol. IV, Annex 250). But in its Note of 22 December 1951 (*ibid.*, Annex 259), Spain maintained that Belgium had not then as yet made a *formal* claim. This was denied by Belgium (Annex 260), which insisted that its diplomatic protest of March 1948 should be considered a formal claim. In any event, at that period Belgium seems to have claimed on behalf of the Barcelona Traction company and not the Belgian shareholders.

77. However, when a case is brought before a permanent tribunal such as the International Court of Justice, the date of the application takes the place of the first diplomatic representation [2]. Counsel for Belgium on 4 July 1969 made a persuasive argument in favour of choosing that as the date required by the continuity rule although I do not agree that the Court is driven to making new law no matter what terminal date it

[1] In its final submissions on 15 July 1969 under heading VI, Belgium asserted:

> "that the Belgian Government has established that 88 per cent. of Barcelona Traction's capital was in Belgian hands on *the critical dates of 12 February 1948 and 14 June 1962 and so remained continuously between those dates* . . ." (Emphasis supplied.) The same assertion was amplified under heading V.

[2] See Institut de droit international, *Annuaire*, 1965, Vol. II, p. 270.

selects. Counsel for Spain on the other hand, insisted on 21 July 1969 that the critical moment for the terminal date should be when the terms of the dispute were clearly defined which could only be after the respondent State had indicated its position. I find slight precedent for this view and see no logic in it [1]. I therefore conclude that the terminal date for compliance with the continuity rule is 19 June 1962, the date of the "new" Application.

Piercing the Veil of Sidro and Sofina

78. Belgium conceded that to prove the nationality of Sidro and Sofina it should go, and had gone, beyond the simple facts of State of corporation and *sèige social*. It stated that in strict law it was not necessary to go beyond that but—

> "it has always admitted—basing itself on the constant practice of States—that a government is only justified in taking up the claim of a company [2] if the latter's nationality be real and effective. For this reason, the Belgian Government has made a point, from its very first pleadings, of showing that three-quarters of Sidro's shares belonged to Belgian shareholders on the two crucial dates (1948 and 1962). On account of the size of the participation in Sidro's capital of another Belgian company, Sofina, the Belgian Government has taken a further step; it has shown that on the same dates Belgian shareholders had an even larger holding in Sofina than in Sidro." (Reply, Part III, Sec. 1013, p. 738.)

In the next section Belgium states that it is not obliged to show that Sidro's shares are, for the major part, Belgian owned but has nevertheless done so particularly in Annex 133 to the Reply.

79. In the light of this statement in its written pleading, the Court is justified in deciding whether Belgium succeeded in its attempt to prove the nationality of the alleged Belgian shareholders in Sidro and Sofina, in other words, to pierce the corporate veils of these two Belgian companies. I repeat that share-ownership is not a test of corporate nationality

[1] Nevertheless, there is some support for the view that nationality must be continuous to the date of the Court's judgment; see the convenient summary in Roëd, "Bankruptcy and the Espousal of Private Claims under International Law" in *Legal Essays—A Tribute to Frede Castberg*, 1963, pp. 307-309.

[2] The "company" in question is *Sidro as shareholder* in Barcelona Traction. Mr. Arthur Dean, in his letter of 1 February 1955 to the Spanish Ambassador in Washington, stated that he represented "Sofina, the majority common shareholder" in Barcelona Traction. [Footnote added.]

in the broad sense, but, as Belgium states, a test of whether the nationality is "real and effective". Belgium in effect thus accepts the application to corporations of the Nottebohm link principle. But there are other Belgian statements in the oral argument which seem to modify that position and which object to the Spanish demand for proof of Belgian shareholding in the two Belgian companies.

80. If, as I maintain, Canada was not legally competent to protect Barcelona Traction because of the absence of a link (such absence being in part proved by the extent of foreign shareholding) [1], then Belgium by the same token would not be legally competent to protect Sidro unless the presence of a link is established. This is the challenge which Belgium seems to have accepted. Apparently Belgium was willing to have the link tested entirely by the extent of shareholdings and not by other factors. This may be due to inability to prove that the international controlling group was associated with or operated out of Belgium. Here again there is an illustration of the fact that the rule which permits claims to be submitted on behalf of shareholders places a heavy burden of proof on the claimant State, especially in the case of great international holding companies whose focus of power can not easily be proved especially over a period of years. There is added difficulty in time of war when many steps, some of them devious, but quite justifiable, need to be taken to avoid enemy appropriation or exploitation and also characterization as enemy by allied or friendly States. As Berle has abundantly demonstrated, the centre or focus of power is not necessarily to be identified by the location of the largest number of shares [2]. Counsel for Belgium recognized this fact in stating, on 13 May 1969, that Sofina was, at one period, controlled by about 8 per cent. of the shareholdings. The place of incorporation, whence the promoters of an enterprise secure a "charter of convenience", has lost its significance as evidence of the real identification

[1] In all the analyses of the nationality of shareholders, very little emphasis is put on any Canadian holdings. On 1 April 1962, out of 1,798,854 issued shares of Barcelona Traction 41,294 were held in Canada. The Canadian shareholders included 57 individuals (of whom 20 held less than 5 shares each) and 43 Canadian companies of which one, Houston & Co., held 30,225 shares. In the "U.S.A. Section", 11, not counting Newman & Co., held over 1,000 shares each. 15 shareholders holding a total of 2,387 shares, had addresses in Belgium. Of these, 7 held only 1 share each; in at least some of these cases they seem to have been simply qualifying shares (A.M., Annex 10).

[2] ". . . it is just possible that in talking the language of 'ownership' in relation to the flow of national capital, we are talking the language of history rather than the language of reality" (Berle, *Power Without Property* (Eng. ed. 1960), p. 45).
This is true because, as Judge Tanaka has pointed out, anonymity brings about the separation of management from the ownership. (Cf. *Morphologie des groupes financiers*, Centre de recherche et d'information socio-politiques, 1962, pp. 9 and 60, and Meyssan, *Les droits des actionnaires et des autres porteurs de titres dans les sociétés anonymes*, 1962, pp. 9-10.)

of a holding company. Moreover, the *siège social* in terms of an office, etc., can be merely a façade.

81. There is, to be sure, a certain logic in taking the position that if international law permits a State to protect a shareholder interest, the State should be able to protect a single shareholder and would not have to prove that a substantial percentage of the shares were held by its nationals. This seems to be the Swiss practice but not that of the United States and there is very little support in the doctrine for pushing logic to such extremes. Nor does the claimant State in the instant case rely on any such principle—quite the contrary. Law is constantly balancing conflicting interests. The British-American Claims Commission, under the Presidency of Henri Fromageot, in 1923 in the *Eastern Extension* case, declared that "the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying . . . the corollaries of general principles". (VI, *U.N.R.I.A.A.*, pp. 112, 114.) It is such reasoning which supports Dunn's allocation of risk theory in the law of State responsibility. I have elsewhere pointed out as a transnational illustration, the power of a single shareholder to induce a great corporation to change its policies. But the international protection of broad State interests of an economic and financial character does not require permitting a State to protect, let us say, a holder of just one of the hundreds of millions of shares of a company like A.T. & T.

82. It must be realized how different in character are various corporations. Holding companies like Barcelona Traction are very different from, let us say, the Ford Motor Company or the Du Pont Company. In these two examples, regardless of foreign holdings or interests of the companies, and regardless of the number of their shares which may be held by foreign interests, the location of plant, the employment of labour and the payment of taxes are all factors, in addition to place of incorporation and of policy making, identifying the companies as "American". Generalizations clustered around the word "corporation" or "company" are therefore dangerous.

83. If one looks at the link of management-brains, the citizenship of an individual is not conclusive. If a "Nottebohm" were the sole managing and controlling personality in a company, this would not prove that the company was identified with Liechtenstein, for purposes of the application of rules of international law. Nor is apparent residence conclusive; compare the arguments of the Parties about the residence of Juan March at

certain periods, and the challenges to evidence produced to prove residence. From the point of view of explaining the reasons for diplomatic protection, it may be significant that the controlling power group has, for one reason or another, strong political influence with a certain government. Spain's invocation of old press reports of scandalous connections between Belgian Government officials and personalities connected with Sidro or Sofina, suggested this element.

84. There are, of course, abundant precedents for protection of bondholders—I refer to the holders of corporate bonds and not the holders of government bonds which raise entirely different legal (and political) problems, as Drago clearly showed. In the instant case, there was at certain times, as already noted, stress by Great Britain and by Canada upon the interests of bondholders. As a characterization of the claim as Belgian, bondholding does not seem to be significant.

Proof by Presumptions

85. In the attempt by Belgium to prove that Sofina's shares were held by Belgians, at least in large part, there is a very extended analysis of Belgian wartime legislation. The subject is covered in greatest detail in Annex 133 of the Reply and in counsel's pleading on 13 May 1969. In this line of argument it is explained that under the legislation in question, various rules were laid down concerning certifications and the declarations of ownership of types of shares, whether held in Belgium or abroad. The argument is to say the least devious and rests on a pyramid of presumptions. In Annex 133 to the Reply at page 769, it is said that the proof adduced "rests on presumptions, but presumptions represent a mode of proof recognized by all legislative systems . . .". Yet counsel for Belgium on 17 April wisely admonished the Court: "The Court will, I trust, here as elsewhere, reject any attempt to substitute allegations for proof or insinuations for fact." It must also be noted that Belgian counsel admitted on 4 July 1969 that the certificates did not purport to establish *continuity* of Belgian ownership. Moreover, there are facile transitions as from broad categories such as "non-enemy", which included "allied", to the particularity of "Belgian". I do not find the evidence at all convincing.

In the pleading of Belgian counsel in 1964, it was stated on 15 April that there is a presumption "that when a company is established in a

particular State and enjoys the national character of that State, the company is also owned and controlled by shareholders of the same nationality". By this token, the controlling shareholders of Barcelona Traction would have been Canadian. Counsel offered a further presumption that since the shares of Sidro and Sofina "are traded principally in the Brussels stock market", Belgian nationals own the shares in those companies. [*Ibid.*, p. 14.] It was further suggested that if shareholders give an address in Belgium, they must be presumed to be Belgians. [*Ibid.*, pp. 9-10.]

86. The Belgian Memorial filed in 1959 after the first Application, was more realistic in its appraisal of a submitted classification of ownership of Barcelona Traction shares. The Memorial stated (at p. 19):

> "It should be noted that the foregoing classification was, in almost all cases, established on the basis of the place of residence of the person in whose name the shares were registered at that time. Having regard to the Anglo-Saxon custom of resorting to nominees who are merely custodians of the securities, such a classification does not necessarily correspond to the place of residence of the real owners of the securities. Sidro itself had its Barcelona Traction shares registered in the name of an American nominee.
>
> Furthermore, the place of residence may not correspond to the nationality of the person concerned, but this is of no great importance in view of the small number of shares considered as Belgian apart from those held by the Sidro company."

On 13 May 1969, Belgian counsel presented a long detailed list of presumptions, largely based on the time and place of declaration and certification under the Belgian wartime legislation. The information does not seem, as claimed by counsel, to be "both exact and consistent".

On 7 May counsel for Belgium had argued from certain reports of trading in Barcelona Traction bearer shares on the bourse in both Paris and Brussels during 1961-1962. (The reports are in A.R., Annexes 131 and 132.) In Paris the shares were apparently unlisted and there was no record of the number of shares bought and sold. In Brussels 44,264 shares were traded and counsel remarked: "True it cannot be said that all the purchasers were necessarily Belgian but the *likelihood* is that they were." [Emphasis supplied.]

87. The actual Belgian position seemed to fall back on that taken by counsel on 7 May 1969 in the following statement:

> "After all, and this is a point of some importance, it is not necessary for the Government of Belgium to satisfy the Court regarding

> the identity and Belgian nationality of every individual shareholder whose rights and interests underlie the Belgian claim. According to the doctrine recognized by this Court and generally accepted by States, Belgium is presenting a claim for injury done to the State of Belgium through wrongs inflicted upon its nationals. The Court therefore, need do no more than estimate in proximate terms the number of Belgian shareholders in Barcelona Traction."

Although he argued that the evidence is enough for the Court to find that as of 14 June 1962 "at least 200,000 bearer shares in Barcelona Traction were owned by Belgians other than Sidro", it was actually left to the Court to make an approximate estimate. All of these presentations and others not noted here, do not suffice to discharge the burden of proof which rested on the Applicant.

88. One cannot deny that it is far from easy to trace the ownership of bearer shares. In the *Certain German Interests in Polish Upper Silesia* case, the Polish Government argued that "no importance can be attached to the possession of bearer securities, since it is impossible to ascertain in whose hands they may be at a given moment". (*P.C.I.J., Series A, No. 7*, p. 67.) The Court did not find it necessary to pursue this point. In the instant case, Belgium said that Spain was seeking to drive them with their backs to the wall by demanding a *probatio diabolica* for identification of holders of bearer shares. But Belgium insisted that in this instance it was able to accomplish this almost impossible task. (Memorial, 1959, p. 17; Reply, Part III, p. 156, and C.R. for 13 May 1969.) I am not convinced that it succeeded [1].

Apparently 341,326 bearer shares were in the trust account with Securitas (to be discussed later herein), after being deposited 31 December 1939 (O.S., p. 203). Then 8,525 more bearer shares were deposited by Sidro with Securitas—7,925 on 12 December 1939 and 600 on 22 February 1940—while 2,075 bearer shares were, for some reason, left in Brussels. (*Ibid.*, pp. 203-204.)

When on 19 April 1948, Sidro asked Securitas to send to Newman & Co. various securities, it included in the lot to be sent 6,025 bearer shares and the coupons of 341,326 bearer shares, but not the latter certificates themselves. (App. 2 to Annex 11 of the Anexes to the Memorial.) In January 1952, Sidro converted the 341,326 bearer shares then in its

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[1] The Belgian State in 1946 or 1947 possessed 10,000 shares of Sofina and 50,000 shares of Sidro. The shares were acquired in payment of a capital levy in 1946 but were apparently held by the State only briefly and probably not after 31 December 1947. See A.O.S., Ann. 30, App. 3, pp. 368 and 381 and Sub-App. 3, p. 388. It was in another context that Belgian counsel spoke, on 4 July 1969, of "the overall claim, here put forward by the Belgian Government, in respect of the injury done to the Belgian State by the unlawful acts for which Spain is responsible".

possession to registered shares; they were registered in the name of Newman & Co. (See *ibid.*, Annexes 11 and 4.) I have not been able to establish that none of these 341,326 bearer shares changed hands between 12 February 1948 and January 1952.

It is alleged that 244,832 additional bearer shares were owned by other Belgians in February 1948. (M., Sec. 10.) It was claimed that on 14 June 1962, 200,000 bearer shares were held by Belgians other than Sidro. (O.S., p. 206). I find no proof that these bearer shares were continuously Belgian-owned (assuming the above allegations to be correct) between 1948 and 1962.

89. In reply to a question from the Bench concerning the possible effect on continuity if shares were transferred during the period 1948-1962, counsel for Belgium said, on 4 July 1969, that if shares were sold to other Belgians and then repurchased by Sidro, "the continuity requirement would be satisfied". But "if the shares had been sold to, and then repurchased from, non-Belgian nationals, other than Spanish nationals, the requirement might *possibly* not have been satisfied . . .". The Spanish side challenged this statement, and properly so, because one does not see why this situation would differ from counsel's third case. The third case he put was where the shares had been sold to, and then repurchased from, Spanish nationals; here he agreed the continuity requirement would *not* have been satisfied. Counsel sought to justify his answer to his own second case by various quotations to the effect that the continuity rule is artificial and should be re-examined. But he merely says that Belgium "feels it right that the existence of this body of critical opinion should be drawn to the attention of the Court". He did not, however, deny the existence of the rule. When later he analysed his evidence of Belgian holdings in 1948, he did not try to adduce proof that the shares did not change hands between 1948 and 1962. It was in this context that he rejected the Spanish suggestion that Belgium should prove in regard to each shareholder that he was a Belgian and that he was a shareholder during the critical period. Counsel said:

> "It is a lengthy and expensive procedure to carry out the investigation proposed by the Government of Spain. It is justifiable if there is something to be distributed. [*Sc.* an award in this case.] It is not justifiable otherwise."

He felt this was the more true because he considered that Belgium had proved that there was at all material times Belgian ownership of at least 200,000 shares aside from the Sidro holdings. None the less, the statement is a damaging admission of Belgium's inability to identify the

shareholders it sought to protect. The exhaustive effort to trace the bearer shares would hardly have been necessary if Belgium had been confident that the Court would be convinced that Sidro was the real owner of the 1,012,688 registered Barcelona shares throughout the critical period since so large a holding would presumably satisfy the demand that Sidro be identified with Belgian interests. This may be another slight indication that Belgian counsel were aware that they were, for one reason or another, not in a position to prove when the Securitas trust arrangement terminated. (See paragraph 96 below.)

* * *

Securitas as Trustee for Sidro

90. On 6 September 1939 Sidro concluded a "custodian" contract with Securitas Ltd. which was a United States corporation formed under the laws of Delaware. (P. 722 of the Chayes Opinion, A.R., Ann. 125; so stated also in A.O.S., Ann. 11, p. 206. Other statements of fact here are taken from the recital in Annex 3 of the Memorial unless otherwise stated.) It is said that this contract was concluded "foreseeing the danger of war". (The contract is in A.M., Ann. 3, App. 2.) Such a custodian contract did not transfer the "real ownership" which was vested in Sidro.

91. The recitals in Annex 3 of the Memorial do not mention the fact (revealed later in A.O.S., Ann. 11, p. 207) that on the same date, 6 September 1939, Sidro made with Securitas a second contract which was a *trust* agreement. It was further revealed that this trust agreement of 6 September 1939 was replaced by another trust agreement on 27 February 1940, but it is said that the differences between the two trust agreements are without relevance for this case! It is said that the second agreement merely took advantage of some new Belgian war legislation. *The texts of the trust agreements have never been revealed throughout the pleadings.* But the existence of the trust agreement of 27 February is recorded in Annex 3, page 36, to the Memorial, where it is described as completing the measures for protection during the war. It is said that this trust agreement was to enter into force when the Brussels area was occupied by the enemy or when any other critical situation developed threatening the normal operations of Sidro. It is further recited that the period of the application of the trust agreement was indicated by a "suspense period" which would cease six months after the end of the critical period. Turning again to Annex 11 of the Observations and Submissions, at pages 207 and 208, it is stated that when one of the "Operative Events" occurred,

Securitas automatically became a trustee of Sidro's property outside Belgium and especially of 341,326 bearer shares of Barcelona Traction. The 1,012,688 registered shares were also already on deposit with Securitas and its possession was transformed into "legal ownership" when Securitas became trustee [1]. Securitas became the trustee in May 1940 (*ibid.*, p. 209).

Curiously enough, Mr. Mockridge, Belgium's Canadian expert, refers to the agreement of 6 September 1939 as the "trust agreement" under which Securitas "became Trustee rather than Custodian". (A.R., Ann. 126, p. 8). On the other hand, Professor Chayes, Belgium's American expert, bases the trust on the agreement of 27 February 1940 and does not reveal a familiarity with the earlier trust agreement of 6 September 1939.

92. Annex 17 to the Observations and Submissions is a certificate without date signed by members of the committee named in application of clause 9 of the trust deed of 27 February 1940, certifying, in conformity with clause 4 (III) of the trust deed, that the state of danger which threatened Sidro (citing clause 3 of the trust deed) had ceased to exist on 14 February 1946 (p. 230). (I note that the Belgian Government had returned to Brussels on 8 September 1944 and Germany surrendered on 7 May 1945.) According to the report of Securitas to Sidro dated 24 September 1946 (*op. cit.*, Ann. 18, p. 231; photocopy in A.R., Ann. 123), the "suspense period" ended 14 August 1946, which was six months after the certified date of the end of the danger; this is said to be according to Article 4 (III) of the trust deed. Securitas reports an inventory of what they held in trust on that date. The letter says they hold the securities subject to future instructions from Sidro. There is no flat statement that they ceased at that moment to be trustee although this is implied. A further letter of 17 April 1947 (A.M., Ann. 3, App. 8) encloses a statement of securities held for Sidro "in custody for your account" as of 31 December 1946. It was not until 19 April 1948 that Sidro instructed Securitas to send the securities to Newman & Co. On 3 May 1948 Securitas wrote that they had delivered the securities and that this operation closed Sidro's deposit account with them (A.O.S., Anns. 19 and 20). The lists showed 1,012,688 shares registered in the name of Charles Gordon & Co., and certificates (presumably of bearer shares?) 6,025. On 7 June 1948, Newman & Co. wrote that the shares in the former

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[1] Securitas held for Sidro many securities other than and in addition to those of Barcelona Traction. For example, of Mexican Light & Power Co. 6 per cent. cumulative income debenture stock, they held shares to par value of $2,254,250, registered in the name of the Midland Bank of London as nominees, and to the value of $1,958,000 registered in the name of the Schröder Bank in London as nominees, the nominees in both instances holding for the account of Charles Gordon & Co. (A.O.S., Ann. 14, p. 219).

group had been registered in their name and were in the Chase Safe Deposit Co. in New York (*ibid.*, Ann. 22).

93. Securitas was dissolved by legal action in Delaware, 16 September 1948 (*ibid.*, Annex 25, p. 258). An affidavit by Duncan, Alley and Newman, all directors or officers of Securitas, 30 October 1958, attesting this fact, says they examined the books of Securitas and that it had held (in addition to the registered shares) 341,326 bearer shares at Winchester House, London, and 7,925 plus 600 bearer shares in Chase National Bank, New York. Further, on 20 January 1947 Securitas "delivered" to Sidro 1,400 of these bearer shares and on 25 February 1947, 1,100 of the same. On 16 January 1947, the safe deposit box at Winchester House, with contents, was "assigned" to Sofina. On 3 December 1947, in accordance with request of Sidro, the 341,326 bearer shares were credited by Sofina to Sidro's account (*ibid.*, Annex 26).

94. Now title to bearer shares may be considered to pass by delivery of the certificates, *unless* the transferee is a nominee or other depositary, for the trustee. It is not clear to me from the documents whether Securitas, as trustee, did actually divest itself of title to these bearer shares through these transactions. It should be noted that the communications in question were originally in English and the words quoted above—"delivered" and "assigned"—are the actual terms used, which might or might not indicate passage of title from the trustee. (See A.O.S., Ann. 25.)

95. It is a vital matter to know when the trust ceased to exist. Professor Chayes, Belgium's American expert, clearly points out why this is so; he says that during the German occupation of Belgium—

> ". . . Securitas acted as trustee of the property. As such, Securitas held legal title to the property and could manage the property in its own discretion, without regard to any instructions from Sidro. Indeed, the whole point of the arrangement was to free Securitas from the control of Sidro, since during the German occupation, instructions might come from Belgium with respect to the shares that were inimical to Sidro's true interests and to the allied cause. Securitas was of course, bound to use its discretion for the benefit of Sidro, the beneficiary under the trust instrument. The trustee would be liable if it abused its discretion or used its position to take advantage of Sidro. And it had to account to Sidro, ultimately, for dividends and other profits. But subject to these general limitations,

as trustee during the war Securitas had full authority over the property" (A.R., Ann. 125, p. 707) [1].

Chayes concludes that the trust had been terminated by 12 February 1948, but in proof of this statement he merely cites Annex 3 to the Memorial, paragraph *(g)*, where it is asserted that the trust ended on 14 August 1946. It is apparent that he either never saw the trust deeds or was not at liberty to disclose their exact terms.

96. Spain, in its Preliminary Objections in March 1963, pages 61-62, remarked on the failure to produce the trust deeds. It also noted the fragile character of the "proof" that the trust ended on 14 August 1946. It noted other documentary omissions by Belgium, some of which at least were later supplied—but the trust deeds were not supplied. The Belgian omission is especially remarkable in Annex 11 to the Observations and Submissions, page 208, where it discusses the two trust agreements of 6 September 1939 and 27 February 1940 and, as already noted, blandly remarks that the differences between the two contracts are irrelevant for the purposes of this case! The content of the trust agreements is described but the text is not produced. In the Rejoinder (p. 951) Spain hammers the point that, with all its documentation, Belgium has not produced the text of the trust agreements, adding a footnote that it was again calling attention to this abnormality. The Rejoinder cites the Chayes opinion along the lines noted above. It makes the sound point that since the personalities acting for Sidro, Securitas and Sofina are essentially the same, their assertions supporting each other are equivalent to self-serving declarations which have little probative value.

In his pleading on 7 May 1969, counsel for Belgium dealt with the question of nominees but did not discuss the trust. On 4 July, he brushed aside the trust issue which had again been raised by counsel for Spain on 18 June. Nor do I find elsewhere in the Belgian oral arguments an attempt to meet the Spanish criticism of the failure to produce the text of the trust agreements.

In his final pleading of 21 July, counsel for Spain stressed the non-production of the trust agreements, calling attention to the whole record on this matter, ending with a reference to the opinion of Professor Chayes. In particular he remarked that the only transfer of shares which Securitas made was that of 3 May 1948 to Newman & Co.—two-and-a-

[1] Securitas evidently was not a "passive trustee" in the sense described by Judge Augustus Hand in the *San Antonio Land and Irrigation Co.* case to which the Spanish side attached such importance. (New Documents, Vol. III, p. 114.)

half months after the critical date of the declaration of bankruptcy. (This is in accord with A.M., Ann. 11, App. 2).

97. I fully agree with Sir Gerald Fitzmaurice (in paragraph 58 of his separate opinion) that this Court does not have any fully developed practice on rules of evidence, but I believe that in the circumstances which have been described it is proper to apply the common law rule which is to the effect that if a party fails to produce on demand a relevant document which is in its possession, there may be an inference that the document "if brought, would have exposed facts unfavourable to the party . . ." [1]. Although it is true, as Sir Gerald Fitzmaurice emphasizes, that one should give due weight to the pressures engendered by the situation in the Second World War, international law has long taken cognizance of practices designed to thwart belligerents by concealing the truth; the history of the law of neutral rights and duties, is full of examples. If disclosure of the text of the trust deeds would have prejudiced some governmental interest, Belgium could have pleaded this fact, as the United Kingdom successfully pleaded "naval secrecy" in the *Corfu Channel* case, *I.C.J. Reports 1949*, pages 4, 32.

Article 48 of the Rules of Court concerning documents submitted after the close of the written proceedings, requires consent of the other party or a special decision of the Court; in this instance, the other party *asked for* the production of the trust document. Nor was the Court strict in the instant case about applying the rule—witness the fact that over 4,000 pages of "new" documents were introduced by the two Parties during the oral proceedings between 21 April and 8 July 1969.

98. The legal aspect of the trust situation which is important is the one which distinguishes it from the nominee situation. As Chayes points out, during the trust, Securitas had not only legal title but full control, even though the beneficial title was in Sidro. Accordingly Belgian character of the claim did not exist during the trust. But in the nominee situations, the nominee is in the position of an agent and the legal title coincides with the beneficial title in the principal even though he is not a registered shareholder.

* * *

[1] Wigmore, *Evidence*, 3rd ed. 1940, Vol. 2, secs. 285 and 291. Wigmore traces the rule back to the beginning of the seventeenth century.

The Status of "Nominees"

99. The requirements of linguistic simplicity necessitate the constant use of the term "shareholder". The danger is that the reality behind the term will be lost to sight through semantic insistence upon the term itself [1]. To my mind, this defect faults the Spanish arguments concerning nominees. The Spanish argument identifies in all situations, the real "shareholders" with the names inscribed on the stock registers. See the Counter-Memorial, Chapter VI, Sections 47 ff. and Rejoinder, Part III, Chapter II, especially Subsection 2. The legal situation of nominees reveals the fallacy of this approach, quite aside from the fact that the names of holders of bearer shares do not appear on the register although they are certainly "shareholders".

100. Under principles of private international law, the legal nature of the right, title, or interest of nominees in whose names Barcelona Traction shares were registered, must be determined by either New York or Canadian law. Counsel for Belgium properly noted on 7 May 1969 that the principles governing the choice of law are not unfamiliar to the Court in view of the Permanent Court's decisions in the *Serbian* and *Brazilian Loans* cases, *P.C.I.J., Series A, Nos. 20 and 21.* Since according to the unrebutted expert opinions of Chayes and Mockridge there is no material difference between the two legal systems in the matters here involved, they need not be analyzed separately.

Annex 125 of the Reply is the opinion of Professor Chayes, and Annex 126 is the opinion of Mr. Mockridge on the Canadian law. I think it is clear that under both New York and Canadian law, the nominee does not have "real title", is not the "real owner" and that the one for whom the nominee acts has all the real elements of ownership [2]. The limitations on this statement are only those which relate to the rights of the corporation, as for example, its right to deal with the registered owner in the payment of dividends, etc. As has been shown, where shares are held by a trustee under a trust instrument, the same conclusion cannot be drawn. The distinction is clear in both opinions although Mockridge lays more stress on cases where there is a "bare trust". There can be situations in which the legal owner of even 97 per cent. of the shares may own something

[1] On this point counsel for Belgium, speaking on 4 July 1969, was absolutely correct: "The question is not who has the right to term himself 'shareholder' but, in Professor Ago's own words, 'who in the last resort has a proper claim to the economic content of the ownership of a share' . . . so as to enjoy the protection of international law."

[2] In opposition to the Belgian position on nominees, Spain invokes an opinion from an eminent New York law firm—Davis, Polk, Wardwell, Sunderland & Kiendl. (See C.M., Chap. VI, p. 675, and the text of the firm's letter of 28 February 1963 in Annex 65, Appendix 2, Preliminary Objections 1963). In my view, this opinion does not controvert the essentials of the Chayes opinion.

worthless because, for example, of the beneficial interests of a usufruct under German law—but this is not such a case. (Cf. the decision of the United States District Court in the *Uebersee* case cited above, at p. 13 of that Court's opinion.)

101. Chayes in his conclusion on page 722 *(loc. cit.)* says "I have the honor to conclude that neither Securitas, Ltd., Charles Gordon & Company, Newman & Company ever had any property interest in the Barcelona Traction shares, except for the period of the German occupation of Belgium during World War II, when Securitas, Ltd., held them as Trustee". Mockridge (A.R., p. 732) agrees with Chayes except he adds the period during which the shares were vested in the Canadian Custodian of Enemy Property which period he says terminated before the commencement of the bankruptcy proceedings. According to the Observations and Submissions (p. 204), they were deblocked 29 April 1947; this fact is confirmed in the Reply, paragraph 994. When the shares were first transferred to Charles Gordon & Co., there was attached (in accordance with cabled instructions by Wilmers) a notice reading:

> "We hereby certify that the within transfer does not involve a change of ownership of the shares represented by the annexed certificates as it is being made to Charles Gordon & Co. as nominee of our depositary therefore no transfer tax is exigible." (A.M., Vol. I, Ann. 3, App. 5, p. 50.)

This was on 11 September 1939 and Chayes stresses that there was nothing inconsistent with the Securitas arrangement in the fact that Sidro transferred direct to Gordon & Co. (A.R., Vol. II, Ann. 125, p. 5). Chayes states on the same page that Sidro listed the shares registered in Gordon's name with the United States authorities before the United States entered the war but there is no documentary record of this listing. But he says that Sidro reported the trust agreement with Securitas and did not report Gordon as holding any interest.

102. I find that it is of no legal consequence that the agents in whose names the shares were registered were not listed publicly as professional nominees. (So also in Canada; Mockridge, A.R., p. 729.) The practice of registering shares in the names of nominees is very common in the United States as Chayes shows (*ibid.*, pp. 708-709). Although nominees were much used in time of war to cloak the identity of the real owner, they are generally used in the United States—where bearer shares are not issued—simply to facilitate transactions in shares [1]. Somewhat comparably, when shares are pledged with a bank as collateral for a loan, a stock power endorsed in blank will be attached.

[1] Under the name of "share warrants" bearer shares may be issued in Canada

103. Chayes noted (*ibid.*, pp. 714 and 715) that unregistered owners of shares may bring a shareholder's derivative suit, or under Delaware and New York law, in case of voting against a merger, may demand an appraisal of their shares and cash payment of the appraised value. In an appraisal case the New York court said there was no justification for interpreting the word "stockholder" in the statute as meaning "registered stockholder" (*ibid.*, p. 720). Mockridge shows that Canadian courts interpreted the word "shareholder" in agreements, as being broader than and not limited to "registered shareholders" [1].

Mockridge (*ibid.*, p. 730) indicates that shares registered in Charles Gordon & Co.'s name were vested in Canada although Charles Gordon & Co. had United States nationality, because Sidro as beneficial owner was "enemy" during the German occupation. He does not mention Securitas in this context. In the Observations and Submissions (p. 199), it is said that while the trust was still in force, Sidro declared the Barcelona Traction shares under Belgian law, although they were registered in the name of Charles Gordon & Co.

104. The jurisprudence of the Foreign Claims Settlement Commission of the United States is of interest, notwithstanding the fact that this is a national body, operating in accordance with its statutory terms of reference and with the terms of agreements with various governments [2]. For example, the Commission "denied recovery to a domestic [i.e., United States] corporation with more than eighty per cent. of its stock registered in the names of American citizens but beneficially owned by aliens. (*Claim of Westhold Corporation . . .*)" (*Foreign Claims Settlement Commission of the United States, Decisions and Annotations*, 1968, p. 20). Thus neither place of incorporation nor majority of shares registered in the names of American nominees, sufficed to make the claim "American".

In the Annotations one reads (at pp. 39-41):

> "*Beneficial interest.*—Occasionally legal title is vested in one person while the true owner is another. Normally such an arrange-

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as in England, but they are not extensively used; Schlesinger, *Comparative Law*, 2nd ed., 1960, p. 442.

[1] Cf. Henn, *Corporations*, 1961, sec. 179: "Statutory references to shareholders are not always clear as to whether they refer only to shareholders of record or also to the beneficial owners of shares. A substantial amount of stock is held by brokers in their own names (known as 'street names') in behalf of their customers."

[2] For the contrary Spanish view on the interest of this jurisprudence, see C.M., Chap. VI, Section 55.

ment is unnecessary; but as the *Arndt* decision indicates, a 'cloaking' of title was sometimes imperative in view of the discriminatory measures that were practiced during World War II. *Applying settled rules of international law*, the Commission held that beneficial interest, as opposed to nominal or bare legal title, was controlling in deciding the question of ownership. [Emphasis supplied.]

A more common example of beneficial ownership is the case of an agent who acquires title to property on behalf of his principal . . .

The technical, legal form in which title to property is held, and the legal capacity to sue, constituting the so-called 'indicia of title,' must be considered of secondary importance to the question whether the interest for which espousal is sought is truly that of a United States national. . . .

A claim concerned an interest in a family fund or 'syndicate', that owned shares of stock in a Swiss corporation, which assertedly owned all the outstanding shares of stock in a Yugoslav corporation. It was stated that 18,949 shares of stock held by the 'syndicate' in Switzerland had been transferred to claimant in 1942, in recognition of her undivided fractional interest in the family fund . . . It appeared that the various record entries of the transactions were designed merely to cloak the shares of stock with ownership by a national of the United States, a device which was then considered best calculated to safeguard the family interests. The Commission held that on the date of loss claimant was not the owner of the 18,949 shares of stock, but was the beneficial owner of only a 5.29% interest in the family fund. (*Claim of Antonia Hatvany*, Docket No. Y-1063, Dec. No. Y-910, Final Decision.)"

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105. Belgium not having established the Belgian character of any substantial number of shares throughout the critical period which the continuity rule defines, might rely, and at times seemed to rely, on the Belgian nationality of the group which shaped the will of the corporate person and dictated its policies. This also may be a difficult task in the case of great holding companies with many cross-holdings of shares, which cross-holdings, Belgium stated, were permissible under Belgian law. The centre of power may be deliberately concealed, not only in time of war, but for reasons of avoidance of taxation or of the application of anti-trust laws, or otherwise. The individuals who give instructions—for

example, in this case, Mr. Heineman and Mr. Wilmers—may be acting for unidentified financial interests, although I have no reason to suggest that this was actually the case. Belgium in the Reply (Ann. 127, Vol. II) quotes from the report of the Spanish members of the International Committee of Experts in 1950, passages attesting that Sidro controlled Barcelona Traction and that Sofina controlled Sidro; and counsel stated on 13 May 1969 that at least in a certain period, Sofina "était contrôlée par des filiales". The Spanish arguments and Belgian explanations about the alleged "Belgianization" and take-over bids in 1964 do not prove what the situation was on 19 June 1962. But whatever is the alleged basis for the State interests which justify protection, that basis must be proved just as much as if the justification were to be found solely in the continued nationality of shareholders.

* * *

106. The influence of the Court's judgments is great, even though Article 59 of the Statute declares that the *decision* "has no binding force except between the parties and in respect of that particular case". It may be said that the new methods and institutions for foreign investments which have been referred to earlier in this opinion, will overtake the possible consequences of the rule which the Court now holds to be the law. But not all of the older business practices have been abandoned and the managerial community of the commercial world might have to meet the announced rule by new devices. If, for example, it is agreed that when the company has been wound up and has ceased to exist, the shareholders, now having a direct right to the assets, may benefit from the diplomatic protection of the State of which they are nationals, it would be quite feasible to secure the cancellation of the "charter of convenience" which the corporation had obtained. But surely no economic, social or political advantage would be gained if in a situation like that in the instant case, the life of the Barcelona Traction Company had to be officially ended in Canada so that the principal shareholders, who are the real parties in interest, could be protected diplomatically. And could it be reasonably argued in such circumstances, that the United States would be the State entitled to extend diplomatic protection because a majority of the shares were found to be registered in the name of American nominees? One is entitled to test the soundness of a principle by the consequences which would flow from its application; the consequences here would clearly be undesirable. With deference to the opinion of the Court, I cannot agree that international law imposes such a solution of

the problem which the *Barcelona Traction* case has laid before the International Court of Justice*.

(Signed) Philip C. JESSUP.

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* Since I have personally had occasion to correct misconceptions about the "law's delays" as a feature of the procedure in the International Court of Justice, I, like Sir Gerald Fitzmaurice, welcome the inclusion in this Judgment of the Court of an indication of the fact that the fault lies with governments of States and not with the Court or its Registry. The Court has never been asked to treat a contested case or a request for an advisory opinion by summary procedure, quite apart from the possible use of the standing Chamber of Summary Procedure, but if the governments concerned desired a prompt decision, the Court could meet their request.