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)
PRELIMINARY OBJECTIONS

JUDGMENT OF 24 JULY 1964

1964

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)
EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 24 JUILLET 1964

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

(NEW APPLICATION: 1962) (BELGIUM *v.* SPAIN) PRELIMINARY OBJECTIONS

Preliminary objections—Competence of the Court—Admissibility of the claim.

Discontinuance of previous proceedings—Effect of, under Article 69, paragraph 2, of Court's Rules—Right to bring new proceedings following upon such a discontinuance—Procedural character of the act of discontinuance—Onus of proof as to its finality in regard to further action before the Court—Alleged understanding between the Parties as to this finality—Plea of estoppel precluding further action before the Court—Relevance of the Treaty founding the jurisdiction of the Court to the question of discontinuance.

Compulsory jurisdiction of the Court by virtue of Article 37 of the Statute—Question of relevance to this issue of the case concerning the Aerial Incident of 27 July 1955 (Israel *v.* Bulgaria)*—Interpretation of Article 37—Effect of the dissolution of the Permanent Court of International Justice on jurisdictional clauses providing for recourse to that Court, and on the applicability of Article 37—Position of States becoming parties to the Statute of the present Court only after the dissolution of the Permanent Court—Question of consent to the exercise of compulsory jurisdiction—Interpretation of the jurisdictional clauses of the Treaty founding the jurisdiction of the Court—Effect in this respect of the dissolution of the Permanent Court—Effect* ratione temporis *of applicability of Article 37 to disputes arising between the Treaty date and the date when Article 37 became applicable.*

*Questions of admissibility—*Jus standi *or capacity of Applicant Government to act—Exhaustion of local remedies rule—Principles governing joinder of preliminary objections to the merits—Grounds of joinder in respect of the admissibility issues.*

JUDGMENT

Present: *President* Sir Percy SPENDER ; *Vice-President* WELLINGTON KOO ; *Judges* WINIARSKI, BADAWI, SPIROPOULOS, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, BUSTAMANTE Y RIVERO, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS ; *Judges* ad hoc ARMAND-UGON, GANSHOF VAN DER MEERSCH ; *Registrar* GARNIER-COIGNET.

In the case concerning the Barcelona Traction, Light and Power Company, Limited,

between

the Kingdom of Belgium,

represented by

M. Yves Devadder, Legal Adviser to the Ministry of Foreign Affairs and External Trade,

as Agent,

assisted by

Mme Suzanne Bastid, Professor at the Paris Faculty of Law and Economics,

M. Henri Rolin, Professor emeritus at the Law Faculty of the Free University of Brussels and *professeur associé* at the Strasbourg Law Faculty, Advocate at the Brussels Court of Appeal,

M. Georges Sauser-Hall, Professor emeritus of the Universities of Geneva and Neuchâtel,

M. Jean Van Ryn, Professor at the Law Faculty of the Free University of Brussels and Advocate at the Belgian Court of Cassation,

M. Angelo Piero Sereni, Professor at the Bologna Faculty of Law, Advocate at the Italian Court of Cassation, Member of the New York State and Federal Bars,

Sir John Foster, Q.C., Member of the English Bar,

Mr. Elihu Lauterpacht, Member of the English Bar and Lecturer at Cambridge University,

as Counsel,

M. Michel Waelbroeck, Lecturer at the Free University of Brussels,

as Assistant Counsel and Secretary,

and

M. Leonardo Prieto Castro, Professor at the Madrid Law Faculty,

M. José Girón Tena, Professor at the Valladolid Law Faculty,

as Expert-Counsel in Spanish law,

and

the Spanish State,

represented by

M. Juan M. Castro-Rial, Legal Adviser to the Ministry of Foreign Affairs,

as Agent,

assisted by

M. Roberto Ago, Professor of International Law at the University of Rome,

M. Paul Guggenheim, Professor of International Law at the University of Geneva,

M. Antonio Malintoppi, Professor of International Law at the University of Camerino,

M. Paul Reuter, Professor of International Law at the University of Paris,

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

as Advocates and Counsel,

M. Maarten Bos, Professor of International Law at the University of Utrecht,

M. Jorge Carreras, Professor of Procedural Law at the University of Pamplona,

M. Eduardo G. de Enterría, Professor of Administrative Law at the University of Madrid, *Maître des requêtes, Conseil d'Etat,*

M. Federico de Castro y Bravo, Professor of Civil Law at the University of Madrid, Legal Adviser, Ministry of Foreign Affairs,

M. Antonio de Luna García, Professor of International Law at the University of Madrid, Legal Adviser, Ministry of Foreign Affairs,

M. José María Trías de Bes, Professor emeritus of International Law at the University of Barcelona, Legal Adviser, Ministry of Foreign Affairs,

as Counsel,

and

M. Mariano Baselga y Mantecón, First Secretary at the Spanish Embassy at The Hague,

as Secretary,

THE COURT,

composed as above,

delivers the following Judgment:

On 19 June 1962, the Belgian Ambassador to the Netherlands handed to the Registrar an Application instituting "new proceedings in the dispute between the Belgian Government and the Spanish Government

concerning the Barcelona Traction, Light and Power Company, Limited". The Application refers to an earlier Application by the Belgian Government against the Spanish Government, dated 15 September 1958 and concerning the said company. The latter Application, which was filed on 23 September 1958, was followed by the filing by the Parties of a Memorial and Preliminary Objections, and, subsequently, by a discontinuance referring to Article 69 of the Rules of Court, a discontinuance which the Respondent stated, in accordance with the same Article, that it did not oppose. By an Order of 10 April 1961 the Court directed that the case be removed from the Court's list.

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. To found the jurisdiction of the Court the Application relies on Article 17 of the Treaty of Conciliation, Judicial Settlement and Arbitration between Belgium and Spain, signed on 19 July 1927, and on Article 37 of the Statute of the Court.

In accordance with Article 40, paragraph 2, of the Statute of the Court, the Application was communicated to the Spanish Government. In accordance with paragraph 3 of the same Article, the other Members of the United Nations and the non-Member States entitled to appear before the Court were notified.

Time-limits for the filing of the Memorial and the Counter-Memorial were fixed by an Order of 7 August 1962. The Memorial was filed within the time-limit fixed. Within the time-limit fixed for the filing of the Counter-Memorial, which expired on 15 March 1963, the Spanish Government filed Preliminary Objections submitting that the Court was without jurisdiction and that the claim was inadmissible. Accordingly, an Order of 16 March 1963, which recited that by virtue of Article 62, paragraph 3, of the Rules the proceedings on the merits were suspended, fixed a time-limit for the presentation by the Belgian Government of a written statement of its Observations and Submissions on the Objections. That statement was presented within the time-limit thus fixed, which expired on 15 August 1963. The case then became ready for hearing in respect of the Preliminary Objections.

M. W. J. Ganshof van der Meersch, Professor at the Brussels Faculty of Law, *Avocat général* to the Belgian Court of Cassation, and M. 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 respectively chosen by the Belgian Government and the Spanish Government, in accordance with Article 31, paragraph 3, of the Statute, to sit as Judges *ad hoc* in the present case.

On 11 to 25 March, 1 to 23 and 27 to 29 April, and 4 to 15 and 19 May 1964, hearings were held in the course of which the Court

heard the oral arguments and replies of M. Castro-Rial, Agent, M. Reuter, Sir Humphrey Waldock, MM. Guggenheim, Ago, Malintoppi, Counsel, on behalf of the Spanish Government ; and of M. Devadder, Agent, MM. Rolin, Van Ryn, Sereni, Mme Bastid, Mr. Lauterpacht, M. Sauser-Hall, Counsel, on behalf of the Belgian Government.

In the written proceedings, the following Submissions were presented by the Parties :

On behalf of the Government of Belgium,

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, individuals or legal persons, being shareholders of 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, individuals or legal persons, being shareholders of 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 companies in the group which it was not possible to recover owing to the acts complained of."

On behalf of the Government of Spain,

in the Preliminary Objections,
on the first Preliminary Objection :

"May it please the Court,

to adjudge and declare :

that it has no jurisdiction to admit or adjudicate upon the claim made in the Belgian Application of 1962, all jurisdiction on the part of the Court to decide questions relating to that claim, whether with regard to jurisdiction, admissibility or the merits, having come to an end by the letters of the Belgian and Spanish Governments respectively dated 23 March and 5 April 1961 which the Court placed on record in its Order of 10 April 1961" ;

on the principal second Preliminary Objection :

"May it please the Court,

to adjudge and declare :

that it has no jurisdiction to entertain or decide the claims advanced in the Application and the Memorial of the Belgian Government, Article 17 of the Treaty of Conciliation, Judicial Settlement and Arbitration not having created between Spain and Belgium a bond of compulsory jurisdiction in respect of the International Court of Justice which could enable the Belgian Government to submit an Application to that Court" ;

on the alternative second Preliminary Objection :

"May it please the Court,

to adjudge and declare :

that it has no jurisdiction to entertain or decide the claims advanced in the Belgian Application and Memorial, the dispute raised by Belgium having arisen from and relating to situations and facts prior to the date on which the jurisdiction of the Court could have produced its effects in relations between Spain and Belgium (14 December 1955)" ;

on the third Preliminary Objection :

"May it please the Court,

to adjudge and declare :

that the claim advanced by the Belgian Government in its Application and Memorial, in each and every one of the three submissions in which it is expressed, is definitively inadmissible for want of capacity on the part of the Belgian Government in the present case, in view of the fact that the Barcelona company does not possess Belgian nationality and that in the case in point it is not possible to allow diplomatic action or international judicial proceedings on behalf of the alleged Belgian shareholders of the company on account of the damage which the company asserts it has suffered" ;

on the fourth Preliminary Objection :

"May it please the Court,

to adjudge and declare :

that the Application filed by the Belgian Government concerning the alleged damage caused to Barcelona Traction by the measures of which it has been the object on the part of the organs of the Spanish State is definitively inadmissible for want of utilization of the local remedies."

On behalf of the Government of Belgium,

in the Observations and Submissions in reply to the Preliminary Objections,

on the first Preliminary Objection :

"May it please the Court,

to adjudge and declare that the arguments put forward by the Spanish Government are inadmissible in so far as that Government relies on alleged ambiguities which it did not remove as it was in duty bound and able to do ;

that these arguments are in any case unfounded and that the discontinuance of the proceedings instituted by the Application of 15 September 1958 is no bar to the institution of a new application, the dispute between the Parties not having been the subject of any settlement and persisting to the present day" ;

on the principal second Preliminary Objection :

"May it please the Court,

to adjudge and declare that the Preliminary Objection No. 2 is inadmissible ;

in the alternative, that it has jurisdiction to hear and determine the claims put forward by the Belgian Government in its Application founded on Article 17, paragraph 4, of the Spanish-Belgian Treaty of 1927 and Article 37 of the Statute of the International Court of Justice" ;

on the alternative second Preliminary Objection :

"May it please the Court,

to dismiss the alternative Preliminary Objection No. 2 raised by the Spanish Government and declare that it has jurisdiction to deal with the dispute submitted to it by the Belgian Government's Application" ;

on the third Preliminary Objection :

"May it please the Court :

to dismiss the Preliminary Objection No. 3 raised by the Spanish Government and declare that the claim of the Belgian Government is admissible ;

in the alternative, to defer a decision on this Objection No. 3 and join it to the merits" ;

on the fourth Preliminary Objection :

"May it please the Court :

to declare Objection No. 4 to be unfounded, or if not to join it to the merits and defer a decision on it in so far as it applies to certain of the complaints against the decisions of the Spanish judicial authorities made in the Belgian Government's claim."

In the oral proceedings the following Submissions were presented by the Parties :

On behalf of the Government of Belgium,

at the closure of the hearing on 23 April 1964 :

"May it please the Court

to adjudge and declare that the arguments put forward by the Spanish Government in support of Preliminary Objection No. 1 are inadmissible in so far as that Government relies on alleged ambiguities which it did not remove as it was in duty bound and able to do ;

that these arguments are in any case unfounded and that the discontinuance of the proceedings instituted by the Application of 15 September 1958 is no bar to the institution of a new application, the dispute between the Parties still persisting today ;

to adjudge and declare that the principal Preliminary Objection No. 2 is inadmissible ;

in the alternative, to declare that it is not well-founded and to adjudge and declare that the Court has jurisdiction to hear and determine the claims put forward by the Belgian Government by an Application relying on Article 17, paragraph 4, of the Spanish-Belgian Treaty of 19 July 1927 and Article 37 of the Statute of the International Court of Justice ;

to dismiss the alternative Preliminary Objection No. 2 raised by the Spanish Government ;

to adjudge and declare that the Court has jurisdiction to hear and determine the claims put forward by the Belgian Government by an Application relying on Article 17, paragraph 4, of the Spanish-Belgian Treaty of 19 July 1927 and Article 37 of the Statute of the International Court of Justice, there being no *ratione temporis* restriction which can be validly advanced to deny such jurisdiction ;

to dismiss as irrelevant in the present proceedings Preliminary Objection No. 3 in so far as it is based on alleged protection by the Applicant Government of the Barcelona Traction Company incorporated under the laws of Canada ;

furthermore, to dismiss the said objection in so far as it seeks to deny the Applicant Government the right in the present case to take up the case of its nationals, natural and juristic persons, who are shareholders of Barcelona Traction ;

in the alternative, to join the third Objection to the merits ; to dismiss Preliminary Objection No. 4 ;

in the alternative, should the Court consider in respect of certain complaints that it cannot find that sufficient use has been made of the local means of redress relating to them without examining the content and validity of the Spanish judicial decisions by which the remedies in fact sought were disposed of, to join the objection to the merits."

On behalf of the Government of Spain,

at the closure of the hearing on 8 May 1964 :

"May it please the Court :

For any of these reasons, and all others set out in the written and oral proceedings, or for all of these reasons,

Firstly, since any jurisdiction of the Court to decide issues relating to the claim formulated in the new Belgian Application of 1962, either to competence, to admissibility or to the merits, came to an end as a result of the letters of the Belgian and Spanish Governments, respectively dated 23 March and 5 April 1961, which the Court placed on record in its Order of 10 April 1961 ;

Secondly, since the Court is without jurisdiction to deal with the present case, the jurisdictional clause of Article 17 of the Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927 not having created between Spain and Belgium a jurisdictional nexus enabling the Belgian Government to submit the Barcelona Traction dispute to the International Court of Justice ;

Thirdly, since the Belgian Government is without capacity in the present case, having regard to the fact that the Barcelona Traction company, which is still the object of the claim referred to the Court, does not possess Belgian nationality ; and having regard also to the fact that no claim whatsoever can be recognized in the present case on the basis of the protection of Belgian nationals, being shareholders of Barcelona Traction, as the principal of these nationals lacks the legal status of a shareholder of Barcelona Traction, and as international law does not recognize, in respect of injury caused by a State to a foreign company, any diplomatic protection of shareholders exercised by a State other than the national State of the company ;

Fourthly, since the local remedies and procedures were not used by Barcelona Traction, as required by international law;

to adjudge and declare:

that the Application filed by the Belgian Government on 14 June 1962 and the final Submissions presented by it are definitively inadmissible."

* * *

In the present case, the Applicant Government alleges injury and damage to Belgian interests in a Canadian registered company, known as the Barcelona Traction, Light and Power Company, Limited, resulting from treatment of the company in Spain said to engage the international responsibility of the Respondent Government. In opposition to the Belgian Application, the Respondent Government has advanced four objections as being objections in respect of the competence of the Court or the admissibility of the claim, and as having a preliminary character. Briefly summarized, these objections are:

(1) 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 Applicant Government from bringing the present proceedings;

(2) that even if this was not the case, the Court is not competent, because the necessary jurisdictional basis requiring Spain to submit to the jurisdiction of the Court does not exist;

(3) that even if the Court is competent, the claim is inadmissible because the Applicant Government lacks any *jus standi* to intervene or make a claim on behalf of Belgian interests in a Canadian company, assuming that the Belgian character of such interests were established; and

(4) that even if the Applicant Government has the necessary *jus standi*, the claim still remains inadmissible because local remedies in respect of the alleged wrongs and damage were not exhausted.

* * *

First Preliminary Objection

The original Belgian Application to the Court in respect of the events said to engage the responsibility of the Respondent Government and to entitle the Applicant Government to intervene, was filed on 23 Sep-

tember 1958, and was followed in due course by the deposit of a Belgian Memorial, and of a set of Spanish preliminary objections having the same character as the second, third and fourth Preliminary Objections in the present case. Before the Belgian observations on these objections were received however (the proceedings on the merits having been suspended under Article 62, paragraph 3, of the Rules), the representatives of the private Belgian and Spanish interests concerned decided to engage in negotiations for a settlement. In connection with this decision, and in circumstances which will be more fully stated later, the Applicant Government informed the Court on 23 March 1961 that "at the request of Belgian nationals the protection of whom was the reason for the filing of the Application in the case [and] availing itself of the right conferred upon it by Article 69 of the Rules of Court [it was] not going on with the proceedings instituted by that Application". Nothing more was stated in the notice as to the motives for the discontinuance, and nothing as to the Applicant's future intentions. Since the case fell under paragraph 2 of Article 69 of the Rules (the Respondent having taken a step in the proceedings) the discontinuance could not become final unless, within a time-limit to be indicated by the Court, no objection should be received from the Respondent Government. Within the time-limit so fixed, however, a notification was in fact received from that Government stating that it "had no objection to the discontinuance". No motivation or condition was attached to this notification, and on 10 April 1961 the Court made an Order in the terms of Article 69, paragraph 2, "recording the discontinuance of the proceedings and directing the removal of the case from the list". In due course discussions between representatives of the private interests concerned took place but, no agreement being reached, the Application introducing the present proceedings was filed on 19 June 1962.

*

The Applicant Government maintains that the discontinuance recorded by the Court's Order of 10 April 1961 was no more than a termination of the then current proceedings before the Court ; and that the negotiations in view of which it was made having broken down, the Applicant was fully entitled to bring new proceedings in regard to the same matters of complaint. The Respondent Government, on the other hand, contends that, both in principle and in the light of the circumstances obtaining, this discontinuance precluded the Applicant Government from bringing any further proceedings, and in particular the present ones.

The main arguments advanced by the Respondent in support of its contention are as follows :

Firstly, that a discontinuance of proceedings under Article 69 of the Rules is in itself a purely procedural act, the real import of which can

only be established by reference to the surrounding circumstances—the fact that it does not contain an express renunciation of any further right of action not being conclusive ;

secondly, that in principle however, a discontinuance must be taken to involve such a renunciation unless the contrary is stated, or the right to take further action is expressly reserved ;

thirdly, that in the present case there was an understanding between the Parties that the discontinuance did involve such a renunciation and would be final, not only as regards the current proceedings but also for the future ;

fourthly, that even if there was no such understanding, the Applicant Government conducted itself in such a way as to lead the Respondent to believe that the discontinuance would be, in the above-mentioned sense, final, but for which the Respondent would not have agreed to it, and in consequence of which the Respondent suffered prejudice ;

finally—a contention of a somewhat different order—that the introduction of new proceedings in regard to the same matters of complaint was incompatible with the spirit and economy of the treaty under which the Applicant sought to found the jurisdiction of the Court.

*

Before examining these various contentions, the Court will deal with certain preliminary matters.

The present case is one in which the Court is called upon for the first time to consider the effect of a discontinuance followed by new proceedings. This is because, ordinarily, discontinuances have been final in fact, whether or not they would have proved to be so in law had an attempt to bring further proceedings been made. Sometimes a discontinuance, though in form unilateral, and therefore notified under Article 69 of the Rules, has been consequent on a settlement of the dispute ; in other cases the claimant State has had reasons, which appeared to it to be of a final character, for not continuing to attempt to prosecute its claim before the Court ; in others yet, it might well have been that, the current proceedings once discontinued, the jurisdictional basis for instituting new ones would no longer have been available.

But, in the opinion of the Court, these various considerations are essentially fortuitous in character ; and the fact that past discontinuances have in practice proved "final" cannot of itself justify the conclusion that any *a priori* element of finality inherently attaches to them. This can readily be demonstrated by reference to circumstances in which the Court considers that no question could arise as to the right to institute further proceedings following upon a discontinuance, quite

irrespective of whether any reasons for it were given, or any right of further action reserved. That this might be the case was indeed expressly recognized in the Respondent's written Preliminary Objections where, in discussing possible motives for a discontinuance, it was stated that—

> "For example, it may be that an applicant discontinues proceedings begun by him only because he finds that he has committed an error of procedure and intends to institute a new action right away."

Similar possibilities are that the claimant State might have failed to give certain notices which, under an applicable treaty, had to be given before any valid application to the Court could be made ; or the claimant State might discover that although it thought local remedies had been exhausted, this was not in fact the case. Again, in a claim on behalf of an individual, evidence might come to light indicating that he was not, after all, a national of the claimant State, leading to a discontinuance ; but subsequently it might be found that this evidence was inaccurate. There are many other possibilities. It is, moreover, clear that in certain of these cases, the discontinuing party could have no foreknowledge of whether the defect or disability leading to the discontinuance would subsequently be cured, in such a way as to remove the obstacle to the renewal of the suit.

The existence of these possibilities suffices in itself to show that the question of the nature of a discontinuance cannot be determined on any *a priori* basis, but must be considered in close relationship with the circumstances of the particular case. In consequence, each case of discontinuance must be approached individually in order to determine its real character. There would therefore be little object in the Court's entering upon any exhaustive discussion of the theory of discontinuance as it is provided for by Articles 68 and 69 of the Court's Rules. But certain points may be noticed by way of clarification.

Both the inherent character of these provisions and their drafting records show that the main object which they have in view is to provide a procedural facility, or rather—since it would in any event never be practicable to compel a claimant State to continue prosecuting its case—to reduce the process of discontinuance to order. But these provisions are concerned solely with the "how", not with the "why", of the matter. They impose no conditions as to the basis on which a discontinuance may be effected other than (in cases coming under Article 68) that the parties shall be in agreement about it, or (in those coming under Article 69, paragraph 2) that the respondent party has no objection ; for it is clear that there are few limits to the motives that might inspire a discontinuance, and these two Articles are not concerned with that aspect of the matter.

One difference between the two provisions is, however, significant. Whereas Article 68 contemplates a discontinuance which not only is (in effect) an agreed one, but also takes the form of an agreed communication to the Court, Article 69 on the other hand contemplates a notification to the Court which, whether it results from an agreed settlement of the dispute or from some other cause, always takes the form of a unilateral communication from the applicant or claimant party, which is either immediately effective, if the case comes under paragraph 1 of Article 69 (the respondent party having taken no step in the proceedings), or which (if such a step has been taken) becomes effective in the absence of any objections from the respondent party within the time-limit fixed by the Court. The respondent can of course signify expressly its non-objection, but is in no way obliged to do so. Thus, whereas in cases coming under Article 68 the act of discontinuance is to all intents and purposes a joint act, in those coming under Article 69 it is an essentially unilateral act, whatever may underlie it, and even though acquiescence is necessary before it can actually take effect. Under Article 69, any notifications, whether of intention to discontinue, or in acceptance of discontinuance, are notifications made to the Court and not passing between the parties, so that any understandings between them (and such may certainly exist) must precede and be sought for outside the act of discontinuance itself.

The right of objection given to a respondent State which has taken a step in the proceedings is protective, to enable it to insist on the case continuing, with a view to bringing about a situation of *res judicata*; or in other words (perhaps more pertinent for the present case), to enable it to ensure that the matter is finally disposed of for good.

The role of the Court, there being no objection to the discontinuance, is simply to record it and to remove the case from its list. In connection with the discontinuance itself, the Court is not called upon to enquire into the motives either of the discontinuing or of the respondent party: Article 69 does not impose any obligation on the parties to give reasons either for the wish to effect the discontinuance, or for not objecting to it.

One further element regarding the process of discontinuance which may be noticed, is that the evidence of the drafting records of Articles 68 and 69 goes to show that in addition to making provision for what was an evidently necessary procedural faculty, the aim was to facilitate as much as possible the settlement of disputes—or at any rate their non-prosecution in cases where the claimant party was for any reason indisposed to discontinue. This aim would scarcely be furthered however, if litigants felt that solely by reason of a discontinuance on their part they would be precluded from returning to the judicial process before the Court, even if they should otherwise be fully in a position to do so.

* * *

It is against this background that the Court must now consider the contentions advanced by the Respondent Government in the present case.

In the light of what has been said about the nature of the process of discontinuance, the Court can accept the first of these contentions, which is to the effect that giving notice of discontinuance is a procedural and, so to speak, "neutral" act, the real significance of which must be sought in the attendant circumstances, and that the absence of express renunciation of any further right of action is inconclusive, and does not establish in itself that there has not been such a renunciation, or that the discontinuance is not being made in circumstances which must preclude any further proceedings.

But for the very reason that the Court thinks this to be a correct statement of the legal position, it cannot accept the Respondent's second principal contention, namely that a discontinuance must always and in principle be taken as signifying a renunciation, unless the contrary is indicated or unless the right to start new proceedings is expressly reserved. The two conceptions are mutually contradictory : a notice of discontinuance of proceedings cannot both be in itself a purely procedural and "neutral" act, and at the same time be, *prima facie* and in principle, a renunciation of the claim. There is no need to discuss this contention any further, except to say that, in view of the reasonable and legitimate circumstances which, as has already been seen, may motivate a discontinuance, without it being possible to question the right of further action, the Court would, if any presumption governed the matter, be obliged to conclude that it was in the opposite sense to that contended for by the Respondent ; and that a discontinuance must be taken to be no bar to further action, unless the contrary clearly appeared or could be established. The problem is however incorrectly formulated if it is asked (as it constantly has been in the present case) what the "effect" of a discontinuance is ; for the effect of a discontinuance must always and necessarily be the same—to put and end to the current set of proceedings. In this, precisely, lies its essentially procedural character. The real question is not what the discontinuance does—which is obvious—but what it implies, results from or is based on. This must be independently established, except in those cases where, because the notice itself gives reasons, or refers to acts or undertakings of the parties, or to other circumstances, its import is clear and apparent.

In the present case, the notice of discontinuance given by the Applicant Government, contained no motivation apart from such implications (and they could be various) as might be drawn from the statement that it was made at the request of the Belgian nationals whose protection had led to the presentation of the original Application in the case. On the other hand, the notice was very clearly related, and

confined, to that Application, the date and character of which were specified. It was "the proceedings instituted by that Application" to which the notice referred, and nothing else.

In these circumstances, the Court considers that, if the notice itself left it open whether or not it involved or was consequent on a renunciation of all further right of action, its terms are nevertheless such as to place upon the Respondent Government the onus of establishing that it meant or was based upon something more than appeared on the face of it, namely a decision to terminate the then current proceedings before the Court, subject to the Respondent's assent.

* * *

In seeking to discharge this onus the Respondent has put forward two contentions :

The first is to the effect that there was an understanding between the Parties about the discontinuance ; and the foundation for it lies in the fact that when, after the original proceedings had been started, the representatives of the Belgian interests concerned approached the representatives of the Spanish interests with a view to re-opening negotiations, they were met with a firm refusal to do so unless the case before the Court were first brought to a definite end ; that a Belgian offer for a suspension of the proceedings was rejected as insufficient, and a "final withdrawal of the claim" was demanded ; that the Belgian representatives thereupon undertook to request their Government to effect a final discontinuance of the proceedings ; that it was perfectly well understood on the Belgian side that the Spanish side meant and assumed that the discontinuance would operate as putting a final end to the claim, or at any rate to any further right of action ; and that the Spanish representatives would not have agreed to negotiate on any other basis, nor the Respondent Government to refrain from objecting to the discontinuance under Article 69, paragraph 2, of the Rules of Court.

On the Belgian side, it was denied that anything more was intended or could reasonably be inferred from the Belgian statements, or from the terms of the notice of discontinuance itself (which was before the Respondent Government when it signified its non-objection), than a simple, though final, termination of the then current proceedings—particularly having regard to the prospective negotiations about to be embarked upon.

The Court notes that, although there were various contacts at the governmental level, the exchanges relied on took place initially almost entirely between the representatives of the private interests concerned. In so far as the Governments were privy to these exchanges, it was evidently, at that stage, only on an unofficial basis. In order that the

Governments on either side should in any way be committed by these exchanges, it would be necessary to show that the representatives of the private interests acted in such a manner as to bind their Governments. Of this there is no evidence : indeed on the Spanish side the apparently very cautious nature of the contacts between the authorities and the private interests negatives the possibility. In this connection the Court recalls that at one stage of the oral hearing, the Parties were invited by the Court to clarify the situation by indicating how far the acts of the representatives of the private interests were adduced as engaging the responsibility of the Governments ; but no really clear light was thrown on the matter.

In the circumstances, the Court sees no reason to depart from the general rule that, in relation to an understanding said to exist between States parties to a litigation before it, and to affect their rights in that litigation, it can only take account of the acts and attitudes of governments or of the authorized agents of governments ; and, in the present case, the Court can, at the governmental level, find no evidence of any such understanding as is alleged by the Respondent. Indeed it seems to have been above all on the part of the latter that the greatest reluctance to become involved in any understanding over the discontinuance was manifested.

Quite apart from these considerations however, the Court finds the various exchanges wholly inconclusive. It seems that the Parties were deliberately avoiding a problem they were unwilling to come to grips with, lest by doing so they should shatter the foundation of their interchanges. The Respondent Government must have realized that an immediate refusal would result from any official request that the Applicant Government, in discontinuing the current proceedings, should definitely renounce, or undertake that it did renounce, all further right of action. As far as the Applicant was concerned, if it did not intimate that it reserved the right to bring further proceedings, should the negotiations fail, it equally avoided suggesting that it renounced that right. The desire felt on the Spanish side not to negotiate whilst proceedings were actually in progress before the Court, involving injurious charges against Spanish authorities and nationals, was fully met by the discontinuance effected, and nothing more was needed for that purpose. Furthermore, it does not appear reasonable to suppose that on the eve of difficult negotiations, the success of which must be uncertain, there could have been any intention on the Belgian side to forgo the advantage represented by the possibility of renewed proceedings. In the face of this, only very clear proof of the understanding alleged by the Respondent would suffice, and none is forthcoming.

The Court considers that in any case, and whatever ambiguities may have existed in the private and official exchanges involved, the onus of making its position clear necessarily lay on the Respondent Government ; for it was that Government which had the right of objection to

the discontinuance, under Article 69, paragraph 2, of the Rules—a right expressly given to respondent parties for their protection, and for the purpose, *inter alia*, of enabling them to prevent what has occurred in the present case. There is nothing to prohibit conditions being attached to any abstention from exercising this right, but the Respondent Government attached no conditions other than, implicitly, the one already satisfied by the notice of discontinuance, that the proceedings begun by the Belgian Application of September 1958 should be brought to an end—as they were.

* * *

A second contention, having the character of a plea of estoppel, was advanced by the Respondent Government in seeking to discharge the onus of proof referred to above. This was to the effect that, independently of the existence of any understanding, the Applicant Government by its conduct misled the Respondent about the import of the discontinuance, but for which the Respondent would not have agreed to it, and as a result of agreeing to which, it had suffered prejudice. Accordingly, it is contended, the Applicant is now estopped or precluded from denying that by, or in consequence of, the discontinuance, it renounced all further right of action.

This plea meets at the outset with two difficulties. In the first place, it is not clear whether the alleged misleading conduct was on the part of the Applicant Government itself or of private Belgian parties, or in the latter event, how far it is contended that the complicity or responsibility of the Applicant Government is involved. In the second place, the Court does not consider that the alleged misleading Belgian representations have been established, any more than was the alleged understanding between the Parties about the implications of the discontinuance. Nevertheless, since this aspect of its first Preliminary Objection has been more strongly insisted upon by the Respondent Party than perhaps any other, the Court will consider it.

Without doubt, the Respondent is worse off now than if the present proceedings had not been brought. But that obviously is not the point, and it has never been clear why, had it known that these proceedings would be brought if the negotiations failed, the Respondent would not have agreed to the discontinuance of the earlier proceedings in order to facilitate the negotiations (the professed object); since it must not be overlooked that if the Respondent had not so agreed, the previous proceedings would simply have continued, whereas negotiations offered a possibility of finally settling the whole dispute. Given that without the Respondent's consent to the discontinuance of the original proceedings, these would have continued, what has to be considered now is not the present position of the Respondent, as compared with what it would have been if the current proceedings had never been brought,

but what its position is in the current proceedings, as compared with what it would have been in the event of a continuation of the old ones.

In making this comparison, the essential point is that the Respondent Government had entered certain preliminary objections in the earlier proceedings which, if successful (and it was presumably hoped to succeed on them), would necessarily have brought the case to an end, and have prevented not only a decision about, but even any discussion at all of the allegations made against Spanish nationals and authorities. But so equally would successful negotiations have prevented this. At the same time, the Respondent Government ran no risk, for if the negotiations were not successful, and the case started again, it would still be possible once more to put forward the previous preliminary objections. Consequently, irrespective of whether the case would begin again or not, it cannot be seen what the Respondent stood to lose by agreeing to negotiate on the basis of a simple discontinuance, or why it would not have agreed had it realized that this alone, without a substantive renunciation, was involved. The explanations given seem to the Court unconvincing.

As to the prejudice alleged, the only point that appears to require examination arises from the fact that in bringing the new proceedings the Applicant Government had the advantage of being able to frame its Application and ensuing Memorial with a foreknowledge of the probable nature of the Respondent's reply—a foreknowledge which a claimant State might not, at that stage of the proceedings, ordinarily possess, even though, normally, previous negotiations and diplomatic exchanges would have given it considerable information about the opposing legal position. The scope of the Court's process is however such as, in the long run, to neutralize any initial advantage that might be obtained by either side. As regards the substance, in so far as the Applicant Government was, for the purposes of its Application in the present proceedings, able to modify the presentation of its claim in order to take account of objections advanced by the Respondent in the original proceedings, it appears to the Court that the Applicant could, in the light of those objections, have done exactly the same thing for the purposes of its final submissions in those proceedings themselves, which would have continued. The Applicant is always free to modify its submissions and, in fact, the final submissions of a party frequently vary from those found in the written pleadings. Consequently the Court is not able to hold that any true prejudice was suffered by the Respondent.

* * *

A final, though different order of contention advanced by the Respondent in support of its first Preliminary Objection, was that the present proceedings were contrary to the spirit and economy of the

Hispano-Belgian Treaty of 19 July 1927, the jurisdictional clauses of which are relied on by the Applicant as conferring competence on the Court. The character of this Treaty is fully considered in connection with the second Preliminary Objection, and it will suffice to say here that according to its terms, before a dispute can be submitted to adjudication, various preliminary stages have to be gone through. These stages were in fact gone through in connection with the original and discontinued proceedings, and they were repeated in connection with the present proceedings. The contention now advanced is that it cannot have been the intention of the Treaty that the same processes should be gone through twice in relation to the same claim, and that the present proceedings are consequently out of order, on the basis of the very instrument on which the Applicant founds the jurisdiction of the Court.

The Court is sensible of the element of artificiality involved in the repetition of the Treaty processes in regard to the same matters of complaint. But if the right to bring new proceedings exists, apart from this, it would seem difficult to hold that precisely because it does, the jurisdictional basis for its exercise is thereby destroyed.

It has been argued that the first set of proceedings "exhausted" the Treaty processes in regard to the particular matters of complaint, the subject of those proceedings, and that the jurisdiction of the Court having once been invoked, and the Court having been duly seised in respect of them, the Treaty cannot be invoked a second time in order to seise the Court of the same complaints. As against this, it can be said that the Treaty processes are not in the final sense exhausted in respect of any one complaint until the case has been either prosecuted to judgment, or discontinued in circumstances involving its final renunciation—neither of which constitutes the position here. If, for instance, to recall an illustration given earlier (and other instances are possible) proceedings brought under the Treaty were discontinued because it was found that local remedies had not been exhausted (and it is of course at the moment of the application to the Court that they require to be), it would be difficult to contend that (this deficiency being remedied) a new application could not be made in the case, merely because it would have to be preceded by a repetition of the Treaty processes. This contention therefore cannot be accepted.

For all of the foregoing reasons, the Court holds that the first Preliminary Objection must be rejected.

* * *

SECOND PRELIMINARY OBJECTION (PRINCIPAL ASPECT)

Although, for the reasons given in connection with the first Preliminary Objection, the discontinuance of the action in the original proceedings before the Court did not disentitle the Belgian Government

from commencing the present proceedings, it is nevertheless essential that a valid jurisdictional basis for these should exist. In order to establish this, the Applicant Government relies on the combined effect of Article 37 of the Statute of the Court and the fourth paragraph of Article 17 of the Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration, signed on 19 July 1927, and kept in force by means of tacit renewals taking place at ten-yearly intervals, the latest having occurred in 1957. This Treaty, which will henceforth be called the 1927 Treaty, provided by its Article 2 for a reference to adjudication of all disputes between the parties, involving a disagreement about their legal rights. For this purpose, and if the methods of conciliation also provided for by the Treaty failed, or were not utilized, the parties were in each case to draw up a *compromis*. If, however, agreement could not be reached upon the terms of a *compromis* within a certain period, then the fourth paragraph of Article 17 of the Treaty, now invoked by the Applicant Government, provided that :

[Translation]

> "... either Party may, on the expiry of one month's notice, bring the question direct before the Permanent Court of International Justice by means of an application".

In combination with this provision, the Applicant invoked Article 37 of the Statute of the Court, the relevant portion of which in the English text, reads as follows :

> "Whenever a treaty or convention in force provides for reference of a matter... to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

In the light of this provision, it was contended by the Applicant that, the 1927 Treaty being "a treaty... in force", and both the Parties in dispute being parties to the Statute of the International Court of Justice, that Court must, by virtue of Article 37, be deemed to have replaced the Permanent Court in the relations between the Parties, for the purposes of such a provision as the fourth paragraph of Article 17 of the Treaty—henceforth to be called Article 17 (4) ; and accordingly that (the necessary time-limits having expired) this provision gave the Applicant the right to bring the case unilaterally before the Court.

This view was contested by the Respondent Government, on the ground that although the 1927 Treaty might as such still be in force, the jurisdictional obligation represented by Article 17 (4) had necessarily lapsed on the dissolution of the former Permanent Court on 18 April 1946, since this brought about the disappearance of the judicial organ to which Article 17 (4) referred ; that no previous substitution

of the present for the former Court had been effected by virtue of Article 37 before that date, Spain not being then a party to the Statute ; and that, in consequence, the 1927 Treaty had ceased to contain any valid jurisdictional clause by the time Spain did become a party to the Statute upon admission to the United Nations in December 1955. Thus, even if Spain would then in principle have become bound by Article 37, there did not in the instant case, so it was contended, exist at that date any clause of compulsory jurisdiction in respect of which that provision could operate to confer jurisdiction on the present Court, and since Article 37 could only apply to jurisdictional clauses already in force, it could not operate to bring a former clause into force again, which occurrence would require for its realization the express consent of both parties, given *de novo*.

Another way of stating what was basically the same contention, was to say that Article 37 only applied in the relations between parties to the Statute which had become such through original membership of the United Nations, or at least by acquiring membership (or by otherwise becoming a party to the Statute), previous to the dissolution of the Permanent Court in April 1946 ; for only in their case had the substitution of the present Court for the Permanent Court been able to take place at a time when the jurisdictional clauses in respect of which this was to occur were themselves still in force. Once any such clause had lapsed by reason of the disappearance of the Permanent Court, there could be no substitution of forum ; or rather, any question of substitution became pointless, since the basic obligation of compulsory adjudication itself no longer existed. Moreover, only those States which had already become parties to the Statute before the dissolution of the Permanent Court could be regarded as having given a true consent to the process involved—that is a consent directly given in respect of jurisdictional clauses still indubitably in force. Anything else, it was contended, would be a fiction.

There were other ways in which the Spanish contention was or could be put, some of which will be noticed later ; but however it might be put, it always involved at bottom the same basic contention, that the dissolution of the Permanent Court brought about the final extinction of all jurisdictional clauses providing for recourse to that Court, unless they had already, previous to this dissolution, been transformed by the operation of Article 37 of the Statute into clauses providing for recourse to the present Court ; and that in respect of any jurisdictional clause not thus transformed previous to the dissolution of the Permanent Court, Article 37 was, thereafter, powerless to effect the transformation.

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This line of reasoning was not put forward by the Respondent Government in the original diplomatic exchanges between the Parties.

It was first advanced after the decision given by the Court on 26 May 1959, in the case concerning the *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria) (I.C.J. Reports 1959,* p. 127). This case had reference, not to Article 37 but to Article 36, paragraph 5, of the Statute ; and not to a treaty, such as the Hispano-Belgian Treaty of 1927, but to a unilateral declaration in acceptance of the compulsory jurisdiction of the former Permanent Court, made under the "optional clause" of its Statute (paragraph 2 of Article 36). It was however contended by the Respondent that the legal considerations applicable in that case were applicable also in the present one ; and the arguments advanced by the Respondent were, *mutatis mutandis,* similar in character to those advanced on behalf of Bulgaria in that case. The Court will therefore consider this matter.

The Court notes in the first place that the decision in the *Israel* v. *Bulgaria* case was confined entirely to the question of the applicability of Article 36, paragraph 5, in a somewhat unusual situation ; that it made only one passing and routine reference to Article 37 and noticeably avoided any finding on, or even consideration of the case of that provision, the position of which it was evidently intended to leave quite open. The Court moreover considers that there are differences between the two cases which require that the present one should be dealt with independently and on its merits. Not only is a different category of instrument involved—an instrument having a conventional form, not that of a unilateral declaration—but the essential requirement of being "in force", which in the cases contemplated by Article 36, paragraph 5, bore directly on the jurisdictional clause—the unilateral declaration itself—is, in Article 37, formally related not to the clause as such, but to the instrument—the treaty or convention—containing it, from which follow certain consequences to be noticed later.

Nor can the Court be oblivious to other differences which cannot but affect the question of the need for the Court to make an independent approach to the present case. The case of *Israel* v. *Bulgaria* was in a certain sense *sui generis.* As some of the separate but concurring opinions show (and as is evident in other ways), it might have been decided—and still in favour of Bulgaria—on grounds which would not have involved the particular issue of the effect of the dissolution of the Permanent Court on the continued existence and validity of a declaration not previously "transformed" into an acceptance of the compulsory jurisdiction of the present Court. Moreover, any decision of the Court, relative to Article 37, must affect a considerable number of surviving treaties and conventions providing for recourse to the Permanent Court, including instruments of a political or technical character, and certain general multilateral conventions of great importance that seem likely to continue in force. It is thus clear that the decision of the Court in the present case, whatever it might be, would be liable to have far-reaching effects. This is in no way a factor which should be

allowed to influence the legal character of that decision : but it does constitute a reason why the decision should not be regarded as already predetermined by that which was given in the different circumstances of the *Israel* v. *Bulgaria* case.

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It will be convenient at this point to mention briefly the question of the other cases cited in the course of the proceedings, in which Article 36, paragraph 5, or 37, of the Statute have been involved. None is directly in point ; for, with the exception of the declaration of Thailand in the case concerning the *Temple of Preah Vihear, Preliminary Objections* (*I.C.J. Reports 1961*, p. 17), all the jurisdictional clauses concerned related to countries which were original Members of the United Nations and parties to the Statute, so that the various processes provided for by the Statute had already been completed as regards these clauses before the extinction of the Permanent Court. In the *Temple of Preah Vihear* case, Thailand had deposited a declaration purporting to accept the present Court's compulsory jurisdiction, by means of a "renewal" of a previous declaration of 1940, accepting that of the former Permanent Court. As Thailand had only become a Member of the United Nations and a party to the Statute after the disappearance of that Court, it was argued, in the light of the *Israel* v. *Bulgaria* decision, that the 1940 declaration had *ipso facto* lapsed and become extinguished, and was consequently incapable of "renewal", so that the 1950 declaration purporting to effect such a renewal was without legal validity. The Court however decided the matter on a different basis, holding that, in sending in its notice of renewal, Thailand must have intended to accept the jurisdiction of a court of some kind—and this could only have been the present one since, as Thailand knew, the former Court no longer existed. Hence, despite the language of "renewal", the notice (on its correct interpretation) operated as a direct acceptance of the compulsory jurisdiction, made in relation to the present Court. Consequently, irrespective of whether or not the previous declaration relative to the Permanent Court had lapsed, Thailand had accepted the compulsory jurisdiction of the present Court. It is clear that this case has no relevance whatever to the present one.

In the light of the foregoing considerations therefore, the Court must decide the present case independently and without further reference to Article 36, paragraph 5, or to the previous cases which have, in one way or another, involved that provision or Article 37 of the Statute—even though in three of them, the Court did actually apply Article 37.

* * *

Although it will be necessary to revert to the matter at a later stage, it is desirable at this point to say something about what appear to have been the objects and purposes of Article 37 at the time when the Statute was being drafted in the period April-June 1945.

Historically, two main considerations appear to have moved the drafters. In the first place, owing to the decision to create an international court of justice which would in law be a new entity, and not a continuation of the existing Permanent Court, the dissolution of the latter became essential, for it would not have been a tolerable situation for two such Courts to be co-existing. The disappearance of the Permanent Court was in any event certain to occur in fact, for lack of machinery to replace its Judges, but it was not known precisely when this disappearance, either as a fact or as the result of a formal dissolution, would come about. At the same time, there were then in existence a very large number of treaties, conventions and other instruments, bilateral and multilateral, containing jurisdictional clauses providing for recourse to that Court. If therefore nothing had been inserted in the new Statute to meet this situation, and to meet it automatically and in advance, the preservation of these clauses would have been left to the uncertain action of the individual parties to the various instruments concerned.

It was this situation that Article 37 was designed to meet, and the governing concept evidently was to preserve as many jurisdictional clauses as possible from becoming inoperative by reason of the prospective dissolution of the Permanent Court ; and moreover, to do this by a process which would automatically substitute the new Court for the Permanent Court in the jurisdictional treaty relations between all Members of the United Nations and other parties to the Statute, thus avoiding the necessity for piecemeal action by special agreement between the parties to the various instruments. The intention therefore was to create a special régime which, as between the parties to the Statute, would automatically transform references to the Permanent Court in these jurisdictional clauses, into references to the present Court.

In these circumstances it is difficult to suppose that those who framed Article 37 would willingly have contemplated, and would not have intended to avoid, a situation in which the nullification of the jurisdictional clauses whose continuation it was desired to preserve, would be brought about by the very event—the disappearance of the Permanent Court—the effects of which Article 37 both foresaw and was intended to parry ; or that they would have viewed with equanimity the possibility that, although the Article would preserve many jurisdictional clauses, there might be many others which it would not ; thus creating that very situation of diversification and imbalance which it was desired to avoid.

Whether Article 37 was aptly framed to carry out these objectives remains for consideration ; but that such were the objectives, and the

motives influencing the drafting, the Court can hardly doubt. This conclusion finds strong support in a second historical consideration. As is well known, Article 37 represented, so far as treaties and conventions were concerned, a compromise between two extreme and opposed schools of jurisdictional thought. There were, on the one hand, those who wanted to insert in the Statute of the new Court a clause of universal compulsory jurisdiction, automatically applicable to all disputes between parties to the Statute, of whatever kind and howsoever arising. Such a clause would have rendered the insertion of jurisdictional clauses in particular treaties or conventions unnecessary except for any special purpose, and would have rendered a provision such as Article 37 unnecessary also, or caused it to be differently drafted. On the other hand, there were those who were opposed to the idea of compulsory jurisdiction in any form, and considered that the Court should only be competent in cases brought before it with the express consent of the parties, given *ad hoc*.

The compromise between these two points of view which Article 37 represented (so far as jurisdictional clauses in treaties and conventions were concerned) involved the rejection of the notion of a universal compulsory jurisdiction ; but on the other hand (and for that very reason) it also involved the preservation at least of the already existing field of conventional compulsory jurisdiction. It was a natural element of this compromise that the maximum, and not some merely quasi optimum preservation of this field should be aimed at.

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With this background in mind, the Court will now consider the text of Article 37. Looking simply at its actual language, the Court sees it primarily as a provision conferring jurisdiction upon the International Court of Justice in respect of a certain category of disputes, and which mentions the Permanent Court for one purpose and one only—namely that of defining or identifying the category of dispute covered. Only three conditions are actually stated in the Article. They are that there should be a treaty or convention in force ; that it should provide (i.e., make provision) for the reference of a "matter" (i.e., the matter in litigation) to the Permanent Court ; and that the dispute should be between States both or all of which are parties to the Statute. No condition that the Permanent Court should still be in existence at any given moment is expressed in the Article. The conclusion, in so far as it is to be based on the actual language of Article 37 must be that the 1927 Treaty being in force ; it being a treaty which contains a provision for a reference of the matter in dispute to the Permanent Court ; and the Parties to the dispute both being parties to the Statute—then, as between them, the matter is to be ("shall be") referred to the Inter-

national Court of Justice, or (according to the French text) that Court is to be the competent forum.

Two central issues evidently arise here. One, which will be considered later, is whether, although the words "in force" are directly related to the treaty or convention as such, they must nevertheless be regarded as relating also, and independently, to the jurisdictional clause as such. The other main issue is, what is the meaning to be ascribed to the phrase "provides for". Clearly this cannot mean "provides for" operationally, here and now, for the Permanent Court no longer being in existence, no treaty could still provide for that. It follows that to impart rationality to the term "provides for" in its context, it must be read in a figurative sense, almost as if it had been put between inverted commas, and as denoting a treaty or convention still in force as such, containing a clause providing, or making provision for, a reference to the Permanent Court, this being simply a convenient method of defining or identifying the category of dispute in respect of which jurisdiction is conferred upon the International Court of Justice.

It was however argued that since Article 37, wherever it was applicable, transferred jurisdiction from the Permanent Court to the present Court, it was necessary that the former Court should still be in existence at the moment of the transfer; for otherwise there would no longer exist any jurisdiction to be transferred. But the Court considers that Article 37 did not in fact operate to effect any "transfer" of jurisdiction as such. What was created was a new Court, with a separate and independent jurisdiction to apply in the relations between the parties to the Statute of that new Court. In the field of the jurisdictional clauses of treaties and conventions already in force, referring to the Permanent Court, the *modus operandi* could, technically, have been to annex to the Statute a list of all such instruments. Such a listing *eo nomine* would have left no doubt that any listed treaty was covered, so long as it remained in force, irrespective of the date at which the parties became parties to the Statute, and independently of the continued existence of the Permanent Court. Instead of any such cumbrous procedure, the same result was achieved by resort to the common factor involved in all these jurisdictional clauses, namely the provision they contained for reference to the Permanent Court. By mentioning this, Article 37 identified and defined the category involved, and nothing else was needed.

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The Court will now turn to the question of the scope to be given to the words "in force" in Article 37. According to the actual text, this phrase relates solely to the treaties and conventions in question, and as such. But this cannot be considered as finally conclusive in itself, because it is necessary to take into consideration not only what

this provision was intended to do, but also what it was not intended to do. It was intended to preserve a conventional jurisdictional field from a particular threat, namely the extinction which would otherwise follow from the dissolution of the Permanent Court. But that was all it was intended to do. It was not intended to create any new obligatory jurisdiction that had not existed before that dissolution. Nor, in preserving the existing conventional jurisdiction, was it intended to prevent the operation of causes of extinction other than the disappearance of the Permanent Court. In this sense but, however, in this sense only, is it correct to say that regard must be had not only to whether the treaty or convention is still in force, but also to whether the jurisdictional clause it contains is itself, equally, still in force. And precisely because it was the sole object of Article 37 to prevent extinction resulting from the particular cause which the disappearance of the Permanent Court would represent, it cannot be admitted that this extinction should in fact proceed to follow from this very event itself. Such a possibility would not only involve a contradiction in terms, but would run counter to the whole intention and purpose of the Article.

The argument to the contrary is based on seeking to draw a distinction between those States which became parties to the Statute previous to the dissolution of the Permanent Court, and those which became parties afterwards. But that is not an independent argument, for the alleged distinction is itself only a part, or another aspect, of the same fundamental question, namely the effect of that dissolution on the status of these jurisdictional clauses—since the sole relevance of the date of admission to the United Nations, if it was subsequent to the dissolution, is whether there still remained in existence any jurisdictional clause in respect of which Article 37 could take effect. It is in this way alone that any distinction between different parties to the Statute could be introduced; for otherwise it must be entirely arbitrary, and it is not recognized by Article 37 itself which, on the contrary, speaks of the "parties to the present Statute", not the "present parties to the Statute". Except for the supposed effects of the dissolution, therefore, the ordinary rule of treaty law must apply, that unless the treaty or provision concerned expressly indicates some difference or distinction, such phrases as "the parties to the Statute", or "the parties to the present convention", or "the contracting parties", or "the Members of the Organization", apply equally and indifferently to cover all those States which at any given time are participants, whatever the date of their several ratifications, accessions or admissions, etc.

Consequently, since the Court cannot, for reasons already stated, accept the dissolution of the Permanent Court as a cause of lapse or abrogation of any of the jurisdictional clauses concerned, it must hold that the date at which the Respondent became a party to the Statute is irrelevant.

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Certain other considerations serve to reinforce this view; for if it is clear from what was said earlier about the origins of Article 37, that the aim was to be comprehensive, it is equally clear that to admit what may for convenience be called the "dissolution" argument, would not only be to make serious inroads upon that objective, but quite possibly—for all that those who were drafting Article 37 could tell at the time—to defeat almost entirely its intended purpose.

In the period April-June 1945, it was impossible to forecast when the Permanent Court would be dissolved, or when—or on the basis of how many ratifications—the Charter of the United Nations would come into force. Circumstances delaying the latter event, or causing it to occur on the basis of only a relatively small number of ratifications, might have given rise to a situation in which, if the "dissolution" argument were correct, many, or possibly even most, of the jurisdictional clauses concerned would have fallen outside the scope of Article 37, a result which must have been contrary to what those who framed this provision intended. It was suggested in the course of the oral hearing that these possibilities, had they threatened to materialize, could and would have been avoided by taking steps to postpone the dissolution of the Permanent Court. This however serves only to show what the real intentions of Article 37 must have been—namely to make any such postponement unnecessary because, whatever the date of the coming into force of the Charter, or of the dissolution of the Permanent Court, and whatever the date at which a State became a party to the Statute, Article 37 would ensure in advance the preservation of the relevant jurisdictional clauses, by causing them to confer competence on the present Court, as between parties to its Statute. This was its purpose.

* * *

It has been objected that the view set forth above leads, in such a case as that of the Respondent Government, to a situation in which the jurisdictional clause concerned, even if in existence, is necessarily inoperative and cannot be invoked by the other party to the treaty containing it; and then, after a gap of years, suddenly it becomes operative again, and can be invoked as a clause of compulsory jurisdiction to found proceedings before the Court. It is asked whether, in these circumstances, any true consent can be said to have been given by the Respondent Government to the exercise of jurisdiction by the Court in this class of case.

Noting in passing that this situation results from the act of the Respondent itself in applying for membership of the United Nations

which, upon admission, entailed, by virtue of Article 93, paragraph 1, of the Charter of the United Nations, becoming a party to the Statute, the Court would observe that the notion of rights and obligations that are in abeyance, but not extinguished, is perfectly familiar to the law and represents a common feature of certain fields.

In this connection, and as regards the whole question of consent, the Court considers the case of the reactivation of a jurisdictional clause by virtue of Article 37 to be no more than a particular case of the familiar principle of consent given generally and in advance, in respect of a certain class of jurisdictional clause. Consent to an obligation of compulsory jurisdiction must be regarded as given *ipso facto* by joining an international organization, membership of which involves such an obligation, and irrespective of the date of joining. In consequence, States joining the United Nations or otherwise becoming parties to the Statute, at whatever date, knew in advance (or must be taken to have known) that, by reason of Article 37, one of the results of doing so would, as between themselves and other parties to the Statute, be the reactivation in relation to the present Court, of any jurisdictional clauses referring to the Permanent Court, in treaties still in force, by which they were bound. It is the position maintained by the Respondent Government which would create inequality, and discriminate in favour of those entering the United Nations, or otherwise becoming parties to the Statute, after April 1946, particularly as regards the obligations contained in the jurisdictional clauses of important general multilateral conventions, thus giving rise to just the kind of anomaly Article 37 was intended to avoid.

The Respondent Government, in the course of the diplomatic correspondence preceding the original proceedings before the Court, and in particular in the Notes exchanged in the period May 1957 to February 1958, implicitly recognized the competence of the Court for the purposes of Article 17 (4) of the 1927 Treaty, and challenged the right of the Applicant Government to resort to the Court only on grounds connected with the third and fourth Preliminary Objections in the present case. It did not demur when the Applicant stated that the International Court of Justice had been substituted for the Permanent Court in Article 17 (4) of the Treaty. It did not even broach the possibility that there might be a question as to the competence of the Court *qua* forum. If this attitude was based on the assumption that Article 37 of the Statute—by which the Respondent had by then become bound—conferred jurisdiction on the Court (an assumption the correctness of which the reasoning of the decision in the *Israel* v. *Bulgaria* case might appear to call in question), then the present finding of the Court, that this assumption was in fact correct, operates to restore the basis on which the Respondent itself appears originally to have recognized the same thing.

* * *

The Court has thought it desirable to base itself up to this point wholly on considerations relating to Article 37 of the Statute which, in its opinion, would (in the absence of any relevant special factor) be applicable to the case of all the jurisdictional clauses in the treaties and conventions to which Article 37 applies. In the case of treaties having the character of the Hispano-Belgian Treaty of 1927, however, there are special features which afford additional support for the conclusions arrived at on the basis of Article 37 alone.

Article 17 (4) of the Treaty was discussed between the Parties in the course of the written and oral proceedings, largely in relation to the question of its "severability" from the rest of the Treaty. Into this question, which has implications reaching far beyond the scope of the present case, the Court does not consider it necessary to go. What must be true, on any view of the matter, is that Article 17 (4) is an integral part of the Treaty as a whole ; and its judicial fate cannot be considered in isolation.

It is at this point necessary to note that Article 17 (4), the relevant terms of which are cited above, had as its primary object in the scheme of the 1927 Treaty, what was more a matter of mechanics—namely to indicate in what circumstances, and at what precise point in the attempt to dispose of the dispute, either party would have the right to take the matter to the Court. This right was to be exercisable if the (optional) conciliation procedure provided for by the Treaty had not been made use of, or had failed ; and if agreement had not been reached within a certain period on the terms of a *compromis* for the submission of the dispute by mutual consent to the Court or to arbitration ; and if, thereupon, a month's notice was given of the intention to take the matter to the Court unilaterally.

The basic obligation to submit to compulsory adjudication, however, was and is carried by two other provisions of the Treaty, namely Article 2, and the first paragraph of Article 17. The relevant paragraph of Article 2 reads as follows :

[Translation]

> "All disputes of every kind between the High Contracting Parties with regard to which the Parties are in conflict as to their respective rights, and which it may not have been possible to settle amicably by the normal methods of diplomacy, shall be submitted for decision to an arbitral tribunal or to the Permanent Court of International Justice."

The Treaty then goes on to provide for the conciliation procedure, and continues in Article 17 (1) to reaffirm the essence of Article 2 as follows :

[Translation]

> "In the event of no amicable agreement being reached before the Permanent Conciliation Commission, the dispute shall be submitted either to an Arbitral Tribunal or to the Permanent Court of International Justice, as provided in Article 2 of the present Treaty."

In the light of these provisions, it would be difficult either to deny the seriousness of the intention to create an obligation to have recourse to compulsory adjudication—all other means of settlement failing—or to assert that this obligation was exclusively dependent on the existence of a particular forum, in such a way that it would become totally abrogated and extinguished by the disappearance of that forum. The error of such an assertion would lie in a confusion of ends with means—the end being obligatory judicial settlement, the means an indicated forum, but not necessarily the only possible one.

This double aspect appears particularly clearly on the basis of the several jurisdictional clauses of the 1927 Treaty, taken as a whole; and these considerations furnish the answer to the contention that the obligation of compulsory adjudication in the Treaty was so indissolubly bound up with the indication of the Permanent Court as the forum, as to be inseparable from it, and incapable of continued existence in the absence of that Court. On the very language of Articles 2 and 17 (1), this is not the case. An obligation of recourse to judicial settlement will, it is true, normally find its expression in terms of recourse to a particular forum. But it does not follow that this is the essence of the obligation. It was this fallacy which underlay the contention advanced during the hearings, that the alleged lapse of Article 17 (4) was due to the disappearance of the "object" of that clause, namely the Permanent Court. But that Court was never the substantive "object" of the clause. The substantive object was compulsory adjudication, and the Permanent Court was merely a means for achieving that object. It was not the primary purpose to specify one tribunal rather than another, but to create an obligation of compulsory adjudication. Such an obligation naturally entailed that a forum would be indicated; but this was consequential.

If the obligation exists independently of the particular forum (a fact implicitly recognized in the course of the proceedings, inasmuch as the alleged extinction was related to Article 17 (4) rather than to Articles 2 or 17 (1)), then if it subsequently happens that the forum goes out of existence, and no provision is made by the parties, or otherwise, for remedying the deficiency, it will follow that the clause containing the obligation will for the time being become (and perhaps remain indefinitely) inoperative, i.e., without possibility of effective application. But if the obligation remains substantively in existence,

though not functionally capable of being implemented, it can always be rendered operative once more, if for instance the parties agree on another tribunal, or if another is supplied by the automatic operation of some other instrument by which both parties are bound. The Statute is such an instrument, and its Article 37 has precisely that effect.

Accordingly, "International Court of Justice" must now be read for "Permanent Court of International Justice" in Articles 2 and 17 of the Treaty. The same applies in respect of Article 23, under which the Court is made competent to determine any disputed question of interpretation or application arising in regard to the Treaty; and similar substitutions in Articles 21 and 22 would follow consequentially.

* * *

SECOND PRELIMINARY OBJECTION (SUBSIDIARY ASPECT)

The Respondent Government also advanced a subsidiary plea in relation to its second Preliminary Objection, which requires to be considered only if the Court should reject the objection in its principal aspect. Since the Court does reject it, it must now consider this subsidiary plea. This was to the effect that the dissolution of the Permanent Court having extinguished Article 17 (4) of the 1927 Treaty, or at any rate deprived it of its force, then if (contrary to the principal contention of the Respondent) Article 37 of the Statute operated to re-activate this clause upon Spain's admission to the United Nations in December 1955, what in consequence came into existence at that date was a new or revised obligation between the Parties; and that just as the original obligation only applied to disputes arising after the Treaty date, so the new or revised obligation could only apply to disputes arising after the date of Spain's admission to the United Nations, creative of that obligation. Since the dispute had in fact arisen previous to that date, it was accordingly not covered; or could only be regarded as covered by a retroactive application of the obligation which its terms, as they must now be deemed to stand, excluded.

In the Respondent's written Preliminary Objections, what was postulated as emerging in 1955 was not merely a new jurisdictional obligation but a whole new "treaty". In the Respondent's Final Submissions, however, as lodged at the end of the oral hearing, what was referred to was a "revised" Article 17 (4) of the 1927 Treaty. It is in fact clear that no new Treaty as such could have emerged in 1955, because it was common ground in the case that, apart from the question of Article 17 (4), the Treaty of 1927 had never ceased to be in force, and had been operative throughout. At the most, therefore, what might have happened in 1955 was that the Treaty was amended by the inclusion in it of a new or revised jurisdictional clause, providing

for a reference to the International Court of Justice instead of to the former Permanent Court. However, as the Respondent's Submissions recognize, the limitation *ratione temporis* regarding the cases which were justiciable under the Treaty was contained in, or arose from Articles 1 and 2, and from the Final Protocol to the Treaty. As these provisions had *ex hypothesi* never ceased to be in force, they would have applied automatically to any new or revised obligation when the latter arose. This must have been so, for otherwise the revised Treaty would have contained two independent and incompatible sets of requirements *ratione temporis*; but in truth, it continued to contain only one set, since the "revised" obligation (as stated in the Respondent's Final Submissions) related to Article 17 (4), which itself contained no requirement *ratione temporis*, while the "revision" related only to the substitution of the present for the former Court. It follows that any new or revised obligation could only operate *ratione temporis* in the same way as the original one, and therefore it must cover all disputes arising after the Treaty date.

However, it is not necessary to rely on this conclusion, for in the opinion of the Court, the grounds on which the second Preliminary Objection has been rejected in its principal aspect, necessarily entail its rejection in its subsidiary aspect also. These grounds are that the basic obligation to submit to compulsory adjudication was never extinguished by the disappearance of the Permanent Court, but was merely rendered functionally inoperative by the lack of a forum through which it could be implemented. What therefore happened in 1955, when this *lacuna* was made good by Spain's admission to the United Nations, was that the operation of the obligation revived, because the means of implementing it had once more become available; but there was neither any new creation of, nor revision of the basic obligation. Its operation having revived, by virtue of Article 37 of the Statute, this obligation could only function in accordance with the terms of the Treaty providing for it, as the Parties must be deemed to have intended, and it consequently continued to relate (as it always had done) to any disputes arising after the Treaty date.

Alternatively, to refer to another part of the grounds on which the objection in its principal aspect was rejected, once Article 37 was applicable, the Court became, in the language of that provision, competent as between parties to the Statute to adjudicate on any matter which, under a treaty or convention in force, would have fallen to be referred to the Permanent Court had it still existed and had Article 37 never been framed. The present case is such a matter.

For the reasons given, therefore, the Court rejects the second Preliminary Objection both in its principal and in its subsidiary aspects.

* * *

THIRD AND FOURTH PRELIMINARY OBJECTIONS

Having decided, in rejecting the first Preliminary Objection, that the discontinuance of the original proceedings did not bar the Applicant Government from reintroducing its claim, and having determined, in rejecting the second Preliminary Objection, that the Court has jurisdiction to entertain the Application, the Court has now to consider the third and fourth Preliminary Objections which involve the question of whether the claim is admissible.

In considering whether these Preliminary Objections should be upheld, the Court recalls the fact that the Applicant has submitted alternative pleas that these objections, unless rejected by the Court, should be joined to the merits. It will therefore be appropriate at this point to make some general observations about such joinders. These are effected under Article 62, paragraph 5, of the Rules of Court, which reads as follows :

> "After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings."

Since this paragraph repeats verbatim the like provision in the 1936 Rules of the Permanent Court of International Justice, it is pertinent to take note of the various reasons which that Court gave for deciding to join a preliminary objection to the merits.

In the *Pajzs, Csáky, Esterházy* case (*Hungary* v. *Yugoslavia*), the Court, on 23 May 1936, issued an Order joining the Yugoslav objections to the merits because "the questions raised by the first of these objections and those arising out of the appeal as set forth in the Hungarian Government's submissions on the merits are too intimately related and too closely interconnected for the Court to be able to adjudicate upon the former without prejudging the latter" ; and because "the further proceedings on the merits ... will place the Court in a better position to adjudicate with a full knowledge of the facts upon the second objection" (*P.C.I.J., Series A /B, No. 66*, p. 9).

Shortly after this, in the *Losinger* case, the Court, in an Order dated 27 June 1936, stated with reference to a plea to the jurisdiction made in that case, that such a plea "may be regarded ... as a ... defence on the merits, or at any rate as being founded on arguments which might be employed for the purposes of that defence". Consequently,

> "the Court might be in danger, were it to adjudicate now upon the plea to the jurisdiction, of passing upon questions which appertain to the merits of the case, or of prejudging their solution".

Therefore, the Court concluded, the objection to the jurisdiction should be joined to the merits, so that "the Court will give its decision upon it, and if need be, on the merits, in one and the same judgment". The Court went on to say in regard to another objection, relating to the admissibility of the suit, that "the facts and arguments adduced for or against the two objections are largely interconnected and even, in some respects, indistinguishable". Accordingly, this objection also was joined to the merits (*P.C.I.J., Series A/B, No. 67*, pp. 23-24).

In the *Panevezys-Saldutiskis Railway* case, the Court, in its Order of 30 June 1938, joining two preliminary objections to the merits, said that—

> "at the present stage of the proceedings, a decision cannot be taken either as to the preliminary character of the objections or on the question whether they are well-founded ; any such decision would raise questions of fact and law in regard to which the Parties are in several respects in disagreement and which are too closely linked to the merits for the Court to adjudicate upon them at the present stage".

Two further reasons which were given were that—

> "if it were now to pass upon these objections, the Court would run the risk of adjudicating on questions which appertain to the merits of the case or of prejudging their solution"

and that—

> "the Court may order the joinder of preliminary objections to the merits, whenever the interests of the good administration of justice require it" (*P.C.I.J., Series A/B, No. 75*, pp. 55-56).

The present Court has been guided by like considerations in the two cases in which it has had occasion to join the preliminary objections to the merits. In the case of *Certain Norwegian Loans*, the Court, on the basis of an understanding between the Parties to that effect, joined the preliminary objections to the merits "in order that it may adjudicate in one and the same judgment upon these Objections and, if need be, on the merits" (*I.C.J. Reports 1956*, p. 74).

In the case concerning *Right of Passage over Indian Territory*, the Court found that both the elucidation of the facts, and the legal effect or significance of certain practices and circumstances, would be involved in pronouncing on one of the preliminary objections, and that the Court could therefore not pronounce upon it "without prejudging the merits". In regard to another objection, the Court said that "having

heard conflicting arguments" it was "not in a position to determine at this stage" certain issues which had been raised. It further found that in regard to certain other questions, it was not "in possession of sufficient evidence to enable it to pronounce on these questions", and that to attempt an evaluation of certain factors involved, "although limited to the purposes of the Sixth Preliminary Objection, would entail the risk of prejudging some of the issues closely connected with the merits" (*I.C.J. Reports 1957*, pp. 150-152).

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The Permanent Court of International Justice drew attention to an important aspect of the matter when, as mentioned above, it said that "the Court may order the joinder of preliminary objections to the merits, whenever the interests of the good administration of justice require it". But the safeguarding of the rights of respondent States is equally an essential part of "the good administration of justice", and it is in the interests of the respondents that the Rules of Court should contain Article 62 permitting the filing of preliminary objections. It must not be overlooked however, that respondents are given broad powers by this provision, since merely by labelling and filing a plea as a preliminary objection they automatically bring about the suspension of the proceedings on the merits (paragraph 3 of Article 62). This assures the respondent State that the Court will give consideration to its objection before requiring it to respond on the merits ; the Court takes no further step until after hearing the parties (paragraph 5 of Article 62—see the discussion on this point by the Permanent Court in 1936, *P.C.I.J., Series D, Third Addendum to No. 2*, pp. 646-649). The attitude of the respondent State is however only one of the elements that the Court may take into consideration ; and paragraph 5 of the Article simply provides that, after the hearing, "the Court shall give its decision on the objection or shall join the objection to the merits".

In reaching its conclusion, the Court may decide that the objection does not in fact have a preliminary character, and that therefore, without prejudice to the right of the respondent State to raise the same question at another stage of the proceedings, if such there be, the objection cannot be entertained as a "preliminary objection". Again, the Court may find that the objection is properly a preliminary one as, for example, to the jurisdiction of the Court, and it may dispose of it forthwith, either upholding it or rejecting it. In other situations, of which examples are given in the cases referred to above, the Court may find that the objection is so related to the merits, or to questions of fact or law touching the merits, that it cannot be considered separately without going into the merits (which the Court cannot do while proceedings on the merits stand suspended under Article 62), or without prejudging the merits before these have been fully argued. In these latter situations, the Court will join the preliminary objection to the

merits. It will not do so except for good cause, seeing that the object of a preliminary objection is to avoid not merely a decision on, but even any discussion of the merits. On the other hand, a joinder does not in any respect indicate that the objection has been ignored. Indeed, as happened in the case of *Certain Norwegian Loans*, the Court, at the stage of the merits, to which the objections had been joined, upheld an objection to the jurisdiction, and therefore did not adjudicate upon the merits at all.

The Court will proceed to consider the third and fourth Preliminary Objections with these considerations in mind.

* * *

By its third Preliminary Objection the Respondent Government denies the *jus standi* of the Applicant Government in the present proceedings, and its legal capacity to protect the Belgian interests on behalf of which it claims, the Belgian national character of most of these being also contested. The grounds of the objection can be stated in various ways, but briefly its main basis is that the acts complained of, said to engage the international responsibility of the Respondent Government, took place not in relation to any Belgian natural or juristic person but to the Barcelona Traction company, which is a juristic entity registered in Canada, the Belgian interests concerned being in the nature of shareholding interests in that company. In these circumstances, it is contended that (citing a passage from the Respondent's final Submissions) "international law does not recognize, in respect of injury caused by a State to a foreign company, any diplomatic protection of shareholders exercised by a State other than the national State of the company". Hence, it is said, no claim can be made by the Applicant Government. The latter, for its part, contests the view of international law thus put forward, and asserts its right to intervene on behalf of Belgian nationals, shareholders in the company.

Put as stated above, the objection evidently has a preliminary character or aspect. But it can also be put in another way, which does not directly raise the question of the Applicant Government's *jus standi*—or does so only at one remove. It can be asked whether international law recognizes for the shareholders in a company a separate and independent right or interest in respect of damage done to the company by a foreign government; and if so to what extent and in what circumstances and, in particular, whether those circumstances (if they exist) would include those of the present case. Put in this way, the question appears as one not simply of the admissibility of the claim, but of substantive legal rights pertaining to the merits which are not confined solely to such matters as whether the acts complained of took place, and if so what their legal effect was, internationally:

or rather, this latter question itself constitutes the greater part of the real issue in this case, and pertains to the substantive legal merits. In short, the question of the *jus standi* of a government to protect the interests of shareholders as such, is itself merely a reflection, or consequence, of the antecedent question of what is the juridical situation in respect of shareholding interests, as recognized by international law. Where, in a case such as the present one, a government is not merely purporting to exercise diplomatic protection, but to make a claim before an international tribunal, it necessarily invokes rights which, so it contends, are conferred on it in respect of its nationals by the rules of international law concerning the treatment of foreigners. Hence the question whether international law does or does not confer those rights is of the essence of the matter. In short, a finding by the Court that the Applicant Government has no *jus standi*, would be tantamount to a finding that these rights did not exist, and that the claim was, for that reason, not well-founded in substance.

If the Court were to take the view that the issues raised by the Respondent's third Preliminary Objection had no other character than that of substantive issues relating to the merits, it would have to declare the objection irreceivable as such, and the issues it involved as being part of the merits. Since however the objection clearly has certain aspects which are of a preliminary character, or involves elements which have hitherto tended to be regarded in that light, the Court will content itself with joining the objection to the merits.

By way of illustration of the sort of situation which the Court considers to exist here, in regard to the question of joinder—and it is not suggested that there are any other analogies—it may be recalled that when in the *Panevezys-Saldutiskis Railway* case the Permanent Court joined two preliminary objections to the merits, it said in its Order of 30 June 1938 that at the preliminary stage it could not even decide "as to the preliminary character of the objections" (*P.C.I.J., Series A /B, No. 75*, p. 56) ; and subsequently on the merits said that :

> "Though it is true that an objection disputing the national character of a claim is in principle of a preliminary character, this is not so in the actual case before the Court" (*P.C.I.J., Series A /B, No. 76*, p. 17).

It is evident that certain kinds of objections (of which the second Objection in the present case affords an example) are so unconnected with the merits that their wholly preliminary character can never be in doubt. They could arise in connection with almost any set of facts imaginable, and the Court could have neither reason nor justification for not deciding them at once, by way either of acceptance or rejection. Any such clear cut situation is, however, far from existing as regards

the third Preliminary Objection in the present case, and the same thing is even more true of the fourth Objection.

The third Objection involves a number of closely interwoven strands of mixed law, fact and status, to a degree such that the Court could not pronounce upon it at this stage in full confidence that it was in possession of all the elements that might have a bearing on its decision. The existence of this situation received an implicit recognition from the Parties, by the extent to which, even at this stage, they went into questions of merits, in the course of their written and oral pleadings. Moreover, it was particularly on behalf of the Respondent that it was sought to justify the process of discussing questions of merits, as involving matters pertinent to or connected with the third and fourth Objections, which the Respondent had itself advanced.

The Court is not called upon to specify which particular points, relative to the questions of fact and law involved by the third Objection, it considers an examination of the merits might help to clarify, or for what reason it might do so. The Court will therefore content itself by saying that it decides to join this objection to the merits because—to quote the Permanent Court in the *Pajzs, Csáky, Esterházy* case (*P.C.I.J., Series A /B, No. 66,* at p. 9)—"the ... proceedings on the merits ... will place the Court in a better position to adjudicate with a full knowledge of the facts" ; and because "the questions raised by ... these objections and those arising ... on the merits are too intimately related and too closely interconnected for the Court to be able to adjudicate upon the former without prejudging the latter".

* * *

As regards the fourth Preliminary Objection, the foregoing considerations apply *a fortiori* for the purpose of requiring it to be joined to the merits ; for this is not a case where the allegation of failure to exhaust local remedies stands out as a clear-cut issue of a preliminary character that can be determined on its own. It is inextricably interwoven with the issues of denial of justice which constitute the major part of the merits. The objection of the Respondent that local remedies were not exhausted is met all along the line by the Applicant's contention that it was, *inter alia,* precisely in the attempt to exhaust local remedies that the alleged denials of justice were suffered. This is so obvious on the face of the pleadings, both written and oral, that the Court does not think it necessary to justify it further at this stage, by any statement or consideration of the events in question, which can be left until the merits are heard.

Accordingly, the Court decides to join the third and fourth Preliminary Objections to the merits.

For these reasons,

THE COURT,

by twelve votes to four,
rejects the first Preliminary Objection ;

by ten votes to six,
rejects the second Preliminary Objection ;

by nine votes to seven,
joins the third Preliminary Objection to the merits ;

by ten votes to six,
joins the fourth Preliminary Objection to the merits.

Done in English and French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fourth day of July, one thousand nine hundred and sixty-four, 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) Percy C. SPENDER,
President.

(Signed) GARNIER-COIGNET,
Registrar.

President Sir Percy SPENDER makes the following declaration :

I concur in the Judgment of the Court. I wish, however, to say a few words on the second Preliminary Objection of the Government of Spain.

Whilst the text of Article 37 of the Court's Statute is quite different to that of Article 36 (5), which was the subject of examination in *Israel* v. *Bulgaria*, and its terms are, in my view, so clear as to admit of no doubt as to their meaning, it is difficult to discern any decisive distinction in principle between Article 36 (5) and Article 37 in relation to the cardinal questions raised by the second Preliminary Objection.

For my part, for reasons which appear in the Joint Dissenting Opinion in *Israel* v. *Bulgaria*, to which I continue to adhere, I would, apart from other considerations referred to in the Court's Judgment, be compelled to reject this Preliminary Objection.

Judge SPIROPOULOS makes the following declaration :

I regret that I am unable to share the view of the Court in regard to the second, third and fourth Preliminary Objections.

As to the second Preliminary Objection, my position is determined by the Court's Judgment in the case concerning the *Aerial Incident* (*Israel* v. *Bulgaria*). Starting from the concept that the purpose of Article 37 of the Statute of the Court is the same as that of Article 36, paragraph 5, and basing myself on the considerations of the Judgment in question, I consider that the Court should have found that it is without jurisdiction.

As to the third Preliminary Objection, I think the Court should have considered as relevant the arguments on which the Spanish Government founds its third Preliminary Objection.

Judge KORETSKY makes the following declaration :

I agree with the Judgment and its reasoning. I venture to make some additional observations as regards the first Preliminary Objection.

Much has been said in the written documents and in the oral proceedings about discontinuance of the action *(désistement d'action)* and discontinuance of the proceedings *(désistement d'instance)*. But this dichotomy is unknown to the Rules of Court. Articles 68 and 69 know only discontinuance of the proceedings in its two possible forms—either by mutual agreement of the parties (Article 68), or by unilateral declaration of the applicant (Article 69).

Under Article 68 the parties inform the Court in writing either that they have concluded an agreement as to the settlement of the dispute *or* that they are not going on with the proceedings, whilst under Article 69 the applicant informs the Court that it is not going on with the proceedings. In either case the Court directs the removal of the case from its list. Under Article 68 however it officially records the conclusion of the settlement or the mutual agreement to discontinue, whilst under Article 69 it officially records the discontinuance of the proceedings.

The conclusion of a settlement is not the discontinuance of an action (if one tried to understand the latter expression as the abandonment of a substantive right), for a settlement is usually the realization of a right which was in dispute. A dispute may subsequently arise in connection with the implementation of this settlement giving rise (possibly) to new proceedings.

It is to be recalled that the heading for Articles 68 and 69 is "Settlement and Discontinuance". At the time of the deliberations on the Rules of Court in 1935 Judge Fromageot (*P.C.I.J., Series D, Acts and*

Documents concerning the Organization of the Court, Third Addendum to No. 2, pp. 313 *et seq.*) said that he "wished to change the heading of the whole section. The word 'agreement' was not sufficiently explicit as an indication of its contents." He was of the opinion that the section should have been headed: "Settlement *and* abandonment of proceedings."

The emphasis on the settlement of the dispute in Article 68 and in the heading of the section was to all appearances not accidental. Generally speaking, the main task of the Court is to *settle* disputes between States. Article 33 of the Charter in the section headed "Pacific settlement of disputes" provides that "the parties to any dispute ... shall ... seek a solution by [among the peaceful means mentioned there] judicial *settlement*".

In Article 68 settlement occupies the first position. In the light of the Court's task in the settlement of disputes, we have to resolve the procedural questions in this case, especially the question of the consequences of the discontinuance of the proceedings, the question of the permissibility of a reinstitution of the proceedings after discontinuance.

The discontinuance of the proceedings in this case was in a sense a conditional one. Though the Belgian Government made no reservation of its substantive rights the conditionality of the discontinuance is evident. One may consider this conditionality as tacit (from a formal point of view), implied, but the documents show that a withdrawal of the proceedings instituted before the Court was demanded of Belgium as a precondition for the opening of negotiations proper (Preliminary Objections, Introduction, paragraph 4, and Observations, paragraph 25); it was then evident that the demand was related to Belgium's Application to the Court, but not to the substantive right, about which the proceedings were instituted. About what then was it intended to carry on negotiations if it be considered that the Belgian Government, by the withdrawal of its Application, decided not to remove an obstacle to promising negotiations but to abandon even its (and its nationals') substantive rights? If no substantive rights existed there would be no subject for negotiations. And we may conclude that discontinuance of the proceedings does not involve an abandonment of a corresponding substantive right. Discontinuance even by mutual agreement is not necessarily a *pactum de non petendo*, which supposes not only discontinuance of a given action but an obligation not to sue at all, which is tantamount to the abandonment of the claim. And it has not been proved in this case that the renunciation of a substantive right has taken place.

Judge JESSUP makes the following declaration:

I am in full agreement with the Court that no one of the Preliminary Objections could be upheld at this stage, and that the first two must

be rejected now for reasons stated in the Judgment. I am also in accord with what the Court has to say about the general considerations which govern a decision to join a preliminary objection to the merits. I agree that those general considerations require that the third and fourth Preliminary Objections should be joined to the merits. Consequently, in order to be consistent with those general considerations, conclusions of law applicable to arguments involved in those two objections, even though I would find them capable of formulation now, may appropriately be deferred until a subsequent stage of the case.

Vice-President WELLINGTON KOO and Judges TANAKA and BUSTAMANTE Y RIVERO append Separate Opinions to the Judgment of the Court.

Judge MORELLI and Judge *ad hoc* ARMAND-UGON append Dissenting Opinions to the Judgment of the Court.

(Initialled) P.S.
(Initialled) G.-C.