Minutes.

I think this is now pretty good and that it should go forward. The only suggestion I have to make is that reference might be given in two places to Dr. Mervyn Jones's article in the Year Book. One is in regard to the nationality of a company and the other is in regard to the right of a State to intervene on behalf of shareholders in a foreign company when the State of which the company is a national is the State which is injuring the company.

I suggest that the three following things should be done simultaneously with regard to this paper:-

(a) I should send it to Professor Gros in Paris, saying that this is a study which has been done here. We would like his observations on it or a copy of any study which has been made on the French side. We have every reason for legal collaboration in this matter.

(b) A copy of it should be given to Sir F. Wylie, who is, I think, the Government Director of the company with whom we always deal, for his private information and for his comments.

(c) Copies should go to the Research Department with a request to check it merely from the point of view of accuracy of fact and from this point of view make any comments by way of elaboration of the facts which they feel they can do.

G.G. Bennett
7th September 1951.

P.S. I should like a copy of paragraph 23 for the meeting about the Anglo-Iranian case. There is something in this paragraph which might form the subject of a new footnote to our pleadings in that case.

P.T.O.

P

Minutes.

African Sketch.

I am sorry I have taken so long over this. I enclose three copies of in opinion, the additions suggested by Sir Eric Beckett having been incorporated. The copy for Prof. Vlas (legal Adviser to Quai d'Orsay) will be sent by Sir Eric Beckett personally, and I have kept aside a copy for this purpose.

12/9/51

I have sent copies to Mr. Of (Mr Osmond) and Sir N. Wright.

J. Brown 14

Nothing to be Written in this Margin.

P

Nothing to be Written in this Margin.

Minutes.

I have hhecked the facts and dates as given and find them correct.

May I suggest with all deference that the third paragraph of Article 16 of the 1866 Convention (which is not mentioned) is relevant to the question of the nationality of the Company? It reads:-

"Les contestations qui viendraient à surgir
"entre le Gouvernement Egyptien et la
"Companie seront également soumises aux
"Tribunaux Locaux et résolues selon les lois
"du pays".

[signature]
19.ix.5.

W. D. Allen [illegible]

Mr Johnson

I sh'd be grateful for your observations on A/Cdr Bucs' minute above.
[signature]
19/ix

I have had a look at this, in Mr. Johnson's absence on leave. It seems to me that Mr. Johnson may have purposely omitted any reference to the third paragraph of Article 16 of the 1866 Convention, but I think it is preferable that Mr. Johnson himself considers this point. He is not likely to be back from [illegible] until October 17th or 18th, at the earliest. But as far as I can see it would not matter if this paper

P

Minutes.

[illegible] held up until [illegible] return.

[illegible] a.c. [illegible]
1/10 [illegible]

no! b/u 16 Oct.

JS
2/10

Nothing to be Written in this Margin.

J

The Suez Canal Company Concession

Introductory

The question to be considered is whether the Egyptian Government is entitled under international law to nationalize the Suez Canal Company or, in other words, to terminate the Company's concession before the appointed date (16th November, 1968).

This question will be considered under three headings:

A. Would the nationalisation of the Suez Canal Company be illegal according to the general principles of international law relating to the treatment of concessions granted to foreigners?

(These principles have been exhaustively examined in connexion with the case of the Anglo-Iranian Oil Company and are set out in paragraph 4 below).

B. Would the nationalisation of the Suez Canal Company be illegal for any other special reason?

C. If the Egyptian Government were to terminate the Suez Canal Company's concession before the appointed date, would it be possible for His Majesty's Government to bring the matter before the International Court of Justice, even if the Egyptian Government did not agree to such a course?

A. [redacted]

1. After much consideration, His Majesty's Government have decided to put forward the following principles of international law with regard to concessions in their Memorial in the Anglo-Iranian Oil Company case.

(a) While a State possesses the right to nationalise and, generally to expropriate property belonging to foreigners in its territory, it is entitled to do so only subject to conditions laid down by international law. Such property includes concessions granted by a State to foreign nationals. The nationalisation (or expropriation) of concessions, as of other property rights, is governed by the general principle of international law obliging the State to respect the property and other vested rights of foreigners.

(b) The termination or cancellation for the purpose of nationalisation - or generally any expropriation - of a concession granted to a foreign national is unlawful, if the State granting the concession has expressly undertaken, either in a contractual engagement with the State to which the foreign national belongs or in the particular concessionary contract, not to terminate it unilaterally.

(c) A measure of expropriation or nationalisation, even if not unlawful on any other ground, becomes unlawful under international law, if in effect it is exclusively or primarily directed against foreigners as such, and it cannot be shown that, but for the measure of expropriation or nationalisation, public interests of vital importance would suffer. The mere fact that the State does not obtain as much financial profit from the concession as it expected, or as it considers it should obtain, is not such a vital interest.

(d) Even in cases where the nationalisation of the property of foreigners, including concessions granted to them, is not unlawful on any other ground, the taking of the property becomes an unlawful confiscation unless provision is made

/for

for compensation which is adequate, prompt and effective.

(e) Where the nationalisation is unlawful, the relief to be granted is governed by the principles formulated by the Permanent Court of International Justice in the Chorzów Factory (Claim for Indemnity) (Merits) case (Series A, No. 17). According to these principles the primary remedy is restitution in kind (or, where such restitution is impracticable, the payment of pecuniary compensation, instead of restitution, consisting of a sum "corresponding to the value which a restitution in kind would bear"), together with pecuniary damages for loss sustained which would not be covered by restitution in kind (or by payment in place of it).

(f) If it is otherwise lawful to nationalise the enterprise, which is covered by a contract of concession with a foreigner, and if that contract contains a provision for arbitration, the amount of compensation due must be decided by the Arbitration Court provided for in the concession.

(g) A measure of confiscation or nationalisation of a concession which is contrary to international law, engages directly the international responsibility of the State, if it is the result of legislation or other action admitting of no recourse against the measure to local courts or the tribunals provided for in the concession agreement. In addition, the international responsibility of the State is directly engaged on the further ground of denial of justice if such a measure is put into force on the pretext of alleged defaults on the part of the concessionaire and if the correctness of such allegations is not proved to the satisfaction of the appropriate judicial tribunal (in particular to the satisfaction of the judicial tribunal provided for in the concession, if one is so specified).

2. His Majesty's Government believe that, although these principles have been formulated with the Anglo-Iranian Oil Company case primarily in mind, they are nevertheless the true

/principles

principles of international law bearing on the general question of the cancellation of concessions granted to foreigners. In the ensuing paragraphs an attempt is made to apply these principles to the case of the Suez Canal Company.

3. The Suez Canal Company (la Compagnie Universelle du Canal Maritime de Suez) was formed in order to exploit the concessions granted by the Firmans of the Viceroy of Egypt on the 30th November, 1854 and the 5th January, 1856. The Firman of 1856, it should be noticed, contained the Viceroy's approval of the Company's Statutes.

4. There followed the Convention of the 22nd February, 1866, between the Company and Ismail Pasha, Viceroy of Egypt. (ratified by the Sublime Porte on the 19th March, 1866, - see paragraph 5 below) This referred to the two earlier Firmans and some intervening arrangements concluded between the two parties between 1854 and 1866.

5. Article 15 of the 1856 convention says:
"Il est déclaré, à titre d'interprétation, qu'à l'expiration des quatre-vingt dix-neuf ans de la concession du Canal de Suez et à défaut de nouvelle entente entre le Gouvernement égyptien et la compagnie, la concession prendra fin de plein droit".

The concession actually came to an end on the 16th November, 1968, because that is 99 years "à compter de l'achèvement des travaux et de l'ouverture du Canal maritime à la grande navigation" (See Article 16 of the Firman of 1856 amplifying Article 3 of the Firman of 1854 which merely said "La durée de la concession est de quatre-vingt-dix-neuf ans à partir du jour de l'ouverture du Canal des deux mers"). Egypt being at the time a vassal state of Turkey, the ratification of the Firmans by the Sublime Porte was necessary to give them full legal effect and such ratification was expressly reserved in the Firmans of 1854 and 1856 themselves. The Sublime Porte ratified the Convention of 22nd February, 1866 on the 19th March, 1866, but there is no doubt that this

/ratification

ratification extends to the Firmans of 1873 and 1873 as well as to the Convention of 1866 itself except in so far as the later instruments modified the earlier ones. In fact the object of the Convention of 1866 was to make it possible for the Sublime Porte to ratify the Firmans, to some features of which it objected. The Convention of 1866 therefore contained the necessary modifications.

6. Thus, we have a situation in which there is a concession granted by the Egyptian State to the Suez Canal Company and, according to its terms, the concession is to endure until 16th November, 1968. The concession, it should be noted, contains no express undertaking on the part of the Egyptian State not to terminate or cancel it unilaterally; nor does it contain an arbitration clause. To this extent it differs from, and is less favourable to the concessionaire, than the Anglo-Iranian Oil Company's concession.

7. On the other hand, if it could be shown that the nationalisation of the Suez Canal Company was a measure "exclusively or primarily directed against foreigners as such", and if at the same time it could not be shown by Egypt that but, for the nationalisation of the Company, Egyptian public interests of vital importance would suffer, then such nationalisation otherwise possibly lawful, would become unlawful. It should not be difficult to show that the nationalisation of the Suez Canal Company was a measure "exclusively or primarily directed against foreigners as such", even though the Suez Canal Company may, from a strictly legal point of view, be an Egyptian company. (see paragraph 8 below). Nor should it be difficult to refute the possible Egyptian argument that, but for the nationalisation of the canal, Egyptian public interests of vital importance would suffer.

8. It is necessary now to consider the nationality of the Suez Canal Company.

Article 21 of the Firman of 5th January, 1856 states:

/"Said

"Sont approuvés les Statuts ci-annexés de la société créée sous la dénomination de: Compagnie Universelle du Canal Maritime de Suez, la présente approbation valant autorisation de constitution, dans la forme des sociétés anonymes, à dater du jour où le capital social sera entièrement souscrit." (italics ours)

Article 26 of the Convention of the 22nd February, 1866 states,

"La Compagnie universelle du Canal maritime de Suez étant égyptienne, elle est régie par les lois et usages du pays". (italics ours).

However, the article goes on to state,

"Toutefois, en ce qui regarde sa constitution, comme société et les rapports des associés entre eux, elle est par une convention spéciale régie par les lois qui, en France, régissent les sociétés anonymes. Il est convenu que toutes les contestations de ce chef seront jugées en France par des arbitres avec appel comme sur-arbitre à la Cour impériale de Paris". It is not easy to assess the precise significance of these provisions. It is unusual for an instrument granting a concession to a company also to contain that company's statutes. On the face of it that feature strengthens the argument that the Suez Canal Company is a purely Egyptian company, the provision for the regulation of the Company's affairs according to French law being regarded merely as an incorporation of French company law into Egyptian law for the purpose of regulating the affairs of this particular Egyptian company. But this explanation hardly holds good with regard to the provision that disputes affecting the internal organisation of the Company are to be settled not merely according to French law but also by French tribunals. The possibility has to be faced that the Suez Canal Company may have a dual nationality, French and Egyptian, if such a status is possible (paragraphs 9-15 below). Be that as it may, it can not be disputed that the Suez Canal Company is an Egyptian company,

/nor

ner has the Company ever disputed this fact. One of its first actions was to apply for authorisation to operate in France as an Egyptian company, in accordance with the provisions of Article 2 of the French law of 30th May, 1857.

9. Although, as we have seen, the Suez Canal Company undoubtedly possesses Egyptian nationality it may be argued that it also possesses French nationality. This argument depends on the fact that

a) the Company has a domicile administratif in Paris, as provided for in Article 73 of its Statutes. The general meetings of the shareholders of the Company are held in Paris, and it is also in Paris that the "Conseil d' Administration" and the "Comité de Direction" of the Company meet, and that

b) Article 74 of the Company's Statutes and Article 16 of the Convention of 1866 provide for the determination by French tribunals of internal disputes within the company.

10. The international law relating to the nationality of companies is extremely complex. It is not proposed in this paper to discuss this question other than briefly, because fortunately a lengthy discussion of it is not strictly necessary. According to Borchard (The Diplomatic Protection of Citizens Abroad, 1928, p. 618), a leading authority on this branch of the law, "leaving aside all theoretical arguments, it may be said that the majority of States in their legislation have accepted the country of domicil (siège, Sitz) as the nationality of the corporation". There are different criteria, however, for establishing domicil.

11. According to one theory, supported by Italy, Spain and Portugal, a corporation is domiciled where it has its principal centre of exploitation (principale exploitation). On this basis the Suez Canal Company would be an Egyptian company.

/12.

12. According to the so-called Anglo-American theory, a corporation is domiciled in the country where it is incorporated. On this basis, also, the Suez Canal Company would be an Egyptian company.

13. According to a third theory, a corporation is domiciled in the country where it has its centre of administration (siège social).* This theory is supported by France and most other European States, including the U.S.S.R., and also by the Latin American States.

14. International law, in many other respects a combination of Anglo-American and Franco-Latin American practice, seems in this respect also, to have recognised both the second and the third of the above theories, though not the first theory. Thus the British-Mexican Claims Commission, in the Madeira Company case (American Journal of International law, vol. 28, 1934, p. 590 at p.593) followed the incorporation test. On the other hand, the Belgian-German Mixed Arbitral Tribunal, in the case of La Préférence Ordinaire v. Keller (Tribunaux Arbitraux Mixtes, vol.3 p. 570 at pp. 572-3) followed the test of the siège social. Further, in the case concerning Certain German Interests in Polish Upper Silesia (Series A, No. 7) the Permanent Court of International Justice to some extent followed the test of the siège social in saying "Nevertheless, regard must be had, in the first place, to the shareholders, for, under German law as well as under other systems of legislation, it is the general meeting of shareholders which exercises the supreme power of the Company. From the General Meeting, which is the constituent body, directly emanate the powers of the Board, and directly or indirectly, those of the management. It is a well-known fact that the acquisition of a majority of the shares is precisely the means by which an interested person or group of persons may seek to obtain control over a company". (at p. 69).

/15.

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* The domicil administratif referred to above is one element, and the most important element, in establishing the location of the siège social.

15. It is not proposed to cite further authority for the proposition that, under international law, a company can be said to possess the nationality of the State where

(i) It was incorporated
or (ii) It has its siège social #

On this basis, under international law, the Suez Canal Company has a dual nationality. There is no a priori reason why a company, like an individual, should not have a dual nationality. In fact the dual nationality of a company can fairly easily arise in practice. Thus in the case of the Société sur de Ferries etc. (Journal Clunet, 1889, p. 510) the Court of Cassation at Rome declared the company Italian, because, although its siège social was in France, its principale exploitation was in Italy. Under French law, such a company would naturally have French nationality.

16. The question of the nationality of the Suez Canal Company, however, although important and interesting, is not absolutely vital to the issue, because there is no doubt that, whatever the nationality of the company, the great proportion of the shares are held by British and French interests. Consequently, even if it were to be held that the Company is an Egyptian company and nothing else, it could still be argued, and argued powerfully, that a unilateral cancellation of the Company's concession was a measure "primarily directed against foreigners as such" and that it could not be shown that, but for the unilateral cancellation of the concession, Egyptian public interests of vital importance would

/suffer.

In an article entitled "Claims on behalf of Nationals who are shareholders in foreign companies" (British Year Book of International Law, 26 (1949), p. 225) Mr. Kerry Jones writes (at p. 226) "International law and practice now attribute nationality to corporations, though there is no unanimity as to the rules to be applied in determining that nationality..... treaties to-day frequently speak of 'Nationals' as including corporations and usually adopt, as a test of such nationality, the fact that a corporation has been formed under the laws of a particular State. There is some authority in the decisions of arbitral tribunals for this test". This author, therefore, seems inclined to favour the "incorporation theory".

suffer. Although the law is not quite certain and may still be in process of development, it seems to be an established rule that, if State A, in circumstances involving its international responsibility, nationalises a company possessing the nationality of State A, and that company has shareholders who are nationals of States B and C, then States B and C may bring an international claim against State A on behalf, not of the company as such, but on behalf of their nationals who are shareholders in the company - such claims being in proportion to the amount of shares held by these shareholders.[X] Consequently, although the Company may be an Egyptian company, the United Kingdom and French Governments would not only have a right to intervene in the case but would also each have a valid and substantial claim against the Egyptian Government.

17. The main question has, therefore, already been answered. For the Egyptian Government to terminate the concession of the Suez Canal Company before the 16th November, 1968 would, it is submitted, be an unlawful act because it would be a measure "primarily directed against foreigners as such" and it could not be shown that, but for the termination of the concession, Egyptian public interests of vital importance would suffer. If, however, this contention were to fail, the legality or otherwise of Egypt's action would depend on whether the compensation offered by Egypt was "adequate, prompt and effective". It is not thought worth while to pursue this hypothetical question any further at this stage.

[X] After an analysis of the precedents, Dr. Mervyn Jones, in the article already referred to, concludes "In such a case it is believed that modern international law is sufficiently developed to allow us to say that there is a legal right to intervene on behalf of individual shareholders" (op.cit., p. 257).

B. Would the nationalisation of the Suez Canal [illegible]

18. It remains to consider whether there are any other principles of international law, not formulated in paragraph 1 above, which might be applicable to the concession of the Suez Canal Company.

19. Professor Georges Scelle-Hall, in an opinion which he prepared for the Suez Canal Company on another question, and which is dated the 20th November, 1948, stressed the universal character of the Company, which was recognized on many occasions by the Egyptian Courts. The Company, he said is universal "par ses usagers, par ses capitaux et par la composition de son conseil d'administration". He refers to the Firman of 1854, by which Ferdinand de Lesseps was to form a "compagnie formée de capitalistes de toutes les nations" (preamble) or a "compagnie universelle" (Article 1) and under which the canal dues were to be "toujours égaux pour toutes les nations" (Article 6); to Article 14 of the Firman of 1856 which guarantees that the canal and its ports shall be open to all merchant ships without distinction of nationality; and also to Article 14 of the Convention, respecting the free navigation by all shipping of the Suez Maritime Canal, signed by the leading European Powers and Turkey at Constantinople on the 29th October, 1888, which states,

"Les Hautes Parties Contractantes conviennent que les engagements résultant du présent Traité ne seront pas limités par la durée des Actes de Concession de la Compagnie Universelle du Canal de Suez".

20. It is doubtful, however, if the "universal character" of the Suez Canal Company, although an unquestioned fact, materially affects its legal situation, as company. It has already been shown (paragraph 16 above) that, although the Suez Canal Company may be an Egyptian company, this factor does not prevent the United Kingdom and French Governments from

/intervening

intervening in the case. The Suez Canal Company does not have a supra-national character equivalent to that of the European Coal and Steel Community which it is proposed to establish under the Schuman Plan Treaty. Not being established under an international treaty, it does not have the character of a public international organization, and so it does not have even the limited right of appearance before the International Court of Justice which such organizations enjoy under paragraphs 2 and 3 of Article 34 of the Statute of the Court. The most that Professor Sauser-Hall can make of the universal character of the Company is to say that it is analogous to the International Committee of the Red Cross which, although a private association under Swiss law, "bénéficie, parce qu'il remplit dans le monde moderne une mission de haute civilisation, et parce que les Gouvernements se sont mis d'accord pour consacrer par des conventions internationales les principes de la Croix Rouge dégagés par lui, d'un tel prestige et jouit, en fait, de telles prérogatives, qu'un auteur le considère comme 'une personne non-étatique de droit des gens" et lui attribue en quelque sorte une personnalité internationale en devenir".

21. On the other hand, although the universal character of the Suez Canal Company does not materially affect its situation qua company, it does materially affect the character of its concession, qua concession. The concession as we have seen, is contained in the Firmans of 1854 and 1856 and in the Convention of 1866 (ratified by the Sublime Porte). It was the latter which was of pre-eminent importance, because it was on the basis of this Convention that the Sublime Porte gave its ratification and consent to the project. The 1866 Convention was concluded "Entre Son Altesse Ismail Pacha, Vice-Roi d'Egypte, d'une part, et la Compagnie Universelle du Canal maritime de Suez..... d'autre part".

The concession is not, therefore, on the face of it an international treaty, involving in itself Egypt's international

/obligations

obligations towards other Powers. Like most concessions granted by a State towards alien nationals it is prima facie subject to municipal (i.e., Egyptian) law, unless any intention of the parties to the contrary can be proved. To some extent, in the case of the Suez Canal Company's concession, such a contrary intention can be proved, because the concession provides in some respects for the submission of the Company to French law and to the jurisdiction of French tribunals (Articles 23 and 24 of the Statutes; Article 16 of the Convention of 1866). This is without doubt a significant exception to the general rule that a concession is governed exclusively by municipal law. It arises in this case because the instrument granting the concession also contains the statutes of the concessionaire company, and it is provided inter alia that internal disputes within the company are to be decided according to French law and by French tribunals. Whatever be the consequences of this exception, however, they seem to relate mainly to the question of determining the nationality of the Suez Canal Company and have already been discussed in that connexion (paragraphs 8-15 above). The exception now under discussion does not of itself seem to bring the concession automatically within the sphere of international law, such as would be the result if it formed part of a treaty.

22. It is, however, possible to argue that the Suez Canal Company's concession represents for Egypt an international treaty obligation. This proposition can be argued in two ways:

(a) The concession itself is a treaty (paragraph 23 below).

(b) The application of the concession is an implied term of a well-known international treaty by which Egypt is bound, namely the Convention of Constantinople, 1888 (paragraph 24 below).

23. The concession is itself a treaty

It is generally considered that by a "treaty" is meant an agreement between two States, or between a State and a public international organisation or between two Public international organisations. The definition of a "treaty" is not necessarily, however, as limited as this. For example, the

/comment

Comment to Article 1(c) of the Harvard Draft Convention on the Law of Treaties, 1935, says "it is not to be implied that an agreement between two or more such entities (*collient* "a person other than a State") and especially one between such an entity and a State, may not properly be regarded as a treaty". Thus, the agreement signed at Rome on 29th March, 1923, between Austria, Hungary, Italy and Yugoslavia on the one hand and the Southern Railway Company on the other hand, was subject to ratification by the States concerned and was registered with the League of Nations (*League of Nations Treaty Series*, volume 23, p. 255).

Similarly, Professor Brierly in his report on the Law for Treaties, (A/CN.4/23 of the 14th April, 1950) prepared for the International Law Commission, writes "it is not implied that agreements to which such entities (*collient* companies and other organizations "not possessing the attributes of States"), in addition to States or international organizations, are parties, lack binding force, or that their obligatory force is not derived from international law" (at page 18).

Neither the Harvard Draft Convention nor Professor Brierly, in his report, in fact defined agreements between States and companies as "treaties" but both the Harvard research lawyers and Professor Brierly were concerned with draft conventions only and their definitions were adopted purely for the purpose of defining the extent of their own draft conventions. It was for this reason that they both added the warning against drawing the too hasty conclusion that agreements to which companies were parties were less binding under international law than treaties as defined by them.

It is in this connexion that the universal character of the company, the quite extraordinary international importance of the work allotted to it and so forth are relevant factors. It is not proposed to go into these matters here, although, if it were decided to start a law-suit against Egypt, they would have to be studied carefully. Another matter which would have to be gone into very thoroughly would be the exact historical

/antecedents

antecedents of the Firmans of 1854 and 1856 and of the Convention of 1866, with a view to showing that the Suez Canal Company's concession was not an ordinary concession governed by municipal law only but was in fact arrived at as a result of prolonged international negotiations, including an arbitration, presided over by Napoleon III of which the award was given on 6th July, 1864.

24. The execution of the concession is an implied term of a well-known treaty by which Egypt is bound, namely the Convention of Constantinople, 1888.

This argument proceeds upon a rather different basis.

The Convention of Constantinople (1888) was concluded in order to secure that the canal should be open in war, as well as in peace, to the ships of war and merchant ships of all flags. It will be recalled (see paragraph 19 above) that Article 14 of the Convention of Constantinople (1888) states: "Les Hautes Parties Contractantes conviennent que les engagements résultant du présent Traité ne seront pas limités par la durée des Actes de Concession de la Compagnie Universelle du Canal de Suez".

From this it follows that Egypt is bound by an express international obligation to secure to the vessels of all nations the right of free navigation in the canal both during the concession's existence and after its existence has come to an end. It is probably not an exaggeration to say that this Article was drafted on the assumption that the concession would remain in existence until 16th November 1968, and it might be argued that it was an implied term of the Convention of 1888 that the concession should not be terminated before that date.

The fact that the canal was operated by a "universal" company (see paragraph 19 et seq. above) and not directly by the Egyptian State was a guarantee to the Powers, not merely that the Canal would be efficiently operated, but also that it would be operated in a manner conducive to the interests of

/all

all nations. The concession would not last indefinitely - the Powers knew that - but it had a long time to run. Had the Powers considered that the concession might be terminated unilaterally at any time by Egypt, they would not have had any such guarantee either of efficient operation of the canal or of operation of the canal in a manner conducive to the interests of all nations. In that event, they would have felt bound to insert a provision in the 1888 Convention to the effect that the canal should remain under international management at least until 1968. The fact that no such provision was expressly inserted may be used to advance the proposition that it was not inserted because it was not necessary, and the reason it was not necessary was that it was an implied term of the 1888 Convention that the concession should not be terminated before 1968. At first sight this argument may not appear very strong, but it is fairly strong if one has regard to the facts. Suppose, for instance, there had been any suggestion that Egypt (or Turkey) could unilaterally annul the concession in 1889, would the Powers have concluded the Convention of 1888 in the same terms as they did in fact conclude it? Yet, legally, the right of Egypt (or Turkey) to cancel the concession unilaterally in 1889 was just as strong as is the right of Egypt to cancel it unilaterally in 1951, or at any other time before the appointed date. The mere passage of time has no effect on this right; it either exists or it does not exist.

[redacted]

35. Egypt, as a Member of the United Nations, is a party to the Statute of the Court. (Article 93 of the Charter). However, Egypt has not signed the declaration referred to in Article 36(2) of the Statute of the Court (i.e. the optional clause). So, in the normal course of events, it would not be possible to bring Egypt before the Court in respect of any dispute unless Egypt consented to sign a compromis referring the dispute to the Court. This she would naturally refuse to do in the case of the Suez Canal Company. However, it may be possible to bring the case before the Court under Articles 2 and 13 of the Montreux Convention, dated the 8th May, 1937, relating to the abolition of capitulations in Egypt.[1]

Article 2 states:

"Subject to the application of the principles of international law, foreigners shall be subject to Egyptian legislation in criminal, civil, commercial, administrative, fiscal and other matters ....." (Italics ours)

Article 13 states:

"Any dispute between the High Contracting Parties relating to the interpretation or application of the provisions of the present Convention, which they are unable to settle by diplomatic means, shall, on the application of one of the Parties to the dispute, be submitted to the Permanent Court of International Justice" ....." (The United Kingdom, France and Egypt were all signatories of this Convention. So were a great many other States. Not only the United Kingdom and France would have a locus standi before the Court because only these States would be able to maintain that their interests, in the

/person

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[1] Treaty Series No. 28 (1937), Cmd. 5616.

[redacted] forum of their shareholders, were effected to any substantial extent.

Further, Article 37 of the statute of the International Court of Justice states:

"Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice".

15. It is not proposed to develop any further in this paper the argument that the International Court of Justice would be entitled to exercise jurisdiction in the event of a unilateral cancellation by Egypt of the Suez Canal Company's concession. It is not pretended that the case in favour of the Court's jurisdiction is a watertight case, but it is [redacted] a fairly strong case and might be found, upon further research, to be even stronger than it looks now. It may be noted that Prof Georges Scelle-Hill, in the above-mentioned opinion which he prepared for the Suez Canal Company, (on another question) expressed the view that the International Court of Justice would be entitled to exercise jurisdiction with regard to matters affecting the Company's status.

It may also be stated in conclusion that, if a premature nationalisation of the Suez Canal Company were to be proposed, it might be argued that this was an event threatening the security or the free passage of the canal and that this would give the Agents in Egypt of the signatory Powers of the 1888 Convention the right to act under Article VIII of the Convention, which says, "en toute circonstance qui menacerait la sécurité ou la libre passage du Canal, les (the Agents) se réuniront sur la convocation de trois d'entre eux et sous la présidence du doyen, pour procéder aux constatations nécessaires".

D. H. H. Johnson
[redacted] September, 1956.

FOREIGN OFFICE, S.W.1.

13th September, 1951.

PERSONAL AND CONFIDENTIAL

I enclose a copy of a study by the legal member of the Foreign Office Research Department on the question of the Suez Canal Company and possible Egyptian attempts to nationalise it at some future date. This is, of course, for your private information, but we should value your comments.

We are also sending a copy of this memorandum to the Ministry of Transport in case they have anything to add, and Beckett is sending one to his opposite number at the Quai d'Orsay.

(D.V. Dundall)

Sir Francis Wylie, K.C.S.I., C.I.E.,
c/o Treasury,
S.W.1.

FOREIGN OFFICE, S.W.1.

CONFIDENTIAL

13th September, 1951.

I think you will be interested to see the attached memorandum which discusses the situation which would arise if the Egyptian Government tried to nationalise the Suez Canal Company before the termination of its concession. We asked the legal member of our Research Department to prepare this when rumours about the possibility of Egypt following Persia's lead were first mooted. We should be glad to receive any comments which your Ministry may care to put forward. A copy is being sent to Sir Francis Wylie for his private information.

2. I should add that there have been no further grounds for supposing that the Egyptian Government have any intention at the present time of nationalising the Canal Company but, with the political atmosphere as it is, one would never be surprised if they attempted to lay their hands on it for reasons both of nationalism and cupidity.

(D.V. Randall)

W.P.S. Gemmell, Esq.,
Ministry of Transport.