

SEPARATE OPINION  
OF PRESIDENT BUSTAMANTE Y RIVERO

[*Translation*]

I subscribe to the reasons on which the Court has based its Judgment in the *Barcelona Traction* case. Nevertheless, certain very special aspects of this case have prompted me to certain additional reflections concerning the question of the law applicable, and I feel it right that I should communicate them as concerning matters of doctrine. I consider, moreover, that the question of the exhaustion of local remedies, which was raised in the fourth preliminary objection during the first phase of the proceedings, could have been taken into consideration in the reasons for judgment and mentioned in the Court's decision. I consequently propose to examine these two points succinctly in the paragraphs which follow.

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1. The Application in the present case stands on the principle of international law which recognizes that each State has the power, subject to certain conditions, to exercise diplomatic protection of its nationals who, in a foreign country, have suffered an injury affecting their persons or their rights in violation of international law. Relying on this principle, the Belgian Government's Application, filed on 19 June 1962 in behalf of certain Belgian nationals holding shares in Barcelona Traction, treated of certain responsibilities which, according to the Applicant, should be imputed to the Spanish Government. These responsibilities were said to arise, on the one hand, from the bankruptcy adjudication made by the Reus judge on 12 February 1948 against the holding company Barcelona Traction, Light and Power Co., Limited, of Canadian nationality, which carried on activities in Spain through the medium of various subsidiary companies. They were said to relate, on the other hand, to the allegedly improper treatment afforded this group of companies by the Spanish administrative and judicial authorities before and after the bankruptcy adjudication.

That Barcelona Traction has the character of a holding company has been recognized by both Parties; it is established in particular by the documents printed in Appendices 1 and 2 to Annex 22 and in Annex 23 of the Belgian Memorial.

Accordingly, the Application gives rise to the necessity of investigating, among other cardinal points, the question of whether the fact of Barcelona Traction's being a holding company has any particular bearing on

the conditions for the diplomatic protection of that company or even on the extent of the responsibility of the respondent State. Such investigation reveals an almost total absence of specific rules of general international law or treaty law applicable to transnational holding companies and shows why, in consequence, judges tend to encounter difficulty in ascertaining the law applicable in each case and may even be forced to fall back on debatable analogies drawn from municipal law or on private international law norms of questionable relevance. A brief analysis of the way holding companies belie the legally established mechanism of the limited company will doubtless facilitate appreciation of the problem.

2. The institution of the limited company, which was destined to displace the old partnership, was a creation of municipal law devised within the purely national domain for the purpose of expanding the financial potentialities and scope of activities of business associations. Each legal system consequently laid down the rules governing the structure and working of commercial companies within the national territory, but always with the end in view of endowing them with the character of autonomous legal *personae* distinct from the *personae* of their shareholders. At a certain moment, however, world-wide economic expansion, under the twofold stimulus of increasing needs and the abundance of investment capital, multiplied the phenomena of financial interdependence between States, thereby revealing that the purely national field of action of the classic commercial company had become insufficient. The holding company then appeared, as a manifestation of the new transnational character of the company. Thus it was that the centre of gravity of commercial and stock-exchange business not infrequently shifted from the field of private law into the international domain.

Nevertheless, this practical evolution in contemporary economic life was not matched on the legislative plane by the appearance of any new form of juridical institution. In order to achieve it, the already familiar appearance of the limited company was quite simply borrowed, though the holding company introduced into that institution a heterogeneous element, one contrary to its very nature, by denying a truly independent legal personality to the subsidiary companies of the constituent group and placing them entirely under the authority of the parent or chief company of the group, the holder of all or a majority of their shares. In fact, this situation arose without any visible alteration in the structure and functioning of the subsidiary companies being perceptible from outside: what unites the constituent group is generally only an invisible bond, a network of hidden links consisting in the decisions of the central organs of control, which "radiate" to the directors of the subsidiaries who are charged with their implementation. It is a further advantage of this system that the central entity of the holding company does not necessarily have to be registered or be seen to carry on business in the country where the capital is invested: all that is required is that the subsidiaries may ap-

pear there in the guise of independent legal entities. The result is a certain possibility of evading responsibilities.

3. This *de facto* reality of the conduct of holding companies—which represents the most usual case—does not, in my opinion, answer the normal requirements of a *de jure* situation. The foregoing historical outline shows that (for the reasons indicated) the concept of the holding company corresponded to a *unilateral* intention or concern on the part of investors who, engrossed with their own interests, relegated to the background the legal situation of the subsidiary companies and the laws of the country of investment. However, the diplomatic protection of foreigners doing business in the territory of a given State must be regarded as establishing a *bilateral* relationship in which a duality of reciprocal rights and obligations comes into play: those of the protecting State in relation to those of the State in which the investment was made. It is hard to see how the terms of this relationship could be defined if no legal bond has first been established between the holding company which forms the subject of diplomatic protection and the State whose acts are the subject of complaint. As soon as the holding company crosses a frontier and penetrates the territory of another State, it is *ipso facto* transformed into an institution of private international law, to ensure the equitable functioning of which would require the formulation of principles and rules defining the reciprocal interests of the subsidiary companies and the central entity of the group, as well as the parent company's relations with and duties towards the States in which the subsidiaries have their domicile and in which they carry on their business. Any other system of organization must run counter to the principles of the equality of juristic persons and of a State's power of *imperium* over its territory. It is true that a few legal norms may be found here and there on this subject, but, despite the importance of the problem, it can be said that neither the legal systems of States nor the law-making organs of the international community have yet succeeded in grasping this elusive reality of holding companies so as to bring it within the framework of a sufficiently explicit and precise body of law. In municipal law, certain precautionary and, moreover, fairly sporadic measures have been taken, such as obliging parent companies to submit consolidated balance-sheets that summarize the individual balance-sheets of the subsidiary companies. The exportation of earnings has also been made the occasion for measures of control, so as to preclude the evasion of fiscal requirements by those who do not fulfil the role of either investor or taxpayer. Finally, certain legal systems require that foreign limited companies be entered in the national commercial register before engaging in activity within the territory of the State where the investment is made. But none of these provisions has ever been more than partially effective, and their sporadic nature stands in the way of any systemization. With the advent of transnationality, the question of the law applicable involves problems of a particularly thorny and controversial nature: for example, that of the apportionment of jurisdictional

competence among the States in whose territories the various companies of the group are established. Other, still graver questions can be posed, moreover, and it may be wondered, for example, whether a holding company neither registered nor domiciled in the country of its operations can avail itself of the right of diplomatic protection; and whether, in such a case, the principle of the responsibility of the State charged with wrongdoing operates undiminished or only for the benefit of certain subsidiaries. In short, the whole subject is bedevilled, on the international plane, with the existence of gaps in the law which it would be desirable to close either by way of treaties (bilateral or multilateral agreements) or through the possible emergence—hardly likely in the circumstances—of customary law.

4. Meanwhile, in the face of this reality, the only way to try and resolve disputes resulting from the insufficient development of the law in its present stage of evolution is to submit them to the appreciation of municipal courts. But as the number of gaps in legislation increases, so the task of the judge grows more difficult and more and more resembles a work of legislation, something which is always dangerous and out of place on his part. It is no doubt for this reason that in the present case the Barcelona Traction bankruptcy proceedings in Spain have given rise to numerous controversial episodes in which scathing criticism has been met with apologetics of a questionable kind. Having regard to the orientation the Court has given to the Judgment it is delivering, it is not possible to broach the merits of the dispute in order to examine the charges relating to the denial of justice of which Belgium complains; in my opinion, however, this does not absolve the international judge of his obligation to lay stress on the objective position of the question of principle, i.e., the existing disparity between the development of certain phenomena in international economics, such as the grouping of limited companies under what are known as holding companies, and the evolution of the law applicable. This evolution has lagged behind; and it is possible that the legal lacunae which have in consequence made their appearance may hamper the proper working of justice.

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5. The preliminary question of the exhaustion of the remedies of Spanish municipal law, though it was joined to the merits by the Judgment delivered by the Court in 1964, did not on that account lose its character of being a preliminary question. The relevant rule of international law in fact lays it down that a claim based on the principle of the diplomatic protection of foreign nationals is only amenable to decision if it is shown that the remedies provided by municipal law have been exhausted. For this reason, I think the Court might have included an examination of this question in its Judgment, since, properly speaking, this matter merely complements the other, concerning Belgium's *ius standi*. Even supposing

that that State had proved its capacity to institute proceedings in behalf of the shareholders in Barcelona Traction, the essential charges advanced in its Application could only have been examined by the Court if the exhaustion of local means of complaint had first been proved.

Due note must at all events be taken of the fact that, even though the question of the various procedural remedies to be employed is closely bound up with the merits of the Belgian claim, the Court has decided that, since the Belgian Government has not been shown to have *jus standi*, it must refrain from considering in the Judgment the merits of the dispute. Nevertheless, while respecting this decision, it is still permissible, where the exhaustion of local remedies rule is concerned, to reason, while drawing the distinction which is essential in order to preclude, when the time comes to decide the purely procedural problem, any obtrusion of elements implying a decision on the merits.

6. The first question to consider in this connection is that of the ascertainment of the persons obliged to exhaust local remedies in the present case. In principle, this obligation lies upon those who put forward a complaint on the grounds of damage allegedly caused in respect of their rights or interests. In 1958 Belgium submitted a first Application in behalf of Barcelona Traction; but after its discontinuance of proceedings in 1961 that same State filed a fresh Application in 1962, in behalf, this time, of the company's shareholders. As from that moment, the burden of the obligation to exhaust local remedies fell without any doubt on the shareholders concerned. Nevertheless, in my opinion all the remedies sought by the bankrupt company before the date of the second Application must, for good legal reasons, be regarded as having been sought for the benefit of the shareholders. The unlawful acts with which the Spanish judicial authorities are charged are the same in both Applications. If the obligation to give the Spanish courts an opportunity to rectify those acts—which is the underlying intention of the rule—had already once been complied with by the injured company, it seems clear that the seeking of those same remedies by the claimants under the second Application would not still be necessary, indeed would be impossible if the time-limits for doing so had lapsed with the passing of time. In accordance with the logic of this reasoning, the omissions of the bankrupt company during the first period are opposable to the shareholders protected by the terms of the second Application.

7. My general impression is as follows: it is beyond doubt that, in the course of the judicial proceedings which took place in Spain, Barcelona Traction and other persons and entities which made common cause with it availed themselves of a considerable number of remedies with a view to having the decisions of the Spanish authorities which they considered unjust reversed. It is no less true that, on the one hand, those interested parties did not in all circumstances respect certain general principles which form the essence of the rule of the exhaustion of local remedies, and that, on the other, they neglected to seek certain available remedies or

did not pursue to the very end other remedies which they had sought but which they did not take as far as the highest court open to them, and, finally, that certain natural or juristic persons who had sought various remedies had in law no chance of succeeding since under Spanish law they were not empowered to bring such actions. For example: as is well known, in bankruptcy proceedings only the bankrupt and his creditors have *jus standi in judicio*, yet persons who did not possess or did not claim these capacities nevertheless sought certain remedies.

On another point, the law is clear that it is for the judge alone and not for the interested party to decide whether a remedy provided by law must in practice be sought or not. In order to be entitled to refrain from doing so, it does not suffice for such a party to prejudge the result and to regard success as improbable either because there are adverse precedents or because the courts are presumed partial. It seems to me that the defence, on the Belgian side, placed much reliance in certain circumstances on its own judgment in evaluating the relevance or viability of certain remedies, without leaving such decision to the courts, as ought to have been done.

8. Having recalled these questions of principle, I feel it worthwhile to consider the chief remedies failure to seek which must, in my opinion, be regarded as an omission for which the Belgian side would be responsible.

So far as administrative remedies are concerned, those that were omitted concern in particular the decisions by which the Spanish Institute of Foreign Exchange refused to grant currency that would have made it possible to implement the various plans of compromise contemplated between Barcelona Traction and its bondholders, and, more particularly, its refusal to approve the last plan of compromise, which provided—at the cost of a considerable loss—for the conversion into Spanish currency of certain bonds expressed in foreign currency. The regulations then in force in Spain allowed private parties to apply to the competent authorities for the necessary authorizations: it is consequently evident, in accordance with well-established principles relating to administrative hierarchies, that all refusals of authorization of such a nature could form the subject of an appeal to a higher authority. The refusals of the Spanish Institute of Foreign Exchange ought consequently to have led to complaints by the interested party to the Minister of Commerce, to whom the Institute was directly responsible. Furthermore, this type of appeal, known as a hierarchic appeal, is indispensable if it is desired that it should subsequently be possible for a contentious-administrative appeal to be admitted.

It has been alleged that no remedy is available against certain administrative decisions if they fall within the discretionary power of the authority which takes them, since that power, by virtue of its very nature, excludes all possibility of their reversal. But the proceedings have shown that precedents are to be found in Spanish administrative jurisprudence of remedies sought and granted against decisions of this kind,

for a discretionary power by no means implies an arbitrary one and only a higher authority is able to discern whether a subordinate official has exceeded the limits of a reasonable discretion and ventured into the unlawful domain of arbitrariness or unjust discrimination.

So far as the remedy of a contentious-administrative appeal is concerned, it can be said to constitute the culminating point of purely administrative procedure. When appeals to the administrative authorities have been totally exhausted, the way of contentious-administrative proceedings remains open and has the advantage that this matter falls within the purview of the Supreme Court. It is true that in order to have access to this new remedy it would have been necessary in the present instance for the party concerned first to appeal to the Minister against the decisions of the Spanish Institute of Foreign Exchange, in order to obtain a decision from the highest administrative authority, that is to say, an irrevocable decision. This remedy was not sought; and it ought to have been, in particular, in connection with the refusal to authorize the implementation of the last plan of compromise, which provided for the payment of the bonds in pesetas, for the subsidiary company Ebro maintained in relation thereto that it had been the subject of unjust discrimination on the part of the administrative authorities, when compared with other entities.

9. With respect to judicial remedies, I must refer in the first place to the remedy of "opposition" to the bankruptcy judgment (*auto de quiebra*), for which provision is made in Article 1028 of the Spanish Commercial Code and in Article 1326 of the Code of Civil Procedure. The former article lays down a time-limit of eight days as from the publication of the bankruptcy judgment within which this remedy may be sought. On 17 March 1948, no plea of opposition having been entered, the Reus judge gave a decision declaring the bankruptcy judgment delivered with respect to Barcelona Traction on 12 February 1948 to be final and *res judicata*. The pleadings show that, by extra-judicial means, this Toronto company had knowledge of the bankruptcy adjudication in Spain two days after the Reus judgment was delivered; that the newspapers of Toronto, of Montreal and of London published information on this subject as from 14 February; that representatives of or shareholders in the company made statements to the press in Toronto and Madrid during the month of February alluding to the bankruptcy adjudication; that on 1 March the president of the company, on behalf of the board of directors, addressed to bondholders a circular letter concerning the bankruptcy adjudication; and that the company on 9 March gave a power of attorney to enter judicial appearance in Spain (see Annex 81 to the Preliminary Objections). There is thus no doubt that from an extra-judicial or factual point of view Barcelona Traction would have been in a position to take legal action and enter a plea of opposition to the bankruptcy judgment well before the decision taken by the Reus judge on 17 March. However, the bankruptcy proceedings gave rise to a controversy between the Parties with respect to two points of law: the non-notification of the judgment of 12 February to

the bankrupt at its domicile in Toronto (Article 260 of the Code of Civil Procedure), and the positive irregularity which, according to Belgium, characterized the mode of publication of the said judgment, which took place only in Spain and never at Toronto where the bankrupt company had its domicile. The Belgian Government maintains that in these circumstances the legal time-limit for making use of the remedy of "opposition" did not begin to run. In fact, Barcelona Traction did not enter a plea of opposition to the bankruptcy until June 1948. The Spanish Government takes the view that, since Barcelona Traction's subsidiaries were domiciled and carried on their activities in Spain, publication abroad was not warranted. The Court could only have decided these disputed points by examining the relevant decisions of the municipal courts which upheld the Spanish position, in order to establish whether or not a denial of justice from the point of view of international law can be imputed to them: which would have meant deciding the merits of the case. Since such a pronouncement has been ruled out by the Judgment, I must refrain from taking up a position on the question of whether the Belgian side did or did not seek the local remedy of "opposition" to the bankruptcy judgment in proper fashion and in good time.

10. The judicial order of 17 March 1948, which finally confirmed the effects of the bankruptcy judgment of 12 February, was no doubt of a very serious nature, for it opened the way for the sale of the bankrupt's property. The remedies sought by the subsidiaries against this order were paralysed, in accordance with the law, in consequence of the *Boter declinatoria*; it consequently became necessary to seek a different sort of remedy in order to avoid or postpone the sale. One of the few remedies capable of having this effect was the remedy of *revisión* (Articles 1796 *et seq.* of the Code of Civil Procedure). According to the law, this remedy may be sought if a judgment which has become final was delivered "as a result of subornation, violence or other fraudulent means" (paragraph 4 of the article referred to). In this connection, the Application speaks of arbitrariness, partiality, contempt for the principle of the equality of parties, and, in short, of a "deliberate intention" on the part of certain Spanish judicial authorities "of favouring" the personal "plans" of the enemies of Barcelona Traction. These defects, in Belgium's opinion, go beyond mere negligence, flagrant errors or imperfections in the law applicable. Referring more specifically to the bankruptcy judgment pronounced by the Reus judge, Belgium has spoken in the Reply of "flagrant connivance" between that judge and the petitioners in bankruptcy (paragraph 26) and in oral argument of the court's lack of scruples. It has thus unequivocally maintained that there was *dolus* or fraud.

Belgium has raised various objections with regard to the appropriateness and effectiveness of the remedy of *revisión*.

In the first place, it contends that under Spanish law *revisión* is only available against a *sentencia firme*, i.e., against a judgment finally pronouncing upon an action or claim, and that in Spanish terminology itself

a bankruptcy judgment is only an *auto*, i.e., a decision which puts an end not to the dispute, as a *sentencia* or judgment proper does, but only to an incidental issue or partial aspect of the case.

This assertion might appear justified from a strictly terminological point of view, but in fact bankruptcy proceedings have in substance a structure all their own, which differs from that of ordinary proceedings with their three classic stages of statement of claim and answer thereto, production of evidence and judgment. In bankruptcy, the proceedings are divided into five "sections", dealt with in separate "files" (Articles 1321 and 1322 of the Code of Civil Procedure). The *first section* concerns the bankruptcy judgment, ancillary provisions concerning its execution, and compositions; the *second* deals with the administration of the bankruptcy; the *third* with the retroactive effects of the bankruptcy; the *fourth* with the proving and ranking of debts; and the *fifth* with the classification of the bankruptcy and the discharge of the bankrupt. The subject-matter of each of these sections, each with its separate file, is kept clearly distinct, and in each of them independent decisions having the force of *res judicata* can be delivered. In this sense, it is sound doctrine that a bankruptcy judgment (*auto*) can be assimilated to a *sentencia*, in particular when that judgment has become final (*firme*) by express judicial decision, either through no plea of opposition to it having been entered or through such opposition's having failed. It is consequently correct to say that in such a case the fate or final direction of the action is settled. A bankruptcy judgment, once it has become *res judicata*, automatically sets in motion all the measures of execution which must carry the proceedings through to their conclusion: liquidation of the assets, payment of the liabilities and distribution of the surplus if any. The effects of such a judgment are those of a true *sentencia*. Lastly (and this is decisive) an examination of Title XIII, Book II, of the Code of Civil Procedure enables it to be seen that Article 1330, with Article 755, gives the name of *sentencia* to the judge's pronouncement deciding, after the presentation of evidence, the incidental proceedings of opposition to the bankruptcy judgment. In terms of the law, a decision which, in the absence of an entry of opposition, recognizes such judgment to have the authority of *res judicata*, has exactly the same character and weight as a *sentencia* (see Article 408).

It is consequently my belief that the remedy of *revisión* is available against an *auto* adjudicating bankruptcy, since the latter possesses the characteristics of a true *sentencia*. In any event, should any doubt have remained, the rule of exhaustion required that the remedy be sought by the interested party, for solely a judge can pronounce upon its admissibility.

Still other reservations have been expressed by Belgium with regard to the possibility of relying on the ground for *revisión* to do with the employment of fraudulent means in the proceedings. Although in the last stage of oral argument counsel for Belgium attenuated noticeably the accusa-

tions made in the pleadings against certain Spanish judicial authorities, there was no formal withdrawal of them. Those accusations consequently stand and, for the purposes of the rule of the exhaustion of local remedies, evidence would have had to be supplied for it to be possible to establish whether the proceedings were or were not vitiated by such irregularities. It was the more indispensable in the present case in that proof of the facts alleged would have had as its immediate consequence the annulment of the tainted procedural acts: in other words, that very correction of the legal position which is the object of the rule. It will consequently be seen how, from the international point of view, the results of the remedy of *revisión* are of capital importance when it subsequently comes to establishing the existence or non-existence of the responsibility of the State.

The Belgian side nevertheless foresaw difficulty in obtaining tangible proof of the accusations of dishonesty. But it always had at its disposal against the authorities accused the prior remedy of proceedings to establish civil liability (Code of Civil Procedure, Articles 903 *et seq.*), which would have made it possible to establish whether criminal liability was involved or not (Article 918 of the same Code). In the event of an affirmative answer, the appropriateness of the remedy of *revisión* would have been beyond dispute. In short, the omission of this remedy created a legal vacancy for which the applicant Party must bear the responsibility. The rule of exhaustion was not complied with.

11. It would also be possible to consider the case of other remedies that were not sought, or which were sought improperly or out of time, by Barcelona Traction, Sidro and Sofina, or other entities defending the interests of the bankrupt company. In this connection an analysis might be made of certain remedies aimed, for example, at challenging the jurisdiction of the courts or calling in question certain aspects of the Conditions of the judicial sale. It seems to me, moreover, to have been proved by the pleadings and oral arguments that some of the remedies sought on behalf of Barcelona Traction were not pursued to the end, that is to say, so far as the obtaining of a final decision from the highest court. Others were only exhausted after the commencement of the international proceedings in this Court. I nevertheless do not consider it indispensable to enter into detail in this connection: I would merely stress that the remedies I have just examined were considered simply as examples, without there being any intention of exhaustively enumerating them; since this question has in fact been excluded from the Judgment, any more thorough study of its many aspects would, indeed, serve no practical purpose. The essential point is that, certain of the local remedies available not having been sought or duly pursued to the end, the conditions for the continuation of diplomatic protection by judicial means have not been satisfied.

(Signed) J. L. BUSTAMANTE Y RIVERO.

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