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DISSENTING OPINION OF JUDGE ARMAND-UGON

[Translation]

First Preliminary Objection

I much regret that I am unable to associate myself with the conclusions at which the Court has arrived in the present Judgment and I avail myself of the right to set out the reasons for my dissent.

The first Preliminary Objection relates to the discontinuance which occurred in the proceedings on the first Application. The Belgian Government asked for such discontinuance, invoking paragraph 2 of Article 69 of the Rules of Court. This discontinuance was agreed to by the Spanish Government at the express request of the Belgian Government, and the Court ordered that the case should be removed from its list.

The two Parties dispute the effect of the discontinuance. The Belgian Government contends that it was a mere discontinuance of the proceedings, while the Spanish Government maintains that the discontinuance put an end to the right to bring the case before the Court.

It is for the Court to construe this legal act. It is proper that this act should be interpreted by the organ from which it emanates.

The discontinuance in question is a judicial contract the subject of which must be determined with precision. It exists only in respect of the point which formed the subject of the agreement between the parties. Its scope must remain limited to what they intended. The proposal to discontinue was agreed to by the Respondent Party. An agreement between the Parties thus came into being. Paragraph 2 of Article 69 of the Rules of Court implies the reaching of an agreement and, in the act effected, there must be seen a judicial contract which, of course, is binding on the two Parties.

The question which this contract raises is that of determining its nature, its extent and its effects.

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Article 30 of the Statute of the Court authorizes the Court to frame rules for carrying out its functions and, in particular, to lay down rules of procedure.

An international organ is given the power of creating rules of law, in full independence. If international law is based on the agreement of States, either express or tacit, in the case of Article 30 of the Statute a new creative source has arisen. The Permanent Court and the International Court, which were created by States, have the capacity to lay down mandatory rules of law in the same way as any national legislature.

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It has been rightly held that the Rules of Court have the force of an international convention binding upon all States but that, by the will of the same States, these Rules can be modified or abrogated by the Court. In Article 31 of the Rules the Court provides that the parties may jointly ask it to make particular modifications or additions to Sections 1, 2 and 4 of heading II of the Rules. The heading *Settlement and Discontinuance* is to be found in Section 1 and Articles 68 and 69 could therefore have been modified or supplemented by agreement between the Parties to the present case, with the Court's consent. The Parties did not take advantage of this possibility.

To understand the scope and significance of Articles 68 and 69 of the Rules, it is indispensable to examine the sources of these two provisions.

Article 68 is a remodelling of Article 61 of the 1922 Rules. The origin of that Article 61 is to be found in the work of the Permanent Court between January and March 1922, when it was drawing up the first Rules of that Court.

The Permanent Court first examined a questionnaire on the points to be dealt with in the draft of the first Rules. One of the points in that questionnaire was the following: Can the parties remove a case from the Court, once they have submitted it? (*P.C.I.J., Series D, No. 2*, p. 291.) A first Article, numbered 44 (given in Annex 21 *(b)*, at p. 304), gave, in its first and second paragraphs, an answer to that question. This text, which relates to numbers 63 and 64, was adopted (p. 154) and appeared finally in the first Rules as Article 61.

The discussion of the questionnaire (pp. 83 and 84) made it clear, according to Judge Anzilotti, that the Court's jurisdiction was based entirely on the will of the parties and that for that reason the wishes of the parties should in all circumstances prevail. Lord Finlay added that it was agreed that the parties should have the right to withdraw, by common consent, a suit which they had brought before the Court.

The original Article 61, now Article 68, covered two cases: that of an agreement between the parties as to the settlement of the dispute and that of an agreement between the parties not to go on with the proceedings, that is to say, to withdraw the case from the Court. In both events, it was laid down that the case should be removed from the list. For the authors of that original Article 61, if discontinuance was effected by common consent of the parties, the withdrawal of the case from the Court was concluded. This decision not to go on with the proceedings was equivalent to withdrawing the case from the Court.

At the time of the preparation of the Rules of 22 March 1936, there was given as footnote 2 on page 318 of *P.C.I.J., Series D, No. 2 (Third Addendum)*, an extract from the report of a discussion regarding Article 61 of the first Rules. It is an extract from the minutes of 12 May 1933.

Baron Rolin-Jaequemyns is reported in these minutes as thinking

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that if "a government had noted the other government's declaration of withdrawal, the result of this was to constitute an agreement between the parties, so that Article 61 was applicable". The Registrar then recalled that Article 68 had been applied in two cases submitted by unilateral application, the *Sino-Belgian* and *Chorzów* cases.

The discussion ended with a statement by Sir Cecil Hurst to the effect that :

> "if the parties were agreed to remove a case from the Court, the latter's jurisdiction ceased and there was not even anything to make an order upon, since the Court's jurisdiction was derived exclusively from the agreement between the parties".

In his view,

> "withdrawal by the applicant did not suffice by itself to put an end to the jurisdiction of the Court ; for that purpose it must be accompanied by the consent of the other party. He thought that Article 61 of the Rules, which only dealt with the case of an agreement between the parties, did not cover the present case."

The aim of the 1936 reform, in framing paragraph 2 of Article 69, was to introduce unilateral discontinuance and to supplement the concepts embodied in Article 61. Hitherto, said Jonkheer van Eysinga,

> "the Court had only been agreed as to the possibility of the joint abandonment of proceedings by both parties. The Commission's intention was now by means of Article [69, paragraph 2] definitely to provide for unilateral discontinuance."

In Judge Fromageot's view the proposed text did not make provision for a possibility which had not previously existed. As a matter of fact it had existed, and the best proof of that was that there had been several instances of such possibilities. The point, according to him, seemed really to be one of drafting.

These antecedents make it possible to affirm that the sole aim of paragraph 2 of Article 69 was to embody a previously existing practice in a provision of the Rules.

Far from making provision for discontinuance of the proceedings, it adopted a discontinuance which, if accepted by the other party, creates an agreement to put an end to the proceedings. In such a case, paragraph 2 of Article 69 has the same legal content as the discontinuance by mutual agreement provided for in Article 68, formerly Article 61 of the old Rules, which, according to Sir Cecil Hurst, had the final result of bringing jurisdiction to an end.

Paragraph 2 of Article 69, moreover, did not introduce the right to re-submit the application ; jurisdiction having come to an end, such a right was inconceivable. In order that such a right might be exercised, it would have had to be based on a provision of the Rules which they do not contain.

* * *

When the Court is seised of a dispute, such dispute may be terminated by a judgment, but there are other means for putting an end to suits before the Court. It is provided in Article 20, paragraph 2, of the Rules, under heading XVIII, that the nature of the result of a suit shall be stated and its immediate effect can only be its removal from the list. As soon as an order has been made removing a case from the list, this means that the case has a final result.

Discontinuance, as provided for in Articles 68 and 69 of the Rules[1], opens another possibility for obtaining the removal of a case from the list. These two Articles come together under the heading *Settlement and Discontinuance* ; these two situations are related to each other.

Under Article 68, parties can agree as to the resolution of the dispute, either by means of a settlement or by not going on with the proceedings. In both cases, the will of the parties puts an end to the suit, and the Court places on record the agreement or the discontinuance and orders the case to be removed from the list on a mere communication from

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[1] *Article 68*

If at any time before judgment has been delivered, the parties conclude an agreement as to the settlement of the dispute and so inform the Court in writing, or by mutual agreement inform the Court in writing that they are not going on with the proceedings, the Court, or the President if the Court is not sitting, shall make an order officially recording the conclusion of the settlement or the discontinuance of the proceedings ; in either case the order shall direct the removal of the case from the list.

Article 69

1. If in the course of proceedings instituted by means of an application, the applicant informs the Court in writing that it is not going on with the proceedings, and if, at the date on which this communication is received by the Registry, the respondent has not yet taken any step in the proceedings, the Court, or the President if the Court is not sitting, will make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. A copy of this order shall be sent by the Registrar to the respondent.

2. If, at the time when the notice of discontinuance is received, the respondent has already taken some step in the proceedings, the Court, or the President if the Court is not sitting, shall fix a time-limit within which the respondent must state whether it opposes the discontinuance of the proceedings. If no objection is made to the discontinuance before the expiration of the time-limit, acquiescence will be presumed and the Court, or the President if the Court is not sitting, will make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. If objection is made, the proceedings shall continue.

the litigants. It is obvious that the parties cannot go back on what they have said concerning their agreement. In either event the case is finally and definitively removed from the Court's jurisdiction.

Paragraph 2 of Article 69 envisages a discontinuance which also requires the agreement of the parties, though that of the respondent party may be implied. In the present case, agreement was explicitly given at the request of the Applicant Party. Discontinuance thus became a fact. The Court placed the communications thus received from the two Governments on record and ordered that the case should be removed from the list, the suit having come to an end.

This provision does not specify whether it provides for a discontinuance of the action or for a discontinuance of the proceedings, this distinction being made in the municipal law of certain States. The Belgian Government bases its argument on a dogmatic notion of discontinuance which it derives, by analogy, from municipal law. It asserts that discontinuance presupposes the abandonment of the proceedings and that for it to comprehend abandonment of the action renunciation thereof is necessary. The vulnerability of this argument lies precisely in the fact that it is based upon analogy, in so far as it applies the principles of municipal procedural law to the procedure of the Court. The Rules have laid down the Court's own system for discontinuance and this is independent of the systems of municipal law, which can neither supplement nor interpret the system of the Rules. It is not in an argument by way of analogy that the concept which underlay the adoption of paragraph 2 of Article 69 must be sought. It is the rules and the procedure which are applicable in the International Court of Justice which apply in the present case and not the municipal law of certain States.

The Rules do not make any reference to these two kinds of discontinuance.

At the time of the 1936 revision of the Rules, the Members of the Permanent Court did not, at any point in their discussions, consider the substance of the discontinuances for which provision is made in Articles 68 and 69. The Members of the Court knew quite well that the municipal law of some States and the rules of some Mixed Arbitral Tribunals allowed discontinuance of proceedings and also discontinuance of the action ; but, on the occasion of the revision of the Rules, no allusion was made to this distinction. The Rules were devised to achieve only one purpose, namely to institute a means of putting an end to the proceedings. If the subject of the discontinuance was simply the proceedings, the party concerned was required to express this quite clearly, as the jurisdiction of the Court is consensual. If the texts concerning discontinuance filed by the parties contained no indication, there arose a problem of interpretation according to the rules of international law which the Permanent Court had laid down.

Paragraph 2 of Article 69 is a provision which partakes of the nature of a treaty and which allows parties to do only what it makes provision

for. What the governments are entitled to do cannot be extended to situations for which this text makes no provision. Declarations of human rights authorize man to do everything which the law does not prohibit him from doing but, in public law, the powers of the organs created by such law can be exercised only within the limits assigned to them. They are only entitled to do what is provided for in the relevant texts or what is absolutely necessary in order to carry out what is provided for in those texts. Paragraph 2 does not make provision for the re-submission, by means of a new application, of a case which has been discontinued. Nor can any presumption in favour of such a right be drawn therefrom. Furthermore, there is no general principle of law in favour of the possibility of a new application which, in order to be permissible in municipal law, must generally be based upon actual texts.

There are no precedents in the Court in favour of the existence of such a right of re-submission. This is the first time that such a claim has come before the Court.

Such a right of re-submission finds no support in the Rules ; nor can it be inferred either from the practice of the Court or from the practice of States in regard to arbitration. Municipal laws on this point are divergent. This right can result only from an explicit reservation contained in the discontinuance agreed to by the parties. Such a reservation is lacking in the present case.

* * *

The discontinuance to which the Court gave its official approval was expressly agreed to by the Parties. The private groups had negotiated an agreement which implied a prior discontinuance and that agreement was recognized by the Belgian Government. The object of the private agreement was the final and definitive withdrawal of the claim and its *raison d'être* was that the Sidro and Fecsa groups might begin negotiations in order to find a solution to their dispute.

The Spanish Government, when replying to the Belgian Government's request that it should agree to the proposed discontinuance, had to take account of the rules of procedure of the Court. Discontinuance under paragraph 2 of Article 69 is not in itself a discontinuance of the proceedings unless the party giving notice thereof wishes to give it this effect only. In such a case it must be clearly indicated. A consideration of a general nature supports this view : international jurisdiction must not be open to doubt and the relationship between States on this point must not be imprecise and lend itself to quibbling. Moreover, the Spanish Government understood that the discontinuance proposed by the Belgian Government contained something more than a mere discontinuance of proceedings.

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The principle of the equality of the parties to a suit is indeed a principle laid down in Article 35, paragraph 2, of the Statute, in the provision of the Rules and in the case-law of the Court. The International Court of Justice, in its Advisory Opinion on *Judgments of the Administrative Tribunal of the I.L.O. (I.C.J. Reports 1956)* said (at p. 86): "The principle of equality of the parties follows from the requirements of good administration of justice." Discontinuance of the proceedings, in itself, obviously favours the applicant, allowing it to correct the mistakes contained in the first application when re-submitting a new one. This was recognized by the Belgian Government in its Observations. It had to take account of the criticism which the first Application had given rise to on the part of the Spanish Government. If the text which notifies the discontinuance does not clearly state that it is a discontinuance of the proceedings which is involved, the party which wishes to give it such an effect must make clear without ambiguities its intentions and the purport of its notice of discontinuance. It is in duty bound to do so. The respondent is thereby informed of the discontinuing party's intention so that it can consent to or refuse the discontinuance with a full knowledge of what is involved.

The Belgian Government maintains that, if the Spanish Government made a mistake in law by interpreting its notice of discontinuance as a final and definitive withdrawal of the claim and not as a discontinuance of the proceedings, it must bear the consequences thereof. It has not been shown that paragraph 2 of Article 69 of the Rules of Court provided for discontinuance of proceedings nor that that provision allows for the re-submission of a new application. In order to know whether there has been an *error juris*, it is first necessary to ascertain the law. This is precisely the question that is before the Court.

Though the practice of the Court authorizes modifications in the original Submissions, it does not permit of a change in the subject of the Application, which must remain the same throughout the proceedings.

In conclusion, according to paragraph 2 of Article 69 of the Rules of Court, any notice of discontinuance which is not accompanied by a reservation must be considered as a renunciation of the right to submit a new application. The right of re-submission does not follow from this provision; it must follow from the wording of the notice of discontinuance.

* * *

If it is for the Court to construe the legal contract of discontinuance which was arrived at, it must take into consideration the evidence presented by the two Governments which led to its adoption. The history of the conversations between the two private groups must be

made clear. It is only thereafter that it will be possible to judge the value and the relevance of this evidence.

The notice of discontinuance cannot be situated in a void. It can be conceived of and understood only in the context of the conversations and discussions which gave rise to it. It is in the light of these facts and of the acts of those concerned that it must be read and interpreted. There is a sequence which links them with their culmination. The relationship which is established between them discloses the purpose of and the reason for the discontinuance. These various facts and acts, which form the context of the discontinuance, are bound together by a logical correlation. They explain one another. All these factors influenced the drafting of the notice of discontinuance, and it must be considered in relation to the circumstances in which it was filed and submitted for the decision of the other Party. These conversations started between Sidro and Fecsa, with Count de Motrico as an intermediary chosen by the two groups. They continued between Sidro and the Belgian Government and, finally, the text of the notice was communicated to the Spanish Government. The conversations which began in October 1960 ended in April 1961.

The documents exchanged during these conversations must be taken into consideration by the Court in order to ascertain the joint intention of the Parties, which must prevail over the literal meaning of the words. All legal acts are bound up with the real intention of those concerned. The two Governments have recognized the documents relating to these conversations as evidence and submitted them to careful examination in their written pleadings and oral arguments.

Before any step was taken in these conversations towards a friendly settlement between the two groups, M. March, of the Fecsa group, had drawn up a basic memorandum[1]. The first paragraph of this basic memorandum was drafted as follows: "From the moral standpoint, the final withdrawal of the claim is a prior condition for entering into negotiations." The Spanish text is as follows: "Desde un punto de vista moral la retirada definitiva de la demanda es condición previa para la apertura de la negociación." This memorandum was dated 20 October 1960 and was communicated by Count de Motrico to the Belgian group. It was at the request of that group that Count de Motrico got into touch with M. March.

Two days later, on 22 October, the representative of Sidro, the engineer M. Hernández, informed Count de Motrico of his disagreement

[1] "1. From the moral standpoint, the final withdrawal of the claim is a prior condition for entering into negotiations.

2. Once this condition has been fulfilled, the other party undertakes to enter in all good faith into immediate negotiations to seek a solution determining compensation for the shareholders.

3. Complete discretion is indispensable for the development of these discussions. No publicity of any kind will be permitted until a final agreement, if such is possible, is reached."

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with the condition of "the final withdrawal of the claim", if it were not accompanied by a final settlement between the two groups. M. Hernández considered that the "final withdrawal of the claim" involved "the discontinuance of the legal action" or the "withdrawal" of the legal action (Observations, Annex 6, Appendix 2, paras. 2 and 3).

The chairman of Sidro, M. Frère, in his letter of 2 December 1960 to M. Hernández, stated that he could not take the risk of stopping proceedings before an agreement was signed (Observations, Annex 6, Appendix 4).

M. Hernández wrote to Count de Motrico, in one of the drafts for an exchange of letters, dated 24 January 1961, that, as there was a "definite wish to arrive at a ... settlement of the dispute relating to Barcelona Traction", he accepted, on behalf of Sidro, among other principles, the "final withdrawal of the action brought by the Belgian Government against the Spanish Government before the Court at The Hague".

The Permanent Committee of Sidro had agreed—states M. Hernández in the same letter—to ask the Belgian Government "to put an end to the proceedings which are at present started in The Hague, if you [Count de Motrico] will be good enough to recognize that this letter faithfully represents what was agreed at our talks" (Observations, Annex 6, Appendix 5).

The Count de Motrico, being duly authorized by the Fecsa group, in a letter to M. Hernández dated 25 January 1961, manifested his agreement to the preceding draft letter (Observations, Annex 6, Appendix 5).

In a talk which the chairman of Sidro, M. Frère, had with the Belgian Minister for External Trade on 26 January 1961, he told him of the conversations with Fecsa. The Minister suggested that there should rather be "a suspension of the proceedings ... for a period of three months" (Observations, Annex 4, Appendix 6).

The Fecsa group and M. March having rejected such a suspension, the chairman of Sidro, at the instance of Count de Motrico, stated in his letter of 23 February 1961 that he was prepared to get the Belgian Government to agree to "a pure and simple withdrawal of the proceedings before the Court, so as to fulfil the condition regarded as a precondition for the negotiations proper" (Observations, Annex 6, Appendix 6). In answer to this letter Count de Motrico said that "it faithfully reflects what was dealt with in the various talks" (Observations, Annex 6, Appendix 6).

Two drafts for letters from M. Frère to Count de Motrico, dated 9 March 1961 (Preliminary Objections, Annex 71, documents 1 and 2) preceded the letter sent by M. Frère to Count de Motrico on the same day (document No. 3). The contents of the second paragraph of this last letter were as follows:

> "I explained to the Minister that the prior withdrawal of the proceedings pending at The Hague was, in sum, a *sine qua nón*

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condition for the negotiations on the bases defined in our exchange of letters of 23 and 24 February last to take place."

On 10 March 1961 M. Frère informed Count de Motrico by letter that the Belgian Government would take the responsibility of withdrawal after an exchange of letters between the Belgian Ambassador and the Minister for Foreign Affairs of Spain, which would be communicated to no-one, governing the procedure for the withdrawal of the proceedings and which would remain outside the knowledge "of the person whom I met in your company" (document annexed to the Count de Motrico's report dated 4 December 1963).

This proposal produced no results, being contrary to the first requirement in the basic memorandum, concerning the final withdrawal of the claim.

On 17 March 1961, Count de Motrico informed the Spanish Minister for Foreign Affairs of the state of the conversations with a view to discontinuance. In a letter dated the following day, Count de Motrico told the Minister that M. Frère had informed him that the Belgian Government had "decided to ask the International Court of Justice for the definitive withdrawal of its application submitted against our Government" and he added that "the Belgian Government will draft its notice of withdrawal in terms similar to those used in connection with a dispute between the United Kingdom and Bulgaria".

On 21 March, the Spanish Minister for Foreign Affairs telegraphed to Count de Motrico to inform him of his Government's position in respect of the announcement of the Belgian discontinuance. He stated that the case must be considered as closed and that the purpose of the discontinuance was to put an end definitively to the dispute between the two Governments.

There were two contacts, on 22 and 23 March, between the Spanish Minister and the Belgian Ambassador in Madrid. The Ambassador first tried to associate the Spanish Government with the discontinuance. On the Minister's refusal, he informed him of the text of the notice of discontinuance filed with the International Court, which was to fix a time-limit, asking him not to communicate his acceptance of the discontinuance before the expiry of the time-limit.

The following is the text of the notice of discontinuance :

> "At the request of Belgian nationals the protection of whom was the reason for the filing of the application... [of] 15 September 1958, I am directed by my Government and I have the honour to request you to be good enough to inform the Court that, availing itself of the right conferred upon it by Article 69 of the Rules of Court, my Government is not going on with the proceedings instituted by that application."

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Fecsa was opposed to beginning the private negotiations with Sidro for so long as the discontinuance had not been approved by the Court. The Spanish Government, at the request of the Belgian Government, agreed, in its letter to the Court of 5 April 1961, not to oppose the discontinuance.

The International Court, in an Order dated 10 April 1961, placed the discontinuance on record and ordered the case to be removed from the list.

A circular from the Spanish Ministry of Foreign Affairs, dated 13 April 1961, informed its diplomatic missions abroad that the Belgian Government had "indicated its discontinuance of the action" instituted and that the case had "ended in tacit recognition of Spain's good name".

These are the essential facts and documents which led up to the discontinuance.

* * *

Let us now turn to an examination of the evidence in order to establish what conclusions are to be drawn.

It is not necessary to spend long over determining which of the two groups took the initiative for the conversations. Fecsa at least did not take the first step. In the first place, it laid down a prior condition for any negotiations, which it firmly maintained throughout all the phases of the conversations. It would not allow either the suspension of the proceedings or the extension of the time-limit for the filing of the Belgian Observations and Submissions. It opposed any suggestion contrary to the final withdrawal of the claim. It did not wish to be a party to negotiations until the discontinuance had been accepted by the two Governments and placed on record by the Court. These facts show the obvious interest which Sidro had in seeking to resolve the dispute.

* * *

The significance and meaning of the prior condition stipulated in the basic memorandum, which was accepted by the Belgian group, must be sought in the documents that preceded the discontinuance which was finally adopted.

What is the legal purport of the words "final withdrawal of the claim" *(retirada definitiva de la demanda)*? Right from the time when, two days later, the Belgian group learned about it from M. Hernández, the latter understood quite well that this withdrawal meant the "final withdrawal of the court action". Subsequently, he repeated this view when accepting on behalf of Sidro the principle of the "final withdrawal of the court action brought by the Belgian Government against the Spanish Government". In that same letter, he assimilated this withdrawal of the action to the phrase "put an end to the proceedings which are at present started in The Hague".

These utterances on the part of Sidro leave no room for doubt. It was a question of finally and definitively renouncing the seising of the Court of the Barcelona Traction case. It was indeed a renunciation of the bringing of the case before the Court. Such was the opinion of the Fecsa group too. There was thus from the outset no divergence as to the significance of the prior condition, no divergence as to the meaning of this phrase.

On 23 February 1961, the chairman of Sidro stated that he was prepared to get the Belgian Government to agree to the "pure and simple withdrawal of the proceedings before the Court so as to fulfil the condition regarded as a pre-condition for the negotiations proper". It was in accordance with that statement that the chairman of Sidro had his first interview with the Belgian Minister for External Trade. The Minister must have been informed of the demand made by the Spanish group and of the meaning of the prior condition, as the chairman of Sidro told Count de Motrico in his letter of 9 March, referring to the letters of the previous 23 and 24 February. But one of the bases of the letter of 23 February was the pure and simple withdrawal of the proceedings so as to fulfil the condition regarded as a pre-condition. The pure and simple withdrawal of proceedings signified to the Chairman, M. Frère, the withdrawal of the Application, so as to comply with the basic memorandum. The Belgians considered the "prior condition" to be excessive, as is shown by their efforts to attenuate it. The Belgian Minister tried to get other conditions substituted for it—suspension of the proceedings, extension of the time-limit for the presentation of the Observations, secret letters, requests for guarantees. It is obvious that, in their view, this prior condition was something other than a discontinuance of the proceedings.

This same view is confirmed by the letter of 18 March from Count de Motrico to his Minister.

The notice of discontinuance sent to the President of the Court read as follows :

> "*At the request of Belgian nationals* the protection of whom was the reason for the filing of the Application ... I am directed by my Government ... to request you ... that, availing itself of the right conferred upon it by Article 69 ... [it] is not going on with the proceedings instituted by that Application."

This is the same formula for discontinuance as in the *Borchgrave* case which, however, was a final discontinuance and it had been used also in another case between the Belgian Government and the Spanish Government.

This discontinuance was filed at the request of Sidro, the only Belgian national taking part in the talks. No evidence was brought as to the intervention of any other Belgian nationals with their Government. The notice of discontinuance establishes a link between the wording

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of that document and the agreement negotiated between Sidro and the Fecsa group and accepted by the Minister for External Trade. Counsel for Belgium said: "In making its declaration of discontinuance on 23 March 1961 the Belgian Government was merely intending to meet the preliminary demand made by Juan March." The reason for the discontinuance was an agreement between the two groups that the suit should be brought to an end so that negotiations with Fecsa could be started. The same Counsel for Belgium stated that the Belgian Government accepted "the final withdrawal of the Application ... to permit of negotiations".

The two groups having arrived at an agreement on the basic memorandum, that is to say, on the final withdrawal of the claim, the Belgian group, in order to honour that agreement, asked its Government to take the necessary measures to that effect. That Government could not avail itself of Article 68 of the Rules, since no agreement had been reached between the Parties to the action; it therefore had to utilize the means available under Article 69, paragraph 2, which permits of a unilateral notice of discontinuance, which must nevertheless receive the express or implicit consent of the other Party. That is what it did. The Belgian Government notified the Court of a discontinuance based on the agreement between the two groups, and that agreement provided for the final withdrawal of the claim before the Court. The Belgian Government's notice of discontinuance endorsed the agreement reached by the two groups.

The Belgian Government must have been informed by the Chairman of Sidro of the meaning of the phrase in the prior condition "final withdrawal of the claim", just as he had informed Count de Motrico of it. Sidro consequently asked the Belgian Government for a final withdrawal of the Application filed with the Court. Sidro had made a promise to the Spanish group, creating an obligation finally to withdraw the claim of which the Court had been seised. The Belgian Government took over that obligation by discontinuing, on behalf of Sidro, without any condition. The evidence adduced is therefore conclusive and decisive; not even the slightest doubt is possible as to the meaning and the scope of the discontinuance. The discontinuance is the expression of the intentions underlying it and these override the words actually employed. This act, in the present case, bears the mark of decisive intentions and these must be conclusive in construing it.

* * *

It was maintained in oral argument on behalf of the Belgian Government that the first condition of the basic memorandum was satisfied when it filed its notice of discontinuance. The basic memorandum, however, required, for the opening of negotiations between the two groups, the final withdrawal of the claim, a requirement which presup-

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posed, as must be inferred from its wording, that no new claim would be brought once the discontinuance had taken place. *Final withdrawal of the claim*, in accordance with the first point in the basic memorandum, meant a *final withdrawal* and not a *mere withdrawal* of the claim. The adjective *final* must be given its meaning. Words are of value only in so far as they express an idea and it must be supposed that when a particular notion is chosen something precise is intended.

To admit the Belgian interpretation would lead to holding that the Spanish group merely asked for a discontinuance of the proceedings. But such an interpretation is not seriously possible and would run counter to the recognized facts—non-suspension of the proceedings, non-extension of the time-limit for the presentation of Observations, non-agreement to secret letters. The withdrawal of the claim had to be final.

In order to establish the meaning of the phrase "final withdrawal of the claim", it must be emphasized further that such withdrawal had to serve a purpose of a moral nature. The Spanish Government and M. March had been abused in the Belgian Application and Memorial. M. March was opposed to any negotiations with Sidro so long as those documents were not finally withdrawn from the Court. The withdrawal was not to be limited solely to the proceedings then pending, but had to be final. This adjective has only one accepted meaning—the complete and total abandonment of the assertions contained in the documents. It was not a provisional abandonment that was asked for but the final withdrawal of the claim. The word *final* must be given its full emphasis. According to the undertaking entered into, these assertions could not be repeated again later. A mere suspension of the proceedings would have maintained them. The moral aspect could be safeguarded only by the final withdrawal of the case. A discontinuance of the proceedings would not have this effect.

The meaning of the judicial contract of discontinuance is further confirmed by the conduct of the two groups and of the Governments, and by the legal analysis of their conduct.

Their acts have not the same importance or the same significance. They are however a source which enables us to construe the discontinuance. They also imply abandonment of reference of the case to the Court.

Some of these acts were brought about by private parties seeking the holding of negotiations, whilst other acts emanate from the actual Parties to the case. They must be examined as a whole, in order to attribute a precise meaning to them and in order to ascertain the purpose and intention of the act performed.

"Cases are known in international practice where it was debated whether the facts alleged could be interpreted as a renunciation, but no cases are known in which the need for an explicit statement was affirmed. The intention to abandon a right may be inferred

also from the attitude of the party concerned." (Anzilotti, *Cours de droit international*, Vol. I, p. 350.)

One salient fact emerges from this conduct. The Fecsa group made of the final withdrawal of the Application a *sine qua non* condition for any negotiations, as is recognized by the chairman of Sidro. This condition was reiterated on numerous occasions, each time there was a fresh attempt to get rid of it. The Fecsa group firmly maintained its position from October 1960 to March 1961. No final withdrawal of the claim : no negotiations. Such a requirement was known to Sidro and to the Minister for External Trade. The Belgian Government was thus informed of the nature of the discontinuance insistently demanded by the Spanish group.

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The letter dated 10 March sent by M. Frère to Count de Motrico gives rise to a presumption in favour of the argument that the Belgian group were aware that M. March's demand referred to a final withdrawal of the claim brought before the Court. In that letter an attempt was made to give a conditional character to the withdrawal instead of the unconditional character insisted on in the basic memorandum. It was suggested in that letter that the Belgian Ambassador should have a talk with the Minister for Foreign Affairs in Madrid with a view to exchanging letters governing the procedure for the withdrawal of the proceedings. These letters would be communicated to no-one, not even to M. March. On the conclusion of the negotiations, they could be returned or destroyed. On this basis—but as an indispensable minimum—the Belgian Government would take the responsibility for the withdrawal.

This Belgian proposal, which was suggested, as M. Frère says, by the legal adviser to the Ministry of Foreign Affairs, was obviously intended to modify the requirement of the basic memorandum for the final withdrawal of the claim. Thus the finality sought by that memorandum would be avoided. This shows that M. Frère was aware of the meaning of this requirement and of its legal effect. There is in this letter from M. Frère a recognition by the Belgian Government of the fact that the discontinuance asked for was not a mere discontinuance of the proceedings, for without such an interpretation, there could be no reasonable explanation for the letter, and it is difficult to see why the Belgian Government would have hesitated to commit itself if the discontinuance in question related only to the proceedings.

The proposal by the Minister for External Trade to replace this condition by a suspension of the proceedings for three months, thereby allowing the Parties concerned to negotiate during this time, was rejected *in limine* by the Fecsa group, which considered it incompatible with the basic memorandum. Other proposals by M. Frère,

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made with the knowledge of the Belgian authorities, met the same fate (withdrawal on agreement being reached by those concerned, an extension of the time-limit for the presentation of the Belgian Observations and Submissions, the procedure of an exchange of secret letters and guarantees). If the Belgian Government believed that the withdrawal asked for involved only a discontinuance of the proceedings which, in the last analysis, would be tantamount to a suspension, why did it submit proposal after proposal in order to avoid agreeing to the withdrawal asked for? What the Minister for External Trade, the chairman of Sidro, M. Hernández, Count de Motrico, and the Fecsa group knew was that the final withdrawal of the claim from the Court's list meant abandonment of the pursuit of the case before the Court. In the talks, there was accordingly a precise undertaking, with a well-defined subject and intention, and not a mere exchange of views. An agreement between the private groups was negotiated and accepted as it stood by the Belgian Government, which proposed it to the Spanish Government.

If the proposal for a suspension was declined on account of its insignificant procedural effect, it is inconceivable that a mere abandonment of the proceedings would have been preferred. A suspension would still have had the merit of preserving the Preliminary Objections should the proceedings be recommenced later, in the event of a breakdown in the negotiations. The refusal of a suspension does not fit in with the discontinuance of the proceedings as contended for by Belgium. Refusal to accept a suspension was also a refusal of a discontinuance of the proceedings. The basic memorandum required something more from the procedural point of view than a mere discontinuance of proceedings.

* * *

Sidro's interest in negotiating can be seen clearly throughout the talks. The letter of 23 February 1961 from M. Frère is one example of this. He was convinced—or at least he says he was—that a basis existed for a settlement favourable to the Barcelona Traction shareholders. The intermediary stated that negotiations could begin immediately after the withdrawal of the claim and that a solution might be found within a fortnight. It was, said M. Frère by reason of the foregoing that he was prepared to make a new effort to induce the Belgian Government purely and simply to withdraw the proceedings then pending. As soon as this withdrawal of the claim had taken place negotiations would open propitious to the Belgian interests, which would lead to concrete results. It was with a knowledge of this state of mind that the Belgian Government decided to agree to the discontinuance asked for by Sidro (Observations, Annex 6, Appendix 7, p. 108). The Belgian Government took the decision to withdraw the claim, as Sidro asked it to do, in order that the dispute might be settled by direct negotiations between the two groups of interests.

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When agreeing to the discontinuance at the express request of the Belgian Government, the Spanish Government had before it the following facts : a letter from Count de Motrico informing it of the final withdrawal of the claim by the Belgian Government and announcing that this discontinuance would contain the same reservation as that made by the British Government in the case against Bulgaria. On that occasion the British Government reserved "all [its] rights in connection with the claim of the United Kingdom against Bulgaria". But the discontinuance proposed to the Spanish Government did not contain any reservation of this type. The Spanish Government, having regard to the wording of the discontinuance, could not doubt, when agreeing thereto, that it was a final discontinuance, without any reservation, and not a discontinuance of the proceedings.

M. Frère's legal adviser had informed Count de Motrico that the notice of discontinuance would contain the British reservation mentioned above. M. Frère, on behalf of Sidro, had taken the decision to accept the basic memorandum, which was known to the Belgian Government. The intermediary, being aware of this position, informed his Government of it at the time when the latter was about to receive communication of the notice of discontinuance. A party which allows its opponent to believe that it is taking up a particular legal position—in this instance the final withdrawal of the claim—cannot go back on its attitude and maintain that it wished for something else, namely a mere discontinuance of the proceedings. This is an application of the concept of good faith, whereby a party creates a right in favour of its opponent by following a certain course of conduct.

Moreover, for the Spanish Government, this discontinuance was effected on the basis of paragraph 2 of Article 69 of the Rules of Court, and not with reference to municipal procedural law. But paragraph 2 of Article 69 does not stipulate a discontinuance of proceedings or a right of reinstitution, and such right is not in accordance with the wording of the Belgian discontinuance, namely "is not going on with the proceedings instituted by that Application". It is impossible to draw from the use of this formula a presumption that the intention was not to put an end to the proceedings once and for all. If this formula had another intention, it was necessary to say so clearly. Good faith required it.

If, according to the argument of Counsel for the Belgian Government, the Spanish Government was informed by Count de Motrico of the conversations between the two private groups, the Spanish Minister for Foreign Affairs would have been aware that the discontinuance asked for by the Spanish group was a discontinuance of the legal action and not merely of the proceedings. In terms of this contention, it is obvious that the Spanish Minister could not have hesitated for a single moment to give his consent to the discontinuance for which the Belgian Ambassa-

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dor had asked him at the instance of his Government. Thus, the case would be at an end in respect of legal proceedings before the Court, in order to make way for a solution between the two groups, a position which the Spanish Government always supported right from the origin of the Barcelona Traction dispute. Any other attitude on the part of the Spanish Government would seem to be ruled out. It would never have agreed to a mere discontinuance of proceedings. The Belgian Government was abandoning judicial settlement in order to obtain a settlement through private negotiations.

One of the reasons why the Spanish Government could not accept such a discontinuance, and would not have accepted it, is an important consideration of a moral order which is expressed in paragraph 3 of its communication to the Court dated 7 July 1962:

> "The Spanish Government would certainly have opposed the discontinuance if it had not had the certainty that this act entailed in itself the renunciation by the Belgian Government of accusations which are as defamatory as they are unjust against the judicial, administrative and governmental authorities of the Spanish State."

In short, the Spanish Government could not knowingly consent to a temporary discontinuance without damage to its moral position. This reason is in itself decisive. From the legal point of view, the Spanish Government, by accepting a temporary discontinuance, also risked compromising its constant position as to the absence of any Belgian *jus standi* in the matter. Finally, the Spanish Government was convinced that its position, judging by the pleadings, was extremely sound. Consequently, if it had not believed the discontinuance to be final, it would have had to examine with the closest attention the question whether it ought to go on with the proceedings at the stage which they had reached.

As to the material or moral prejudice actually suffered, Spain was again brought before the Court on the basis of the same grave accusations, which were automatically communicated to all Members of the United Nations. Secondly, the other party had the opportunity of revising, in the light of Spain's arguments, its entire case in respect of the Preliminary Objections and has, indeed, sought to modify its defence against one of the objections. Thirdly, Spain has had to bear the heavy administrative burden represented by a second submission of the case to the Court.

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The first Objection must therefore be upheld.

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SECOND PRELIMINARY OBJECTION

This Preliminary Objection is concerned with the jurisdiction of the Court.

The Application instituting proceedings states that the Treaty of 19 July 1927, which came into force on 23 May 1928, is binding on Spain and Belgium. Pursuant to Article 17 of that Treaty, these States may bring direct before the Permanent Court of International Justice, by means of an application, disputes with regard to which the parties are in conflict as to their respective rights. This Treaty being in force, according to Article 37 of the Statute of the International Court of Justice it is to this Court that the jurisdiction provided for in favour of the Permanent Court is transferred. As Belgium and Spain are parties to the Statute of the International Court it is claimed that this Court possesses jurisdiction to hear and decide the present dispute.

In its Submissions, the Spanish Government states that the bond of jurisdiction provided for in Article 17 applies to the submission of disputes, not to the International Court but only to the Permanent Court. The admission of Spain to the United Nations, in 1955, did not have the effect of substituting the compulsory jurisdiction of the International Court for that of the Permanent Court, for the Permanent Court was dissolved before Spain was admitted as a Member of the United Nations. This situation was not modified by Article 37 of the Statute, which binds only States that were Members of the United Nations prior to the dissolution of the Permanent Court. The Court is therefore without jurisdiction.

* * *

The Belgian Government maintains that the interpretation given in the Judgment of 26 May 1959 in the *Aerial Incident* case (*I.C.J. Reports 1959*, p. 127), although valid and correct in respect of Article 36, paragraph 5[1], is not applicable as an interpretation of Article 37[2].

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[1] Article 36, para. 5 :

"5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

[2] Article 37 :

"Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

The interpretation given in this Judgment was followed in the *Temple of Preah Vihear* Judgment of 26 May 1961 (*I.C.J. Reports 1961*, p. 17).

In the Judgment in the *Aerial Incident* case, the Court made no mention of Article 37 in order not to prejudge the case on the first Application relating to Barcelona Traction which was then pending.

It must therefore be shown why that interpretation is not applicable with regard to Article 37. For this purpose, it must be shown that the question raised by Article 36, paragraph 5, is a different question from that raised by Article 37. In the absence of such proof, the decision in the *Aerial Incident* case would be applicable and the Belgian contention must be abandoned. It is only the legal differences between these two texts that concern us. Factual differences between the present case and that of the *Aerial Incident* are of less importance, for they have no bearing on the legal problem concerning the two texts.

The Belgian Government's central argument is to the effect that, from the legal standpoint, there is a difference between a declaration under Article 36, paragraph 5, and a declaration of acceptance of jurisdiction embodied in a treaty or convention (Article 37).

The legal nature of these two undertakings is identical and so is their content. Their purpose is to make the jurisdiction of the Court compulsory for the States (the same content) and they are also consensual undertakings (the same nature). They may or may not be subject to time-limits. The form of the undertaking is unilateral in one case and becomes subsequently, as in the other case, bilateral. It is therefore difficult to see how there can be any difference between these two undertakings, in respect of their form, their nature or their content. In both cases compulsory jurisdiction is brought into operation by means of a unilateral application.

It is true that the declarations were unilateral undertakings. But as those undertakings were addressed to other States, which had accepted the same obligation, they gave rise to agreements of a treaty character concerning jurisdiction which were legally equivalent to the jurisdictional clause embodied in a treaty or convention. The Court confirmed this view in the *Right of Passage* case:

> "The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established '*ipso facto* and without special agreement'."

These declarations could not be modified without the consent of the parties. Nor could they be withdrawn unless the right to do so had been explicitly reserved. They had the same force and the same legal content as a provision in a treaty. That is the point of view of the Belgian Government, as can be seen from the reservations it made when Paraguay denounced, unilaterally, its declaration of acceptance of the optional clause and when South Africa withdrew part of its declaration.

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The *ratio legis*, the object, of these two provisions of the Statute is the same, namely the immediate transfer to the International Court of the jurisdictional obligations in respect of the Permanent Court—it being understood that these obligations must be "in force".

Article 36, paragraph 5, and Article 37 were both drawn up, discussed and adopted by Commission IV and the relevant committee at the same time, as dealing with the same legal question, namely that of the adaptation to the International Court of declarations relating to the jurisdiction of the Permanent Court.

After explaining, in paragraphs *(a)* and *(b)*, the means by which the succession of the new Court to the jurisdiction of the Permanent Court was to be ensured, on the one hand, by Article 36, paragraph 4 (which later became paragraph 5), and, on the other hand, by Article 37, Committee IV/1 emphasized that—

> "acceptances of the jurisdiction of the old Court over disputes arising between parties to the new Statute and other States, or between other States, should also be covered in some way".

After stating that it seems desirable "that negotiations should be initiated with a view to agreement that such acceptances will apply to the jurisdiction of the new Court", the above-mentioned report reaches the conclusion that this matter "cannot be dealt with in the Charter or the Statute", adding that it may later be possible for the General Assembly to facilitate such negotiations. The terms employed (jurisdiction of the Court, acceptances of jurisdiction) leave no room for doubt that they relate to the cases referred to in Article 37 and in paragraph 5 of Article 36.

These two texts therefore deal with the same question, namely that of the transfer of declarations and jurisdictional clauses from one Court to the other. It therefore follows that the interpretation of one of these texts must be valid also as the interpretation of the other. In the *Nottebohm* case the Court said : "The same issue is now before the Court : it must be resolved by applying the same principles" (*I.C.J. Reports 1955*, p. 22).

Of the jurisdictional clauses mentioned, one was incorporated in the Statute of the Permanent Court and the other in certain provisions of treaties or conventions. These legal undertakings have their own special purpose in the instrument in which they are embodied and they may be extinguished either through the expiry of a certain time-limit, or through some external cause. When the time-limit has expired, the obligation lapses, as it does also in the case in which an external cause affects the very subject-matter of the obligation. Where the obligation binds a State in regard to the Permanent Court (a declaration

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or a convention) the object of the obligation becomes impossible of achievement, definitively, if the organ, i.e., the Permanent Court, has disappeared. The obligation lapses and the lapsing occurs on the date of the dissolution of the Permanent Court, 18 April 1946, in respect both of declarations and of treaty clauses.

In order that the operation of the transfer from one Court to the other may be effected, immediately, validly, it is essential that the jurisdictional clauses should be in force in respect of the two States at the date on which the two States became parties to the Statute. In the present case, the obligation under the Spanish-Belgian Treaty was in force for Belgium when that country became a party to the Statute ; but this obligation had lapsed when, in its turn, Spain became a party to the Statute in December 1955.

* * *

As already stated, Article 37, which is a transitional provision, had no other purpose than that of preventing the disappearance in the immediate future of the declarations accepting jurisdiction which were contained in certain treaties. This is also the purpose of Article 36, paragraph 5. The two provisions were concerned with declarations, whether bilateral or unilateral. The jurisdictional clauses incorporated in a treaty or convention were inevitably bound to lapse at the date of the dissolution of the Permanent Court. The preservation of these clauses could apply only to those that were in force and were included in a treaty signed by States that were parties to the Statute prior to the dissolution of the Permanent Court. Clauses not included in this category would lapse irremediably. That is what happened in the case of Article 17, paragraph 4, of the Treaty, on the dissolution of the Permanent Court. To enable Article 17 to survive after the dissolution of the Permanent Court, Spain would have had to be a party to the Statute before the dissolution of that Court.

The purpose of Article 37 was to maintain for the immediate future the jurisdiction that had been accepted, whilst transforming its object. Its purpose was not at all to resuscitate across the passage of time an obligation which had lapsed for want of substance and applicability, at the time of the dissolution of the Permanent Court. Consequently, it cannot be claimed that, between 18 April 1946 and 14 December 1955, owing to the effect of Article 37, Spain was bound to the compulsory jurisdiction of the Permanent Court, nor to that of the International Court, as Spain was not a party to the Statute at the time of the substitution effected in the jurisdictional clause. The obligation which had been extinguished could not be revived on the basis of Article 37.

There was no intention to cover all such jurisdiction, as might, in principle, have been desirable, but only jurisdiction that had not lapsed before the disappearance of the Permanent Court. The San Francisco Conference, as will be seen later, did not concern itself with the juris-

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dictional clauses in treaties of enemy or neutral States. The intention to maintain all jurisdiction agreed to in respect of the Permanent Court was not envisaged in Article 37.

To determine the effect of Article 37, it is necessary to consider the situation that would have been created if it had not been adopted. There can be no doubt that any provisions of treaties accepting the jurisdiction of the Permanent Court that were in force would have lapsed on the dissolution of that Court. Article 37 was intended to safeguard these provisions in treaties in force in the case of States parties to the Statute before that dissolution.

The purpose of Article 37 was, within certain limits, to obviate a hiatus, a lacuna, between the two Courts and continuity was obtained by giving validity in respect of the new Court to certain declarations concerning jurisdiction included in treaties and relating to the Permanent Court. This continuity could be ensured only as between those States that were parties to the Statute prior to the dissolution of the Permanent Court. Article 17 of the 1927 Treaty could not be used for this purpose, as Spain was not one of those States.

It is maintained that, although Article 36, paragraph 5, is transitional in character, Article 37 is not so. This interpretation is based on Article 37 of the Statute of the Permanent Court.

It may be noted, in the first place, that Article 37 of the Statute of the Permanent Court also had a transitional character. Indeed, once the Permanent Court was established, it became necessary to decide that that Court was the tribunal referred to in the Peace Treaties. The purpose of Article 37 of the Statute of the Permanent Court was not, as is contended, to extend the field of compulsory jurisdiction but to identify an international tribunal. Compulsory jurisdiction was not founded on that Article, but on the treaties by which it was established, and it could not be related explicitly to a court which had not yet been created. The treaties had established the compulsory jurisdiction of a tribunal which was to be instituted. Once its Statute had been drawn up, it became necessary to determine that that Court, and no other, was the tribunal to which the treaties referred. Article 37 of the Statute of the Permanent Court determined the organ on which the treaties in question had conferred compulsory jurisdiction.

In the second place, the conclusions to be drawn from Article 37 of the Statute of the Permanent Court are not applicable to Article 37 of the present Court, since they serve different purposes. The purpose of Article 37 of the International Court is to transfer a jurisdiction in order to prevent it from lapsing. When the present Article 37 was drawn up, those who drafted it did not have before them treaties establishing the compulsory jurisdiction of a Court which had not yet been created and which still remained to be established. For treaties prior to the institution of the Permanent Court, it had already been determined, by virtue of Article 37 of the Statute of the Permanent Court, that that Court was the organ on which jurisdiction had been

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conferred. In treaties such as that of 1927, on the contrary, jurisdiction was conferred on a jurisdictional organ that was specifically determined, namely the Permanent Court. What had to be done was, so far as was possible, to transfer this compulsory jurisdiction, created under a treaty, from the Permanent Court to the International Court. It was not, as in the case of the former Article 37, a matter of determining the organ on which jurisdiction had been conferred by agreements in which it was impossible to specify the organ. The case of the dissolution of an international tribunal cannot be assimilated to the case of a tribunal that has not yet been instituted. In the latter situation, it may be considered that there is a suspension of the undertaking to accept the jurisdiction of a court. In the other case, the existing jurisdiction is extinguished and it is absolutely impossible for the obligation to be fulfilled. A non-existent court can no longer have jurisdiction.

The two Articles of the Statute apply to analogous situations and it is impossible to form an opinion about Article 37 without taking account of the discussion in 1959 about Article 36, paragraph 5. It has been previously shown that, as between the system of these two Articles, there are no fundamental differences which would lead to devising different solutions for each case. Neither in the Judgment on the *Aerial Incident* case, nor in the Joint Opinion or in the Separate Opinions of individual Judges is it possible to find reasons of a convincing legal character in favour of the view that a distinction must be drawn between these two Articles.

The Court must be quite definite about the interpretation of its Statute. Either it is decided that there is a legal difference or else it is recognized that there is not such a difference.

The Belgian Government's contention is seen to be unconvincing on several points.

It is maintained that in the case of a declaration of acceptance of the jurisdiction of the Court a treaty position arises only when a specific dispute occurs. But this is also true from the standpoint of the 1927 Treaty which contains no more than an obligation to accept the jurisdiction of the Permanent Court at the time when a specific dispute arises. The difference alleged therefore does not exist. In both cases there is a firm obligation to accept jurisdiction and, in both cases, there is a firm obligation to accept jurisdiction only in respect of one and the same tribunal, namely the Permanent Court. There is no legal basis for the assertion—which is a mere begging of the question—that the obligation to accept jurisdiction subsists since the Treaty remains in force, but that it is merely the means for exercising that jurisdiction (the Permanent Court) which has disappeared. It is not sufficient merely to make such an assertion. It must be proved, for the 1927 Treaty did not provide for reference to "an international tribunal" but to the Permanent Court (Articles. 2, 4 and 17).

If an obligation arising from an acceptance by unilateral declaration came to an end because the Permanent Court disappeared and because

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it was bound up with the Statute of that Court, it did not survive after the disappearance of that Statute. An obligation arising from a clause which relates only to the Permanent Court disappears with that Court and with its Statute—in just the same way.

The 1927 Treaty must be construed according to the meaning it had in 1927, within the international context of 1927, and according to the intention of the parties in 1927. This Treaty bears the mark of its period. If there had been no Permanent Court, there would have been no reference whatsoever to an international tribunal. The Treaty would have been purely and simply a treaty of arbitration and conciliation. That is what it became on 18 April 1946. It is too easily forgotten that the 1927 Treaty was drawn up only five years after the institution of the first permanent international tribunal and that the treaties which referred to it could relate only to what existed and had only recently come into existence.

This analysis is reached through the application of two elementary rules of international law, namely that concerning the interpretation of clear texts and that concerning the "historical" interpretation of treaties according to the meaning they had at the time when they were concluded (case concerning *Rights of Nationals of the United States of America in Morocco, I.C.J. Reports 1952*, pp. 188-189).

It is contended that the provisions of the Charter and those of the Statute form a single mandatory whole for the States Members of the United Nations. This view is not absolutely correct. It is subject to derogations in relation to certain of those provisions which are not mandatory, as they do not apply to all the Members of the United Nations. This is the case with regard to paragraph 5 of Article 36 and Article 37 of the Statute.

The particular legal nature of these two provisions is clear from their actual wording. In the first place, they are concerned with situations that are quite special and specific, namely the jurisdictional clauses existing and in force relating to the Permanent Court. Further, these provisions apply only to certain specific States. Thus, Article 36, paragraph 5, is concerned only with States which had made declarations that are in force and Article 37 is concerned only with States whose treaties or conventions contain clauses that are still in force—in both cases at the time when they become parties to the Statute. This examination shows that these two provisions apply only to certain States, namely those which have accepted the jurisdiction of the Court, and not all States Members of the United Nations.

These two provisions are transitional and their application must very soon come to an end. Article 36, paragraph 5, as the Court has interpreted it, can no longer be applied. The same will in future be true of Article 37.

If the Statute had been set out with a more technical presentation, these two provisions would have been inserted at the end of it, under the heading "Transitional Provisions". This method was not adopted,

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no doubt in order to preserve the same numbering of the articles in the two Statutes. The transitional provisions mentioned were inserted where they would not entail changes in the numbering.

Furthermore, account must be taken of the effects of the dissolution of the Permanent Court on the 1927 Treaty and on its jurisdictional clause.

The subjection to a judicial settlement provided for in the 1927 Treaty relates specifically to the Permanent Court, stipulated by name and not in the form of a reference to a generic and undetermined international tribunal.

The Permanent Court was dissolved with final effect and the International Court of Justice is another and different Court, as is clear from the preparatory work concerning it.

This being so, the clear impossibility of submitting to the Permanent Court any disputes that may arise between the Parties after the final dissolution of that Court becomes apparent.

It is precisely because of the disappearance of the Permanent Court and the creation of a new Court that it was necessary to draft the conditions embodied in Article 37 of the present Statute for the purpose of transferring, so far as was possible, the jurisdiction conferred upon the Court that it had been decided to dissolve.

In the light of these considerations and taking account of the general principle that the jurisdiction of the Court is not to be presumed and that it is founded on the consent of States, an extensive interpretation of Article 37 would, as a consequence, entail an extensive interpretation also of the 1927 Treaty by means of which a jurisdictional obligation stated specifically in favour of the Permanent Court would be transferred to another Court, when such obligation no longer existed legally and Article 37 could no longer operate.

* * *

The Court's task related essentially to the interpretation of Article 37. For the transfer of jurisdiction from one Court to the other to take effect, this provision requires the fulfilment of two conditions :

(1) that the State party to the jurisdictional clause embodied in the treaty should be a party to the Statute, and

(2) that this clause should be in force.

These two conditions, which are clearly laid down in Article 37, must be fulfilled concurrently. Each of them must be fulfilled at the time when the other is fulfilled. If one of them is not fulfilled, Article 37 does not effect the transfer of jurisdiction. The two conditions prescribed by Article 37 must always be considered with reference

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to the same crucial date. It would be contrary to the principle of good faith if the applicability of Article 37 were to be judged, in respect of one condition, with reference to the date of the entry into force of the Charter and, in respect of the second condition, with reference to the date of the admission of the State in question to the United Nations. Such an interpretation would, moreover, be contrary to the text of Article 37.

But, when Spain was admitted as a Member of the United Nations, in December 1955, the jurisdictional clause of the 1927 Treaty was no longer in force, owing to the dissolution of the Permanent Court on 18 April 1946. At that date there was no treaty with a jurisdictional clause in force. The second condition was unfulfilled. Consequently, the situation covered by Article 37 does not exist in the case before the Court.

The acceptance of the jurisdiction of the Permanent Court stated in this clause was henceforth devoid of object since that Court no longer existed as a means for exercising it. The legal basis for that acceptance provided by Article 36, paragraph 1, of the Statute of the Permanent Court had ceased to exist as a result of the disappearance of that Statute. Thus, Article 17, paragraph 4, of the 1927 Treaty had lapsed and was no longer in force. The terms of that provision are as follows :

> "If the special agreement has not been drawn up within three months from the date on which one of the Parties was requested to submit the matter for judicial settlement, either Party may, on the expiry of one month's notice, bring the question direct before the Permanent Court of International Justice by means of an application."

The dissolution of the Permanent Court destroyed the jurisdictional clause and the attribution of jurisdiction to the Court specified therein.

Spain gave its consent only in respect of that Court.

The Treaty continues to be in force in respect of the other means provided for the settlement of disputes (conciliation and arbitration), but in so far as the means of judicial settlement connected with the Permanent Court is concerned, it has entirely disappeared through the disappearance of that Court. All the provisions of the Treaty which referred to the Permanent Court, including Articles 1 and 2, had lapsed completely. The real importance of the Treaty resides in all the means of settlement for which it made provision and not exclusively in the means of judicial settlement (Permanent Court).

The admission of Spain to the United Nations resulted in that country being deemed to be a party to the Statute of the Court (Article 93, para. 1, of the Charter). Spain thus became invested with a certain procedural capacity in respect of the Court; but this situation is not sufficient to establish the jurisdiction of the Court in respect of that State. It merely creates a preliminary situation for the establishment

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of that jurisdiction. The source of the jurisdiction of the Court lies in the declarations of the States (Article 36, paras. 1 and 2) and, *in exceptional cases,* in Article 36, paragraph 5, and Article 37 of the Statute.

The admission of a State as a Member of the United Nations has the immediate consequence of making that State a party to the Statute of the Court. This admission does not signify any acceptance whatsoever of the jurisdiction of the Court. But such acceptance is attributed to Spain on the ground of its admission, through the application of Article 37. This interpretation, as is clear from the foregoing considerations, is quite indefensible.

The obligation to accept judicial settlement provided for in Article 2 of the 1927 Treaty in the case of certain disputes relates either "to an arbitral tribunal" or "to the Permanent Court of International Justice". Although this obligation is general in regard to an arbitral tribunal (it does not refer to the Permanent Court of Arbitration, for instance) it is particular in regard to the Permanent Court, which it mentions specifically. In the 1927 Treaty the Permanent Court is both the *object* and the *means* for fulfilling this obligation. There was an intention to accept this means of settlement, but only because it was indissolubly connected with the Permanent Court and not with any other court. Jurisdiction and the attribution of it are inseparable from the Permanent Court.

* * *

The Parties agree in the view that, according to Article 37, the provision concerning jurisdiction had to be in force at the time when Spain became a Member of the United Nations and, of course, also at the time of the filing of the Application instituting proceedings.

It is contended that the 1927 Treaty must be considered to be in force. This Treaty is renewable for periods of ten years, as from the time of its ratification, failing denunciation by one of the parties. That was the situation of Spain at the time when that country became a party to the Statute. This renewal every ten years must, however, be understood as a renewal of the provisions of the Treaty that are still in force. It is not possible to renew what has lapsed.

Although the 1927 Treaty remains in force in respect of some of its provisions, the conclusion is inevitable that Article 17, paragraph 4, so far as concerns that part of it which establishes the jurisdiction of the Permanent Court, had lost all legal force because of the dissolution of that Court on 18 April 1946. This provision was no longer in force in December 1955. The jurisdictional clause can be detached from the other articles of the Treaty. The "reference of a matter" mentioned in Article 37 is related to the provisions attributing jurisdiction to the Permanent Court. Those provisions are the specific object of the reference to the Court. There is no reference to other provisions of

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the Treaty. This is clear also from Article 35, paragraph 2, of the Statute which refers to "the special provisions contained in treaties in force", in a narrow sense.

With regard to Article 37, the report of Committee IV/1 of the San Francisco Conference says :

> "*(a)* It is provided in Article 37 of the draft Statute that where treaties or conventions in force contain provisions for the reference of disputes to the old Court such provisions shall be deemed, as between the members of the Organization, to be applicable to the new Court" (Conference Documents, Vol. 13, p. 384).

The provisions referred to can thus only be jurisdictional clauses in force. It is the provision for the reference of a matter that must be in force, as is quite clear from the text of Article 37.

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A treaty may lapse partially even before the expiry of the term for which it is concluded. This is true also in the case of certain legal instruments, laws and regulations, which may also have lapsed partially. In an international obligation, a distinction must be made between lapsing as the result of the expiry of the prescribed term and lapsing as the result of some other fact, also involving a lapse, such as the dissolution of the Permanent Court. That dissolution also constituted the time-limit for the validity of the jurisdictional provision in the Treaty. Article 17, paragraph 4, of the Treaty expired on 18 April 1946. That clause could not come into force again at the time when the Statute came into force in respect of Spain, in December 1955.

The separation of international obligations as between clauses that are valid and clauses that are not valid is admitted in the case-law of the Permanent Court. One example is furnished in that Court's consideration of the Special Agreement in the *Free Zones* case. In that case, the principle *vitiatur et non vitiat* was admitted. In point of fact, the Special Agreement was, in the case of some of its clauses, in contradiction with the Statute and the Court decided that the Special Agreement was valid but that the stipulations contrary to the Statute were null and void. The Court took no account of the second paragraph of Article 1 of the Special Agreement (*P.C.I.J., Series C, No. 17-I, Vol. II*, p. 492).

The Permanent Court refused to consider that the individual provisions of a treaty are inseparable and indissolubly connected. In the *Free Zones* case (*P.C.I.J., Series A/B, No. 46*, p. 140), that Court considered that Article 435 of the Treaty of Versailles was "a complete whole" separable from the rest of the Treaty. It took a similar view

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in the Advisory Opinions on the *Competence of the I.L.O.* (*P.C.I.J., Series B, No. 2*, pp. 23-24 and *Series B, No. 13*, p. 18), concerning the independence of Part XIII of the Treaty.

The idea of the integral character of a convention has its origin in a notion taken from private law. In the Opinion of the Court on *Reservations*, this notion of the absolute integrity of conventions was rejected as not having been transformed into a rule of international law (*I.C.J. Reports 1951*, pp. 24-25). The Opinion of the Court in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* indicates certain limits to the notion of the inseparability of treaty provisions in respect of provisions which are not fundamental to the treaty as a whole. An article which has lapsed may quite properly be separated from other provisions of the treaty which continue to be in force where such provisions can apply quite apart from the provision that has lapsed.

* * *

International law can envisage various ways in which an international obligation may become impossible of performance. Such impossibility may be permanent. In the present case, the jurisdictional clauses of the 1927 Treaty disappeared permanently on the date of the dissolution of the Permanent Court. This fact inevitably put an end to the obligation to have recourse to that tribunal. This is an example of a case where it is permanently impossible to perform an international obligation—the latter having disappeared with the Permanent Court.

So far as general international law is concerned, Article 17, paragraph 4, of the 1927 Treaty is said, in short, to have been deleted from the Treaty until 1955—this being on the hypothesis that the Permanent Court did not finally and definitively disappear in April 1946, which distorts the relative position of the two Courts. Any reference to the continuity of the two Courts is merely a formula describing intentions as a matter of general policy and is not an assertion of legal succession.

The error in the Belgian contention in its presentation of the rules of international law concerning suspension is that it supposes that the basic problem has been resolved : the Permanent Court has disappeared ; why should the obligation expressed in the Treaty, namely the obligation to have recourse to the Permanent Court, be only suspended? This contention presumes, asserts but does not prove, the original phenomenon : the suspension in this particular case, whereas suspension does not exist in the case of the permanent disappearance of the subject-matter.

For there to be suspension, it would indeed be necessary to prove that there were two categories of obligations in the 1927 Treaty and in the intentions of those who drew it up :

—a basic obligation, namely the obligation to have recourse to an international tribunal ;

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—an obligation concerning the means, namely the choice, amongst possible international tribunals, of the Permanent Court.

This analysis has an artificial character. In 1927 the parties decided on only one thing, namely recourse to the Permanent Court. To say today that there is in this Treaty a division into two obligations one of which, namely the obligation to accept any international tribunal whatsoever, was suspended is nothing more than a theoretical and *ex post facto* view of the facts.

This would seem to justify the rejection of the Belgian argument, at all events so far as concerns the phenomenon of "suspension" over and above the effects proper to Article 37.

It should be noted that the positions taken up by the Belgian Government in regard to Article 17 of the 1927 Treaty are necessary to it in order that it may put forward the following contention as to the difference between Article 36, paragraph 5, and Article 37. Article 36, paragraph 5, concerns not only the tribunal on which jurisdiction is conferred, but also the obligation to accept jurisdiction on the basis of the pre-existing treaty, the Statute. Article 37, on the contrary, does nothing more than "effectively ensure the performance of the treaty obligations".

Here again it is therefore presumed that the Treaty remained in force so far as concerns a general obligation to accept jurisdiction in vague terms, without reference to any specific tribunal. If the existence of an obligation of this nature in the 1927 Treaty is not admitted, the Belgian argument collapses both in regard to the 1927 Treaty and in regard to Article 37 since it is all based on the *ex post facto* invention of a general jurisdictional obligation in the 1927 Treaty, which does not exist.

* * *

Article 37 of the Statute, which creates a very special régime, must be construed restrictively for two reasons :

(1) It constitutes an exception to the means whereby jurisdiction of the Court is accepted. It is a provision which constitutes a derogation from the ordinary law in this matter. Any exceptional rule of law must be construed restrictively. Normal consent to the jurisdiction of the Court can be given only through a treaty clause (Article 36, para. 1, of the Statute) or through a declaration (para. 2 of the same Article). Article 37 establishes jurisdiction by the substitution of a new jurisdictional clause for an old one. The jurisdiction of the Court is optional ; this is a principle of the Statute. Article 37 introduces an exception to this rule by providing for a case of automatic and compulsory jurisdiction.

(2) Article 37 is a legal fiction, a solution that is empirical and more or less arbitrary. It transfers to the International Court an acceptance

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of the jurisdiction of the Permanent Court which is in force. This artificial method of stating the law requires a restrictive interpretation of the Article in question. The Permanent Court said that it did not "dispute the rule ... that every Special Agreement, like every clause conferring jurisdiction upon the Court, must be interpreted strictly" (*P.C.I.J., Series A/B, No. 46*, pp. 138-139). And this is all the more essential in the case of a system of acceptance of jurisdiction as exceptional as that of Article 37 of the Statute.

The intention of Article 37 was that the jurisdictional clause in force in treaties and conventions should be considered, as between parties to the Statute, as an acceptance of the compulsory jurisdiction of the International Court. If a State was a party to that Statute at the time of the dissolution of the Permanent Court, it gave explicit and voluntary consent to the transfer from the old Court to the new Court. If a State was not a party to the Statute at that time, as was the case for Spain, it is said, according to a certain interpretation, to have given an undeclared and non-voluntary consent to the new jurisdiction. This interpretation envisages two kinds of consent, according to whether the State in question was a party to the Statute before or after the dissolution of the Permanent Court. It is claimed that Article 37 would automatically establish the jurisdiction of the new Court in the case of States that became parties to the Statute after that dissolution.

Under such an interpretation, an undeclared consent, an automatic consent would be held to proceed from the Article in question—a consent given in a general way and beforehand. A consent thus given is not given in the way the Statute requires consent to be given by States if they accept the jurisdiction of the Court. Such an exceptional manifestation as this form of consent should have been clearly provided for in the text of Article 37. But that is not the case. As between two interpretations of Article 37, one following the principle of optional consent and the other accepting the idea of an alleged automatic consent, the choice must be in favour of the former interpretation. Any extensive interpretation is therefore inadmissible.

It would be surprising if Article 37 had established compulsory jurisdiction for a certain category of States when the San Francisco Conference had rejected the principle of compulsory jurisdiction for all States.

The jurisdiction of the Court is based on the explicit consent of States. Thus no doubt can arise as to the execution of any judgment it may deliver. No interpretation of texts concerning the acceptance of jurisdiction should be based on any ambiguous reasoning. It is an essential principle that jurisdiction must be established by clear manifestations of the will of States. To attempt to force the meaning of texts relating to the jurisdiction of the Court would be to risk consequences that might affect its authority and its prestige. The Judgment in the *Aerial Incident* case is a good demonstration of the fact that the Court must employ the discretionary power conferred by Article 36,

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paragraph 6, of its Statute with the greatest prudence. If there should be lack of jurisdiction, any action would be *ultra vires*. A change of jurisprudence on a question of jurisdiction must have a very solid basis. It is important that decisions should be consistent in order to maintain the authoritative character of the texts interpreted. The fact that the Court's list is somewhat slender cannot justify any extension of its jurisdiction.

* * *

The jurisdiction of the Court which is derived from Article 37 must be founded on the will of the parties and it exists only to the extent to which it has been accepted.

The transfer to the International Court of Justice of jurisdiction which a provision in a treaty provided for in favour of the Permanent Court of International Justice could not be made without the consent of the States parties to the treaty in question. It is a well-established principle of international law that only the parties to a treaty can modify its provisions.

By adopting Article 37 which provides for the transfer of jurisdiction from one Court to another, the San Francisco Conference could not substitute itself for the consent of States which were not present and did not take part in that Conference. As Spain did not take part in that Conference, Article 17, paragraph 4, cannot be made to apply to it. The States present at San Francisco were not able to modify a treaty signed by Spain without the consent of that country. Any modification decided upon by the States at the Conference, in respect of jurisdictional clauses embodied in the provisions of the 1927 Treaty, remained without effect so far as Spain was concerned in the absence of that State's acceptance of those modifications, and Spain has not signified its acceptance.

Furthermore, on the occasion of that Conference, Spain was not invited to take part in it. Spain was not *persona grata* (resolution 39 (I), of the General Assembly, of 12 December 1946). Spain, being excluded from the negotiations at San Francisco, had no part in them, and in the Statute which came into force on 24 October 1945 remained, so far as Spain was concerned, *res inter alios acta*. The Conference had excluded ex-enemy and neutral States from its meetings. It is obvious that the States assembled at that Conference did not concern themselves with the jurisdictional clauses contained in treaties of ex-enemy or neutral States for the purpose of imposing on them the obligation to agree that certain jurisdictional clauses should be applicable to the new Court in the possible event of their becoming Members of the United Nations. Such an interpretation is not reasonable. By making the international treaty which the Charter and the Statute constitute, the States at the Conference were not able to establish, by one of the provisions of those instruments, obligations incumbent on third States.

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Provisions of this character are not to be presumed. Article 37 effects a substitution of one obligation for a previous one and such a substitution must not be presumed. For such a substitution to take place it is essential that the party concerned should formally and voluntarily express its intention to make the substitution. Spain, which was absent at the time when Article 37 was drawn up and accepted, had no opportunity to manifest such an intention.

The report of 22 May 1945 of sub-committee IV/1/A on the question of continuity of the International Court, and on related problems, said, amongst other considerations, at the end of paragraph *(d)*:

> "In the case of enemy States, it would be possible as part of the conditions of peace to terminate their rights under the Statute; in the case of other States, this would not be possible unless they were to agree to it."

And the report added, in paragraph *(e)*:

> "From this conclusion it follows that, in the case of certain neutral States at any rate, the exclusion from participation in the Statute of the Court which is clearly laid down by Chapter VII, paragraph 5, of the draft Charter could probably not be accomplished without some breach of the accepted rules of international law" (U.N.C.I.O., Vol. 13, p. 525).

The relevant documents show that, at the San Francisco Conference, measures of exclusion from the Statute of the Court were contemplated in respect of enemy States and certain neutral States. That was the situation with regard to Spain. The sub-committee in question therefore did not concern itself with the maintenance of the jurisdictional clauses embodied in the declarations or treaties of those States.

When a State has for many years remained—as Spain did—a stranger to the Statute, this being moreover also by decision of the General Assembly (decision of 12 December 1946), it cannot be maintained that that State, by the fact of its request for admission to the United Nations, has recognized the jurisdiction of the International Court of Justice. Consent that is merely presumed is insufficient (*I.C.J. Reports 1959*, p. 142).

The States assembled at the San Francisco Conference, knowing their international obligations in the matter of the acceptance of the jurisdiction of the Permanent Court, whether through the optional clause or through a provision in a treaty, were, of course, able properly to assume the responsibility of transferring them to the new Court. Those States had the power to do this. That power could not be claimed in respect of States which might subsequently come to be admitted as Members of the United Nations on the basis of Article 4 of the Charter.

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To admit such a power in relation to States not present would quite simply result in making them subject to a principle which the Conference firmly rejected, namely that the jurisdiction conferred on the new Court should be in all respects compulsory. The new Members of the United Nations would have had to accept such jurisdiction imposed on them by the States assembled at San Francisco, if they happened to be bound by treaties in force under which matters were to be referred to the jurisdiction of the Permanent Court. The decisions given by that Court and by the International Court have always maintained that the Court possesses jurisdiction in respect of a State only if that State has given its voluntary and unequivocal consent.

* * *

The jurisdiction of the Court is based on the consent of States. The International Court has said, in the *Monetary Gold* case, that it must be careful not to "run counter to a well-established principle of international law embodied in the Court's Statute, namely that the Court can only exercise jurisdiction over a State with its consent".

According to a certain view, this consent must be understood to have been given by Spain when that country became a Member of the United Nations. The States assembled at San Francisco could not, in the absence of Spain, impose on that country an obligation involving the acceptance of a new jurisdiction, namely that of the International Court. They had no power to impose on Spain, as a supplementary condition for Membership of the United Nations, the acceptance of a specific jurisdiction of the International Court. To admit this would be contrary to the principle of the legal equality of States. The conditions for admission to membership of the United Nations did not stipulate that certain States would, in order to be admitted, have to accept obligations of a jurisdictional nature which other States were not required to accept.

On becoming a Member of the United Nations, Spain could not have been compelled to accept the jurisdiction of the International Court for certain cases. It is the distinctive feature of this jurisdiction that it is particular and voluntary and not general and compulsory. The jurisdiction of the Court must be established by a clear text which does not call for interpretation, so that it cannot come as a surprise. There is no compulsory jurisdiction of the Court. If any reasonable doubt can exist as to the interpretation of Article 37, its application also must be reasonable. A restrictive interpretation is absolutely essential.

It is contended that, when it became a Member of the United Nations, in December 1955, the Spanish Government ratified Article 37 of the Statute and thereby accepted the transfer of jurisdiction. Article 37 would thus be a clause concerned with accession or adhesion, an offer addressed to States other than those assembled at San Francisco. The

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International Court has replied to this view, in the *Aerial Incident* case. The same considerations are relevant with regard to Article 37.

At the time when Spain became a Member of the United Nations, its acceptance of the jurisdiction of the Permanent Court under Article 17, paragraph 4, of the 1927 Treaty had lapsed as from the date of the dissolution of that Court. Article 37 does not revive an obligation which no longer had any legal effect. This provision could not apply to Spain at the time of its admission to the United Nations. It follows therefore that Spain's acceptance of this provision does not constitute consent to the jurisdiction of the International Court of Justice (*I.C.J. Reports 1959*, p. 145). And any manifestations of acceptance attributed to Spain at a later date are unfounded.

It is contended that Article 37 is concerned solely with the validity of jurisdictional clauses in point of time, of the period which they still have to run within the context of the treaties of which they form part. So long as the term prescribed by the treaty has not expired, these jurisdictional clauses, it is said, remain in force, though not applicable because of the disappearance of the field of application to which they relate. There is said to be a suspension of these clauses for the acceptance of the jurisdiction of the Court until the time comes when the two States signatories of the treaty become parties to the Statute.

This view entails certain difficulties.

In the first place, it takes no account of the very strong argument in the judgment in the *Aerial Incident* case, when it admits that the jurisdictional clauses in question lapsed for want of the legal basis they found in the Statute of the Permanent Court, which had ceased to exist because of its disappearance. The extinction of such international obligations may be connected with the periods for which they were concluded, but there may be other causes that bring about their extinction before the expiry of those periods.

There is nothing in Article 37 to suggest that Article 17, paragraph 4, would continue to be able to be revived after the expiry of the Statute of the Permanent Court. To bring about this effect, Article 37 would have had to be worded differently. It would at least have been necessary for it to state that the provisions of treaties accepting the jurisdiction of the Permanent Court should be considered, as between the States which are parties to the present Statute or which may at any time become parties to the Statute, as involving acceptance of the compulsory jurisdiction of the International Court. Article 37 says nothing of the kind and has no effect upon Article 17, paragraph 4, which is included in a treaty of a State that had not yet become a party to the Statute.

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Furthermore, this theory of the suspension of treaty clauses concerning the acceptance of the jurisdiction of the Court creates a delicate situation as regards both the duration of the suspension and its effects.

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In order that the effects of this suspension may be brought to an end, an event that is extraneous to the will of the contracting parties must occur, namely the admission of a particular State to the United Nations. If the period prior to this admission is prolonged for an undue length of time, the above interpretation may lead to unreasonable results, which will have to be examined very carefully. When does such a suspension cease to be reasonable? The difficulty lies in the choice of units of measurement. What is the unit for what is reasonable? To what bases for comparison or judgment must resort be made? The frontier between what is reasonable and what is not reasonable must always remain arbitrary for the reason that between the one situation and the other there is no abrupt transition.

If the suspension begins to run from the date on which the Charter entered into force, Spain would have remained a stranger to the Statute for more than ten years. Could the suspended clause still have any effects after that period?

An interpretation in this sense has artificial aspects and gives ground for arbitrary conclusions and applications which may compromise principles hitherto accepted in the matter of consent to the jurisdiction of the Court. If some other interpretation of Article 37 does not entail the disadvantages just mentioned, it should be preferred.

* * *

Is it legally admissible that the jurisdictional clauses of treaties or conventions should, in respect of States that are not parties to the Statute, have potential validity by virtue of Article 37, either as from the entry into force of the Charter or as from the dissolution of the Permanent Court? There is nothing that could support this proposition, either in the text of that Article or in the preparatory work, or within the framework of an interpretation of this provision. To this concept of the potential validity of the clause there would be added the idea of its suspension pending the admission of a State to the United Nations, whilst it would be agreed that this suspension, if unduly prolonged, might cause the clause to lapse.

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The view must be examined that Article 37 of the Statute could have the effect of reviving Article 17 of the 1927 Treaty. Can this Article, which had created an obligation to accept jurisdiction in respect only of the Permanent Court, "resume" its effect because of Article 37 of the Statute?

The whole problem centres round the text of this Article. Either it created a special kind of "suspension", not provided for by the general rules of international law, a "dormant" condition, a temporary "paralysis" of the means of jurisdiction, even in respect of States that are

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not yet parties to the Statute, with a "resuscitation" on their becoming parties to that Statute, or else Article 37 did not create that effect.

As this is a matter of the interpretation of the Statute, there is no obligation to take account of the arguments presented by the Parties. The Court must seek the solution by its own means.

Even if the view were admitted that Article 37 was intended to extend its effects to all parties to the Statute, whatever might be the date at which they became parties thereto, the legal problem is not solved thereby, for the question is whether the Statute could create in international law this new obligation relating to the "resuscitation" of provisions that had lapsed through the permanent disappearance of the subject of the obligation.

It is useless to say that this paralysis is the sole purpose of Article 37 and that it has no other purpose. Such an assertion implies that an obligation could be created in relation to third States, causing, *before* they had become parties to the Statute, a clause in a bilateral treaty to become "dormant". It is no negative proof that is required, but positive proof of the fact that the Statute could legally bring about such an effect.

It is true that every State which becomes a party to the Statute accepts it as it is. But in December 1955, when Spain became a party to the Statute, was there still in the 1927 Treaty an Article 17 which could be *revived*? Can Article 37 have "seized" the bilateral treaties of a third State, long before that State became a party to the Statute, for the purpose of "preserving" the jurisdictional clause?

This presupposes a new and complex operation which *a priori* is contrary to the voluntary character of the acceptance of the jurisdiction of the Court and which would have to be justified by some means other than a mere description of it. For it is no proof of the legal existence of an obligation merely to say that it is "dormant". This would, in fact, be laying down a principle contrary to the generally recognized principle of the voluntary acceptance of the jurisdiction of the International Court of Justice. Spain did not give its acceptance of the Statute until December 1955.

Hence follows the need to argue that Spain had itself recognized that the effect of Article 37 was indeed to revive Article 17 of the 1927 Treaty at the time when Spain became a party to the Statute. Whether Spain did or did not believe that Article 37 had a certain effect is quite immaterial. It is the Court alone which is called upon to determine its own jurisdiction *according to the Statute*, and not according to the view one of the Parties takes of the Statute.

The fundamental problem is in fact the following. How can Article 37 be given an effect of preserving the jurisdictional clauses of bilateral treaties between third States? That effect must necessarily date from the entry into force of the Statute, before the disappearance of the Permanent Court. And how can Article 37 then be given the effect of automatically transferring jurisdiction to the International

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Court of Justice on the day when the third State is admitted to the United Nations? The "preservation" must, of course, apply as from the time when the Statute came into force since it is claimed that Article 37 of the Statute applies to "all treaties" and therefore to treaties binding States which have not yet any obligation arising from membership of the United Nations and which might, by hypothesis, never have any such obligation if they did not become Members of the United Nations. Yet it is necessary that Article 37 should apply without any limitation of time for, if the "preservation" of the jurisdictional clause of a bilateral treaty has been brought about by the entry into force of the Statute, Article 37 will apply whatever be the date when the third State is admitted to the United Nations. If the preservation has occurred, it is "potentially" effective so long as the bilateral treaty is in force.

For it to be otherwise, it would have to be held that Article 37 does not "preserve" the jurisdictional clause of a bilateral treaty until the day when the third State is admitted. But, in that case, the problem already mentioned remains. A "paralysing" operation is one that is not known in general international law, according to which suspension means relief from the obligation. But it has not been proved that Article 37 determined such renewal after paralysis.

This consideration becomes still more conclusive in the examination of the alternative second objection. If a suspended obligation comes into force again only as from the day on which the obstacle ceases to exist, there is no jurisdiction during the period of suspension. Otherwise it is not a case of suspension but of a "dormant" condition or "paralysis", and these descriptions are in fact necessary to justify the fact that the suspension has had *no effect*. For if the period of suspension disappears retrospectively and if the jurisdiction of the International Court of Justice is admitted as if there had been no interruption in the application of the bilateral treaty, this is no longer a suspension of the obligation, by definition. Here again it must be held that this was the purpose of Article 37, but without any shadow of proof to establish it. Now, to prove that the suspension of an obligation has not "relieved" the parties of the obligation for the whole of the period of suspension, it is necessary to produce something more than a mere assertion.

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Spain and Bulgaria signed a Treaty of Conciliation, Judicial Settlement and Arbitration on 26 June 1931, which was ratified in Sofia on 21 June 1935 (*P.C.I.J., Series E, No. 13*, p. 296). Under Article 17 each party may, subject to one month's notice, bring a dispute before the Permanent Court by means of an application. This Treaty is renewed every five years, unless denounced six months before the expiry of that period.

Is such a treaty still in force between these two States in regard to the jurisdiction of the International Court, even after the Judgment

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in the *Aerial Incident* case? Assuming that one of the passengers in the unfortunate aircraft brought down by the Bulgarian military forces was a Spaniard, would his Government have had the right to file an application in the exercise of protection of its national, on the basis of the above-mentioned Article 17?

If Article 37 confers jurisdiction on the International Court, it will also stipulate that Article 17 of the Spanish-Bulgarian Treaty is in force—a result that seems improbable and that would be contradictory.

The position would be the same in the case of other treaties, of the same kind as the 1927 Treaty, signed between Spain and Poland, Czechoslovakia and Hungary, to mention only a few of these treaties with countries that might not maintain diplomatic relations.

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International practice with regard to the application of the treaties referred to in Article 37 of the Statute is only of relative value. The practice that would be of real interest in the case of the present objection would be practice subsequent to the interpretation given in the judgments in the cases concerning the *Aerial Incident* and the *Temple of Preah Vihear* in which the question was raised on two occasions.

The signatories to the protocols drawn up for the purpose of adapting clauses in treaties referring to the Permanent Court had no other object than to apply those jurisdictional clauses included in the treaties—expressly—to the International Court. But they did not raise the question whether Article 37 covered Members of the United Nations that were parties to the Statute before the dissolution of the Permanent Court and also new Members of the United Nations after that date. Those protocols referred to all of these States. Nevertheless, a doubt subsisted as to the field of application of this Article.

Here, the wisdom of the United Nations concurred with the wisdom of the International Court in its interpretation in the *Aerial Incident* case, in limiting the application of Article 37 to those States which were present at the San Francisco Conference. Thus, it was known what States were really going to be placed under the obligation, without going into situations the effects of which could not be foreseen in regard to treaties which conferred jurisdiction on the Permanent Court. If such a cautious attitude was adopted in regard to the declarations referred to in Article 36, paragraph 5, which were clearly limited and well known, a similar attitude should *a fortiori* be observed in regard to the jurisdictional clauses included in a large number of treaties between States parties to the Statute prior to the dissolution of the Permanent Court.

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The interpretation upheld by the Applicant is not supported by the practice of various organs of the United Nations.

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Two important instances cited by the parties may be mentioned, *inter alia*.

The General Act: The General Assembly's Resolution 268 A (III) of 28 April 1949 was intended to restore its original efficacy to the Geneva General Act of 26 September 1928. In paragraph *(e)* this resolution states that this Act, with the amendments introduced, would be open to accession by the Members of the United Nations and by the non-Member States which shall have become parties to the Statute of the International Court of Justice or to which the General Assembly of the United Nations shall have communicated a copy for this purpose. Such a provision was necessary as the efficacy of the General Act had been impaired by the fact that the organs of the League of Nations and the Permanent Court to which it refers had disappeared. This resolution states that the amendments made to the General Act will only apply as between States having acceded to that Act as thus amended. Paragraph *(c)* mentions the amendments to be made to Articles 17, 18, 19, 20, 23, 28, 30, 33, 34, 36, 37 and 41, namely the words "Permanent Court of International Justice" shall be replaced by "International Court of Justice". This precedent shows, beyond all possible doubt, that the General Assembly did not think it could apply Article 37 of the Statute of the Court in the case of the provisions of the General Act relating to the Permanent Court. In order to transfer to the International Court the jurisdiction conferred on the Permanent Court, a new agreement was essential. This meant that Article 37 did not operate. The Belgian delegation's intervention in the United Nations in support of this resolution was not without its importance.

If Article 37 does not operate in the case of the General Act, as was admitted by the General Assembly's Resolution 268 A (III), how can it logically be maintained that Article 37 must operate in the case of the Spanish-Belgian Treaty of 1927? This Treaty is nothing other than a General Act on a small scale between two States. The General Act does, in fact, provide for the settlement of disputes between States by means of conciliation commissions, arbitration and judicial settlement before the Permanent Court, and the Spanish-Belgian Treaty of 1927 mentions the same means of settlement in regard to disputes between the two States. If, in order that the General Act may enter fully into force in respect of the International Court, it is essential that the States which signed and accepted it should make certain declarations to that effect, there is no reason why the same thing should not be true in the case of the two States that signed the Spanish-Belgian Treaty. If Article 37 does not bind the States that were signatories of the General Act to accept the jurisdiction of the International Court, how could that provision bind the Spanish Government to accept the jurisdiction of that Court?

The General Act adopted by the Assembly of the League of Nations on 26 September 1928 received the accession of Belgium on 18 May 1929 and of Spain on 16 September 1930. Thus the following situation

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arises. If Belgium invokes this General Act against Spain, it will only be able to do so when the latter State has signed the amendments made to that Act (General Assembly Resolution 268 A (III)). But, if Belgium invokes the 1927 Treaty, which is fundamentally identical with the General Act, it will, according to a certain interpretation of Article 37, be able to do so apart from any other condition. The same legal situation would thus be governed in two different ways according to whether it is the General Act or the Treaty that is invoked. It is difficult to agree with such an interpretation, which leads to contradictory results.

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The Constitution of the I.L.O.: The revision of the constitution of the I.L.O. was necessary, after the dissolution of the Permanent Court, in respect of all the provisions in it which referred to that Court. For the States which were parties to the Statute of the International Court of Justice before the said dissolution, the transfer provided for by Article 37 was sufficient but, for other States which were not Members of the United Nations or which became Members subsequently to that dissolution, amendments were necessary.

* * *

In regard to the Advisory Opinion of 1950 on the *International Status of South-West Africa* and in the *South West Africa* cases, it should be noted that the three States concerned in these cases, namely the Union of South Africa, Ethiopia and Liberia, were original Members of the United Nations. The situation was similar in the *Ambatielos* case, both States parties to which were Members of the United Nations before 18 April 1946. These precedents are therefore by no means conclusive. They are all in line with the interpretation given in the Judgments in the cases concerning the *Aerial Incident* and the *Temple of Preah Vihear*. This interpretation was upheld also, indirectly, in the *Right of Passage* case. At the time when Portugal filed its new declaration of acceptance of the jurisdiction of the Court, that country was bound by an earlier declaration to which Article 36, paragraph 5, of the Statute applied. The Court took account only of the later declaration.

In connection with the revision of many conventions conferring jurisdiction on the Permanent Court, new agreements or protocols were, in all cases, necessary to effect the transfer of that jurisdiction to the International Court. It was not considered that Article 37 settled the question. In these protocols the transfer was explicitly provided for with mention of the International Court, and this is an argument in favour of the Spanish contention.

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The interpretation of Article 37 given by third States in their agreements loses much of its force, particularly if those agreements are prior to the interpretation which the International Court gave of paragraph 5 of Article 36 of the Statute, which raises the same question as Article 37. If reference is made to the Agreement of 9 April 1953 between Sweden and Finland, which modifies a convention of 29 January 1926, it will be seen that it makes valid Article 1 of the 1926 Treaty and that this validity does not depend on the entry of Finland into the United Nations. Indeed, when that State became a Member of the United Nations in 1955, it was by reason of that fact a party to the Statute of the International Court but, at that date, the 1926 Treaty, modified in April 1953, had been binding for two years. It was that Agreement which effected the transformation of the 1926 Treaty, and not the fact that Finland had become a party to the Statute. The fact that the procedure adopted was that of the Agreement, and not the application of Article 93, paragraph 2, of the Charter, gives rise to the supposition that Finland considered that Article 37 was not sufficient to render applicable the treaties in which acceptance of the jurisdiction of the Permanent Court was stipulated.

* * *

The Statute has provided two normal methods by which States may accept the jurisdiction of the International Court. The first method is by treaty or convention and the second by a unilateral declaration. These are the methods mentioned in Article 36, paragraphs 1 and 2.

According to a certain contention, Spain is said to have accepted the jurisdiction of the Court—implicitly—at the time when the Belgian Government proposed to the Spanish Government a special agreement as a preliminary step towards bringing the matter before the Court by means of an application. When the Spanish Government rejected this proposal, it said that Belgium had no *jus standi* entitling it to make such a proposal for the protection of a Canadian company and that local remedies had not been exhausted. From this it is argued that Spain had implicitly recognized the jurisdiction of the Court in connection with the special agreement that was proposed or submitted. Such is the contention advanced.

As a starting point, the basis adopted must be that the acceptance of the jurisdiction of the Court, whether by agreement or by declaration, must be "clear and unequivocal" as has been held in the decisions consistently given hitherto by the Permanent Court and by the International Court. The instruments by which such an acceptance of jurisdiction is given must be conclusive, decisive and such as to leave no room for doubt.

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As soon as the Belgian proposal came before the Spanish Government, the latter stated quite clearly that it could not accept this proposal for the reasons already mentioned. It did this because the Spanish Government did not think it necessary at that stage to examine the question whether Spain was or was not bound towards Belgium, under any clause whatsoever, in regard to the submission of the case to the Court. The proposal made by Belgium was rejected outright because of the absence of a basic requirement, namely Belgium's right to introduce such a claim. Can it be deduced that Spain gave a "clear and unequivocal" manifestation of its acceptance of the jurisdiction of the Court? Can such acceptance be established by implication on the basis of implied reasoning? Moreover, what is the legal situation attributed—under this view—to Spain? Did Spain conclude a tacit agreement to come before the Court or is Spain held merely to have expressed willingness to accept the jurisdiction of the Court—also by way of implication? All these questions run counter to the contention advanced.

Hitherto it was a well-established principle that the jurisdiction of the Court must be accepted as required by the Statute, by explicit and clear manifestations of intention, and not by arguments founded on suppositions, on doubtful facts and on silences that have to be interpreted. For jurisdiction to be established, there must be a voluntary, indisputable and indubitable act on the part of the State to which such an intention is attributed.

One observation must be made on this contention which is dangerous because it would introduce a new notion of the acceptance of the jurisdiction of the Court by tacit acquiescence or by tacit agreement—a situation far from compatible with the principle of the Statute according to which acceptance of jurisdiction must be established by clear and unequivocal act and consent. The jurisdiction of the Court must not be founded on ambiguous considerations and arguments.

* * *

It is maintained that the present objection is incompatible with the earlier attitude of the Spanish Government. The conclusion is reached that certain paragraphs in the Spanish Note of 30 September 1957 contain a "clear and unequivocal" declaration of the recognition of the jurisdiction of the Court. That Note is concerned mainly with the proposal made in the Belgian Note of 8 July 1957 for a special agreement for the purpose of submitting the dispute to the International Court. The divergence in view, as between the two Governments, centred round the fact that the Belgian Government had not proved that it was entitled to grant its diplomatic protection to Barcelona Traction, a Canadian company, without furnishing evidence of the Belgian nationality of the shareholders of that company.

The question of the interpretation of Article 37 was not raised either in the Spanish Note or in the Belgian Note mentioned above.

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The reference in the Spanish Note to the existence of a jurisdiction binding on both States relates to the Belgian silence in regard to the fundamental objection advanced by the Spanish Ministry of Foreign Affairs, in its Notes of 22 December 1951 and 5 January 1952. It is impossible to see how any explicit recognition can be deduced from the text of an incidental sentence. The reference to jurisdiction is connected with the question of the *jus standi*. It must be considered in its context. No jurisdictional obligation can be inferred from the statement. There is a definite and unequivocal manifestation of intention in the final summary of this Note given in paragraph 6, which says textually: "The above mentioned Treaty [of 1927] cannot be relied upon for the settlement of a dispute which, for the reasons indicated, cannot have arisen."

Moreover, this Note of 30 September does not, in the sentence that is cited, constitute a declaration of intention. It is clear from this correspondence that the Spanish Government never agreed to the intervention of the Court in the present case. This position alone is what is important. Belgium's lack of capacity was not the sole ground for lack of jurisdiction in the Court. From the point of view of the Spanish Government, this question of capacity was a preliminary one and the question of the Court's jurisdiction on the basis of Article 37 was neither discussed nor even touched upon.

If this Note Verbale is examined as a whole, the conclusion must inevitably be reached, in the light of the circumstances which gave rise to it, the proposals which it rejects and the reasons on which its attitude is based, that the Spanish Government did not in any way, either explicitly or implicitly, accept the jurisdiction of the Court.

* * *

It was only after the Belgian Application and Memorial that the question of preliminary objections really arose and Spain immediately put forward the preliminary objection relating to the jurisdiction of the Court. Before that, it was only the *jus standi* that was under discussion. The use, in the Spanish Note of 10 June 1957, of the words "an alleged dispute" shows clearly that Spain did not admit the existence of a dispute. The problem of whether or not any compulsory jurisdiction existed was not discussed in the Note. The fact that, in its Note of 30 September 1957, the Spanish Government stated that "the Treaty cannot be relied upon for the settlement of a dispute which, for the reasons indicated, cannot have arisen" implies that any discussion of preliminary objections in the event of Belgium deciding to bring the dispute before the Court becomes superfluous.

From the moment when Belgium actually brought the Barcelona Traction case before the Court, or when that possibility was seriously discussed between the Parties, Spain immediately took up position by

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denying that the Court possessed jurisdiction, thereby anticipating the future Preliminary Objection No. 2.

In the *Anglo-Iranian Oil Co.* case, the International Court gives rules for the grammatical interpretation of unilateral declarations. This Judgment says:

> "But the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court" (*I.C.J. Reports 1952*, p. 104).

Account should not be taken, in isolation, of the literal meaning of words, without regard to the object and purpose they serve in the document in which they are employed, for it is from this that they derive a certain value and significance as the expression of the intention of the author. The jurisdiction of the Court must result from either an explicit declaration or from acts conclusively establishing it. In the present case there is no explicit declaration and there are no conclusive acts.

In the diplomatic correspondence, the Respondent has never displayed any wish to obtain a decision on the merits or to raise the question of jurisdiction. It seems evident that an acceptance of the jurisdiction of the Court cannot be inferred from such an attitude.

Alternative Preliminary Objection

In the event of the Court's finding that it possesses jurisdiction by virtue of Article 37 of its Statute and of its reviving Article 17, paragraph 4, of the 1927 Treaty together with the other provisions which are in harmony with that Article, the dispute to which the Belgian Government refers could not be submitted to the jurisdiction of the Court because it arose and relates to situations and facts prior to the date on which the Court's jurisdiction could have had effect in the relations between Belgium and Spain. Until the date at which it was revived, the jurisdictional clause was dormant and, in order to be brought again into force, consent thereto was required, this consent resulting from Spain's entry into the United Nations.

The date in question must be fixed as at 14 December 1955, that being the date on which Spain was admitted as a Member of the United Nations. As the dispute was prior to this crucial date, it could not be submitted to the Court.

The 1927 Treaty, in fact, in its Articles 1 and 2 and in the Final Protocol, is concerned with disputes that "may arise" between the two States. It cannot be said that the Spanish-Belgian Treaty indicates

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any clear intention to cover all disputes. The jurisdictional clause of Article 17 of the Treaty—paragraph 4, which Article 37 of the Statute revives—does not apply to any disputes whatsoever, but only to disputes which are subsequent to the date of 14 December 1955. For disputes prior to that date, there is no applicable jurisdictional clause. The present dispute arose much earlier than 14 December 1955, as is admitted by the Belgian Government in its diplomatic Note of 16 May 1957. It is clear therefore that Article 37 could not make the effect of the jurisdictional clause of Article 17 retrospectively applicable to disputes that arose prior to its coming into force. The Permanent Court said :

> "Not only are the terms expressing the limitation *ratione temporis* clear, but the intention which inspired it seems equally clear : it was inserted with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects" (*P.C.I.J., Series A/B, No. 74*, p. 24).

In the *Mavrommatis* case, the Permanent Court said :

> "The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it *after its establishment*. In the present case, this interpretation appears to be indicated by the terms of Article 26 itself where it is laid down that 'any dispute whatsoever ... which may arise' shall be submitted to the Court" (*P.C.I.J., Series A, No. 2*, p. 35).

Article 1 of the 1927 Treaty stipulates :

> "The High Contracting Parties reciprocally undertake to settle by pacific means and in accordance with the methods provided for in the present Treaty *all disputes or conflicts* of any nature whatsoever *which may arise* between Belgium and Spain and which it may not have been possible to settle by the normal methods of diplomacy."

The Judgment of the Permanent Court cited above interpreted the phrase "any dispute whatsoever ... which may arise", which corresponds to the text of Article 1 of the Treaty quoted above "all disputes or conflicts of any nature whatsoever which may arise...", as referring to all disputes arising after the establishment of the jurisdiction, and this came into force when Spain became a party to the Statute of the Court. Earlier disputes are therefore excluded from this jurisdiction.

When Article 17, paragraph 4, came into force again, in 1955, the reservations *ratione temporis* of Articles 1 and 2 of the Treaty became applicable once more.

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In its declarations of 25 September 1925 and 10 June 1948, the Belgian Government followed the usual practice of limiting its acceptance of the jurisdiction of the Court by a clause *ratione temporis*, in accordance with general international law. It is not conceivable that that Government intended to depart from or derogate from that practice when it signed the 1927 Treaty. The declarations in question admit of a clear presumption of Belgium's intention in this matter.

Certain provisions of the 1927 Treaty which had been dormant were brought into force, more particularly those provisions which mentioned the Permanent Court. It may be said that certain provisions of the Treaty were brought into force.

The only exception to non-retroactivity admitted by the Protocol is limited by two conditions, namely *(a)* that the dispute should relate to the interpretation of a previous treaty still in force, and *(b)* that the application challenged should have been initiated before the signature of the 1927 Treaty and should continue after its signature. These conditions are not relevant to the case now before the Court.

Article 37 does not establish any reservation *ratione temporis*. It merely brings into force the part relating to the compulsory jurisdiction established by the 1927 Treaty. It is in the provisions of that Treaty that the limitations *ratione temporis* on the jurisdiction of the Court must be sought. These are the limitations already mentioned.

* * *

On the Joinder of the Third and Fourth Preliminary Objections to the Merits

On joinder to the merits four points should be borne in mind:

(1) The basis of international jurisdiction is not, as in municipal law, the will of a law-maker, but the consent of the parties themselves.

(2) It is in the light of that fundamental observation that the effect of the raising of a preliminary objection by the respondent State must be judged. The respondent is thus exercising its right to have the Court ascertain as a preliminary matter whether the case for which the applicant has sought to bring it before the Court is or is not one of those for which it has agreed that the Court should give a decision where it is concerned. For that reason, when a preliminary objection is raised, the proceedings on the merits are stopped and can normally be resumed only when the question raised as a preliminary objection has been decided.

(3) It is always in the light of the basic observation made above

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under (1) that the question of the propriety of joining a preliminary objection to the merits must be examined. As Judge Anzilotti remarked (*P.C.I.J., Series D, Third Addendum to No. 2*, p. 647) :

> *"The joinder of an objection to the merits, which compelled a State to appear before the Court, in spite of the fact that it claimed not to have accepted any obligation to do so, was in international proceedings an entirely different matter to the same step in proceedings at municipal law, in which the obligation to appear before a Court was not dependent on the will of the party concerned."*

Thus, while it certainly cannot be said that the Court needs the consent of the respondent in order to be able to join a preliminary objection to the merits, it is none the less true that joinder to the merits may be decided upon only as an absolutely exceptional step. It runs manifestly counter to the respondent's right not to have the merits of a case discussed unless it has first of all been established that, in one way or another, its consent has been given to the Court's deciding the case.

Thus the Court can resort to the joining of a preliminary objection to the merits only :

(a) when the parties themselves request it, or

(b) when the question raised as a preliminary objection is so bound up with the question which constitutes the merits of the case that it is manifestly impossible to decide the one without deciding the other at the same time.

(4) As regards the validity of such a conclusion, there can be no difference whatever according to whether the question raised as a preliminary objection is a purely procedural question or a question which is in itself a question which touches upon substantive law. What is necessary is that it should be a question separate from that which constitutes the actual merits of the case. Many questions can be in themselves questions of substance without on that account touching on the merits of the case.

These four points should be borne particularly in mind when taking a decision on the possibility of joining to the merits a question raised by the respondent State as a preliminary objection. If joinder to the merits were decided upon in a case where the question could have been decided independently of the merits of the case, the Court would be going against the very purpose of the institution of preliminary objections. It would be compelling the respondent to address itself to the whole merits of a case in connection with which it might subsequently have to hold that, in the end, the respondent had not at all been bound to do so.

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In the Barcelona Traction case, there is nothing to warrant the suggestion that the third and fourth objections should be joined to the merits. The idea advanced during the hearings to the effect that in the present situation the Court should first explore the circumstances of the case which might affect the Belgian State's *jus standi*, and take its decision in relation to those circumstances, would be likely to lead to an absurd situation. What is first necessary is to establish the rule governing the matter. Consideration should then be given to the question whether that rule ever contemplates the possibility, where prejudice has been caused to a company by a *foreign* State, of diplomatic protection being exercised by a State other than the national State of the company itself. If the Court comes to a negative conclusion, it should quite simply declare that the Belgian State has no capacity to exercise diplomatic protection in the Barcelona Traction case, whether it comes forward as the protector of the allegedly injured company or whether it seeks to act as the protector of the alleged Belgian shareholders of the company. The circumstances of the particular case cannot in any way modify this conclusion.

According to its terms of reference the Court must apply international law. It must apply a rule of international law in order to decide questions which are raised as preliminary objections, whether it be the question of the Belgian Government's lack of capacity or the question of failure to exhaust local remedies. The very idea of a *decision for a particular case,* such as seems to be suggested by the Belgian Government, is inadmissible. Is it possible to conceive of the Court's refraining from ascertaining the rule of international law which relates to questions under consideration and deciding those questions in themselves without troubling to determine beforehand what rules must be applied? Or, again, is it conceivable that after determining those rules it should not apply them to the particular case? This would not be deciding according to the circumstances of the particular case but inventing and applying to it a rule different from that laid down by international law and hence patently violating that rule.

It is moreover quite clear that the question of the Belgian Government's lack of capacity can be decided without going in any way into the merits of the case. The merits of the case consist of the question whether or not a Canadian company suffered a denial of justice in Spain. Whether the answer to that question is in the affirmative or in the negative cannot in any way affect the position to be taken on the question whether or not the Belgian Government has capacity to intervene in the case, either for the diplomatic protection of the company or for the diplomatic protection of the company's alleged Belgian shareholders. Nor can it affect the position on the question whether or not Sidro is a shareholder of Barcelona Traction.

The Belgian Government agreed, both at the time when it submitted its draft special agreement to the Spanish Government, and later when, after the Spanish Government's refusal, it notified it of the filing of

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its unilateral application, that the question of the Belgian Government's capacity to take action in the case could and should be decided prior to any consideration of the merits. It will be recalled that the Belgian Government had even explicitly excluded that question from among those on which a joinder to the merits might be contemplated. It is not open to it now to take a view different from the one which it took then. It cannot now claim that the question of the Belgian Government's capacity to take action cannot be disentangled from the merits of the case, seeing that it asserted the contrary itself at the time of the filing of the Application.

The two Governments are in agreement that the Court should decide the question whether the second Application is similar to the first (both are claimed to be concerned with protection of Barcelona Traction) and the question whether entry in the company's register is evidence of the status of shareholder. These points, in the view of both Governments, should not be joined to the merits.

The same applies to the question of the exhaustion of local remedies. Whether or not the adjudication in bankruptcy of Barcelona Traction and its consequences constituted a denial of justice towards the company cannot alter the fact that the company itself, and the company alone, was able and bound to make use in due time of the remedies which the Spanish legal system made available to it for the purpose of challenging the adjudication in bankruptcy. The company did not do so and has therefore lost the right to complain, at the international level, of a denial of justice which, if it had really existed, could have been cured at the municipal level and was not so cured solely because of its own negligence. There is nothing in this finding which could be modified by investigation of the question whether or not the alleged denial of justice existed, or whether or not the alleged Belgian shareholders in the company sustained damage to their own interests as a result of the prejudice sustained by the company. It is to the company and to its directors who failed to take appropriate steps to safeguard the rights and interests of the company that the shareholders should address their complaints, and not to the Spanish State which has never had anything to do with them.

It is impossible to see how the Court could derive from an examination of the merits any element that might be of use for the purpose of a decision on the preliminary objections concerning the Belgian Government's lack of capacity and the failure to exhaust local remedies. Might not the joinder of these objections to the merits, in a case where the questions with which they deal are manifestly separate from and independent of the question which constitutes the merits of the case, be regarded as a departure from the rules governing the procedure for the examination of preliminary objections and, over and above those rules, as a departure from the principles on which international jurisdiction itself is based?

(Signed) ARMAND-UGON.