

The Papers of Hyndrex

At the recent Arab Oil Experts meeting of October 26th - 29th in Jeddah, (a summary of the main resolutions is attached) Frank Hyndrex, Legal Adviser to the Saudi Directorate of Petroleum and Mineral Affairs, returned once again to his thesis that Governments could unilaterally abrogate or modify existing oil agreements.

At Jeddah Hyndrex presented a paper claiming that the Arab oil producing states were entitled to impose discriminatory income tax legislation on foreign oil companies to increase their share of oil revenues above the existing 50% (instancing the precedent of Venezuela). In answer to questions arising from his paper, Hyndrex went on to assert that, in the case of Companies not developing concession areas as fast as a government might wish, "the government is legally entitled to expropriate these areas."

It will be recalled that the right of Governments to act unilaterally was the burden of Hyndrex's earlier paper, delivered at the Cairo Congress in April on the first working day and entitled "A Sovereign Nation's Legal Ability to Make and Abide by a Petroleum Concession Contract". This paper attempted to demonstrate that there could be circumstances in which a government could unilaterally break or amend an existing contract.

According to Petroleum Press Service ("Cairo Forum", May 1959), "the paper fell rather flat, and caused much less of a stir than it had done in the press abroad. Points in the paper were challenged, but few cared, or were qualified, to embark on a contentious legal argument. The general impression seemed to be that whatever the ultimate legal rights no businessman, building or other contractor, or concessionaire, whether Arab or foreigner/

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would be happy to deal with governments given to insistence on such a right. No Arab government representatives offered any support to this paper, though quite a few of them would like to see existing arrangements with the oil companies modified". P.P.S. went on to say that "one or two delegates from other Arab countries, speaking later than Mr. Hyndrex, took the opportunity to assert their country's belief in the sanctity of contracts".

The discussion, which followed the paper, was referred to in greater detail by Petroleum Times ("The First Arab Petroleum Congress", May 8th, 1959), where it was stated that, "the author of this paper was afterwards questioned by delegates representing BP, Kuwait, a private American oil company, the Italian ENI organisation and delegates representing the U.A.R. and Lebanon." It was pointed out to Mr. Hyndrex that an agreement between a company and a government was a contract subject to internal law and not to international law. He replied that, frequently, as in Saudi Arabia, there was no complete internal law which would apply to a concession contract. In such circumstances he contended that international law must be employed, but the International Court had no jurisdiction unless both parties to a concession agreement were willing to submit it to the Court for a decision.

"Dr. Mahmoud el Ayouti, the U.A.R. delegate, further pointed out that petroleum agreements nowadays included arbitration clauses which must be resorted to in cases of dispute, but Mr. Hyndrex replied that arbitration clauses themselves were governed by the same principle.

"Another questioner said that the legalistic point of view

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was not the correct one. He thought the problems should be tackled practically and suggested that the way to a solution was cooperation between the parties concerned. Mr. Hyndrex replied that he was merely stating a legal point of view and was not qualified nor appointed to do more than this.

"The next speaker, Anis al Kassem, who read a paper on "Libyan Oil Legislation", summed up the general feeling of the Committee by ending his speech with the words: 'Libya believes in the sanctity of freely negotiated contracts and will honour them'. He was loudly applauded.

Although it is quite clear that the general sentiments of the Committee both on the governments' and companies' sides was against Mr. Hyndrex's contention, it is also possible that Mr. Hyndrex was not challenged strongly enough on the legal tenability of his views. One speaker started his criticism with the words, "I am not a lawyer", and received the reply, "You stated that you were not a lawyer, that is the difference between us".

In any event, it is of some significance, as Petroleum Week pointed out (May 8th, 1959) that "the Hyndrex paper was conspicuously omitted from the final list of resolutions of 'general agreement' adopted by the congress at its closing meeting".

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Reactions to Hyndrex's attempt to reassert the principle of the 'divine right' of the state, by using Hobbesian logic to chop international legal relations to pieces, can be broadly summarised under two main heads :-

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- a) the commercial
- b) the legal.

The commercial reaction as expressed by several Arab delegates to the Cairo Congress, is simply that mutual trust is essential for good business, or, put more cynically, that it is more commercially expedient on the whole to honour than to break them.

The legal reaction is more complicated, but it appears to have been put most clearly in The Financial Times ("Contracts and Oil", April 21st, 1959). "The position is this: towards its own nationals a Government has normally no executive right but may have a legislative power to vary contracts: towards aliens it has under <sup>inter-</sup>national law no right to vary a contract except under the stringent conditions laid down (i.e. in the contract). National law may vary, but the obligation under international law does not". (The full text of this article is given in an appendix).

So far published reactions, of either kind, have been confined to Hyndrex's Cairo paper. His further pronouncements at Jeddah do not appear as yet to have produced any significant comment.

It is, however, worth adding that on the legal issue a significant decision was given last year by an arbitration tribunal in Geneva on the so-called Onassis dispute. The tribunal upheld Aramco's contention that the Saudi Arabian Government's decree of 1954, giving A.S. Onassis priority rights to transport Aramco oil, conflicted with Aramco's concession rights. Petroleum Week (in "Petroleum Comments", by Wanda M.

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Jablonski, September 12th, 1958) noted that "The real significance of the case lies in the grounds on which the tribunal issued its decision.

"Aramco based its pleadings on its concession contract. The Saudi government defended its power to regulate transportation of Aramco's oil. The outcome thus hung on the issue of sovereign rights.

"The tribunal concluded: A state cannot in the name of its sovereignty take away from a private company, by new legislation or other name, any of the rights it had granted to that company through a previous exercise of its sovereignty.

"In other words, it ruled that the right of sovereignty does not include the right to abrogate pacts made by the sovereign in the very exercise of his sovereignty".

S.R.

19th November, 1959.