SEPARATE OPINION OF JUDGE GROS

[Translation]

1. Although the force of *res judicata* does not extend to the reasoning of a judgment, it is the practice of the Court, as of arbitral tribunals, to stand by the reasoning set forth in previous decisions (cf. Judgment No. 10: "The Court sees no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound"; *P.C.I.J., Series A, No. 11*, p. 18). Although I accept the operative part of the present Judgment, my reasoning is entirely different. Considering the importance of the case from the point of view of its consequences on the law applicable to international economic relations, I feel it my duty to set forth, as briefly as possible, the reasons which lead me to accept only the operative part of the Court's decision.

2. The separation of fact and law is for the international judge merely a working-method in the first stage of considering a case; but to judge is always to apply a rule of law to particular facts. What has therefore to be done is to ascertain, taking account solely of the facts of the case, what rules of international law are applicable to the treatment given in Spain to a limited company, Barcelona Traction, as from the decision rendered by the Reus judge on 12 February 1948, according to the terms of the claim set forth in the Application dated 19 June 1962 and in the final submissions of the Belgian Government on 9 July 1969. "Each case must be considered on its individual merits" (*P.C.I.J., Series A, No. 7*, p. 69).

3. If the question of the nationality of the claim is taken first, which is the way the Court decided to proceed, the facts assume crucial importance in the present case, and it was precisely the idea that the third and fourth preliminary objections could not be decided without full knowledge of the merits which served to justify the joinder effected by the Judgment of 24 July 1964 [1]. This was thrown into particular relief, as regards the third objection, i.e., the very point on which the present Judgment is based, by the observation which the President made on the Court's behalf in opening the hearing of 13 March 1964.

What then are the facts of the case? Since Belgium is claiming to protect Belgian nationals, it has to be verified that the persons in question

[1] I share the views on this joinder expressed by Judge Sir Gerald Fitzmaurice in paragraphs 84-90 of his separate opinion.

were Belgian at the time of the acts with which Spain is reproached and were still Belgian at the moment when the Application was filed. Yet this question of proof of the nationality of the claim has been left aside and the Court has dealt in the first place and exclusively with Belgium's right to institute proceedings in behalf of the shareholders in Barcelona Traction. Though the Court, in the reasoning it chose to follow, dealt only with this point of law, I shall also have to refer to the question of proof of the nationality of the claim.

4. In seeking to ascertain what are the persons whose case Belgium has taken up, one must first and foremost pay attention to a fundamental aspect of the case from which it is evident that any general theory on the status of limited companies fails to take account of the particular facts in the present case and ignores the legal problem with which the Court is faced. In protecting shareholders in the company, Belgium claims to be protecting a moderate number of natural persons and certain companies that hold stock in Barcelona Traction; i.e., an important investment on the part of the Belgian economy. This is not a simple situation, as if it were a question of a limited company whose capital was shared among a few hundred natural persons the list of whose names was readily available (cf. on this point the role of shareholders' protection associations, either national or *ad hoc*, in particular in the *Certain Norwegian Loans* case, *I.C.J. Pleadings*, Vol. I, p. 86). Barcelona Traction is a company heading 14 others in a group of its own (see A.M., Vol. I, Ann. 24; the table shows the composition of the Barcelona Traction group of companies as at 31 December 1947), while itself forming part of a group which appears to be controlled by the Sofina company and, judging by the Belgium-Luxembourg index in *Who Owns Whom* (Part I, B.E.13), involves over 80 closely linked companies. One cannot simply ignore this fact and argue as if the case concerned the diplomatic protection of an ordinary limited company. The present case is a special one, firstly because the principal shareholders in Barcelona Traction are companies and secondly because Barcelona Traction itself is the holding company of a group of 14 others which it controls either 100 per cent. (nine companies), or nearly 100 per cent. (four) or 90 per cent. (one). These features have several legal consequences for the question of diplomatic protection and for that of the jurisdiction competent to pass judgment on the activities of the group. The question that has been raised concerns the fate of a large investment claimed to have been made by the Belgian economy in Spain, and it is to this question that an answer must be given. When the times are such that from 1954 to 1968 private investments of the order of 30,000 million dollars were made, international law cannot ignore the phenomenon of investment, and it can hardly be claimed that it did not exist in the critical period of 1948-1952.

5. To facilitate this exposé and simplify its presentation, one funda-

mental observation is called for with respect to the right of protection in international law. When the Court defined such protection in the *Nottebohm* case, it was in these terms:

> "Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State. As the Permanent Court of International Justice has said and has repeated, 'by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law' . . ." (*I.C.J. Reports 1955*, p. 24.)

This classic formula is usually held to be an explanation of the role of the State when acting on the international plane, in relation to the position of the individual. This view of matters might well originally have been that called for by the comity of nations as it appeared in the nineteenth century and, already with evident attenuations, during the first third of the twentieth century. But since then, and particularly at the present day, the formula that in defending its nationals a State is asserting "its own rights" at the international level has acquired a reality which goes further than the procedural justification of its origin. Leaving aside the position of the socialist States where the question of private investments cannot arise and the security of public investments is obtained by other methods [1], and confining our consideration of the legal nature of international judicial action to States with a liberal economic system, the economic world today exhibits phenomena of State intervention in and responsibility for the economic activity of the subject within the national territory or abroad which are so frequent and thoroughgoing that the separation of the interest of the individual from that of the State no longer corresponds to reality.

A few brief illustrations will suffice, since this situation is well known. To remain in the field of limited companies, the scale on which many States have acted to preserve the national character of such companies or regulate the labour problem, the direct aid granted by the State to encourage investment, and the system of State guarantees against the risks incurred in foreign countries by domestic companies, are examples of the way in which the State asserts its "own right" to control the growth of the national economy, ranging over the whole of the activities of private undertakings, the results of which enter into the gross national product. Thus when, in consequence of a risk covered by an export-credit guarantee, a State undertakes to make good to a domestic com-

[1] See "Observations sur les méthodes de protection des intérêts privés à l'étranger" in *Mélanges Rolin*, 1964, pp. 125-133.

pany any damage caused it by another State within the latter's territory, it is a financial effort on the part of the national community which enables this liability to be assumed, through a solidarity based on the idea that certain exports are necessary for the prosperity of the nation [1]. (Cf. likewise the United States legislation providing for the protection of domestic industries against "actual or potential" threats; the provisions prohibiting the subsidiaries of American companies, wherever they may be, from trading with certain countries when 50 per cent. or more of their capital belongs to American shareholders; the Japanese law of 10 May 1950 authorizing foreign investment "which contributes to a healthy and independent expansion of the Japanese economy and to the improvement of the country's balance of payments . . .".) The Luxembourg Agreement of 29 January 1966 between the six member-States of the European Economic Community contains a recognition of the national character of the "very important" economic interests of a State (one of the signatories declared that no majority could force a member-State to take measures which it regarded as contrary to its national interests). It is clear from all these examples, which are merely illustrations of a planned industrial society, that it is nowadays out of touch with the facts of economics to represent the relations between private investors and the State—whether that of the investor or the State where the investment is made—as mere relations of municipal law. Private investment is no longer an isolated operation but a factor in the national economic growth policy.

6. For the examination of the present case, however, there is no need to expound the classic theory of planned economies: it will be sufficient to recall the situation of the Parties at the material time, i.e., in 1948-1952. In a period when Belgium and Spain were endeavouring to restore their economies, devastated by the world war or the civil war, a true account of the economic facts shows that all their resources, like those of other European States, were at that time mobilized for reconstruction; imports, exports and transport were State-controlled. Any harm done to essential elements of the national economy constituted, indeed, harm to the efforts at reconstructing that economy. If, as has been maintained, the Belgian investment in the Barcelona Traction undertaking in Spain was so considerable, it formed an element on which the Belgian Government was entitled to count in its plans for reconstruction (in its final submissions the 1948 value is estimated at 116 million dollars). The effects of two world wars on the foreign investments of nationals of the belligerent States are well known: each time funds invested abroad have had to be liquidated and repatriated.

[1] See "A Note on Recent Developments and Problems of Export-Credit Guarantees" in *Economic Bulletin* of U.N. Economic Commission for Europe, Vol. 12, 1960, No. 2, pp. 51 ff.

7. In respect of a period when the economic life of Belgium was ordered by planning, it is an academic view of the facts that would construe them in terms of the classic legal relationships which obtained between individuals and limited companies in a world of liberal economics that had disappeared by the advent of the world war.

If the economic situation of the Parties at the time of the dispute be taken into account, the distinction between rights and interests upon which the Judgment bases its explanation of the position of the shareholders does not correspond to the facts of the case.

8. The position adopted by the Court is that an individual cannot, owing to his legal status as a shareholder in municipal law, obtain, in international law, the protection of his national State in cases of unlawful acts, attributable to a foreign State, which result in material loss for the company. I have indicated the reason why the problem before the Court is a different one: because the relationship between the individual shareholder and the company is inextricable from the phenomenon of overall investment. However, even on the Judgment's own ground, the position does not strike me as convincing.

In terms of the reasoning followed by the Court, the problem may be divided into two: in the first place, is it the status of shareholder which makes protection impossible or is it, in the second place, the nature of the damage caused to the shareholder "through" the assets of the company?

In the present case, the shareholder has been treated in discussion as a uniform abstract being. But there are in fact at least three categories of shareholder: the small private investor, largely unfamiliar with the detailed problems of investment and inclined to leave his investments undisturbed [1]; the speculator, who buys for a quick resale; the businessman or company that, as shareholders, control the activity of a company in their own interest, at times with a proportionally small holding (financial circles speak of 10 per cent.), either by means of their actual presence in the organs running the company or the banks lending it vital assistance or by the conclusion of agreements for technical or commercial co-operation.

There is no essential difference between a shareholder in the first category whose investment abroad is lost on account of an unlawful act attributable to the foreign State, and the owner of a deposit of money or some other property abroad which has disappeared for the same reason.

It therefore remains to be shown that the share is a form of property right which, for reasons peculiar to the legal régime governing the rela-

[1] It is in respect of this category of shareholder that one would tend to concede, prima facie, a "continuity" in the ownership of Barcelona Traction shares acquired before 1948, up to 1962. It is also in respect of these individual shareholders that, despite the particular characteristics of the holding company, the question might arise of whether direct rights have been infringed, as the Judgment says in paragraph 47. However, the claim was not concerned with this legal point.

tionships between a limited company and its shareholders, is not protected. This is the reasoning followed by the Judgment, and I regret that I am unable to accept it. For it is based on a conception of the role of the Court, and of the relationship between international and municipal law, which may be summarized as follows:

(a) an international court must fall back on concepts of municipal law when seeking to define the legal relationships between the company and the shareholder;
(b) municipal law does not comprise any right of action of the shareholder in behalf of the company;
(c) since such right of action does not exist, the State of the shareholder cannot invoke its right of protection for what is no more than an individual financial interest.

9. The premise of this reasoning seems to me as unacceptable as its conclusions: the *renvoi* to municipal law leads eventually, in the present case, to the establishment of a superiority of municipal over international law which is a veritable negation of the latter. It may happen, in certain cases, that the only problem to be decided is that of whether a rule of municipal law is in conformity with a treaty rule, and that it is necessary for the purpose to interpret municipal law as it stands. But here we have a different situation, one in which a denial of justice is alleged to have been committed against foreign nationals, both the company itself and the shareholders. To consider as a ground for exonerating a State from international responsibility for an alleged denial of justice the fact that its municipal law, or some systems of municipal law, do not feature a shareholder's right of action is not admissible; any more than the absence of municipal rules on the responsibility of the State for damage caused by the legislature, administration or judiciary is taken into account by international law.

10. In the present case, the rules of municipal law are nothing more than facts in evidence, and they deserve the same attention as the other facts, and the same rigour in their interpretation, but no more. The Court does not have to apply the rules of municipal law, as a municipal court of last instance would, to the relationships between the company and the shareholder; it takes account of them as being facts for the purpose of its appraisal of the legal situation laid before it by Parties and in order to see whether that situation as a whole is in conformity with the rules of international law or not. It is the latter rules which for an international tribunal go to constitute the reasons of its decision. It is therefore not enough to say that since a given municipal legal system creates a certain legal relationship, an international tribunal is obliged, on account of *renvoi* to municipal law, to accept that relationship as possessing the same legal cogency. The international tribunal takes this legal relationship as an established fact and tests it against the rules of international law. This holds good in the present case for the

relationship between the shareholder and the limited company, which we will examine further below.

11. First, an observation with regard to the limited scope of the Judgment. If it is true that between 1948 and 1952, at the time of the acts complained of whereby the investment in question changed hands from the viewpoint of Hispano-Belgian relations the legal system of neither country contained any provision generally enabling a shareholder to act in place or in behalf of a limited company, that is not a generally accepted rule. Suffice it to refer to the provisions of the French law of 24 July 1966, which institutes for a minority of shareholders a mechanism enabling them to participate in controlling the way a limited company is run, as well as an action for the reparation of damage sustained by the company (Articles 226 and 245) [1]. The result finally produced is that the position of the shareholder as regards the exercise of diplomatic protection would depend in each case on the existence of provisions of municipal law; if, in a given case of investment abroad, one of the States in question allowed shareholders an individual right of action, that would be sufficient to preclude basing on the *renvoi* theory any finding that the State had no capacity.

12. If the *renvoi* method is not applicable in the present case and if the provisions of municipal law are merely factual data, the complaint that the shareholders in a limited company were despoiled must be judged in terms of the rules of international law applicable to foreign investments in the territory of a State, and it would appear that, as between two European States such as Belgium and Spain, on the critical dates no less than at present, a total loss of assets that results from acts described as unlawful and is wholly unindemnified, which amounts to confiscation, constitutes a grievance justifying a claim to establish international responsibility. The protocol of 20 March 1952 to the European Convention on Human Rights declares:

> "Article I: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by *the general principles of international law*. . . ." (My italics.)

Although Spain is not a party to that convention, there can be no doubt but that it accepts its content. The least that can be said is that here is a general principle of law which loses none of its binding force through being restated in the 1952 protocol; irrespective of any treaty provisions, it is directly opposable to Spain. Investment consists of a decision to assign assets to a productive activity; it does not, merely

[1] Likewise the Swedish company-law of 1944, revised in 1948, provides a right of action for a 10 per cent. minority of shareholders (Art. 129); there are similar provisions in Norwegian law (Art. 122 of the 1957 company-law) and in Articles 122-124 of the corresponding law of the Federal Republic of Germany.

because it takes place in a foreign country, thereby turn into a vulnerable form of property subject to confiscation without redress, when it enjoys secure protection from unlawful acts if carried out within the national territory. The opponents in the present case are two States whose economic and legal conceptions are the same; any reference to different legal systems is the less acceptable that, generally speaking, they exclude resort to an international court, with the result that their rules cannot be subjected to the examination of such a tribunal. I would add that it is paradoxical, to say the least, to invoke the protection of human rights in the name of universality while at the same time excluding from it the protection of property from unlawful acts in the name of a particular way of thinking which contests that right.

One cannot but observe how an industrial undertaking which nobody ever claimed to be Spanish before 1948 became Spanish, against the will of the corporate organs of Barcelona Traction, as a result of acts characterized as a denial of justice both overall and in detail. In fact the undertaking is today incorporated into the economy of Spain by a sort of "nationalization" which, if it was effected by a misuse of legal procedure, constitutes a breach of international law as between the Parties. It is clear that any nationalization of a regular kind would have been accompanied by compensation. The fact that negotiations between the private groups involved halted the first proceedings also shows that the Spanish private group accepted in principle that some compensation should be provided. I find it hard to see how it could be claimed that, as between the Parties, an irregular confiscation would not be a breach of international law, on the sole ground that in municipal law the shareholder, as such, would have no direct remedy. That is really to displace the problem rather than solve it.

13. If the view that it is impossible to take international proceedings in behalf of the shareholders in a limited company cannot be justified by a *renvoi* of the question to a system of municipal law from which a shareholder's right of action is absent, it remains to examine the second reason advanced for finding that the State of which the shareholders are nationals lacks capacity to institute proceedings.

It has been maintained that the shareholder cannot sustain direct damage: the damage is always to the company; it is true that the shareholder's personal finances might be adversely affected, but only "on the rebound". Here we once again come up against the theory based on certain systems of municipal law as they stood in the early stages of limited-company legislation, explaining the latter by the idea that the shareholder confides his investment to the company for better and for worse, and must accept all the risks without having any right to the protection which the holder of a bond enjoys. As applied to the small private investor, this theory is incorrect in its economic justification, but it is even more incorrect as regards the majority of large companies in the modern economic scene—and this was already true in 1948. The

shareholder no longer plays any useful part in controlling the management of the company via general meetings, for "we observe that the board of directors has entirely confiscated the power of the general meeting and become to all intents omnipotent" (A. Tunc, in *Travaux et conférences de l'Université libre de Bruxelles*, 1959, p. 11) [1].

The theory in question, therefore, bases the refusal of shareholder protection on a reason which is today incorrect, because the "legal nature" of the relationships between the company and the shareholder now has scarcely anything in common with the legislative texts of the early nineteenth century. It is inadmissible for the legal analysis to ignore the economic facts; the shareholder-bondholder contrast is now meaningless if the situation of the State in relation to the company be envisaged. The various guarantees that the State gives the shareholders no less than the company by its protecting interventions (advancing credit in the event that an undertaking be threatened with closure) are the very negation of the notion of risk. Investment is an instrument of general economic policy. But the theory of the financial risk to be borne by the shareholder must be ruled out for a reason deriving from the above-mentioned idea that the situation created in international law by a confiscation characterized as unlawful cannot be ignored on the sole ground that shareholders must accept all the risks. That is to proceed as if the substantive issue had been settled, for if there has been unlawful confiscation, there has been a breach of international law. Foreigners are not, just because they are shareholders, bound under international law to run the risk of seeing their investments disappear as a result of unlawful acts. The shareholder's risk is a financial one, not a risk of subjection to unlawful treatment.

14. The international-law situation which must be taken into account in the present case is made up of a series of acts on the part of one State which have been described as unlawful, and of their effects upon investments made by the nationals of another State. To affirm that the shareholder is always a speculator who must shoulder every risk, on the strength of an explanation that no longer corresponds to prevailing corporation law, not only constitutes, on the international plane, an irrelevant submission vis-à-vis a State complaining that, via its nationals' investments, its general economy has been damaged by an act described as unlawful, but also leaves out of account the rule of international law which prohibits confiscation without compensation [2].

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[1] With regard to the United States, see J. K. Galbraith, *The New Industrial State*, London, 1967, p. 403:

> "For many years those who specialize on the problems of the corporation have been much concerned with the way control in the large firm has been passing without recourse from stockholders to the hired management. The latter, as sufficiently noted in this study, selects itself and its successors as an autonomous and self-perpetuating oligarchy."

Of course one must not forget the efforts made by certain countries to remedy this situation by legislative means: cf. paragraph 11 above.

[2] Modern bankruptcy law has evolved to no less an extent than corporation law,

15. In the analysis based on municipal law, it is indeed stated that the damage at all events is never "personal" and proper to the shareholder, but solely damage sustained by the company; this makes it possible to maintain that there has been no damage suffered by the shareholder, and therefore no confiscation. Here again, even if the standpoint adopted is that of municipal law, abstraction must not be driven too far: a limited company is always an assemblage of persons who do not vanish with the attribution of a corporate personality, the *raison d'être* of which is to facilitate the running of the business. The shareholders form the company, and the Judgment recognizes the possibility of action by the State of the shareholders when the company has disappeared. In the present case the company has been entirely deprived of the means for pursuing its corporate objects and, from the point of view of the shareholders, this produces the same effects as a disappearance of the company. The shade of differentiation is therefore a matter of form or rather of formality. As from 1952 the corporate objects of the Barcelona Traction group have been void of meaning [1].

If a shareholder were to claim compensation for the loss of profits of a company whose activities had come to an end, he would be demanding a kind of "functional" protection, a guarantee of the right to trade abroad, which, if it existed by virtue of a treaty or of general international law, could be invoked only by the State in whose territory the company is incorporated and to the economy of which it is linked. But when shareholders ask for compensation for their investment and what it represented on the date of the damage, on the ground that the company is no longer in a position to continue its operations, the fact that this damage, by the totalling of the damages sustained by all the shareholders, is also the damage done to the company does not seem to be relevant, leaving aside the problems of assessment and apportionment. The damage to the company is that it is destroyed; the damage to the shareholders is that they are injured in respect of their property through the destruction of the

so that the proceedings in the present case can be seen to have developed on anachronistic lines. It is nowadays the tendency to rescue the enterprise no matter what the faults committed by its officers and the penalties to which they are liable. See M. Houin's account of the matter in *Idées nouvelles sur le droit de la faillite*, 1969, pp. 122 ff. Suffice it to observe that the judge chooses between the liquidation of the assets (bankruptcy) and judicial settlement (composition) in accordance with an economic yardstick: the chance of bringing the enterprise back to normal. Furthermore, French legislation has set up special machinery for preventing the failure of important undertakings whose disappearance would be likely to result in grave perturbations for the national economy (*Ordonnance* of 23 September 1967).

[1] The argument using the fact that Barcelona Traction shares have recently been transacted to prove that the company is still active is unconvincing. A few purchases or sales are enough to keep certain loan-stock, unpaid for over half a century, quoted on some exchanges. When it is said that the shareholder has the right to dispose of his share, this certainly means to dispose of it under normal conditions, which—apart from a few speculations on the outcome of the present case before the Court—is no longer true in respect of Barcelona Traction.

investment; the damage suffered by the State of the shareholders is that one component element of the national economy has undergone spoliation. The cause of the responsibility is in all cases the unlawful act of the State, and the action for the protection of the shareholders cannot be described as an intervention in the domestic affairs of that State, as has sometimes been alleged, unless it is claimed that denial of justice does not come within the purview of international law. The point that there should not be any double reparation, on the one hand for the company and on the other for the shareholders, denotes a very understandable concern for fair play. Nevertheless, intellectually and juridically, the individualization of the damage remains a possibility.

Finally, the Judgment's view which admits the possibility of action by the State of the shareholders in the event of the disappearance of the company is lacking in logic for, in such an eventuality, if the company's State had started an action it could not be nonsuited through the disappearance of the company. And even if such action had been instituted after the disappearance of the company, it is difficult to see why the State of the company should be unable to make a claim in respect of the unlawful act which was the root cause of the disappearance. If then, in this case, both States can act, does this not mean that the general rule conferring the right of action on the State of the company is not an exclusive rule?

16. Let us now return to the argument of the financial risk that must be borne by the shareholder: the shareholder is not injured in respect of his "rights", but only in respect of an economic interest which is not legally guaranteed and not entitled to diplomatic protection or recourse to proceedings. If a partnership were involved, those very persons who refuse the idea of protection of the shareholder admit that protection would be possible, but we are told that, as a shareholder does not enjoy any right over the company, he has merely an interest in its optimum functioning.

In the first place, this is again to erect definitions taken from certain municipal systems of law into a rule of international law; this is paradoxical in the present-day world, when two-thirds of the population live outside the capitalist system and the legal rules to which the Parties adhere. The principle asserted must therefore be demonstrated to form a veritable rule for States with a liberal economic system, one accepted by them as a rule of regional international law. Such is patently not the case, as is shown by diplomatic practice and arbitration. Moreover, we must recall the numerous agreements, which were concluded precisely in the period when the dispute arose, by which minority holdings in companies were indemnified at the request of the State of which the minority shareholders were nationals (the agreement of 19 March 1948 between France and Poland, for instance). In the conventions concluded by Switzerland with Hungary on 19 July 1950, with Romania on 3 August 1951 and with Bulgaria on 26 November 1954, compensation is granted even to the holders of single shares. It seems to me impossible to dismiss these agree-

ments with a stroke of the pen, in particular those of Switzerland, which are not peace settlements imposed by a victorious State; it is not the habit of States to make each other free gifts [1], and the number of agreements for the compensation of shareholders considered apart from the limited company does imply the recognition of an obligation.

17. In the current ethos the limited company is simply a means of investment in the industrial economy. The State, now having scarcely any property of its own[2], supervises and directs the activities which go to make up the gross national product, by drawing up the economic policy of the nation. The supervision requisite to make sure that the components of the national economy are maintained in normal working conditions, and in particular to prevent their disappearance as a result of decisions contrary to law, constitutes one of the normal functions of the State, and takes the form of anticipating, guiding and assisting at the time of the decision to make the investment, and of protecting in case of need after the investment has been made. Investments which have made possible the creation or the development of an enterprise abroad are as essential to the national economy as investments which are made within the national territory. The action of the State for the purpose of protecting a component item of the national economy is a natural feature of the economic society of which Belgium and Spain formed part at the time when the dispute arose.

18. It would be a distortion of this argument to claim that it leads to the recognition that, in all circumstances, every shareholder has the right to secure the protection of his State in respect of any act which has inflicted damage on the limited company itself. In the first place, the present opinion has been directed towards showing that, while accepting for the sake of argument the *renvoi* to systems of municipal law, the alleged legal obstacles to the exercise of a right of protection of shareholders, as such, were not insuperable even within this legal framework. It is not the case that the legal characteristics of the bond between the shareholder and the company do not permit the State to act; neither is it the case that the

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[1] In the *Hammaken* case (U.S.A./Mexico, Moore, *International Arbitrations*, Vol. IV, p. 3471) the umpire rejected the argument by the agent of Mexico that a sum of $100,000 allowed by Mexico on account of the cancellation of a concession was only an *ex gratia* donation: "if the [Mexican Government] did not think that the wrong had been done by the Mexican authorities, it would not have agreed to grant compensation . . ."

In many cases the respondent State prefers to pay an indemnity rather than to be declared responsible for the damage; hence the conventional reference to payments "in equity", "without admitting any legal obligation", "without reference to the question of liability" (cf. Moore, *International Law Digest*, Vol. VI, in particular with regard to the lynching of Italians in Colorado (p. 841) and at New Orleans, and the lynching of Chinese at Rock Springs (p. 830)). But these forms of words do not remove the problem of the imputation of international responsibility.

[2] When, in liberal economies, public bodies buy stock in companies and become shareholders, are they to be deprived of the protection of the State? (The Industrial Reorganisation Corporation in the United Kingdom; the *Institut de développement industriel* in France.)

damage done to the company necessarily rules out the possibility of there being a damage proper to the shareholder in respect of which the State may intervene; neither, lastly, is it the case that the State of the shareholders possesses no right of its own to seek to preserve the component items of the national economy. In fact there are no legal obstacles to such protection; there are only necessary dispositions, precautions to be taken so as to reach a reasonable solution in each case.

In the second place, the view that investments may be defended by the State whose national economy is adversely affected is subject to limitation by the terms of that very definition. The investments in question must be connected with the national economy (and therefore not an ephemeral transaction in securities) and there must have been an unlawful act involving the responsibility of a State. The only problem is that of deciding in each case how to co-ordinate the protections possible, that of the company and that of the shareholders.

19. To apply this reasoning more specifically to the case, there is a complaint of denial of justice, the claim that an industrial undertaking was made to change hands by procedures that are described as unlawful, and therefore a problem of violation of international law. The substance of the obligation invoked against the Spanish Government is the obligation to respect the investments of Belgian nationals and to protect them from unlawful acts: this is a general obligation incumbent upon States in the conduct of their economic relations. The Belgian Government's capacity to institute proceedings corresponds to the right possessed by every State to secure the respect of that obligation, when the investments of its nationals constitute an important part of the national economy. The foundation of a rule of economic international law must abide by economic realities. The company's link of bare nationality may not reflect any substantial economic bond. As between the two criteria the judge must choose the one on the test of which the law and the facts coincide: it is the State whose national economy is in fact adversely affected that possesses the right to take legal action.

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20. In the present matter one must seek to ascertain what is reasonable both on the legal plane and on the plane of economic realities. When a limited company has been set up, it may be granted that the shareholder is, in principle, defended by the company, subject to the remarks above as to the three categories of shareholder and the special character of holding companies.

Accordingly, the State which has the right to protect the Barcelona Traction investment would be Canada, and that, according to the Judgment, is what both Parties have admitted. But that is a proposition which must be verified, just as any contention made by a State which brings an international claim before a court must be verified, to make sure that it

really corresponds to the facts. The issue here relates to certain investments which have suffered serious damage; who has been harmed? If any property suffers damage, reparation should be sought by the State with which the property is genuinely linked. Now, supposing that Canada had intervened before the Court in order to be recognized as having an interest of a legal nature, relying on Article 62 of the Statute, Spain would not have failed to object that there were not in Barcelona Traction any substantial or genuine Canadian interests. It is of course inevitable in complicated cases that parties should commit self-contradictions, but it would be regrettable if the Court were indirectly to recognize these as possessing significance. There is indeed a major reason why no account should be taken of the statements made by the Parties concerning the Canadian character of the company. The example of the right to intervene provided for in Article 62 is to the point: if Canada had intervened, even an agreement between the two Parties by which Canada were recognized to have a legal interest as being the national State of the company would not have dispensed the Court from examining the question whether Canada really had a legal interest, for Article 62 says that "It shall be for the Court to decide" whether an intervention is justified, and it seems to me that, in the matter of jurisdiction, the Court cannot content itself with taking note of an agreement between the Parties concerning the existence of a legal interest on the part of a third State which is absent from the proceedings. The legal interest of Canada either exists or does not exist; it is not for third States to create it, and the most they could have done would be to recognize this legal interest so far as their positions in the present case were concerned, without such recognition having for the Court any effect whatever in regard to the obligation laid upon it by its Statute to verify its own competence.

21. It is therefore an *obiter dictum* void of judicial significance to assert at the present time the Canadian nationality of the Barcelona Traction company. That Canada did in fact act at the diplomatic level for a certain time, that it proposed arbitration, these are not reasons for recognizing its right to institute proceedings; it is not enough to claim a right to be recognized as possessing it. All litigants make claims and one is always the loser, and, his claim having been dismissed, he finds that he did not have a right. A holding company whose capital is apportioned among shareholders of several nationalities and of which the object is to operate an industry abroad cannot be governed by one system of municipal law in respect of all the problems concerning it (cf. paragraph 29 below). And the question of which municipal law is applicable to a specific problem is a matter for international law. That is what underlies the problem of the "nationality" of companies. The assertion by a State that it has jurisdiction over a company is nothing but a claim so long as it has not been admitted by all the States directly concerned in that situation or by an international judicial decision.

22. It has not been established that Canada has capacity to institute

proceedings in behalf of Barcelona Traction, since that company was Canadian in appearance only [1] and since, in the economic sphere, the protection of investments must conform to the reality of the connection. The decision regarding *Nottebohm*, an individual, which tacitly left the case of companies open, can be applied with even greater reason to companies, for the connecting factor of economic interest, as between investments and the State from which they really come, is essential, as has been stated above [2]. It is even more true of investment via a limited company than of an individual or a ship that it cannot be given consideration at the international level unless the State which puts forward the claim has suffered a damage to its national economy; when there are several States with which a company has a genuine connection, a complication may arise, but that is not the case of all limited companies engaged in activities abroad and the Court is not called upon to deliver a judgment laying down the law for the protection of limited companies in general.

23. One final observation must be made concerning the attitude of Canada ever since the proceedings were brought. If Canada had felt any interest in the case it had means so to inform the Court, without having to intervene and run the risk of judicial rejection of its intervention. In the *Corfu Channel* case various documents were proposed to the Court by the Yugoslav Government, which was not a party to nor intervening in the proceedings, and they were finally submitted to the Court by the Albanian Government following a decision taken by the Court on 10 December 1948 (*I.C.J. Pleadings*, Vol. III, p. 190; see also the Judgment on that case, with regard to this point: *I.C.J. Reports 1949*, p. 17). In the present case, any Canadian document relating the course of diplomatic protection by Canada and giving the exact views of the Canadian Government could have been furnished to the Court by the same procedure. Yet, on the contrary, the elliptical answer returned by the Canadian Government on 24 June 1969 to the question put by Members of the Court did not supply any clarification (New Documents Nos. 44 and 45 submitted by the Belgian Government). On this point I would refer to paragraphs 19 ff. of the separate opinion of Judge Jessup.

24. Although the Court has rejected the possibility of considering any analogy with the *Nottebohm* case, it seems to me that the *Nottebohm*

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[1] Notwithstanding the references in the Judgment in paragraph 71 to various points of connection with Canada, I agree with the observations made by Judge Jessup in paragraph 49 of his separate opinion (in particular the footnote thereto). Those really in control of Barcelona Traction do not seem to have featured any genuine connection with Toronto.

[2] The distinction between seeking a genuine connection in favour of or against a company is devoid of legal significance. No party is ever either favoured or penalized by the law, because of the fundamental principle of equality before the law. The purpose of seeking the reality behind appearances is to discover the true legal situation underlying the forms adopted. The bringing of truth to light is not inspired by any favourable or unfavourable attitude towards one of the elements of the problem but by the needs of the process of ascertaining the law.

Judgment does establish a relative standard and does not go further than the rule already recalled: "each case must be considered on its individual merits." Thus, even without any need to rely on that Judgment, the particulars of the present case are such as to place in the forefront of the matters which the Court should have investigated the problem of the real provenance of the investments in question. The theory of the genuine connection implies comparison between Canada, Belgium and Spain—and perhaps other States—, and inquiry into the concentration of the undertaking in Spain, the problem as to whether the real control lay with the organs of Barcelona Traction or elsewhere, and the reality of the Belgian investment. As the Court did not in fact consider these verifications to be necessary, it is difficult to give any final opinion concerning the real connection of Barcelona Traction with any national economy, but the documents in the case do permit of a few conclusions.

25. The connection with the national economy of Canada is certainly not the most conspicuous, for the undertaking has never appeared to constitute a factor of production in that economy.

The connection of Barcelona Traction with the Spanish economy cannot be disputed so far as the factor of the production of goods and services in Spain is concerned. The company concentrated all its activities in Spain, and its subsidiaries, Spanish companies all but three, were under its absolute control, so that it may be considered that the Barcelona Traction group as an integrated enterprise formed a component in the Spanish national production. But although this aspect of the matter may have legal consequences, more particularly in respect of certain problems of jurisdiction, it has none whatsoever for the purpose of ascertaining with which State the foreign investments underlying the creation and development of the enterprise are truly connected. It has not been established that these investments were mainly Spanish. There is therefore, from the standpoint of the law applicable to the investments, no genuine connection with the Spanish economy.

26. The connection with the Belgian economy has been made the subject of exhaustive commentary by Judge Sir Gerald Fitzmaurice and Judge Jessup. For the sake of brevity, I will merely say that I do not feel proof has been supplied that the investments in question belong to the Belgian economy in the sense of the view propounded in this opinion.

In this case, proof has not been supplied in a manner satisfying for a court that Barcelona Traction, in continuous fashion, predominantly—or even substantially—represented an investment on the part of the Belgian economy. While it was possible to furnish prima facie evidence that over certain periods, in terms of origin of capital invested and of actual control of industrial and financial operations, the Belgian economy was more involved than others, the observations made by Judge Jessup in paragraphs 72-98 of his opinion show that the same has not been proved true of the period after 1940, more particularly during part of the critical period. Neither was it possible to demonstrate a predominant, constant and certain

connection with the Belgian economy on the basis of an inspection of the company-group of which Barcelona Traction forms part.

To claim the right to protect investments, the presumption that Belgian interests existed is indeed not enough; what is needed is to prove a genuine connection with the economy during a continuous period, thus enabling it to be said that appurtenance to the State in which the company was incorporated is not in line with economic realities. If it is possible to verify the genuineness of the seat, that cannot be for the purpose of substituting one presumption for another. In all cases of this kind, it is naturally difficult to pinpoint effective appurtenance to a particular national economy, but the fault does not lie in any inadequacy of legal rules: it lies in the very features of a complex undertaking. Within the ramification of companies in such a group it is perhaps possible at a given moment, and with reference to a given operation, to determine with what national economy that operation is connected; it is not certain that this will be possible for the whole of the group's operations, especially not with regard to long periods during which there will have been changes in stockholdings, control and management. But each case raises its own particular problem and it would not, conversely, be difficult to refer to company-groups which, despite their complexity, are incontestably connected with a given national economy.

27. There is therefore no reason to treat company-groups as stateless and deprive them of all protection at the level of international law; it is not unlawful either in municipal or in international law to set up such groups, and the problems to which they give rise are in no way different from those arising out of the commercial, financial or industrial operations carried out by other corporations. The difficulty of determining the connecting link creates a complication, not an incapacity. What is necessary is to ascertain in each case whether the investment in question is, in fact, connected with a particular national economy and whether the national economic prosperity of the claimant State has been harmed by the unlawful act which directly affected the company. When several economies are affected, this produces a situation which is familiar in international law and is resolved by the acknowledgment of an obligation to negotiate (cf. the agreements nowadays concluded among several creditor States vis-à-vis a debtor State).

That the connection should be genuine is a necessary condition for the protection of a corporate person no less than for that of an individual, and in its absence the link with the State is fictitious and does not confer capacity to institute proceedings. Finding that proof of Barcelona Traction's appurtenance to the Belgian economy has not been produced, whether on account of the internal organization of the group or for other reasons, I am obliged to conclude that the claim must be dismissed.

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28. I would add that there is another ground on which I would consider the dismissal of the claim justified, but as the Court has not dis-

cussed the matter I can do no more than allude to it. Within the limits of a separate opinion on a point not settled by the Judgment and not deliberated, I must needs be brief [1]. Nevertheless the matter is of sufficient interest and priority to justify an outline of my reasoning.

The fact that a State may invoke the right to protect its nationals who are shareholders in a company does not exempt the company from the obligation of exhausting the local remedies available for the rectification of the situation complained about. Barcelona Traction ought to have entered a plea of opposition to the judgment declaring bankruptcy within the legal time-limit, and there are no reasonable grounds for deciding that the company's failure to enter such opposition within the time-limit does not form a bar to the institution of proceedings on the international level. As Sir Hersch Lauterpacht wrote in his separate opinion on the *Certain Norwegian Loans* case: "however contingent and theoretical these remedies may be, an attempt ought to have been made to exhaust them" (*I.C.J. Reports 1957*, p. 39). As it happens, at the time when the Reus judge gave his decision, there was nothing to justify the contention that the remedy of opposition was merely theoretical. Generally speaking, in bankruptcy law the bankruptcy judgment divests the bankrupt as soon as it is delivered and before any publication; the rule is perhaps too rigorous but there are reasons for it with which specialists in commercial law are familiar, and that effect was at all events a feature of Spanish law in 1948 [2]. Even if it had been intended to maintain that this rule was contrary to a general principle of law, it was necessary to enter opposition to the judgment while expressing the necessary reservations as to the lack of notification; this complaint ought indeed to have been laid in the first instance before the local judge so that he could rule upon it and, if need be, rectify the situation. Whether it be Spanish law or international law that is considered to have been violated, it is necessary to request the local courts to look into the matter and allow them the opportunity of correcting any mistake.

29. The necessity of entering a plea of opposition becomes still more evident when it is observed how the concentration of the industrial under-

[1] I consider that this point of principle remains governed by the observation of President Huber in July 1926 (*P.C.I.J., Series D, addendum to No. 2*, p. 15) and the resolution adopted by the Permanent Court of International Justice on 17 February 1928 (Stauffenberg, *Statut et Règlement de la Cour permanente de Justice internationale*, p. 414). When a point of law has not been retained, in application of Article 4 of the Resolution concerning the Internal Judicial Practice, as one which should be decided by the Court, any observations thereon that a judge may make are precluded from possessing the character of judicial pronouncements.

[2] There is nowhere to be found in the different legislations of the same legal system, at that time, any provisions concerning publication which are such that they enable the existence to be deduced of a general principle of law the infringement of which would *ipso facto* render the entire proceedings null and void. And if it be held that failure to publish the judgment at the bankrupt's place of domicile constitutes a breach of Article 1044 (5) of the Spanish Commercial Code, then it is to the Spanish courts that complaint must first be addressed in this regard.

taking in Spain lends colour, prima facie to, the Spanish assumption of jurisdiction, on considering the jurisdiction problem in general and quite apart from the petition for bankruptcy on account of failure to honour bonds.

The corporate purpose of the undertaking is to develop the hydro-electricity industry in Spain, and the electric railway and tramway system in the city and province of Barcelona (cf. *Moody's Public Utility Manual*, 1968, p. 2067). No area other than Spain is contemplated for hydro-electric development, and in fact Barcelona Traction never undertook works in any other country; its subsidiaries operated electricity production and distribution systems in Barcelona, Catalonia "and the industrial cities of Tarrasa, Tarragona, Reus" *(sic)* "and Tortosa" (*ibid.*: it should be noted that these details are based on information supplied by the company; see the paragraphs "Property Seized" and "Assets in Spain sold"). In these circumstances, the absence of publication in Canada can be seen in a particular light; furthermore, the considerations set forth in a number of separate opinions concerning the genuineness or otherwise of the company's headquarters in Toronto could have been adduced by the Spanish judge, who could also have invoked the judicial precedents of certain States, where foreign companies which have a branch, have carried on business, issued bonds or entered into contracts within the national territory have been adjudged bankrupt [1]. It should be noted that the courts of certain States have declared bankruptcies for non-repayment of loans, when a businessman has called on credit in their territory, though that is an exceptional circumstance. The claim to possess a certain jurisdiction over the activities of the Barcelona Traction group in Spain was consequently not, *a priori*, illegitimate, though this does not imply the legitimacy of all the measures for the execution of the bankruptcy, or of the actual petition made to the Reus judge. But the state of the law concerning the bankruptcy of foreign companies was not, at the time of the facts, such as to justify any abandonment by the company of the remedies open to it.

After the passage of many years and countless proceedings, it is not easy to recover the standpoint of the time when the act complained of occurred, but that is what has to be done in utter objectivity, and in that light it will be seen that a plea of opposition to the declaration of bankruptcy ought to have appeared to the company as an immediately available and practicable remedy.

(Signed) André GROS.

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[1] In several European legal systems a debtor can be declared bankrupt by the courts of a country in which he carries on a secondary occupation or possesses assets (Article 9 of the Italian, Article 2 of the Netherlands and Article 238 of the Federal German laws concerned), or if he is in debt there (French case-law). Some doubt is thrown on the character of Barcelona Traction as a holding company by direct activities in Spain (cf. hearing of 14 July 1969).