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Additional Information:
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Since 26 July [1956] the Western powers have continuously denounced Egypt’s violation of its international obligations. Yet even though they have denied the legality of the Canal Company’s “nationalization” by the Egyptian State - a measure based, at least in principle, on numerous precedents - they have discreetly left the infringements of the [private] rights of the Company unmentioned.

As Mr Roger Pinto has recently shown in this newspaper¹, the usurpation of the Company’s power to manage the canal and Egypt’s claim to take over this business from then on are contrary to the provisions and implications of the Constantinople Convention. One need not hesitate to add that its nationalization and the brutally enforced expropriation of all of its assets in Egypt and abroad - compensated with the promise of a future and unilaterally set indemnity - were as well illegal.

Although the Universal Company of the Suez Maritime Canal is tasked with the execution of an international public service, it can certainly be regarded as a legal entity of private law. Nevertheless it is subject neither solely to the Egyptian legal order nor, therefore, to the arbitrary decisions of the respective Egyptian state authority. There is no need to take sides in the very technical controversy about the ‘nationality’ of companies to be convinced of this fact. For, after all, the controversy as to how to determine the national legal order to which a company is subject concentrates on only three possible criteria: the Anglo-Saxon ‘incorporation’ [theory], according to which a company has the nationality of the country whose law governed its birth and conferred upon it its structure; the ‘real seat’ [theory], traditionally followed in France and in most other countries including Egypt; and finally the ‘control’ [theory], which seeks to find real content hidden beneath the company’s structural shape and according to which a company is subject to the law of the country whose citizens effectively control the company through their capital majority or by other means. This more recent notion
emerged to replace or complete the real seat theory in its original countries when it became necessary to take measures of war towards companies which had a domestic real seat, but which were dependant on foreigners or enemies.

The Suez Company has not been ‘incorporated’ in Egypt. Its articles of association, which Mr Lesseps deposited with the Paris notary Mr Mocquard on 2 December 1858, conform with French law. Further, Article 16 of the Convention of 22 February 1866 specifies that ‘regarding the Company’s constitution and the relationships between its associates, it is by virtue of a special convention governed by the laws which apply to corporations [“sociétés anonymes”] in France.’ It is true that Article 3 of the articles of association provides that ‘the Company has its seat in Alexandria and its administrative domicile in Paris’. Yet, a seat in Alexandria never existed and in Cairo the Company was only represented by a ‘superior agent’, as provided by the second firman of 5 January 1856. Its ‘brain’ operates in Paris, as do the organs legally vested with the power to express its will, namely the board of administration and the general assembly whose localisation defines the place of its real administrative seat. Lastly, regarding the control of the Company one has to keep in mind that, according to the articles of association, the board of administration is composed of ‘thirty-two members representing the main nationalities interested in the enterprise’, and that about half of the shares belong to French nationals and 44 % to the British Crown.

Therefore, despite careful assertions to the contrary in some constitutive texts which were commanded by the concerns of not hurting the Turkish government [‘Sublime Porte’], the Canal Company is not, in fact, an Egyptian company. Did not the Sultan – as soon as in the 1860s, namely in the Convention of 18 March 1863 – even put the stress on its foreign nationality to impose on it the retrocession of 60,000 hectare land to the viceroy? And the mixed tribunals have, disregarding other opinions, always been careful to limit the link between the Company and the Egyptian sovereignty to particular matters and have several times decided that, because of its universal character, the Company avoided the application of rules essential to internal public policy (especially those monetary matters). The Egyptian Law on Corporations of 29 July 1947, finally, has never applied to the Company, and some of the matters covered by this law were added through a later freely negotiated convention between the Company and the royal government.

Moreover, it is not enough to say that in relation to Egypt, the Suez Company is a foreign company. It is true that one could consider it as French because of its ‘place of incorporation’, its real seat and, to some extent, because of the ‘control’ of the capital and the administration. Otherwise, from this last point of view, the Company can be viewed as having both the French and the British nationality, which is no less conceivable for a legal person than for an individual. And that alone would be enough to show the legal irregularity of the Egyptian nationalization. This nationalization would, without being in line with a general reform on the economic structures of the country, appear as a discriminatory measure against a single foreign company which is based only on the reason that it is foreign. Additionally, it would infringe the contractual rights acquired by this company, whereas the compensational indemnity itself was not contractually fixed.

But one must go even further: the Canal Company which is not Egyptian, is not French or British-French either. It is, through its capital structure and its management bodies as well as through the subject matters and the effects of its business activity, an international company which is directly subject to the international legal order. This is certainly a new concept – if not to say one in the process of being born – but its necessity has, to draw from an ancient reality, for many years been recognized. The fact that a company’s birth and way of functioning are necessarily territorial does not pose an obstacle to that: one has rightfully cited the examples of the Bank for International Settlements or the International Red Cross – legal persons created in Switzerland and in accordance with Swiss law – which cannot, however, be considered as depending only on Swiss law. Towards them, as well as towards Suez, no one territorial state is entitled to exert exclusive powers. Their legal status, even if it materially conforms with the laws of one or several countries whose provisions it borrows, is of an essentially international origin and nature, resulting from conventions which are concluded between the territorial states and them, with other states or with international public organisms. Therefore, it cannot be within the competence of a territorial state to infringe company rights by a measure of nationalization, expropriation or by a withdrawal of concession.

These truths strike us as worthy of mentioning: if it was once odious to shield the big companies from the application of law, it would not be less odious today to deprive them from the law’s protection.

*English translation of the article published in ‘Le Monde’ on 4 October 1956, p. 3; French original available at www.Trans-Lex.org/img/monde.jpg. The text was translated by Thomas Claeßens in collaboration with Bernd Scholl.

1 See Le Monde of 3 October 1956.