THE NATIONALIZATION OF THE SUEZ CANAL COMPANY IN INTERNATIONAL LAW.*

The promulgation, by the President of the Egyptian Republic, of a law purporting to nationalize the Suez Canal Company gave rise to a series of events which might well have proved disastrous to mankind, and the writer, for one, will not soon forget the tension surrounding only one of its consequences which certainly seemed, at the time, a considerably more grave affair than the assassination of a mere Archduke. We are, one supposes, entitled to conclude that the time was not then ripe, but few would have staked anything on such a prophecy before the event. This part of the wider aspect of the affair has its own moral, but we are not concerned with it.

The promulgation of the decree also gave rise to a complex fact situation, and from these facts, a considerable number of legal issues emerge. Dogmatic claims have been made and in many places in this paper, reply has been made in kind. At the same time, considerable discussion has at times centred round irrelevant issues, prominent among which has been the transit servitude to which the canal is subjected. The connection between the nationalization and the transit servitude is by a most flimsy chain that will not, it is believed, bear the weight even of a cursory scrutiny. For this reason, no attention has been paid to this question, other than to attempt to emphasise its irrelevance.

Nevertheless, 'out of the strong cometh forth sweet', and some interesting issues have emerged. Attention is largely focussed on such as may be considered as falling within the province of public international law, consideration of conflicts of laws being omitted.

I. JURISDICTION.

(a) *The International Court of Justice.*

Paragraph (6) of Article 36 of the Statute of the International Court of Justice provides that "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." There is, admittedly, little point in proceeding under Article 36(6) unless there is at least some slight possibility of the Court assuming jurisdiction. It is, however, suggested in what follows, that there was such a possibility, certainly as much as sufficed

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for submission to the Court of the question of jurisdiction in the *Anglo-Iranian Oil Co. Case*.[1] The fact that no such reference has yet been made may in itself to some extent reflect the merits of the case.

The jurisdiction of the Court comprises "all cases which the parties refer to it and all matters especially provided for in the Charter of the United Nations or in treaties and conventions in force."[2] Some source of jurisdiction must therefore be established under this Article. The parties injured could not maintain that the dispute had been referred to the Court. Far from this, Egypt had expressly stated that the matter was outside the jurisdiction of the Court and had refused to consider sending it to the Hague. Nor did the 'Optional Clause'[3] offer a source, for at this time, Egypt had not subscribed to it and the United Kingdom Declaration is subject to a condition of reciprocity.[4] Thus the matter could only be brought before the Court by virtue of special provision in a treaty or convention in force, the Charter of the United Nations containing no provision in point.[5]

It has been suggested,[6] and this point is believed to be substantial,

1 [1952] I.C.J. Rep. 93.

2 I.C.J. STAT. Art. 36 (1).

3 "The States parties to the present Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligations the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature and extent of the reparation to be made for the breach of an international obligation." I.C.J. STAT. Art. 36 (2). Britain, France and Egypt are all parties to the Statute by virtue of Article 93 (1) of the Charter of U.N.

4 Declaration of 28th Feb., 1940. This condition has been retained in the subsequent declarations.

5 Article 39 of the Charter confers upon the Security Council power to determine the existence of any threat to the peace, breach of peace, or act of aggression and to act upon it in accordance with Articles 41 and 42. The Security Council could, of course, have called upon the International Court of Justice to give an advisory opinion under Article 96 (1) of the Charter, but until this was done, as in fact it was not, no jurisdiction could arise in this way. This was the procedure adopted in the Case of the Nationality Decrees in Tunis and Morocco, P.C.I.J., Ser. B, No. 4 (1923). It is by no means clear, however, that Article 2 (7) does not also apply to Article 39.

6 In the introductory note to THE SUEZ CANAL, A SELECTION OF DOCUMENTS RELATING TO THE INTERNATIONAL STATUS OF THE SUEZ CANAL AND THE POSITION OF THE SUEZ CANAL COMPANY (1956) published by the Society of Comparative Legislation and International Law (hereinafter cited SUEZ DOCUMENTS).

that the Montreux Convention[7] may still be efficacious in conferring jurisdiction on the Court. Article 2 of this Convention provides that "subject to the application of the principles of international law, foreigners shall be subject to Egyptian legislation in criminal, civil, commercial, administrative, fiscal and other matters" and that such Egyptian legislation would not be "inconsistent with the principles generally adopted in modern legislation" and would not "with particular relation to legislation of a fiscal nature, entail any discrimination against foreigners or against companies incorporated in accordance with Egyptian law wherein foreigners are substantially interested." These provisions "in so far as (they) do not constitute a recognised rule of international law, shall apply only during the transition period." Article 3 provided, *inter alia*, that the "period from 15th October, 1937 to 14th October, 1949, shall be known as the 'transition period'. Thus, the Convention would appear to establish, without limit as to time, a rule of subjection of legislation to international law and particularly, a rule of non-discrimination against foreigners, in so far as this is declaratory of international law.[8] This is important because Article 13 of the Convention states that "Any dispute between the High Contracting Parties relating to the interpretation or application of the provisions of the present Convention, which they are unable to settle by diplomatic means, shall, on the application of *one* of the parties to the dispute, be submitted to the Permanent Court of International Justice." By Article 37 of the Statute of the International Court of Justice "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."

[7] Signed 8th May 1937. See 7 HUDSON, INTERNATIONAL LEGISLATION, 684. (The Convention is relevant here for no purpose other than the question of jurisdiction by the International Court of Justice. It dealt with the abolition of the system of capitulations and is discussed in an anonymous note in (1938) 19 BRIT. Y.B. INT'L L. 161 *et seq.*)

[8] So far as non-discrimination is concerned, this would appear to be affirmed by the Egyptian Declaration of the same day as the Convention: "The fact that the effect of the non-discrimination rule . . . is limited to the duration of the transition period, does not imply any intention on the part of the Royal Egyptian Government to pursue thereafter in this matter any contrary policy of discrimination against foreigners . . ." Although it is suggested that this declaration may be supplementary to the Treaty provisions (*see Abolition of the Capitulations in Egypt,* (1938) 19 BRIT. Y.B. INT'L L. 164), it is doubtful in the extreme if it can be regarded as an operative part of it. If, however, it could, it would give a right of action in the event of any discrimination.

The United Kingdom, a party to the Montreux Convention, appears to be in a position to invoke the jurisdiction of the International Court of Justice on the question as to whether the nationalization decree offended Article 2 of the Montreux Convention. Egypt could, of course, raise several objections, but their chances of success would appear to be slight. For instance, it could be argued that since the object of the treaty was to abolish the system of capitulations, the treaty lapsed at the end of the transition period,[9] that object then having been achieved. If this be a valid ground for voidance of a treaty at all, the reply could be made that there can be no expiration of a treaty which has, as one of its objects, abidance by international law. The invocation of the doctrine of the *Clausula Rebus Sic Stantibus* can likewise hardly apply to an undertaking to abide by international law. A plea might be made on the ground of the constitutional changes which have taken place in Egypt since 1937, but the weight of opinion is against any possibility of this succeeding.[10]

Prima facie, then, the Court would have jurisdiction if any question of international law were involved, or, more particularly, if the nationalization decree were inconsistent with the provisions of international law in respect of modern legislation and the rule of non-discrimination, provided that it fell under the head of 'criminal, civil, commercial, administrative, fiscal' or 'other' legislation.

Egypt would almost certainly raise a preliminary objection, that the matter was one entirely within the domestic jurisdiction within the meaning of Paragraph (7) of Article 2 of the Charter of the United Nations: "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require

9 This is suggested by a statement in I OPPENHEIM, INTERNATIONAL LAW, 851 (7th ed., Lauterpacht, 1948). The writer knows of no case where this plea has succeeded.

10 This is the opinion of McNair in THE LAW OF TREATIES c. xxxiv (1938). The leading decision of *rebus sic stantibus* is the Case of the Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Ser. A, No. 22 (1929-32), where the plea was rejected. Again, the writer knows of no case involving treaty provisions where this plea has succeeded. It would, however, seem to be the basis of some awards involving other than treaty provisions, for example, in Barcs-Pakrac Railway Co. v. Yugoslavia, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, [1933-34] No. 190, 424 (Lauterpacht ed. 1940) (hereinafter cited ANNUAL DIGEST) where a concession was involved. See, generally, I OPPENHEIM, *op. cit.* 846, n. 1.

the Members to submit such matters to settlement under the present Charter . . . "[11]

The point of departure of the International Court of Justice is international law, and that institution is not therefore concerned with the jurisprudential aspects of this plea. 'Domestic jurisdiction' is a concept to be defined, not by the municipal law of any one State but by international law, and the criterion for establishing whether a particular matter falls within the domestic jurisdiction of a state is the determination of the question 'Is there a rule of international law which prohibits this conduct?' If the answer is in the negative, the matter is within the domestic jurisdiction of the State concerned. This is described by Kelsen: "Solely within the domestic jurisdiction of a state are only matters which, for the time being, are not regulated by a rule of international law. That a matter is not regulated by a rule of international law, that is to say that there is no rule of international law referring to that matter, does not mean that the matter is not regulated at all by international law. For, if there is no rule of international law imposing in a certain matter an obligation upon a state to behave in a definite way, this state is, under international law, free to behave in this matter as it pleases or, in other terms, this state has under international law the right—and the other states the obligation not to prevent the former—to behave according to its discretion; which implies that no other state has a right to claim a definite behaviour in that matter from the state concerned. Consequently, when a dispute between two states arises out of a matter which according to the opinion of one of the parties is solely within its domestic jurisdiction, this dispute is an international dispute, just as any other dispute between two states; and there is no reason that can be deduced from the nature of the dispute, for eliminating the jurisdiction of an international agency."[12]

The result of this is that in determining the question of jurisdiction, the Court is obliged to consider the merits of the case, a fact which has, on occasion, embarrassed the Court.[13] It is doubtful, however, if the Court could even have resort to a provisional judgment

11 A parallel plea existed in customary international law and under the Covenant of the League of Nations. Article 2 (7) of the Charter would appear to supercede these.

12 THE LAW OF THE UNITED NATIONS, (1950) 771. On the question generally, see at 769 *et seq.*; also Waldock, *The Plea of Domestic Jurisdiction Before International Legal Tribunals,* (1954) 31 BRIT. Y.B. INT'L L. 96.

13 In the Case of the Nationality Decrees in Tunis and Morocco, P.C.I.J., Ser. B, No. 4 (1923).

on the merits,[14] were either of two claims to be substantiated. These are (1) that although the Court might normally have had jurisdiction, the matter falls outside its purview by special agreement; (2) that the rules as to nationality of claims were not satisfied.[15]

The first of these claims rests upon Article 16 of the Concession of 22nd February, 1866,[16] which provides: "Disputes which arise between the Egyptian Government and the Company will also be placed before the local courts and decided according to the laws of the country." This purports to bind the claimant to exhaust local remedies before proceeding before an international tribunal, and may even, if read together with the first part of the Article[17] have the true 'Calvo Clause' effect of purporting to withdraw such disputes entirely from the jurisdiction of such a tribunal.

Most authorities are now agreed that in so far as the 'Calvo Clause' purports to nullify the right of a state to make international reclamations in respect of an injury to one of its nationals, it is void.[18] No-one would go so far as to say that it is entirely ineffective in all circumstances, and the prevalent opinion would seem to be that it normally imposes upon the individual concerned the obligation to exhaust local remedies,[19] an obligation which some would regard as merely repetitive of customary international law.[20] Is, then, a claim before the International Court of Justice barred until proceedings have been carried through in the Egyptian courts?

14 The device resorted to in the above case.

15 In so far as there are strict rules of evidence in international tribunals, the rule appears to be that the burden of proof falls upon the party making the affirmation. The Arbitrator in the Islands of Palmas Arbitration said: "The dispute having been submitted to arbitration by special agreement, each party is called upon to establish the arguments on which it relies in support of its claim." ANNUAL DIGEST, [1927-28] No. 70.

16 Reprinted in SUEZ DOCUMENTS, 38 (translation at 40); see also WILSON, THE SUEZ CANAL, (1933) 192-3.

17 "The Universal Suez Canal Company, being Egyptian, is governed by the laws and customs of the country; . . ."

18 See 1 OPPENHEIM, *op. cit.* 312; Hornsey, *Foreign Investment and International Law*, (1950) 3 INT. L.Q. 552, at 559.

19 North American Dredging Co. of Texas Case, ANNUAL DIGEST, [1925-26] No. 218. In this case, the Tribunal declined to make an award in favour of the claimant on the ground that local remedies had not been exhausted. In the El Oro Mining and Railway Co. Ltd. Case, ANNUAL DIGEST, [1931-32] No. 100, however, an award was made on the ground of denial of justice, proceedings having been pending in the local courts for nine years.

20 FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE, (1938) 221.

The answer to this question is believed to be 'No'. The rule as to the exhaustion of local remedies has been framed in connection with interference not amounting to abrogation. The instant case, however, is one where expropriation has been decreed by the legislative authority which, one assumes for present purposes, binds the Egyptian courts, and reference to which would therefore be an empty formality. In fact, the instant case falls within a class which is not affected by the rule, according to one most helpful analysis.[21] A classification of acts complained of into three categories is adopted: (a) acts in breach of international law but not of municipal law; (b) acts in breach of municipal law, but not of international law; (c) acts in breach of both. The rule of exhaustion of local remedies is maintained to apply fully only in case (b); it has a limited application in case (c) confining the jurisdiction of the international tribunal to the award of a declaratory judgment, and no application at all to case (a).—"Where the act complained of is in breach of an international agreement or of customary international law, but not of local rule, the rule of exhaustion of local remedies is not applicable and cannot support a preliminary objection or defence to a claim." Egypt's action was, allegedly, within category (a), and for this reason, failure to exhaust local remedies would probably not operate as a bar to the Court's jurisdiction.

The second of these claims is based upon the rule that for a claimant state to have *locus standi* before the Court, it must be able to show that the claimant, both at the time the injury occurred, and at the time of the hearing, was a national of the claimant state.[22] The Decree purported to nationalize a company, which, while being a legal person, was not subject to the tests of birth and naturalization as are natural persons. That company was registered and carried on the main part of its business in Egypt.[23] The property with which it was primarily concerned is also situated in Egypt. Yet its administrative domicil was in Paris, and amongst its shareholders were persons of French and British nationality.

In order to succeed in this claim, it would be incumbent upon Egypt to establish that the company was an Egyptian national and

21 See Fawcett, *The Exhaustion of Local Remedies: Substance or Procedure?* (1954) 31 BRIT. Y.B. INT'L L. 452.

22 Case of the Panevezys-Saldutiskis Railway, P.C.I.J., Ser. A/B, No. 76, at 16-17 (1939).

23 The company was also registered in France, but only the Egyptian company could acquire rights under the concession.

that no state other than Egypt was competent to espouse its claim, in the case of injury; or alternatively, as has been suggested,[24] that since the *locus* of the object of business of the company (the canal) was in Egypt, no other state was competent to espouse its claim.

The latter of these two alternatives has been stated thus: "No problem as to the extraterritorial effects of the nationalization exists, for the canal is situated entirely on Egyptian territory . . . (this) proves clearly that the nationalization of the canal was, from the point of view of the international law in force, a perfectly legitimate act." No authority is cited in favour of this view, which cannot be reconciled with what is believed to be the true principle enunciated below. Certainly, if no foreign element exists at all, no objection can be taken provided the property does fall within the territory of the nationalizing state. But this is far from the case where the interests of foreign nationals as shareholders are concerned. To apply this principle as suggested would be to excuse discriminations of all types against foreigners resident within the jurisdiction. No matter how desirable this may be from the point of view of a particular policy, it has no place in international law.[25]

The former must also fail, for international law is "not unduly hampered by legal fictions but has, generally speaking, only considered the realities of the situation. International law only takes account of the real nationality of the physical persons covered by the legal fiction of corporate personality since such physical persons alone possess any importance as nationals of a state."[26] That is to say, the vital test, in cases such as the one under consideration, is not the nationality of the company, but of the individuals who comprise it. If a foreign element exists here, the matter cannot be considered within the domestic jurisdiction.

24 In *La Question Du Canal De Suez Du Point De Vue Du Droit International,* (1956) 14 BULLETIN DE DROIT TCHECOSLOVAQUE, 129 at 129-130.

25 One cannot validly deduce such a claim from general statements of principle concerning the meaning of sovereignty in the modern world, such as that of Max Huber in the Islands of Palmas Arbitration, (1928) 22 AM. J. INT'L L. 867, at 875.

26 FRIEDMANN, EXPROPRIATION IN INTERNATIONAL LAW, (1953) 171. This is couched in too-wide terms. In fact, for some purposes, international law is concerned with the nationality of corporations. In the instant case, for example, though international law may consider the real interests, so far as the question of injury is concerned, it cannot ignore the company's nationality for the purpose of title to property, and hence, extraterritorial effect of the decree. International law has no rules relating to the acquisition of property by private persons.

This very point was contemplated in the early years of the company in the Arbitration by Napoleon III, and though, admittedly, this decision savours strongly of the political in many aspects, at least in this one, it would appear free from the taint: "The dispute appears to relate to a public works concession and would be subject to the jurisdiction of the Egyptian Administrative courts. This would certainly be the case had it been a question of an entirely Egyptian company. But whilst the company was Egyptian by nationality, it was foreign by reason of its origins, personnel and capital."[27] 'Origins' and 'Personnel' are no longer accepted as valid criteria, but otherwise, this would seem in accord with the modern view as expressed by Max Huber in the *Arbitration between Spain and the United Kingdom concerning British Property in the Spanish Zone of Morocco.*[28] "In spite of the fact that many legal systems admit the independent existence of incorporate societies, the preponderant view[29] of arbitral tribunals recognises the possibility of distinguishing, for the requirements of international litigation, between the contributions of the shareholders, on the one hand, and the corporation itself on the other. International law which, in this field is governed primarily by principles of equity, has established no formal criterion for according or refusing diplomatic protection to nationals interests linked with the interests of persons of different national types. In these circumstances, it will be necessary . . . to examine the merits of each case before determining if the damage claimed has been done immediately to the person in whose favour the reclamation was presented."

In all cases of doubt, the tendency has been to construe the rule in favour of international interests. There is no case known to the writer where a defendant state has succeeded simply on the ground that the injury was caused to a company having its own nationality. The Arbitration of *Reparation Commission v. United States,*[30] like that of the *Netherlands South Africa Railway Co.*[31] involved the interests of third parties and a consideration of unneutral acts.

27 55 BRITISH & FORFIGN STATE PAPERS 1009; 2 DE LAPRADELLE ET POLITIS, 376.

28 2 U.N. REP. INT'L. ARB. AWARDS 729 (1949).

29 For example, the Case concerning certain German interests in Polish Upper Silesia, P.C.I.J., Ser. A, No. 7, at 70 (1926). Also, BORCHARD, (1931) ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 297; I SCHWARZENBERGER, INTERNATIONAL LAW, (1945) 162-8.

30 (1927) 8 BRIT. Y.B. INT'L L. 156; (1928) 22 AM. J. INT'L L. (Spec. Supp.) 157. This case also turned, to some extent on the *compromis* reference to property in law or equity, which was construed in accordance with Anglo-American principles, by the two concurring arbitrators. It was on this ground that the dissentient based his award.

31 CMD. 623, 36. Discussed in BARCLAY, PROBLEMS OF INTERNATIONAL PRACTICE AND DIPLOMACY, (1907) at 47.

Thus, the nationality of the company is a secondary matter, the requisite foreign element being present in the person of the shareholders. A provisional decision on jurisdiction would thus be possible, if indeed this course were adopted. The other courses are a decision of the merits in jurisdiction, and a decision of the jurisdiction in merits. Whichever course was pursued would not matter for present purposes.

(b) *Tribunals other than the International Court of Justice.*

In two places in the instruments under which the concession was granted, provision is made for reference of certain matters to arbitration. Article 10 of the Concession of 1854 provides for "An amicable arrangement, or arbitration" for the determination of "the compensation due to the Company for the abandonment of its material and stock," at the expiration of the concession. By Article 3, "The duration of the concession is ninety-nine years from the date of the opening of the canal . . . ". Article 16 of the Concession of 1856 similarly provides for compensation by arbitration, if necessary, at the end of the ninety-nine year term. By Article 23 of the latter Concession, the 1854 Concession remains in force so far as it is not inconsistent with the terms of the 1856 Concession. From these provisions it appears that:—

(1) The matter of compensation may be referred to arbitration at the end of the ninety-nine year term.

(2) The matter of compensation may be referred to arbitration on the prior expiration of the concession, under Article 10 of the 1854 Concession, provided that that provision is construed in such a way to contemplate such prior termination.

This is purely a matter of interpretation. Were the International Court of Justice to decline jurisdiction, which seems unlikely, this course might be worth pursuing, but in view of the differences in enforcement measures available in the two Courts, and the scope of the terms of reference which they would have, it would seem wise to exhaust the former possibility first.

II. MERITS.

It may seem paradoxical, in view of the fact that there seems every chance of the Court assuming jurisdiction, that the dispute has not been referred to the Hague. There seemed to be little doubt of the 'high-handed and totally unjustifiable'[32] nature of the Egyptian action. Nevertheless, it has not been referred, a fact which may reflect

[32] The words of H. M. Leader of the Opposition in the House of Commons.

the considered, though regrettably unexpressed, opinions of the permanent branches of the foreign offices. It is quite true of course that failure to refer is not unequivocal, but it would be difficult to justify the attitude taken with the apparent lack of confidence in an institution created by the parties involved, among others, for the very purpose of regulating the pacific settlement of disputes such as the one under consideration.

As things are, we are left with broad sweeping claims as to the illegality of the nationalization, and a paucity of specific allegations. In these circumstances, one can only presume the line which the attack on the validity of the expropriation would have taken.

Two possibilities are generally available in these circumstances; firstly, it might be argued that expropriation was entirely impossible: secondly, it might be argued that in the circumstances, though possible, it was not effected.

(a) *The plea that nationalization was impossible.*

To support this plea, one of three factors must be established. Either:—

(1) The nationalization could not be effected because Article 3 of the 1854 Concession provided that "The duration of the concession is ninety-nine years after the date of the opening of the canal."

or,

(2) The nationalization could not be effected because the company was an 'international agency',[33] or an integral and essential part of the system under which the canal functioned, all of which was elevated to treaty level by the preamble to the Constantinople Convention of 1888,[34]

or,

(3) The nationalization could not be effected because it would operate in direct breach of the Constantinople Convention of 1888, or some other international instrument in force.[35]

33 The London Declaration of 2nd Aug. 1956.

34 See Hostie, *Notes on the International Statute of the Suez Canal,* (1957) 31 TUL. L. REV. 397, at 420-1. This was also the argument of the United Kingdom Representative, Mr. Selwyn Lloyd, before the Security Council. U.N. Doc. S/P.V. 735, 12.

35 This was the general tenor of many of the statements issued following upon the promulgation of the Decree; *Keesing's Contemporary Archives,* (1956) 15001 *et seq.*

The first of these could not be expected to succeed in the face of authority to the contrary.[36] It appears to be the rule that a state cannot, by an agreement with a private individual, bind itself to a particular course of conduct. Such an agreement may well, and often does, operate as a source of vested rights, and there are well-established rules of international law in connection with the protection of these. But no rule exists that a private agreement is binding on the state in its terms. This is illustrated by the award in the *Claim of the Company General of the Orinoco*:[37] "As the Government of Venezuela, whose duty of self-preservation rose superior to any question of contract, it has the power to abrogate the contract in whole or in part. It exercised that power and cancelled the provision of unrestricted assignment. It considered the peril superior to the obligation and substituted therefore the duty of compensation." This is fully compatible with principle. A concession is a mixture of public and private rights.[38] As a source of private rights, the conventional nature of a concession is operative, provided, of course, that the relevant municipal law regards it as such. But as a source of public rights, this aspect of the concession is quite irrelevant. As opposed to a treaty, which is binding in international law on the parties to it, solely by virtue of their having agreed to its terms, a concession is no more than a unilateral declaration.[39] This distinction was firmly emphasised by the International Court of Justice in the *Anglo-Iranian Oil Co., (Jurisdiction) Case*[40] where the existence of a treaty provision would have conferred jurisdiction on the Court, under the Optional Clause. The Permanent Court of International Justice had already expressed itself on this principle in the *Mavrommatis Concessions Case*,[41] in

36 For example, Walter Fletcher Smith Claim, 2 U.N. REP. INT'L ARB. AWARDS 918 (1949); The Claims of Elliott, Bartlett and Barge, and Putegnat's Heirs, MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, (1898) 3718-21; also RALSTON, VENEZUELA ARBITRATIONS OF 1903; the claim of the Government of Iran in the Anglo-Iranian Oil Co. Ltd. Case, (1951) 45 AM. J. INT'L L. 749, at 752; General Assembly motion 21st Dec. 1952, A/626/VIII; Report submitted to U.N. Secretary-General by International Association of Democratic Lawyers, 25th Sept. 1956.

37 RALSTON, VENEZUELA ARBITRATIONS OF 1903, 244.

38 Lighthouses Case, P.C.I.J., Ser. A/B No. 62 (1934); The Case of the Electric Co. of Varsovie, 3 U.N. REP. INT'L ARB. AWARDS, 1680 (1949); Rosenstein v. German State and the State of Hamburg, ANNUAL DIGEST, [1929-30] No. 283, 482; BENTWICH, WAR AND PRIVATE PROPERTY, 72.

39 See Schwarzenberger, *The Protection of British Property Abroad,* (1952) 5 CURRENT LEGAL PROBLEMS, 295, at 312.

40 [1952] I.C.J. Rep. 93.

41 P.C.I.J., Ser. A, No. 2, at 11-15 (1924).

deciding that an arrangement between a state on the one hand and an individual on the other was not an international arrangement, a breach of which would amount to a breach of international law. In short, concessionary relationships are not among the methods by which, according to Schwarzenberger,[42] a state can derogate from its sovereignty.

In effect, then, the sole effect of Article 3 of the 1854 Concession was to define the term during which the concessionary company would enjoy the protection accorded to vested rights under international law.

Establishment of the second factor is equally difficult. Attempts have been made to support it on two grounds. The first of these is that the company is an international agency charged under the Convention of 1888 with maintenance and regulation of the canal; the second is that it was immune from expropriation because it was a 'transnational business organization.'[43]

The preamble to the Convention of 1888 states that the Convention was designed to "establish, by a Conventional Act, a definite system destined to guarantee at all times and for all the Powers, the free use of the Suez Maritime Canal, and thus to complete the system under which the navigation of this canal has been placed by the Firman of His Imperial Majesty the Sultan, dated the 22nd February, 1866, and confirming the Concessions of His Highness the Khedive." Of this provision, it is said[44] "The statute resulting from the relevant rules of the Firman and the concessions could be completed by a treaty only if it was already part of public international law, or at least, if the treaty transformed it into public international law. Therefore, from the coming into force of the conventional act, if not earlier, the Company, whatever its personal status, functioned as a special organ within the international statute of the canal."

To maintain this argument, each of three propositions must be maintained, though this is not expressly appreciated in the thesis under consideration. It must be shown, first, that the system referred to was the whole regime of the canal and not just the concept of free

42 *The Protection of British Property Abroad, op. cit. supra* note 39 at 308: "Sovereignty is not an absolute right. It is freedom under international law, and limitations of economic sovereignty may be imposed by treaties, international customary law and general principles of law recognised by civilised nations."

43 See Olmstead, *Annual Survey of American Law—International Law,* (1957) 32 N.Y.U.L. REV. 1, at 8-9.

44 Hostie, *op. cit.* at 420-1.

passage; second, that the existence of the company as opposed to the function performed by it was an essential part of that system; and third, that the system was elevated to treaty-level.

In support of the first of these propositions, reference is made to some of the *travaux préparatoires* of the Convention of 1888. The Austro-Hungarian delegate, M. de Haan, is cited[45] as referring to the Convention as a "recognition of the public and international character of the undertaking," and reference is also made to the analogy drawn by Sir Julian Pauncefote, the British delegate, between the company and the European Danube Commission.[46] The value of this evidence as to the meaning of the Convention is demonstrated by the author's own words: "The argument (of Sir Julian Pauncefote) was questionable, and so was the analogy[47] . . . the statement however, shows that the Austro-Hugarian delegate did not express an isolated opinion."[48] Even were reference to the *travaux préparatoires* admissible in this case, (and it is believed not to be, for reasons stated below), something more than the ambiguous statement of one delegate out of nine supported by the ill-founded assertion of one of the others, would be necessary to persuade the Court. In fact, of course, a consideration of *travaux préparatoires* is perfectly legitimate, but only where the provisions of a treaty are not otherwise clear.[49] In interpreting an international instrument, regard must be had to it as a whole.[50] Furthermore, where the meaning does not thus become clear, that interpretation should be adopted which is less onerous to the party charged.[51] Reading the Convention as a whole, its purpose is obviously the establishment and regulation of an international transit servitude through the canal. The presumption would thus arise that the 'system' referred to in the Firman of 1866 was the system of 'free passage' discussed below. Further, the duty of taking the necessary measures for the execution of the treaty is imposed upon the Egyptian Govern-

45 *Ibid.*, at 421; CMD. No. 19 (1885) 197.

46 *Ibid.*, at 146.

47 The analogy is questionable for the reason that the Danube Commission was expressly created in an instrument, for the purpose of administering the 'Free Status' of the River Danube. It was either an international agency or nothing.

48 Hostie, *op. cit.* at 421.

49 MCNAIR, THE LAW OF TREATIES, c. XXV (1938); Case of the Convention Concerning Employment of Women during the Night, P.C.I.J., Ser. A/B, No. 50, 373 (1932).

50 The Vryheid (No. 1), (1778) Hay & M. 188, 1 English Prize Cases, 13.

51 The Advisory Opinion Concerning the Frontier between Turkey and Iraq, P.C.I.J., Ser. B, No. 12, at 25 (1925).

ment.[52] Interpretation of the term 'system' is, of course, rendered more difficult if it be proposed to include the whole regime, by the rule that whilst the preamble is a substantive part of the treaty, reliance upon it is generally only permissible "as a means of elucidating the intentions of the parties"[53] where this is not apparent from the instrument as a whole. This leads us back to a consideration of the whole instrument.

Even, however, were the term 'system' to be interpreted so as to include the whole regime, the other two propositions would remain to be established. In this connection, it is submitted that what is essential to the whole regime is the function thus far discharged by the company, and not the existence of the company itself. This is emphasised by the express terms of the Convention, Article XIV of which states that the servitude is to continue in force after the expiry of the concession to the company. The only reconciliation of this proposition with the Convention itself is the assertion that the company should continue in existence after the concession has expired. This it cannot do by its own Statutes.[54] The gap thus created would have to be filled by another organ. This is finally admitted in the thesis under discussion.[55]

Disregarding this difficulty, the question of 'elevation' would still remain. Since the Convention contemplates a system which (as is admitted for the purposes of argument here) has as an integral part of it the existence of the company, it is claimed that that company thereby achieves international personality. As a rule of construction, this is unknown to the writer. As a question of interpretation, even where the reference to the entity was express, the International Court of Justice[56] has held that no elevation can be presumed where the provision is equivocal, and that weighty proof will be required of such 'elevation': "The fact that the concessionary contract was reported to the Council (of the League of Nations) and placed on its records does not convert its terms into the terms of a treaty by which

52 Art. IX.

53 Schwarzenberger, *op. cit. supra* note 39 at 207; the Case of Pajzs Czaky and Esterhazy, P.C.I.J., Ser. A/B, No. 68 (1936) was an instance of the extreme application of the rule. The preamble was held to be evidence of the basis upon which the parties had concluded the treaty, but not evidence as to the actual existence of that basis.

54 Art. 4 STATUTES OF THE UNIVERSAL SUEZ CANAL COMPANY (1856).

55 Hostie, *op. cit.* 423-4, 433-6.

56 In the Anglo-Iranian Oil Co. Ltd. Case, (Jurisdiction), [1952] I.C.J. Rep. 93; (1952) 46 AM. J. INT'L L. 737, at 749.

the Iranian Government is bound *vis-a-vis* the United Kingdom Government."[57]

It would, then, seem difficult to establish any one of these three propositions, let alone all three. But two further grounds are then put forward to establish the fact that the company was an international agency. It is first attempted to render the Firmans of concession binding in themselves internationally by their own terms:[58] "It is hard to believe that, when the Khedive made the following declaration: 'We solemnly declare for our part and that of our successors, subject to the ratification of His Imperial Majesty the Sultan, that the Great Maritime Canal from Suez to Pelusium and the ports appertaining thereto shall always remain open as a neutral passage to every merchant ship crossing from one sea to another, without distinction, exclusion or preference of persons or nationalities on payment of the dues and observance of the regulations established by the Universal Company, lessee for the use of the said Canal and its dependencies' he made a statement which was not intended as internationally binding and which, contrary to its express terms, was limited in time to the 99 years of the concession." Certainly this statement does not appear to be intended to be limited in time, but this is a fact quite irrelevant to the status of the declaration. Of sole importance is the assertion that it becomes internationally binding by virtue of its intention to do so. This is to attempt to lift oneself by one's boot-straps. The Firman here quoted has the effect of a unilateral declaration, in international law, and as such "it could be unilaterally modified and abrogated by Egypt at any time."[59]

Secondly, we are referred[60] to the Agreement of 1949 between Egypt and the company, where the company stated that it envisaged improvement works to the extent of some four and a half million Egyptian pounds. It seems to that author that "A company actuated in the first place by the financial advantage of its shareholders would hardly have taken the decision to carry out improvements so late in the day, knowing that the concession would not be renewed." One need not consider that twenty years of the concession remained unexpired and that in any case, provision was made for payment of

57 *Ibid.*

58 Hostie, *op. cit.* 421.

59 The words of M. Georges-Picot, French Representative at U.N. in objecting to the Egyptian Declaration regarding the Canal, transmitted to the Secretary-General on 24th April 1957, cited in 3 U.N. REV. 11 (1957).

60 Hostie, *op. cit.* at 432.

compensation at the end of the concession,[61] for there is no rule of international law conferring international personality on those who perform charitable acts.

It is argued in another place[62] that the company could not be nationalized because of its status in international law. "In dealing with an international public utility such as the Suez Canal which is unique in the fullest sense of the word, it is erroneous to employ established principles applicable only to a municipal taking for a public purpose. In such a case the domestic legislative or administrative body may be competent to make a finding as to whether the particular action is in the public interest, but where the taking involves an irreplaceable utility on which a major portion of the world community is dependent, a single state's determination of its public interest cannot be equated with the larger international public interest. Furthermore, even assuming that compensation will eventually be paid, it would be difficult to fix an adequate and fair amount."

"'This, of course, meets only one aspect of the Suez problem. Sanctity of the concession to the Suez Canal Company could be ignored and yet the canal might remain open under the Convention. An attitude that agreements between nation-states must be kept but that those between nation-states and individuals can be disregarded by the state party is again a survival of the antiquated theory that only states are subjects of international law—others being mere objects. It is clear, however, to the objective observer, that in practice and in fact, certain transnational business organizations are subjects of international law and, in many instances, of greater import than certain states. To deny such business institutions the status of membership in the world community is to deny the obvious and to prevent the full participation of potentially great forces for improving the lot of large segments of that community."[63]

This author takes upon himself a terrible burden. The only international personality known to customary law is statehood. Conventional law has seen the introduction of many international agencies, particularly under the auspices of the United Nations, but this thesis is based on neither of these two sources. It is, in fact, a plea that the realist theory of personality is a general principle of law recognised by civilised nations, and as such would be difficult in the

61 Art. 10 of the 1854 Concession, probably replaced by Art. 16 of the 1856 Concession dealing with the same point.

62 Olmstead, *op. cit. supra* note 43.

63 *Ibid.*, at 8-9.

extreme to establish before an international tribunal. Much of what is here said may be desirable as a policy, but is not supported in law.

The third ground upon which nationalization might be impossible merits little consideration. Nobody has pursued it since the first policy statements were issued. No provision of the Convention of 1888 is infringed by the nationalization. Nor is it believed that nationalization of the company can operate as a modification of the conditions for the passage through the canal, so as to infringe the provisions of the *procès-verbal* resulting from the meeting of the International Commission in Constantinople in 1873.[64] Provided the distinction between control of the canal and discharge of the function heretofore discharged by the company is borne in mind, these provisions do not constitute a valid ground of complaint.

Thus in no one of the grounds upon which it might have been sought to establish the *inexpropriability* of the company does there appear to be any substance. Any attempt to impugn the Egyptian action must therefore be directed against the manner in which the purported expropriation was actually carried out.

(b) *The plea that nationalization, though possible, was totally or partially ineffective.*[65]

The same difficulties encountered in connection with plea (a) are again present. There is great paucity of specific claims, and thus, for instance, when objection is taken to the 'arbitrary action' without more, one is at a loss to know in what respect and in what sense, it is claimed to be arbitrary. In these circumstances, discussion must again be confined to a brief survey of what appears to be the meaning of such allegations.

In so far as it is possible to classify them the objections taken appear to fall under three heads:—

(1) The arbitrariness of the act, (including absence of notice,[66] unilateralness,[67] and wrongness of motives).[68]

(2) The apparent infringement of human rights in Articles IV and V of the nationalization decree.

64 CMD. 943, 7.

65 According to one view considered below, the expropriation may be lawful, though non-payment of compensation be a delict *sui generis*. Also, the expropriation may be regarded as effective as regards assets in Egypt, but not so as regards assets in Paris and London.

66 The U.K. Prime Minister in the House of Commons. *Keesing's Contemporary Archives,* (1956) 15002.

67 The London Declaration of 2nd Aug 1956.

68 *Ibid.*

(3) The inadequacy of the provision for compensation.[69]

Of these, only the last-mentioned deserves serious consideration. The fact that the action was unilateral, as it undoubtedly was, is totally irrelevant, in that an expropriation is, in its nature, a unilateral act. The company could have been dissolved by agreement, and had this been the case, no question could have arisen. But in this event, the rights and duties of the parties would spring from agreement and the rules of international law which relate to expropriation and its incidents would have had no application. To argue that a unilateral expropriation is an illegal one is to deny the possibility of expropriation in international law, plainly contrary to truth and even to the express terms of the London Declaration.[70] It is equally difficult to see how the objection as to notice can stand. It is true that in the *Walter Fletcher Smith Claim*[71] it appears as one of the factors by reason of which the Arbitrator condemned the expropriation. But that was a case firstly, of confiscation, no compensation being offered and secondly where buildings were destroyed within eight hours of the issue of an order which was unconstitutional by the law of state, and which therefore offered a remedy to the victim in municipal law. The expropriation with which we are here concerned is not one such that implementation of it would amount to an irrevocable step, nor, as far as the writer has been able to ascertain, is it one against which municipal law offers a remedy. A further point is, of course, that as a general rule, notice operates as expropriation.[72]

So far as motives are concerned, they may become relevant if the expropriation amounts to confiscation, that is to say, if the offer of compensation falls short of the standard required by international law.[73] In this event, the expropriation will only be justified if it is carried out in the exercise of the police power of the state expropriating, or if it is done in the overriding national interest. When such has

69 The Leader of the Opposition in the House of Commons.

70 " . . . the right of Egypt to enjoy and exercise all the powers of a fully sovereign and independent nation, including the generally recognised rights, under appropriate conditions, to nationalize assets . . ."

71 Note 36, *supra*.

72 The Case concerning certain German interests in Polish Upper Silesia, P.C.I.J., Ser. A, No. 6, at 26 (1925).

73 The more extreme view would leave the question of 'public policy' entirely in the discretion of the expropriating state; Kunz, *Two Causes Célèbres*, (1939) 5 HUNGARIAN QUARTERLY, 50 at 57; Bourquin, (1931) 1 REC. DES COURS DE L'ACAD. DE DR. INT. 166; STOWELL, INTERNATIONAL LAW, (1931) at 172; Fischer Williams, *International Law and the Property of Aliens*, (1928) 9 BRIT. Y.B. INT'L L. 1 at 25; Cutler, *Treatment of Foreigners*, (1933) 27 AM. J. INT'L L. 225 at 239.

been claimed to be the case, international courts have, on occasion, looked beyond the mere clai... of the state expropriating and considered the substance of it.[74] A detailed consideration of this point is by the way for two reasons, firstly because the offer of compensation appears to be satisfactory, and secondly because of the probable motives, (the financing of the Aswan High Dam Project).[75] The claim as phrased in the London Declaration is even less tenable.[76]

Articles IV and V[77] of the nationalization decree are *prima facie* objectionable, but the Human Rights provisions of the Charter of the United Nations[78] and the Draft Declaration on Human Rights are better regarded as statements of principle, rather than as creating legal duties on member states.[79] The question has not yet arisen before the International Court of Justice but some municipal courts have implemented these provisions.[80] Whether the mere enactment of legislation will provide a sufficient cause of action or whether the decree must be implemented before any claim can be made is, according to one case, a question of fact and depends on the circumstances.[81] There is con-

74 For example, in the Walter Fletcher Smith Claim, *supra* note 71.

75 According to the speech by President Nasser at Alexandria, 26th June 1956. The affair appears to have been ignited by the withdrawal of offer of help by the United States, the United Kingdom and World Bank, for the project, on 19th July, two days after the offer had been unconditionally accepted by the Egyptian Government. One is only, of course, concerned with the motives of the State agent, not with his private *bêtes noires*.

76 "This situation is the more serious in its implications because it avowedly was made for the purpose of enabling the Government of Egypt to make the canal serve the purely national purposes of the Egyptian Government rather than the international purpose established by the Convention of 1888." International law can only take cognisance of those international interests recognised by itself as such. Egypt claimed, and there appears to be some substance in it, that in this case, national and international interests coincided in keeping the canal open and busy.

77 Art. IV: "The body shall retain all the present officials, employees and workmen of the nationalized company. They must continue to carry out their duties. No one of them is in any way or for any reason authorized to leave or relinquish his post except with the permission of the body provided for in Article II."
Art. V: "He who contravenes the rules of . . . Article IV shall be punished with imprisonment in addition to his being deprived of any right to gratuity, pension or compensation."

78 Preamble, Arts. 1, 13 (1) (b), 55, 62 (2), 68 and 76. Enforcement of these provisions has had a sorry history in the United Nations General Assembly; see KELSEN, *op. cit.* 27 *et seq.*

79 This is the view of Kelsen, *op. cit.* 39.

80 For example, Sei Fujii v. The State, 217 P. 2d 481 (1950), where a Californian Court refused to allow confiscation of the property of a Japanese resident under a local statute on the ground that the legislation in question infringed the Human Rights provisions of the Charter.

81 Mariposa Claim, ANNUAL DIGEST, [1933-34] No. 99.

siderable authority in favour of the view that responsibility depends upon damage.[82]

In the instant case, the repugnant provisions of the nationalization decree were repealed within one week of its promulgation,[83] after the issue of the London Declaration. At that time, no action had been taken under Article V, though Article IV would no doubt have the effect of restricting the freedom of action of employees during this period.

Whether these facts would entail liability or not is a question which cannot be answered categorically. It is submitted that the Court might be inclined to view favourably the facts of no action being taken, and speedy repeal. But even were these provisions repugnant, the expropriation could not be impugned, unless it were established that the infringements of human rights were necessary incidents to its implementation. This burden would not be easily discharged.

The case must therefore turn on the question of compensation, and it might well be said before embarking upon a consideration of this aspect of the problem, that a clear decision upon it, by the International Court of Justice would have been welcomed by most international lawyers. There is wide disagreement, not only as to the application of rules suggested, but even as to whether there be a rule at all. In these circumstances, it is impossible to draw absolutely definite conclusions.

It is now over a year since the nationalization decree was promulgated and as yet, no compensation has been paid. Will this fact suffice to establish either the invalidity of the expropriation, or, a right in the states of the nationals injured to damages for an international delict?

In order to obtain damages, it must be established that the expropriation would, apart from the question of compensation, have taken effect; that provision for compensation was inadequate; and, in order to set aside the expropriation, it must be further proved that expropriation is dependent upon adequate provision of compensation, and not merely an independant obligation arising out of it.

As to the first of these points, Article I of the nationalization law appears quite categorical in its terms: "The Universal Suez Maritime Canal Company S.A.E. is hereby nationalized." This would, at first sight, seem to be affirmed by the general rule as to the time when

82 Draft Convention on Responsibility of States, Art. 7 (a); (1929) 23 AM. J. INT'L L. (Spec. Supp.) 133, and comment at 159-60.

83 Keesing, *op. cit.*

an expropriation becomes effective, for the prevalent test is notification; and the reason behind the test is that mere notification or announcement of intention to nationalize suffices to make any right of property illusory. Its market value is in the normal case largely destroyed because of the impending acquisition by the expropriating state, and it is not therefore necessary that property should actually have passed, or the state entered into possession.[84] The position in the instant case is, however, complicated by the fact that certain of the assets of the company were situated in Paris and London, creating a situation where, by freezing Egyptian assets,[85] loss of value could be avoided, and Egypt deprived of the benefit of the assets. Since the decree is effective in its terms only in municipal law, (the statement that the Canal Company was thereby nationalized not being conclusive in international law), the following problems arise:—

(a) Could the faculty of nationalization legitimately extend to property situated outside the territory of the expropriating state?

and,

(b) Can expropriation be said to take effect when notified where such notice operates neither to confer a benefit on the state, nor to deprive the foreigner of the value of his property.

On the first of these questions, there is singularly little authority to be found in customary international law. It is clear that a state cannot, at any rate for the purpose of international law, enact legislation effective outside its territory in all circumstances.[86] At the same time, it is also clear that the view of international law in this matter is that jurisdiction exists unless there is some prohibitory rule to the contrary, rather than that a state purporting to exercise jurisdiction need prove the existence of a permissive rule.[87] There does not appear to be any rule prohibiting the exercise of jurisdiction over the property of one of a state's nationals, although that property is situate abroad, and its assets in London and Paris are undoubtedly the property of the company which, for this purpose, is an Egyptian

84 See the Case concerning certain German interests in Polish Upper Silesia, P.C.I.J., Ser. A, No. 6, at 26 (1925): " . . . once notice has been given, the owner cannot, without the consent of the Polish Government, alienate *inter vivos* either the estate to be expropriated or its accessories, so that the giving of notice places serious restrictions on the rights of ownership."

85 On 18th July 1956, the United Kingdom Government took this step.

86 The Case of the S.S. "Lotus", P.C.I.J., Ser. A, No. 9 (1927).

87 *Ibid.*, at 18.

national.[88] This would satisfy the only test on this point which the writer has been able to find: "The concept of territorial connection is, moreover, one of fact which does not easily lend itself to abstract definition. It must therefore be determined in each particular case whether the connection between the property . . . and the territory of the expropriating state is sufficiently close and whether the extent of (its) participation in the life of the political community is sufficient for them to share in common sacrifices."[89]

There remains the source of general principles of law recognised by civilised nations, but this is a source which, though prolific in the volume of its jurisprudence, is lacking in the clarity of it. It is believed however, that it is possible to be a little more definite where the property concerned is that of one of the nationals of the expropriating state and where (as is assumed for the moment) there is adequate provision of compensation.[90] The view of the English courts in these circumstances is clearly demonstrated by the dictum of Clauson, L.J., in *Banco de Bilbao v. Sancha & Rey.*[91] "The question what body of directors have the legal right of representing the Bank of Bilbao, a

88 International law being, in this instance concerned with the proprietory rights which, so far as private persons are concerned, can only exist in municipal law. A failure to respect those rights is a matter falling within the purview of international law, which will thus, in this case, look at the realities of the situation. International law may take cognizance of the municipal law as a fact, see Case concerning certain German interests in Polish Upper Silesia, P.C.I.J., Ser. A, No. 7 at 19 (1926); Case concerning the Payment of Various Serbian Loans issued in France, P.C.I.J., Ser. A, No. 20 at 37 (1929). The question of the nationality of a corporation is one of some difficulty. For the common law view, see the English decisions of Gasque v. Inland Revenue Commissioners, [1940] 2 K.B. 80, at 84 *per* McNaughton J.; Janson v. Driefontein Consolidated Mines Ltd., [1902] A.C. 484, at 498 *per* Lord Davey, at 501 *per* Lord Brampton, at 502 *per* Lord Lindley. For the American view see Bergner & Engel Brewing Co. v. Dreyfus, [1898] 172 Mass. 154, a decision of Holmes, J. primarily concerned with domicil. These cases favour the place of registration as the test of nationality. The civil law apparently favours centre of business, see Vaughan Williams and Chrussachi, *The Nationality of Corporations,* (1933) 49 L.Q. REV. 334; Norris, *The Nationality of Companies,* (1921) 3 J. COMP. LEG. (3rd Ser.) 273; McNair, *The National Character and Status of Corporations,* (1923-24) 4 BRIT. Y.B. INT'L L. 44; Feilchenfeld, *Foreign Corporations in International Public Law,* (1926) 8 J. COMP. LEG. (3rd Ser.) 81 and 260. It would appear that by either test the company would be an Egyptian national.

89 FRIEDMANN, *op. cit.* 166.

90 This is an *a fortiori* on Princess Paley Olga v. Weisz, [1929] 1 K.B. 718, and Luther v. Sagor, [1921] 3 K.B. 532, in both of which cases, the property concerned was that of nationals of the expropriating state. In neither case has compensation been ordained.

91 [1938] 2 K.B. 176.

commercial entity organized under the laws prevailing in Bilbao and having its corporate home in Bilbao, must depend in the first place on the articles under which it is constituted. The interpretation of those articles and the operation of them, having regard to the general law, must be governed by the *lex loci contractus,* i.e. by the law from time to time prevailing at the place where the corporate home (*domicilio social*) was set up."[92] Though the point was not considered by the Court of Appeal, it was implicit in the judgment of Lewis, J., at first instance that the right to the assets of the bank in London vested in the new board of directors established in Bilbao by the usurping government. Were this applied to the instant case, the London and Paris assets would vest in the body set up by Article II of the nationalization decree, in English municipal law, and were this principle applied in an international tribunal as a general principle recognised by all civilised nations, the decree must be regarded as extending to the assets in Paris and London.

If this were not the case, then the time of expropriation must be regarded as the time of notification, i.e. the 26th June, 1956. If, on the other hand, this were the case,[93] the problem would arise whether the time of expropriation must be regarded as the time of notification, i.e. the 26th June, 1956, or whether it was only when the assets were effectively called in.[94] The test and the reason behind it have already been stated. There is little jurisprudence on the point. One case, however, supports the proposition that expropriation only takes place when it becomes effective.[95]

A decision on the above point is essential to a true evaluation of the obligation to compensate for two reasons. Firstly, if the obligation to compensate had not arisen at the time the assets were frozen, the states taking those reprisals may have deprived themselves of the right to sue for compensation.[96] Secondly, the time when the expropriation

92 *Ibid.,* at 194-5 approving Lord Wrenbury in Russian Commercial & Industrial Bank v. Comptoir D'Escompte de Mulhouse, [1925] A.C. 112, 149.

93 As seems likely if only for the reason that since the company was certainly dissolved in Egyptian law, any other course would leave the property without owner.

94 Art. I of the nationalization decree provided that " . . . Payment of . . . compensation shall take place after completion of the handover to the State of all the funds and property of the nationalized company."

95 Ellerman v. Poland, 5 MIXED ARBITRATION TRIBUNAL REP. 457 (1925-26).

96 Something like the maxim *ex turpi causa non oritur actio* applies in international law, see the order of 6th Dec. 1930 in the Case of The Free Zones of Upper Savoy and The District of Gex, P.C.I.J., Ser. A, No. 24, 4; Eastern Greenland Case, P.C.I.J., Ser. A/B, No. 53, at 75 (1933). Subsequent events have rendered this a much more significant point.

takes effect is, according to the prevalent Anglo-American test, the time when compensation becomes due.

This test may be briefly stated as that the compensation must be "adequate, prompt and effective."[97] If it be applied, then although the closing prices on the Paris Bourse on 25th July may appear adequate, and although the effectiveness[98] of the compensation cannot be determined until after the event, the compensation will nevertheless be unsatisfactory from the point of view of promptness, if it became due on 26th July, 1956. If on the other hand, it has not fallen due yet, there can be no complaint on this ground. It would seem, on the balance of authority as stated above, that compensation is not yet due. But even assuming that it is, it is by no means certain that liability will ensue, for the 'Anglo-American' test propounded above is not admitted by all to be the correct one.

Herz[99] lists some of the dissentients. Others are Friedmann[100] and Fischer Williams[101] who are not prepared to accept it in its entirety. State practice offers it no support at all, other than in the case of the United Kingdom expropriations of 1945-50, where foreign interests were not to the fore. The French expropriations of 1945 were carried out without compensation and as is to be expected, the Communist countries have far from acceded to them.[102] Lauterpacht's view on this question appears to have been ignored, yet it is certainly worthy of note. "In such cases (exercise of police power, changes in political or economic systems, far-reaching social reforms) neither the principle of absolute respect for alien property nor rigid equality with the dispossessed nationals offer a satisfactory solution of the difficulty. It is probable that, consistently with legal principle, such solution must be sought in the granting of partial compensation." This is, nevertheless, yet another voice in the wilderness. The problem is a recurring one.

97 For example, the 'Middleton' letter. The letter of 7th Sept. 1948, from the United Kingdom Minister in Roumania to The Roumanian Minister for Foreign Affairs regarding the Roumanian expropriations is in similar vein.

98 In so far as this term means anything.

99 *Expropriation of Foreign Property,* (1941) 35 AM. J. INT'L L. 243.

100 *Op. cit. supra* note 26.

101 *International Law and the Property of Aliens,* (1928) 9 BRIT. Y.B. INT'L L. 1.

102 The Polish (16 Department of State Bulletin, 28 (1946)), Yugoslavian (Treaties and other International Acts, Ser. 1779), and Czechoslavakian (Parallele 50, No. 112, 12th Nov. 1948) expropriations were made on the basis of lump-sum payments without regard to adequacy. The Russian expropriations denied any right to compensation.

Thus (assuming for this point that expropriation had taken place), whether non-payment of compensation in the circumstances amounted to an international delict or not remains a question of doubt. There remains only to consider whether the expropriation may be regarded as effective, whether or not the compensation was satisfactory.

It is a question, again, to which no firm answer can be made, but it is vital for the purposes of determining the rights to dues, etc. since 26th July, 1956, is concerned. If the completion of the act of expropriation is dependent upon the payment of compensation, then until compensation is paid, the accumulated assets of the company belong to the shareholders. If, on the other hand, the two are independent, the position will be different.[103]

The confusion on this point is exemplified by the cases reviewed in *Anglo-Iranian Oil Co. v. Jaffrate*[104] all of which avoided the point on other grounds. The *Venice Case*[105] was likewise inconsistent and hesitant. O'Connell poses the question and is obliged to admit that "there is no direct decisive authority."[106] It is, however, possible to cite some persuasive authorities for both theses.

In favour of the thesis of independence,[107] the writer has been able to find only one decision before an international tribunal. This is the case of *Czechoslovakia v. Radio Corporation of America*[108] where there are *dicta* in the majority judgment to the effect that "any alteration or cancellation of an agreement on this basis should as a rule only be possible subject to compensation to the other party." That this is not decisive is due to the facts that the point was not directly in issue and that the attention of the Court was not fully directed to the issues involved.

The thesis of independence is more widely supported.[109] The

103 FRIEDMANN, *op. cit.* 312.

104 [1953] 1 W.L.R. 246.

105 Anglo-Iranian Oil Co. Ltd. v. Società S.U.P.O.R., (1955) 49 AM. J. INT'L L. 259.

106 *A Critique of the Iranian Oil Litigation,* (1955) 4 INT. & COMP. L.Q. 267, at 268-9.

107 Other authorities are Anglo-Iranian Oil Co. Ltd. v. Jaffrate, *supra* note 104; O'CONNELL, *op. cit.* at 268; SCHWARZENBERGER, *op. cit.* note 39 at 321.

108 (1936) 30 AM. J. INT'L L. 530.

109 For example, De Sabla Claim, Panama-United States Claims Commission, (1934) 28 AM. J. INT'L L. 602; Norwegian Claims Case, (1923) 17 AM. J. INT'L L. 362; The Delagoa Bay Railway Arbitrations, (1904) 30 MARTENS, NOUVEAU RECEUIL GENERAL DE TRAITES 329 (2d Ser.). Schwarzenberger admits of "an expropriation which is rightful in itself, but regarding which

Landreau Claim[110] accepts the expropriation as a *fait accompli* and ordains payment on a quantum meruit. The same view is taken in the *Case of the Expropriated Religious Properties in Portugal*[111] and in the *Orinoco Case.*[112] But the best authority for this view is the *Chorzow Factory Case*[113] apropos which, Herz[114] says "Apart from the case where a special treaty stipulation forbids expropriation such a measure is a lawful faculty or right of the state which leads to an international obligation to pay compensation for value taken. The action of a state exercising this right is not one which international law qualifies as illegal or tortious and which therefore, would oblige the state to restore the damage done . . . the Court (in the *Chorzow Factory Case*) stated that ordinary, lawful expropriation would have brought about merely the obligation to pay cash compensation for direct losses." Kaeckenbeeck arrives at the same conclusion.[115]

It is believed as a matter of principle that the latter is the correct view, for expropriation and compensation operate in different spheres. Expropriation is an act in municipal law, even where the interests of foreigners are concerned. As such, it is a fact of which international law takes cognizance, and recognition of this fact is the catlyst which evokes the obligation of compensation in international law. Expropriation without compensation is not an international delict. Failure to pay compensation is.[116]

the just price for the expropriated property has not been paid to the individual concerned"; INTERNATIONAL LAW, 189; O'Connell allows that "A sovereign, by acting unilaterally, creates a new juridical situation that cannot be described as contractual", *op. cit.* note 106 at 268. The Walter Fletcher Smith Claim whilst condemning the actual expropriation, declined to set it aside, and ordained compensation: 2 U.N. REP. INT'L. ARB. AWARDS 913 (1949).

110 1 U.N. REP. INT'L ARB. AWARDS 347, at 364 (1948).

111 1 U.N. REP. INT'L ARB. AWARDS 6 (1948).

112 RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS (Revised ed. 1926) 255-6.

113 P.C.I.J., Ser. A, No. 17 at 59 (1928). The award was made on the basis of reparation due at the time of purported expropriation, and profits in the meantime rejected.

114 *Op. cit. supra* note 99, at 254-5.

115 *The Protection of Vested Rights in International Law,* (1936) 17 BRIT. Y.B. INT'L L. 1 at 15.

116 Law must, of course, bear some relation to the facts. If expropriation is indeed depedent upon the payment of compensation, then the state purporting to expropriate does not own the products of the property and cannot pass title. At the same time, the entrepreneur is hardly likely to be able, or to want to continue the enterprise. If the position is in doubt, the consequences are even more unsatisfactory as is evidenced by the confusion which followed the issue of *caveats* by the Anglo-Iranian Oil Co. Ltd., in 1951.

If this be the rule, then, regardless of the other considerations, the company has been expropriated and there is no question of the right to profits in the meantime.

CONCLUSIONS.

So far as the jurisdictional aspect of the affair is concerned one concludes that there was a good chance of reference to the Court for a decision on the merits. Failure to refer in these circumstances must only be due to extraneous circumstances which are not relevant here. The *savant* regrets; I despair.

This consideration of the merits would, however, suggest that the balance of probabilities favours Egypt. But there are doubts; as to the extraterritorial effect of nationalization laws; the rules as to compensation; and the independence or otherwise of compensation and expropriation. These matters the dispute has only served to underline.

A negative result such as this, however, has its place, for it serves to pose the general question are international relations a fit subject for regulation by law or not? Sooner or later we must make the choice. The rule of law in the international community would remove the pitfalls; honest acknowledgment of its absence would put us on our caution; but blindness on the part of the traveller and hypocrisy on the part of the guide give the dangers of one without the safeguards of the other. In these circumstances anyone who walks the path of international intercourse, and traffic is becoming heavier all the time, must inevitably, sooner or later, slip again.

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