COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DE LA BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED

(NOUVELLE REQUÊTE: 1962)
(BELGIQUE c. ESPAGNE)
DEUXIÈME PHASE

ARRÊT DU 5 FÉVRIER 1970

1970

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED

(NEW APPLICATION: 1962)
(BELGIUM *v.* SPAIN)
SECOND PHASE

JUDGMENT OF 5 FEBRUARY 1970

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CASE CONCERNING THE BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED

(NEW APPLICATION: 1962)
(BELGIUM *v.* SPAIN)
SECOND PHASE

Question of admissibility—Capacity of Applicant Government to act.

Claim brought on behalf of natural and juristic persons alleged to be shareholders in foreign limited liability company and based on allegedly unlawful measures taken against the company—Nature of corporate entities under municipal law generally—Distinction between injury to rights of company and injury to direct rights of shareholders—Distinction between rights and interests—No injury to shareholders' direct rights alleged—Injury to shareholders' interests resulting from injury to rights of company insufficient to found claim.

Diplomatic protection—General principle of protection of company by company's national State—Company incorporated in third State, admitted by both Parties to be company's national State—Possible circumstances involving exceptions to general principle: case of disappearance of company; case of company's national State lacking capacity to act—Cessation of protection by company's national State not equivalent to legal impediment—Irrelevance of non-existence of link of compulsory jurisdiction between company's national State and Respondent Government.

Foreign investments as part of State's national economic resources—Injury thereto—No responsibility in absence of injury to recognized rights of State.

Possible relevance of considerations of equity—Right of protection in respect of shareholders' interests if not possible to apply general principle—Practical difficulties of any system of concurrent or secondary rights—Equitable considerations not applicable if company's national State able to act.

JUDGMENT

President: *President* BUSTAMANTE Y RIVERO; *Vice-President* KORETSKY; *Judges* Sir Gerald FITZMAURICE, TANAKA, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS, AMMOUN, BENGZON, PETRÉN, LACHS, ONYEAMA; *Judges* ad hoc ARMAND-UGON, RIPHAGEN; *Registrar* AQUARONE.

In the case concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962),

between

the Kingdom of Belgium,

represented by

Chevalier Y. Devadder, Legal Adviser to the Ministry of Foreign Affairs and External Trade,

as Agent,

Mr. H. Rolin, Professor emeritus of the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,

as Co-Agent and Counsel,

assisted by

Mrs. S. Bastid, Professor in the Faculty of Law of the University of Paris
Mr. J. Van Ryn, Professor in the Faculty of Law of the Free University of Brussels and Advocate at the Belgian Court of Cassation,
Mr. M. Grégoire, Advocate at the Brussels Court of Appeal,
Mr. F. A. Mann, Honorary Professor in the Faculty of Law of the University of Bonn, Solicitor of the Supreme Court, England,
Mr. M. Virally, Professor in the Faculties of Law of the Universities of Geneva and Strasbourg and at the Graduate Institute of International Studies in Geneva,
Mr. E. Lauterpacht, Lecturer in the University of Cambridge, Member of the English Bar,
Mr. A. S. Pattillo, Q.C., Member of the Ontario Bar (Canada),
Mr. M. Slusny, Lecturer in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
Mr. P. Van Ommeslaghe, *Professeur extraordinaire* in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
Mr. M. Waelbroeck, *Professeur extraordinaire* in the Faculty of Law of the Free University of Brussels,
Mr. J. Kirkpatrick, Lecturer in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,

as Counsel,

Mr. H. Bachrach, Member of the New York State and Federal Bars,

as Assistant Counsel and Secretary,

and by

Mr. L. Prieto-Castro, Professor in the Faculty of Law of the University of Madrid,

Mr. M. Olivencia Ruiz, Professor in the Faculty of Law of the University of Seville,

Mr. J. Girón Tena, Professor in the Faculty of Law of the University of Valladolid,

as Expert-Counsel in Spanish Law,

and

the Spanish State,

represented by

Mr. J. M. Castro-Rial, Professor, Legal Adviser to the Ministry of Foreign Affairs,

as Agent,

assisted by

Mr. R. Ago, Professor of International Law in the Faculty of Law of the University of Rome,

Mr. M. Bos, Professor of International Law in the Faculty of Law of the University of Utrecht,

Mr. P. Cahier, Professor of International Law at the Graduate Institute of International Studies in Geneva,

Mr. J. Carreras Llansana, Professor in the Faculty of Law of the University of Navarre,

Mr. F. de Castro y Bravo, Professor, Legal Adviser to the Ministry of Foreign Affairs,

Mr. J. M. Gil-Robles Quiñones, Professor in the Faculty of Law of the University of Oviedo,

Mr. M. Gimeno Fernández, Judge of the Supreme Court, Madrid,

Mr. P. Guggenheim, Professor of International Law at the Graduate Institute of International Studies in Geneva,

Mr. E. Jiménez de Aréchaga, Professor of International Law in the Faculty of Law of the University of Montevideo,

Mr. A. Malintoppi, Professor of International Law in the Faculty of Political Science of the University of Florence,

Mr. F. Ramírez, Secretary-General of the Spanish Institute of Foreign Exchange, Madrid,

Mr. P. Reuter, Professor in the Faculty of Law of the University of Paris,

Mr. J. M. Rivas Fresnedo, Inspector and Expert, Ministry of Finance, Madrid,

Mr. J. L. Sureda Carrión, Professor in the Faculty of Law of the University of Barcelona,

Mr. D. Triay Moll, Inspector and Expert, Ministry of Finance, Madrid,

Mr. R. Uría González, Professor in the Faculty of Law of the University of Madrid,

Sir Humphrey Waldock, C.M.G., O.B.E., Q.C., Chichele Professor of Public International Law in the University of Oxford,

Mr. P. Weil, Professor in the Faculty of Law of the University of Paris,

as Counsel or Advocates,

and by
Mr. J. M. Lacleta y Muñoz, Secretary of Embassy,
Mr. L. Martínez-Agulló, Secretary of Embassy,
as Secretaries,

THE COURT,

composed as above,

delivers the following Judgment:

1. In 1958 the Belgian Government filed with the International Court of Justice an Application against the Spanish Government seeking reparation for damage allegedly caused to the Barcelona Traction, Light and Power Company, Limited, on account of acts said to be contrary to international law committed by organs of the Spanish State. After the filing of the Belgian Memorial and the submission of preliminary objections by the Spanish Government, the Belgian Government gave notice of discontinuance of the proceedings, with a view to negotiations between the representatives of the private interests concerned. The case was removed from the Court's General List on 10 April 1961.

2. On 19 June 1962, the negotiations having failed, the Belgian Government submitted to the Court a new Application, claiming reparation for the damage allegedly sustained by Belgian nationals, shareholders in the Barcelona Traction company, on account of acts said to be contrary to international law committed in respect of the company by organs of the Spanish State. On 15 March 1963 the Spanish Government raised four preliminary objections to the Belgian Application.

3. By its Judgment of 24 July 1964, the Court rejected the first two preliminary objections. The first was to the effect that the discontinuance, under Article 69, paragraph 2, of the Court's Rules, of previous proceedings relative to the same events in Spain, disentitled the Belgian Government from bringing the present proceedings. The second was to the effect that even if this was not the case, the Court was not competent, because the necessary jurisdictional basis requiring Spain to submit to the jurisdiction of the Court did not exist. The Court joined the third and fourth objections to the merits. The third was to the effect that the claim is inadmissible because the Belgian Government lacks any *jus standi* to intervene or make a judicial claim on behalf of Belgian interests in a Canadian company, assuming that the Belgian character of such interests were established, which is denied by the Spanish Government. The fourth was to the effect that even if the Belgian Government has the necessary *jus standi*, the claim still remains inadmissible because local remedies in respect of the acts complained of were not exhausted.

4. Time-limits for the filing of the further pleadings were fixed or, at the request of the Parties, extended by Orders of 28 July 1964, 11 June 1965, 12 January 1966, 23 November 1966, 12 April 1967, 15 September 1967 and 24 May 1968, in the last-mentioned of which the Court noted with regret that the time-limits originally fixed by the Court for the filing of the pleadings had not been observed, whereby the written proceedings had been considerably prolonged. The written proceedings finally came to an end on 1 July 1968 with the filing of the Rejoinder of the Spanish Government.

5. Pursuant to Article 31, paragraph 3, of the Statute, Mr. Willem Riphagen, Professor of International Law at the Rotterdam School of Economics, and Mr. Enrique C. Armand-Ugon, former President of the Supreme Court of Justice of Uruguay and a former Member of the International Court of Justice, were chosen by the Belgian and Spanish Governments respectively to sit as judges *ad hoc*.

6. Pursuant to Article 44, paragraph 2, of the Rules of Court, the pleadings and annexed documents were, after consultation of the Parties, made available to the Governments of Chile, Peru and the United States of America. Pursuant to paragraph 3 of the same Article, the pleadings and annexed documents were, with the consent of the Parties, made accessible to the public as from 10 April 1969.

7. At 64 public sittings held between 15 April and 22 July 1969 the Court heard oral arguments and replies by Chevalier Devadder, Agent, Mr. Rolin, co-Agent and Counsel, Mrs. Bastid, Mr. Van Ryn, Mr. Grégoire, Mr. Mann, Mr. Virally, Mr. Lauterpacht, and Mr. Pattillo, Counsel, on behalf of the Belgian Government and by Mr. Castro-Rial, Agent, Mr. Ago, Mr. Carreras Mr. Gil-Robles, Mr. Guggenheim, Mr. Jiménez de Aréchaga, Mr. Malintoppi, Mr. Reuter, Mr. Sureda, Mr. Uría, Sir Humphrey Waldock and Mr. Weil, Counsel or Advocates, on behalf of the Spanish Government.

* * *

8. The Barcelona Traction, Light and Power Company, Limited, is a holding company incorporated in 1911 in Toronto (Canada), where it has its head office. For the purpose of creating and developing an electric power production and distribution system in Catalonia (Spain), it formed a number of operating, financing and concession-holding subsidiary companies. Three of these companies, whose shares it owned wholly or almost wholly, were incorporated under Canadian law and had their registered offices in Canada (Ebro Irrigation and Power Company, Limited, Catalonian Land Company, Limited and International Utilities Finance Corporation, Limited); the others were incorporated under Spanish law and had their registered offices in Spain. At the time of the outbreak of the Spanish Civil War the group, through its operating subsidiaries, supplied the major part of Catalonia's electricity requirements.

9. According to the Belgian Government, some years after the First World War Barcelona Traction's share capital came to be very largely held by Belgian nationals—natural or juristic persons—and a very high percentage of the shares has since then continuously belonged to Belgian nationals, particularly the Société Internationale d'Energie Hydro-Electrique (Sidro), whose principal shareholder, the Société Financière de Transports et d'Entreprises Industrielles (Sofina), is itself a company in which Belgian interests are preponderant. The fact that large blocks of shares were for certain periods transferred to American nominees, to

protect these securities in the event of invasion of Belgian territory during the Second World War, is not, according to the Belgian contention, of any relevance in this connection, as it was Belgian nationals, particularly Sidro, who continued to be the real owners. For a time the shares were vested in a trustee, but the Belgian Government maintains that the trust terminated in 1946. The Spanish Government contends, on the contrary, that the Belgian nationality of the shareholders is not proven and that the trustee or the nominees must be regarded as the true shareholders in the case of the shares concerned.

10. Barcelona Traction issued several series of bonds, some in pesetas but principally in sterling. The issues were secured by trust deeds, with the National Trust Company, Limited, of Toronto as trustee of the sterling bonds, the security consisting essentially of a charge on bonds and shares of Ebro and other subsidiaries and of a mortgage executed by Ebro in favour of National Trust. The sterling bonds were serviced out of transfers to Barcelona Traction effected by the subsidiary companies operating in Spain.

11. In 1936 the servicing of the Barcelona Traction bonds was suspended on account of the Spanish civil war. In 1940 payment of interest on the peseta bonds was resumed with the authorization of the Spanish exchange control authorities (required because the debt was owed by a foreign company), but authorization for the transfer of the foreign currency necessary for the servicing of the sterling bonds was refused and those interest payments were never resumed.

12. In 1945 Barcelona Traction proposed a plan of compromise which provided for the reimbursement of the sterling debt. When the Spanish authorities refused to authorize the transfer of the necessary foreign currency, this plan was twice modified. In its final form, the plan provided, *inter alia*, for an advance redemption by Ebro of Barcelona Traction peseta bonds, for which authorization was likewise required. Such authorization was refused by the Spanish authorities. Later, when the Belgian Government complained of the refusals to authorize foreign currency transfers, without which the debts on the bonds could not be honoured, the Spanish Government stated that the transfers could not be authorized unless it was shown that the foreign currency was to be used to repay debts arising from the genuine importation of foreign capital into Spain, and that this had not been established.

13. On 9 February 1948 three Spanish holders of recently acquired Barcelona Traction sterling bonds petitioned the court of Reus (Province of Tarragona) for a declaration adjudging the company bankrupt, on account of failure to pay the interest on the bonds. The petition was admitted by an order of 10 February 1948 and a judgment declaring the company bankrupt was given on 12 February. This judgment included provisions appointing a commissioner in bankruptcy and an interim

receiver and ordering the seizure of the assets of Barcelona Traction, Ebro and Compañía Barcelonesa de Electricidad, another subsidiary company.

14. The shares of Ebro and Barcelonesa had been deposited by Barcelona Traction and Ebro with the National Trust company of Toronto as security for their bond issues. All the Ebro and the Barcelonesa ordinary shares were held outside Spain, and the possession taken of them was characterized as "mediate and constructive civil possession", that is to say was not accompanied by physical possession. Pursuant to the bankruptcy judgment the commissioner in bankruptcy at once dismissed the principal management personnel of the two companies and during the ensuing weeks the interim receiver appointed Spanish directors and declared that the companies were thus "normalized". Shortly after the bankruptcy judgment the petitioners brought about the extension of the taking of possession and related measures to the other subsidiary companies.

15. Proceedings in Spain to contest the bankruptcy judgment and the related decisions were instituted by Barcelona Traction, National Trust, the subsidiary companies and their directors or management personnel. However, Barcelona Traction, which had not received a judicial notice of the bankruptcy proceedings, and was not represented before the Reus court in February, took no proceedings in the courts until 18 June 1948. In particular it did not enter a plea of opposition against the bankruptcy judgment within the time-limit of eight days from the date of publication of the judgment laid down in Spanish legislation. On the grounds that the notification and publication did not comply with the relevant legal requirements, the Belgian Government contends that the eight-day time-limit had never begun to run.

16. Motions contesting the jurisdiction of the Reus court and of the Spanish courts as a whole, in particular by certain bondholders, had a suspensive effect on the actions for redress; a decision on the question of jurisdiction was in turn delayed by lengthy proceedings brought by the Genora company, a creditor of Barcelona Traction, disputing Barcelona Traction's right to be a party to the proceedings on the jurisdictional issue. One of the motions contesting jurisdiction was not finally dismissed by the Barcelona court of appeal until 1963, after the Belgian Application had been filed with the International Court of Justice.

17. In June 1949, on an application by the Namel company, with the intervention of the Genora company, the Barcelona court of appeal gave a judgment making it possible for the meeting of creditors to be convened for the election of the trustees in bankruptcy, by excluding the necessary procedure from the suspensive effect of the motion contesting jurisdiction. Trustees were then elected, and procured decisions that new shares of the subsidiary companies should be created, cancelling the shares located outside Spain (December 1949), and that the head offices of Ebro and Catalonian Land should henceforth be at Barcelona and not

Toronto. Finally in August 1951 the trustees obtained court authorization to sell "the totality of the shares, with all the rights attaching to them, representing the corporate capital" of the subsidiary companies, in the form of the newly created share certificates. The sale took place by public auction on 4 January 1952 on the basis of a set of General Conditions and became effective on 17 June 1952. The purchaser was a newly formed company, Fuerzas Eléctricas de Cataluña, S.A. (Fecsa), which thereupon acquired complete control of the undertaking in Spain.

18. Proceedings before the court of Reus, various courts of Barcelona and the Spanish Supreme Court, to contest the sale and the operations which preceded or followed it, were taken by, among others, Barcelona Traction, National Trust and the Belgian company Sidro as a shareholder in Barcelona Traction, but without success. According to the Spanish Government, up to the filing of the Belgian Application, 2,736 orders had been made in the case and 494 judgments given by lower and 37 by higher courts. For the purposes of this Judgment it is not necessary to go into these orders and judgments.

19. After the bankruptcy declaration, representations were made to the Spanish Government by the British, Canadian, United States and Belgian Governments.

20. The British Government made representations to the Spanish Government on 23 February 1948 concerning the bankruptcy of Barcelona Traction and the seizure of its assets as well as those of Ebro and Barcelonesa, stating its interest in the situation of the bondholders resident in the United Kingdom. It subsequently supported the representations made by the Canadian Government.

21. The Canadian Government made representations to the Spanish Government in a series of diplomatic notes, the first being dated 27 March 1948 and the last 21 April 1952; in addition, approaches were made on a less official level in July 1954 and March 1955. The Canadian Government first complained of the denials of justice said to have been committed in Spain towards Barcelona Traction, Ebro and National Trust, but it subsequently based its complaints more particularly on conduct towards the Ebro company said to be in breach of certain treaty provisions applicable between Spain and Canada. The Spanish Government did not respond to a Canadian proposal for the submission of the dispute to arbitration and the Canadian Government subsequently confined itself, until the time when its interposition entirely ceased, to endeavouring to promote a settlement by agreement between the private groups concerned.

22. The United States Government made representations to the Spanish Government on behalf of Barcelona Traction in a note of 22 July 1949, in support of a note submitted by the Canadian Government the previous day. It subsequently continued its interposition through the diplomatic channel and by other means. Since references were made by the United States Government in these representations to the presence of

American interests in Barcelona Traction, the Spanish Government draws the conclusion that, in the light of the customary practice of the United States Government to protect only substantial American investments abroad, the existence must be presumed of such large American interests as to rule out a preponderance of Belgian interests. The Belgian Government considers that the United States Government was motivated by a more general concern to secure equitable treatment of foreign investments in Spain, and in this context cites, *inter alia*, a note of 5 June 1967 from the United States Government.

23. The Spanish Government having stated in a note of 26 September 1949 that Ebro had not furnished proof as to the origin and genuineness of the bond debts, which justified the refusal of foreign currency transfers, the Belgian and Canadian Governments considered proposing to the Spanish Government the establishment of a tripartite committee to study the question. Before this proposal was made, the Spanish Government suggested in March 1950 the creation of a committee on which, in addition to Spain, only Canada and the United Kingdom would be represented. This proposal was accepted by the United Kingdom and Canadian Governments. The work of the committee led to a joint statement of 11 June 1951 by the three Governments to the effect, *inter alia*, that the attitude of the Spanish administration in not authorizing the transfers of foreign currency was fully justified. The Belgian Government protested against the fact that it had not been invited to nominate an expert to take part in the enquiry, and reserved its rights; in the proceedings before the Court it contended that the joint statement of 1951, which was based on the work of the committee, could not be set up against it, being *res inter alios acta*.

24. The Belgian Government made representations to the Spanish Government on the same day as the Canadian Government, in a note of 27 March 1948. It continued its diplomatic intervention until the rejection by the Spanish Government of a Belgian proposal for submission to arbitration (end of 1951). After the admission of Spain to membership in the United Nations (1955), which, as found by the Court in 1964, rendered operative again the clause of compulsory jurisdiction contained in the 1927 Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration, the Belgian Government attempted further representations. After the rejection of a proposal for a special agreement, it decided to refer the dispute unilaterally to this Court.

* * *

25. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Belgian Government,

in the Application:

"May it please the Court

1. to adjudge and declare that the measures, acts, decisions and omissions of the organs of the Spanish State described in the present Application are contrary to international law and that the Spanish State is under an obligation towards Belgium to make reparation for the consequential damage suffered by Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction;

2. to adjudge and declare that this reparation should, as far as possible, annul all the consequences which these acts contrary to international law have had for the said nationals, and that the Spanish State is therefore under an obligation to secure, if possible, the annulment of the adjudication in bankruptcy and of the judicial and other acts resulting therefrom, obtaining for the injured Belgian nationals all the legal effects which should result for them from this annulment; further, to determine the amount of the compensation to be paid by the Spanish State to the Belgian State by reason of all the incidental damage sustained by Belgian nationals as a result of the acts complained of, including the deprivation of enjoyment of rights and the expenses incurred in the defence of their rights;

3. to adjudge and declare, in the event of the annulment of the consequences of the acts complained of proving impossible, that the Spanish State shall be under an obligation to pay to the Belgian State, by way of compensation, a sum equivalent to 88 per cent. of the net value of the business on 12 February 1948; this compensation to be increased by an amount corresponding to all the incidental damage suffered by the Belgian nationals as the result of the acts complained of, including the deprivation of enjoyment of rights and the expenses incurred in the defence of their rights";

in the Memorial:

"May it please the Court

I. to adjudge and declare that the measures, acts, decisions and omissions of the organs of the Spanish State described in the present Memorial are contrary to international law and that the Spanish State is under an obligation towards Belgium to make reparation for the consequential damage suffered by Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction;

II. to adjudge and declare that this reparation should, as far as possible, annul all the consequences which these acts contrary to international law have had for the said nationals, and that the Spanish State is therefore under an obligation to secure, if possible, the annulment by administrative means of the adjudication in bankruptcy and of the judicial and other acts resulting therefrom, obtaining for the said injured Belgian nationals all the legal effects which should result for them from this annulment; further, to determine the amount of the compensation to be paid by the Spanish State to the Belgian State by reason of all the incidental damage sustained by Belgian nationals as a result of the acts complained of, including the deprivation of enjoyment of rights and the expenses incurred in the defence of their rights;

III. to adjudge and declare, in the event of the annulment of the consequences of the acts complained of proving impossible, that the Spanish State shall be under an obligation to pay to the Belgian State, by way of compensation, a sum equivalent to 88 per cent. of the sum of $88,600,000 arrived at in paragraph 379 of the present Memorial, this compensation to be increased by an amount corresponding to all the incidental damage suffered by the said Belgian nationals as the result of the acts complained of, including the deprivation of enjoyment of rights, the expenses incurred in the defence of their rights and the equivalent in capital and interest of the amount of Barcelona Traction bonds held by Belgian nationals and of their other claims on the companies in the group which it was not possible to recover owing to the acts complained of";

in the Reply:

"May it please the Court, rejecting any other submissions of the Spanish State which are broader or to a contrary effect,

to adjuge and declare

(1) that the Application of the Belgian Government is admissible;

(2) that the Spanish State is responsible for the damage sustained by the Belgian State in the person of its nationals, shareholders in Barcelona Traction, as the result of the acts contrary to international law committed by its organs, which led to the total spoliation of the Barcelona Traction group;

(3) that the Spanish State is under an obligation to ensure reparation of the said damage;

(4) that this damage can be assessed at U.S. $78,000,000, representing 88 per cent. of the net value, on 12 February 1948, of the property of which the Barcelona Traction group was despoiled;

(5) that the Spanish State is, in addition, under an obligation to pay, as an all-embracing payment to cover loss of enjoyment, compensatory interest at the rate of 6 per cent. on the said sum of U.S. $78,000,000, from 12 February 1948 to the date of judgment;

(6) that the Spanish State must, in addition, pay a sum provisionally assessed at U.S. $3,800,000 to cover the expenses incurred by the Belgian nationals in defending their rights since 12 February 1948;

(7) that the Spanish State is also liable in the sum of £433,821 representing the amount, in principal and interest, on 4 January 1952, of the Barcelona Traction sterling bonds held by the said nationals, as well as in the sum of U.S. $1,623,127, representing a debt owed to one of the said nationals by a subsidiary company of Barcelona Traction, this sum including lump-sum compensation for loss of profits resulting from the premature termination of a contract;

that there will be due on those sums interest at the rate of 6 per cent. per annum, as from 4 January 1952 so far as concerns the sum of £433,821, and as from 12 February 1948 so far as concerns the sum of U.S. $1,623,127; both up to the date of judgment;

(8) that the Spanish State is also liable to pay interest, by way of interest on a sum due and outstanding, at a rate to be determined by

reference to the rates generally prevailing, on the amount of compensation awarded, from the date of the Court's decision fixing such compensation up to the date of payment;

(9) in the alternative to submissions (4) to (6) above, that the amount of the compensation due to the Belgian State shall be established by means of an expert enquiry to be ordered by the Court; and to place on record that the Belgian Government reserves its right to submit in the course of the proceedings such observations as it may deem advisable concerning the object and methods of such measure of investigation;

(10) and, should the Court consider that it cannot, without an expert enquiry, decide the final amount of the compensation due to the Belgian State, have regard to the considerable magnitude of the damage caused and make an immediate award of provisional compensation, on account of the compensation to be determined after receiving the expert opinion, the amount of such provisional compensation being left to the discretion of the Court."

On behalf of the Spanish Government,

in the Counter-Memorial:

"May it please the Court

to adjudge and declare

I. that the Belgian claim which, throughout the diplomatic correspondence and in the first Application submitted to the Court, has always been a claim with a view to the protection of the Barcelona Traction company, has not changed its character in the second Application, whatever the apparent modifications introduced into it;

that even if the true subject of the Belgian claim were, not the Barcelona Traction company, but those whom the Belgian Government characterizes on some occasions as 'Belgian shareholders' and on other occasions as 'Belgian interests' in that company, and the damage allegedly sustained by those 'shareholders' or 'interests', it would still remain true that the Belgian Government has not validly proved either that the shares of the company in question belonged on the material dates to 'Belgian shareholders', or, moreover, that there is in the end, in the case submitted to the Court, a preponderance of genuine 'Belgian interests';

that even if the Belgian claim effectively had as its beneficiaries alleged 'shareholders' of Barcelona Traction who were 'Belgian', or yet again alleged genuine 'Belgian interests' of the magnitude which is attributed to them, the general principles of international law governing this matter, confirmed by practice which knows of no exception, do not recognize that the national State of shareholders or 'interests', whatever their number or magnitude, may make a claim on their behalf in reliance on allegedly unlawful damage sustained by the company, which possesses the nationality of a third State;

that the Belgian Government therefore lacks *jus standi* in the present case;

II. that a rule of general international law, confirmed both by judicial precedents and the teachings of publicists, and reiterated in Article 3 of the Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927 between Spain and Belgium, requires that private persons

allegedly injured by a measure contrary to international law should have used and exhausted the remedies and means of redress provided by the internal legal order before diplomatic, and above all judicial, protection may be exercised on their behalf;

that the applicability of this rule to the present case has not been disputed and that the prior requirement which it lays down has not been satisfied;

III. that the organic machinery for financing the Barcelona Traction undertaking, as conceived from its creation and constantly applied thereafter, placed it in a permanent state of latent bankruptcy, and that the constitutional structure of the group and the relationship between its members were used as the instrument for manifold and ceaseless operations to the detriment both of the interests of the creditors and of the economy and law of Spain, the country in which the undertaking was to carry on all its business;

that these same facts led, on the part of the undertaking, to an attitude towards the Spanish authorities which could not but provoke a fully justified refusal to give effect to the currency applications made to the Spanish Government;

that the bankruptcy declaration of 12 February 1948, the natural outcome of the conduct of the undertaking, and the bankruptcy proceedings which ensued, were in all respects in conformity with the provisions of Spanish legislation on the matter; and that moreover these provisions are comparable with those of other statutory systems, in particular Belgian legislation itself;

that the complaint of usurpation of jurisdiction is not well founded where the bankruptcy of a foreign company is connected in any way with the territorial jurisdiction of the State, that being certainly so in the present case;

that the Spanish judicial authorities cannot be accused of either one or more denials of justice in the proper sense of the term, Barcelona Traction never having been denied access to the Spanish courts and the judicial decisions on its applications and appeals never having suffered unjustified or unreasonable delays; nor is it possible to detect in the conduct of the Spanish authorities the elements of some breach of international law other than a denial of justice;

that the claim for reparation, the very principle of which is disputed by the Spanish Government, is moreover, having regard to the circumstances of the case, an abuse of the right of diplomatic protection in connection with which the Spanish Government waives none of its possible rights;

IV. that, therefore, the Belgian claim is dismissed as inadmissible or, if not, as unfounded";

in the Rejoinder:

"May it please the Court

to adjudge and declare

that the claim of the Belgian Government is declared inadmissible or, if not, unfounded."

In the course of the oral proceedings, the following text was presented as final submissions

on behalf of the Belgian Government,

after the hearing of 9 July 1969:

"1. Whereas the Court stated on page 9 of its Judgment of 24 July 1964 that 'The Application of the Belgian Government of 19 June 1962 seeks reparation for damage claimed to have been caused to a number of Belgian nationals, said to be shareholders in the Barcelona Traction, Light and Power Company, Limited, a company under Canadian law, by the conduct, alleged to have been contrary to international law, of various organs of the Spanish State in relation to that company and to other companies of its group';

Whereas it was therefore manifestly wrong of the Spanish Government, in the submissions in the Counter-Memorial and in the oral arguments of its counsel, to persist in the contention that the object of the Belgian claim is to protect the Barcelona Traction company;

2. Whereas Barcelona Traction was adjudicated bankrupt in a judgment rendered by the court of Reus, in Spain, on 12 February 1948;

3. Whereas that holding company was on that date in a perfectly sound financial situation, as were its subsidiaries, Canadian or Spanish companies having their business in Spain;

4. Whereas, however, the Spanish Civil War and the Second World War had, from 1936 to 1944, prevented Barcelona Traction from being able to receive, from its subsidiaries operating in Spain, the foreign currency necessary for the service of the sterling loans issued by it for the financing of the group's investments in Spain;

5. Whereas, in order to remedy this situation, those in control of Barcelona Traction agreed with the bondholders in 1945, despite the opposition of the March group, to a plan of compromise, which was approved by the trustee and by the competent Canadian court; and whereas its implementation was rendered impossible as a result of the opposition of the Spanish exchange authorities, even though the method of financing finally proposed no longer involved any sacrifice of foreign currency whatever for the Spanish economy;

6. Whereas, using this situation as a pretext, the March group, which in the meantime had made further considerable purchases of bonds, sought and obtained the judgment adjudicating Barcelona Traction bankrupt;

7. Whereas the bankruptcy proceedings were conducted in such a manner as to lead to the sale to the March group, which took place on 4 January 1952, of all the assets of the bankrupt company, far exceeding in value its liabilities, in consideration of the assumption by the purchaser itself of solely the bonded debt, which, by new purchases, it had concentrated into its own hands to the extent of approximately 85 per cent., while the cash price paid to the trustees in bankruptcy, 10,000,000 pesetas—approximately $250,000—, being insufficient to cover the bankruptcy costs, did not allow them to pass anything to the bankrupt company or its shareholders, or even to pay its unsecured creditors;

8. Whereas the accusations of fraud made by the Spanish Government against the Barcelona Traction company and the allegation that that company was in a permanent state of latent bankruptcy are devoid of all

relevance to the case and, furthermore, are entirely unfounded;

9. Whereas the acts and omissions giving rise to the responsibility of the Spanish Government are attributed by the Belgian Government to certain administrative authorities, on the one hand, and to certain judicial authorities, on the other hand;

Whereas it is apparent when those acts and omissions are examined as a whole that, apart from the defects proper to each, they converged towards one common result, namely the diversion of the bankruptcy procedure from its statutory purposes to the forced transfer, without compensation, of the undertakings of the Barcelona Traction group to the benefit of a private Spanish group, the March group;

I

ABUSE OF RIGHTS, ARBITRARY AND DISCRIMINATORY ATTITUDE OF CERTAIN ADMINISTRATIVE AUTHORITIES

Considering that the Spanish administrative authorities behaved in an improper, arbitrary and discriminatory manner towards Barcelona Traction and its shareholders, in that, with the purpose of facilitating the transfer of control over the property of the Barcelona Traction group from Belgian hands into the hands of a private Spanish group, they in particular—

(a) frustrated, in October and December 1946, the implementation of the third method for financing the plan of compromise, by refusing to authorize Ebro, a Canadian company with residence in Spain, to pay 64,000,000 pesetas in the national currency to Spanish residents on behalf of Barcelona Traction, a non-resident company, so that the latter might redeem its peseta bonds circulating in Spain, despite the fact that Ebro continued uninterruptedly to be granted periodical authorization to pay the interest on those same bonds up to the time of the bankruptcy;

(b) on the other hand, accepted that Juan March, a Spanish citizen manifestly resident in Spain, should purchase considerable quantities of Barcelona Traction sterling bonds abroad;

(c) made improper use of an international enquiry, from which the Belgian Government was excluded, by gravely distorting the purport of the conclusions of the Committee of Experts, to whom they attributed the finding of irregularities of all kinds such as to entail severe penalties for the Barcelona Traction group, which enabled the trustees in bankruptcy, at March's instigation, to bring about the premature sale at a ridiculously low price of the assets of the Barcelona Traction group and their purchase by the March group thanks to the granting of all the necessary exchange authorizations;

II

USURPATION OF JURISDICTION

Considering that the Spanish courts, in agreeing to entertain the bankruptcy of Barcelona Traction, a company under Canadian law with its registered office in Toronto, having neither registered office nor commer-

cial establishment in Spain, nor possessing any property or carrying on any business there, usurped a power of jurisdiction which was not theirs in international law;

Considering that the territorial limits of acts of sovereignty were patently disregarded in the measures of enforcement taken in respect of property situated outside Spanish territory without the concurrence of the competent foreign authorities;

Considering that there was, namely, conferred upon the bankruptcy authorities, through the artificial device of mediate and constructive civil possession, the power to exercise in Spain the rights attaching to the shares located in Canada of several subsidiary and sub-subsidiary companies on which, with the approval of the Spanish judicial authorities, they relied for the purpose of replacing the directors of those companies, modifying their terms of association, and cancelling their regularly issued shares and replacing them with others which they had printed in Spain and delivered to Fecsa at the time of the sale of the bankrupt company's property, without there having been any effort to obtain possession of the real shares in a regular way;

Considering that that disregard is the more flagrant in that three of the subsidiaries were companies under Canadian law with their registered offices in Canada and that the bankruptcy authorities purported, with the approval of the Spanish judicial authorities, to transform two of them into Spanish companies, whereas such alteration is not permitted by the law governing the status of those companies;

III

Denials of Justice Lato Sensu

Considering that a large number of decisions of the Spanish courts are vitiated by gross and manifest error in the application of Spanish law, by arbitrariness or discrimination, constituting in international law denials of justice *lato sensu*;

Considering that in particular—

(1) The Spanish courts agreed to entertain the bankruptcy of Barcelona Traction in flagrant breach of the applicable provisions of Spanish law, which do not permit that a foreign debtor should be adjudged bankrupt if that debtor does not have his domicile, or at least an establishment, in Spanish territory;

(2) Those same courts adjudged Barcelona Traction bankrupt whereas that company was neither in a state of insolvency nor in a state of final, general and complete cessation of payments and had not ceased its payments in Spain, this being a manifest breach of the applicable statutory provisions of Spanish law, in particular Article 876 of the 1885 Commercial Code;

(3) The judgment of 12 February 1948 failed to order the publication of the bankruptcy by announcement in the place of domicile of the bankrupt, which constitutes a flagrant breach of Article 1044 (5) of the 1829 Commercial Code;

(4) The decisions failing to respect the separate estates of Barcelona Traction's subsidiaries and sub-subsidiaries, in that they extended to their property the attachment arising out of the bankruptcy of the parent

company, and thus disregarded their distinct legal personalities, on the sole ground that all their shares belonged to Barcelona Traction or one of its subsidiaries, had no legal basis in Spanish law, were purely arbitrary and in any event constitute a flagrant breach of Article 35 of the Civil Code, Articles 116 and 174 of the 1885 Commercial Code (so far as the Spanish companies are concerned) and Article 15 of the same Code (so far as the Canadian companies are concerned), as well as of Article 1334 of the Civil Procedure Code;

If the estates of the subsidiaries and sub-subsidiaries could have been included in that of Barcelona Traction—*quod non*—, it would have been necessary to apply to that company the special régime established by the imperative provisions of Articles 930 *et seq.* of the 1885 Commercial Code and the Acts of 9 April 1904 and 2 January 1915 for the event that public-utility companies cease payment, and this was not done;

(5) The judicial decisions which conferred on the bankruptcy authorities the fictitious possession (termed "mediate and constructive civil possession") of the shares of certain subsidiary and sub-subsidiary companies have no statutory basis in Spanish bankruptcy law and were purely arbitrary; they comprise moreover a flagrant breach not only of the general principle recognized in the Spanish as in the majority of other legal systems to the effect that no person may exercise the rights embodied in negotiable securities without having at his disposal the securities themselves but also of Articles 1334 and 1351 of the Civil Procedure Code and Article 1046 of the 1829 Commercial Code, which require the bankruptcy authorities to proceed to the material apprehension of the bankrupt's property;

(6) The bestowal on the commissioner by the bankruptcy judgment of power to proceed to the dismissal, removal or appointment of members of the staff, employees and management, of the companies all of whose shares belonged to Barcelona Traction or one of its subsidiaries had no statutory basis in Spanish law and constituted a gross violation of the statutory provisions referred to under (4), first sub-paragraph, above and also of Article 1045 of the 1829 Commercial Code;

(7) The Spanish courts approved or tolerated the action of the trustees in setting themselves up as a purported general meeting of the two Canadian subsidiaries and in transforming them, in that capacity, into companies under Spanish law, thus gravely disregarding the rule embodied in Article 15 of the 1885 Commercial Code to the effect that the status and internal functioning of foreign companies shall be governed in Spain by the law under which they were incorporated;

(8) The Spanish courts approved or tolerated the action of the trustees in setting themselves up as purported general meetings and modifying, in that capacity, the terms of association of the Ebro, Catalonian Land, Union Eléctrica de Cataluña, Electricista Catalana, Barcelonesa and Saltos del Segre companies, cancelling their shares and issuing new shares; they thus committed a manifest breach of Article 15 of the 1885 Commercial Code (so far as the two Canadian companies were concerned) and Articles 547 *et seq.* of the same code, which authorize the issue of duplicates only in the circumstances they specify; they also gravely disregarded the clauses of the trust deeds concerning voting-rights, in

flagrant contempt of the undisputed rule of Spanish law to the effect that acts performed and agreements concluded validly by the bankrupt before the date of the cessation of payments as determined in the judicial decisions shall retain their effects and their binding force in respect of the bankruptcy authorities (Articles 878 *et seq.* of the 1885 Commercial Code);

(9) The Spanish courts decided at one and the same time to ignore the separate legal personalities of the subsidiary and sub-subsidiary companies (so as to justify the attachment of their property in Spain and their inclusion in the bankrupt estate) and implicitly but indubitably to recognize those same personalities by the conferring of fictitious possession of their shares on the bankruptcy authorities, thus giving decisions which were vitiated by an obvious self-contradiction revealing their arbitrary and discriminatory nature;

(10) The general meeting of creditors of 19 September 1949 convened for the purpose of appointing the trustees was, with the approval of the Spanish judicial authorities, held in flagrant breach of Articles 300 and 1342 of the Civil Procedure Code, and 1044 (3), 1060, 1061 and 1063 of the 1829 Commercial Code, in that *(a)* it was not convened on cognizance of the list of creditors; *(b)* when that list was prepared, it was not drawn up on the basis of particulars from the balance-sheet or the books and documents of the bankrupt company, which books and documents were not, as the Spanish Government itself admits, in the possession of the commissioner on 8 October 1949, while the judicial authorities had not at any time sent letters rogatory to Toronto, Canada, with the request that they be put at his disposal;

(11) By authorizing the sale of the property of the bankrupt company when the adjudication in bankruptcy had not acquired irrevocability and while the proceedings were suspended, the Spanish courts flagrantly violated Articles 919, 1167, 1319 and 1331 of the Civil Procedure Code and the general principles of the right of defence;

In so far as that authorization was based on the allegedly perishable nature of the property to be sold, it constituted a serious disregard of Article 1055 of the 1829 Commercial Code and Article 1354 of the Civil Procedure Code, which articles allow the sale only of movable property which cannot be kept without deteriorating or spoiling; even supposing that those provisions could be applied in general to the property of Barcelona Traction, its subsidiaries and sub-subsidiaries—*quod non*—, there would still have been a gross and flagrant violation of them, inasmuch as that property as a whole was obviously not in any imminent danger of serious depreciation; indeed the only dangers advanced by the trustees, namely those arising out of the threats of prosecution contained in the Joint Statement, had not taken shape, either by the day on which authorization to sell was requested or by the day of the sale, in any proceedings or demand by the competent authorities and did not ever materialize, except to an insignificant extent;

The only penalty which the undertakings eventually had to bear, 15 months after the sale, was that relating to the currency offence, which had occasioned an *embargo* for a much higher sum as early as April 1948;

(12) The authorization to sell and the sale, in so far as they related to the shares of the subsidiary and sub-subsidiary companies without delivery of the certificates, constituted a flagrant violation of Articles

1461 and 1462 of the Spanish Civil Code, which require delivery of the thing sold, seeing that the certificates delivered to the successful bidder had not been properly issued and were consequently without legal value; if the authorization to sell and the sale had applied, as the respondent Government wrongly maintains, to the rights attaching to the shares and bonds or to the bankrupt company's power of domination over its subsidiaries, those rights ought to have been the subject of a joint valuation, on pain of flagrant violation of Articles 1084 to 1089 of the 1829 Commercial Code and Article 1358 of the Civil Procedure Code: in any event, it was in flagrant violation of these last-named provisions that the commissioner fixed an exaggeratedly low reserve price on the basis of a unilateral expert opinion which, through the effect of the General Conditions of Sale, allowed the March group to acquire the auctioned property at that reserve price;

(13) By approving the General Conditions of Sale on the very day on which they were submitted to them and then dismissing the proceedings instituted to contest those conditions, the judicial authorities committed a flagrant violation of numerous *ordre public* provisions of Spanish law; thus, in particular, the General Conditions of Sale—

(a) provided for the payment of the bondholder creditors, an operation which, under Article 1322 of the Civil Procedure Code, falls under the fourth section of the bankruptcy, whereas that section was suspended as a result of the effects attributed to the Boter motion contesting jurisdiction, no exemption from that suspension having been applied for or obtained in pursuance of the second paragraph of Article 114 of the Civil Procedure Code;

(b) provided for the payment of the debts owing on the bonds before they had been approved and ranked by a general meeting of the creditors on the recommendation of the trustees, contrary to Articles 1101 to 1109 of the 1829 Commercial Code and to Articles 1266 to 1274, 1286 and 1378 of the Civil Procedure Code;

(c) in disregard of Articles 1236, 1240, 1512 and 1513 of the Civil Procedure Code, did not require the price to be lodged or deposited at the Court's disposal;

(d) conferred on the trustees power to recognize, determine and declare effective the rights attaching to the bonds, in disregard, on the one hand, of Articles 1101 to 1109 of the 1829 Commercial Code and of Articles 1266 to 1274 of the Civil Procedure Code, which reserve such rights for the general meeting of creditors under the supervision of the judge, and, on the other, of Articles 1445 and 1449 of the Civil Code, which lay down that the purchase price must be a definite sum and may not be left to the arbitrary decision of one of the contracting parties;

(e) in disregard of Articles 1291 to 1294 of the Civil Procedure Code, substituted the successful bidder for the trustees in respect of the payment of the debts owing on the bonds, whilst, in violation of the general principles applicable to novation, replacing the security for those debts, consisting, pursuant to the trust deeds, of shares and bonds issued by the subsidiary and sub-subsidiary companies, with the deposit of a certain sum with a bank or with a mere banker's guarantee limited to three years;

(f) delegated to a third party the function of paying certain debts, in disregard of Articles 1291 and 1292 of the Civil Procedure Code, which define the functions of the trustees in this field and do not allow of any delegation;

(g) ordered the payment of the debts owing on the bonds in sterling, whereas a forced execution may only be carried out in local currency and in the case of bankruptcy the various operations which it includes require the conversion of the debts into local currency on the day of the judgment adjudicating bankruptcy, as is to be inferred from Articles 883 and 884 of the 1885 Commercial Code;

IV

Denials of Justice Stricto Sensu

Considering that in the course of the bankruptcy proceedings the rights of the defence were seriously disregarded; that in particular—

(a) the Reus court, in adjudicating Barcelona Traction bankrupt on an *ex parte* petition, inserted in its judgment provisions which went far beyond finding the purported insolvency of or a general cessation of payments by the bankrupt company, the only finding, in addition to one on the capacity of the petitioners, that it was open to it to make in such proceedings;

This disregard of the rights of the defence was particularly flagrant in respect of the subsidiary companies, whose property was ordered by the court to be attached without their having been summonsed and without their having been adjudicated bankrupt;

(b) the subsidiary companies that were thus directly affected by the judgment of 12 February 1948 nevertheless had their applications to set aside the order for attachment which concerned them rejected as inadmissible on the grounds of lack of capacity;

(c) the pursuit of those remedies and the introduction of any other such proceedings were also made impossible for the subsidiary companies by the discontinuances effected each time by the solicitors appointed to replace the original solicitors by the new boards of directors directly or indirectly involved; these changes of solicitors and discontinuances were effected by the new boards of directors by virtue of authority conferred upon them by the interim receiver simultaneously with their appointment;

(d) the proceedings for relief brought by those in control of the subsidiary companies who had been dismissed by the commissioner were likewise held inadmissible by the Reus court when they sought to avail themselves of the specific provisions of Article 1363 of the Civil Procedure Code, which provide for proceedings to reverse decisions taken by the commissioner in bankruptcy;

(e) there was discrimination on the part of the first special judge when he refused to admit as a party to the bankruptcy the Canadian National Trust Company, Limited, trustee for the bankrupt company's two sterling loans, even though it relied upon the security of the mortgage which had been given to it by Ebro, whereas at the same time he admitted to the proceedings the Bondholders' Committee

appointed by Juan March, although National Trust and the Committee derived their powers from the same trust deeds;

(f) the complaints against the General Conditions of Sale could be neither amplified nor heard because the order which had approved the General Conditions of Sale was deemed to be one of mere routine;

Considering that many years elapsed after the bankruptcy judgment and even after the ruinous sale of the property of the Barcelona Traction group without either the bankrupt company or those co-interested with it having had an opportunity to be heard on the numerous complaints put forward against the bankruptcy judgment and related decisions in the opposition of 18 June 1948 and in various other applications for relief;

Considering that those delays were caused by the motion contesting jurisdiction fraudulently lodged by a confederate of the petitioners in bankruptcy and by incidental proceedings instituted by other men of straw of the March group, which were, like the motion contesting jurisdiction, regularly admitted by the various courts;

Considering that both general international law and the Spanish-Belgian Treaty of 1927 regard such delays as equivalent to the denial of a hearing;

Considering that the manifest injustice resulting from the movement of the proceedings towards the sale, whilst the actions contesting the bankruptcy judgment and even the jurisdiction of the Spanish courts remained suspended, was brought about by two judgments delivered by the same chamber of the Barcelona court of appeal on the same day, 7 June 1949: in one of them it confirmed the admission, with two effects, of the Boter appeal from the judgment of the special judge rejecting his motion contesting jurisdiction, whereas in the other it reduced the suspensive effect granted to that same appeal by excluding from the suspension the calling of the general meeting of creditors for the purpose of appointing the trustees in bankruptcy;

V

Damage and Reparation

Considering that the acts and omissions contrary to international law attributed to the organs of the Spanish State had the effect of despoiling the Barcelona Traction company of the whole of its property and of depriving it of the very objects of its activity, and thus rendered it practically defunct;

Considering that Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction, in which they occupied a majority and controlling position, and in particular the Sidro company, the owner of more than 75 per cent. of the registered capital, on this account suffered direct and immediate injury to their interests and rights, which were voided of all value and effectiveness;

Considering that the reparation due to the Belgian State from the Spanish State, as a result of the internationally unlawful acts for which the latter State is responsible, must be complete and must, so far as possible, reflect the damage suffered by its nationals whose case the Belgian State has taken up; and that, since *restitutio in integrum* is, in the circumstances

of the case, practically and legally impossible, the reparation of the damage suffered can only take place in the form of an all-embracing pecuniary idemnity, in accordance with the provisions of the Spanish-Belgian Treaty of 1927 and with the rules of general international law;

Considering that in the instant case the amount of the indemnity must be fixed by taking as a basis the net value of the Barcelona Traction company's property at the time of its adjudication in bankruptcy, expressed in a currency which has remained stable, namely the United States dollar;

Considering that the value of that property must be determined by the replacement cost of the subsidiary and sub-subsidiary companies' plant for the production and distribution of electricity at 12 February 1948, as that cost was calculated by the Ebro company's engineers in 1946;

Considering that, according to those calculations, and after deduction for depreciation through wear and tear, the value of the plant was at that date U.S. $116,220,000; from this amount there must be deducted the principal of Barcelona Traction's bonded debt and the interest that had fallen due thereon, that is to say, U.S. $27,619,018, which leaves a net value of about U.S. $88,600,000, this result being confirmed—

(1) by the study submitted on 5 February 1949 and on behalf of Ebro to the Special Technical Office for the Regulation and Distribution of Electricity (Catalonian region) (Belgian New Document No. 50);

(2) by capitalization of the 1947 profits;

(3) by the profits made by Fecsa in 1956—the first year after 1948 in which the position of electricity companies was fully stabilized and the last year before the changes made in the undertaking by Fecsa constituted an obstacle to any useful comparison;

(4) by the reports of the experts consulted by the Belgian Government;

Considering that the compensation due to the Belgian Government must be estimated, in the first place, at the percentage of such net value corresponding to the participation of Belgian nationals in the capital of the Barcelona Traction company, namely 88 per cent.;

Considering that on the critical dates of the bankruptcy judgment and the filing of the Application, the capital of Barcelona Traction was represented by 1,798,854 shares, partly bearer and partly registered; that on *12 February 1948* Sidro owned 1,012,688 registered shares and 349,905 bearer shares; that other Belgian nationals owned 420 registered shares and at least 244,832 bearer shares; that 1,607,845 shares, constituting 89.3 per cent. of the company's capital, were thus on that date in Belgian hands; that on *14 June 1962* Sidro owned 1,354,514 registered shares and 31,228 bearer shares; that other Belgian nationals owned 2,388 registered shares and at least 200,000 bearer shares; and that 1,588,130 shares, constituting 88 per cent. of the company's capital, were thus on that date in Belgian hands;

Considering that the compensation claimed must in addition cover all incidental damage suffered by the said Belgian nationals as a result of the acts complained of, including the deprivation of enjoyment of rights, the expenses incurred in the defence of their rights and the equivalent, in capital and interest, of the amount of the Barcelona Traction bonds held by Belgian nationals, and of their other claims on the companies in the

group which it was not possible to recover owing to the acts complained of;

Considering that the amount of such compensation, due to the Belgian State on account of acts contrary to international law attributable to the Spanish State, cannot be affected by the latter's purported charges against the private persons involved, those charges furthermore not having formed the subject of any counterclaim before the Court;

VI

OBJECTION DERIVED FROM THE ALLEGED LACK OF JUS STANDI OF THE BELGIAN GOVERNMENT

Considering that in its Judgment of 24 July 1964 the Court decided to join to the merits the third preliminary objection raised by the Spanish Government;

Considering that the respondent Government wrongly denies to the Belgian Government *jus standi* in the present proceedings;

Considering that the object of the Belgian Government's Application of 14 June 1962 is reparation for the damage caused to a certain number of its nationals, natural and juristic persons, in their capacity as shareholders in the Barcelona Traction, Light and Power Company, Limited, by the conduct contrary to international law of various organs of the Spanish State towards that company and various other companies in its group;

Considering 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, that a single Belgian company, Sidro, possessed more than 75 per cent. of the shares; that the Belgian nationality of that company and the effectiveness of its nationality have not been challenged by the Spanish Government;

Considering that the fact that the Barcelona Traction registered shares possessed by Sidro were registered in Canada in the name of American nominees does not affect their Belgian character; that in this case, under the applicable systems of statutory law, the nominee could exercise the rights attaching to the shares entered in its name only as Sidro's agent;

Considering that the preponderence of Belgian interests in the Barcelona Traction company was well known to the Spanish authorities at the different periods in which the conduct complained of against them occurred, and has been explicitly admitted by them on more than one occasion;

Considering that the diplomatic protection from which the company benefited for a certain time on the part of its national Government ceased in 1952, well before the filing of the Belgian Application, and has never subsequently been resumed;

Considering that by depriving the organs appointed by the Barcelona Traction shareholders under the company's terms of association of their power of control in respect of its subsidiaries, which removed from the company the very objects of its activities, and by depriving it of the whole of its property, the acts and omissions contrary to international law attributed to the Spanish authorities rendered the company practically defunct and directly and immediately injured the rights and interests

attaching to the legal situation of shareholder as it is recognized by international law; that they thus caused serious damage to the company's Belgian shareholders and voided the rights which they possessed in that capacity of all useful content;

Considering that in the absence of reparation to the company for the damage inflicted on it, from which they would have benefited at the same time as itself, the Belgian shareholders of Barcelona Traction thus have separate and independent rights and interests to assert; that they did in fact have to take the initiative for and bear the cost of all the proceedings brought through the company's organs to seek relief in the Spanish courts; that Sidro and other Belgian shareholders, after the sale of Barcelona Traction's property, themselves brought actions the dismissal of which is complained of by the Belgian Government as constituting a denial of Justice;

Considering that under the general principles of international law in this field the Belgian Government has *jus standi* to claim through international judicial proceedings reparation for the damage thus caused to its nationals by the internationally unlawful acts and omissions attributed to the Spanish State;

VII

Objection of Non-Exhaustion of Local Remedies

Considering that no real difference has emerged between the Parties as to the scope and significance of the rule of international law embodied in Article 3 of the Treaty of Conciliation, Judicial Settlement and Arbitration concluded between Spain and Belgium on 19 July 1927, which makes resort to the procedures provided for in that Treaty dependant on the prior use, until a judgment with final effect has been pronounced, of the normal means of redress which are available and which offer genuine possibilities of effectiveness within the limitation of a reasonable time;

Considering that in this case the Respondent itself estimates at 2,736 the number of orders alone made in the case by the Spanish courts as of the date of the Belgian Application;

Considering that in addition the pleadings refer to more than 30 decisions by the Supreme Court;

Considering that it is not contended that the remedies as a whole of which Barcelona Traction and its co-interested parties availed themselves and which gave rise to those decisions were inadequate or were not pursued to the point of exhaustion;

Considering that this circumstance suffices as a bar to the possibility of the fourth objection being upheld as setting aside the Belgian claim;

Considering that the only complaints which could be set aside are those in respect of which the Spanish Government proved failure to make use of means of redress or the insufficiency of those used;

Considering that such proof has not been supplied;

1. With Respect to the Complaints Against the Acts of the Administrative Authorities

Considering that the Spanish Government is wrong in contending that the Belgian complaint concerning the decisions of October and

December 1946 referred to under I *(a)* above is not admissible on account of Barcelona Traction's failure to exercise against them the remedies of appeal to higher authority and contentious administrative proceedings;

Considering that the remedy of appeal to higher authority was inconceivable in this case, being by definition an appeal which may be made from a decision by one administrative authority to another hierarchically superior authority namely the Minister, whereas the decisions complained of were taken with the co-operation and approval of the Minister himself, and even brought to the knowledge of those concerned by the Minister at the same time as by the competent administrative authority;

Considering that it was likewise not possible to envisage contentious administrative proceedings against a decision which patently did not fall within the ambit of Article 1 of the Act of 22 June 1894, which recognizes such a remedy only against administrative decisions emanating from administrative authorities in the exercise of their regulated powers and "infringing a right of an administrative character previously established in favour of the applicant by an Act, a regulation or some other administrative provision", which requirements were patently not satisfied in this case;

2. With Respect to the Complaint concerning the Reus Court's Lack of Jurisdiction to Declare the Bankruptcy of Barcelona Traction

Considering that the Spanish Government is wrong in seeking to derive an argument from the fact that Barcelona Traction and its co-interested parties supposedly failed to challenge the jurisdiction of the Reus court by means of a motion contesting its competence, and allowed the time-limit for entering opposition to expire without having challenged that jurisdiction;

Considering that in fact a motion contesting jurisdiction is not at all the same thing as a motion contesting competence *ratione materiae* and may properly be presented cumulatively with the case on the merits;

Considering that the bankrupt company contested jurisdiction at the head of the complaints set out in its opposition plea of 18 June 1948;

Considering that it complained again of lack of jurisdiction in its application of 5 July 1948 for a declaration of nullity and in its pleading of 3 September 1948 in which it confirmed its opposition to the bankruptcy judgment;

Considering that National Trust submitted a formal motion contesting jurisdiction in its application of 27 November 1948 for admission to the bankruptcy proceedings;

Considering that Barcelona Traction, after having as early as 23 April 1949 entered an appearance in the proceedings concerning the Boter motion contesting jurisdiction, formally declared its adherence to that motion by a procedural document of 11 April 1953;

Considering that the question of jurisdiction being a matter of *ordre public*, as is the question of competence *ratione materiae*, the complaint of belatedness could not be upheld, even in the event of the expiry of the allegedly applicable time-limit for entering a plea of opposition;

3. With Respect to the Complaints concerning the Bankruptcy Judgment and Related Decisions

Considering that the Spanish Government is wrong in contending that the said decisions were not attacked by adequate remedies pursued to

the point of exhaustion or for a reasonable length of time;

Considering that in fact, as early as 16 February 1948, the bankruptcy judgment was attacked by an application for its setting aside on the part of the subsidiary companies, Ebro and Barcelonesa;

Considering that while those companies admittedly confined their applications for redress to the parts of the judgment which gave them grounds for complaint, the said remedies were nonetheless adequate and they were brought to nought in circumstances which are themselves the subject of a complaint which has been set out above;

Considering that, contrary to what is asserted by the Spanish Government, the bankrupt company itself entered a plea of opposition to the judgment by a procedural document of 18 June 1948, confirmed on 3 September 1948;

Considering that it is idle for the Spanish Government to criticize the summary character of this procedural document, while the suspension decreed by the special judge on account of the Boter motion contesting jurisdiction prevented the party entering opposition from filing, pursuant to Article 326 of the Civil Procedure Code, the additional pleading developing its case;

Considering that likewise there can be no question of belatedness, since only publication of the bankruptcy at the domicile of the bankrupt company could have caused the time-limit for entering opposition to begin to run, and no such publication took place;

Considering that the bankruptcy judgment and the related decisions were moreover also attacked in the incidental application for a declaration of nullity submitted by Barcelona Traction on 5 July 1948 and amplified on 31 July 1948;

4. With Respect to the Complaints concerning the Blocking of the Remedies

Considering that the various decisions which instituted and prolonged the suspension of the first section of the bankruptcy proceedings were attacked on various occasions by numerous proceedings taken by Barcelona Traction, beginning with the incidental application for a declaration of nullity which it submitted on 5 July 1948;

5. With Respect to the Complaint concerning the Dismissal of the Officers of the Subsidiary Companies by Order of the Commissioner

Considering that this measure was also attacked by applications for its setting aside on the part of the persons concerned, which were quite improperly declared inadmissible; and that the proceedings seeking redress against those decisions were adjourned until 1963;

6. With Respect to the Failure to Observe the No-Action Clause

Considering that this clause was explicitly referred to by National Trust in its application of 27 November 1948 for admission to the proceedings;

7. With Respect to the Measures Preparatory to the Sale and the Sale

Considering that the other side, while implicitly admitting that adequate proceedings were taken to attack the appointment of the trustees and the authorization to sell, is wrong in contending that this was supposedly not so in respect of—

(1) The failure to draw up a list of creditors prior to the convening of the meeting of creditors for the appointment of the trustees, whereas this defect was complained of in the procedural document attacking the appointment of the trustees and in the application that the sale be declared null and void;

(2) Certain acts and omissions on the part of the trustees, whereas they were referred to in the proceedings taken to attack the authorization to sell and the decision approving the method of unilateral valuation of the assets;

(3) The conditions of sale, whereas they were attacked by Barcelona Traction in an application to set aside and on appeal, in the application of 27 December 1951 for a declaration of nullity containing a formal prayer that the order approving the conditions of sale be declared null and void, and in an application of 28 May 1955 (New Documents submitted by the Belgian Government, 1969, No. 30); the same challenge was expressed by Sidro in its action of 7 February 1953 (New Documents submitted by the Spanish Government, 1969) and by two other Belgian shareholders of Barcelona Traction, Mrs. Mathot and Mr. Duvivier, in their application of 26 May 1955 (New Documents submitted by the Belgian Government, 1969, No. 29);

8. With Respect to the Exceptional Remedies

Considering that the Spanish Government is wrong in raising as an objection to the Belgian claim the allegation that Barcelona Traction did not make use of certain exceptional remedies against the bankruptcy judgment, such as application for revision, action for civil liability and criminal proceedings against the judges, and application for a hearing by a party in default;

Considering that the first of these remedies could patently not be contemplated, not only on account of the nature of the bankruptcy judgment, but also because until 1963 there was an opposition outstanding against that Judgment and, superabundantly, because Barcelona Traction, its subsidiaries and co-interested parties would not have been in a position to prove the facts of subornation, violence or fraudulent machination which alone could have entitled such proceedings to be taken;

Considering that the remedies of an action for civil liability and criminal proceedings against the judges were not adequate, since they were not capable of bringing about the annulment or setting aside of the decisions constituting denials of justice;

Considering that similarly the remedy of application for a hearing accorded by Spanish law to a party in default was patently in this case neither available to Barcelona Traction nor adequate;

FOR THESE REASONS, and any others which have been adduced by the Belgian Government in the course of the proceedings,

May it please the Court, rejecting any other submissions of the Spanish State which are broader or to a contrary effect,

To uphold the claims of the Belgian Government expressed in the submissions [in] the Reply."

The following final submissions were presented

on behalf of the Spanish Government,

at the hearing of 22 July 1969:

"Considering that the Belgian Government has no *jus standi* in the present case, either for the protection of the Canadian Barcelona Traction company or for the protection of alleged Belgian 'shareholders' of that company;

Considering that the requirements of the exhaustion of local remedies rule have not been satisfied either by the Barcelona Traction company or by its alleged 'shareholders';

Considering that as no violation of an international rule binding on Spain has been established, Spain has not incurred any responsibility vis-à-vis the applicant State on any account; and that, in particular—

(a) Spain is not responsible for any usurpation of jurisdiction on account of the action of its judicial organs;

(b) the Spanish judicial organs have not violated the rules of international law requiring that foreigners be given access to the courts, that a decision be given on their claims and that their proceedings for redress should not be subjected to unjustified delays;

(c) there have been no acts of the Spanish judiciary capable of giving rise to international responsibility on the part of Spain on account of the content of judicial decisions; and

(d) there has not been on the part of the Spanish administrative authorities any violation of an international obligation on account of abuse of rights or discriminatory acts;

Considering that for these reasons, and any others expounded in the written and oral proceedings, the Belgian claims must be deemed to be inadmissible or unfounded;

The Spanish Government presents to the Court its final submissions:

May it please the Court to adjudge and declare that the Belgian Government's claims are dismissed."

* * *

26. As has been indicated earlier, in opposition to the Belgian Application the Spanish Government advanced four objections of a preliminary nature. In its Judgment of 24 July 1964 the Court rejected the first and second of these (see paragraph 3 above), and decided to join the third and fourth to the merits. The latter were, briefly, to the effect that the Belgian Government lacked capacity to submit any claim in respect of wrongs done to a Canadian company, even if the shareholders were Belgian, and that local remedies available in Spain had not been exhausted.

27. In the subsequent written and oral proceedings the Parties supplied the Court with abundant material and information bearing both on the preliminary objections not decided in 1964 and on the merits of the case. In this connection the Court considers that reference should be made to the unusual length of the present proceedings, which has been due to the

very long time-limits requested by the Parties for the preparation of their written pleadings and in addition to their repeated requests for an extension of these limits. The Court did not find that it should refuse these requests and thus impose limitations on the Parties in the preparation and presentation of the arguments and evidence which they considered necessary. It nonetheless remains convinced of the fact that it is in the interest of the authority and proper functioning of international justice for cases to be decided without unwarranted delay.

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28. For the sake of clarity, the Court will briefly recapitulate the claim and identify the entities concerned in it. The claim is presented on behalf of natural and juristic persons, alleged to be Belgian nationals and shareholders in the Barcelona Traction, Light and Power Company, Limited. The submissions of the Belgian Government make it clear that the object of its Application is reparation for damage allegedly caused to these persons by the conduct, said to be contrary to international law, of various organs of the Spanish State towards that company and various other companies in the same group.

29. In the first of its submissions, more specifically in the Counter-Memorial, the Spanish Government contends that the Belgian Application of 1962 seeks, though disguisedly, the same object as the Application of 1958, i.e., the protection of the Barcelona Traction company as such, as a separate corporate entity, and that the claim should in consequence be dismissed. However, in making its new Application, as it has chosen to frame it, the Belgian Government was only exercising the freedom of action of any State to formulate its claim in its own way. The Court is therefore bound to examine the claim in accordance with the explicit content imparted to it by the Belgian Government.

30. The States which the present case principally concerns are Belgium, the national State of the alleged shareholders, Spain, the State whose organs are alleged to have committed the unlawful acts complained of, and Canada, the State under whose laws Barcelona Traction was incorporated and in whose territory it has its registered office ("head office" in the terms of the by-laws of Barcelona Traction).

31. Thus the Court has to deal with a series of problems arising out of a triangular relationship involving the State whose nationals are shareholders in a company incorporated under the laws of another State, in whose territory it has its registered office; the State whose organs are alleged to have committed against the company unlawful acts prejudicial to both it and its shareholders; and the State under whose laws the company is incorporated, and in whose territory it has its registered office.

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32. In these circumstances it is logical that the Court should first address itself to what was originally presented as the subject-matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.

35. Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions:

> "The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach." (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 181-182.)

In the present case it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account

of its nationals' having suffered infringement of their rights as shareholders in a company not of Belgian nationality?

36. Thus it is the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of Belgium's capacity.

> "This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged." (*Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 16.)

It follows that the same question is determinant in respect of Spain's responsibility towards Belgium. Responsibility is the necessary corollary of a right. In the absence of any treaty on the subject between the Parties, this essential issue has to be decided in the light of the general rules of diplomatic protection.

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37. In seeking to determine the law applicable to this case, the Court has to bear in mind the continuous evolution of international law. Diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign, a fact of which the general law on the subject has had to take cognizance in order to prevent abuses and friction. From its origins closely linked with international commerce, diplomatic protection has sustained a particular impact from the growth of international economic relations, and at the same time from the profound transformations which have taken place in the economic life of nations. These latter changes have given birth to municipal institutions, which have transcended frontiers and have begun to exercise considerable influence on international relations. One of these phenomena which has a particular bearing on the present case is the corporate entity.

38. In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treat-

ment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights.

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39. Seen in historical perspective, the corporate personality represents a development brought about by new and expanding requirements in the economic field, an entity which in particular allows of operation in circumstances which exceed the normal capacity of individuals. As such it has become a powerful factor in the economic life of nations. Of this, municipal law has had to take due account, whence the increasing volume of rules governing the creation and operation of corporate entities, endowed with a specific status. These entities have rights and obligations peculiar to themselves.

40. There is, however, no need to investigate the many different forms of legal entity provided for by the municipal laws of States, because the Court is concerned only with that exemplified by the company involved in the present case: Barcelona Traction—a limited liability company whose capital is represented by shares. There are, indeed, other associations, whatever the name attached to them by municipal legal systems, that do not enjoy independent corporate personality. The legal difference between the two kinds of entity is that for the limited liability company it is the overriding tie of legal personality which is determinant; for the other associations, the continuing autonomy of the several members.

41. Municipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them. Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction. So long as the company is in existence the shareholder has no right to the corporate assets.

42. It is a basic characteristic of the corporate structure that the company alone, through its directors or management acting in its name, can take action in respect of matters that are of a corporate character. The underlying justification for this is that, in seeking to serve its own best interests, the company will serve those of the shareholder too. Ordinarily, no individual shareholder can take legal steps, either in the

name of the company or in his own name. If the shareholders disagree with the decisions taken on behalf of the company they may, in accordance with its articles or the relevant provisions of the law, change them or replace its officers, or take such action as is provided by law. Thus to protect the company against abuse by its management or the majority of shareholders, several municipal legal systems have vested in shareholders (sometimes a particular number is specified) the right to bring an action for the defence of the company, and conferred upon the minority of shareholders certain rights to guard against decisions affecting the rights of the company vis-à-vis its management or controlling shareholders. Nonetheless the shareholders' rights in relation to the company and its assets remain limited, this being, moreover, a corollary of the limited nature of their liability.

43. At this point the Court would recall that in forming a company, its promoters are guided by all the various factors involved, the advantages and disadvantages of which they take into account. So equally does a shareholder, whether he is an original subscriber of capital or a subsequent purchaser of the company's shares from another shareholder. He may be seeking safety of investment, high dividends or capital appreciation—or a combination of two or more of these. Whichever it is, it does not alter the legal status of the corporate entity or affect the rights of the shareholder. In any event he is bound to take account of the risk of reduced dividends, capital depreciation or even loss, resulting from ordinary commercial hazards or from prejudice caused to the company by illegal treatment of some kind.

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44. Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. Creditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss. In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.

45. However, it has been argued in the present case that a company represents purely a means of achieving the economic purpose of its members, namely the shareholders, while they themselves constitute in fact the reality behind it. It has furthermore been repeatedly emphasized

that there exists between a company and its shareholders a relationship describable as a community of destiny. The alleged acts may have been directed at the company and not the shareholders, but only in a formal sense: in reality, company and shareholders are so closely interconnected that prejudicial acts committed against the former necessarily wrong the latter; hence any acts directed against a company can be conceived as directed against its shareholders, because both can be considered in substance, i.e., from the economic viewpoint, identical. Yet even if a company is no more than a means for its shareholders to achieve their economic purpose, so long as it is *in esse* it enjoys an independent existence. Therefore the interests of the shareholders are both separable and indeed separated from those of the company, so that the possibility of their diverging cannot be denied.

46. It has also been contended that the measures complained of, although taken with respect to Barcelona Traction and causing it direct damage, constituted an unlawful act vis-à-vis Belgium, because they also, though indirectly, caused damage to the Belgian shareholders in Barcelona Traction. This again is merely a different way of presenting the distinction between injury in respect of a right and injury to a simple interest. But, as the Court has indicated, evidence that damage was suffered does not *ipso facto* justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.

47. The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.

48. The Belgian Government claims that shareholders of Belgian nationality suffered damage in consequence of unlawful acts of the Spanish authorities and, in particular, that the Barcelona Traction shares, though they did not cease to exist, were emptied of all real economic content. It accordingly contends that the shareholders had an

independent right to redress, notwithstanding the fact that the acts complained of were directed against the company as such. Thus the legal issue is reducible to the question of whether it is legitimate to identify an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights.

49. The Court has noted from the Application, and from the reply given by Counsel on 8 July 1969, that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it is not open to the Court to go beyond the claim as formulated by the Belgian Government and it will not pursue its examination of this point any further.

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50. In turning now to the international legal aspects of the case, the Court must, as already indicated, start from the fact that the present case essentially involves factors derived from municipal law—the distinction and the community between the company and the shareholder—which the Parties, however widely their interpretations may differ, each take as the point of departure of their reasoning. If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.

51. On the international plane, the Belgian Government has advanced the proposition that it is inadmissible to deny the shareholders' national State a right of diplomatic protection merely on the ground that another State possesses a corresponding right in respect of the company itself. In strict logic and law this formulation of the Belgian claim to *jus standi* assumes the existence of the very right that requires demonstration. In fact the Belgian Government has repeatedly stressed that there exists no rule of international law which would deny the national State of the shareholders the right of diplomatic protection for the purpose of seeking redress pursuant to unlawful acts committed by another State against the company in which they hold shares. This, by emphasizing the absence of any express denial of the right, conversely implies the admission that there is no rule of international law which expressly confers such a right on the shareholders' national State.

52. International law may not, in some fields, provide specific rules in particular cases. In the concrete situation, the company against which allegedly unlawful acts were directed is expressly vested with a right, whereas no such right is specifically provided for the shareholder in respect of those acts. Thus the position of the company rests on a positive rule of both municipal and international law. As to the shareholder, while he has certain rights expressly provided for him by municipal law as referred to in paragraph 42 above, appeal can, in the circumstances of the present case, only be made to the silence of international law. Such silence scarcely admits of interpretation in favour of the shareholder.

53. It is quite true, as was recalled in the course of oral argument in the present case, that concurrent claims are not excluded in the case of a person who, having entered the service of an international organization and retained his nationality, enjoys simultaneously the right to be protected by his national State and the right to be protected by the organization to which he belongs. This however is a case of one person in possession of two separate bases of protection, each of which is valid (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 185). There is no analogy between such a situation and that of foreign shareholders in a company which has been the victim of a violation of international law which has caused them damage.

54. Part of the Belgian argument is founded on an attempt to assimilate interests to rights, relying on the use in many treaties and other instruments of such expressions as property, rights and interests. This is not, however, conclusive. Property is normally protected by law. Rights are *ex hypothesi* protected by law, otherwise they would not be rights. According to the Belgian Government, interests, although distinct from rights, are also protected by the aforementioned conventional rules. The Court is of the opinion that, for the purpose of interpreting the general rule of international law concerning diplomatic protection, which is its task, it has no need to determine the meaning of the term interests in the conventional rules, in other words to determine whether by this term the conventional rules refer to rights rather than simple interests.

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55. The Court will now examine other grounds on which it is conceivable that the submission by the Belgian Government of a claim on behalf of shareholders in Barcelona Traction may be justified.

56. For the same reasons as before, the Court must here refer to municipal law. Forms of incorporation and their legal personality have

sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.

57. Hence the lifting of the veil is more frequently employed from without, in the interest of those dealing with the corporate entity. However, it has also been operated from within, in the interest of—among others—the shareholders, but only in exceptional circumstances.

58. In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.

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59. Before proceeding, however, to consider whether such circumstances exist in the present case, it will be advisable to refer to two specific cases involving encroachment upon the legal entity, instances of which have been cited by the Parties. These are: first, the treatment of enemy and allied property, during and after the First and Second World Wars, in peace treaties and other international instruments; secondly, the treatment of foreign property consequent upon the nationalizations carried out in recent years by many States.

60. With regard to the first, enemy-property legislation was an instrument of economic warfare, aimed at denying the enemy the advantages to be derived from the anonymity and separate personality of corporations. Hence the lifting of the veil was regarded as justified *ex necessitate* and was extended to all entities which were tainted with enemy character, even the nationals of the State enacting the legislation. The provisions of the peace treaties had a very specific function: to protect allied property, and to seize and pool enemy property with a view to covering reparation

claims. Such provisions are basically different in their rationale from those normally applicable.

61. Also distinct are the various arrangements made in respect of compensation for the nationalization of foreign property. Their rationale too, derived as it is from structural changes in a State's economy, differs from that of any normally applicable provisions. Specific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing any norm as to the classes of beneficiaries of compensation, such arrangements are *sui generis* and provide no guide in the present case.

62. Nevertheless, during the course of the proceedings both Parties relied on international instruments and judgments of international tribunals concerning these two specific areas. It should be clear that the developments in question have to be viewed as distinctive processes, arising out of circumstances peculiar to the respective situations. To seek to draw from them analogies or conclusions held to be valid in other fields is to ignore their specific character as *lex specialis* and hence to court error.

63. The Parties have also relied on the general arbitral jurisprudence which has accumulated in the last half-century. However, in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case. Other decisions, allowing or disallowing claims by way of exception, are not, in view of the particular facts concerned, directly relevant to the present case.

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64. The Court will now consider whether there might not be, in the present case, other special circumstances for which the general rule might not take effect. In this connection two particular situations must be studied: the case of the company having ceased to exist and the case of the company's national State lacking capacity to take action on its behalf.

65. As regards the first of these possibilities the Court observes that the Parties have put forward conflicting interpretations of the present situation of Barcelona Traction. There can, however, be no question but that Barcelona Traction has lost all its assets in Spain, and was placed in receivership in Canada, a receiver and manager having been appointed. It is common ground that from the economic viewpoint the company has been entirely paralyzed. It has been deprived of all its Spanish sources of income, and the Belgian Government has asserted that the company

could no longer find the funds for its legal defence, so that these had to be supplied by the shareholders.

66. It cannot however, be contended that the corporate entity of the company has ceased to exist, or that it has lost its capacity to take corporate action. It was free to exercise such capacity in the Spanish courts and did in fact do so. It has not become incapable in law of defending its own rights and the interests of the shareholders. In particular, a precarious financial situation cannot be equated with the demise of the corporate entity, which is the hypothesis under consideration: the company's status in law is alone relevant, and not its economic condition, nor even the possibility of its being "practically defunct"—a description on which argument has been based but which lacks all legal precision. Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their government could arise.

67. In the present case, Barcelona Traction is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist. Moreover, it is a matter of public record that the company's shares were quoted on the stock-market at a recent date.

68. The reason for the appointment in Canada not only of a receiver but also of a manager was explained as follows:

> "In the Barcelona Traction case it was obvious, in view of the Spanish bankruptcy order of 12 February 1948, that the appointment of only a receiver would be useless, as positive steps would have to be taken if any assets seized in the bankruptcy in Spain were to be recovered." (Hearing of 2 July 1969.)

In brief, a manager was appointed in order to safeguard the company's rights; he has been in a position directly or indirectly to uphold them. Thus, even if the company is limited in its activity after being placed in receivership, there can be no doubt that it has retained its legal capacity and that the power to exercise it is vested in the manager appointed by the Canadian courts. The Court is thus not confronted with the first hypothesis contemplated in paragraph 64, and need not pronounce upon it.

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69. The Court will now turn to the second possibility, that of the lack of capacity of the company's national State to act on its behalf. The first question which must be asked here is whether Canada—the third apex of

the triangular relationship—is, in law, the national State of Barcelona Traction.

70. In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some States to give a company incorporated under their law diplomatic protection solely when it has its seat *(siège social)* or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned. Only then, it has been held, does there exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the "genuine connection" has found general acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one State have had to be weighed against those with another. In this connection reference has been made to the *Nottebohm* case. In fact the Parties made frequent reference to it in the course of the proceedings. However, given both the legal and factual aspects of protection in the present case the Court is of the opinion that there can be no analogy with the issues raised or the decision given in that case.

71. In the present case, it is not disputed that the company was incorporated in Canada and has its registered office in that country. The incorporation of the company under the law of Canada was an act of free choice. Not only did the founders of the company seek its incorporation under Canadian law but it has remained under that law for a period of over 50 years. It has maintained in Canada its registered office, its accounts and its share registers. Board meetings were held there for many years; it has been listed in the records of the Canadian tax authorities. Thus a close and permanent connection has been established, fortified by the passage of over half a century. This connection is in no way weakened by the fact that the company engaged from the very outset in commercial activities outside Canada, for that was its declared object. Barcelona Traction's links with Canada are thus manifold.

72. Furthermore, the Canadian nationality of the company has received general recognition. Prior to the institution of proceedings before the Court, three other governments apart from that of Canada (those of the United Kingdom, the United States and Belgium) made representa-

tions concerning the treatment accorded to Barcelona Traction by the Spanish authorities. The United Kingdom Government intervened on behalf of bondholders and of shareholders. Several representations were also made by the United States Government, but not on behalf of the Barcelona Traction company as such.

73. Both Governments acted at certain stages in close co-operation with the Canadian Government. An agreement was reached in 1950 on the setting-up of an independent committee of experts. While the Belgian and Canadian Governments contemplated a committee composed of Belgian, Canadian and Spanish members, the Spanish Government suggested a committee composed of British, Canadian and Spanish members. This was agreed to by the Canadian and United Kingdom Governments, and the task of the committee was, in particular, to establish the monies imported into Spain by Barcelona Traction or any of its subsidiaries, to determine and appraise the materials and services brought into the country, to determine and appraise the amounts withdrawn from Spain by Barcelona Traction or any of its subsidiaries, and to compute the profits earned in Spain by Barcelona Traction or any of its subsidiaries and the amounts susceptible of being withdrawn from the country at 31 December 1949.

74. As to the Belgian Government, its earlier action was also undertaken in close co-operation with the Canadian Government. The Belgian Government admitted the Canadian character of the company in the course of the present proceedings. It explicitly stated that Barcelona Traction was a company of neither Spanish nor Belgian nationality but a Canadian company incorporated in Canada. The Belgian Government has even conceded that it was not concerned with the injury suffered by Barcelona Traction itself, since that was Canada's affair.

75. The Canadian Government itself, which never appears to have doubted its right to intervene on the company's behalf, exercised the protection of Barcelona Traction by diplomatic representation for a number of years, in particular by its note of 27 March 1948, in which it alleged that a denial of justice had been committed in respect of the Barcelona Traction, Ebro and National Trust companies, and requested that the bankruptcy judgment be cancelled. It later invoked the Anglo-Spanish treaty of 1922 and the agreement of 1924, which applied to Canada. Further Canadian notes were addressed to the Spanish Government in 1950, 1951 and 1952. Further approaches were made in 1954, and in 1955 the Canadian Government renewed the expression of its deep interest in the affair of Barcelona Traction and its Canadian subsidiaries.

76. In sum, the record shows that from 1948 onwards the Canadian Government made to the Spanish Government numerous representations which cannot be viewed otherwise than as the exercise of diplomatic

protection in respect of the Barcelona Traction company. Therefore this was not a case where diplomatic protection was refused or remained in the sphere of fiction. It is also clear that over the whole period of its diplomatic activity the Canadian Government proceeded in full knowledge of the Belgian attitude and activity.

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77. It is true that at a certain point the Canadian Government ceased to act on behalf of Barcelona Traction, for reasons which have not been fully revealed, though a statement made in a letter of 19 July 1955 by the Canadian Secretary of State for External Affairs suggests that it felt the matter should be settled by means of private negotiations. The Canadian Government has nonetheless retained its capacity to exercise diplomatic protection; no legal impediment has prevented it from doing so: no fact has arisen to render this protection impossible. It has discontinued its action of its own free will.

78. The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally.

79. The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that.

80. This cannot be regarded as amounting to a situation where a violation of law remains without remedy: in short, a legal vacuum.

There is no obligation upon the possessors of rights to exercise them. Sometimes no remedy is sought, though rights are infringed. To equate this with the creation of a vacuum would be to equate a right with an obligation.

81. The cessation by the Canadian Government of the diplomatic protection of Barcelona Traction cannot, then, be interpreted to mean that there is no remedy against the Spanish Government for the damage done by the allegedly unlawful acts of the Spanish authorities. It is not a hypothetical right which was vested in Canada, for there is no legal impediment preventing the Canadian Government from protecting Barcelona Traction. Therefore there is no substance in the argument that for the Belgian Government to bring a claim before the Court represented the only possibility of obtaining redress for the damage suffered by Barcelona Traction and, through it, by its shareholders.

82. Nor can the Court agree with the view that the Canadian Government had of necessity to interrupt the protection it was giving to Barcelona Traction, and to refrain from pursuing it by means of other procedures, solely because there existed no link of compulsory jurisdiction between Spain and Canada. International judicial proceedings are but one of the means available to States in pursuit of their right to exercise diplomatic protection (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 178). The lack of a jurisdictional link cannot be regarded either in this or in other fields of international law as entailing the non-existence of a right.

83. The Canadian Government's right of protection in respect of the Barcelona Traction company remains unaffected by the present proceedings. The Spanish Government has never challenged the Canadian nationality of the company, either in the diplomatic correspondence with the Canadian Government or before the Court. Moreover it has unreservedly recognized Canada as the national State of Barcelona Traction in both written pleadings and oral statements made in the course of the present proceedings. Consequently, the Court considers that the Spanish Government has not questioned Canada's right to protect the company.

84. Though, having regard to the character of the case, the question of Canada's right has not been before it, the Court has considered it necessary to clarify this issue.

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85. The Court will now examine the Belgian claim from a different point of view, disregarding municipal law and relying on the rule that in inter-State relations, whether claims are made on behalf of a State's national or on behalf of the State itself, they are always the claims of the

State. As the Permanent Court said,

> "The question, therefore, whether the . . . dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12. See also *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 24.)

86. Hence the Belgian Government would be entitled to bring a claim if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty or a general rule of law. The opinion has been expressed that a claim can accordingly be made when investments by a State's nationals abroad are thus prejudicially affected, and that since such investments are part of a State's national economic resources, any prejudice to them directly involves the economic interest of the State.

87. Governments have been known to intervene in such circumstances not only when their interests were affected, but also when they were threatened. However, it must be stressed that this type of action is quite different from and outside the field of diplomatic protection. When a State admits into its territory foreign investments or foreign nationals it is, as indicated in paragraph 33, bound to extend to them the protection of the law. However, it does not thereby become an insurer of that part of another State's wealth which these investments represent. Every investment of this kind carries certain risks. The real question is whether a right has been violated, which right could only be the right of the State to have its nationals enjoy a certain treatment guaranteed by general international law, in the absence of a treaty applicable to the particular case. On the other hand it has been stressed that it must be proved that the investment effectively belongs to a particular economy. This is, as it is admitted, sometimes very difficult, in particular where complex undertakings are involved. Thus the existing concrete test would be replaced by one which might lead to a situation in which no diplomatic protection could be exercised, with the consequence that an unlawful act by another State would remain without remedy.

88. It follows from what has already been stated above that, where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim.

89. Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are

often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.

90. Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures. No such instrument is in force between the Parties to the present case.

91. With regard more particularly to human rights, to which reference has already been made in paragraph 34 of this Judgment, it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim.

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92. Since the general rule on the subject does not entitle the Belgian Government to put forward a claim in this case, the question remains to be considered whether nonetheless, as the Belgian Government has contended during the proceedings, considerations of equity do not require that it be held to possess a right of protection. It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction.

93. On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. This hypothesis does not correspond to the circumstances of the present case.

94. In view, however, of the discretionary nature of diplomatic protection, considerations of equity cannot require more than the possibility for some protector State to intervene, whether it be the national State of the company, by virtue of the general rule mentioned above, or, in a secondary capacity, the national State of the shareholders who claim protection. In this connection, account should also be taken of the practical effects of deducing from considerations of equity any broader right of protection for the national State of the shareholders. It must first of all be observed that it would be difficult on an equitable basis to make distinctions according to any quantitative test: it would seem that the owner of 1 per cent. and the owner of 90 per cent. of the share-capital should have the same possibility of enjoying the benefit of diplomatic protection. The protector State may, of course, be disinclined to take up the case of the single small shareholder, but it could scarcely be denied the right to do so in the name of equitable considerations. In that field, protection by the national State of the shareholders can hardly be graduated according to the absolute or relative size of the shareholding involved.

95. The Belgian Government, it is true, has also contended that as high a proportion as 88 per cent. of the shares in Barcelona Traction belonged to natural or juristic persons of Belgian nationality, and it has used this as an argument for the purpose not only of determining the amount of the damages which it claims, but also of establishing its right of action on behalf of the Belgian shareholders. Nevertheless, this does

not alter the Belgian Government's position, as expounded in the course of the proceedings, which implies, in the last analysis, that it might be sufficient for one single share to belong to a national of a given State for the latter to be entitled to exercise its diplomatic protection.

96. The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands. It might perhaps be claimed that, if the right of protection belonging to the national States of the shareholders were considered as only secondary to that of the national State of the company, there would be less danger of difficulties of the kind contemplated. However, the Court must state that the essence of a secondary right is that it only comes into existence at the time when the original right ceases to exist. As the right of protection vested in the national State of the company cannot be regarded as extinguished because it is not exercised, it is not possible to accept the proposition that in case of its non-exercise the national States of the shareholders have a right of protection secondary to that of the national State of the company. Furthermore, study of factual situations in which this theory might possibly be applied gives rise to the following observations.

97. The situations in which foreign shareholders in a company wish to have recourse to diplomatic protection by their own national State may vary. It may happen that the national State of the company simply refuses to grant it its diplomatic protection, or that it begins to exercise it (as in the present case) but does not pursue its action to the end. It may also happen that the national State of the company and the State which has committed a violation of international law with regard to the company arrive at a settlement of the matter, by agreeing on compensation for the company, but that the foreign shareholders find the compensation insufficient. Now, as a matter of principle, it would be difficult to draw a distinction between these three cases so far as the protection of foreign shareholders by their national State is concerned, since in each case they may have suffered real damage. Furthermore, the national State of the company is perfectly free to decide how far it is appropriate for it to protect the company, and is not bound to make public the reasons for its decision. To reconcile this discretionary power of the company's national State with a right of protection falling to the shareholders' national State would be particularly difficult when the former State has concluded, with the State which has contravened international law with regard to the company, an agreement granting the company compensation which the foreign shareholders find inadequate. If, after such a settlement, the national State of the foreign shareholders could in its turn put forward

a claim based on the same facts, this would be likely to introduce into the negotiation of this kind of agreement a lack of security which would be contrary to the stability which it is the object of international law to establish in international relations.

98. It is quite true, as recalled in paragraph 53, that international law recognizes parallel rights of protection in the case of a person in the service of an international organization. Nor is the possibility excluded of concurrent claims being made on behalf of persons having dual nationality, although in that case lack of a genuine link with one of the two States may be set up against the exercise by that State of the right of protection. It must be observed, however, that in these two types of situation the number of possible protectors is necessarily very small, and their identity normally not difficult to determine. In this respect such cases of dual protection are markedly different from the claims to which recognition of a general right of protection of foreign shareholders by their various national States might give rise.

99. It should also be observed that the promoters of a company whose operations will be international must take into account the fact that States have, with regard to their nationals, a discretionary power to grant diplomatic protection or to refuse it. When establishing a company in a foreign country, its promoters are normally impelled by particular considerations; it is often a question of tax or other advantages offered by the host State. It does not seem to be in any way inequitable that the advantages thus obtained should be balanced by the risks arising from the fact that the protection of the company and hence of its shareholders is thus entrusted to a State other than the national State of the shareholders.

100. In the present case, it is clear from what has been said above that Barcelona Traction was never reduced to a position of impotence such that it could not have approached its national State, Canada, to ask for its diplomatic protection, and that, as far as appeared to the Court, there was nothing to prevent Canada from continuing to grant its diplomatic protection to Barcelona Traction if it had considered that it should do so.

101. For the above reasons, the Court is not of the opinion that, in the particular circumstances of the present case, *jus standi* is conferred on the Belgian Government by considerations of equity.

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102. In the course of the proceedings, the Parties have submitted a great amount of documentary and other evidence intended to substantiate

their respective submissions. Of this evidence the Court has taken cognizance. It has been argued on one side that unlawful acts had been committed by the Spanish judicial and administrative authorities, and that as a result of those acts Spain has incurred international responsibility. On the other side it has been argued that the activities of Barcelona Traction and its subsidiaries were conducted in violation of Spanish law and caused damage to the Spanish economy. If both contentions were substantiated, the truth of the latter would in no way provide justification in respect of the former. The Court fully appreciates the importance of the legal problems raised by the allegation, which is at the root of the Belgian claim for reparation, concerning the denials of justice allegedly committed by organs of the Spanish State. However, the possession by the Belgian Government of a right of protection is a prerequisite for the examination of these problems. Since no *jus standi* before the Court has been established, it is not for the Court in its Judgment to pronounce upon any other aspect of the case, on which it should take a decision only if the Belgian Government had a right of protection in respect of its nationals, shareholders in Barcelona Traction.

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103. Accordingly,

THE COURT

rejects the Belgian Government's claim by fifteen votes to one, twelve votes of the majority being based on the reasons set out in the present Judgment.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fifth day of February, one thousand nine hundred and seventy, in three copies, one of which will be placed in the Archives of the Court and the others transmitted to the Government of the Kingdom of Belgium and to the Government of the Spanish State, respectively.

(Signed) J. L. BUSTAMANTE Y RIVERO,
President.

(Signed) S. AQUARONE,
Registrar.

Judge PETRÉN and Judge ONYEAMA make the following Joint Declaration:

We agree with the operative provision and the reasoning of the Judgment subject to the following declaration:

With regard to the nationality of Barcelona Traction, the Judgment refers to the existence of opinions to the effect that the absence of a genuine connection between a company and the State claiming the right of diplomatic protection of the company might be set up against the exercise of such a right. In this context the Judgment also mentions the decision in the *Nottebohm* case to the effect that the absence of a genuine connecting link between a State and a natural person who has acquired its nationality may be set up against the exercise by that State of diplomatic protection of the person concerned. The present Judgment then concludes that given the legal and factual aspects of protection in the present case there can be no analogy with the issues raised or the decision given in the *Nottebohm* case.

Now in the present case the Spanish Government has asserted and the Belgian Government has not disputed that, Barcelona Traction having been incorporated under Canadian law and having its registered office in Toronto, it is of Canadian nationality and Canada is qualified to protect it.

Canada's right of protection being thus recognized by both Parties to the proceedings, the first question which the Court has to answer within the framework of the third preliminary objection is simply whether, alongside the right of protection pertaining to the national State of a company, another State may have a right of protection of the shareholders of the company who are its nationals. This being so, the Court has not in this case to consider the question whether the genuine connection principle is applicable to the diplomatic protection of juristic persons, and, still less, to speculate whether, if it is, valid objections could have been raised against the exercise by Canada of diplomatic protection of Barcelona Traction.

Judge LACHS makes the following Declaration:

I am in full agreement with the reasoning and conclusions of the Judgment, but would wish to add the following observation:

The Court has found, in the light of the relevant elements of law and of fact, that the Applicant, the Belgian Government, has no capacity in the present case. At the same time it has stated that the Canadian Government's right of protection in respect of the Barcelona Traction company has remained unaffected by the proceedings now closed.

I consider that the existence of this right is an essential premise of the Court's reasoning, and that its importance is emphasized by the seriousness of the claim and the particular nature of the unlawful acts with which it charges certain authorities of the respondent State.

President BUSTAMANTE Y RIVERO, Judges Sir Gerald FITZMAURICE, TANAKA, JESSUP, MORELLI, PADILLA NERVO, GROS and AMMOUN append Separate Opinions to the Judgment of the Court.

Judge *ad hoc* RIPHAGEN appends a Dissenting Opinion to the Judgment of the Court.

(Initialled) J. L. B.-R.
(Initialled) S. A.