EDITORIAL COMMENT

POST-MORTEM ON THE SUEZ DEBACLE

Sir Anthony Eden resigned on January 9th as Prime Minister of Great Britain. According to a press despatch, "His health and his spirit have broken under the pressure aroused in Britain and abroad by his policy in Egypt."[1] He was appointed Prime Minister by Queen Elizabeth on April 6, 1955, after many years of service in positions of responsibility in Parliament and as Foreign Secretary under Sir Winston Churchill.

The sympathy felt for his personal disappointment was only exceeded by the shock of his resort to armed force in Egypt. When the American Society of International Law was founded fifty years ago to promote the establishment and maintenance of international relations on the basis of law and justice there were many more skeptics than believers in that aspiration. Today world opinion is overwhelmingly opposed to the use of armed force in the conduct of international affairs, certainly to the point that an offer of peaceful settlement should be made and refused before nations draw the sword in their legitimate right of self-defense.

The Charter of the United Nations is an existing criterion to judge a nation's conduct on this question. According to it, the Security Council may recommend appropriate procedures or methods of adjustment of any dispute the continuance of which is likely to endanger the maintenance of international peace and security. It is specifically provided that in making recommendations the Security Council should "take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice" (Article 36). Legal disputes are defined by the corresponding provision of the Court's Statute to include disputes concerning (a) the interpretation of a treaty, (b) any question of international law, (c) the existence of any fact which, if established, would constitute a breach of an international obligation, and (d) the nature or extent of the reparation to be made for such a breach (Article 36).

It is immaterial to this comment that any or all of the Members of the United Nations involved in the Suez Canal imbroglio have accepted the so-called Optional Clause incorporated in Article 36 of the Statute of the Court. We are content to leave that question to the semasiologists, whose debates in our opinion have not been very helpful in promoting the high purposes of the United Nations. The first paragraph of that article reads:

> The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

The Suez Canal dispute was triggered on July 26, 1956, by the precipitate and unjustifiable act of the President of Egypt purporting to na-

[1] New York Times, Jan. 10, 1957.

tionalize the Suez Canal Company. It was an act of retaliation against the United States and Great Britain for their declination to extend financial help to Egypt to build a high dam on the Nile River at Aswan.

Those who never believed in, or who have become cool in their respect for, the rights of private property, have not directly challenged the international legality of the nationalization decree. Some have taken the position that President Nasser's surprising move in his negotiations for a foreign loan was no breach of international law because, they assert, the treatment of the company was a purely internal Egyptian matter. In the view of the writer of this comment that position is untenable. It is not a rule of international law that sovereignty confers immunity to disregard or violate international obligations. Sovereignty imposes duties as well as rights, including the exercise of good faith in the fulfillment of private contracts with governments as well as in the observance of the obligations of solemn treaties.

> Every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states. . . . No community can be allowed to enjoy the benefit of national character in modern times without submitting to all the duties which that character imposes.[2]

It is not intended to question the right of nationalization under justifiable circumstances and conditions. The governments of France, the United Kingdom and the United States promptly and vigorously denied that President Nasser's act was of that character. Moreover, it is difficult to separate the legal issue raised by the cancellation of the concession to the company, which had been performed to Egypt's undoubted benefit for 88 of its term of 100 years, and the relevant provisions of the Convention respecting the Free Navigation of the Suez Maritime Canal signed at Constantinople on October 29, 1888, by which the Government of Egypt was bound. The fact that the convention was made in perpetuity and that the concession would terminate within twelve years is not material to the legality of the unilateral act of Egypt on July 26, 1956.

Article XII of the Convention of 1888 provides:

> The High Contracting Parties, by application of the principle of equality as regards free use of the Canal, a principle which forms one of the bases of the present Treaty, agree that none of them shall seek, with respect to the Canal, territorial or commercial advantages or privileges in any international arrangements that may be concluded.

The motive of "territorial or commercial advantages or privileges" for the unilateral abrogation of the international arrangements with the Suez Canal Company is conclusively shown in President Nasser's speech announcing the so-called decree of nationalization. He asserted that: "The

[2] Instruction of Secretary of State Daniel Webster to the U. S. Minister to Mexico, April 15, 1842, 1 Moore, International Law Digest 5.

Suez Canal was built for the sake of Egypt and for its benefit. But it was a source of exploitation and the draining of wealth." He linked the nationalization of the company with the building of "a strong and dignified Egypt, the Arab Egypt," industrialized and capable of competing with those who "used to suck our blood, our rights and take them." "Citizens, today," he declared, "our wealth has been restored to us. . . . We are conscious of accomplishing glories and achieving true dignity. Sovereignty in Egypt will belong only to her sons." [3]

The Declaration of London of January 17, 1871, states:

> It is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement.

The United States is not a party to either the Canal Concession or the Treaty of 1888, but both stipulate for the free and equal use of the Canal by all nations. Under international law that stipulation inures to the benefit of non-signatories.

> The contracting parties may frame the covenants of the treaty between themselves so as to lay down an universal principle binding on them, at least, in their intercourse with the rest of the world.[4]

On the day following the publication of the Egyptian nationalization decree the United States Department of State made public an announcement in which it was said that "the seizure of the installations of the Suez Canal Company carries far-reaching implications. It affects the nations whose economies depend upon the products which move through this international waterway and the maritime countries as well as the owners of the Company itself." [5] The United States Government accordingly began urgent consultations with the other governments concerned.

On August 2, the Governments of France, the United Kingdom and the United States issued a tripartite statement from London which contained the following paragraphs:

> 1. They have taken note of the recent action of the Government of Egypt whereby it attempts to nationalise and take over the assets and the responsibilities of the Universal Suez Canal Company. This Company was organised in Egypt in 1856 under a franchise to build the Suez Canal and operate it until 1968. The Universal Suez Canal Company has always had an international character in terms of its shareholders, Directors and operating personnel and in terms of its responsibility to assure the efficient functioning as an international waterway of the Suez Canal. In 1888 all the Great Powers then principally concerned with the international character of the Canal and its free, open and secure use without discrimination joined in the Treaty and Convention of Constantinople.

[3] The Suez Canal Problem, July 26–September 22, 1956 (Department of State Publication 6392), pp. 25–30.

[4] 1 Phillimore, International Law 46–49 (3d ed.).

[5] Department of State Press Release No. 413, July 27, 1956.

This provided for the benefit of all the world that the international character of the Canal would be perpetuated for all time, irrespective of the expiration of the Concession of the Universal Suez Canal Company. Egypt as recently as October 1954 recognised that the Suez Canal is "a waterway economically, commercially and strategically of international importance," and renewed its determination to uphold the Convention of 1888.

2. They do not question the right of Egypt to enjoy and exercise all powers of a fully sovereign and independent nation, including the generally recognised right, under appropriate conditions, to nationalise assets, not impressed with an international interest, which are subject to its political authority. But the present action involves far more than a simple act of nationalisation. It involves the arbitrary and unilateral seizure by one nation of an international agency which has the responsibility to maintain and to operate the Suez Canal so that all the signatories to, and beneficiaries of, the Treaty of 1888 can effectively enjoy the use of an international waterway upon which the economy, commerce, and security of much of the world depends. This seizure is the more serious in its implications because it avowedly was made for the purpose of enabling the Government of Egypt to make the Canal serve the purely national purposes of the Egyptian Government, rather than the international purpose established by the Convention of 1888. Furthermore, they deplore the fact that as an incident to its seizure the Egyptian Government has had recourse to what amounts to a denial of fundamental human rights by compelling employees of the Suez Canal Company to continue to work under threat of imprisonment.

3. They consider that the action taken by the Government of Egypt, having regard to all the attendant circumstances, threatens the freedom and security of the Canal as guaranteed by the Convention of 1888. This makes it necessary that steps be taken to assure that the parties to that Convention and all other nations entitled to enjoy its benefits shall, in fact, be assured of such benefits.[6]

The steps taken pursuant to the foregoing decision were directed toward a political settlement with Egypt. The provisions of the United Nations Charter for the settlement of justiciable questions were not invoked, nor was there any other offer to submit the question to arbitration. The failure of the political negotiations resulted in Great Britain and France taking the law into their own hands by invading Egypt with military forces on October 31st. Their objective failed and they evacuated Egypt on December 22nd, in compliance with a resolution of the General Assembly of the United Nations adopted by an overwhelming vote.

President Nasser's refusal to submit to a political settlement and the failure to bring him to the bar of international justice before the principal judicial organ of the United Nations permitted him to stand before the world as an innocent party. The ill-considered policy of the governments of Great Britain and France, in resorting to force and not to legal remedies after the peaceful overtures to President Nasser were rejected, subjected them instead of Egypt to condemnation by the United Nations and the world at large. The unfavorable reaction to their choice of the sword was instant and universal, even to some extent in their own countries.

[6] The Suez Canal Problem (Department of State Publication 6392), pp. 34–35.

Had an International Court decision been rendered unfavorable to Egypt's position, and that government had refused to abide by it, sanctions could have been applied, even with force in the background if necessary, with the support of other law-abiding nations and of their public opinion. Had the decision been in support of the position of Egypt, there would still have remained with the claimant states any political pressures or economic sanctions to which the Egyptian Government might be amenable.

The unhappy fate of Sir Anthony Eden should be a lesson to other statesmen tempted to follow a similar course. His example in defeat may serve a more constructive purpose in promoting the rule of law in international relations than would have his success in resorting to armed force.

GEORGE A. FINCH
Honorary Editor-in-Chief

EXTRATERRITORIAL APPLICATION OF UNITED STATES LEGISLATION AGAINST RESTRICTIVE OR UNFAIR TRADE PRACTICES

For several years now legal literature in the United States has carried articles *pro* and *con* on the question whether the application of the American antitrust laws to transactions taking place wholly or partially abroad and being directed primarily toward distributive activity outside the American market, violates "international law."[1]

On the same page of a recent advance sheet[2] the Supreme Court has dealt in sibylline fashion with certain issues involved in the debate, refusing to rehear its denial of certiorari in *Vanity Fair Mills* v. *T. Eaton Co., Ltd.*,[3] and affirming by memorandum decision the District Court decision in *Holophane Company, Inc.* v. *United States.*[4] Both cases involve the issue of the international validity of so-called "extraterritorial" application of United States legislation for the regulation of economic conduct, *i.e.*, in both cases the contention was made that "international law"[5] would forbid the extension by the United States of its legislative authority to the conduct in issue.

Vanity Fair Mills was extensively reported in the last issue of the

[1] Haight, "International Law and Extraterritorial Application of the Anti-Trust Laws," 63 Yale L. J. 606 (1954); Whitney, "Sources of Conflict between International Law and the Anti-Trust Laws," *ibid.* 640; Report of the Attorney General's National Committee to Study the Anti-Trust Laws, Ch. II, pp. 65–115 (Unnumbered Govt. Doc., March 31, 1955); Stocking, "The Attorney General's Committee's Report: The Business Man's Guide Through Anti-Trust," 44 Georgetown L. J. 1, 27–30 (1955); Proceedings, Section of International and Comparative Law, American Bar Association, 1953, pp. 75–100; Timberg, Emmerglick and Whitney, "Anti-Trust Problems in Foreign Commerce," 11 Record of the Ass'n. of the Bar of the City of New York 3–41 (1956); Note, "Extraterritorial Application of the Anti-Trust Laws," 69 Harv. L. Rev. 1452 (1956).

[2] 77 S. Ct. 144; 352 U. S. 903, 913 (1956).

[3] Certiorari denied, 77 S. Ct. 96, 352 U. S. 871 (1956); opinions below, 234 F. 2d 633 (2d Cir., 1956), affirming (with modification) 133 F. Supp. 522 (D.C.N.Y., 1955).

[4] Opinion below, 119 F. Supp. 114 (D. C. Ohio, 1954).

[5] Whether public or private or both is not always clear; *cf.* Timberg, *loc. cit.* (note 1 above) 13–14.