SEPARATE OPINION OF VICE-PRESIDENT WELLINGTON KOO

1. I am in complete agreement with the Court's findings on the first, second and fourth Preliminary Objections and with the general line of reasoning which has led up to them, except on one point in connection with the second Objection which calls for some elucidation on my part. As regards the third Preliminary Objection, I regret to be unable to concur in the Court's conclusion in favour of a joinder to the merits. It is my view that this objection should have been rejected. Accordingly, I propose to state the reasons for my opinion in the two respects.

I

2. The Judgment in referring to the reliance of the Respondent upon the decision of the Court in the *Israel* v. *Bulgaria* case in support of the second Preliminary Objection points out a number of differences between that case and the present one. In so far as this is done for the purpose of making an independent approach to the instant case on its merits, it can be easily understood. But, as I look at it, calling attention to these differences does not imply, nor do they themselves justify an implication of, any justification of the decision in the former case, concerning which my views remain the same as stated in the Joint Dissenting Opinion appended to the Judgment in that case.

3. The differences which have been noted in the present Judgment on the second Preliminary Objection are, in my view, only of an incidental character as regards the point in issue. The two situations arising from Article 36 (5) of the Statute in relation to the Bulgarian declaration of acceptance under Article 36 and from Article 17 (4) of the Hispano-Belgian Treaty of 1927 in relation to Article 37 are basically similar, if not identical, so far as the question of the transfer of the compulsory jurisdiction from the old Court to the new Court is concerned. Both depend upon the factor of being "still in force", independently of the disappearance of the Permanent Court, which was taken for granted. This term, which, as regards declarations of acceptance mentioned in Article 36 (5), was originally drafted in English and rendered in French as "pour une durée qui n'est pas encore expirée", constitutes the requisite condition for the said transfer. As regards Article 37, the condition is in fact the same for it calls for "a treaty or convention in force [which] provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the

Permanent Court of International Justice". The dissolution of both the League and the Court had been known and they were expected to be on their way to disappearance. The purpose of Article 37 and Article 36 (5) is the same : it is to preserve as far as possible the compulsory jurisdiction arrangements in force apart from the expected dissolution of the League and the Court. The form of the instrument in which the compulsory jurisdiction provision is embodied is immaterial. Whether this provision forms the whole subject-matter of a given instrument or is only one of the provisions of a treaty or convention for pacific settlement of disputes by specified bodies, or whether it constitutes a special provision in a general treaty or convention on other matters, is of no decisive importance as regards the transfer of the jurisdiction under Article 37. What matters is that the treaty or convention should in such case continue to be in force. This continuation of validity refers to the instrument as a whole ; so long as the instrument itself remains in force, so long does the provision for compulsory jurisdiction, just as under Article 36 (5) of the new Statute, the declarations of acceptance made under Article 36 of the old Statute, are considered to remain in force so long as the period for which they were made has not expired. Article 17 (4) of the 1927 Treaty, like the Bulgarian declaration of acceptance, may have been temporarily inoperative due to the dissolution of the Permanent Court of International Justice, but this transient factor of inapplicability had been taken for granted and had been the very reason for the provisions of Article 37 just as it had been, in respect of declarations of acceptance under Article 36, for those of Article 36 (5). In other words the whole purpose of both provisions was intended to discount the effect of the dissolution of the old Court and make possible the effective transfer of its compulsory jurisdiction to the new Court.

4. Moreover, on closer examination it will be found that the argument of differentiation between the *Aerial Incident* case and the present case does not explain away the former decision. From the juridical point of view there is really no distinction as regards the principle of transfer from the old Court to the new Court. Only the two sources of the obligation to submit to compulsory jurisdiction are different. In the case of the declarations of acceptance made under Article 36, paragraph 2, of the old Statute, like similar declarations made under the identically numbered provision of the new Statute, their effectiveness depended upon the extent of concordance of the terms between any two given acceptances, having due regard to the respective reservations and limitations on the principle of reciprocity, whereas the jurisdictional clauses, to which Article 37 is applicable, derive from the mutual consent and agreement of the contracting parties in bilateral or multilateral instruments. But the process of the transfer itself and the legal

effect of the transfer once consummated, are the same in both situations, just as the purpose of the two provisions in the Statute in question is identical. Only, in the instant case, as the Judgment has rightly pointed out, the basic obligation of submitting to compulsory adjudication is clearly stipulated in Articles 2 and 17 (1) of the 1927 Treaty just as in Article 23 in respect of "any disputes arising as to the interpretation of execution of the present Treaty", while the provision of Article 17 (4) is of a functional character as regards the tribunal for such adjudication, as is also the case in respect of the tribunal mentioned in Articles 21 and 22 for the determination of certain matters.

5. Such being the situation in the instant case, the difference in legal effect, if any, is one of degree as regards the validity or strength of the source of the obligation and not one of kind. For this reason there is even greater justification to uphold the validity of the transfer of the compulsory jurisdiction under Article 37 than under Article 36, paragraph 5. It does not warrant any implication that the decision in the *Aerial Incident* case was equally justifiable in law.

II

6. The third Preliminary Objection undoubtedly raises important questions of law and fact. In principle I fully endorse judicial caution as a sound policy in the interest of good administration of justice and the Court certainly has full discretionary power to decide on a joinder for good reasons, as the Court has affirmed in the present Judgment.

7. In the instant case I am, however, of the opinion that this objection could and should have been adjudicated upon. The elaborate written pleadings and the lengthy oral hearing have brought out clearly and almost exhaustively the various issues involved and the searching, though conflicting, arguments of the two Parties. While the Applicant has asked the Court, as the alternative to dismissal, to join the third Preliminary Objection to the merits, the Respondent has urged that the issue raised by it "is wholly ripe for decision" and that the alternative Belgian request for the joinder of this objection to the merits cannot be justified.

8. In the light of the submissions of the Parties on the third Preliminary Objection, two principal questions are involved at the outset: *(a)* one of law and *(b)* one of fact, the other issues raised being subordinate to and dependent upon the answers to the two questions for their solution. The question of law can be stated thus: does international law recognize the right of a State to protect its nationals,

natural or juristic persons, being shareholders in a foreign company, for damage or injury to them through an internationally illicit act done to the company by a third State? And the question of fact centring on two crucial points : are the shares in Barcelona Traction registered on its books in the name of nominees of American nationality and claimed by the Applicant as belonging to natural and juristic persons of Belgian nationality found *prima facie* to be owned by them, and have these persons sustained damage through damage caused to the said company by internationally wrongful acts, measures or omissions of the organs of the Respondent Government?

9. If the answer to the question of law is found to be in the negative and nevertheless the facts and circumstances of the case appear to be weighty and serious, judicial caution and sound administration of justice would dictate a joinder to the merits in order to make two determinations at the second phase of the proceedings, if it should finally take place. First, to determine whether the facts and circumstances of the instant case are juridically adequate to constitute a valid ground for recognizing the Applicant's capacity or *jus standi* before the Court. If they are found to be inadequate for the purpose, the claim of the Applicant must be held to be inadmissible and the third Preliminary Objection must be sustained. If they are found to be adequate, it would then be in order to make the second determination, namely whether the facts and circumstances of the instant case are of such a particular character as to warrant the finding by the Court of another exception to the existing recognized rule of protection of a company only by its national State.

10. If, on the other hand, the answer to the same question of law is found to be in the affirmative and the essential facts alleged by the Applicant constitute *prima facie* a valid ground for recognizing its capacity, a *jus standi* in the instant case, the said objection must be rejected at the present stage of the proceedings. Such a finding, however, would still leave it open to the Respondent at the later phase of the proceedings on the merits, if it should finally take place, to refute and disprove the alleged facts by counter-evidence. If the Respondent, in the opinion of the Court, succeeds in the task, a finding will of course be made to reject the Applicant's claim on the merits.

11. In brief, the primary question of law raised by the third Preliminary Objection consists in determining first of all whether under modern international law there exists a general right on the part of a State to protect its nationals, shareholders in a foreign company, vis-à-vis a third State independently of the general rule of protection by States of their national companies and of the recognized exception to it as noted above. It centres on the point whether modern inter-

national law sanctions such a general right of intervention as claimed by the Applicant on behalf of Belgian shareholders. I propose now to consider this question.

A

12. The introduction of the concept of private legal entities in international law in the form of corporate bodies is a natural sequel to its emergence in municipal law. Since there are almost as many different kinds of corporate entities as there are different systems of municipal law under which they are constituted and since their activities have been growing in complexity as well as in kind, the problem of protecting their legitimate interests in international law has been assuming increasing importance as well as endless complexity.

13. This idea of protection is fundamental and appears to be common ground between the two schools of advocates on the subject. Their difference of view relates to the manner and extent of its implementation in international law. What is pertinent to the question under consideration, however, is to determine which is the more reasonable and practical view as regards protection of the shareholders by their national State in a foreign company. Should this protection be confined to the shareholders in a foreign company which is of the nationality of the "offending State"? Should it be limited again to such a case where the said foreign company has been dissolved or is practically defunct? Should there be an additional requirement that the said shareholders must be owners of a majority of the total number of shares of the company or at least a substantial proportion of them? What is the criterion for constituting a substantial proportion? Or what is the bearing and effect of the attitude of the State, the nationality of which is possessed by the company, upon the right of the national State of its shareholders to protect their interests? Has it intervened or has its intervention been energetic or not?

14. I am inclined to think that while the positive answers to them may be interesting or useful, they do not constitute essential elements to a general rule of protection of the national shareholders of the intervening State (still less to the particular issue under consideration).

15. Foreign investments constitute one form of property, rights or interests, and as such are in principle entitled to the protection of international law. Since the kinds and methods of such investment are numerous and varied, and since they are still in the process of expansion and development, it is inevitable that at the present stage of their evolution new circumstances and unfamiliar features will be encountered in the protection of such rights and interests in the inter-

national field. But in essence they all fall within the compass of the general rule of diplomatic and judicial protection of international law. What is really involved is the basic principle of protection, which has been so clearly affirmed by the Permanent Court of International Justice in the *Mavrommatis* case when it declared :

> "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels[1]."

Moreover, international law, which is primarily founded on the generally recognized principles of law and justice, attaches less importance to form and appearance than municipal law. Where it is a question of protection of property, rights and interests, it is the proper function of international law to ascertain where and to what extent they exist, and to accord recognition to realities rather than to forms and appearance. As stated by this Court in the *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949* "throughout its history, the development of international law has been influenced by the requirements of international life ...[2]". Max Huber, Rapporteur on British claims against Spain in the Spanish Zone of Morocco, observed :

> "... Malgré le fait que beaucoup de systèmes de droit admettent l'existence indépendante de sociétés en nom collectif, la jurisprudence prépondérante des tribunaux reconnaît la possibilité de distinguer entre les parts contributives des sociétaires, d'un côté, et la société même de l'autre. Le droit international qui, dans ce domaine, s'inspire essentiellement des principes de l'équité, n'a établi aucun critère formel pour accorder ou refuser la protection diplomatique à des intérêts appartenant à des personnes de nationalité différente...[3]"

16. The right of a State to protect a company which possesses its nationality by diplomatic intervention or by recourse to international judicial settlement against another State for wrongful acts toward the company involving its international liability is generally recognized by international law. This rule is evidently derived by analogy from the principle that—

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[1] *P.C.I.J., Series A, No. 2*, p. 12.
[2] *I.C.J. Reports 1949*, p. 178.
[3] Quoted by John Thomas Miller Jr., *Du traitement par les gouvernements des intérêts étrangers dits substantiels des sociétés*, 1950, p. 82.

> "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure in the person of its subjects, respect for the rules of international law[1]."

But this analogy, by the very nature of the corporate personality, is only approximate and cannot be pushed too far. It has been generally accepted because it facilitates protection abroad by its so-called national State. But it could not have been, and was obviously not intended to be, an all-in-all prescription for the protection of the various categories of rights and interests embodied in a corporate entity, the owners of which often have several different nationalities. Moreover, as a matter of fact, even in municipal law the shareholders are entitled, in certain circumstances, to take action in their own names in respect of injuries to a corporate entity. This principle is not only to be found in the decisions of the English and United States courts but is also recognized in the jurisprudence and law of associations under the Continental system[2].

17. As the concept of corporate personality has become more complex and the activities of modern private corporations of different kinds have rapidly grown in variety and range, often extending to the territories of many States with different municipal law systems, their organization has taken on many forms of structure with an increasing number of constituent and associated elements. They often have subsidiaries with varying degrees of ownership and different classes of shareholders with differentiated rights of voting and sharing in the profits or dividends. Because of this fact of rapid growth and development of modern joint stock companies and corporations, the problem of their protection has likewise become more complex.

18. In my view the foregoing general considerations are useful to keep in mind when examining the points at issue in respect of the third Preliminary Objection.

19. It may be true, as contended by counsel for the Respondent, that international jurisprudence provides no precedent to support the Applicant's claim of the right of protection of the interests of its nationals, shareholders in a foreign company, against the wrongful acts of a third State done to the company. But it is to be noted that the cases of arbitral awards examined by the Parties were mostly decided several

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[1] *P.C.I.J., Series A, No. 2*, p. 12.

[2] J. Mervyn Jones, "Claims on Behalf of Nationals who Are Shareholders in Foreign Companies", in *British Yearbook of International Law*, 1949, Vol. XXVI, pp. 232-234.

decades ago whereas the progress and development of corporate organization and activities in international commerce and finance have overtaken their applicability and have created new and unprecedented conditions which in turn constantly give rise to hitherto unknown problems in international law for fair and equitable solution.

20. For this reason, the original simple rule of protection of a company by its national State has been found inadequate and State practice, treaty regulation and international arbitral decisions have come to recognize the right of a State to intervene on behalf of its nationals, shareholders of a company which has been injured by the State of its own nationality, that is to say, a State where it has been incorporated according to its laws and therefore is regarded as having assumed its nationality.

21. Whether this recognition may be regarded as an exception to the rule of protection of a company by its own national State or as a supplementary rule of protection of the shareholders of a company is immaterial; nor, in my view, is it a point of great consequence that this recognition is sometimes qualified by the requirement that such protection must be conditioned by the extinction or the practically defunct state of the company in question. The important point to note is that the national State of the shareholders is recognized to have the right to protect them irrespective of whether they are to be regarded merely as beneficial owners of the rights, property and interests of the company or as virtual successors to the defunct or practically defunct company.

22. It is true, as has been contended by the Respondent, that this right of protection has been recognized because the wrongdoing State being the national State of the particular company, there would otherwise be no possibility of redress under international law. But it is equally true that the *raison d'être* of this recognition is to secure redress for the damage caused to the shareholders, and the particular rule allowing only the national State of the company to exercise its protection is set aside, precisely for this predominant purpose of effective protection of the legitimate interests of the shareholders of the company who are nationals of the intervening State. If this is true, it follows that the original rule authorizing only the national State of the company to exercise diplomatic protection of its property, rights and interests is more of the nature of a particular rule for the protection of the company as such rather than a general rule to apply to the protection of all kinds of rights and interests, both individual and corporate, grouped within the juridical entity of the company. This being so,

the national State of the shareholders of a foreign company is *a fortiori*, entitled to exercise protection on their behalf.

23. For convenience sake or as a matter of policy, the national State of the shareholders of a foreign company may leave their protection to the national State of the foreign company to exercise the right of protection on its behalf as a first step. But this right is neither an exclusive right nor a preferential right. There is no fundamental reason why the national State of the shareholders of the company should be denied the right to undertake their protection vis-à-vis the third State having caused damage to the company and consequently to its shareholders. This protection may be undertaken, for the purpose of obtaining redress, either jointly with the national State of the company or simultaneously with and independently of it. It is for the shareholders' national State to determine as a matter of policy what step is to be taken and when it is to be taken for the purpose. It may well be that the action taken by the company's own State is effective in securing redress for the company and therefore also for the shareholders from the State causing the damage to it ; and in that event, the State of the shareholders will see no need to intervene on their behalf. But if the action of the national State of the company is fruitless or if it is disinclined to take steps to protect the company or discontinues its intervention without securing the desired result, there is no good reason why the national State of the shareholders should be precluded from exercising its own right to intervene on their behalf for effective protection.

24. Perhaps in one instance the interests of the shareholders may not be protectable in international law ; that is, if the wrongdoing State is one of which the shareholders of a foreign company so injured are nationals. In such a case it is not only impossible to conceive of an international claim to protect the interests of the shareholders as such against their own State, if they own all the shares of the company, but the said State can also justifiably disclaim international responsibility toward the national State of the injured company on the same ground as that on which the national State of a company injured by itself declines responsibility by affirming that under international law a State cannot, at least in theory, injure itself or claim against itself. For possible protection, the interests of the shareholders would have to depend upon the attitude and effort of the national State of the company in asserting its right of diplomatic intervention in favour of the company as such. For, on the principle stated by the Court in the *Mavrommatis* case in claiming for redress of an injury caused to its nationals by a foreign State, a State is really asserting its own right to ensure respect for international law by the foreign State in the person of its nationals, the national State of the company in question could perhaps insist upon redress being accorded to the injured company so as to repair also the losses to the shareholders by the wrongdoing

national State of the shareholders, but it would be confronted by the argument of lack of genuine interests on its part, to which international law attaches primary importance.

25. However, if there are other shareholders of a different nationality or nationalities from that of the shareholders of the wrongdoing State, the claims of their national States obviously cannot be met with the same refusal to acknowledge international responsibility for its wrongful act.

26. What I have said above shows that the rule of protection of a company by its national State and the rule of protection of its shareholders by their national State are really not, and cannot be, exclusive of each other. These two rights are based on different concepts ; they are different and independent of each other. They co-exist. They are complementary and equally necessary from the standpoint of international law, though the right of a State to protect a company incorporated under its laws is limited to the needs arising from the nature of the corporate personality only[1].

27. The so-called exception, mentioned above, in favour of protection of the shareholders by their national State, to the general rule of protection of a company by its national State, in my view is not an exception. On examination it will be found to be of the nature of a separate rule for the protection of the interests of the shareholders in a foreign company by their national State. It is independent of the first rule and co-exists with it. It is only incidentally by circumstances connected with it. It is different from the right of the national State of the foreign company. Like the latter it flows indirectly from the general right of a State to protect its nationals and their property, rights and interests on the territory of a foreign State. It is a natural corollary of the principles of international law regarding fair treatment by a State of aliens on its territory and diplomatic protection by their national State for redress of wrongful acts committed by the foreign State in breach of its international obligations.

28. For if the rule of protection of a company only by its national State even in respect of the interests of its shareholders were of the nature of a general and absolute rule, then in the case of the injury to a company with foreign shareholders having been caused by its own

[1] See De Visscher (Ch.), "De la protection diplomatique des actionnaires d'une société contre l'Etat sous la législation duquel cette société s'est constituée", in *Revue de droit international et de législation comparée*, 1934, pp. 641-642.

national State, that should be the end of the matter, since it is affirmed that a State cannot incur international liability toward itself. Yet the Respondent admits and agrees that in such a case international liability attaches to the national State of the company for having caused damage to its foreign shareholders through the corporate body, though the wrongful act has been directed to the company only. This recognition of the right of diplomatic protection of a State of its nationals, shareholders in a foreign company, already sanctioned by State practice, international arbitral awards and treaty stipulations, constitutes in fact a rule in application of the general principle of diplomatic protection of nationals by their own State in international law. In other words, the interests of shareholders are recognized by international law as entitled to protection by their national State in the same way as the other property, rights and interests of its nationals are protected.

29. The Respondent has also argued that such dual or multiple protection by the national State of the company and the national State or States of the shareholders will cause inconvenience and even confusion internationally. It is pertinent to cite as an appropriate answer what this Court has stated in the *Reparation for Injuries, Advisory Opinion*, of 1949 when referring to the possibility of competition between the State's right of diplomatic protection and the Organization's right of functional protection, as follows :

> "In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense. . . .
>
> Although the bases of the two claims are different, that does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over[1]."

The argument of confusing multiple protection therefore has no merit.

30. In the present case it will also be relevant to recall that in the early years following the declaration of bankruptcy of Barcelona Traction by the Reus court on 12 February 1948, Canada, the national State of the company, intervened actively to protect its interests. The efforts of the Canadian Government, however, showed a change

[1] *I.C.J. Reports 1949*, pp. 185-186.

of attitude as time went on. By late 1951 the Canadian Secretary of State for External Affairs told the Spanish Consul in Canada that "Canadian interests in this case are so slight that it is of little interest to us"[1]. In a letter of 19 July 1955 replying to Mr. Arthur Dean, attorney for Sidro, who had urged that "a vigorous inquiry" from several ambassadors in Madrid, including the Canadian Ambassador, "would be most helpful in bringing about a favourable result", the Canadian Secretary of State for External Affairs declined to accept the suggestion and stated: "The Canadian Government has not been prepared actually to intervene in this matter to make representations to the Spanish Government as to the measures which ought to be taken toward a settlement[2]."

31. In connection with the issue of the right of a State under international law to protect its nationals, shareholders in a foreign company, against a third State, an incidental question of law has been debated by the Parties in the present case as to whether this right, if it exists, is not limited to legal shareholders but extends to beneficial owners of shares. The question relates to the system of registering the shares of a particular company in its books in the names of the nominees. This is usually authorized by statutory law or sanctioned by commercial practice in the economically more advanced countries where capital for investment abroad as well as at home is more abundant. Technically the registered shareholders are legal owners of the shares so registered, but it would be obviously unjust and incorrect, in the light of the intent and purpose of the municipal law which provides for such a system of registration, which recognizes the equitable title of the beneficial owner, and which as a fact must be taken into consideration by international law, to disregard the interests of the beneficial or real owners, if in the event of the particular company having suffered damage caused by the wrongful acts of a foreign State, the national State of the real owners of the shares in question should be denied the right of protecting them on the international plane, even if the national State of the nominees, who are the registered owners, should decline, for considerations of policy or expediency, to intervene with the wrongdoing State to protect its own nationals, the registered owners of the shares in a given case.

32. International law, being primarily based upon the general principles of law and justice, is unfettered by technicalities and formalistic considerations which are often given importance in municipal

[1] Letter, dated 12 February 1952 from the Belgian Ambassador in Madrid to the Belgian Minister of External Trade, document filed by the Belgian Government on 5 May 1964.

[2] Document filed by the Belgian Government on 5 May 1964.

law. As has already been stated above, the fundamental right of diplomatic intervention of a State to protect its nationals against another State and to seek redress for them for any wrongful act on its part aims generally to protect the genuine interests of its nationals. It is the reality which counts more than the appearance. It is the equitable interest which matters rather than the legal interest. In other words it is the substance which carried weight on the international plane rather than the form.

33. The salient issue of the whole question, from the point of view of international law, is the right of protection of a State of the legitimate interests of its nationals, shareholders in a foreign company, against a wrongdoing third State. In regard to the evolution of a rule of customary international law there always exists the possibility of a difference of opinion as to the degree of uniformity of the facts and the regularity of their occurrence necessary to warrant, on this basis of reasoning, an affirmation of its existence. This is obviously because, in the absence of a generally accepted norm for evaluating the factors, it must depend, to a certain extent, upon a subjective appreciation, both of the recurrence of the same facts and of the rapid development of foreign investments in the international community, in arriving at a conclusion[1]. In my view the evidence placed before the Court has not established the existence of any rule denying recognition of the existence of the interests of shareholders or beneficial owners of shares in a foreign company or prohibiting their protection by their national State or States by diplomatic intervention or recourse to international adjudication. On the contrary there is seen a substantial body of evidence of State practice[2], treaty arrangements[3] and arbitral decisions[4] to warrant the affirmation of the inexplicit existence of a rule under international law recognizing such a right of protection on the part of any State of its nationals, shareholders in a foreign company, against another wrongdoing State, irrespective of whether that other State is the national State of the company or not, for injury sustained by them through the injury it has caused to the company.

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[1] See De Visscher, *Interprétation judiciaire*, pp. 219-251.

[2] For cases see Alexandre-Charles Kiss, "La protection diplomatique des actionnaires dans la jurisprudence et la pratique internationales", in *Travaux et Recherches de l'Institut de Droit comparé de l'Université de Paris*, 1960, Vol. XVIII, pp. 178-210.

[3] For treaty arrangements, see Daniel Vignes, "La protection des actionnaires dans les conventions internationales bilatérales", *ibid.*, pp. 211-241.

[4] For a review of cases see J. Mervyn Jones, "Claims on Behalf of Nationals who Are Shareholders in Foreign Companies", in *British Yearbook of International Law*, 1949, Vol. XXVI, pp. 237-254.

B

34. Having determined the general question of law as above, it remains now to consider the question of fact, namely whether the evidence placed before the Court justifies a conclusion that the Applicant has established its *jus standi* in the instant case. The main facts alleged by the Applicant consist of the following: (1) ownership by Belgian nationals of shares in Barcelona Traction and their holding of the capital of the company amounting to 88 per cent., both on 12 February 1948, the date on which Barcelona Traction was declared bankrupt, and on 14 June 1962, the date of the Application filed on 19 June 1962 instituting the present proceedings; (2) the order of the Reus court of 12 February 1948 declaring Barcelona Traction bankrupt; (3) the seizure of the property and other assets of Ebro, Barcelonesa and other subsidiaries of the company; (4) the *mediata y civilíssima* seizure of the shares of the subsidiaries belonging to Barcelona Traction kept in Toronto; (5) the printing and issuance of new shares in substitution of them; (6) the holding of a general shareholders' meeting on the basis of their possession by the bankruptcy organs; (7) the replacement of the originally appointed legal representatives before the Spanish courts; (8) the appointment of new boards of directors for the subsidiaries; (9) the holding of a private meeting of creditors and the appointment of the trustees for the liquidation of the capital of Barcelona Traction; and (10) the sale of the subsidiaries through the newly created shares to Fecsa, belonging to the March group on 4 January 1952.

35. Whether the foregoing facts are all true as alleged; or what is the precise character or actual amount or value of the interests owned by Belgian nationals, both natural and juristic persons; or how the damage has been caused to them; or to what extent it has been actually sustained by them—these are all questions which essentially belong to the merits. At the present stage of the proceedings it is sufficient, in my view, to note that the facts alleged by the Applicant have not been denied by the Respondent. This being so, and in the light of the question of law determined above, it is proper to conclude that *prima facie* the Applicant has established its *jus standi* and that the third Preliminary Objection should have been rejected.

(Signed) WELLINGTON KOO.