# SEPARATE OPINION OF JUDGE BUSTAMANTE

*[Translation]*

## INTRODUCTION

This opinion expresses certain views which differ from those of the Court on the first Preliminary Objection. It also contains an expression of individual views on the third Objection, although the conclusion reached is that of the majority.

## FIRST OBJECTION

Although I share the views of the Court so far as concerns certain doctrinal aspects relating to the first Preliminary Objection, the same does not apply to the facts and conclusions. This leads me to state separately the reasons for my dissent.

There does not seem to be any doubt that Articles 68 and 69 of the Rules of Court, in conformity with Article 30 of the Statute, contemplate only the procedural aspects of discontinuance. In accordance with their purpose, the Rules do not decide substantive rights, and consequently no rule is to be found concerning the nature of discontinuance, so as to characterizing and distinguishing substantive discontinuance or abandonment of the right from discontinuance or abandonment of the proceedings. Having regard to the fact that this is the juridical framework adopted, an investigation will be necessary in each particular case into the reasons and circumstances of the discontinuance submitted to the Court in order to decide its true scope and to define its legal consequences.

In the present case, Belgium's reasons for discontinuing the first Application of 1958 had their origin in an approach by the Belgian group of shareholders in the Barcelona Traction, Light and Power Company, Limited, to the Belgian Government, such discontinuance being the prior condition imposed by M. Juan March, the head of the Spanish group of share- and bondholders in the said company, for opening private negotiations intended to settle the dispute by extrajudicial means. The Belgian group well knew that M. March was demanding a final and irrevocable discontinuance, the manifest intention of which was that the case should no longer be a matter for international adjudication.

Certainly no provision was made for what would happen in the case of the failure of the negotiations. For M. March's part, the only condition envisaged was that the Court should no longer be seised. Nevertheless, there is no reason not to suppose that, in the event of failure, some other solution might have been adopted, for example arbitration.

This was a matter for the private discussions. But there is no doubt that as from the moment when the private controversy between the two Barcelona Traction groups was brought into the field of international law through the intervention of the Belgian and Spanish States, it was for the States and not for the private groups to assume the capacity of the real parties concerned. It was for them, consequently, to define in accordance with their own judgment the scope of the discontinuance by either accepting or modifying the bases proposed by the private groups.

The versions given by each State Party are in the present case mutually contradictory. Belgium maintains that it was never its intention when discontinuing the proceedings already instituted to abandon the right to reinstitute new proceedings if the private negotiations did not succeed. Spain asserts, for its part, that it would have opposed a discontinuance which was not final, as the reinstitution of proceedings, apart from not being in accordance with March's conditions, would have placed the Spanish Government in an unfavourable position morally and legally.

But in the face of these versions of the Parties, a number of questions arise which demonstrate the complexity of the case.

*(a)* If Belgium had rejected M. March's condition, why did it formalize its discontinuance instead of first officially negotiating an amendment of that condition with the Spanish Government?

*(b)* Although Belgium, in effecting its discontinuance, used the normal procedural formula for unilateral discontinuance contained in Article 69 (2) of the Rules, did the fact that this proceeding was not accompanied by any official reservation as to the scope of the discontinuance lead Spain wrongly to suppose that M. March's condition had purely and simply been accepted?

*(c)* Ought, on the other hand, the hesitations shown by Belgium during the negotiations prior to the discontinuance (for example, the proposal for a mere suspension of the proceedings, the suggestion that Spain should not express its "non-objection" to the discontinuance until the end of the time-limit of six weeks to be fixed by the Court, the fact that the official letter giving notice of discontinuance speaks only of a discontinuance of the proceedings), ought such hesitations, I repeat, to have led Spain to ask Belgium beforehand for a precise explanation of the true scope of the discontinuance?

*(d)* Did Spain's omission to take this step imply a certainty in good faith on its part that Belgium, despite its precautions, was abiding by the agreements reached between the private groups? Or did it on the contrary imply culpable negligence or, indeed, acceptance by the Spanish Government of a merely procedural discontinuance of the proceedings already instituted?

*(e)* To sum up, are we confronted with an erroneous interpretation by Spain of the scope of the discontinuance? If so, was this mistake, this misunderstanding, due to Belgium's own action in maintaining silence as to the true meaning of its discontinuance, one not in accordance with that proposed by M. March? Was any such mistake by Spain due, on the contrary, to the fault of its own Government, to an interpretation of the text of Belgium's notice of discontinuance running counter to its actual wording?

Sufficient tangible evidence to elucidate these uncertainties is, in my view, lacking in these proceedings. Contrary to what the Court has decided, I do not feel able to express any categorical judgment on this objection. I admit that it might perhaps be possible to arrive at a conclusion on the basis merely of inferences or deductions forming part of a logical process, but not on the basis of duly proven facts. The records of the interviews between the Belgian Ambassador and the Spanish Minister for Foreign Affairs on the eve of the discontinuance are vague and incomplete. It would not be surprising if there were more explicit documentary evidence which has not yet been submitted to the Court. In addition, it is reasonable to suppose that more definite representations on all these matters may have passed between the two Governments. Accordingly, it does not seem to me to be unlikely that if the Court, in the exercise of its powers, were *proprio motu* to ask the Parties to furnish it with any relevant document or piece of information—a suitable questionnaire would be drawn up for this purpose—it might be found possible to throw light on one or more of the questions raised above. I naturally accept that in each case the onus of proof is placed on one of the parties, but it is also true that the overriding interests of justice give the Court the faculty of taking such steps as are possible to induce the parties to clarify what is not sufficiently clear.

Seeing that, for other reasons, which I shall set out elsewhere, the first Objection cannot, in my view, be decided at this preliminary stage of the proceedings without the risk of encroaching on the merits of the case, I had thought that, were the Court so to wish, it could have taken advantage of a joinder of the objection to the merits to seek *proprio motu* at the second stage of the proceedings to obtain further evidence of the circumstances surrounding the negotiation of the discontinuance between the Parties. There would thus perhaps be a better chance—at the time of the final judgment—for deciding the first Objection raised by the Respondent Party with full knowledge of the facts.

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In the course of its argument the Spanish Government referred to the fact that the Belgian Government had availed itself of the discon-

tinuance in order to introduce various changes in the text of its second Application by comparison with the first one, with a view to improving its legal position, after studying the Preliminary Objections raised by Spain in the first proceedings ; the result of this being to upset the balance between the Parties to the detriment of the position of Spain, since no prior notice was given by Belgium that its discontinuance of itself signified a reservation, that of its right subsequently to reinstitute proceedings (Preliminary Objections, first Objection, para. 107).

During the hearings, Sir Humphrey Waldock, Counsel for Spain, replying to a question put by one of the Judges of the Court (hearing of 27 April) referred to the moral and material prejudice which the Spanish State felt that it had suffered through the reinstitution of the Application after the discontinuance (hearing of 4 May).

It was no doubt with such considerations in mind that the Spanish Government, in the 14th recital concerning the first Objection in the Submissions which it filed at the closure of the hearing on 8 May 1964, maintained that—

> "the discontinuance of the Belgian Government in the proceedings started by its Application of 15 September 1958, without that discontinuance having been accompanied by any reservation concerning its right to reinstitute the claim which had been the subject of that Application, necessarily supposed that it waived its arguments in defence against the Spanish Preliminary Objections and agreed to arrest *in limine litis* the proceedings which it had instituted".

Moreover, recitals 15 to 17 of the Spanish Submissions on the first Objection deny that a second application is compatible with the system of peaceful settlement stipulated by the Hispano-Belgian Treaty of 1927, the first proceedings—closed by virtue of the discontinuance—having exhausted the remedies provided for in that Treaty (hearing of 4 May). In reality, all these allegations imply a denial of Belgium's right after its discontinuance again to take up the protection of the shareholders whom it considers as its nationals ; this brings the subject of the first Preliminary Objection close to that of the third, which concerns Belgium's *jus standi*. (See recitals 2 to 6 of the Submissions of the Spanish Government on the third Objection, hearing of 8 May.)

In order for the Court to be able to reach a decision on these points *the nature* of the Belgian discontinuance would inevitably have to be defined and, moreover, certain matters would have to be passed upon which touch on the merits. In fact, in order to conclude that the application of the Treaty of 1927 must be held as finally closed or exhausted with regard to the new Application, a finding with respect to the substantive nature of the discontinuance would first be necessary,

in the sense that the discontinuance by Belgium involved an abandonment of the disputed right. But such a finding could not be made at the moment, as I have already said, so long as sufficient additional information has not been gathered to supplement the so far insufficient evidence of the facts alleged. Moreover, the denial by Spain of the right of the Belgian State to rely on the 1927 Treaty in order to reinstitute proceedings after the discontinuance cannot be separated from the question of Belgium's *jus standi*, which forms the subject of the third Objection. In reality, in this first Objection Belgium's *jus standi* to reintroduce the action in regard to which the discontinuance was filed is denied. The Court cannot consequently pass on the present applicability of Article 17 (4) of the 1927 Treaty without first passing on the legitimacy of Belgium's intervention as the national State of its shareholders *(jus standi)*. But such a decision also requires that other questions contained in the third Objection be settled first, such as that of the precise position of the Canadian Government and that of whether exceptional circumstances really deprived the Canadian Barcelona Traction Company of all possibility of exercising its right of taking legal action to defend the interests of the Belgian shareholders. As these problems touch upon the very merits of the Application, they could not be settled at a preliminary stage of the proceedings without prejudging the merits ; and it is no doubt for this reason that the Court has decided in favour of joining the third Objection to the merits.

This very close relationship between the first and the third Objections decided me to take the view that the first Objection should be joined to the merits, its examination and an endeavour to obtain additional evidence on the facts being reserved for the second stage of the proceedings, with a view to a decision on this objection in the final judgment. Consequently I voted against the rejection of the first Objection at this preliminary stage of the proceedings.

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THIRD OBJECTION

The examination of the third Preliminary Objection made it clear to the Court that a decision could not be taken in respect of it during this preliminary stage of the proceedings because the existence or non-existence of Belgium's *jus standi* in this case cannot be properly considered without at the same time prejudging the merits of the Application.

Nevertheless, I am of the opinion that before deciding to join the objection to the merits it should have been ascertained that no more direct means existed for resolving the third Objection straight away at the preliminary stage of the proceedings.

The following is my reasoning : the two Parties have shown that they agree on the fact that a general rule of international law exists with regard to the diplomatic and judicial protection of commercial limited liability companies which have been injured by the State in which they conduct their business, this rule being that the exercise of the right of protection belongs preferentially to the national State of the company. Since in the present case Barcelona Traction is a company incorporated under Canadian law, its protection ought in principle to be exercised by the State of Canada.

The record shows (Preliminary Objections, Preliminary Objection No. 3, heads 4 and 8 ; Belgian Observations, para. 129) that from 1948 to 1955 the Canadian Government to a certain extent exercised such protection as against the Spanish Government, either independently or through the British Government. But official interventions by the Canadian Government ceased at a certain moment and were not thereafter resumed. Moreover, Canada did not react in any way at the time of the Belgian Application of 1958 nor at the time of the new Application of 1962.

Taking these circumstances into account, can it be said that they are sufficient to conclude that intervention by Canada has definitely come to an end? In my view, no ; because at no time was there any explicit or official statement by the Canadian Government in this connection and because its protection of Barcelona Traction was limited to the diplomatic field and international judicial means were not resorted to.

There are, certainly, reasons for presuming that Canada might not perhaps have had the intention of continuing its representations to Spain on behalf of Barcelona Traction ; but this mere presumption is not in my view sufficient grounds for abandoning the general rule of international law which has been mentioned and holding that a third State—Belgium—has a supplementary right of protection on behalf of the shareholders in the company.

It is true that during the hearings a question was put to the Parties by one of the Judges of the Court as to whether they could supply any information concerning the attitude of the Canadian Government subsequent to the dates of certain communications which appear in the record. However, this enquiry produced no appreciable result (hearing of 27 April). I think that further steps should be taken and concrete questions put to the Parties, who should be asked to supply any relevant document or information concerning Canada's final decision. It seems to me that the Parties, as the sovereign States concerned, can find means to inform themselves more or less directly on this subject. The advantage of such further clarification would be to provide a final answer to the question of whether or not the specific rule of international law concerning the diplomatic and judicial protection of companies is susceptible of application in the present case. In the event of a negative result, the joinder of the third Objection to the merits would be

inevitable in order to ascertain to what extent the intervention of the Belgian State, taking the circumstances into account, may emerge as well-founded, with a view to the establishment of its *jus standi* to exercise, either in an alternative capacity or—as Belgium claims—independently in its own right, the protection of its national shareholders in a foreign company.

On the basis of the foregoing, I would have been in favour, before this preliminary stage of the proceedings was closed, of the Court's making an order putting certain questions, to which the Parties would have had to reply, in which they would have been asked to supply the Court with any relevant document or information which would help to establish the position of the Canadian State with regard to the judicial and diplomatic protection of the Canadian Barcelona Traction Company in the future. But since the majority of the Court has decided in favour of immediate joinder to the merits and since the further clarification to which I have referred will still be possible in the course of the second stage of the proceedings, I subscribe to the decision of the Court so far as concerns the joinder of the third Objection to the merits in order that it may be resolved in the final judgment, since I share the view that any decision with regard to the third Objection, taken as a whole, must involve passing on the actual merits of the dispute.

*(Signed)* J. L. BUSTAMANTE R.