SEPARATE OPINION OF JUDGE MORELLI

[Translation]

I

SUBJECT OF THE DISPUTE AND OBJECT OF THE CLAIM

1. It will be advisable to begin by defining, on the one hand, the subject of the dispute between the Belgian State and the Spanish State and, on the other, the object of the claim submitted to the Court by Belgium in its Application of 19 June 1962. This Application has been compared, particularly from the Spanish side, with the other Application submitted by Belgium on 23 September 1958, and the question has been raised as to whether what is involved is the same claim or two different claims.

Having regard to the circumstances of the case, comparison of the two Applications is useful only for the purpose of a precise determination of the object of the claim submitted by the 1962 Application, the only one on which the Court had to give a decision in the present Judgment. The proceedings instituted by the 1958 Application having been closed pursuant to the discontinuance, there was no *litispendance* obstacle to prevent Belgium from again submitting the same claim to the Court. On the other hand there can be no doubt that Belgium was completely free to refer a different claim to the Court.

2. As regards the subject of the dispute between Belgium and Spain, that dispute has from the outset been characterized, in the first place, by the complaint put forward by Belgium on account of the measures taken by the Spanish authorities in respect of Barcelona Traction and, in the second place, by Belgium's claim to reparation of some kind for the damage sustained as a result of those measures, regarded as contrary to international law. Now these elements (and the resulting dispute) remained unchanged even after the discontinuance, which did not affect the dispute in any way. It may also be said that the subject of the dispute remained unchanged, for that subject can only be the product of the component elements of the dispute.

3. Is it possible, despite the continuance of the same dispute, to consider that in its 1962 Application Belgium referred to the Court a claim having a different object from that submitted to the Court in 1958? I am of the opinion that this question must be answered in the negative.

When a State is said to be exercising, as against another State, diplomatic protection of a particular person, to be protecting that person, to be

taking up his case, what is meant by these expressions is that a State is exercising as against another State a right of its own conferred on it by the international legal order, concerning a particular treatment due to the person concerned. The national State of the person is entitled to demand that that person be accorded the treatment required by the relevant rules of international law and, should such treatment not be accorded, may claim reparation in the form of either *restitutio in integrum* or compensation. International reparation is always owed to the State and not to the private person, even in the case of compensation and despite the fact that the amount of compensation must be determined on the basis of the damage suffered by the private person.

These very elementary notions explain quite simply why in the present case the two claims successively referred to the Court by Belgium, that of 1958 and that of 1962, must be regarded as completely identical.

4. In the first as in the second Application Belgium asked the Court to adjudge and declare that the Spanish State was under an obligation towards Belgium to make a certain form of reparation for an alleged international wrong. Naturally the international wrong, as such, could have been done by the Spanish State only to the Belgian State and not to the injured persons.

The wrong complained of by Belgium is described in the same way in both Applications: according to both it consists of the same conduct on the part of the Spanish authorities. The principal claim for reparation as expressed in both Applications has *restitutio in integrum* as its object and seeks the annulment by the Spanish State of the measures complained of against it in the same way in both Applications. As regards the alternative claim for compensation, it is perfectly true that in the 1962 Application the amount of compensation was reduced to 88 per cent. of Barcelona Traction's net assets and that, in conformity with the new presentation of the case, the justification for this alternative claim was changed, so that reference is no longer made to the damage suffered by Barcelona Traction, but to the damage suffered by the company's Belgian shareholders. However, neither the reduction of the amount claimed nor the alteration of the argument in support of the claim for compensation in any way changes the object of that claim as to its substance.

5. Between the two claims there is identity not only of *petitum* but also of *causa petendi*.

In this case the *causa petendi* is the allegedly unlawful character where Belgium is concerned of a particular course of conduct on the part of the Spanish authorities composed, according to both Applications, of the same acts and omissions. Thus the identical nature of the *causa petendi* is not affected by the fact that there is, as between the two Applications, a difference in the way in which they set out to prove that a right of

Belgium's was indeed infringed by the measures complained of. The fact that in the first Application Belgium complained of the damage suffered, as a result of those measures, by a company in which there was asserted to be a preponderance of Belgian interests, whereas in the second Application Belgium complained of the damage indirectly suffered as a result of the same measures by Belgian nationals in their capacity as shareholders in the company, is merely a change of argument which has nothing to do with the object of the claim.

Whenever, as in the present case, there is a claim for reparation on account of the breach, through a particular course of conduct, of the rules of international law concerning the treatment of foreigners, the specifying of such and such a person as the one in respect of whom diplomatic protection is exercised is not a matter which is at all relevant to the object of the claim, for the claim has no other object than the reparation sought by the State for itself. This is so of course only if the description of the allegedly unlawful conduct of the other State remains unchanged throughout, otherwise there would be a change of claim because of a change in the *causa petendi*.

Matters are otherwise when diplomatic protection is exercised not in the form of a claim for reparation on account of a wrong asserted to have been done but, on the contrary, in the form of a claim to a particular sort of treatment due by the other State to a private person. In this case the specifying of the private person in respect of whom diplomatic protection is exercised is an integral part of the specification of the conduct which the State exercising diplomatic protection calls for on the part of the other State. Consequently, in the case of such a claim submitted in judicial proceedings, the substitution of one protected person for another entails a change in the object of the claim. In such a case there is indeed a change of *petitum*.

6. The reasons why I am of the opinion that both claims submitted by Belgium to the Court must be regarded as objectively identical are not the same as those advanced by the Spanish Government in reaching the same conclusion.

The Spanish Government appears to start from the idea that in order to determine the object of the claim (or of the case, as it sometimes puts it) regard must be had to the identity of the protected person. In the argument and submissions of the Counter-Memorial it reaches, by the use of a perhaps elliptic form of words, the point of envisaging either the Barcelona Traction Company or the Belgian shareholders as themselves constituting the possible "*objet*" of the Belgian "claim". Thus in that pleading a case involving company protection is contrasted with a case involving shareholder protection.

Now if the idea is accepted that the protected person himself constitutes the *objet* of the claim, or at least the decisive element for determining the object of the claim, it would have to be inferred as a logical conclusion that the claim submitted by Belgium in 1962 is different from

that submitted to the Court in 1958, because Belgium now states that it is protecting not Barcelona Traction but its Belgian shareholders.

However, according to the Spanish Government, this conclusion must be rejected, because, it alleges, Belgium sought in its 1962 Application to disguise, under the appearance of a case concerning Belgian shareholders in Barcelona Traction, a case which really concerns the company as such. This is purported to be proved by, on the one hand, the complaints advanced (relating to the measures taken by the Spanish authorities in respect of the company) and, on the other, the form of reparation claimed (in the first place *restitutio in integrum* of the undertaking).

7. I am of the opinion that, in submitting its new claim in the way it considered most suitable, Belgium was only exercising a freedom which —as the Court has observed in the Judgment—it undoubtedly possessed. The claim had therefore to be examined and judged in accordance with the content which Belgium had imparted to it. It would have been quite arbitrary, on the pretext of bringing to light what was alleged to be hidden behind a disguise, to substitute for the actual claim as formulated by Belgium a different, purely hypothetical claim.

If, then, the 1962 claim is to be compared with that submitted to the Court in 1958 (the only useful purpose to be served thereby, as already said, being the better to define the content of the new claim), both claims must be regarded as objectively identical. But the reason for this is not, as alleged by the Spanish Government, that the new claim also concerns, despite its outward appearance, diplomatic protection of the Barcelona Traction Company as such, but rather that in both claims there is identity of *petitum* (the reparation sought) and of *causa petendi* (the allegedly unlawful conduct of the Spanish authorities).

This having been established, it must however be observed that as between the two claims there is a difference in respect of the way in which Belgium seeks to prove that the measures complained of constitute a wrong done by Spain to Belgium. In its endeavour to prove this (and hence its right to reparation) Belgium ceased relying on the contention of damage suffered by a company in which there were allegedly preponderant Belgian interests and, on the contrary, based its claim on the purported fact that the measures complained of, although taken in respect of the company, indirectly injured the Belgian shareholders in it. But this new argument could not be rejected out of hand on the ground that it was only a means of disguising a different claim. It was the actual argument put forward by Belgium in its 1962 Application which had to be considered on its own merits in order to judge whether or not it was well-founded.

II

THE ORDER OF THE QUESTIONS

1. Belgium claims reparation from Spain for the measures taken by the Spanish authorities in respect of Barcelona Traction, which are considered by Belgium as internationally unlawful. The unlawfulness here concerned must naturally be unlawfulness vis-à-vis Belgium resulting from the infringement of a right pertaining to Belgium, or in other words from the breach by Spain of an obligation it owed to Belgium. For the international rules concerning the treatment of foreigners, although they are rules of general international law and, as such, are binding on every State with regard to every other State, take concrete form in the shape of bilateral legal relationships, so that a State's obligation to accord the required treatment to a particular person exists solely towards the national State of that person and not towards other States.

In order to prove that it was indeed a right pertaining to Belgium which was infringed by the measures complained of, the Belgian Government contends that those measures, although taken in respect of a Canadian company, indirectly injured Belgian nationals as shareholders in the company. The Spanish Government challenges this argument from several standpoints, thus posing, *inter alia*, a problem as to Belgium's *capacity*.

2. It is necessary to be clear as to the sense in which it is possible in this connection properly to speak of capacity; in particular because the Parties have used terms which are open to misunderstanding: "*qualité pour agir*" or "*jus standi*". These terms would appear to indicate a form of *procedural* capacity relating to the right to apply to court. But that right is not now in issue, since the 1964 Judgment upheld the Court's jurisdiction in the present case and thereby Belgium's corresponding power to seise the Court, that is to say, Belgium's power to institute proceedings.

At the present stage it is possible to speak of capacity only in the sense of *substantive* and not procedural capacity, that is to say in the sense of the vesting in one State rather than in another of the substantive right invoked in the case. The hypothesis of the existence of a certain obligation on the part of a given State (the respondent State) is assumed, and the question is which State possesses the corresponding hypothetical right; in particular whether or not that right pertains to the applicant State.

As I said in my dissenting opinion attached to the Judgment on the Preliminary Objections (*I.C.J. Reports 1964*, pp. 111 f.), the question of capacity, understood in this way, is one concerning a substantive right with regard to the actual merits of the case. A judgment declaring that the applicant State is devoid of capacity in respect of the right of diplo-

matic protection which it invokes is not a judgment declaring the claim inadmissible, but one dismissing the claim on the merits. A judgment of this kind has the effect of *res judicata* in the material sense.

3. In my dissenting opinion (pp. 112 ff.; see also pp. 98 ff.) I also explained that the question of capacity, as a question concerning the possession by the applicant State of the substantive right invoked by it as the basis for its claim, does not have any preliminary character, in the sense that there is no logical necessity to resolve the question of capacity before going on to examine the other questions that likewise concern the merits.

It follows that it rests with the judge to determine the most suitable order, taking convenience and economy as his criteria. It is open to him to begin with an examination of the question of capacity, assuming as a hypothesis the existence of the obligation relied on as the basis for the claim. But he may also find it simpler, without going into the question of capacity at all, to find that the claim should be dismissed on the ground that the obligation asserted by the Applicant is not one which exists on the part of the Respondent vis-à-vis any State at all. For this it might be sufficient to resolve a question of pure law, either by showing the non-existence of the legal rule invoked as the basis for the claim, or by ascertaining its true content [1].

4. Now the Spanish Government opposes the Belgian claim by raising, among others, questions which are undoubtedly questions of capacity. For it denies the existence of major Belgian shareholdings in Barcelona Traction by disputing the possibility of regarding certain persons, in respect of whom Belgium claims to exercise diplomatic protection, as Belgian shareholders in the company; and it does this from two different standpoints. In the first place the Spanish Government denies that certain persons described by Belgium as Belgian nationals can really be regarded and treated as Belgian. In the second place the Spanish Government denies that certain persons protected by Belgium can be regarded as shareholders in Barcelona Traction.

There is thus raised from two different standpoints a problem which is undoubtedly one of capacity, relating as such to the direction of the obligation assumed to exist on the part of Spain. In the first instance the question is whether the right corresponding to the hypothetical obligation pertains to Belgium or to some other State which must be considered to be the national State of the person concerned. Similarly, in the second

[1] See, in my separate opinion on the cases concerning *South West Africa, Second Phase, I.C.J. Reports 1966*, pp. 65 f., the observations as to the relationship between the question of capacity (standing) and that of the existence of obligation, and as to the hypothetical nature of the former question when raised before the obligation has been shown to exist.

instance, the question is whether the right of diplomatic protection pertains to Belgium or to some other State as the putative national State of the real shareholder. In short, it is what is known as the nationality of the claim which is the issue in both instances.

5. As will have been noted, all this assumes the existence with regard to the treatment of Barcelona Traction of an obligation on the part of Spain toward the national State or States of the shareholders. But the existence of any such obligation is denied in another argument put forward by the Spanish Government. That argument does not raise a problem of capacity at all; it raises no problem concerning the nationality of the claim. It raises on the contrary a problem concerning the very existence of the rule of law invoked by Belgium as the basis for its claim; and it is possible to pose this problem even if it is assumed that the protected persons really are Barcelona Traction shareholders and also Belgian nationals.

It is not possible to maintain that this issue is none the less one concerning the direction of the obligation (hence one of capacity in relation to the corresponding right) on the ground that regard must also be had to the right of diplomatic protection pertaining to Canada as the national State of the company, and therefore seek to resolve the question of whether it is not Canada rather than Belgium which has the capacity to claim reparation. This is so because Canada's right is derived from a rule different from that invoked by Belgium, the latter concerning not diplomatic protection of the company as such, but diplomatic protection of the shareholders in connection with measures taken in respect of the company. If it is decided that no such rule exists, no problem of capacity arises at all.

6. The point is that any question of capacity can only be raised in relation to a rule of law which is either undisputed or assumed to exist. The question is then as follows: which is the entity, as between the various entities to which that rule is directed, on which, in the actual case, that rule confers the right invoked? More particularly, is it in fact on the Applicant that such a right is conferred? If the very existence of the rule is negated, any possibility of raising a problem of capacity is excluded.

Consequently, to say that there is no rule which authorizes diplomatic protection of shareholders on account of measures taken in respect of the company is to exclude the existence of any obligation of Spain in this connection, vis-à-vis any other States. Belgium's right is thereby denied, not because such a right might hypothetically belong to a State other than Belgium (in other words, not for lack of capacity on the part of Belgium), but rather because no such right can be invoked by any State, since no rule exists from which it could derive.

On the other hand, the other question, that of the nationality of the claim, does concern capacity. The possible existence is postulated of a rule authorizing each State to exercise diplomatic protection of its nationals holding shares in a company, in respect of the treatment given to the company by another State; and the question is whether, on the basis of this hypothetical rule, it is to Belgium that the right to protect certain private persons would belong, on the ground of their being, according to Belgium's assertion, both Belgian nationals and shareholders in Barcelona Traction. Thus, as will be seen, a true problem of capacity is raised, the problem, in other words, of the attribution of the right deriving from a certain rule which is assumed to exist. A negative answer to this question would also have brought about the dismissal of the Belgian claim on the merits.

7. Nevertheless, the fact that this problem is one of capacity does not mean that it ought to have been examined and settled in the affirmative before the Court had any possibility of going on to examine the other problem, that of the existence of an obligation owed by Spain to the national States of the shareholders in Barcelona Traction with regard to the treatment of that company. I said above that the problem of capacity also concerned the merits and that there was, on that account, no logical necessity to solve it before the others likewise concerning the merits. The order to be followed could only be dictated by considerations of economy.

As it happens, the Court gave priority to examining the problem of pure international law relative to the diplomatic protection of shareholders in a company by their national State, in respect of measures taken vis-à-vis the company. This choice appeared in itself the most apt; that it was so was subsequently borne out by the result to which it led.

For, having settled that problem in the negative—having, in other words, denied the existence, as regards the treatment accorded by a State to a given company, of any obligation owed by that State to the national States of the shareholders—, the Court was thereby enabled to leave aside any problem of capacity, that is to say, the problem as to whether the persons that Belgium claims to protect are or are not shareholders in the company and at the same time Belgian nationals. In that way many very delicate problems of fact and of municipal law, the solution of which was not necessary for the disposal of the case, have been avoided.

8. And so the Court has been able to bestow a very simple logical structure on its decision, which in substance consists in negating the major premise of the syllogism or, in other words, in denying the existence of the rule relied upon by Belgium. In this way the Court has given a final, concrete solution to the fundamental problem at issue between the Parties, which lay in the very question whether the rule of international law invoked by Belgium existed or not. The negative answer to this question implies that none of the national States of the shareholders,

irrespective of the quantity of shares possessed by its nationals, could exercise diplomatic protection. In consequence, the Belgian claim had to be dismissed on that basis, even if it had been proved that the whole or nearly the whole of the shares in Barcelona Traction were in the hands of Belgian nationals.

If, on the other hand, the Court had begun by examining the problem of capacity, its reasoning and the logical structure of its decision would have been, at all events, much more complex. As I have already said, any question of capacity can only be raised in relation to a given rule, which, if it is disputed, as in the present case, must be supposed to exist for the purposes of the argument. Thus the Court would have set out from the hypothesis that a certain rule, constituting the major premise of the syllogism, existed; assuming that premise to be true, the Court would have examined and settled the various questions of fact which went to make up the minor premise (it being borne in mind that, in the eyes of an international tribunal, questions of municipal law also are questions of fact).

Now the problem of capacity raised in this hypothetical way would have had to be settled either in the affirmative or in the negative.

In the first event, once the Court had decided that Belgium would have capacity on the basis of a rule of law supposed for the sake of argument to exist, it would have been obliged to examine and solve the problem as to whether that rule really existed or not: that is to say, the very problem to which the Court did in fact give priority and the negative solution of which has been sufficient in itself to dispose of the case without there being any need to tackle the highly complex question of capacity.

It was only in the event of replying in the negative to the question of capacity that the Court could, on that basis, have dismissed the Belgian claim without troubling to see whether the hypothesis on which it had been based corresponded or not to the real state of affairs in international law. But the hypothetical character of the reasoning would have appeared somewhat strange. Faced with a very important problem of international law, one basic to the respective arguments of the Parties, the Court would have evaded the task of solving it because, instead of setting about that problem, it had started from a mere hypothesis, that of the solution of the same problem in the affirmative.

9. It must further be observed that the solution either way of a problem of capacity is dependent on the particular rule in relation to which the problem is raised. If for example the postulate consisted of a hypothetical rule whereby each State had the right to protect its nationals holding shares in a company, irrespective of the quantity of shares possessed by those nationals, there would be no difficulty in the present case in finding that Belgium had capacity, considering that Spain does not dispute the existence in the hands of Belgian nationals of a certain number of shares in Barcelona Traction, whether that number be large or small. The

question of capacity would, on the other hand, appear very delicate if, in accordance with the Belgian position, one were to posit the existence of a different and, in a sense, more restricted rule, one bestowing a monopoly of the diplomatic protection of the shareholders in a company affected by a certain measure on the State whose nationals possessed the largest proportion of the shares, or of a rule confining diplomatic protection to the various States whose nationals possessed a substantial quantity of shares.

Furthermore, the very usefulness of any preliminary, hypothetical solution of the capacity problem depends on the choice of the assumed rule in relation to which the problem is raised. It need only in this connection be pointed out, for example, that an affirmative solution of the capacity problem would be absolutely useless unless the rule whose existence was assumed for the sake of argument coincided with a rule subsequently shown to exist.

III

THE PROBLEM OF THE DIPLOMATIC PROTECTION OF SHAREHOLDERS

1. I shall now turn to the problem of whether a State has the right to exercise diplomatic protection over those of its nationals who, as shareholders in a company of a different nationality, have suffered damage on account of measures taken with regard to the company by a foreign State. To solve this problem correctly it is in my opinion necessary to begin with a few very general observations on the rules of international law governing the treatment of foreigners.

These rules are invariably concerned to ensure the protection of certain *interests* proper to individuals or collective entities. These interests, although contemplated by rules of international law, remain simple interests for the purposes of the international legal order. For it would be contrary to the present structure of the international community and of the international legal order to consider that the latter might either bestow or simply predicate rights upon individuals or upon any collective entities other than those, such as States, which qualify as subjects of international law. It is only within the State legal order that the interests of foreign nationals may acquire protection by means of the attribution to the latter either of rights or of other personal legal situations in their favour (faculties, legal powers or expectations).

However, the fact that this possibility is open to the legal order of the State may in one way or another be taken into account in such rules of international law as are framed with a view to imposing certain obligations upon States in the treatment of foreigners.

The rules of international law in this matter, although they all seek to protect interests, as such, of individuals or collective entities, may employ different means to attain their ends and refer in different ways to the systems of municipal law.

2. In the first place there are rules of international law concerning the treatment of foreigners which directly specify the interests they seek to protect, regardless of the prevailing attitude of the municipal legal order in that respect. The interests contemplated by the rules in this category are always interests personal to individuals and never interests of collective entities. Moreover, the rules in question always concern those interests of individual foreign nationals which are of fundamental importance, such as their interest in life or liberty, and never interests of a purely economic nature.

In such cases the international rule refers to the legal order of the State solely in the sense that it is addressed to the State with a view to laying upon it an obligation to observe a given line of conduct in its own internal legal order; which conduct may consist in conferring, within that legal order, certain rights or other personal legal situations on foreign nationals.

The international rules in this category are somewhat analogous to the rules of international law concerning the protection of human rights. For the latter rules also are concerned not with the protection of such rights as may already have been conferred by the internal legal system but with the actual predication, binding upon States, of rights within the municipal order. While it is true that, in this context, it is to human "rights" that reference is made as being the subject of the protection sought by the rule of international law, the term is here employed in the sense of natural rights. In this case also international law envisages the protection of certain individual interests and not of rights already resulting from any positive legal order.

3. Those international rules regarding the treatment of foreigners which belong to the category I have just described may be contrasted, having regard to their structure, with the rules in a second category. These have a much wider area of applicability, because, on the one hand they concern not only foreign individuals but also foreign collective, entities, while they are, on the other hand, for that very reason, designed not to protect a small number of interests of fundamental importance to the human person but rather to protect other, more numerous interests which more often than not possess a purely economic character.

Like the rules in the first category, those in the second are also intended for the protection of interests, to which end they enjoin upon the States to which they are directed a certain line of conduct which they place those States under an obligation to observe in their municipal legal orders. But

before referring in this way to the internal legal order, the international rules of which I now speak refer to that same legal order for the purpose of performing a preliminary task, that of determining what interests are to be the subject of the protection envisaged. This is so in that the international rule postulates a certain attitude on the part of the State legal order, inasmuch as it has regard solely to interests which, within that legal order, have already received some degree of protection through the attribution of rights or other advantageous personal legal situations (faculties, legal powers or expectations): an attitude on the part of the State legal order which in itself is not obligatory in international law.

It is on the hypothesis that this state of affairs has arisen in the municipal legal order that the international rule lays upon the State the obligation to observe a certain line of conduct with regard to the interests in question: with regard, one might thenceforward say, to the rights whereby the interests in question stand protected in the municipal legal order. I should explain that it is only for the sake of brevity that in this connection I speak of rights, because instead of a right some other advantageous legal situation may be involved: a faculty, legal power or expectation.

The conduct which international law renders incumbent upon a State with regard to the rights which the same State confers on foreign nationals within its own municipal order consists, in the first place, in the judicial protection of those rights. Any State which, having attributed certain rights to foreign nationals, prevents them from gaining access to the courts for the purpose of asserting those rights is guilty, in international law, of a denial of justice. In addition, international law lays upon a State, within certain limits and on certain conditions, the obligation to respect, in the conduct of its administrative or even legislative organs, the rights which the municipal legal order of the same State confers on foreign nationals. This is what is known as respecting the acquired rights of foreigners.

As will be observed, the fact that the rules of international law in question envisage solely such interests of foreigners as already constitute rights in the municipal order is but the necessary consequence of the very content of the obligations imposed by those rules; obligations which, precisely, presuppose rights conferred on foreigners by the legal order of the State in question.

Both the obligation to afford rights judicial protection and the obligation to respect them apply, then, to rights as conferred by the municipal legal order. This provides an indirect way of determining what interests the international rule is intended to protect, given that this rule only protects the interests of foreign individuals or foreign collective entities if those interests already enjoy a certain degree of protection within the municipal legal system. This means that the international rule refers to the municipal legal order in that, to impose upon a State a particular

obligation, it presupposes a certain freely adopted attitude on the part of the legal order of that State.

4. There is nothing abnormal in this reference of an international rule to the law of a given State. It is wholly untenable to object, as the Belgian Government has done, that in this way the international responsibility of the State is made to depend upon categories of municipal law, thus enabling a State to set up the provisions of its own legal order as a means of evading the international consequences of its acts. In reality, no subordination of international responsibility, as such, to the provisions of municipal law is involved; the point is rather that the very existence of the international obligation depends on a state of affairs created in municipal law, though this is so not by virtue of municipal law but, on the contrary, by virtue of the international rule itself, which to that end refers to the law of the State.

Nor is it possible to invoke against this, as has also been done, the alleged basic principle of the supremacy of international law. Despite what the Belgian Government has asserted to the contrary, this principle has never been affirmed, as such, by the International Court and, so far as the Permanent Court is concerned, it stands in clear contradiction to the idea, by which that Court was always guided, of the separateness of international and municipal law.

Quite another principle underlay the Permanent Court's statement to the effect that municipal laws were simply facts from the standpoint of international law (*P.C.I.J., Series A, No. 7*, p. 19). This was a reference not to any supposed principle of the supremacy of international law but rather to the exclusive character of the international legal order, as of any non-derivative legal system. But this principle does not by any means rule out the possibility that a rule of international law may refer to municipal law in some way or another: for example, for the very purpose of rendering an obligation laid upon a State subject to a certain point of fact within the province of that State's municipal law. Very clear illustrations of that possibility are to be found in treaties dealing with extradition or with the recognition of foreign judgments.

5. In the present instance, the interests concerned are either interests of collective entities, or more precisely companies, such as Barcelona Traction and the companies holding shares in it, or interests of individuals, such as the individual shareholders in Barcelona Traction. But, either way, we are dealing with interests of a purely economic nature.

It follows that the international rules which may be invoked for the sake of protecting those interests are exclusively rules entering into the second of the two categories I have described. But, as has been seen, these rules postulate that, if those same interests are to be protected, certain rights must already have been bestowed by the municipal legal order. It is on the hypothesis that the municipal order has adopted this attitude, op-

tional in international law, that the international rule imposes certain obligations on the State.

From the considerations I have set forth it needs must follow that, in terms of general international law at least, a State is free even to deny companies—or certain companies—legal personality. For it is only in respect of individuals that the State is under an obligation in international law to recognize personality, or in other words to confer a set of rights. The rights in question are precisely those which the State, by virtue of the rules of international law entering into the first category, has an obligation to confer upon individuals so as to protect certain of their interests which are fundamental in nature. It is only in the event that certain rights and, consequently, legal personality are conferred on a company within the municipal order that the State is bound by certain international obligations with regard to the judicial protection of those rights and respect for the same.

Where the municipal legal order denies a company legal personality, this signifies that the municipal order in question considers the corporate property as the subject-matter of rights pertaining to the members. In that event it is in relation to these rights, freely conferred on the members by the municipal order, that there is incumbent upon the State an international obligation of protection and respect.

If, on the other hand, the municipal legal order allows the company legal personality, it can but treat the members' rights accordingly. Consistently with the attribution of the corporate property to the company, considered as a juristic person, the members will in this case enjoy no more than limited rights, the subject-matter of which will not be the corporate property. Needless to say, in this case too, the rights accorded to the members, whatever they may be, enjoy the international protection which is appropriate to them.

In other words, there is on the one hand a set of rights conferred by the municipal order on the company and, on the other hand, within the same legal order, another, quite distinct set of rights conferred on the members. Each set of rights is entitled to its own, distinct international protection.

As has been seen, both these protections afforded by the international legal order presuppose a certain attitude on the part of municipal law, namely a certain manner in which it deals with the rights of the company, on the one hand, and those of the members on the other. In the present case, the State legal order to be considered is the Spanish legal system, that is to say the legal order of the State whose international obligations have to be determined.

So far as the members of the company are concerned, to say that the international legal order affords protection only to their rights, such as recognized by the municipal order of the State whose international obligation is in question, is not in any way to deny that the subject of international protection is, in the upshot, in this case as always, interests.

The reference to the legal order of the State and to the rights which it confers constitutes merely the means whereby international law establishes what interests it is concerned to protect. International law protects, by laying certain obligations upon a State, solely such interests of the members as already enjoy protection within the municipal legal order of that State on account of the attribution to those members of rights or other personal legal situations.

If that condition is not satisfied or if, in other words, what is at stake is interests which do not, within the municipal order, constitute rights conferred on the members, those interests are not subject to any specific protection in international law. They may however be interests of the members which coincide with interests of the company. In that event, if the interests of the company are legally protected within the municipal order, it is to these interests (constituting rights of the company) that the international obligations apply.

6. The application to the present case of the principles I have just mentioned does not occasion any difficulty.

There is no disagreement between the Parties with regard to the attitude of the Spanish municipal order so far as concerns the way in which it deals with the legal situation of a limited-liability company, on the one hand, and the rights of its shareholders on the other. No-one denies that Barcelona Traction, like any such company, enjoyed legal personality in the legal order of Spain and that it had consequently to be regarded as the owner of the rights over the corporate property. Accordingly, the shareholders in Barcelona Traction were not recognized to possess any rights over the corporate property; they enjoyed only those rights proper to shareholders in a limited-liability company, such as the right to dividend and certain rights relating to the conduct of the company's business.

However, Belgium does not complain of any damage that might have been suffered by Barcelona Traction shareholders in respect of their own rights as shareholders on account of the measures taken by the Spanish authorities. On the contrary, Belgium complains of the fact that those measures, although (or rather, precisely because) they were taken vis-à-vis the company, were detrimental to the interests of the shareholders. But these were simple interests, not interests constituting rights in the Spanish legal order.

It follows, in accordance with the principles I have stated, that, so far as such shareholders' interests are concerned, Spain was under no obligation in international law; which rules out any international responsibility on the part of Spain for such damage as the measures taken by its authorities may have caused to the interests of foreign shareholders. If simple interests are (as they must be) disregarded, and only rights considered, such as they arise out of the Spanish legal order, it is only to the rights of the company that the measures of which complaint is made could have caused harm. But damage caused in respect of the rights of Barcelona Traction, a Canadian company, could, if internationally un-

lawful, have constituted an international wrong only vis-à-vis Canada, not vis-à-vis Belgium or any other State. In this connection it can properly be said that it is the Canadian State alone which, on account of the nationality of the injured private party, has capacity to claim reparation.

7. Mention must now be made of another way in which the Parties put the question of whether the measures taken by the Spanish authorities were of an unlawful nature vis-à-vis Belgium. In place of reference to the distinction between rights and simple interests, a distinction was drawn between direct damage and indirect damage, and it was asked whether the measures complained of, although taken with respect to Barcelona Traction and, as such, causing it direct damage, constituted an internationally unlawful act vis-à-vis Belgium because they also, albeit indirectly, caused damage to the Belgian shareholders in Barcelona Traction.

On the basis of what I have said with regard to the different attitudes evinced by the international rules on the treatment of foreigners with respect to simple interests on the one hand and rights on the other, I find that the distinction between direct damage and indirect damage serves no useful purpose.

For, to consider that very limited category of international rules on the treatment of foreigners which is concerned to protect certain interests independently of whether or not they constitute rights in the municipal legal order, an injury to such an interest is, of itself, an internationally unlawful act. No importance could be attached in this connection to the relationship in which such an injury might stand towards an injury to another interest, more especially in the sense of its having to be regarded as the latter's indirect consequence.

Similarly, to consider the other category of international rules, concerned to protect solely rights recognized by the municipal legal order, what matters in a given instance is of course to establish whether or not there was an injury in infringement of such a right. If this is not the case or if, that is to say, there was only an injury to a simple interest, such injury will not constitute an international wrong even if it stands in some relationship to an injury in respect of a right which might, as such, constitute an unlawful act vis-à-vis the national State of the injured party.

It would appear, moreover, that the distinction between direct damage and indirect damage is, in substance, merely a different way of stating the distinction between injury in respect of a right and injury to a simple interest. For, supposing a measure to have been taken with respect to a private party who, as a result of that measure, has directly suffered damage, if it be enquired, in a concrete case, who is the private party with respect to whom the measure can be regarded as having been taken, the only way of answering this question is to consider the legal effects of the measure. A measure can only be regarded as having been taken with respect to a particular party if it produces legal effects for that party; if,

in other words, it involves the rights of that party. All that other parties could suffer from such a measure would be consequences affecting their simple interests. To term such consequences indirect is in fact merely an imprecise way of describing the injury of a particular party's simple interest, an injury standing in a certain relationship to the injury suffered by another party in respect of his right.

8. From this I conclude that an international obligation on the part of Spain with respect to the treatment of Barcelona Traction and, in consequence, international responsibility on the part of Spain for any breach of that obligation, could only be held to exist vis-à-vis Canada, the company's national State. Neither an obligation nor responsibility on the part of Spain could be held to exist vis-à-vis Belgium, or vis-à-vis any other State of which Barcelona Traction shareholders might be nationals.

The absence of any responsibility on the part of Spain vis-à-vis Belgium in respect of the measures taken by the Spanish authorities with regard to Barcelona Traction is simply a consequence of the absence of any obligation owed in this respect by Spain to Belgium; this, in its turn, results from the fact that there is no rule of international law from which such an obligation might be derived.

In sum, therefore, Belgium has no possibility of exercising diplomatic protection with respect to the Belgian shareholders in Barcelona Traction, since, as has already been said, a State which exercises diplomatic protection with respect to one of its nationals is merely demanding for such national the treatment required by the international rules governing the matter or else claiming reparation for the violation of those rules.

9. No importance can be attached in this connection to the facts that the Belgian shareholders in Barcelona Traction might have benefited indirectly, so far as their own interests were concerned, from the exercise by Canada of diplomatic protection of the company and that such protection was not pursued.

We have seen that the interests of shareholders, as simple interests not constituting rights within the municipal legal order, enjoy no protection under the international rules governing the treatment of foreigners. This obviously does not rule out the possibility that those interests might benefit indirectly from the protection which those same rules afford the company's interests in so far as these constitute rights under the municipal legal order. It is therefore possible that the exercise of diplomatic protection of the company by its national State may eventually lead, through the retrieval of the interests of the company, to the indirect retrieval of the shareholders' interests too.

But this in no way influences the attitude evinced toward the interests of shareholders by the international rules governing the treatment of foreigners. The mere possibility of an indirect protection of shareholders' interests, in the sense indicated above, does not warrant any inference

that whenever such indirect protection is lacking it must be replaced by direct protection. There could be no question of such direct protection unless a State owed an obligation and happened to have incurred responsibility toward the national State of the shareholders. And I cannot see where any basis for such an obligation or such responsibility is to be found.

Actually the very idea of the diplomatic protection of shareholders by their national State, it being conceived as a second line of protection that may be brought into play if protection of the company by its own national State should be lacking, is strictly bound up with a way of thinking that misconceives the very basis of diplomatic protection in general, regarding it not as a State's mere exercise of a right bestowed upon it by the rules of international law concerning the treatment of foreigners, but rather as a procedure entirely independent of the existence of a right.

Only by taking such a standpoint could it be possible, where the treatment afforded a company is concerned, to envisage diplomatic protection of the shareholders by their national State as a second line of protection, that is to say as a protection subordinated to the condition that diplomatic protection is not exercised, or not pursued, by the national State of the company. This view, on the contrary, would be utterly inconceivable on the correct premise that an act of diplomatic protection is simply the exercise of an international right, and is consequently conditional on the existence of such a right.

10. Neither is it possible, with a view to demonstrating the admissibility of a second-line diplomatic protection of shareholders in the event that diplomatic protection of the company is lacking, to rely on a supposed analogy or rather parallel between that alleged second-line diplomatic protection and such possibility as may be afforded shareholders in municipal law of taking action against the organs of the company, or in their stead, should they remain inactive.

It is the very idea behind such reasoning which, in my opinion, is unacceptable: the idea that international law must necessarily offer some kind of protection to shareholders' interests. There is nothing necessary about such protection; it exists only within the limits and on the conditions which are fixed by international law itself. Furthermore the requirements which municipal law is concerned to satisfy are not necessarily requirements that ought also to be the concern of international law.

Needless to say, if the municipal legal order does, in the event of the inactivity of the organs of a company, confer certain rights on the shareholders, those rights, like any other rights peculiar to shareholders, will as such enjoy the protection which international law affords in general to rights conferred on individuals by a municipal legal order.

11. The lack, in a given case, of any exercise of diplomatic protection in respect of the company might result from the actual impossibility, in that case, of exercising such protection.

As an example of a case where it would be impossible for the national State of the company to exercise diplomatic protection in its respect, the hypothesis has been adduced of the company's being dissolved, or being in a state of legal or simply material incapacity to act.

With regard to the extreme case, that of dissolution, this must naturally be taken to mean a dissolution which took place after the measure complained of, whether as a result or independently of that measure. For if the company were already dissolved at the time when the measure complained of was taken, it would obviously be impossible to speak of a measure taken with regard to the company; one would on the contrary have to speak of a measure taken directly with regard to the members of the company, which would *ipso facto* authorize the national States of the members to exercise diplomatic protection of them.

Furthermore the logic of the argument implies that the dissolution in question must be an extinction which is effective from the standpoint of the legal order of the company's national State. Such an extinction is not necessarily the automatic consequence of an extinction occurring in the legal order of the State that had taken the measure complained of.

Now it is quite obvious that if a company is dissolved from the standpoint of the legal order of its national State, there is no possibility of its applying to that State for diplomatic protection. However, the ability of persons to request diplomatic protection of their national State is one thing, and entirely depends on the internal legal system of the State in question; but the exercise of diplomatic protection on the international plane is quite another matter. Diplomatic protection, as the exercise of a right arising out of the international legal order, belongs exclusively to the State, which has entire discretion in its respect. A State is free not to exercise diplomatic protection even if the national concerned requests it. Conversely, a State may exercise diplomatic protection even if there is no request from its national. It follows that the dissolution of a company does not prevent its national State from exercising diplomatic protection in its respect and that, consequently, the hypothesis envisaged cannot arise at all.

12. On the other hand it must be recognized that diplomatic protection of a company really may be impossible when there is no foreign State to exercise it. This would be so in the case of a company which had the nationality of the very State whose international obligation was in question.

Nevertheless, to say that in such a case the national States of the shareholders are entitled to protect the latter's interests because there is no possibility of their benefiting indirectly from any protection afforded the company would be to make havoc with the system of international

rules regarding the treatment of foreigners. It would, furthermore, be a wholly illogical and arbitrary deduction.

For to envisage the possibility of indirect protection in certain eventualities is tantamount to recognizing the absence, so far as shareholders are concerned, of any direct protection on the part of international law—to recognizing, in other words, that international law does not consider the interests of shareholders, as simple interests, worthy of its protection and that it consequently refrains from imposing upon a State, in this connection, any obligations toward shareholders' national States. This negative attitude on the part of international law cannot be reversed on the ground that the interests of shareholders might, in other circumstances, benefit from a purely indirect protection. Such artificial and illogical reasoning would lead to the creation, for the interests of shareholders, of a direct protection such as their national States might take up: the very protection which is refused by international law.

13. *A fortiori*, the diplomatic protection of shareholders by their national States must be ruled out where, as in the present case, the diplomatic protection of the company by its national State is possible but, for some reason or other, is not exercised or not pursued.

To my general remarks on the notion of a second line of diplomatic protection for shareholders, and to those I have just made regarding the hypothesis of the impossibility of the company's receiving diplomatic protection, remarks which remain no less valid for the hypothesis now under consideration, I would add certain other observations of specific application to the latter.

According to this latter hypothesis, the possibility of a State's exercising diplomatic protection of those shareholders in a company who are its nationals would not be absolute, but contingent on a certain attitude which a third State, i.e., the national State of the company, is free to adopt or not: an attitude consisting either in refraining from exercising diplomatic protection of the company or in not pursuing diplomatic protection once exercised. It would not be easy to establish at what moment the requisite condition might be regarded as fulfilled. In any event, there would be a point in time before which the diplomatic protection of the shareholders would not be admitted; as from that moment, on the other hand, the possibility of exercising such protection would exist.

But any diplomatic protection presupposes that the State approached by the protector owes an obligation or, it may be, has incurred a debt of responsibility, because it is precisely such obligation or responsibility that diplomatic protection relies on and asserts. Consequently, to say that the national State of the shareholders cannot exercise diplomatic protection for so long as it is not possible to affirm that the national State of the company is refraining from exercising diplomatic protection of the

latter amounts to excluding the existence, until then, of any obligation or responsibility vis-à-vis the national State of the shareholders. It is only later that such an obligation and, it may be, such responsibility (indeed the very unlawfulness of the measure taken vis-à-vis the company) would arise, necessarily with retroactive effect, owing to the conduct of a third State, the national State of the company, in abstaining—for some motive the appraisal of which would be a matter for its own discretion—from the exercise of diplomatic protection in respect of the company.

Simply to propound such a theory is to expose its absurdity. Generally speaking, it is hard to see how a State's non-exercise of its right could have any influence on the possibility of exercising, let alone the very existence of, another State's right. I have already pointed out that the international rules governing the treatment of foreigners take concrete shape in bilateral relationships. Now each of these relationships, between clearly circumscribed subjects, is absolutely independent of any other relationship which, though deriving from those same rules, might exist between other, or partly other, subjects. Hence no such relationship could, through its own existence or merely through its activation, exert any influence on the very existence of another. Consequently, if the view be taken that a State is not, vis-à-vis the national State of shareholders in a limited company, under any obligation whatever concerning the treatment of that company, it is impossible to see how such an obligation could arise retroactively out of the fact that the national State of the company does not, for whatever reason, exercise its own right.

(Signed) Gaetano MORELLI.