The Nationalization of the Suez Canal and the Illicit Act in International Law

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THE NATIONALIZATION OF THE SUEZ CANAL AND THE ILLICIT ACT IN INTERNATIONAL LAW

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THE RATIONALE OF THE ILLICIT ACT

The international illicit act consists of the transgression of an obligation established and defined by an international juridical norm which is accompanied by damage suffered by the injured party.2

The transgression creates a new juridical situation since the relationship of the parties involved takes on the nature of transgressor and injured party. To constitute a transgression, one of the parties has to violate an existing right or breach a duty jointly established between the parties or accepted by either one of them.3

To any international obligation corresponds a state of fact. The breach of said obligation will constitute an illicit act when it occurs, even though it occurs when the norm does not expressly foresee it. The act is not necessarily unlawful per se but will be illicit if its results constitute a derogation from a right or the failure to perform a duty; this can be achieved by commission or omission. However, such an

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1 For the rationale of the illicit act, see generally Grotius (de Groot), Le droit des gens; 1 Guggenheim, Traité de droit international public (1953); Kelsen, Principles of International Law (1952); Scelle, Manuel élémentaire de droit international public; Vattel, Le droit des gens (1916).

2 See generally 1 Guggenheim, op. cit. supra note 1; Oppenheim, International Law (1948); Rousseau, Droit international public (1953); Rousseau, Principes généraux de droit international public (1946). Bishop, International Law 636 (2d ed. 1962), refers to it as tortious conduct. On the definition of tortious conduct, see generally Chaffin (United States v. Mexico), [1927] Opinions of Comm'n Under the Convention Concluded Sept. 8, 1923, Between the United States and Mexico 422. For the establishment of the General Claims Commission, see generally 43 Stat. 1730 (1924), 4 Treaties, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers 4441 (1937). On conduct creating liability, see Bishop, op. cit. supra.

3 Supra, notes 1 and 2. Del Bez, Manuel de droit international public (1951).

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act will not constitute an illicit act unless it upsets an "order of things," i.e., an order established by treaty or international principles of law among nations. The material interpretation of said reversal of an "order of things" is measured by the existence of damages. Whether direct or indirect, they will determine the rupture of the established international relationship. The illicit act will create a new situation of fact resulting from the change in the nature and character of the relationship then in existence between the parties.

We can conclude that the illicit act is the violation of an international duty which injures or damages one of the parties involved. Every violation definitely imputable can be followed by sanctions, but certain conditions precedent must exist in order that these sanctions may be fully exercised:

1. The imputability of conduct contrary to promises or right-duty relations established or accepted by international agreement.
2. The damage that occurs as a result of such conduct.
3. The lack of express justification and good faith.

According to the Permanent Court of International Justice (P.C.I.J.), "It is a principle of international law that the violation of an obligation bears a corresponding obligation to restore damages in an adequate form;" this is one of the fundamental principles of international law. The failure must either be expressly foreseen in the convention or agreement or implicitly recognized. In a case where it may not be apparent or obviously implied, the general principles of international law will define the character of the conduct and determine the degree of liability. Therefore, we can add that any illicit act is not only a failure to perform an international obligation resulting from an international agreement, but also that it results from a duty imposed by the general principles of international law as established by valid precedents. It is obvious that the above conditions are necessary for the valid existence of the principle of imputability of an illicit act.

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The question consists of the determination of the elements to put in motion the effects of imputability.6

The illicit act or conduct is essentially materialized in the development of an activity, conduct or methods of a political character or of general direction that may be qualified as legislative or legal activities in the national and internal sense. What may seem justified or unjustified in the view of national legislation or national political activities may not be the same in the eyes of international law. (Where the same conduct bears a double-barreled result of internal injustice and international illegality, this is but pure coincidence.)

Often an international illicit act is legal nationally, while an unjust or unfair national act or course of conduct will be legal in the sense of international law. This is one of the effects of sovereignty as recognized by the United Nations Charter in art. 2, para. 7.7 There is no interpenetration in the results provoked by the same conduct in the eyes of international and national law. They are both quite distinct and do not derive from the same source, although the act that produced them may be the same.

The opinions of Mr. Spiropoulos8 are opposed to those of Mr. Kelsen9 in that respect, and Mr. Anzillotti10 considers the results produced by the act of any state, even if they bear a dual internal and international result, completely distinct and thus one cannot influence the other. As Mr. George Scelle puts it, "This is a real phenomenon of dedoublement (duality)."11

Certain proponents of the Monisme12 theory avoid the subject of necessary damage as a condition precedent to the principle of imputability of an illicit act. However, in my opinion the imputability of an illicit act under the Monisme theory would be a mere formality entailing a blame which would not even have the effect of moral blame and would go no further than the exchange of diplomatic notes.

6 See generally Bishop, op. cit. supra note 2; Guggenheim, op. cit. supra note 1; Oppenheim, op. cit. supra note 2; Reuter, Le droit international (1956).
7 See generally supra notes 5 and 6, and the U.N. Charter.
8 Spiropoulos, International Law.
9 Kelsen, op. cit. supra note 1.
10 Anzillotti, Corso di diritto internazionale.
11 Scelle, op. cit. supra note 1.
12 The Monisme theory is the Unitarian Theory of Judicial Order. See generally Kelsen, op. cit. supra note 1; and Scelle, op. cit. supra note 1.
Only actual resulting damage can render effective the imputability of an act, as to whether it should be followed by restoration or sanctions.¹³

To consider an act illicit when it starts in operation but remains without consequences or damages would weaken international law and would render ineffective the principle of imputability whenever actual results would require its application.

This is why, in view of the actual status and stage of development of international law, I express the opinion that to establish the principle of imputability of an illicit act or conduct, two conditions must be present: the illicit act of the transgressor must proximately cause the breach of a right duty relationship and some damage must be incurred by the injured party.¹⁴

The future development of international law and international justice will create a body of doctrine and jurisprudence that may, as the time requires, enlarge or restrict the interpretation of what constitutes damages or injury. Although the elements of good faith and intentions are important in the field of internal law, I do not feel that the same would apply to international law except insofar as justifications are concerned, and as a parallel I would view it as a problem of strict liability rather than intentional tort. It is the act creating the transgression of an international duty (or obligation), affecting the rights of others and producing damage or injury that will be considered when determining whether an illicit act has occurred, regardless of any possible circumstances advocated in the explanation of the act or any possible operational excuses which should not affect the result. The result is a new situation of fact which is the product of conduct which produced damages or injured a party through another party's failure to exercise or execute an international obligation. The failure to exercise or execute an international legal duty by commission or omission, which results in the injury to a third party as a direct or

¹³ GUGGENHEIM, op. cit. supra note 1; HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES (1922); Friedmann, supra note 5.

¹⁴ Friedmann, op. cit. supra note 4; GUGGENHEIM, op. cit. supra note 1; McNair, The Seizure of Property and Enterprises in Indonesia, 6 NETHERLANDS L. REV. 218 (1959); O'Connell, op. cit. supra note 4. The Third Committee of The Hague Codification Conference of 1930 adopted the following article which was not acted upon then by the Conference: “Article 9. International responsibility is incurred by a state if damage is sustained.”
proximate cause, is sufficient to require reparation. Good faith will be a factor to restrict or extend the blame, but not to excuse it or exclude reparation.\textsuperscript{16}

As the P.C.I.J.\textsuperscript{16} defined it in a decree (advice) of 1926, "In the eyes of international law and of the court, which is its organ, the national laws are simple facts, manifestations of the will and activity of the states just as their judicial decisions or administrative measures." A national law may not materialize in an illicit international act per se, though an illicit international act can become illegal in internal law by the mere fact of its international illegality. The principle of sovereignty and independence will be a bar to it.\textsuperscript{17} In decree No. 7,\textsuperscript{18} the P.C.I.J. stated that if nothing requires it to interpret a national law, neither does anything preclude it from expressing itself on the question of whether in the application of a national law or in the promulgation of its laws, a nation has acted in conformity with the obligations imposed by international law. The effect of the unitarian concept of the State in international law is that no juridical pertinence will derive from the imputation of international responsibility in the fashion in which the activity is materialized from the national standpoint in relationship to the violation of the international duty.

These principles and the one enunciated by the court as quoted above are an expression of the development of principles of international law which attempt to protect the rights and property of individuals of foreign nationality in a territory other than their national territory, and said foreign territory may promulgate laws which by

\textsuperscript{16} See \textit{supra} note 14. See generally Bindschedler, \textit{La protection de la propriete prive en droit international public}, 90 \textit{Hague Academie Recueil des cours} 173 (II, 1956); \textit{White}, \textit{Nationalization of Foreign Property} (1961). Regarding the difficulty of measuring damages in international claims, see \textit{5 Hackworth, Digest of International Law} 718 (1927); \textit{Whiteman, Damages in International Law} (1937–43); \textit{Eagleton, Measure of Damages in International Law, 39 Yale L.J.} 52 (1929).

\textsuperscript{17} U.N. \textit{Charter} art. 2, para. 7. See also the views on principles of sovereignty in international law by authors \textit{op. cit. supra} note 1.

\textsuperscript{18} P.C.I.J., ser. A, No. 7 at 22–24 (1926); see \textit{supra} note 16. See generally Guggenheim, \textit{Referat uber Völkerrecht, 6 Swiss Yb. Intl. L.} 124 (1949). Domke, \textit{American Protection Against Foreign Expropriation in Light of the Suez Crisis}, 105 \textit{U. Pa. L. Rev.} 1033 (1957), states that a basic tenet of international law is that expropriation will be recognized only when accompanied by adequate, effective, and proper compensation.
their enforcement could become the basis of an illicit act or conduct in international law.  

THE JURIDICAL SITUATION OF THE SUEZ CANAL

Following the nationalization of the Suez Canal, various polemics of a legal and political order arose and the event in question provided the opportunity for many legal researches which are of interest to students of political science and international law. In the course of these studies and discussions relative to the Suez crisis and the present status of the Suez Canal, the question is very often posed as to whether the problem should be approached by applying general principles of national law and existing conventions or as a new situation of facts and law as a result of the nationalization by the Egyptian Government of the Universal Company of the Maritime Suez Canal.

In view of the existing juridical situation of the Suez Canal, it is important and indispensable to divide the subject into two distinct phases: (1) the Maritime Suez Canal and (2) the Universal Company of the Maritime Suez Canal.

THE MARITIME SUEZ CANAL

The Maritime Suez Canal links the Mediterranean to the Red Sea through the lakes of Amer and Timsah. The Canal has been and still is governed by the Convention of Constantinople of October 29, 1888. The parties to the Convention were France, Germany, 

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20 La Compagnie Universelle Du Canal De Suez.


22 Supra note 2. Regarding free navigation through the Suez Canal, see generally Martens, La convention de Constantinople 1888, Nouveau Recueil General de Traite 266; Finch, supra note 21.
Austrian-Hungarian Empire, Spain, Great Britain, Italy, Holland, Russia and Turkey, and the Convention was subsequently ratified by Egypt. This Convention recognized the national character of the Canal as a maritime waterway without diminishing its international importance. The Convention consists of seventeen articles, takes notice of prior conventions and concessions, and establishes the general principles of navigation through the Canal and the regulations corresponding to such navigation, thereby finally establishing the status of the waterway.

THE STATUS OF THE CANAL AND THE FREEDOM OF NAVIGATION

The juridical status of the Canal was established by the 1888 Convention, which promulgated the rules under which ships in time of peace and war are to use the Canal, defined the conditions of transit, assured the equality of all flags, guaranteed the rights of the users to transit without distinction or preference, and prohibited the militarization of the Canal Zone so that in time of war the security and right of free passage may not be hindered. Thus, by establishing these principles, the act, meaning the Convention that created them, created a principle of international law formally obligating the parties to the Convention to the duties arising therefrom.

The Convention proceeded without ambiguity to delegate to Egypt the material powers of execution of these principles and obligations. Egypt has therefore received the entire obligation and responsibility for the execution of these principles. The authority and prerogative of execution and application of the Convention are delegated by all parties to the Convention to Egypt. It seems, therefore, that Egypt remains the only judge as to the necessary measures to be taken to implement the language and the spirit of the Convention. No foreign power, whether a party to the Convention or not, can delegate or lend to Egypt its forces or means of action in the execution of these principles. This in no sense can be construed as a discretionary power granted to Egypt to take measures not in conformity with the stipulations of the Convention. This unilateral right of Egypt to the material application of the principles of the Convention imposes upon Egypt the obligation of exercising them diligently. The failure of

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23 Supra note 22.

24 Convention of Constantinople of 1888, art. 9, states: "The Egyptian Government is to take ... the necessary measures to enforce the execution of said treaty...."
Egypt to comply with this international obligation gives rise to international liability. Egypt, by her ratification of the Convention, obligated herself to the material and concrete execution of the principles enunciated in the Convention, and her failure to do so would constitute a failure to comply with an international duty. The Convention did not stop at merely enunciating general principles and charging Egypt with its application, but stipulated in Article 14 that the obligations resulting from the present treaty will not be limited by "the duration of the concessions granted to the Universal Company of the Suez Canal." Article 14 is important in that it definitely determines the separation of the Universal Company, with the grants and concessions obtained by it, from the Convention, which establishes the juridical status of international navigation through the waterway.

The Maritime Suez Canal is, in compliance with Article 14, a maritime waterway, the international importance of which requires the guarantee of free navigation and unmolested passage, which is expressed in an international treaty. The scope of this treaty is extended to free passage and guarantees of non-discrimination against users. The execution of this treaty is the exclusive responsibility of Egypt, and her transgression or failure to comply with it would create an unconditional right in the injured party to request compliance with the principles of the treaty.

Therefore, we can conclude that the Canal, as a maritime waterway, cannot be presumed or inferred to be international, but that the principles of the Convention create an international right-duty relationship, the violation of which would constitute a transgression and hence an illicit act in the sense of international law.

The Canal remains exclusively Egyptian regardless of its international importance. Her sovereignty and prerogatives are limited only by the Convention and the principles enunciated therein. Therefore, it is within the framework or limits established by the Convention that the full sovereignty of Egypt can be exercised. Sovereignty is the general rule and the principles of the Convention are but an exception to it. This will be important in the interpretation of the principles if there is any conflict between the two, since exceptions are always interpreted in the restrictive sense.

The affirmation and confirmation that the Canal is an internal maritime waterway, exclusively Egyptian, are not only apparent in the Convention but also from the various documents preceding it which marked the creation of the Canal as well as the various international acts of recognition by the nations which signed the Convention of 1888.26

THE CHARACTER OF THE CANAL27

Article 12 of the Convention of 1866 expressly affirms the character of the Egyptian public domain of the Canal.28 Article 10 of the Faraman of November 30, 1854 recognizes clearly that the Canal has been pierced on properties of Egyptian public domain and is therefore property of the state of Egypt. Articles 11, 12, 13 and 16 of the Faraman of January 5, 186629 and Article 4 of the Convention of February 22, 186630 are also worthy of citation insofar as they reflect the

26 On the nationalization of the Suez Canal Company, see "The Tripartite Statement of August 3, 1956," The Suez Canal Problem, U.S. DEPT. OF STATE BULL., supra note 21, at 35, wherein it was expressly mentioned that "the Governments of France, the United Kingdom and the United States do not question the right of Egypt to enjoy and exercise all privileges of a fully sovereign and independent nation, including the generally recognized right under appropriate conditions to nationalize assets not impressed with an international interest which are subject to its political authority."

On the work of the U.N. in regard to the political and security questions concerning the nationalization of the Suez Canal, see EVERYMAN'S UNITED NATIONS 80 (1964); U.N. GEN. ASS. OFF. REC. 7th Sess., Plenary 493-501 (RCS. No. 626) (1952).

27 See Convention of Constantinople of 1888, Faraman of Nov. 30, 1954; Faraman of Jan. 5, 1956; Convention of Feb. 22, 1886 infra note 30. A "Faraman" is the Arabic word for a decree by the sovereign. In this case, it is a decree granting power and authority to M. DeLesseps to undertake his venture. See also Anglo-Egyptian Treaty of 1936 (CMD. 1936) and Anglo Egyptian Treaty of 1954 (CMD. No. 9298 1954).

28 Convention of 1866 art. 12: "However, all rights of Turkey as the territorial power are reserved." Egypt was then territorially part of Turkey and when Egypt ratified the treaty, the Convention of Constantinople of 1888, and gained full independence, she assumed all rights of sovereignty as the territorial power.

29 Faraman of November 30, 1854 art. 10 refers to the right of Egypt to take measures of defense, use her own military forces and maintain public order. The Faraman of Jan. 5, 1866 art. 11 refers to the grant of land and conditions of such grants, and future taxes if the land would be used for agricultural purposes. Art. 12 is a grant by the Government of privately owned land and the establishment of a condemnation board acting as arbitrators for the evaluation of indemnification. Art. 13 states: "The Egyptian Government grants the company-grantee for the duration of the grant the privilege of excavating mines and quarries belonging to the public domain. . . ."

Art. 16 states that the duration of the company and of the grant is ninety-nine years from the date of completion of the canal.

30 Contrat du Vice-Roi d'Egypte avec la Compagnie Universelle du Canal Maritime de Suez art. 4 (1866) prohibits the company from using the land for any speculations. See supra 29 for art. 13, which specifies duration of the grant.
same concept of Egyptian public domain of all land and property through which the Canal runs.

This reflects the character of ownership of the property involved, since it is within the territorial confines and borders of Egypt. The sovereignty of Egypt over the territory involved is demonstrated by other stipulations in the various grants, concessions, Faramans and Conventions. In various ways these stipulations define the conditions of piercing the Isthmus, the exploitations, passage, transit, etc.; all clearly demonstrate Egyptian sovereignty and do not infer in any way the abandonment or delegation of such sovereignty. Article 9 of the Faraman of February 22, 1866 dissipates every possible equivoque. The Canal and all its depending property remain subject to the Egyptian police, who will "exercise freely as on any other part of the territory in order to insure good order, public safety and the execution of the laws and regulations of the country." The citation speaks for itself and it is followed by Article 14 of the 1888 Convention which does not attempt to encroach upon the sovereign right of Egypt. We can conclude safely and unequivocally that the Canal itself, its property, and territory form an integral part of Egyptian territory as a public domain. Furthermore, in examining the 1888 Convention and in light of the situation existing at that time, it is obvious that the Convention, far from limiting the sovereign rights of Egypt, took care to underline them. This is why Article 9 imposes on Egypt and Egypt alone the obligation of taking the necessary measures for the execution of said treaty. It also determines to what extent prior Conventions, Faramans and grants, which were not limited by the 1888 Convention, are valid following the 1888 Convention.

The preamble of the 1888 Convention refers to the 1866 Faraman which, in Article 17, affirms the prior grants, concessions, and conventions, whereas Article 10 of the 1854 Faraman was a grant to Ferdinand DeLesseps and stipulated, "At the expiration of this concession, Egypt will succeed to the rights of the Company without any reserve and will have full ownership of the Canal of the two seas and all installations thereof." Similar provisions appear in Article 16 of the 1856 concession. Finally, let us take note of Article 8 of the Anglo-

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31 By exploitation, we mean management, operation, administration, development and any other activity which such a venture would require. The word exploit is so used in the original French documents, cited and translated herein by the author.

32 Supra note 24.
Egyptian treaty of 1954: 33 "The Maritime Suez Canal, which is an integral part of Egypt. . . ." 34 Great Britain was a signatory to the 1888 Convention.

Thus we conclude that the Canal itself, as a waterway, was and always has been an integral part of the Egyptian territory and therefore the nationalization of the Universal Company of the Suez Canal has nothing to do with the Maritime Canal, and the theory that there is no distinction between the company and the waterway as a Maritime Canal is without foundation. 35

The Maritime Suez Canal is subject to Egyptian laws, 36 although its international juridical status derives from the 1888 Convention, which establishes general principles which were delegated for execution to the sole sovereign of the territory. The users have the right to the execution of the 1888 principles but in no way can participate in the management of the Canal, its control, or execution of the 1888 Convention. Whereas one may invoke the Convention and request its execution in the case of a flag being discriminated against, one may not invoke the right to the management of the Canal itself, claiming this as part of the right of the users under the cover of the preservation of the freedom of navigation.

33 Supra note 26.

34 That the canals are integral parts of the national territory in which they are built results in the fact that they are artificially erected waterways. Oppenheim, AppendicuM to International Law (8th ed. 1955).

35 Supra note 22. Everyman's United Nations, op. cit. supra note 26, at 80: "On July 26, 1956, Egypt proclaimed the nationalization of the Suez Canal Company and placed the management of the Canal in the hands of an Egyptian operating authority. The decree provided for compensation to the stockholders in the Canal Company on the basis of the market value of the shares."

"At a meeting of the United Nations Security Council on October 13, a resolution was unanimously adopted by which it was agreed that any settlement of the Suez question should meet six requirements which had previously been agreed to in the course of private meetings—held in the office of the Secretary-General—of the Ministers for Foreign Affairs of Egypt, France, and the United Kingdom. The requirements were: (1) there should be free and open transit through the Canal without discrimination; (2) the sovereignty of Egypt should be respected; (3) the operation of the Canal should be insulated from the politics of any country; (4) the manner of fixing tolls and charges should be decided by agreement between Egypt and the users; (5) a fair proportion of the dues should be allotted to development; and (6) in case of disputes, unresolved affairs between the Suez Canal Company and the Egyptian Government should be settled by arbitration with suitable terms of reference and suitable provisions for the payment of sums found to be due." U.N. Gen. Ass. Off. Rec. 7th Sess., Plenary 493-501 (Res. No. 626) (1952).

The nationalization of the Universal Company bears consequences exclusively on the company and not on the juridical status of the Canal.  

**The Universal Company of the Maritime Suez Canal**

This is the name of the company as it appears in the first Faraman, the grant to M. DeLesseps. “M. DeLesseps will constitute a Company and we confer upon him the management of it under the name of the Universal Company of the Maritime Suez Canal.” This name created many controversies and equivoques. However, it was nothing but a commercial denomination tending to facilitate the opening of the financial participation of European financiers and underlining the idea that the venture was without distinction of nationality. Said denomination, being commercial, is under the exclusive jurisdiction of national legislation, corporate laws, and denomination of commercial activities. This commercial label can easily be paralleled with the one used by the International Company of Wagon-Lits, which is a Belgian company. The name did not erase the national character of the company.

The historical aspect of the company has already been examined by other researchers. As a general background, we will briefly examine an overlooked aspect.

**The Financial Aspect of the Company as it Pertains to the Piercing of the Isthmus**

Article 5 of the 1854 Faraman starts with the distribution of the Canal’s income: 15% to the Egyptian Government, 10% to the charter members (founders) and 75% to the company. In 1858 the company started with an initial capitalization of 200 million gold francs. These were represented by 400,000 shares. Egypt underwrote 176,000 shares, equivalent to 44% of the company and in 1860, two years after the opening of the financial underwriting and

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37 Supra note 21.
38 Faraman of Nov. 30, 1954, supra note 27.
39 This is the European equivalent of the Pullman railroad car.
40 Supra note 21.
after most of these stocks had made their way in the various world markets, the company reached the verge of bankruptcy. The various stockholders and market reports placed the blame on the financial manipulations of the directors, and Egypt was talked into purchasing 64,000 shares at a price of 32 million gold francs. Some of these stocks were purchased from various individuals willing to sell and it is recorded that among them were 25,000 shares purchased at market price, which was 30% less than the price of issue (nominal), which Egypt had paid. These transactions were carried out personally by M. De-Lesseps.

Egypt had agreed to provide men to participate in the piercing of the Isthmus, but after having paid a heavy toll in lives (120,000 men are claimed to have died in the overall operations) Egypt abolished forced labor on the Canal on February 22, 1866, and withdrew that free privilege, for which she had to pay 30 million gold francs, from the company.

By the same agreement, Egypt was induced into purchasing the sweet-water canal from the company, although it was granted freely to the company and pierced with Egyptian labor. It cost Egypt 16 million gold francs. In addition, the government had freely granted land surrounding the Canal, as requested by the company. The government was induced to purchase this land for 13 million gold francs. The total amount paid in 1866 by Egypt was 84,000,000 gold francs for the restitution of property of public domain and grants freely received by the company.

In 1875, as a result of the expenses incurred for the formal opening of the Canal by the Khedive Ismail, Egypt was forced to sell 166,602 shares to England. England considered this as repayment of a loan of £4,000,000 to Egypt which was guaranteed by these shares. This loan was at an interest rate of 4%, principal and interest payable in 20 years. This gave England £4,000,000 of interest in addition to the £4,000,000 principal. These same shares, which England acquired in this transaction in repayment of a £4,000,000 loan, were worth £72,000,000 in 1929, and from 1875 to 1929 the British treasury received a total income of £38,600,000 as dividends from them. From 1882, it should be remembered, Egypt was occupied by England, un-

42 The sweet-water canal is a canal from the Nile to the construction area running parallel to the Suez Canal for the purpose of supplying water for the laborers constructing the canal and for domestic and agricultural purposes.
NATIONALIZATION OF THE SUEZ CANAL

Under the status of a protectorate, until the first Egyptian constitution in 1929.

Unfortunately, six months prior to the formal opening of the Canal, the company started to show signs of financial instability and the entire project seemed close to bankruptcy once more. Again the blame was placed on the directors, but Egypt came to the company’s aid and loaned it £1,250,000. This amount was considered the reasonable consideration for the transfer of title of certain company buildings which, however, remained in the company’s possession. Since the company was tax free, it gave up a small part of this exemption in return for permanent use of these buildings without cost. Thus Egypt had not gained much in this transaction either.

In 1876, Egypt went through a severe financial crisis and the company purchased the government’s share of the Canal revenues outright from the Khedive. These revenues, amounting to 15% of the Canal’s income, brought an annual income of £869,000 and the total price paid for the entire outright purchase was only £880,000, just a little more than a year’s income.

In summary, the company was able to obtain the sum of £3,500,000 under the pretense of indemnity for the abandonment of certain grants or privileges, while the entire initial capitalization was only £500,000. Under one form or another, the company obtained from Egypt 12.5 million while the entire venture of piercing the Canal cost 16 million.\(^4\) This gives us a brief insight into the financial history of the company.\(^4\)

THE LEGAL STATUS OF THE UNIVERSAL COMPANY OF THE MARITIME SUEZ CANAL\(^4\)

The legal status of the company is summed up in its purpose. It is a company charged with the exploitation of a public service. As such it

\(^4\) In 1956, the total income of the company was £34,500,000 and the total expenditures £18,300,000. The annual net profit of the company in 1956 was £10,700,000, undoubtedly a profitable venture.

\(^4\) This financial data may be found in the documents of the Compagnie Universelle du Canal de Suez; El-Hefnawy, op. cit. supra note 21; documents of the Egyptian Ministry of Finance; Senate and House documents on budgets and finances, Egyptian Senate Library, op. cit. supra note 41.

\(^4\) Faramans of Nov. 30, 1854 and Jan. 5, 1956; Convention of Feb. 22, 1866, supra note 30.
is (1) a public law entity insofar as its relations with the Egyptian Government is concerned, and (2) an anonymous stockholders' corporation.

THE COMPANY EXPLOITS OR MANAGES A PUBLIC SERVICE

It is established that states enjoy a discretionary power insofar as the creation of public services is concerned. In effect, when a state creates a public service it behooves it to adopt one of the recognized types in administrative law. This is established in the grant of the public service concession, in which the state confers to an individual or a corporate structure the administration of a public economic service, the grantee furnishing, as its responsibility, management, labor, capital or whatever is agreed upon. The grantee collects the fees from the users of this public service.

The evaluation of the principle underlying the creation of a public service has raised many problems of definition and distinction. However, it remains a fact that two important characteristics are indispensable:

1. The manifestation of a public need to be satisfied.
2. The subjection of this public service to a system of public law which allows it to follow means and procedures generally exclusively within the province of the public powers, thereby guaranteeing the continuity and efficiency of the needed service.

THE MANIFESTATION OF A PUBLIC NEED TO BE SATISFIED

It appears from the application of these general principles and in light of the documents pertaining to the company that the venture's

46 Egyptian law is derived from the French civil code and is therefore a codified system in which the private law regulates the relationship between individuals or corporate structures, and public law regulates the relationship between individuals and governmental or administrative functions.

47 Pasley, The Interpretation of Government Contracts: A Plea for Better Understanding, 25 Fordham L. Rev. 211 (1956). Anonymous stockholders' corporations are corporations under a special type of regulation which, unlike corporations in the United States, have a different legal status, more like stocks listed on the market in contrast with privately held stocks or those issued to a given name and not negotiable to the bearer or on the market.


49 European administrative law and Egyptian administrative law have the same origin.
purpose and duty were the creation and exploitation of a public service and that it would bear all the inherent elements of a public service.\textsuperscript{50}

It responded to a need of creating a navigable maritime waterway.\textsuperscript{51} To satisfy this need it extended from the Nile a navigable river called the sweet-water canal. This provided water, needed for irrigation and drinking, to the areas of the Canal constructions and adjacent areas between the two extremities of the Canal.\textsuperscript{52} In witness thereof, Article 1 of the first Faraman, dated November 30, 1854 and granting the concession, states: "M. DeLesseps will form for the piercing of the Isthmus of Suez . . . and the exploitation of a passage for great navigation . . . ." Article 1 of the second Faraman of concession, dated January 5, 1856, states: "The Company . . . will have to execute all works and constructions necessary for the establishment of:

1. A Canal appropriate to great navigation.
2. A Canal of irrigation appropriate to river navigation.
3. Two branches of a Canal for irrigation and alimentation."

The Convention dated February 22, 1866 states in Article 9: "The Egyptian Government will enjoy the servitude of crossing the maritime Canal on the points on which it will judge necessary insofar as its own communications are concerned as well as for the free circulation of commerce." Egyptian law No. 73, dated July 31, 1937, referring to the Convention of 1866, enforces the company's obligation in regard to other public needs, such as the maintenance of streets, sidewalks and parks of Ismailieh, the maintenance and protection of the cemeteries, the sewage and the maintenance of the streets and parks of Port-Tewfik. Egyptian law No. 130, dated August 15, 1940 and also referring to the Convention of 1866, deals with the government's agreement with the company in Article 14. The 1949 law goes on to declare that from now on the municipality of Ismailieh will undertake, in place of the company, the charges and obligations relating to municipal services that the company had conducted so far in that city. Article 17 of the same law provides that the company will deliver to the government the sweet-water canal which was created for the purpose of servicing the cities of Port Said, Kantara and the various installations of the Canal.

Prior to the two preceding laws, it was obvious that the company

\textsuperscript{50} El-Hefnawy, \textit{op. cit.} supra note 21. See infra note 57.

\textsuperscript{51} For the purposes of the canal, see supra note 45.

\textsuperscript{52} See Faramans, \textit{supra} note 27.
had obligated itself to satisfy a public need. In regard to the legal status that applies to a public service, it is established that the state which creates such public service submits it to an order of public law, since it has conferred upon the public service the necessary authority, emanating from public law, in order to permit it to perform its purpose. The intervention of the state in the administration of this public service and the subjection of the latter to the status of public law jurisdiction are recognized in the following documents. The first Faraman, dated November 30, 1854, declares:

Article Two—The Manager of the Company will always be nominated by the Government.

Article Six—The tariffs and dues on passages through the Canal will be by mutual consent between the Company and the Viceroy of Egypt.

Article Eleven—By-laws of the Company will be subject and will have to bear our [the Viceroy's] approval. The modification that could be introduced later will have to receive our [the Viceroy's] prior approval.

The first Faraman, granting the concession, stipulates in Article 6 that the tariffs and passage dues collected by the company will always be equal for all nations without any particular advantage to one nation or detriment to another. There again was an imposed control by the Sovereign. The second Faraman, dated January 5, 1856, reaffirms the provisions of the first Faraman.

This is why it is important to analyze the agreements between the government and the company. These agreements are a series of concessions and grants for the exploitation of a public service. These official documents emanated from the Sovereign and under the Sovereign's authority. If we add that the agreements concluded between the government and the company created an effective monopoly in the company for the exploitation of the venture, we can reach the inevitable conclusion that the company was in effect charged with the creation and exploitation of a public service and that the entire venture was a public service.

53 Supra notes 35 and 36.
54 Faraman of Nov. 30, 1954, supra note 27.
55 Faraman of Jan. 5, 1956, supra note 27.
56 Faramans, supra note 27.
57 De Laubadere, Droit administratif (1957); Pequignat, Théorie générale du contrat administratif (1954); Vedel, Droit administratif (1958); Woline, Droit administratif (1957); Langrod, Administrative Contracts: A Comparative Study, 4 Am. J. Comp. L. 325 (1955).
An act of concession is "a legal act in virtue of which a person obligates himself to an administrative authority to exploit a public service at his expense and his risk in return for the right to collect dues paid by the beneficiaries (users) or to obtain subventions or financial advantages provided in the act of concession."

Therefore, the idea of concession of a public service rests on the following bases:

1. The undertaking is by an institution to organize and administer a public service by means of private funds and under its own management. This undertaking is stipulated in various documents concerning the company and notably in Article 1 of the first Farman granting concession and authorizing the formation of a company for the piercing of the Isthmus and the exploitation of an appropriate passage for (great:) navigation. Article 4 of the same Farman stipulates that all works will be done exclusively at the expense of the company and Article 1 of the second Farman stipulates that the company will execute at its expense, risk and peril, all works and construction necessary. Article 7 of the same Farman stipulates that the Maritime Canal and dependent ports will be constantly maintained in good condition by the company at its expense.

2. As developed above, the legal status of the project and the company was for the "purpose of undertaking the exploitation of a venture which resulted in a public service."

3. The undertaking by the grantee (concessionaire) is to assume all risks of the enterprise and to exploit it in the name of a public administration. Article 5 of the first Farman states: "The Egyptian Government will receive annually from the Company, 15% of the net profits ... without any guarantee on its behalf of the execution of works or the operation of the company...." Article 3 of the first Farman fixes the duration of concession to ninety-nine years from the first day of the opening of the Canal connecting the two seas. Article 10 of the same Farman says that at the expiration of the concession, the Egyptian Government will replace the company and will enjoy without reserve all of its rights and will be in possession of the Canal of the two seas and all the establishments depending thereon. Therefore, the concessionaire is exploiting a public service for the benefit of the Egyptian Government. The concession having been granted for a determined period (ninety-nine years), the public service, including installations, machinery, and materials, reverts to the Government at the expiration of the concession. Article 16 of the second Farman bears the same tenor.

4. The compensation agreement to the concessionaire was under the form of right to collect dues from the users of the Canal. The act of concession determines the privileges of the company to collect passage dues according to Article 6 of the first Farman and Article 17 of the second Farman.

This definition is paraphrased from various authorities and is in compliance with those to be found in authorities cited supra note 57.
Therefore, the Egyptian Government had granted the Suez Canal Company a concession for the creation and exploitation of a public service and the state, which reverts to such means to satisfy existing needs, confers to the contractual concessionaire the quality of mandatee to execute a certain task that the state itself should have undertaken. The qualifications of the mandate by the government to the company are confirmed in the Faraman of 1856 where Article 20 specifies "that independently of the necessary time for the execution of these works, our friend and mandatee, Mr. F. DeLesseps, will preside and manage the company."

From the above it is clear that we are dealing with a public service company acting by mandate of the government to perform a public service for a specified period of time and deriving its potential profit from the collection of dues under the authority delegated by the state and with the necessary grants and privileges indispensable to the execution of such an undertaking.

THE COMPANY IS A LEGAL ENTITY IN THE FIELD OF PRIVATE LAW AND ITS RELATIONS WITH THE EGYPTIAN GOVERNMENT ARE OF A NATIONAL CHARACTER

We have demonstrated under what conditions and for what purposes the Egyptian Government granted the company a concession for the exploitation of a public service—primarily for navigation through the Suez Canal. This company, created by public authority, took the form of a legal entity in the field of private law. But, by its creation in the field of public law, it is admitted that the status of a legal entity is governed by an important principle of specialization. In more precise terms, a legal entity must undertake activities only within the frame of its specialty, or field of public service.

When we refer to the documents granting the concession, we realize that it is the Egyptian Government that created the company by conferring upon it the character of a legal entity. The creation of this legal entity was for the purpose of a determined objective, namely, the exploitation of one of the services that the Egyptian Government recognized as needed in Egyptian territory, and for the benefit of maritime traffic and commerce from which Egypt would benefit.

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50 Faraman of Nov. 30, 1854.
60 See supra notes 46, 47, 48 and 49.
62 The Preamble of the Faraman of Jan. 5, 1956, is entitled "Firman de Concession et Cahier Des Charges Pour La Construction et L'Exploitation du Grand Canal Maritime de Suez et ses dependantes." "Cahier des Charges" is the book of charges or obli-
other government can attribute to itself any role in the creation and exploitation of this public service, even though such foreign government entertains relations with the concessionaire. By its formation and composition, the concessionaire is a legal fiction depending on the field of private law and bound to the government, which is an entity dependent upon the field of public law. The nature of their relationship is determined by the grant of concession.\textsuperscript{63}

The act granting the concession demonstrates that the company would not have acquired the necessary legal status to be legally recognized as properly acting under the laws of the country if it had not fulfilled the foregoing requirements.

The formation of the company was prescribed by the grantor, by virtue of Article 2 of the first Faraman which provided that the manager of the company would always be appointed by the government. Article 2 of the second Faraman stipulated that "the by-laws of the Company will have to be submitted and bear our approval as well as the name of its founders (charter members)." Article 9 of the second Faraman reserved to the Egyptian Government the right to delegate to the headquarters of the company a special commissioner that was to represent it. Article 19 of the second Faraman stipulated that the list of names of the founding members (charter members) would have to be decreed or embodied in the form of a decree to be promulgated by the Egyptian Government.

That the formation of the company was in conformity with the laws and customs of Egypt is evidenced by the fact that it was constituted by a grant of concession from the Egyptian Government, thereby creating the legal entity which is now the company. It is in this order of thoughts that Article 21 of the second Faraman declared: "Our approval of the by-laws of the Company created under the name of the Universal Company of the Maritime Suez Canal and the present approval authorizes the formation in the form of an anonymous corporation from the date on which the entire capital stock will be underwritten."

\begin{flushright}
\vspace{.5em}\textsuperscript{63} Supra notes 46, 47, 48, 49, 57, and 62.
\end{flushright}
The company having conformed to these requirements and having been constituted according to the legal provisions of the internal laws regulating the formation of an anonymous shareholders' corporation, insures that the Egyptian Government recognizes the status of this legal entity as an Egyptian corporation subject to the laws and customs of the territory, in witness of which was the provision of Article 16 of the Convention of February 22, 1866.

We should add that the preparatory works in view of the formation of the company were undertaken by two parties, on one hand, M. F. DeLesseps, as an individual and not representing any state or government, and, on the other hand, the same M. DeLesseps, this time in his capacity as mandatee of the Egyptian Government, and that the agreement itself was dealing with the exploitation of a local public service. We can conclude again that the legal relationship that existed between the nationalized company and the Egyptian Government had a purely national character and did not bear any foreign or international element.  

THE SUEZ CANAL COMPANY, AN EGYPTIAN ANONYMOUS STOCKHOLDERS' CORPORATION—SOCIETE ANONYME EGYPTIENNE (S.A.E.)

We have demonstrated that the company obtained its legal existence from national legislation under which it had been constituted, by virtue of the power of the legitimate representative of the national or public power, and that Article 21 of the second Faraman authorized and created the company under the form of "Societe Anonyme Egyptienne." Under these conditions, it is indispensable to consider that a company nationally constituted was so to the exclusion of any other international or foreign power. Although this elementary principle is the basis of the Faraman, the author of the concession or grant insisted upon confirming it with an explicit document which stipulated: "The Suez Canal Company, being Egyptian, falls under the laws and customs of the country." This is Article 16 of the Conven-

64 See Faramans, supra note 27.
65 Faraman of Jan. 5, 1856.
66 Supra p. 17.
67 Develle, La concession en droit international (1936); 7 Hackworth, International Law 610 (1943); 2 Hyde, Contractual Claims in International Law 988 (2d ed. 1945); 1 Hyde, International Law 711 (1945); 6 Moore, International Law 703 (1906); Borchard, Contractual Claims in International Law, 13 Colum. L. Rev. 457 (1913); Carlston, Concession Agreements and Nationalization, 52 Am. J. Int'l L. 260 (1958).
tion of February 22, 1866. We have brought out this question of the nationality of the company since it was put in issue by at least two circumstances that we feel are quite interesting.

First Instance.—The Egyptian Government promulgated law number 35 on May 2, 1935, Article 1 of which stated that contracts requiring payment in gold and which bear an international character are null and void, with the exception of such obligations undertaken in virtue of conventions or agreements relative to postage, telegraphs and telephones.

This law was invoked in three cases then pending in the Mixed Courts. One of these cases was against the company. Its creditors requested payment in gold, but the company had refused payment in gold in compliance with the above mentioned legislation. In a decision rendered February 26, 1940, the Appellate Mixed Court recognized the validity of the gold clause contained in the legislation, determining that the 1935 gold legislation allowed gold payments only in regard to state transactions, postage, telegraphs and telephones. The court further stated that the purpose of cancelling obligations to pay in gold was to prevent a depreciation of the national currency. The creditors of the company contended that their obligation be paid in gold or in a foreign non-depreciated currency because the users of the Canal and of the company’s services paid their dues in either gold or foreign currencies. Therefore, they argued, the company could fulfill its financial obligations out of these collected dues and this would not influence the national currency since said income in gold or foreign currency was not injected into the internal financial market. The court concluded that the 1935 law was not applicable, either to the rights of the company in collecting dues in gold or foreign currency or to the obligations of the company to repay its creditors in the same type of currency.

In this decision, the court drew a parallel to a similar case involving the Bank of the Credit Foncier, in which the court took notice

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68 The Mixed Courts were established to try cases involving an Egyptian national and a foreign national, or between foreign national’s, for any disputes arising in Egypt. Judges and lawyers represented several foreign nations.


70 Supra note 69.
that the activities of the bank were of a national and internal character while the Suez Canal Company was an institution having a universal character insofar as its activities with various states were concerned. The company had been created prior to the institution of the Mixed Courts and it could not as a consequence oppose its creditors under the provisions of the Commerce Code of the Mixed Courts. The Bank of the Credit Foncier, continued the decision, was a Societe Anonyme constituted in Egypt after the promulgation of the Mixed Court legislation to which it is now subject. It was further noted that the income of this bank was in local Egyptian currency while the income of the company was in gold and foreign currency, and that the two companies had different types of activities. The Mixed Court attempted to protect the interests of foreign states and foreign creditors against the company, while holding that it was an Egyptian company. Although the decision was in favor of the creditors, it reaffirmed the Egyptian nationality of the Company.

This decision involving the Suez Canal Company is an error in the application of the law for the following reasons:

1. The 1935 Gold Act\textsuperscript{71} is explicit insofar as the absolute cancellation of any gold clause is concerned. An explanatory note accompanied the promulgation of this law which clearly indicated that the cancellation was for the purpose of putting an end to discrimination, established by the Mixed Courts, between internal activity and external activity. Although the law excepted certain payments made by the state or for postage, telegraphs and telephones, the application of the law is unambiguous. As a general principle of law these exceptions must be interpreted in the restrictive sense. Therefore, it does not follow that the Mixed Courts can attribute themselves the power to search for the hidden scope of the legislation in determining that the company's income did not influence the national financial market.\textsuperscript{72}

2. It is obvious that the above law is a matter of public policy and as such no interpretation thereof should differ from the obvious verbal context of the legislation itself. This may be different in matters of private law which regulate the relationship of individuals and in which the law may disgress from the letter to the spirit of the transaction.

3. The argument invoked referring to the universal nature of the business of the company confuses the service of the company with the administration of the same. The service of the company may be universal but the company itself, created under Egyptian laws as the administrator of a public service limited within the confines of Egyptian territory, cannot be confused with the type of service it renders, and certainly not with its name. This brings us again to the example of the International Company of Wagon-Lits, which administers a service of a much more universal character than the Suez Canal

\textsuperscript{71} Supra note 35.

\textsuperscript{72} See briefs of Government Attorney in cases cited in supra note 69.
Company, since it extends its service outside the confines of the Belgian territory. However, it has never been contended that it is not a Belgian company subject to Belgian laws.

At the time of this gold payments controversy, the British Government had intervened in the action in its capacity as stockholder and had presented to the Mixed Court the following argument: "The company is a legal entity by virtue of the Egyptian law that regulates it. Its nationality is therefore Egyptian and necessarily subject to Egyptian laws."\(^73\)

The Appellate Mixed Court had recognized in two other decisions the Egyptian nationality of the company. These decisions were rendered on June 4, 1925 and June 18, 1925, and stated specifically that the name of the company "... Universal, was due to the fact that it was formed to gather capital from various parts of the world and that it had to draft its documents in various languages."\(^74\)

The Egyptian Government, in view of this erroneous application of the 1935 Gold Act by the Mixed Courts and as a result of the Mixed Court’s misinterpretation of local laws in other instances which infringed upon the national sovereignty, rendered Ordinance No. 113 through the military governor. Dated January 5, 1945, it suspended the execution of the two decisions rendered by the Appellate Mixed Court in regard to the Suez Canal Company case and the Land Bank case, which were based on the Credit Foncier case. The ordinance suspending these two decisions had the nature of a legislative act (in time of war) and reaffirmed the 1935 Gold Act by suspending a decision contrary to the legislature’s intent.

Second Instance.\(^75\)—This was on the occasion of the promulgation of the 1947 law regulating the anonymous stockholders’ corporation—Societe Anonyme Egyptienne.\(^76\) By virtue of this law, the government required that all boards of directors of corporations of this type be comprised of a determined number of Egyptian members and that the personnel of all such companies be composed of a determined proportion of Egyptian employees.

\(^73\) See amicus brief of the British Government, which intervened in case decided Feb. 26, 1940, supra note 69.

\(^74\) Supra note 69.

\(^75\) See MINISTRY OF INFORMATION OF EGYPTIAN GOVERNMENT, op. cit. supra note 41; El-HEFNAWY, op. cit. supra note 21. See also Suez Canal Company documents with Egyptian Government, which are on file at the former offices of the Company in Paris, France.

\(^76\) Supra note 35.
The Suez Canal Company attempted to exempt itself from the application of this law and presented a note in which it raised the question of the applicability of the law to it. The note stated that the contractual character that linked the company to the government resulted from the Faramans, the decrees, and law No. 73 of 1937, and that the Egyptian Government did not have a unilateral right to cancel rights granted to the company which were the basis of its economic, legal, financial and technical structure. Furthermore, the note stated, the company had vested rights derived from the act of concession and that the Egyptian Government had undertaken obligations towards the company in virtue of which it had conferred upon the company the privileges of administration, the piercing and exploitation of the Canal, and a guarantee that the internal administration of the company and its relations with the stockholders would be subject to French law. It emphasized that these obligations bind the Egyptian Government in the present and in the future, and that if not so bound, the government could gradually withdraw all the privileges it had granted the company and therefore the present instance was not a matter of the application of a law, but a matter of respecting vested rights and obligations undertaken previously. The note concluded that the government could not undo its contractual obligations by promulgating a law. This would mean that any agreement concluded between the state and foreigners or foreign interests would be illusory since it could be nullified by the promulgation of any law.

The government delegated Dr. W. Raafat to reply to the note of the company. His reply involved the following arguments:

1. The new law was promulgated as a matter of public policy and does not effect prior vested rights. There is no doubt that the concession or grant obtained by the company created juridical relations between the government and the company which had developed consequences and situations giving birth to what are now vested rights. The present legislation or future legislation could not modify them since it would infringe upon the legal principle of the non-retroactivity of law. However, he pointed out that the legislation applied to future results and future effects. Therefore, the by-laws of the company, which determine the selection and composition of the board of directors as well as the choice of its personnel, became subject to certain

77 Note to the Egyptian Government from the Suez Canal Company, Sept., 1947.
78 Full text of the note is in the records of Government notes and correspondence of La Compagnie Universelle du Canal de Suez, former administrative offices of the Company in Paris.
79 Legal scholar, former Professor of Law, University of Cairo, represented the Egyptian Government in this exchange of legal notes.
restrictions in 1937. Therefore, as the 1937 law imposed certain changes which have not been disputed, the same is now true with the present legislation.

The present law says that a percentage of the members of the board of directors, employees and laborers must be national citizens. The company could not sustain the argument that it had vested rights by virtue of which only two Egyptian members could sit on its board and this by virtue of the 1937 law. Neither could the company argue that the law would violate its vested rights while other enterprises were subject to the same law and had to hire a determined percentage of Egyptian personnel. The basis of this concept is that this is a matter of public policy and that as such the government may regulate such matters as it had embodied in this labor legislation. This is also in agreement with eminent French jurists such as Dean Bedant, Prof. Laborde La Coste and others who formulated the bulk of French theory and doctrine of public law.80

Since the 1947 law was specifically directed toward the hiring of a greater number of Egyptians in corporations exercising their activities in Egypt, it is logical that it pertained to public policy and national interest. It is of little consequence that the result of such legislation pertains to relations created by public or private law since in itself this legislation was public law and was a matter of unanimous agreement in the field of French doctrine and jurisprudence.

2. The present legislation does not affect any basic obligation between the parties since these contractual obligations were of two natures: (a) conditions of generality and (b) specific contractual conditions. Conditions relating to the status of personnel and employees are conditions of generality. They are therefore subject to modifications by the government and such modifications were in no way a breach of contractual obligations. The noted French legal author, Duguit, and Prof. Jéze are in complete agreement, they being the foremost authorities on the subject.

3. In regard to the company’s argument that French law should apply, the reply by Dr. W. Raafat81 was that the Egyptian legislature was referring to certain provisions in the then existing French laws which were lacking in the Egyptian laws, which in respect to the subject matter had the same origin. Article 16 of the Convention of February 22, 1866 declared that it was for the purpose of implementing Egyptian legislation and hence could be unilaterally modified. Therefore, the reference to the applicability of a specific area of the French law which was lacking in the Egyptian law cannot be considered as an abandonment by the Egyptian legislature of its privilege to enact laws in regard to corporations, which is the subject matter of this dispute. Egyptian law derives from the French law, and that which was lacking in the Egyptian law was gradually supplemented.

It is interesting to note at this point the decision of the International Court of Lagaye in regard to matters of loans to Serbia and Brazil.

80 Dean Bedant and Dean Lacoste, scholars and authors of many books and articles, are former professors of law, University of Paris.

81 The above paraphrased and condensed opinion from Dr. W. Raafat’s note is a true representation of the spirit of the note and the arguments are identical. They also represent the opinions of the author.
The agreement thereby concluded was not considered an agreement between states, insofar as states are subjects of international law, but as based on national law. Therefore, the national law regulating the activities of the Suez Canal Company, which is a company of Egyptian nationality, is Egyptian law to the exclusion of any other law, even though Egypt may wish to subject for a time a given aspect of such activity to a foreign law or custom that she deems more favorable or complete until such time as she would decide to eliminate the application of such foreign law. This is merely the confirmation of a sovereign prerogative.

THE JURIDICAL NATURE OF THE ACTS OF CONCESSION BY A STATE AND THE CONCESSION OF THE CANAL GRANTED BY EGYPT

French jurisprudence sustained various theories as to the interpretation of the nature of the right a state exercises on public property,

82 See MINISTRY OF INFORMATION OF EGYPTIAN GOVERNMENT, op. cit. supra note 41. See also Decree, P.C.I.J., ser. II A, Nos. 10 and 21 (1939): “Every contract which is not an international agreement—i.e., a treaty between states is subject (as matters now stand) to municipal laws.” Martini (Italy v. Venezuela), 25 AM. J. INT’L L. 554 (1931), held that there exists in several countries a well established jurisprudence by which the rights of a grantee under a contract of concession are interpreted restrictively. International Fisheries Company (United States v. Mexico), [1930-1931] Opinions of Comm’rs Under the Convention Concluded Sept. 8, 1923, Between the United States and Mexico 207: “[This] was not an arbitrary act . . . which in itself might be considered as a violation of some rule or principle of international law.” Case of the Serbian Loans, P.C.I.J., ser. A, Nos. 20-21 at 41 (1929): “Any contract which is not a contract between states in its capacity or subjects of international law is based on the municipal law of some country.” Case of Hemming, Nielsen’s Report 617 (1926), 15 AM. J. INT’L L. 292 (1921); The Abailard Case, 12 REV. GEN. DE D.I.P., Documents 12 (1905).

Amersinghe, States Breaches of Contract With Aliens, 58 AM. J. INT’L L. 881 (1964), stated that there is little or no evidence that any breach of such a contract by a state has per se been treated as a breach of international law in any case. On the other hand, there is evidence that such breaches per se have not been regarded as breaches of international law. A breach of contract is not a breach of international law.” Id. at 892.

83 Brandon, Legal Aspects of Private Foreign Investments, 18 Feb. B.J. 298, 304 (1958): “The right of a state to nationalize any private property situated within its territorial jurisdiction is not generally disputed. This is an essential attribute of sovereignty.” See also Hyde, Compensation for Expropriation, 33 AM. J. INT’L L. 108 (1939); Kissam and Leach, Sovereign Expropriation of Property and Abrogation of Concession Contracts, 28 FORDHAM L. REV. 177, 194 (1959): “Whatever the status of the law or of informed opinion may be as to the obligation of a state to pay compensation to a foreign national whose property has been expropriated, there is substantially unanimous agreement with the proposition that if compensation is paid . . . the state has the power and the right under international law to expropriate . . . within its territorial jurisdiction . . .”; Joseph, International Aspects of Nationalization, 5TH CONF., INTERNATIONAL BAR ASSOCIATION (1954): “The right of a state to nationalize property under its jurisdiction is unquestioned regardless of whether the owners be citizens or aliens.”
and the nature of grants and concessions thereof. Toward the end of the nineteenth century, the trend was toward the application of principles of public law to public property. Gradually, courts followed this tendency in their decisions and this evolution is now established law.

It is indisputable that the area in which the Canal was pierced and the property on which buildings and installations are in existence are part of Egyptian territory, since they are within Egypt's international borders. Thus, the right exercised by the state on such property is a property right derived from the public law. Under these conditions, could the concession granted for the exploitation of the Maritime Suez Canal modify this juridical situation? In other words, is the grant of a concession for a given period of time (ninety-nine years) an act which would affect the property rights of Egypt on its public territory?

Article 87 of the Egyptian Civil Code states:

"1. Property of public domain is real property and personal property belonging to the state and to other legal entities of the public law, and affected by assignment either in fact by law or a decree to a public service or public utility."

"2. These properties are inalienable, unattachable and not subject to statutes of limitations [adverse possession]." Article 88 of the Code says: "The properties of public domain regain their character if they stop being assigned to a public utility service and if this is done in fact by law or by decree or whenever the public utility or public service to which they are assigned is terminated."

The rationale of public property and public domain is based upon the need to satisfy a public service, a public order, a public utility or a public need, unlike that of private property, which benefits the owner. Since the grant by the Egyptian Government for the exploitation of the Suez Canal was a concession of some of the public property reserved for public utility, and since this public property was part of the entire public domain, this property enjoys the immunity

84 Long, Weil, and Braibant, op. cit. supra note 61.
85 Faraman of Jan. 5, 1956, art. 16, supra note 27.
86 Sanhoury, El-Wassit, which is his interpretation in a three volume book of the Egyptian Civil Code. Dr. Sanhoury is former Professor of Law, Dean of Cairo University Law School, and former Chairman of the Drafting Committee of the 1958 Egyptian Constitution.
87 De Laubadere, op. cit. supra note 57; Sanhoury, op. cit. supra note 86; Tamawy, Administrative Law; Waine, op. cit. supra note 57. Tamawy is Assoc. Professor of Law, Cairo University.
provided for in Article 87, paragraph 2 of the Egyptian Civil Code. It follows that the Canal and surrounding territory are in the category of public property, reserved and assigned to a public utility, and cannot become the private property of the company, the grantee.\textsuperscript{88}

It is in the application of this principle of public domain property that the French Conseil D'Etat (the French Administrative Court) decided that the coal extracted from the areas of Wahran through the labor of the grantees of a concession was the property of the state because the assignment of this area for use by a public utility did not vest ownership in the grantee, and would not involve any of the property within the land not destined for the purpose of the public utility. In regard to property assigned to a public utility, the state maintains the status of ownership and the authority to exercise its police power, public policy, and public hygiene statutes.\textsuperscript{89} We have no difficulty finding that these inherent qualities of public domain exist in all documents and concessions pertaining to the Suez Canal Company.

\textbf{THE ASPECTS OF OWNERSHIP BY THE EGYPTIAN STATE APPEAR FROM THE FOLLOWING DOCUMENTS}\textsuperscript{90}

1. Article 4 of the Convention of February 22, 1866, dealing with properties necessary for the creation of the Canal and the construction of buildings and warehouses, provided: "The Company cannot use any of these territories for the purpose of speculation. It will return the property either for agriculture, erection of buildings or whenever population increase will so require...."

It appears from this provision that in granting the company the necessary territory and property for the exploitation of the enterprise, the Egyptian Government had no intention of transferring title or ownership of said property, but only intended to put it to the service of the project, prohibiting the company from making use of this property in speculation, sales, or other unintended uses. This clearly strips from the company any incident of ownership that it may have claimed over said territory.

2. Article 18 of the second Faraman of 1866, relative to the concession, stated: "However, in view of the grants of property and

\textsuperscript{88} This also appears from the ban on land speculations in the Faraman of Jan. 5, 1856, art. 4, \textit{supra} note 27. Art. 16 limits the period of said grant to ninety-nine years and Arr. 13 refers specifically to "public domain" of the property.

\textsuperscript{89} \textit{El-Hefnawy, op. cit. supra} note 21; \textit{Tamawy, op. cit. supra} note 87.

\textsuperscript{90} \textit{El-Hefnawy, op. cit. supra} note 21; Scelle, \textit{La nationalization du Canal de Suez, supra} note 21.
other advantages granted to the Company by the preceding articles, we reserve as profit for the Egyptian Government a share of 15% of the yearly profits of the Company."

3. Paragraph 2 of Article 9 of the Convention of February 22, 1866 affirmed that the Egyptian Government will enjoy the use of the property hereby assigned to the public utility without payment to the company-grantee.

This established that the state-grantor had continued to exercise its authority on the property belonging to it even after its assignment to the public utility by means of concession, in witness of which Article 9 of the second Faraman of 1866 stated: "The Egyptian Government will enjoy free passage through the Canal and the Company will not be permitted to collect any dues from the Government."

Article 11 of the same Convention contained a similar provision prescribing that the State continue to exercise its authority on the property subject to the concession for the public service. "The Egyptian Government ... will use for its administrative services (post office, customs) any place it will judge convenient ...; in this event, the Government will reimburse the Company for the sums that the Company would have spent to create or appropriate this property which it will hold to use."

4. Article 16 of the second Faraman granting concession dealt with the termination and expiration date of the concession. This article formally affirmed the right of the Egyptian Government to repossess or re-enter its public property, which includes the Maritime Canal, the property, buildings and equipment of the company at the expiration of the ninety-nine-year concession.

It appears clearly from these documents that the Egyptian Government continued to exercise its rights and privileges during the entire period of concession in its dual capacity as owner of the public property and as the public power exercising governmental control, including its public authority.

**ASPECTS OF THE POLICE AUTHORITY OF THE EGYPTIAN GOVERNMENT**

The police authority exercised by the Egyptian Government as part of its sovereignty is clarified by the following documents:

1. Article 9 of the Convention of February 22, 1866 stipulated that, "The Maritime Canal and its installations remain subject to the Egyp-

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91 EL-HEFNAWY, op. cit. supra note 21; Delson, supra note 21; Scelle, La nationalization du Canal de Suez, supra note 21; Note, 70 HARV. L. REV., supra note 21.
tian police who will freely exercise authority as on any other point of the territory so as to assure the good order, the public security, and the execution of laws and regulations of the country.” Article 10 of the same Convention provided: “The Egyptian Government will occupy within the perimeter of the property reserved for the Maritime Canal any position on any strategical point it will judge necessary to the defense of the Country.” These quotations reaffirm the sovereignty of the Egyptian state.

The Canal and other grants of lands and property are for a limited period of time and to fulfill the need of an exploiting public service. Added to its general authority, Egypt specified its particular police power over these properties. These documents reaffirmed powers a sovereign state uses in the exercise of its sovereignty over its entire territory without distinction or reservation. (This was also reaffirmed in the Anglo-Egyptian treaty of 1936, in the 1937 Convention, as well as in the 1888 Convention. As discussed earlier, this last Convention is the basis of the international obligations assumed by the Egyptian Government.)

CONCLUSION

Unfortunately, notwithstanding all these proofs and demonstrations, the powers of Western Europe, when gathered at the 1956 Lancaster House Conference in London, attempted to confer an international quality or capacity upon the company-grantee, which, as previously demonstrated, is an Egyptian company, Societe Anonyme Egyptienne. This Conference attempted to internationalize the Canal. The idea of internationalizing the Canal came from this “Users Club” Conference. The users thought that their rights were in jeopardy because of the unprofessional and inexperienced management of the Canal by the Egyptian Government and claimed international rights under the 1889 Convention. The allegations were that Egypt violated the users’ rights protected by the 1889 Convention and therefore breached an international duty requiring a remedy.92

THE LEGAL PROVISIONS IN FAVOR OF THIRD PARTY BENEFICIARIES (USERS)

This is a thesis based on French administrative law better known as “Ayants Droit.”93 The French administrative court, the Conseil


93 De Laubadere, op. cit. supra note 57; Long, Weil, and Braibant, op. cit. supra note 61; Waline, op. cit. supra note 57.
D'Etat, had a tendency at its inception to recognize the right of a third party requesting the enforcement of a privilege under a grant.\(^4\) When a public authority delegated to a private party an obligation to conduct a public service, the duties imposed were entered into a special document called “Cahier Des Charges,” meaning “Record of Duties.” Considering that the act between the public powers and the grantee obligated the latter to offer to anybody upon request the service or utility provided in the grant, under these terms any third party who desires this use or benefit found its rights in the act of grant, which was partly a contractual obligation. Therefore, the users for whom the utility or service was created were considered to have a right, based upon the grant, to the services of the public utility. As a general rule, third party beneficiaries cannot invoke the contract between the grantor and grantee even though the grantee’s public service will ultimately benefit these third parties.\(^5\)

The public service company-grantee is in a contractual relationship with the state-grantor under a juridical position regulated only by the acts of grant and the legislation regarding public utilities or public services within the administrative laws, i.e., public law. In consequence, a provision for the benefit of any user or “Ayants Droit” (third party beneficiaries) must be stipulated in the act of grant. These stipulations do not create a right in the third party beneficiary since the third party beneficiary is a person in the private field of law who could not be a contractual party to the grant, which falls under the field of public law. The grant itself contains organic provisions and statutory regulations involving the grantor and the grantee, and other provisions, established for third party beneficiaries, which could not be considered in the light of private contract law. These provisions in favor of third party beneficiaries are in a statutory form obligating the grantee to perform a specific service or duty which will benefit the third party beneficiary. The organic provisions and statutory regulations of such a public service contract remain subject to the modifications of the grantor for reasons he may deem needed for the benefit of the public service and the users. The third party bene-

\(^4\) Long, Weil, and Braibant, op. cit. supra note 61.

\(^5\) Supra note 57. Friedmann, Expropriation in International Law (1953) at 126: “The concept of acquired rights is obscured, ambiguous and undefinable; that it finds no support in international judicial decisions, that it cannot therefore be raised to the dignity of a principle of international law...”
fiduciaries cannot formulate objections or requests indicating their requirements other than through the grantor. We refer also to the declaration made by the Minister of French Communications in the 1908 Session of the French Parliament, which reflected the same opinion.96 It is clear, therefore, that the third party beneficiary or user cannot compel a grantor to change or amend its agreements with the grantee under the concept that as third party beneficiary he has rights either vested or in future.97

As a consequence, there is no relationship between the grant to the Universal Company and the regulations established in the 1888 Convention, which incidentally gave rise to an international juridical situation many years after the legal relationship was established between the Egyptian Government and the company. The company, as an entity dependent upon the field of private (corporation) law, could not participate and in fact did not participate in the International Convention of 1888. Such a Convention remains within the initiative and sole competence of a sovereign state exercising its rights on its territory.98

We cannot conclude this section without making reference to the fact that the rights of a third party beneficiary under the Convention of 1888, and as mentioned in the acts of grant, pertain to a “vessel” requiring passage through the Canal and being discriminated against. The only contractual obligation imposed by the state in the act of grant seems to be the free and unmolested passage of any vessel regardless of its flag or the nationality of its owner and subject only to war restrictions between Egypt and the country seeking the passage of its vessels.100

96 French Congressional Record (1908).

97 Meron, Repudiation of Ultra Vires State Contracts and the International Responsibility of States, 6 Int'l & Comp. L.Q. 273, 288 (1957): “It is sometimes said that contracts affecting the attributes of national sovereignty . . . do not create vested rights, and that there is no responsibility for their repudiation by the contracting state. . . .” Meron contends that the basis of the State’s responsibility is damages, and that compensation dissolves any further liability of that state. See also Committee on the Study of Nationalization of the American Branch of the International Law Association, Nationalization of the Property of Aliens, 13 Rec. of N.Y.C.B.A. 367, 369 (1958).

98 The first Faraman was signed in 1854. See also Faraman of 1856, supra note 27, and Convention of 1888, supra note 30.


100 Supra notes 21 and 99.
IS THE NATIONALIZATION AN ILLICIT ACT IN THE MEANING OF PUBLIC INTERNATIONAL LAW? 101

THE LEGAL STATUS OF THE NATIONALIZATION

As mentioned above, it is the unanimous opinion of the legal doctrine and jurisprudence in France and Egypt that the grant has a double nature by the fact that it consists of two types of conditions: 102 (1) contractual conditions and (2) organic conditions.

The contractual conditions imply mutual obligations determined by both parties such as assistance, guarantee of interest, assumption of expenses and distribution of profits. These obligations may be bilateral or unilateral. It is, however, the opposite when we deal with organic conditions because they refer to the method of the exploitation of the public service objective of the concession and are only unilateral impositions by the grantor. This is considered the law that governs the grant.

We are concerned with the withdrawal of the grant by the Egyptian Government from the Company prior to its expiration 103 (eighteen years earlier). The French judicial decisions hold that if a public service does not produce the expected results the administrative powers may terminate the grant. 104 The French Conseil D'Etat, the highest administrative court, has also been of this opinion and French law No. 129 of 1949 declares, in article 4, that the grant must express the conditions and methods of withdrawal of a grant from a public service if contemplated prior to its expiration date. 105

Although the documents granting the exploitation of the service


102 De Laubadere, op. cit. supra note 57; Long, Weil, and Braibant, op. cit. supra note 61; Mitchell, op. cit. supra note 48; Pequinat, op. cit. supra note 57; Tamawy, op. cit. supra note 87; Vedel, op. cit. supra note 57; Waline, op. cit. supra note 57; Williston, op. cit. supra note 48; Langrod, supra note 57; see also supra notes 46, 47, 48, and 49.

103 Faraman of Jan. 5, 1856, art. 16, supra note 27.

104 Supra note 102; see Meron, supra note 96, and Mouskelly, International Law, which is an intensive study on this matter.

105 On French administrative law, see supra note 102.
of the Canal did not provide for or anticipate the withdrawal of the grant prior to its expiration date, it still remains the privilege of the grantor to reassume the public service even though prior to the end of the grant. This coincides with French jurisprudence. The limitation (if we may call it such) in law No. 129 of 1941 had the purpose of allowing the grantee to recoup or recover its investments in the enterprise. The fabulous amounts representing the annual income of the stockholders of the company, and Egypt’s payment of almost 80% of the cost of the Canal in addition to the 120,000 Egyptian lives lost while completing the piercing of the Canal, indicate clearly that the investments by the stockholders have long been recovered. By the very provisions of the grant, the Egyptian Government found itself in the position of doing one of two things:

1. It could put an end to the concession prior to its expiration since it alleged grave infractions of contractual obligations by the company leading to a breach of contract. In this case, the public au-

106 Supra note 102. See Fenwick, International Law (3rd ed. 1948), at 292: “...[p]ersons entering into such contracts do so with a knowledge of the risks involved and with expectations of correspondingly large returns upon their investment;” O’Connell, The Law of State Succession (1956), at 271: “Another alleged justification for the right of a state to abrogate a contract is based upon a sort of contractual assumption of risk”; and Hendryx, A Sovereign Nation’s Legal Ability to Make and Abide by a Petroleum Concession Contract, Platt’s Oilgram News Service (N.Y. ed. Apr. 28, 1959), who supports the proposition that the service of their people requires that on proper occasions governments must be released from, or be able to override their contractual obligations by citing three United States Supreme Court decisions: Thurlow v. Massachusetts, 46 U.S. (5 How.) 504 (1847); Marcus Brown Co. v. Feldman, 256 U.S. 170 (1921); and W. B. Worthen Co. v. Thomas, 292 U.S. 426 (1934).

107 French law No. 129 (1941), Official Law Reports; Dalloz, Noveau repertoire.

108 This is equivalent to the right of compensation in international law. See Fenwick, op. cit. supra note 106; O’Connell, op. cit. supra note 106. See also Einaudi, Byé, and Rossi, Naturalization in France and Italy (1955); Domany, Postwar Nationalization of Foreign Property in Europe, 48 Colum. L. Rev. 1125 (1948); O’Connell, Unjust Enrichment, 5 Am. J. Comp. L. 2 (1956).


110 The Government issued a note of explanation following the nationalization law. The note declared the discovery of serious contractual breaches by the Company which justified the termination of the concession.

111 On international law and compensation, see Cavarez, La protection des droits contractuels reconnus par les états à des étrangers à l’exception des emprunts (1956); Foighel, Nationalization; A Study in the Protection of Alien Property in International Law (1957); Abdel-Wahab, Economic Development Agreements and Nationalization, 30 U. CinC. L. Rev. 418 (1961); Hjerner, The General Approach to
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Athority could have made use of the power of seizure or sequestration, which are both methods tolerated under French law as methods of dealing with irregularities or breaches of contractual obligations by public services and public utilities.\(^{112}\)

2. The government could just withdraw the concession by a unilateral act based upon considerations of public policy which only the state may determine. In this case, the withdrawal of the concession differs from the method of seizure in that it allows the grantee a right to indemnification.\(^{113}\)

In selecting the second procedure, the government granted proper indemnification without artificially diminishing or reducing the actual value of the stock of the company on the Paris stock market. This act in itself is legal, and recognized by both the Egyptian and French law, even though the withdrawal was not anticipated or expected in the grant itself.\(^{114}\)

We deal with France as an example since, as previously mentioned, most of the Egyptian law has its source in French law. There was a very large scale of nationalization in France, involving all military

Foreign Confiscations, Scandinavian Studies in Law (1958); Kissam and Leach, supra note 83.

\(^{112}\) On the theory of French administrative law, see de Laubadère, op. cit. supra note 57; Weline, op. cit. supra note 57. See also Einaudi et al., op. cit. supra note 108; Krzyanowski, Quelques développements récents en matières de nationalisation de la propriété privée étrangère (Thèse, Doctorat, Univ. of Paris 1961); Allison, Cuba's Seizures of American Business, 47 A.B.A.J. 48-51, 187-191 (1961); Baade, Indonesian Nationalization Measures Before Foreign Courts--A Reply, 54 AM. J. INT'L L. 801 (1960); Doman, supra note 108; Donike, On the Nationalization of Foreign Shareholders' Interests, 4 Y.L.F. 46 (1958); McNair, supra note 14; Comment, Cuban Nationalization Decree Reviewed under International Law, 37 N.Y.U.L. Rev. 155 (1962); Note, 49 Calif. L. Rev., supra note 19.

\(^{113}\) See Brandon, supra note 83; Hyde, supra note 83; Joseph, supra note 83; Meron, supra note 97; Rubin, Nationalization and Compensation: A Comparative Approach, 17 U. Chi. L. Rev. 458 (1950); Draft Resolutions on the Effects of Nationalizations, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (1950).

\(^{114}\) There is great confusion in the area of expropriation, nationalization and withdrawal of grants not only in international law but in national laws under a civil code and a separate administrative system of jurisdiction. We have tried to approach the problem from its national law sources and examine its effects in international law where nationalizations are generally recognized and admitted, subject to prompt, adequate, and just compensation. For compensation in international law, see supra notes 83, 84, 93, and 113. For administrative law and administrative contracts, see de Laubadère, op. cit. supra note 57; Long, Weil, and Braibant, op. cit. supra note 61; Shehata, Principles of Administrative Law (1955); Vedel, op. cit. supra note 57; Weline, op. cit. supra note 57; and infra notes 118 and 119.
industries, the Renault Industries, the "Gnome and Rhone" Company (River Navigation), the Company of "Transport Aerien" (now Air France), the gas and electricity companies, "Houilleres et Charbonnages" (mining and coal industry), the "Societe Nationale de Presse" (printing and publishing of newspapers), banks, insurance companies and many other industries which are of less importance. At the time this was justified and legally sustained by French law, doctrine, and jurisprudence.\footnote{5} England is another example. When the Labor Party was in power, it nationalized all industries dealing with coal, gas, electricity, railroads, airlines, telephones, telegraphs, the Bank of England, coal and steel.

Many examples of nationalization are found all over the world. Some countries deal with a given service, such as Mexico, which nationalized all petroleum industries. Other countries, such as France and England, nationalized a vast group of industries.\footnote{118}

However, it is unfortunate that because of political considerations, when the Egyptian Government, based on the same legal principles and following examples set by France and England, who have both left their imprint and influence in Egypt, decided on July 26, 1956 to nationalize the Suez Canal Company, a pandemonium developed in Western Europe and was lead by those same countries which preceded Egypt in the field of nationalization in its various forms.\footnote{117} As mentioned above, the nationalized company, as a corporation, was in the field of private law, its relationship with the Egyptian Government had a purely national character, the company exploited a public service in virtue of a concession granted by Egyptian public authority, and the state had a right to nationalize, with compensation, a public service for considerations of public policy.\footnote{118}

\footnote{115} Supra notes 106, 107, 108, and 112, 113, and 114.

\footnote{116} On the nationalizations by Mexico and the General Claims Commission established between Mexico and the United States, see Bisno, op. cit. supra note 2.

\footnote{117} See Statement by Secretary of State Dulles, Dept. of State Bull. No. 33, p. 335 (1956).

\footnote{118} On the effects of nationalizations and right to nationalize in international law, see Kissam and Leach, supra note 83, at 214: "Unless restricted by treaty or other agreement a state has the right under international law to expropriate property of foreign nationals within its territorial jurisdiction but only if the expropriation is made for reasons of public utility and only upon the payment of prompt, adequate and effective compensation. The requirement of compensation is equally applicable in cases of both general and individual expropriation."
The Nationalization of the company in the view of public international law is a purely internal matter, as it arises from principles of sovereignty and independence. Every state can regulate transactions in her own territory, allow the economic regimes that she considers most advantageous for her needs, and nationalize when necessary. These rights have been recognized by the United Nations resolution of the General Assembly, December 21, 1952, No. A-626-VIII, which declares that it is a "sovereign and inalienable right of every state to freely dispose of her natural wealth. . . . [This] is fully in agreement with the goals and principles of the United Nations Charter." This resolution invites the member states to respect this right and to abstain from any action tending to compromise it. The company, as demonstrated, was not an entity within the field of international law; was not created through an international act; after it was created, it did not develop any international obligation; and the nationalization, applying exclusively to the company by means of withdrawing its concession, does not constitute an international act and therefore cannot violate an international obligation.

In reference to what we mentioned concerning the required conditions for the imputation of an illicit act in international law, we cannot find a transgression by Egypt of an international obligation or agreement, and in application of the principles of the act of transgression in international law, we cannot find that Egypt failed in any way

119 Supra note 118. On the validity of nationalizations, see Hyde, International Law 650 (1947): "A state enjoys an exclusive right to regulate matters pertaining to the ownership of property of every kind which may be said to belong within its territory." See also Bishop, op. cit. supra note 2; Guggenheim, op. cit. supra note 1; Katzarov, Théorie de la nationalisation Neuchâtel (1960); Oppenheim, op. cit. supra note 2; Brandon, supra note 83; Domke, supra notes 18 and 112; Hyde, supra note 83; Joseph, supra note 83; Katzarov, L'ordre public international et les nationalisations, 22 Rev. int’l française du droit des gens 13 (1957); Katzarov, Validity of the Act of Nationalisation in International Law, 22 Modern L. Rev. 659 (1959); Rubin, supra note 113.

120 U.N. Charter art. 2, para. 7.


122 U.N. Charter. See also El-Hefnawy, op. cit. supra note 21; Scelle, La nationalization du Canal de Suez, supra note 21; Note, 70 Harv. L. Rev., supra note 21.
to exercise an international duty or obligation resulting from international public law, by nationalizing an Egyptian company.  

It remains for us to determine in what way Egypt may have violated international law. Therefore, we must find a duty arising out of an international treaty or the breach of a general principle of international law bearing upon the rights of a state or of a legal entity created by international law, such as an international organization. As we have demonstrated, there was no breach of an international duty arising from an international agreement or convention. It remains to be seen in what way the company could contend it was an international legal entity, on subject to international diplomatic protection or international extra-territoriality.

This contention unfortunately arises out of the declaration of August 2, 1956, promulgated by the governments of France, Great Britain and the United States, which tended to give the character of an international institution (maybe similar to the United Nations) to the company, and also to establish rights for the users in the management of the company and in the administration of the Canal, in view of their rights, as third party beneficiaries, to free passage and free navigation.

However, as demonstrated above, the rights of third party beneficiaries are limited to those certain rights restrictively enunciated by the 1888 Convention of Constantinople which gave Egypt the exclusive right and prerogative of application and execution of the principles with measures it judges opportune to take. Regardless of the legal arguments that anybody brought concerning the fact that the company did not have an international legal status, the influence of the great political powers overrode all legal argument.

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123 See Bishop, op. cit. supra note 2 and supra notes 1, 2, 3, 4, and 5.
124 Kissam and Leach, supra note 83.
125 The only international treaty involved was the Convention of 1888, supra note 27 (which was not breached and is still in force). See U.N. Gen. Ass. Off. Rec., supra notes 26 and 35.
126 La Compagnie Universelle du Canal de Suez pretended to have some sort of special international status in view of its universal service. See Scelle, La nationalization du Canal de Suez, supra note 21.
128 See supra notes 93, 94, 95, and 96.
129 See supra note 27 and El-Hefnawy, op. cit. supra note 21.
130 See supra note 117.
The services rendered by the company, just as the Canal itself, are of international importance and universal utility to the world. However, the character of the company as well as the territory that the Canal crosses is definitely national, and the importance of the service rendered by the company cannot, under our present legal system and our present international law, give any legal status to a local company other than the one for which its grantor created it.  

There was a theory used in 1956, which was derived from American international law doctrine regarding companies to which the United States could grant diplomatic protection if more than 50% of the stockholders are Americans. However, this theory as used by the conference of the users of the Canal was totally out of order and there is no doubt that the percentage of ownership of a corporation's stock does not determine its character or its nationality and certainly does not give it extra-territoriality for foreign diplomatic protection. The purpose of this doctrine or any similar diplomatic protection doctrine is exclusively for restitution or indemnification which is also an established principle of international law.

This leaves the problem of indemnification and the methods of payment of said indemnity. If Egypt had refused indemnification to the stockholders of foreign nationality, I would agree that the states whose citizens had been deprived of their property or refused indemnification could and should be protected by proper diplomatic action to obtain indemnification for their citizens. The argument dealing with diplomatic protection is therefore overthrown by its own purposes. These purposes are the negotiations for remuneration and adequate indemnification of the injured party. The allegedly injured parties (stockholders) were granted their due rights without negotiations and there was no question as to the fairness or adequacy of the indemnification. The basis for repayment was the price of the stock

131 See Faramans supra note 27.
132 Allison, supra note 112; Domke, supra note 18; Stokes, Some Aspects of the Protection of Foreign Investment under International Law, PROCEEDINGS AND COMMITTEE REPORTS, INT'L LAW ASS'N, AMERICAN BRANCH 19 (1959-60); Wetter, Diplomatic Assistance to Private Investment; A Study of the Theory and Practice of the United States During the Twentieth Century, 29 U. CHI. L. REV. 275 (1962).
133 Supra note 132.
134 The entire purpose of diplomatic protection is to ensure prompt, adequate and just compensation. See supra note 132 and discussion of compensation in supra notes 83, 111, and 113.
at the closing of the Paris market the day before the nationalization, July 26, 1956. The events had even then outgrown the alleged problem.\textsuperscript{135}

Egypt, by virtue of her sovereign rights as recognized by the United Nations Charter\textsuperscript{136} and by general principles of public international law, nationalized a local company. Egypt gave all the stockholders, whether foreign or national, just compensation. The Act of Nationalization did not apply to an international legal entity, nor did it abrogate an international right. The act did not constitute a transgression in the sense of public international law and therefore Egypt cannot be said to have committed an illicit act, in the sense of international law or recognized principles as established by valid precedents. The Act of Nationalization was a purely national matter giving rise to no right of international interference or sanction and any such unjustifiable act by any nation would constitute a transgression of Egypt's right to dispose of property under her jurisdiction and within her own boundaries.

\textsuperscript{135} Law of Nationalization of July 26, 1956 (no. 385 [1956]) (Egypt), art. 1: "... The stockholders and bearers of founding shares will be compensated for their stocks and shares which they hold on the computed value of closing quotations of the Paris Stock Market for the day preceeding the date of issuance of this law. This compensation shall be paid after the state will have taken possession of all funds and assets of the nationalized company."

\textsuperscript{136} U.N. Charter art. 2, para. 7.