DISSENTING OPINION OF JUDGE MORELLI

[Translation]

It is my opinion that of the four objections presented by the Spanish Government as preliminary objections, it is solely on the second that it was open to the Court to take a decision at the present stage of the proceedings. The Court should have upheld this objection and declared that it has no jurisdiction.

The other objections, although presented by the Spanish Government as preliminary objections, do not really possess the character of preliminary objections, because they all raise questions which directly and solely concern the merits of the case. This being so, it was not in my opinion open to the Court to take a decision on those objections, as it has done on the first by dismissing it. Nor was it open to the Court to do what it has done in connection with the third and fourth objections in deciding to join those two objections to the merits. For joinder to the merits, within the meaning of Article 62, paragraph 5, of the Rules of Court, implies the preliminary nature of the objection, and in my opinion this condition is not met in respect of the so-called preliminary objections in question.

I consider that the first, third and fourth objections should have been declared inadmissible as preliminary objections. This would have left it open to Spain to raise the same questions once again, as questions which in fact relate to the merits, in the further proceedings.

It is quite true that the Court's decision to join the third and fourth objections to the merits is not in respect of its practical consequences very far removed from what in my view would have been a more correct decision by the Court declaring those two objections inadmissible as preliminary objections. There is, however, a fundamental distinction between joinder to the merits and a declaration of inadmissibility, and this distinction will I hope clearly emerge from the considerations I propose to devote to the subject of preliminary objections in general.

I shall begin my Dissenting Opinion with a first part dealing with the question of the Court's jurisdiction. I shall first of all describe what I consider to be the operation of Article 37 of the Statute and then go on to show that this Article did not operate in respect of the fourth paragraph of Article 17 of the Hispano-Belgian Treaty of 19 July 1927. In the second part I shall pass on to the above-mentioned general considerations on the subject of preliminary objections. The third part will be devoted to discontinuance in general and to the application in respect of the first Spanish Preliminary Objection, which relates to the discontinuance, of the general considerations on the subject of preliminary objections. The application of those considerations to the

third and fourth Spanish Preliminary Objections will be dealt with in the fourth and fifth parts.

I. On the Jurisdiction of the Court (Second Preliminary Objection)

1. Article 37 of the Statute of the International Court of Justice has a relationship which might be called both historical and verbal with Article 37 of the Statute of the Permanent Court, some of the terms of that Article being used by Article 37 of the Statute of the present Court. In spite of this there is a radical difference between the two provisions in respect of their functions.

Article 37 of the Statute of the Permanent Court is of the nature of a provision serving purely to interpret other provisions, namely clauses in treaties which provide for reference to a tribunal to be established by the League of Nations. It is a provision which may be regarded as supplementary to other provisions which themselves, on the other hand, possess the character of principal provisions. Jurisdiction is created by these latter provisions, that is to say by the treaty clauses providing for reference to a tribunal to be established by the League of Nations. By the operation of Article 37 of the Statute of the Permanent Court, and for the parties to that Statute, jurisdiction thus created is to be deemed jurisdiction conferred upon the Permanent Court.

Unlike Article 37 of the Statute of the Permanent Court, which, as already stated, is a provision supplementing other provisions which had already—though only partially—created a certain jurisdiction, Article 37 of the Statute of the International Court has importance in itself, and serves an independent purpose. Article 37 of itself creates new jurisdictional rules, namely rules conferring a certain jurisdiction upon the International Court of Justice, although it refers back to other provisions to determine the conditions of its own operation and the content of the jurisdictional rules it seeks to create.

2. Article 37 of the present Statute speaks of two categories of provisions: *(a)* provisions for reference of a matter to a tribunal to have been instituted by the League of Nations; and *(b)* provisions for reference of a matter to the Permanent Court.

By its mention of the latter, Article 37 effects what is called the "transfer" of the Permanent Court's jurisdiction to the International Court of Justice.

The transfer formula is short and convenient, and there is no objection to its use provided its meaning is defined. It must be borne in mind that jurisdiction is conceivable only in relation to the organ on which it is conferred; this means that it is not possible to consider the

jurisdiction of one organ as capable of being actually transferred to another. In fact new jurisdiction is conferred on a particular organ by means of a reference to the provisions governing the jurisdiction pertaining to another.

Now it is perfectly possible to conceive of the creation of jurisdiction by means of a reference to provisions which are no longer in force, or even by means of a reference to formulae which never had any legal validity. However, when the term transfer is used what is meant is that there is a certain relationship between two different jurisdictions, from two points of view. In the first place there is a relationship in respect of the content of the provisions governing the two jurisdictions and the conditions of their application. These provisions are identical except as regards the specification of the organ on which jurisdiction is conferred. Secondly, transfer denotes a chronological relationship between the two jurisdictions. A new jurisdiction is created, linking up with another jurisdiction which still exists at the time when the new one is created, but which is abolished as from that moment, by the very fact of the creation of the new jurisdiction.

It is not only by its reference to treaties or conventions explicitly providing for reference of a matter to the Permanent Court that Article 37 creates new jurisdictional rules. The same operation is effected by the reference to treaties or conventions providing for reference of a matter to a tribunal to have been instituted by the League of Nations. Even in respect of this latter reference, Article 37 does not have the purely interpretative character of the similarly worded provision in Article 37 of the Statute of the Permanent Court. It might be said that by this reference also Article 37 of the present Statute effected the transfer to the International Court of jurisdiction already conferred upon the Permanent Court, in view of the fact that treaties providing for reference to a tribunal to have been established by the League of Nations had, by the operation of Article 37 of the Statute of the Permanent Court, to be interpreted as referring to the jurisdiction of that Court.

3. Thus, Article 37 of the present Statute lays down autonomous rules creating the Court's jurisdiction, although for this purpose it refers back, in a certain fashion, to other provisions. As I have said already, it is quite possible, in general, for a jurisdictional rule, or more generally any legal rule at all, to refer back to provisions which are no longer in force ; and it is even possible for a legal rule to refer to formulae which never had legal validity. But that is not the case with Article 37, since this refers to treaties or conventions and adds that such treaty or convention must be "in force". We thus have to determine the meaning to be attributed to this term, particularly with regard to the time at which such treaty or convention must be in force.

This term is found in other provisions of the Statute of the Court,

such as Article 35, paragraph 2, and Article 36, paragraph 1. The same term was also to be found in Article 37 of the Statute of the Permanent Court. But this obviously does not mean that the expression "in force" in Article 37 of the present Statute must necessarily have the same significance and scope as in the other provisions I have just mentioned. It is necessary to have regard to the character and content of the different provisions in which the term is used.

4. Article 35, paragraph 2, of the Statute confers on the Security Council the function of laying down the conditions under which the Court shall be open to the States not parties to the Statute, but "subject to the special provisions contained in treaties in force". These are provisions by which the subject-matter is already governed, independently of the reference made to such provisions in Article 35, paragraph 2, which confines itself to reserving them. As provisions which govern the subject-matter, independently, they must, of course, be provisions which are in force with relation to the date which is regarded as decisive for that purpose and which is not specified at all in Article 35, paragraph 2. The expression "in force" used in that paragraph may therefore be considered as quite superfluous.

The same observation may be made concerning the term "in force" used in Article 36, paragraph 1, of the Statute, which states that the jurisdiction of the Court comprises, *inter alia*, all matters specially provided for "in treaties and conventions in force". Far from itself creating jurisdiction for the Court, the provision contained in Article 36, paragraph 1, in fact merely makes reference to other sources of jurisdiction, separate from the Statute, namely to special or general agreements, among which treaties and conventions are mentioned. It is perfectly clear, even were it not specified in Article 36, paragraph 1, that by this must be meant treaties and conventions in force : in force at the time when such treaty or convention has to be applied, namely at the time of the proceedings. The questions of the more precise determination of the point in time which is decisive for this purpose (application or judgment) is left open by the term "in force". The fact is that in using the term, Article 36, paragraph 1, does not specify any particular point in time when stating that the treaties and conventions to which it refers must be in force. The term is therefore superfluous.

As regards Article 37 of the Statute of the Permanent Court I have already said that it is a provision that is purely interpretative of other treaty provisions. It was by these provisions (interpreted, of course, in accordance with Article 37) that jurisdiction was created. To speak in this connection, as did Article 37, of a treaty or convention "in force" added nothing whatsoever and in no way influenced the manner in which Article 37, as an interpretative rule, had to operate.

Unlike Articles 35, paragraph 2, and 36, paragraph 1, of the Statute of the International Court, and Article 37 of the Statute of the Permanent Court, where the term "in force" refers to provisions which themselves govern the subject, Article 37 of the present Statute uses this term in relation to provisions which do not govern the subject in question. The subject in question is the jurisdiction of the International Court of Justice. That jurisdiction derives from rules which Article 37 itself creates, by means of a reference to provisions concerning a completely different subject, namely the jurisdiction of the Permanent Court. Thus, the indication that these latter provisions must be in force is by no means superfluous or redundant, but is of substantive importance for the operation of Article 37.

5. It might be considered that, by referring to treaties or conventions "in force", the intention of Article 37 is to make some particular specification concerning the actual substance of the rules it seeks to create—to the effect that these rules, concerning the jurisdiction of the present Court, would have validity in point of time identical to that of the provisions concerning the jurisdiction of the Permanent Court to which Article 37 refers. According to this interpretation, the meaning of the expression "in force" in Article 37 would be very close to that of the same expression in Article 36, paragraph 1. Just as Article 36, paragraph 1, provides that the International Court may be seised on the basis of a treaty only if that treaty is in force, Article 37 would mean that the International Court may be seised on the basis of a rule created by Article 37 only if a treaty concerning the jurisdiction of the Permanent Court is in force. Thus neither of the provisions just mentioned would be understood to refer to any particular point in time in its specification as to the treaty concerned being in force.

This interpretation is not tenable, however. Its logical consequence would be that the jurisdictional rules created by Article 37 would have operated only over a very brief period—namely until 18 April 1946, the date when the Permanent Court was dissolved : taking into account the principle of *perpetuatio jurisdictionis*, they would have applied solely to proceedings instituted prior to that date. This would be so unless the term "in force" were to be understood in a very special sense—namely as meaning that a provision concerning the jurisdiction of the Permanent Court did not cease to be in force as a result of the dissolution of that Court ; or unless the term "in force" were applied not specifically to the clause relating to the jurisdiction of the Permanent Court, but to the treaty as a whole in which the clause is contained.

But this is not all. According to the interpretation which I have been considering, the jurisdictional rules created by Article 37 would not, in reality, have operated even during the brief period I mentioned,

for the very simple reason that Article 37, by the very fact of prescribing the transfer of the jurisdiction of the Permanent Court to the International Court, automatically entailed the extinction of the treaty clauses relating to the jurisdiction of the Permanent Court. This excludes the simultaneity of jurisdiction on the part of both Courts which is required by the interpretation under consideration. In order to give meaning to Article 37 it would be necessary to assume, for the purposes of that Article, that there was in force, not a clause which was really in force, but a clause which would have been in force had Article 37 not operated.

6. All this makes it necessary to put an entirely different construction upon the term "in force" in Article 37 of the Statute. This term does not relate to the content of the jurisdictional rules created by Article 37, but rather to the technical process by which those rules are created, namely to the actual operation of Article 37.

Article 37 hinges the creation of certain jurisdictional rules (rules conferring jurisdiction upon the International Court) on the existence of treaties or conventions concerning the jurisdiction of the Permanent Court, which must be in force in order for Article 37 to produce its intended effect.

The treaties and conventions referred to by Article 37 must be in force in relation to a particular point of time. That is, at the time of the entry into force of the Statute, the time when the legal operation for which the Statute provides in Article 37 is effected.

This follows from the actual terms of Article 37. That Article predicates 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. To specify the contingency it covers, Article 37 uses the verb "provides" in the present tense, whereas it uses the future in going on to stipulate that the matter "shall" be referred to the International Court of Justice. The last part of this sentence refers to the (future) time in which the jurisdictional rules created by the legal operation for which Article 37 makes provision are to have effect ; while on the contrary the condition necessary for this operation to take place is indicated in the first part of the sentence by a reference to the present time. It must be concluded from this that the treaties and conventions referred to in Article 37 cannot be other than treaties and conventions in force at the time of the entry into force of the Statute.

A similar observation might be made with regard to Article 36, paragraph 5, which deals with the contingency of declarations made under Article 36 of the Statute of the Permanent Court "which are still in force" (*pour une durée qui n'est pas encore expirée*, in the French text), while on the contrary the future tense is used ("shall be deemed") to indicate the legal effect conferred by Article 36, paragraph 5, on the declarations concerned. The reference to a given point in time in

order to indicate the duration of the declaration is further strengthened, in Article 36, paragraph 5, by the use of the word "still".

It may be noted on the other hand that in Article 37 of the present Statute, the term "in force" has a different effect from that of Article 37 of the Statute of the Permanent Court ; this is so even with regard to the treaties and conventions also covered by this latter provision, namely treaties and conventions which provide for reference to a tribunal to have been instituted by the League of Nations. Unlike Article 37 of the Statute of the Permanent Court, Article 37 of the Statute of the present Court uses the term "in force" in relation to a particular point in time, namely the entry into force of the Statute. The difference is due to the difference in the functions of two provisions : Article 37 of the Statute of the Permanent Court simply interpreted existing jurisdictional rules, whereas Article 37 of the present Statute in itself creates new jurisdictional rules, even where it refers back to treaties providing for reference of a matter to a tribunal to have been instituted by the League of Nations.

7. I have said that Article 37 of the present Statute refers to treaties or conventions in force at the time of the entry into force of the Statute, at the point in time when the legal operation for which Article 37 makes provision takes place. It must be made clear that if regard is had only to the terms of Article 37, the entry into force of the Statute is to be taken to mean either its initial entry into force or, in respect of a particular State, its entry into force for that State as a result of the admission of that State to the United Nations. This is of course so on the basis of the wording of Article 37 alone, which makes no distinction between original Members and Members admitted later. It is another matter to ascertain whether, among the admissions which have actually taken place, there have been some which, in the light of the conditions required by Article 37, have given rise to the legal effect for which that Article makes provision.

Now the basic condition laid down by Article 37 is that the treaty or convention providing for reference to the Permanent Court shall be a treaty or convention in force. I have already said that the treaty or convention must be in force at the time of entry into force of the Statute. It must be added, however, that it is not enough for the treaty or convention to be in force in respect of any of its provisions indiscriminately. On the contrary, it is necessary for the treaty or convention to be in force specifically in respect of its clause conferring jurisdiction on the Permanent Court. Should that clause have lapsed, the treaty containing it, though possibly still in force so far as its other provisions are concerned, is no longer a treaty in force providing for reference to the Permanent Court of International Justice. It follows that the contingency covered by Article 37 fails to materialize, because of the very terms of that Article.

In my opinion, there can be no doubt that the dissolution of the Permanent Court entailed the lapse of all the clauses, more generally speaking of all the jurisdictional rules, conferring jurisdiction upon that Court, since by this very fact those rules became devoid of object. Hence the consequence that the legal operation for which Article 37 makes provision became impossible as from 18 April 1946, the date of the dissolution of the Permanent Court. Since it is a historical fact that before that date there were no admissions to the United Nations, it is permissible to conclude that the legal operation provided for by Article 37 occurred once only, namely when the Statute first entered into force, and consequently solely in respect of the original Members of the United Nations. But this is no more than a statement of fact, not a restriction to be considered as inherent in the functioning of Article 37.

8. If the conditions laid down in Article 37 are present, and more particularly if, at the time of the entry into force of the Statute, a treaty or convention providing for reference to the Permanent Court was in force, the operation for which Article 37 makes provision was effected by the creation of a corresponding jurisdictional rule relating to the International Court of Justice. By the effect of Article 37 itself, the creation of that rule was accompanied by the simultaneous extinction of the rule relating to the Permanent Court. This has no influence on the condition laid down in Article 37 by the use of the term "in force", that requirement being a condition for the operation of Article 37, not a condition for the subsistence of the rule created by that Article.

The jurisdictional rules created by the legal operation provided for by Article 37 are rules the content and conditions of application of which (except as regards the indication of the organ on which jurisdiction is conferred) are determined by the reference back to the treaties relating to the Permanent Court. That reference also applies to the treaty clauses governing the duration of the jurisdictional rule relating to the Permanent Court. Obviously if the expiry of the time-limit governing the jurisdictional rule relating to the Permanent Court occurred before the entry into force of the present Statute, this prevented the operation for which Article 37 makes provision taking place, because no treaty was then in force under the terms of the Article. If, on the contrary, the time-limit expires after the entry into force of the Statute, and consequently after Article 37 has already operated to create a jurisdictional rule relating to the International Court, that rule expires at the same time as the time-limit in question expires. But this has nothing to do with the fact that Article 37 explicitly refers to treaties or conventions "in force", because, as has been said, that term relates solely to the time when the operation contemplated in the Article is carried out. On the contrary, it is merely a consequence of that Article's reference back to the treaty concerning the jurisdiction of the

Permanent Court for the purpose of determining the content and provisions of application of the jurisdictional rules concerning the present Court which Article 37 seeks to create.

If Article 37 is compared with Article 36, paragraph 5, it is seen that, unlike Article 37, this latter provision explicitly specifies the consequence of the expiry of the period laid down for a declaration relating to the Permanent Court as regards the extinction of the jurisdictional rule concerning the present Court created by the means provided for in Article 36, paragraph 5. That consequence is specified by the words "for the period which they still have to run and in accordance with their terms", whereas the words "and which are still in force", used in the first part of the provision, refer to the fact of the declaration being in force at the time of the entry into force of the Statute and consequently at the time of the operation of Article 36, paragraph 5 (this reference corresponds to the explicit reference to a treaty in force in Article 37).

There is no need to add that after the accomplishment of the legal operation provided for in Article 37 by the creation of a jurisdictional rule relating to the present Court, the validity of that rule was in no way affected by the subsequent dissolution of the Permanent Court. This is so for the very simple reason that this was an event not foreseen by the treaty to which Article 37 refers.

9. My observations concerning the extinction of the jurisdictional provision concerning the Permanent Court, brought about by the very effect of the operation of Article 37, prevents me from subscribing to a statement frequently made by the Spanish Government. According to that Government, for the jurisdiction of the International Court to be able to be asserted on the basis of Article 37 of the Statute, an additional requirement would have to be fulfilled, namely that the clause providing for the jurisdiction of the Permanent Court should be in force at the time of the filing of the Application with the International Court.

This condition would however be quite incapable of fulfilment. This is because, as has been said, in every case where Article 37 has operated, that same Article, by stipulating the transfer of jurisdiction from the Permanent to the International Court, caused, by the very fact of the transfer, the extinction of the clause relating to the jurisdiction of the Permanent Court ; hence this extinction occurred independently from the dissolution of the Permanent Court and well before that event.

In reality, for the International Court to be able to exercise jurisdiction on the basis of Article 37 of the Statute, it is necessary that there should be in force at the time of the filing of the Application not the jurisdictional provision relating to the Permanent Court but rather the jurisdictional provision relating to the International Court created by

means of the legal operation provided for in Article 37, and whose status as a provision in force remained completely unaffected by the extinction of the provision relating to the Permanent Court pursuant to that Court's dissolution.

For the same reasons I am unable to subscribe to a phrase in the reasoning of the Advisory Opinion of 11 July 1950 concerning the *International Status of South West Africa*, in which the Court states that Article 7 of the Mandate "is still in force" (*I.C.J. Reports 1950*, p. 138). If my conception of the operation of Article 37 of the Statute is correct, in order to support the conclusion reached by the Court in the operative provisions of the Opinion, to the effect that the reference to the Permanent Court of International Justice is to be replaced by a reference to the International Court of Justice, it would have been sufficient to find that Article 7 of the Mandate was in force at the time of the entry into force of the Statute. At that time Article 7 of the Mandate as such was extinguished by the very operation of Article 37 of the Statute, precisely because it was replaced by a new corresponding provision relating to the jurisdiction of the International Court of Justice.

10. The Statute of the Court, including Article 37, did not come into force for Spain until 14 December 1955, as a result of the admission of that State to the United Nations. On that date, Article 37 had no possibility of application, because at that date there was no treaty or convention providing for reference to the Permanent Court which could be considered, as such, as being in force within the meaning of Article 37.

In particular, Article 17 (4) of the Hispano-Belgian Treaty of 19 July 1927 had lapsed on 18 April 1946, as a result of the dissolution of the Permanent Court. That provision did not decide that the parties were subject to some generic or abstract jurisdiction, quite inconceivable as such. On the contrary, it provided for the jurisdiction of a particular organ, specifically named. That organ was the Permanent Court of International Justice. The dissolution of that Court necessarily entailed the lapse of the treaty clause relating to the jurisdiction of that Court, which thereby became devoid of object.

11. This result cannot in my view be set aside by arguing, as does the Belgian Government, the inseparability of the provisions of the 1927 Treaty. It is difficult to find any reason why this alleged inseparability should have the effect of keeping Article 17 (4) in force, rather than the contrary effect of entailing the lapse of the entire treaty.

In my opinion there can be no doubt that Article 17 (4) lapsed, for lack of object, as a result of the dissolution of the Permanent Court. This is the only conclusion which is relevant for the purpose of the operation of Article 37 of the Statute. The fate of the other provisions

of the 1927 Treaty is of no interest. But if it is desired also to consider the question of the preservation in force of the other provisions of that Treaty, what consequence must be drawn, for the solution of that problem, from the assertion that the Treaty constitutes an inseparable whole? If it is considered, as does the Belgian Government, that "resort to adjudication is an essential part of the economy of the treaty" that "the various methods of settlement were carefully combined, so that to remove those which concern the Court amounts to dismantling the whole system" and that Article 17 (4) "was an essential condition for the consent of the parties to the treaty as a whole" the inevitable result, assuming the impossibility, thus affirmed, of separability of the provisions of the Hispano-Belgian Treaty, would simply be that the entire treaty has lapsed.

12. Against the lapse of Article 17 (4) of the 1927 Treaty, the Belgian Government also argued that the sole consequence of the dissolution of the Permanent Court was the temporary impossibility of performance of that provision, which is said to have been suspended in its effects without ceasing to be in force. In this connection the Belgian Government relied on the concept of the suspension of international obligations. It observed that impossibility of performance of an obligation entails the extinction of the obligation only if the impossibility is permanent; in the case of temporary impossibility, on the other hand, the obligation is not extinguished, but is merely suspended.

However it is not correct in my view to apply to Article 17 (4) of the 1927 Treaty the various concepts used by Belgium, namely performance of the obligation, impossibility of performance, and extinction or suspension of the obligation as a consequence of permanent or temporary impossibility of performance. This is because strictly speaking that provision of the 1927 Treaty did not create a true obligation for the contracting States, that of adopting a certain course of conduct, which might subsequently have become impossible with the consequences considered to attach to such impossibility, namely impossibility of performance of the obligation (extinction or suspension of the obligation depending on the permanent or temporary nature of the impossibility).

Article 17 (4) of the 1927 Treaty created for each of the contracting States not an obligation, but rather a situation of subjection to particular legal powers, they also being created by the same provision. Those powers consist on the one hand of the power of jurisdiction conferred on a certain organ, the Permanent Court, and on the other hand the power for the other contracting State to seise that Court. Since these are legal powers conferred either on a particular organ or on a State with reference to a particular organ, the disappearance of that organ, the Permanent Court, necessarily entailed the extinction of those powers

and, at the same time, the extinction of the corresponding situation of subjection to those powers. Those powers were extinguished and not simply suspended, because the organ provided for, namely the Permanent Court, was definitively abolished and not merely suspended in its operation for a certain period.

13. If regard is had to the true significance of Article 17 (4) of the 1927 Treaty, it becomes clear that it is not correct, as Belgium has done, to assimilate the question of the preservation in force or lapse of that provision to the question of the effects of the disappearance of an international agency on the treaties conferring certain functions on that agency.

If a treaty creates obligations for the contracting States and at the same time provides for the intervention of a certain organ in connection with the performance of those obligations, the obligations may well continue to exist despite the disappearance of the organ which is not necessarily bound to entail more than the extinction of the powers of the organ and of the subjection of the States to it. But this has nothing to do with the question of the preservation in force or lapse of Article 17 (4) of the 1927 Treaty or even less with the operation of Article 37 of the Statute. That Article requires the existence, at the time of its entry into force, of the jurisdiction of the Permanent Court. But that jurisdiction, created by Article 17 of the 1927 Treaty, had ceased to exist when the Statute came into force for Spain on 14 December 1955.

14. Nor is it possible, as is sought by the Belgian Government, to find any analogy between the case of the disappearance of the organ on which jurisdiction is conferred by a treaty and the case of a treaty conferring jurisdiction on an organ yet to be established, as in the case of the clauses in the Treaty of Versailles which refer to a tribunal to be instituted by the League of Nations.

In this latter case there were provisions in connection with which no problem of lapse arose at all; these were provisions which looked to the future institution of a particular organ and which therefore made their own attribution of jurisdiction dependent on that event. Those provisions can readily be held to have been in force before the organ instituted by the League of Nations, to which they referred, was in a position to operate. But this has nothing to do with the term "in force" in Article 37 of the Statute of the Permanent Court, which relates to a point in time which is that of the proceedings and not to the point in time of the entry into force of the Statute, as is the case, on the contrary, in respect of the identical term in Article 37 of the present Statute.

15. I have said that the effect of Article 37 of the Statute is to create new rules concerning the jurisdiction of the present Court, those

rules having come into existence at the time of the operation of Article 37. This effect of Article 37 is, however, subject to the condition that there is a treaty or convention "in force" concerning the jurisdiction of the Permanent Court, and that condition must be present at the time of the entry into force of the Statute. But Article 17 (4) of the Hispano-Belgian Treaty had lapsed before the Statute came into force for Spain, which leads to the conclusion that the condition laid down in Article 37 has not been fulfilled.

The question may well arise, however (and this appears to be a question raised by the Spanish Government in terms which are neither uniform nor completely clear), whether Article 17 (4) of the 1927 Treaty was not revived by Article 37 of the Statute. This would of course be a revival having no other effect than the fulfilment of the condition laid down by Article 37 for its own operation.

This observation forbids an affirmative reply to the question. If Article 37 requires, as a necessary condition for its own operation, that the clauses providing for reference to the Permanent Court should be in force at the time of the entry into force of the Statute, it would be quite absurd to conceive of Article 37 completely destroying this requirement by providing that the clauses relating to the jurisdiction of the Permanent Court, which lapsed as a result of the dissolution of that Court, are revived merely for the sake of the operation of Article 37.

Moreover, this would be contrary to the very concept of the transfer of the jurisdiction of the Permanent Court to the International Court of Justice. That transfer was intended to ensure continuity between two jurisdictions—a jurisdiction which actually existed at the time when the transfer took place, and a new jurisdiction, intended to replace it. But that continuity would have in no way been achieved if the jurisdiction of the Permanent Court had lapsed before the entry into force of the Statute and consequently before the jurisdiction of the present Court came into existence. The assumed revival of the first jurisdiction would be a pure fiction and quite incapable of ensuring such continuity.

II. On Preliminary Objections in General

1. In referring to preliminary objections, Article 62 of the Rules of Court attaches to these objections the effect of suspending the "proceedings on the merits" and, at the same time, of initiating a phase in the proceedings in which the only task the Court has to perform is to give its decision on the objection in question. The Court may, however, refrain from discharging this task in this phase and may decide to join the objection to the merits.

The term "preliminary" in the expression "preliminary objection" may be understood in two senses.

On the one hand, this term is used to denote the effect produced by an objection that is presented as a preliminary objection, this effect being precisely the initiation of a phase in the proceedings which also might be called preliminary.

It is in this sense that Article 62 speaks of preliminary objections when it says, in paragraph 1, that "a preliminary objection must be filed" within a certain time-limit. Indeed, far from prescribing the means by which certain objections must be presented, Article 62 merely provides a party with a faculty which it is free not to exercise, In other words, an objection which might be filed in the way specified in Article 62 can be presented also in the pleadings mentioned in Article 41. It is only if the party chooses the course made available by Article 62 that it *must* file the objection within the time-limit fixed in paragraph 1 of that Article, complying also with the other stipulations specified in paragraph 2.

It follows that, when Article 62 (1) refers to an objection that is described as "preliminary", it indicates, by that term, not so much a certain possible character of the objections raised by the parties, as a certain means by which the objections may be presented.

2. It is quite certain, however, that the means provided in Article 62 can be utilized, not for all objections or all pleas advanced by the parties, but only for objections possessing a certain character. It is quite certain that a party cannot, merely by presenting an objection or a plea according to the procedure indicated in Article 62, compel the Court to give a prior decision on a certain question, regardless of any relationship between that question and the other questions that have to be decided in the case.

Thus an objection may be presented by the means indicated in Article 62 only if it possesses a certain character; and that character relates to the actual content of the objection and consists precisely in a certain relationship that must exist between the question that is raised by the objection and the other questions that have to be decided. The necessity for such a character is only impliedly prescribed by Article 62. The character of the objection may very well be indicated by the same term "preliminary" which Article 62 employs with a different object, namely to denote the means by which the objection may be presented. This is the other sense in which the word "preliminary" in the term "preliminary objection" may be understood.

A question can constitute the subject of a preliminary objection within the meaning of Article 62 of the Rules of Court only if a decision on that question is logically necessary before proceeding with the consideration of the other questions. There must be, between the different questions, an order that is imposed by a logical necessity and not merely one inspired by considerations of expediency or economy.

If a certain order is not imposed by any logical necessity, it is for the Court to determine the order that may most suitably be followed. In this connection, the Court may be guided by various criteria and these, as I have said, might even be criteria of economy. Thus the Court might find it desirable to start by considering a question of law that is so presented that it is easy to settle, before entering upon the consideration of a complicated question of fact, if it appears that a possible decision of the question of law might obviate the necessity for considering the question of fact.

The Court's freedom to determine the order to be followed, when the order between the different questions is not imposed by any logical necessity, cannot be removed or restricted by the attitude of the parties, still less by the attitude of one of the parties. It would be inconceivable that, by making use of the means provided by Article 62 or of any other means, one of the parties should be able to compel the Court to give a prior decision on a certain question, when such prior decision is not called for by any logical necessity.

3. It is quite obvious that the question whether a decision on the merits is or is not possible must necessarily be settled before the merits are considered. There can therefore be no doubt that procedural objections (on the ground of lack of jurisdiction or on any other grounds) aimed at preventing consideration of the merits can be presented as preliminary objections under Article 62 of the Rules of Court. What has to be determined is whether this possibility exists solely for the objections I have just mentioned or whether the same possibility can be admitted in respect of certain questions relating to the merits.

The answer to the question I have just raised must be in the negative. This follows from the fact that there is no necessary logical order between the various questions all relating to the merits in a case. This is tantamount to saying that there are no questions relating to the merits the prior decision of which is called for by logical necessity. It follows that there are no questions relating to the merits that can be presented as preliminary questions under Article 62 of the Rules of Court.

The conclusion I have reached is confirmed by the actual terms of Article 62. This Article stipulates, in paragraph 3, that, upon receipt by the Registrar of a preliminary objection filed by a party, the proceedings "on the merits" shall be suspended. In paragraph 5, the same Article gives the Court the faculty of joining the preliminary objection "to the merits". There emerges from the provisions of Article 62 which I have just recalled a clear distinction between consideration of the preliminary objection and consideration of the merits. This precludes any idea of it being possible to raise a question relating to the merits by means of a preliminary objection under Article 62. It is indeed obvious that, if proceedings on the merits are suspended, it is not possible, during such suspension, to decide any question which

relates to those merits. It is equally obvious that it would not be correct to say that a particular objection may be joined to the merits in the case of an objection which itself concerns the merits.

4. Consequently, if a party presents as a preliminary objection an objection that concerns the merits, the Court cannot do otherwise than declare the objection inadmissible as a preliminary objection. This does not of course preclude the party in question from presenting the same objection, like all other objections concerning the merits, in any further proceedings.

An objection relating to the merits which is presented by a party as a preliminary objection must be declared to be inadmissible as a preliminary objection. It must not be joined to the merits under paragraph 5 of Article 62. A decision by the Court joining an objection to the merits presupposes the admissibility of the objection as a preliminary objection. The objection must be one that is intended to prevent consideration of the merits, but one on which the Court cannot give a decision without considering certain matters which are also connected with the merits. In the hypothesis I have stated the question is, on the contrary, one that directly concerns the merits.

The declaration of inadmissibility is obligatory for the Court and not discretionary like the joinder of a preliminary objection to the merits. Furthermore, the declaration of inadmissibility is something quite apart from any attitude which may be adopted by the party against which the objection is raised. The objection must be declared inadmissible even if that party does not object to the question which is raised by the objection presented as a preliminary objection being decided prior to the other questions which also relate to the merits, in a preliminary phase of the proceedings. It is not possible for one of the parties or the two parties in mutual agreement to limit the Court's freedom to determine the order to be followed in the examination of the different questions relating to the merits, by compelling the Court to give a prior decision on one of those questions.

5. Consideration must, however, be given to an argument that might be advanced to set aside the conclusion I have reached.

It might be argued that it is quite possible for the Court to be seised for the purpose of deciding, not a dispute in its entirety, but solely a question a decision on which is necessary for the settlement of the dispute. Proceedings of this kind can be instituted either by mutual consent of the parties, that is to say, by a special agreement, or by a unilateral application, as is shown by Article 36 of the Statute, according to which acceptance of the compulsory jurisdiction of the Court may relate to no more than questions of law or of fact. From the possibility of proceedings before the Court confined to the subject of a specific question of law or of fact, it might be inferred that, at any rate if there is an explicit or tacit agreement between the parties to this effect, it is also possible to utilize a special phase in the proceedings for

the determination of some particular question, that phase in the proceedings being precisely the one provided for by Article 62 of the Rules of Court.

But such a conclusion would not be correct. Indeed, it is one thing to confine the subject of proceedings to a particular question ; in other words, it is one thing to confine to one question the task which is entrusted to the Court and which the Court discharges fully by deciding that question. It would be another thing to detach a particular question from the whole body of questions all requiring decision by the Court for the purpose of the decision which the Court is required to give on the dispute, so that there might be devoted to this question a preliminary phase of the proceedings which, as such, would be followed by a subsequent phase in which the other questions would be considered and the dispute decided by the Court. In this latter case, unlike the former, there would be a restriction, not of the task entrusted to the Court, but rather of the freedom which the Court must enjoy in determining the order to be followed in the examination of the different questions concerning the merits which will all have to be decided by the Court. No such restriction is, in my view, permissible.

III. On Discontinuance (First Preliminary Objection)

1. Articles 68 and 69 of the Rules of Court are concerned with facts that differ in character but they ascribe to those facts identical legal consequences. These legal consequences always take the form of the extinction or termination of the proceedings, that is to say, they put an end to the proceedings.

Article 68 deals first with settlement, that is to say, the contingency in which "the parties conclude an agreement as to the settlement of the dispute".

Settlement produces, on the basis of general international law, the effect that the dispute is resolved in a certain way (this effect does not always consist of extinction of the right at issue, as is stated by Belgium). The particular rule of Article 68 of the Rules of Court, taking account of the effect produced by a settlement on the basis of general international law and of the fact that the specific purpose of the proceedings, that is to say, the resolution of the dispute, is achieved by another means, namely by means of settlement, ascribes to that settlement, where the parties inform the Court thereof in writing, the consequence of putting an end to the proceedings. Article 68 provides that, in the situation just described, the Court, or the President if the Court is not sitting, makes an order officially recording the conclusion of the settlement and directing the removal of the case from the list.

It must be observed that it is not true, as stated by Belgium, that a settlement is a bar to new proceedings. Settlement, if the conditions

specified in Article 68 of the Rules of Court are fulfilled, and on the basis of that Article, does indeed produce the consequence of putting an end to the proceedings in the course of which it is concluded. But it does not affect any right of action conferred on the parties or any jurisdiction the Court may possess. The dispute which is resolved by the settlement may well arise again. In that event, each of the parties may exercise any action to which it is entitled, by means of an application which would have to be considered fully admissible ; and the Court if it possesses jurisdiction may exercise it by giving a decision on the merits. It is clear, however, that, in giving such a decision, the Court must take account of the settlement concluded between the parties.

2. The effect of putting an end to the proceedings is ascribed by Article 68 and Article 69 not only to a settlement notified by the parties to the Court but also to a declaration of intention made specifically for the purpose of producing such an effect, namely a declaration of intention known as "discontinuance". Article 68 deals with the discontinuance effected by the parties by mutual agreement. Article 69 deals with the discontinuance effected by the applicant in the course of proceedings instituted by means of an application.

Discontinuance has, in any case, the effect of putting an end to the proceedings. This is evident from the actual terms in which the content of the notice of discontinuance is indicated in Articles 68 and 69. Article 68 deals with cases in which the parties, by mutual agreement, inform the Court "that they are not going on with the proceedings". Article 69 deals with cases in which "the applicant informs the Court in writing that it is not going on with the proceedings". This means that, after the discontinuance, the proceedings (in French the two terms *instance* and *procédure* can only have the same meaning) cannot be pursued. Thus, Article 69, paragraph 2, referring to the case in which, because of the objection of the respondent, acquiescence in the discontinuance is not presumed, states that "the proceedings shall continue". Both in the case dealt with in Article 68 and in that dealt with in Article 69 (provided that, in the latter case, acquiescence in the discontinuance is presumed, in accordance with paragraph 2), the order recording the discontinuance of the proceedings directs the removal of the case from the list.

The reasons for which either the parties by mutual agreement under Article 68, or the applicant alone under Article 69, may decide to give notice of discontinuance, can be of the most varied character. And these reasons need not be stated in the notice of discontinuance. Discontinuance may be due, *inter alia*, to the possibility or the probability of a settlement. But it may be due also to a settlement that has already been concluded between the parties ; and this may be so both in the circumstances to which Article 68 refers and also in the circumstances to which Article 69 refers. If the parties have concluded a

settlement, they may, instead of notifying the Court of it in accordance with Article 68, use the other means offered by the same Article. They may also inform the Court in writing that they are not going on with the proceedings, and they may do this even without stating the reason for such discontinuance, that is to say, without mentioning the settlement arrived at between the parties. It may also be that, once the settlement has been concluded, the applicant alone may give notice of discontinuance in accordance with the terms of Article 69 (provided, of course, in the hypothesis of paragraph 2 of that Article, that the respondent does not oppose the discontinuance).

3. The discontinuance referred to both in Article 69, as in the present case, and also in Article 68 of the Rules of Court (and similarly, on the basis of the last-named Article, a settlement notified by the parties to the Court, naturally leaving aside the effects produced by a settlement on the basis of general international law) therefore produces no other legal consequences than that of extinguishing the effects of the application filed with the Court, that is to say, other than that of putting an end to the proceedings in the course of which the discontinuance was effected.

Thus, discontinuance as such does not affect, in the first place, the actual existence of the dispute between the parties. Notwithstanding the discontinuance (whether effected by the parties by mutual agreement or by the applicant alone, accompanied, if such be the case, by the non-opposition of the respondent) the parties may maintain their respective attitudes in relation to the conflict of interests at issue. In that case, the dispute which had been submitted to the Court continues to subsist even after the discontinuance.

Furthermore, the discontinuance, as such, does not affect either any right of action possessed by the party and the jurisdiction of the Court, or the substantive right on which the claim was based. It follows that, in the case of a discontinuance pure and simple, the dispute can be submitted to the Court by means of a new application and that the Court must deliver judgment upon it on the same legal basis that existed before the discontinuance.

4. Once the discontinuance has been perfected, it produces its effects in a final manner. In view of the fact that, as has been said, the effect of the discontinuance is merely to put an end to the proceedings, this means that, after the discontinuance, the proceedings in the course of which the discontinuance was effected are finally terminated. For the reasons already given, however, this does not preclude the possibility of new proceedings in respect of the same dispute.

In the discussions which led up to the discontinuance by Belgium, the term "final" was very frequently employed to indicate the character which, according to the Spanish nationals concerned and the Spanish Government itself, the discontinuance or withdrawal of the claim had

to possess. For instance, the "basic memorandum" drawn up by M. March says that "the final withdrawal of the claim is a prior condition for entering into negotiations". However, the adjective by which the discontinuance is qualified does not in any way change the nature of the discontinuance. This adjective does not in any way of itself indicate, as Spain claims in its arguments, that the discontinuance was bound to produce effects which are not the effects pertaining to discontinuance as such, or that it was bound to produce other effects in addition to those effects.

The "final" character which, according to the Spanish nationals concerned and the Spanish Government, the discontinuance had to possess, can be understood in two different ways.

In the first place, the term "final" has been used in regard to the perfected character of the discontinuance. Since the contingency envisaged was that of paragraph 2 of Article 69, it was intended to indicate in this way a discontinuance capable of a presumption of acquiescence under paragraph 2 in the absence of any objection by the respondent within the prescribed time-limit. It is in this sense that the term "final" is understood by Spain itself in paragraphs 39, 54, 55, 56, 60, 119 and 125 of its first Preliminary Objection. This interpretation of the "final" character of the discontinuance is in line, on the Belgian side, with the passage in the Application (paragraph (5)) in which it is stated that "the Spanish group had intimated that it did not wish to negotiate so long as the case before the International Court of Justice was proceeding". It is in the same sense that the Belgian Government understands the final character of the discontinuance when, in paragraph 25 of its Observations, it refers to its proposal of March 1961 "that the discontinuance should become effective through acceptance by the Spanish Government only after an agreement had been arrived at between the private parties".

But the term "final" is also applied to the Belgian discontinuance in another sense, namely to indicate that the Spanish nationals concerned and the Spanish Government required true discontinuance and that true discontinuance was effected by Belgium ; true discontinuance as opposed to a different concept, namely mere suspension of the proceedings.

Suspension of the proceedings is not explicitly contemplated in the Rules of Court although it is admitted by certain systems of municipal law. It consists of a pause in the course of proceedings which nevertheless remain open, a pause during which no step in the proceedings may be taken. Once the suspension has come to an end, the proceedings resume their course without there being any need for the institution of new proceedings.

Now, as is stated in paragraph (5) of the Application, the Belgian Government had in fact said that it was "prepared to ask the Court for a suspension of the proceedings". This proposal, and also the other proposal concerning an extension of the time-limit fixed for the filing

of the Belgian reply to the Spanish Preliminary Objections, was considered to be insufficient by M. March. This led the Belgian Government, as is stated in the same paragraph of the Application, to effect a real discontinuance, that is to say, a discontinuance which, precisely in order to distinguish it from a mere suspension was, on many occasions, described as "final". It is in this sense that the term "definitive" is employed in paragraphs 70 and 71 of the first Preliminary Objection of the Spanish Government, whereas the paragraphs immediately following use it in an entirely different sense. Similarly, the "final withdrawal of the claim" is the term used as opposed to a mere suspension of the proceedings, *inter alia*, in paragraphs 122 and 123 of the same Spanish Preliminary Objection.

5. If it is recognized (as, in my opinion, it must be recognized) that, on the basis of Articles 68 and 69 of the Rules of Court, the discontinuance produces no other effects than that of putting an end to the proceedings in the course of which the discontinuance is effected, it follows that it is quite possible, after the discontinuance and the ending of the proceedings resulting therefrom, to file a new application for the purpose of instituting new proceedings.

Such a possibility is in no way dependent on the need for any reservation whatsoever. The need for a reservation could be upheld only on the basis of the, in my view erroneous, concept that discontinuance, as such, produces in addition to the effect of putting an end to the proceedings, other effects and it is those other effects that the reservation would in fact be intended to obviate.

If discontinuance as such, that is to say, as the step referred to in Articles 68 and 69 of the Rules of Court, produces only the effect of putting an end to the proceedings, it is quite possible that a discontinuance—more particularly a discontinuance effected by the applicant in accordance with the terms of Article 69—could be accompanied by another act of will of the same party producing independent effects of its own on the basis of general international law or of other particular rules. It is, however, quite certain that the existence of such an act, in any particular case, would have to be proved by the party concerned. The existence of this act, contemporaneous with the discontinuance but distinct from it, could not be presumed. Nor could it be inferred from the absence of any reservation in the notice of discontinuance.

6. If it is recognized, in general, that discontinuance may be accompanied by other acts of the applicant party and that those acts may produce independent effects of their own, it may be convenient to refer here, again in a quite general way, to the different cases that may arise.

The first case is that of discontinuance pure and simple, not accompanied by any other expressions of intention and, consequently, producing the sole effect pertaining to discontinuance, namely that of putting an end to the proceedings.

A second case occurs when there is, on the part of the applicant, not only a discontinuance of the proceedings, but also the abandonment of its claim or of its protest as a constituent element of the dispute which had been submitted to the Court, with the consequence that the dispute is extinguished. It is possible that the abandonment of the claim or of the protest may not be accompanied by abandonment either of the right of action before the Court or of the substantive right on which the claim or the protest was based. In that case, if the dispute arises again or, more precisely, if a new dispute arises corresponding, to a greater or lesser degree, to the extinct dispute, the Court may well be seised for the settlement of such a dispute and, if so, that dispute will have to be decided on the basis of the substantive right which the applicant party had invoked before the discontinuance.

It is possible, on the other hand (and here we are confronted with a third case), that the discontinuance may be accompanied by the abandonment of the right of action before the Court. In this case, the right of action is extinguished and this results in the extinction also of the jurisdiction of the Court. In view of the fact that the abandonment of the right of action does not necessarily imply the abandonment of the substantive right, the latter right may very well be invoked subsequently, either quite apart from any legal proceedings, or in the course of proceedings instituted before some authority other than the Court, or even before the Court, by some means other than the exercise of the right of action which was abandoned (for means of a special agreement).

Lastly, there is a fourth possible case. This is the case in which the applicant party which discontinues the proceedings abandons also its substantive right or recognizes that such substantive right does not exist. Such abandonment or admission produces effects going to the actual merits of the dispute. The substantive right that is abandoned or is recognized to be non-existent can no longer be invoked either apart from legal proceedings or in the course of any possible proceedings, such proceedings being quite possible, even before the Court, seeing that the abandonment or admission in respect of the substantive right do not, of themselves, affect the right of action before the Court.

The distinction between the last two cases mentioned is clearer in international law than in municipal law. Having regard to the fact that, in international law, the right of action and the corresponding jurisdiction are not, as in municipal law, of a general character but, on the contrary, are derived from certain particular rules, it is easy to conceive of an abandonment of the right of action deriving from a given rule which would not in any way affect the substantive right. The abandonment which is contemplated in municipal law, on the contrary, is usually not an abandonment of the right of action as such, but rather of the substantive right. It is this abandonment, in fact, which constitutes the situation which has been opposed to a mere

abandonment of the proceedings. While this latter form of abandonment is described as a *discontinuance of proceedings*, the term *discontinuance of the action* is used to indicate something that does not exactly correspond to such a term, namely the abandonment, not of the procedural right of action, but rather of the substantive right. This is the terminology which is employed by both the Parties in the present case. It will suffice, in this connection, to recall that, in paragraph 294 of its Memorial, the Belgian Government states than in most countries on the European Continent "by *discontinuance of the action* is meant the abandonment by the plaintiff of his action, thus of his right". The same terminology, which reveals a certain confusion between the procedural right of action and the substantive right, is used in the Spanish arguments.

At all events, so far as concerns the terminology and in regard to the hypothesis which is usually contemplated in municipal law, it is necessary, for the purposes with which we are concerned, to determine which hypothesis is, according to the Spanish Government, the one that applies in this particular case as a result of the Belgian discontinuance.

7. In the Submissions in the Preliminary Objections the Spanish Government asked the Court to declare that it has no jurisdiction to admit or adjudicate upon the claim made in the new Belgian Application, "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" pursuant to the Belgian discontinuance. In the Submissions filed after the hearing on 8 May 1964 the Spanish Government asked, for the reason set out above and for the reasons given in support of the other Preliminary Objections, that the Belgian Application be declared definitively inadmissible.

If regard is had only to the way in which the Spanish Government's Submissions are formulated, the first Preliminary Objection might be understood in a purely procedural sense, namely that it was specifically and solely designed to deny the jurisdiction of the Court to decide the dispute. Since the Court's jurisdiction in the present case was founded by Belgium on the 1927 Treaty and Article 37 of the Statute, the first Preliminary Objection would according to this construction be understood in the sense that Spain thereby asserted that Belgium had abandoned any right of action before the Court which might derive from those provisions.

It must however be observed that the contention that Belgium abandoned its right of action as such is not developed or even clearly outlined in the Spanish arguments. It is moreover a contention which does not fit in with the formula of "definitive" inadmissibility used by Spain in its final Submissions. For the only possible subject of a declaration of inadmissibility would be the application instituting the

proceedings in which the declaration of inadmissibility is made. But by asking that the Belgian Application be declared "definitively" inadmissible, Spain has on the contrary asked the Court for a judgment relating not specifically to the Application of 19 June 1962, but also relating to any other applications which, pursuant to the judgment asked for by Spain, would likewise have to be deemed to be "inadmissible". In substance Spain has asked for a judgment producing the effect of *res judicata* in the material sense, and such a judgment could, as such, only be a judgment on the merits.

8. In order to define the true scope of the first Preliminary Objection, it is necessary to construe the Spanish Submissions in the light of the arguments developed by Spain both in the written and in the oral proceedings.

It must be observed in the first place that in the circular sent to its diplomatic missions abroad on 13 April 1961, after the Order of the Court directing the removal of the case from the list, the Spanish Government, while it describes the Belgian discontinuance as a "discontinuance of the action", says that the Belgian Government was led "to discontinue the protection of certain private interests whose defence was not possible within the ambit of international law". The Spanish Government then comes to the conclusion that "Belgium's not going on with the proceedings therefore constitutes a definitive recognition that the position taken by Spain is well-founded". But the first Preliminary Objection refers to this circular in paragraph 62, stating that it demonstrates "as clearly as possible that the Spanish Government considered *the international dispute between the two governments* as having definitively come to an end".

But there are also other passages in the first Preliminary Objection which show the meaning which the Spanish Government attaches to the Belgian discontinuance. Although described as a "discontinuance of the action", that discontinuance is said to have as its subject, in reality, a substantive right, namely the right of diplomatic protection. For instance in paragraph 98 the Spanish Government refers to the definition given in the *Dictionnaire de la terminologie du Droit international*, according to which the term "discontinuance" can "be used to designate the renunciation of a claim or of a right". After this, the Spanish Government repeats precisely that the word can be "used in connection with the renunciation of a claim or of a right". Similarly, in paragraph 101 the term "discontinuance of the action" is used to denote "the intention of the parties concerning their rights as to the merits of the case". Again, in paragraph 102 it is said that "in most cases in which discontinuance occurs after agreement between the States the notice of discontinuance will reflect an agreement the purpose of which

is to settle the dispute *once and for all*". It may be recalled finally that, in paragraph 103, with reference to the Belgian discontinuance in the *Borchgrave* case, mention is made of the Belgian Government's intention "of abandoning once and for all its right to appear before the Court". This is said to be precisely the consequence of the fact that the same Government had recognized "that the responsibility of the Spanish Government was not at all involved".

The real significance of the first Preliminary Objection can be seen also from the arguments presented in support of it at the hearing. A relationship was inferred between the Belgian discontinuance and the Preliminary Objections advanced by Spain against the first Application and, more particularly, the Preliminary Objection relating to lack of capacity, and it was asserted that the discontinuance implied the abandonment by Belgium of its arguments against the Spanish Preliminary Objections. Having regard to the fact that the question of capacity, as we shall see later (Part IV below) is concerned with a substantive right, namely the right of diplomatic protection, it is seen very clearly that, according to the contention advanced by Spain in its first Preliminary Objection, Belgium, when, through its discontinuance, it abandoned its arguments in this connection, disposed of the said substantive right. It is claimed that Belgium either abandoned that right or recognized its non-existence.

Thus if account is taken of the way in which the first Preliminary Objection is presented and if the Spanish Submissions are understood in the light of the arguments developed both in the written proceedings and also in the course of the hearing, it becomes in my view very clear that by this objection Spain denies, as a consequence of the Belgian Government's discontinuance, that it is possible for that Government to exercise the right of diplomatic protection in any way whatsoever in respect of Barcelona Traction. Henceforward, from the Spanish Government's point of view, such a right could no longer be invoked by Belgium, not only before the Court but also in any proceedings that might be instituted before any other jurisdiction whatsoever, or even quite apart from any legal proceedings.

9. If this is the significance of the first Preliminary Objection, it is quite certain that this objection raises a problem that is concerned, not with the possibility or impossibility of a judgment on the merits, but, on the contrary, with the very way in which the merits of the case should be judged by the Court. But, for the reasons I have given in Part II above, such a question, as a question relating directly and exclusively to the merits, could not be considered by the Court at the present stage of the proceedings. Consequently the Court should in my view have declared the first Objection inadmissible as a preliminary objection.

IV. On the Third Preliminary Objection

1. In the third Preliminary Objection, Spain denies that Belgium has the capacity to exercise diplomatic protection in favour of the Barcelona Traction Company, or in favour of the Belgian shareholders in that company in respect of the damage suffered by it.

In my opinion, diplomatic protection is nothing other than the exercise by a State of its right to claim from another State a certain treatment for its nationals (whether natural or juristic persons). When a State demands, through the diplomatic channel, that one of its nationals shall be treated by another State in the manner prescribed by the international rules on the subject, or when it claims compensation because that treatment has not been afforded, the first State is merely exercising the right conferred upon it by those international rules. These are substantive rules conferring a right which has the character of a substantive right. It is simply because of the means by which that right is usually exercised that it is known as the right of diplomatic protection. There is no reason to consider that a right of diplomatic protection exists independently of the substantive right established by the rules relating to the treatment of foreigners.

The Spanish Government appears to have adopted an entirely different concept, which considers diplomatic protection as an institution the purpose of which is to *guarantee* the international rules relating to the treatment of foreigners. The Spanish Government appears to make a distinction between the right of a State to demand a certain treatment for its nationals and, as a corollary of that right, the same State's faculty of intervention through the exercise of diplomatic protection.

In my opinion, this differentiation is neither necessary nor even conceivable. In any event it is quite certain that when a State acts not through the diplomatic channel but by use of the judicial method, the right it invokes as the basis of its claim is simply the substantive right conferred by the rules concerning the treatment of foreigners. No account at all could be taken in judicial proceedings of the other right, or other faculty sought to be conceived of (wrongly, in my opinion) as something apart from the said substantive right in order to provide an explanation for the basis of diplomatic intervention.

2. In proceedings instituted by an application based on a right deriving from a rule concerning the treatment of foreigners (which may be called the right of diplomatic protection, subject to the above qualifications), the question of whether or not such a right exists is obviously one which directly concerns the merits of the case. Consequently, a judgment deciding this question is a judgment on the merits, producing the effect of *res judicata* in the material sense. Thus a judg-

ment finding that the right of diplomatic protection does not exist in a particular case is a judgment on the merits of the claim, not a judgment declaring that the substance of the claim cannot be considered or in other words a judgment declaring the claim inadmissible.

There are various reasons why in a particular case a right of diplomatic protection may be deemed to be non-existent. One possible reason is lack of capacity on the part of the State which relies on a would-be right of diplomatic protection. By capacity, in this instance, is meant nothing other than that the substantive right relied on in the proceedings pertains to one State rather than to another ; it is thus substantive and not procedural capacity. Since the right of diplomatic protection, like any other right, can be conceived of only as a right possessed by a particular State as against another particular State, denial that the right of diplomatic protection in respect of a certain private person pertains to the State which advances it as the basis of the claim made by that State to the Court is equivalent to a finding that the claim is, for this reason, not well-founded. This is so irrespective of whether or not the respondent State has committed any breach of an obligation, such obligation possibly existing towards a State other than the applicant. We thus see that a judgment declaring that the applicant State lacks capacity to exercise the right of diplomatic protection to which it lays claim, is a judgment dismissing the claim on the merits and not one declaring it to be inadmissible.

3. What are the merits in the present case? Belgium claims compensation from Spain for the alleged breach of an international obligation owed by Spain to Belgium. Spain refuses compensation, and denies that it has committed a breach of any obligation towards Belgium. Spain denies the existence of such breach on various grounds. One consists of a denial of the existence of the obligation alleged to have been violated : naturally, the existence of an obligation towards Belgium. Spain maintains that even were it possible to speak of an international obligation and of a breach of that obligation, the obligation in question would be owed by Spain to a State other than Belgium, and Belgium would thus have no claim in the matter.

Hence, the question of whether Belgium does or does not possess the capacity to bring the claim it has brought against Spain is nothing other than an aspect of the merits of the case. A judgment on this question would not be a judgment on the admissibility of the claim, it would on the contrary be a judgment on the merits. Thus a judgment by the Court deciding this question in the manner desired by Spain would not be a judgment declaring the claim inadmissible, but rather a judgment deciding the merits of the claim to the effect that Belgium's claim is without foundation. The effect of such a judgment would

not be limited to the present proceedings, preventing the pursuance of those proceedings before the Court. As a judgment on the merits, it would produce the effect of *res judicata* in the material sense. The judgment would be binding upon the parties, and upon any tribunal (the Court itself or any other tribunal) which might be called upon to give a decision on the same subject between the same parties. As a result of such a judgment, it would not be open to Belgium to make any further claim upon Spain in respect of the measures taken by the latter with regard to Barcelona Traction.

4. It is not possible to follow the Spanish Government in its attempt to separate from the merits of the case the question of the Applicant State's capacity to intervene for the purpose of diplomatic protection (hearing of 7 May 1964) for the very simple reason, already indicated, that capacity in this instance is nothing other than the possession by the Applicant State of the substantive right relied on as the basis of its claim.

The Spanish Government itself explicitly recognizes that the determination of the existence or otherwise of an international obligation, the breach of which a State alleges, is a matter of the merits. Such an obligation could be declared existent or non-existent only as an obligation owed by a particular State to another particular State. Consequently if the question of whether or not the Respondent State has committed a breach of an international obligation owed to the Applicant State by taking a certain measure in respect of a private person is a matter of the merits, the establishment of whether the obligation which is alleged to have been breached by the Respondent State is owed to the Applicant State—namely whether the right (the right of diplomatic protection) corresponding to the obligation pertains to the Applicant State—is also a matter for the merits, being only one aspect of the same question.

The answer to this question depends on the resolution of a number of points. Not only is it necessary to determine the identity of the private person affected by the measure of which the Respondent State is accused, but it is also necessary to ascertain whether or not that person is linked to the Applicant State by a bond of nationality. These are all points relating to the very existence of an obligation on the part of the Respondent State towards the Applicant State, hence the existence of a breach of such obligation, and hence the international liability asserted by the Applicant State. All these points thus concern the merits of the case.

5. The question raised by Spain as its third Preliminary Objection is therefore by no means of a preliminary character, since the answer to it is inseparable from an actual decision on the merits of the case. This is why this question was not open to consideration by the Court at the present stage of the proceedings, which was confined to questions

which really, and not simply because they are so qualified by a party, have the character of preliminary questions.

The bar on the Court's considering at the present stage of the proceedings the question of Belgium's capacity to exercise diplomatic protection was an absolute bar. There could be no question of a possible exercise of the discretionary power to join the objection to the merits, which presupposes the preliminary character of the objection. On the contrary, in the present case the question of capacity was a question directly and exclusively concerning the merits, not a preliminary question arising as linked to the merits in such a way as to justify the Court in joining it to the merits.

Nor were there any grounds for making a distinction, within the ambit of what has been called Preliminary Objection No. 3—as did the Belgian Government (hearing of 23 April 1964)—between questions ripe for decision and questions which were not. This distinction could apply only in respect of questions which all possessed the character of genuine preliminary questions ; it would then be a matter of the greater or lesser degree of relationship between each question and the merits of the case. In this case the questions concerned were not separate questions, but rather different points all relating to the same question, namely the question of the capacity of the Belgian State. Now as I said before, that capacity derives from the substantive right ; and the question of whether or not it exists is a question which is not merely connected with the merits, but rather which directly and exclusively concerns the merits.

I need hardly point out that the argument which appeared to exist between the parties, concerning the possibility of deciding at this stage certain points considered by both as ripe for decision, was one which could have no influence on the powers of the Court. Such an agreement not only did not oblige the Court, but did not even give it authority to consider the question of capacity at the present stage of the proceedings, either as a whole or in respect of certain of the points on which it arises.

6. The question of capacity could therefore definitely not be one arising for consideration at the present stage of the proceedings. Nor was the objection relating to it capable of being joined to the merits under Article 62 (5) of the Rules of Court. It ought on the contrary to have been declared inadmissible as a preliminary objection.

Whether the question of capacity should be considered before the other questions which also concern the merits, and the order in which the different points on which that question arises should be taken, are of course matters which may arise for consideration. It rests exclusively with the Court and not with the parties (either with the respondent party or with both parties acting in agreement) to decide such matters. The decision depends not upon logical reasons, but simply upon reasons

of convenience and economy. It is only on the basis of a comprehensive view of all the questions concerning the merits, and consequently only in the phase of the proceedings in which such questions arise for decision, that the Court could embark upon an examination of such matters.

It suffices to observe in this connection that it is quite possible, in a particular case, for a question other than that of capacity (for example, the question of the actual content of the rule of law on which the claim relies) to appear to lend itself more readily to decision than the question of capacity. In such case, the Court may well think fit to begin by considering that question and, on the basis of the conclusion reached on that question, possibly to decide to reject the claim on the merits without dealing with the question of capacity at all.

V. On the Fourth Preliminary Objection

1. In the fourth Preliminary Objection Spain asserted that the remedies provided by Spanish municipal law had not been exhausted and submitted that the Court should for this reason declare the Belgian claim to be "definitively inadmissible".

The preliminary character of this objection and hence its admissibility as a preliminary objection depend on what is held to be the nature of the rule on which the objection is based. It must be observed in this connection that the Spanish Government did not base its fourth Preliminary Objection directly on Article 3 of the Hispano-Belgian Treaty of 1927. On the contrary, the Spanish Government relied on a rule of general international law, the local remedies rule which, according to the Spanish Government, is only confirmed by Article 3 of the 1927 Treaty.

However, the local remedies rule, as a rule of general international law, is in my view substantive and not procedural. It is indeed a rule which is supplementary to other rules which also themselves possess the character of substantive rules, namely the rules concerning the treatment of foreigners.

Those rules require from the States to which they are directed a particular final result in respect of the treatment of foreign nationals, leaving the State which is under the obligation free as regards the means to be used. Consequently, if an organ of the State which is under the obligation performs an act contrary to the desired result, the existence of an internationally unlawful act and of the international responsibility of the State cannot be asserted so long as the foreign national has a possibility of securing, through the means provided by the municipal legal system, the result required by the international rule.

2. It follows that if in international proceedings instituted, like the present proceedings, by a claim based on damage to a national of the applicant State by an organ of the respondent State, it is found that the remedies made available by the municipal law of the respondent State have not been exhausted, the conclusion which must be drawn from this finding is not the inadmissibility of the claim, but rather the dismissal of the claim on the merits. In the eventuality I have described what is in fact found is that the alleged violation of the substantive international right of the applicant State has not been accomplished.

The consequence of such a finding can only be a denial of the responsibility of the respondent State and hence dismissal of the claim on the merits. A judgment to this effect is thus a judgment on the merits and produces as such *res judicata* in the material sense. It is just such a judgment, although incorrectly and contradictorily worded in the form of definitive inadmissibility, that is asked for by Spain in its fourth Preliminary Objection. But it was not open to the Court to give such a judgment in the present phase of the proceedings.

It must be concluded that the fourth Preliminary Objection also ought to be, not joined to the merits, but rather declared inadmissible as a preliminary objection.

(Signed) Gaetano MORELLI.