The Relevance of Public and of Private International Law Respectively for the Solution of Problems Arising from Nationalization of Enterprises

J. H. W. Verzijl
Professor at the University of Utrecht

I.

There are few chapters of international law which at first sight present such a chaotic appearance as that on the international aspects of nationalization. This state of affairs is due to a number of causes, amongst them the fact that nationalization proper is often mixed up with related additional subjects which, although involved in a certain number of nationalization cases, are properly speaking outside its essential legal domain, such as: the complications caused by State succession and the emergence and activities of *de facto* governments. But even without such complications the subject-matter is intricate enough, entangled as it is in the violent political struggle for the general recognition of the novel concept of "economic self-determination" with all its implications; in the wide variety of solutions which the courts of different countries and even the various courts of the same country give to the problems involved; in the different legal forms in which the operation called "nationalization" can legally be effectuated; and last but not least, in the indiscriminate intermingling of two quite different viewpoints, those of public international law and of the conflict of laws (private international law). It is in particular from this latter cause of the legal imbroglio that I propose to start my brief analysis of the legal aspects of nationalization under international law. One of the causes mentioned above I propose to eliminate from the outset by ruling out completely such complicating additional factors as the actions of *de facto* governments and the consequences of State succession, which elimination results in confining this examination of the subject to such types of nationalization as the Mexican and in omitting such varieties as the nationalization practice of the Soviet-

Union in its initial period of unrecognized existence and the recent developments in Indonesia as the successor State to the Netherlands.

I will therefore begin with a brief analysis of the least complicated case of nationalization where a State takes over the running of one or more private enterprises, industrial, commercial, agricultural, or other. This operation can take different legal forms the effects of which upon the enterprise(s) concerned can vary accordingly. It can limit its effects to national-owned enterprises, or extend them to, or even affect exclusively, those foreign-owned. It can be intended to produce direct effects outside the State's territory, or be confined to objects within the orbit of its national jurisdiction. It can be effectuated without infringing any, or in violation of a specific, formal engagement not to proceed to it. Such engagement can have been entered into towards another State by treaty, or towards aliens by *e. g.* a concession. The operation can be carried through in compliance, or on the contrary at variance, with obligatory rules laid down in the municipal legislation or Constitution. It can serve reasonable social purposes of a vital nature, or simply constitute a form of official robbery. It can treat all enterprises upon the same footing, or be discriminatory in nature. It can affect the exploitation of riches of the national soil, the running of public utilities, or the exercise of particular trades or industries. It can be accompanied by full compensation paid or promised to the enterprise(s) concerned, or present itself under a predatory form which makes it fall below the international standard of treatment due to aliens.

Which of all these aspects give rise to problems to be solved according to public international law, and which to problems in the field of the conflict of laws? And which of these two possible measures of appraisal is paramount in case of their concurrence or collision? It has always appeared to me that failure to separate these two ways of approach to a solution of the multifarious problems involved in nationalization cases by a logical fence preventing the arguments from becoming intermingled is one of the main causes of the confusion obtaining in this field.

II.

Already *a priori* it would seem to be clear that there is an essential difference between the way in which, and the extent to which, public international law governs the matter under consideration and the manner and the measure in which the rules on the conflict of laws can govern it. Public international law is a body of rules binding upon States and prescribing,

allowing or forbidding them to act in a certain way; this body of rules is to be looked upon in principle as a common measure of conduct for all and sundry. Where no such precepts or prohibitions exist the States are free, in general, to act according to their own discretion. Private international law, on the contrary, is essentially municipal in origin and in legal effect. Unless specific rules on the solution of particular conflicts of law have been embodied in an international Convention, or, very exceptionally, have become internationally binding in the normal process of formation of customary law, each State is at liberty to determine the contents of its own national rules of private international law, which it can not, of course, impose upon other States. What is presented as a more general "private international law" is nothing else than the outcome of an intellectual operation or exercise consisting of comparing the various and varying systems of municipal law in this field and the equally varying legal doctrines on the matter, and of drawing therefrom a greatest common divisor. Or it is, at the utmost, the result of the additional mental operation of evaluating, according to their intrinsic legal merits, the rules thus found to be actually in force over a large part of the world, or to be professed by a preponderating legal doctrine. However, such outcome or result can not, as such, be considered as positive law so long as it has not been transformed by constant observance and on the strength of an *opinio juris* or *opinio necessitatis* into binding customary rules of inter-State conduct in the field of the conflict of municipal laws.

From the preceding observations it follows that (a) the rôle of public international law in determining the legal effects of nationalization abroad in the municipal sphere of other States consists in solving the problem to what extent individual States are under an obligation, or under a prohibition, or legally free to recognize such effects, and that (b) they or their courts of justice can only to the extent that public international law grants them freedom of action according to their discretion choose their own answers to the manifold controversies to which a foreign nationalization can give rise within their municipal legal order. The latter answers need by no means be identical everywhere, and they probably never will be, since the legislative, judicial and doctrinal solutions of the many and variegated problems which foreign nationalizations give rise to are as variegated themselves. Students of the conflict of laws may contrive ways and means to remedy this situation of uncertainty and diversity of the law, but they can never, by themselves, create a body of binding rules, susceptible of filling the existing lacunae, or of bringing about a certain degree of uniformity. Their efforts are doomed to remain a *jus constituendum* so long as the solutions

they proffer fail to result in winning the approval of either an international Conference, or overwhelming support from municipal legislatures or judicatures.

The validity of the above-stated principle of subordination of considerations or rules in the sphere of the conflict of laws to considerations and rules of public international law is absolute on the interstate plane. Before an international tribunal a so-called general principle of private international law can never prevail over, or neutralise, a rule sanctioned by the law of nations.

On the municipal plane, however, its validity is only relative since it does not obtain in countries where (a) mandatory rules on the conflict of laws are in force which present an imperative or a prohibitive character [1]) and are at variance with obligatory rules of public international law, and where, moreover, (b) a rule or principle of constitutional law forbids the courts to set mandatory municipal legislation aside in favour of the application of binding rules of public international law. But even in the case of those countries the principle of subordination formulated above prevails on the interstate plane, as a State is internationally responsible even for legislative action which is contrary to its obligations under the law of nations. In all other countries public international law is paramount in the matter under consideration even on the municipal level.

III.

Every analysis of the existing legal situation must, therefore, start from the basic question as to how far public international law contains provisions which limit the freedom of action of the members of the international community, either in proceeding to nationalization, or in recognizing or ignoring a foreign nationalization.

One of the paramount principles of public international law is that a State is legally prevented from nationalizing private enterprises whenever it has bound itself not to nationalize them. Such an obligation can be undertaken either through an international treaty, or, for example, in a concessionary contract entered into with a foreign company [2]). The only difference

[1]) Rules of a simply permissive nature can of course never have the legal effect of overriding mandatory rules of public international law.

[2]) It is worth mentioning here that international practice has given rise to a peculiar intermediate type of legal relationship in this field which lies between an interstate agreement and a "limping" settlement between a State and a foreign company. Two instances of this special type have become famous. – The first was the Concession granted on Feb-

between these two cases from the point of view of international law is that in the latter the breach of the engagement can under certain conditions only be made the object of a claim on the inter-state level after the available local remedies have been exhausted without result. The obligation can furthermore be contracted either directly (by an express undertaking to this effect) or indirectly (*e. g.* by granting a concession for a certain period without reserving the right of interim cancellation). True, this principle has of late been the object of strong attacks from States which no longer seem to consider it a duty, if only of honour and decency, to comply with their freely contracted engagements, but such objectionable behaviour can not alter the law. Nor can new-fangled, but erroneous doctrines proclaiming an absolute "right of economic self-determination" and such-like set aside the sound fundamental principles of law recognized by civilised States.

It would be entirely inappropriate to approach this first and fundamental problem from the angle of private international law. One might be inclined to argue, for example, that the enterprise affected by the nationalization is situated within the territorial boundaries of the nationalizing State and that it falls therefore under the *lex rei sitae;* or that the relations between the State and the concessionnaire originate in a concession granted by the former and accepted by the latter and are therefore contractual in nature, which means that they must be held to be governed by the *lex loci contractus,* identical in this case with the *lex loci executionis;* or that, on the contrary, the granting of a concession is essentially an act of State, so that it can not but be subject to the sovereign discretion of the public law of the State; or finally, in case the nationalization should take the form of suppression of the enterprise's legal personality, that it has no longer any legal standing according to its *statut personnel.* All these reasonings would tend to subject the enterprise to the *jus vitae ac necis* of the State within which it

---

ruary 22nd, 1866 by the then Viceroy of Egypt to the Compagnie Universelle du Canal Maritime de Suez. This company was not only international by the special features of its creation and the spreading of its capital and peculiarly bi-national in its company structure, being at the same time subject to French law (with respect to its status as a company and relations between its shareholders under private law) and to Egyptian law (under other aspects, especially that of administrative law), but moreover, as to its existence, concession and activities, mentioned in the preamble and some of the articles of the Convention of Constantinople of October 29th, 1888. – The second instance was that of the Concession Contract of April 29th, 1933, entered into by the Government of Iran and the Anglo-Persian Oil Company through the good offices of the Council of the League of Nations, and subsequently reported to the Council and placed in its records, which gave it to some extent international status should Iran in future renew her breach of contract *vis-à-vis* the concessionnaire.

operates, but they are all fallacious since public international law simply does not allow the conceding State to violate in this way its freely contracted obligations towards an alien and there is, consequently, no room for the application of any municipal rule whatever on the conflict of laws.

IV.

The second fundamental question arising from nationalization concerns the conditions under which such operation, if not unlawful in itself according to the preceding observations, may be carried through. There are in particular two such paramount conditions, *viz* a) that the nationalization be not of an adversely discriminatory nature, directed either against the interests of aliens as compared to subjects, or against those of one group of foreigners as compared to other groups, and b) that prompt, effective and adequate compensation be paid to foreign owners of the nationalized enterprise. There is no need here to enter into any particulars attaching to these conditions since the only important question in this connection is whether there is any scope for private international law in this matter.

Again, there is none. Either of the two conditions comes entirely under the sway of public international law and leaves no margin for the play of so-called principles of private international law. True, in so far as no specific treaty or contractual engagements as supposed above exist to hinder a particular nationalization, every sovereign State is entitled for urgent social or economic reasons to nationalize enterprises operating within its borders, even when they are owned by foreigners. This is a freedom of action which, according to contemporary public international law, undoubtedly comes within the domestic jurisdiction of every sovereign State. That does not imply, however, that every State is equally entitled, in virtue of its sovereignty, freely to determine the conditions under which such nationalization, though lawful in itself, may be carried through, because even in those matters which fall in principle under its domestic jurisdiction, a State is bound to observe its international obligations either under a treaty or under customary international law. No more than, according to the authoritative statement of the Permanent Court of International Justice in the case of the Tunisian and Moroccan Nationality Decrees, a State can legally impose its nationality upon aliens contrary to its international obligations, can a State nationalize foreign enterprises without itself conforming to certain fundamental rules of conduct. These have a bearing upon the requirements that no discriminatory measures be practised – and that the opera-

tion be not depredatory in nature – to the detriment of aliens or of particular categories of aliens. If these requirements are not met, the State commits an international tort and makes itself liable for the consequences of such tort. It is no use for the nationalizing State to plead, in order to escape from this responsibility, that its nationals are being treated in no better way than aliens and that, consequently, the latters' complaints are fully met by the principle of private international law pursuant to which, supposedly, aliens need only, and that at the utmost, be put on a par with nationals. It is just here that positive public international law, evidenced by a long series of international pronouncements, steps in with its demand that *vis-à-vis* aliens certain minimum standards of conduct be observed. Reference to a pretended principle of private international law according to which a State is free to treat aliens and its own citizens on the same footing is of no more avail in this matter than is an appeal to the concept of domestic jurisdiction taken from public international law. – In any case, in respect of this aspect of nationalization as well as in respect of the preceding, public international law is prevalent and no considerations borrowed from rules or theories of private international law have any legal force against it.

V.

The situation becomes a little more complicated when one broaches the question of the extraterritorial effect proper of a nationalization, whether lawful or unlawful under either of the two aspects discussed above. By the problem of extraterritorial effect proper we mean the question as to whether a nationalization extends its legal effects to assets or branches of the nationalized enterprise which at the critical moment were outside the jurisdiction of the nationalizing State.

The problem arises only when the nationalizing State i n t e n d e d to give its legislation such extraterritorial effect. It may not have had this intention. Whether it was its intention or not is a question of construction which must in the first instance be solved by the municipal courts of the nationalizing State. Only in case this point is still doubtful because no authoritative decision has yet been given by those municipal courts, may a foreign State or its courts, which may happen to be confronted with this question, feel called upon to give an independent decision (comp. below).

On the assumption, however, that the nationalizing State intended to comprise in its nationalization assets or branches being outside its juris-

diction [3]), how is then the legal position and by which law is it governed? The answer must again be that this is primarily a question of public international law, and only secondarily a problem falling under the municipal rules on the conflict of laws. The primary question to be answered is whether public international law either obliges a State to recognize such extraterritorial effect of a foreign nationalization, or prohibits it from doing so. Only in so far as neither of these alternatives applies, can the rules on the conflict of laws play an independent part in the solution.

(a) Is there, on the one hand, any binding rule of public international law in existence which obliges a State and its courts to attribute extraterritorial effects proper to a foreign nationalization? Would they, that is, commit an international tort by refusing to consider as comprised in a foreign nationalization, even if otherwise irreproachable from a legal point of view, other assets of the nationalized enterprises than those which were at the critical moment under the jurisdiction of the nationalizing State? The answer must be in the negative. Public international law surely obligates a State A to recognise the normal legal effects of public acts accomplished by another State B, but only to the extent that (1) they were performed within the orbit of B's sovereign reach (territorial or otherwise), that (2) they were in accordance (a) with B's own local legislation and (b) with international law, and that (3) they were not contrary to the *ordre public* of A. No binding rule of public international law seems, therefore, to exist which obliges a State or its courts to recognise the title of another State to property which the latter should claim on the strength of its nationalization measures (even if no foreign enterprises or goods were involved) if the property concerned was at the critical moment outside the exclusive jurisdiction of the nationalizing State.

(b) Is there, on the other hand, any binding rule of public international law in existence which prohibits a State and its courts from attributing extraterritorial effects proper to a foreign nationalization? Would they, that is, commit an international tort by, in the same circumstances as set out

[3]) Which of the assets can be said to be outside this jurisdiction is a further question. Agreement might be possible on the proposition that the exclusive jurisdiction of the nationalizing State extends to: a) assets situated within its territorial borders; b) assets consisting of vessels flying its flag or aircraft carrying its distinguishing marks, and sailing on or flying over the high seas; c) goods carried in such national vessels or aircraft. More controversial is the situation in respect of vessels and aircraft temporarily in foreign waters or within or over foreign territory, incorporeal assets, such as debts, patent rights, trade marks, life insurance contracts, etc. Private international law, again municipal and not universal in character and therefore possibly different from country to country, might in these cases come to play an active part in the solution. In this field also, there are no general binding rules in force.

under (a), allowing assets of a nationalized enterprise to be considered as property of the nationalizing State, if they were at the critical moment outside its jurisdiction? There is certainly no such prohibition in existence in respect of assets which belonged to purely national enterprises of the nationalizing State. Neither would there be any such prohibition as regards assets belonging to nationals of the State of the forum, but no such State or court would probably be so senseless as to sacrifice national interests to abstract considerations of international law, and of a purely imaginary character at that. However, with regard to assets belonging to nationals of a third State the position in law would seem to be different. A German Court, for example, would, to my mind, be prohibited by sound principles of public international law from admitting as property of the Italian Republic goods belonging to a Dutch company having operated in Italy prior to its nationalization there, but which were at the moment of the nationalization outside Italy's grasp, even if there were nothing unlawful in the nationalization in itself.

(c) Beyond the very narrow limits of the rare obligatory rules of public international law set out under (a) and (b), each State and each court is legally free to decide for itself whether it shall, or shall not, attribute extraterritorial effect proper to even irreproachable foreign nationalizations. In this field it is perhaps possible to state, by way of comparison, general trends in municipal legislation, in the judgments of municipal courts or in legal doctrine, but a conclusion of universal validity *de lege lata* and the qualification of such trends as "international law" cannot be derived therefrom.

There seems to be much misunderstanding in this field. In this context it is not inappropriate to refer to the discussion which took place in the 1950 session of the «Institut de Droit International» in Bath on a set of draft resolutions prepared by Professor Donnedieu de Vabres on «la portée extraterritoriale des sentences répressives étrangères». Although that discussion was not concerned with general principles of private, but of penal international law, the problems involved in either run parallel. The *rapporteur* tried to make a distinction between rules in his draft which he designated as «droit positif», «droit existant» or «principes de droit commun incontestables», and others which could only be recommended to governments as «droit désirable» for future adoption as «une solution progressive». One of the other participants to that session was not sure what exactly the *rapporteur* meant by «droit commun existant» in this context and expressed his doubts on the point by asking him whether perhaps he intended to convey by that term that in case a State or a court should deviate from the rules qualified as such, they would incur liability for the breach of

an international engagement? The *rapporteur,* visibly surprised by the question put in this way, answered without hesitation that that of course was not his intention and that he had only meant to say that some of the rules were so widely accepted in municipal legislation or by municipal courts that they could be labeled as «droit commun positif». But at the bottom of this construction of the term «droit positif» there lay, to my mind, a certain confusion between, on the one hand, the recognition of certain rules as positive law, binding upon specified subjects of law, with all the consequences thereof in the field of international responsibility for tort in case of violation or non-observance of such rules and, on the other hand, the detached statement of a certain uniformity or identity of rules as the result of a purely intellectual operation, that is, of comparison of municipal laws, judgments of municipal courts and legal doctrine, justifying the conclusion that specified practices and theories are prevailing or even quasi-universal.

From the viewpoint of the *lex ferenda,* the weight of the contradictory arguments in answering the question whether a lawful foreign nationalization should or should not be attributed extraterritorial effect proper by a third State in respect of assets belonging to a purely national enterprise of the nationalizing State but being outside the latter's grasp at the critical moment, would seem to be so finely balanced that it is hard to say which solution must be held preferable. A legislature, a court or legal doctrine can, of course, in this regard keep to the maxim of the prevalence of the *situs* of the assets at the moment of the nationalization and thus refuse to recognize any transfer of title in respect of assets situate at that moment outside the jurisdiction of the nationalizing State, even though there was nothing in the nationalization to find fault with. But it would seem to be equally defensible and just to give in this matter effect to an irreproachable sovereign decision of a foreign State in a matter coming under its domestic jurisdiction. The question as to how best to solve particular conflicts of law is often so doubtful and aleatory that the conclusion can only be that "it is six of one and half a dozen of the other", which often makes discussions in this field without much substance and the difference in value of the opposing theories inversely proportional to the heat with which they are propounded, the more so when no point of intrinsic justice or injustice is involved, contrary to the problems discussed under III and IV above. But in any case, no binding rule of public international law governs the case, nor does there exist any obligatory universal principle of private international law. What there is in the field of positive law is at the utmost varying municipal legislation, or a more or less constant body of case law, differing in each individual country not only in contents but also in binding force according to whether the legal

system of the country concerned traditionally adopts or rejects the principle of *stare decisis*.

VI.

Apart from the question of the extraterritorial effect proper, there is the more interesting and more serious problem of the secondary extraterritorial effect of a foreign nationalization, *i. e.* of the recognition of rights acquired by the nationalizing State in respect of assets within its jurisdiction.

(a) Is there any binding rule of public international law in existence which o b l i g e s a State and its courts to recognise the legal effects created, or the titles to property acquired, as a result of a nationalization within the orbit of jurisdiction of a foreign State? Would they, in other words, be guilty of a violation of international law by r e f u s i n g to recognise such effects or titles within their own legal order?

In this respect all in the first instance depends upon the lawfulness or unlawfulness of the nationalization, either in essence or because of its particular features. If the nationalization in itself was neither explicitly nor implicitly forbidden, if it was neither discriminatory nor predatory in nature, and if it was regularly carried out in conformity with the constitutional and legal provisions obtaining in the nationalizing State, foreign States and courts would indeed commit an international tort by refusing to recognise the normal legal effects arising from such nationalization. If, however, in one or more of these respects the requirements for validity or legality of the nationalization were not complied with, other States are under no obligation to recognise its effects. They must, therefore, be held competent to enquire into the particulars and the merits of the foreign nationalization.

On the whole, it appears to me that governments and municipal courts often show an exaggerated respect for official acts of a foreign State, even if they are clearly unlawful and detrimental to their own nationals. Personally, I see, for example, no valid objection against a municipal court putting a law or a decree of a foreign State to the test of its international obligations, either under a treaty (containing, *e.g.*, a distinct inter-State engagement not to nationalize) or under general principles of customary international law (duty to observe engagements freely undertaken towards aliens, for example in a concession or a comparable contract – to pay prompt, adequate and effective indemnity in case of lawful nationalization – not to discriminate against aliens or particular groups of aliens, etc.). Refusal to apply these criteria to public acts of foreign States is most frequently based on a so-

called principle of international law, that of the sovereignty of States. But to admit this argument in an unqualified form would lead to an absurdity, as though international law itself should command respect by one sovereign State and its organs for violations of its own precepts committed by another sovereign State. Such a supposed attitude of international law would be nothing less than self-destructive. International law is only too frequently invoked by the lawbreakers themselves in an attempt to secure it as an ally in covering their own violations of it. This attempt is fundamentally inadmissible and such doctrines should, therefore, be abandoned as misinterpretations of public international law.

But not only must municipal courts be considered as competent to enquire into the legality of a foreign nationalization in the light of public international law, they would seem to be to a certain extent equally competent to control whether the foreign nationalization was valid under the municipal law of the State concerned. It would not, for example, be outside their competence to judge whether a particular nationalization decree was enacted in accordance with the general legal provisions obtaining in the nationalizing State. Nor would they – in case the Constitution of the nationalizing State itself recognizes the principle that the validity of municipal laws is subject to their compatibility with itself, and subjects the realization of the said principle to judicial control, as is the case in Mexico – exceed the limits of their competence even by enquiring into the question as to whether the foreign nationalization law was in conformity with the Constitution, provided that no decision on this point has been given already by the competent courts of the nationalizing State.

Even if a nationalization affected exclusively assets belonging to nationals of the nationalizing State and even if no breach of international law were therefore involved, a foreign State or its courts would not be obliged to recognise the legal effects produced by the nationalization within the nationalizing State, should, for example, that nationalization not be accompanied by full compensation. International law, in effect, entitles a State or its courts to deny recognition within the State's own jurisdiction to the legal effects created by foreign legislation on the grounds of its being contrary to their own *ordre public.*

(b) Is there, on the other hand, any binding rule of public international law in existence which p r o h i b i t s a State and its courts from recognising the legal effects produced within the jurisdiction of a foreign State as a consequence of a nationalization? Would they, in other words, be guilty of a violation of international law by a d m i t t i n g such effects within their own legal order?

In this respect again, a distinction must be made according to whether the said effects were detrimental to the rights of nationals (i) of the nationalizing State itself, (ii) of the State of the forum, or (iii) of a third State.

Nothing in public international law would seem to prohibit a State or its courts from recognising the legal effects created by a foreign nationalization, however irregular, to the detriment of nationals of the nationalizing State itself. Whether they will in fact avail themselves of this freedom of action against the interests of the foreign victims will mainly depend upon their own attitude *vis-à-vis* predatory practices of this kind.

Nor has public international law as such anything to object to a State or its courts recognising the predatory effects of a foreign nationalization upon their own citizens, but no State or court will probably be so ill-advised as to take this course and thus to sacrifice the interests of their nationals, unless nationalization without adequate indemnity has come to be considered also by themselves as an ideological social ideal.

However, in the case of depredations carried through to the prejudice of nationals of a third State, the legal situation would seem to be different. A third State C would indeed seem to be justified in holding another State B responsible under international law for the latter's condonation of unlawful nationalizations operated by a State A to the detriment of citizens of C, by recognising within its own (B's) forum the effects produced by such unlawful nationalization within A's jurisdiction.

(c) Outside the limits thus set by public international law to the freedom of legal action by States *vis-à-vis* nationalizations in foreign States, the former may adopt such legislative solution as they may think just or expedient, or may prefer to leave it to their courts to find the right solutions. In doing so they are again bound by no general rules of private international law since no such universally obligatory rules exist. A lawyer can, therefore, only suggest the solutions which he feels should in future be universally accepted as binding. This, however, could only be realized by means of a multilateral treaty since to leave the final solution either to municipal legislation or to judicial action, or for that matter to the science of private international law, would only perpetuate the existing legal chaos.

VII.

The relevance of public or private international law respectively for the solution of controversies originating in nationalization can play a further part where either the nationalizing State itself or the former owner of the

nationalized assets claims them as his property in the courts of another State.

(a) The first contingency raises a problem of public international law, *viz.* what attitude a third State or its courts must or may take *vis-à-vis* requests or demands of the nationalizing State aimed at obtaining the former's assistance in enforcing its own public laws abroad. It is not uncommon to find statements in court decisions or in legal doctrine to the effect that this question falls under the rules on the conflict of laws and that these rules are against the rendering of assistance by one State to another for the enforcement of its legislation of a public law character. Posed thus, the problem would again seem to be misrepresented. It may be, of course, that municipal legislation expressly forbids the courts to assist foreign governments in this way, or that municipal courts have developed on their own initiative the practice of refusing them such assistance. The primary question is, however, whether public international law commands or forbids such legislation or such practice, or rather grants a third State freedom to legislate, and its courts the necessary latitude to develop their own practice, as they think fit.

Is there any rule of public international law which f o r b i d s a State or its courts to assist a foreign State in its efforts to achieve the enforcement of its nationalization measures by allowing it to present itself in a foreign country as the owner of the nationalized assets? For a correct analysis of the legal situation under public international law it is essential that the case presents itself in *Reinkultur* without any disturbing complications, *i.e.* it must concern a nationalization lawful in all respects, and assets affected thereby while being under the jurisdiction of the nationalizing State. Suppose the nationalization of the enterprise of a privately owned national air navigation company, though perhaps with foreign interests invested therein. carried through without any breach of international law and comprising only aircraft being within the national jurisdiction at the moment of nationalization. And suppose further that the commander of one of the airplanes thus regularly nationalized, after landing during a subsequent flight on a foreign airport, refuses to leave it and asks for "asylum" for his aircraft. Does public international law in such conditions in any way prohibit the government of the State where the aircraft landed from acceding to a diplomatic request of the nationalizing State to secure the normal departure of its State aircraft against the opposition of the commander concerned? Of course not. It may be that municipal legislation either prevents the police from interfering directly, or allows the commander to have recourse to the local courts, but from the standpoint of public international law the govern-

ment concerned is entirely free to comply with the diplomatic request. Neither would public international law in any way hinder the municipal courts from recognizing the title of the nationalizing State to the airplane in legal proceedings instituted before them either by that State or by the commander or, for that matter, on behalf of the foreign interests supposedly involved in the nationalized enterprise. There is no foundation whatsoever for the thesis occasionally defended in municipal proceedings or espoused by municipal courts according to which such claims to nationalized property by foreign States are inadmissible under international law. Such pronouncements may be correct under possible mandatory rules of municipal private international law, but they have nothing at all to do with the law of nations.

Is there then perhaps any obligatory rule of public international law in existence which commands a third State or its courts to recognize the title of a nationalizing State to property, in all respects regularly acquired and situated at the critical moment within its jurisdiction? I feel indeed inclined to admit a mandatory rule to this effect and, consequently, to hold that the nationalizing State would have a good case when bringing before an international tribunal a claim against a third State based upon the latter's refusal in diplomatic discussions or upon the refusal of its courts in judicial proceedings, to recognize its title to property regularly acquired in virtue of lawful municipal legislation. This standpoint presupposes the right of foreign governments and courts, defended above, to test, in cases of this kind, whether the claimant State has indeed regularly acquired the title upon which it bases its claim. This conclusion applies even when foreign investments are involved in a lawfully nationalized enterprise.

In conclusion I would suggest that there is no principle of public international law prohibiting a State or its courts from delivering to a foreign State on its demand assets lawfully nationalized by it while situated under its jurisdiction and thus having regularly become its property, and that, on the contrary, they would commit an international tort by refusing to recognize the title of the claimant State to such property. As a result existing municipal rules of private international law, if any, would be contrary to the law of nations if they forbade the courts to comply with demands for the delivery of goods brought before them by a foreign State under the conditions set out above. There is, therefore, no substance whatsoever in the thesis sometimes propounded by municipal courts according to which "international law", either in the sense of the law of nations, or in that of a supposed general principle of private international law, prevents them from assisting a foreign State to attain its duly acquired property.

(b) The second contingency raises the question as to what part the general

principle of sovereign immunity of one State in the courts of another State plays, or must be allowed to play, in the matter of nationalization. This principle is not seldom presented as an absolute and automatic bar to any proceedings not only in which a foreign State is directly sued by a private person or corporation, but also in which a claim is met by a private defendant with the exception that disposal thereof is inadmissible because it can not be judged by the court without its entering into an examination of the merits of a foreign act of State. Often also a court raises this point *proprio motu*. However, construed and applied as widely and mechanically as that and without any discrimination between several possible procedural situations, the defence is, I feel, stretched much too far and must be held to be unreasonable, since it would in actual fact and in many instances result in a direct and very serious denial of justice to the unfortunate private persons concerned which is hardly reconcilable with the high task of the administration of justice. There are, in particular, two situations in which the refusal by a municipal court to take cognizance of a claim, or to judge its merits in a lawsuit, on the strength of a more or less automatic application of either the so-called principle of sovereign immunity, or the theory asserting the absolute unassailability of foreign acts of State, would seem to reveal itself as erroneous and as a substantial denial of justice.

First, the case in which the suit is pending not between a private person and a foreign State, but between two private parties one of which – the defendant – pretends to derive its rights from a foreign State or to have acquired them under foreign (confiscatory) legislation. It may even occur that either party invokes in its favour a (different) foreign act of State, as once occurred before a Dutch court when in 1925 the claimant based his revindication of certain goods upon a decision of the Ottoman authorities in Constantinople whereas the defendant sheltered behind a contrary act of the Allied occupying authorities there. In all such cases the courts must have freedom, or at least a certain latitude, to deal with the merits of the opposing arguments.

Second, the case in which a private person claims certain goods which were pretendedly affected by a foreign nationalization, as having been and still being his property, by means of an action which is essentially an action *in rem*, accompanied by an attachment of the goods concerned. It may be that under specified municipal systems of civil procedure it is indispensable to direct such a revindication of property formally against someone else, for example against the foreign master of the transporting vessel on which the goods were attached, or against a selling agent in charge of the cargo, or even against the foreign State itself, but even then it would result in a sub-

stantial denial of justice if the court, on the strength of such procedural niceties, abstained from taking cognizance of the claim or, even worse, dismissed it on the sole ground that a foreign act of State is somehow involved. There would certainly seem to be no valid reason for the court to refuse to deal with such a claim, essentially *in rem,* if the foreign State confined itself to making a default and the claimant on his side adduced satisfactory evidence of his (former) ownership of the goods attached. Should, on the other hand, the foreign State make an appearance, the court would, I feel, not be justified in dismissing the law-suit on the simple assertion of the defendant State that it is the lawful owner of the goods, that it must be trusted on its sovereign word and that, consequently, it is entitled to judicial immunity in respect of actions regarding its "property". A foreign State may adduce, and has indeed sometimes adduced, fantastic proprietary pretentions with regard to goods abroad. Before allowing the exception of sovereign immunity to succeed, it is, therefore, reasonable and necessary for the court to verify the correctness of the pretention put forward by the self-styled owner. Such verification is impossible without entering into the merits of the pretention and the foreign State, once having made an appearance, must submit to this examination since the admissibility of its claim of sovereign immunity depends precisely upon the outcome of that examination.

I know, of course, that many municipal courts show a profound, to my mind exaggerated, reverence for foreign acts of State as such, whatever their purport and nature, and even if they would seem to be a direct violation of binding rules or principles of public international law. However, this respect for indefensible foreign actions lacks every deeper justification; a judicial practice based on such an erroneous premise ought therefore to be abandoned and fundamentally reversed. This may sound a heresy in *e.g.* American ears since foreign acts of State continue to be held by the courts of the United States as unassailable, more or less sacrosanct, and since moreover the idea of firmly reversing by sounder subsequent judgments a trend of case law which is basically unsound is an idea much more familiar to continental lawyers. The theory of the act of State as a bar to the normal administration of justice is wrong, in my view, because public international law, if it could personify itself and express its own authentic opinion on the issue in question, would simply laugh at the idea that it should be assumed to command respect by its subjects and their courts for infringements of its own rules by other subjects.

But, however this may be, and without entering further into the merits of this practice, the entire controversy is one of public and not of private

international law, the main and real legal issue being whether public international law in fact enjoins its subjects and their courts of justice, either to censure, or on the contrary to abstain from censuring, official acts committed by other subjects in violation of its own commands. Should public international law indeed contain a mandatory rule in either sense, imperative or prohibitive, then no room would be left to the States and their courts to display any independent law-creating activity in their own municipal sphere. Lack of such mandatory rules of public international law, on the contrary, is tantamount to sovereign freedom for the individual States and their courts to choose their own way of handling the situation. Only in this case are the different municipal legal orders at liberty to enact their own rules of private international law on the subject and only then are they, in their turn, free either to give binding instructions in this field to their courts, or to entrust them with the creative task of developing their own judicial practice. In the latter case, however, it goes without saying that in performing this task the courts can not possibly found their decision on any mandatory rules or principles of public international law (as they often appear inclined to do) since the premiss itself implies that there are none.

VIII.

The situation becomes still more complicated and controversial when a foreign nationalization is effected not, for instance, in the form of a mere taking over of the property of an enterprise, accompanied by penetration of the Government of the nationalizing State into the main statutory organs of the company concerned or by appropriation of a substantial amount of shares in its capital, but in that of total suppression of the company's legal personality. If in such a case the company is possessed of assets abroad (factories, stores, warehouses, wharves, port installations, banking accounts, etc.) and has developed its activities there through branch offices, daughter companies, etc., often with a legal personality of their own, the question again arises whether the situation is primarily governed by public or by private international law. There is a marked tendency in legal doctrine and municipal jurisprudence to apply to that situation a principle taken from the doctrine on the conflict of laws, the principle, that is, according to which questions of legal personality fall to be determined by reference to the law of the place where the company is or was incorporated. If this argument is to be taken seriously, it can not but mean that a foreign State or court is under an unescapable obligation, sanctioned by mandatory rules on the

conflict of laws, to conform to the action taken by the nationalizing State and thus also on its side to consider the company so annihilated as no longer legally existant.

However, here we meet with in my view the same erroneous approach as we met with before, the primary question again being one of public international law, *viz* whether a State or a court, finding itself confronted with the suppression of a private company by another State, is either obliged to accept that suppression as operative and binding also *vis-à-vis* itself, or on the contrary prohibited from recognizing the validity thereof in its own legal order, or whether it is at liberty to form an independent view of the situation according to its own sense of justice. Here again, the answer to this threefold question of public international law would seem to depend primarily upon the lawfulness of the foreign act of State. If the suppression of the company's legal personality was in any way at variance with international law, as it may indeed happen to be, a foreign State or its courts are certainly n o t o b l i g e d to recognize such suppression. They m a y even be p r o h i b i t e d from recognizing it, namely when the unlawful foreign act of State affected the vested rights of subjects of a third State: such vested rights under international law deserve, and legally have, precedence over the claim of the wrong-doer to see its "sovereign" offences against the law accepted as they stand. If, on the other hand, there was nothing illegal in the nationalization nor in the consequential suppression of the company, there is no room for the adoption of a critical attitude towards it by other States or courts.

Within the legal limits thus left to the sovereign freedom of a State or its courts in handling the juridical situation created by actions of a foreign State resulting in the suppression of the legal personality of a company operating under its jurisdiction, they are at liberty under public international law to deal with such situations by adopting their own rules on the conflict of laws. This freedom of choice, consequently, applies to different cases. The suppression of the legal entity of a nationalized enterprise by the nationalizing State may be in no way contrary to public international law, but may be inacceptable pursuant to the *ordre public* of the *lex fori*. It may be unlawful under the said law, but *in casu* only concern subjects of the nationalizing State or of the State of the *forum*. Or it may finally be unlawful and moreover affect the rights of nationals of a third State. In the first case no censuring of foreign acts of State in the light of the law of nations is necessary and only private international law is involved. In the second case – suppose that Hungary has entered into an agreement with *e.g.* Sweden by which a for-

mally Hungarian company with Swedish capital [4]) is granted the right to build an electricity plant and to run it during a fixed period of twenty years, but cancels this grant and dissolves the company through legislative action before the date of expiry of the period – nothing in public international law would forbid Sweden, for example for political reasons, to acquiesce in the international tort and to instruct her courts in that sense. In the third case – Sweden openly protests against Hungary's action and the question of the suppression of the legal personality of the company is raised in a Dutch court – the first question which arises is one of public international law, *viz* whether the court is under an obligation to treat the Hungarian act of State as a nullity, *i. e.* to disregard the suppression of the company's legal personality, upon the official protest of Sweden, or whether it is, on the contrary, obliged to give the unlawful act of State precedence over the lawful protest of Sweden. Personally I do not feel the slightest doubt that a Dutch court should take the first view. But at all events, it would seem to be an erroneous approach to such cases to attack the problem at once from the side of the conflict of laws. The question is primarily one of public international law even where private rights are concerned in the law-suit. This latter fact alone does not make the preliminary and primary question one of private international law.

This does not alter the fact that, within the limits prescribed by whatever imperative or prohibitive rules of public international law may govern a particular case, nice problems of private international law will not fail to be involved, irrespective of whether the fact of the annihilation of the company's legal personality is recognized or disregarded. But an examination of these problems would lead us too far from the subject-matter of this article.

---

[4]) If the company is formally Swedish, no Hungarian action can possibly deprive it of its legal personality.