Colonial Fragments: Decolonisation, Concessions and Acquired Rights

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> 'The twentieth century, when the future looks back on it, will not only be remembered as the era of atomic discoveries and interplanetary explorations. The second upheaval of this period, unquestionably, is the conquest by the peoples of the lands that belong to them.'[1]

1. Introduction

In one of a series of anonymous articles written in El Moudjahid in the years between his two most significant works – *Black Skin White Masks* (1952) and *The Wretched of the Earth* (1961) – Franz Fanon described what he saw to be an emergent pattern in the process of decolonization. On one side, he saw the parties leading the struggle against colonialist oppression as deciding, at a certain moment, and 'for practical reasons', to accept 'a fragment of independence with the firm intention of arousing the people again within the framework of the fundamental strategy of the total evacuation of the territory and of the effective seizure of all national resources'.[2] On the other side, however, he saw an opposite movement at work: the colonial powers, who had formerly privileged the social, cultural and religious dimensions of the civilizing mission ('conjuring away', as he put it, the concessions, expropriations and exploitation that accompanied it) had suddenly turned things on their head. 'In the negotiations on independence' he explains, 'the first matters in issue were the economic interests: banks, monetary areas, research permits, commercial concessions, inviolability of properties stolen from the peasants at the time of the conquest, etc…. Of civilizing, religious, or cultural works, there was no longer any question'.[3] The actual 'rights of the occupant' he declared, 'were then perfectly identified': '[a]rmed with a revolutionary and spectacular good will, it

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[1] Fanon F., 'First Truths on the Colonial Problem' in *Toward the African Revolution* (1961) 120. First published in El Moudjahid, No. 27, July 22, 1958.
[2] Ibid.
[3] Ibid, p. 121.

grants the former colony everything. But in so doing, it wrings from it an economic dependence which becomes an aid and assistance programme.'[4]

Fanon identifies, here, a pervasive theme that was to run throughout the course of decolonization - picked up in one direction by the likes of Nkrumah[5] and Rodney[6] in their discourses on neo-colonialism and, in another, by the various initiatives to promote economic self-determination (most notably in the form of the Declaration on Permanent Sovereignty over Natural Resources,[7] and the New International Economic Order[8]). The theme was as simple as it was seemingly intractable – that political self-determination had to be seen as simply the first stage of a broader, anti-colonial struggle that had to engage, ultimately, with its economic dimensions, and that in order to do so, it had to confront the grounds of its opposition: '[t]he notorious rights of the occupant, the false appeal to a common past [and] the persistence of a rejuvenated colonial pact'.[9]

If, as Fanon suggests, the battle over the economic dimensions of decolonization was often a post-independence preoccupation – focusing on questions such as the right to nationalize, the necessity and quantum of compensation, the terms of trade and investment, the transfer of technology and aid – it was always to be pre-configured by the prior juridico-political settlement that was to accompany formal independence itself. And Fanon's description of the 'fragment' was to exemplify a particular, but yet very common, way of thinking about that settlement: that it was to be understood, above all else, as a moment in which the political landscape was to be profoundly changed, but in which the general terms of economic relations were to be maintained intact. The first half of this equation, of course, was almost axiomatic – decolonization meant, at the very least, the renunciation of political control by the metropole and the emergence to

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[4] Ibid.
[5] Nkrumah K., *Neo-Colonialism: The Last State of Imperialism* (1966) xiii.
[6] Rodney W., *How Europe Underdeveloped Africa* (1973)
[7] General Assembly Resolution 1803 (XVIII), 14th Dec. 1962. On the PSNR see Schrijver N. *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997)
[8] General Assembly Resolution 3201 (S-VI), 1st May 1974. On the NIEO see Bedjaoui M., *Towards a New International Economic Order* (1979).
[9] Fanon, *supra,* n. 1, p. 122.

independence of a host of 'newly independent' states. And the very formalities of instituting, in each case, a new juridical order and constituting it as 'sovereign', seemed to signify something of a revolutionary break. If a transformation of the 'public' sphere, thus, was to be taken as read, what remained to be negotiated were the terms under which putatively 'private' legal relations were to remain in place, and the extent to which they were immune to changes in the 'superstructure' of the public order of the polis. To what extent, it was repeatedly asked, should pre-independence relations of property, contract or debt be deemed to 'survive' the transition to independence? Did the newly independent states 'succeed' to obligations concluded in name of the former colonial authorities? And was there, as Fanon noted, an obligation to respect the 'acquired' rights of the occupant?

Even though the terms of this analytic of (economic) continuity and (political) change were to be largely influential in shaping the discussion of state succession during decolonization – illustrated most visibly in Bedjaoui's assault on the doctrine of acquired rights in the early 1970s[10] - I want to suggest that it is also largely misleading. Beyond the observation that the rubric of 'economic continuity and political change' seemed to merely internalize a set of contested delineations (between the public and the private, the political and the economic), it was also a description that only barely captured the complex legal transformations that were to be necessitated by decolonization. My suggestion is, in fact, that one might better understand the process of decolonisation to be precisely the opposite of that proposed – as being marked, in effect, by political continuity (rather than change) and economic change (rather than continuity). If, on the one side, one may understand the political dimensions of decolonization as being couched in the normalizing language of Western sovereignty - the preservation of colonial boundaries, the acquisition of the legal, political and cultural markers of 'statehood', the assignment of nationality, and

[10] Bedjaoui M, 'Second Report on Succession of States in Respect of Matters other than Treaties', UN Doc. A/CN.4/216/Rev.1 (1969).

the survival of the administrative structures of the colonial state etc[11] - so also, on the other, it is apparent that economic relations (of property, contract and debt) were only capable of being held stable by means of being substantively transformed. Political change, to put it most starkly, was to be achieved largely by keeping the legal arrangements of rule in place, whereas economic continuity necessitated a profound reorganization of existing relations of property, contract and debt.

In subverting the received account, I do not intend to argue with Fanon and others as to the limits of political independence or indeed displace the insights of the critics of neo-colonialism. Indeed, my account owes much to Nkrumah's observation that, during decolonisation, the former colonial powers had simply exported the contradictions of capitalism so as to turn a local competition between capital and labour into an international competition between the exporters of capital and the producers of raw materials.[12] What I do want to call attention to, however, is how the language of legal continuity (and economic stability), provided cover for a fundamental transformation of the legal landscape of the colony, turning regimes of resource extraction into foreign investments, public works into private undertakings, and political institutions into economic enterprises. At the centre of this work of transformation were two institutions/ideas – one being the 'concession agreement' the other the idea of 'acquired rights'.

2. 'Concessions' and the Expansion of Empire

One of the main themes of the critics of imperialism in the early 20th Century was the perception that the imperial project – associated for several centuries with the establishment of overseas colonies and battles over mercantile trade – had undergone a transformation in the 19th Century with the emergence of high finance capitalism, cartels, monopolies, trusts, and combinations, in which capital was seen to be moving out of the European metropole to be invested in

[11] See Anghie A., *Imperialism, Sovereignty and the Making of International Law* (2005) pp. 204-7.
[12] Nkrumah, *supra*, n. 5, pp. xii-xiii.

speculative initiatives overseas.[13] Associated with this were not only projects for the construction of dams, railways, canals, ports, telegraph systems and other forms of infrastructure for manufacturing and trade, but investments in the extraction of mineral resources (such as gold, diamonds, copper, bauxite, tin and petroleum), or for the establishment of large-scale agricultural activities (for the production of sugar, timber, tobacco, rubber and palm oil). The critics were divided as to what to make of this – for Luxemburg[14] it was a feature of Capital's ongoing search for new sites of primitive accumulation, for Lenin[15] a political dimension of the 'highest stage' of imperialism, for Hilferding[16] an offshoot of the emergence of centralized banking, and for Hobson[17] and Wolff[18] a degradation of Metropolitan politics.

Whatever the cause for the 'export' of capital during this period, the conditions under which such projects were pursued were largely undertaken through the medium of what were to become known as 'concession agreements' (later to acquire a variety of designations[19] such as economic development agreements,[20] public-private-partnerships, or more simply as state contracts[21]). The terms of such 'agreements' varied enormously[22] but in the metropolitan context at least

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[13] See generally, Brewer A, *Marxist Theories of Imperialism* (1980); Fieldhouse D., *The Theory of Capitalist Imperialism* (1967); Semmel B., *The Rise of Free Trade Imperialism: Classical Political Economy, the Empire of Free Trade and Imperialism 1750-1850* (1970).
[14] Luxemburg R, *The Accumulation of Capital* (1913, trans 1951)
[15] Lenin V. *Imperialism: The Highest Stage of Capitalism* (1916, trans. 1939)
[16] Hilferding R., *Finance Capitalism* (1910).
[17] Hobson J., *Imperialism: A Study* (1902)
[18] Wolff L., *Empire and Commerce in Africa: A Study in Economic Imperialism* (1921)
[19] See Ohler C., 'Concessions', in Max Planck Encyclopedia of Public International Law (2013) para. 4.
[20] See Hyde J., 'Permanent Sovereignty over Natural Wealth and Resources' 60 AJIL (1956) 862; McNair A., 'The General Principles of International Law Recognized by Civilized Nations', 33 BYIL (1957) 1; Carlston K., 'Concession Agreements on Nationalization', 52 AJIL (1958) 260; Hyde J, 'Economic Development Agreements' 105 Hague Recueil (1962) 271; Farer T., 'Economic Development Agreements: A Functional Analysis', 10 Colum.J.Transnat'l L. (1971) 200; Geiger R., 'The Unilateral Change of Economic Development Agreements', 23 ICLQ (1974) 73.
[21] Jennings R., 'State Contracts in International Law' 37 BYIL (1961) 156; Sonorajah M., *International Commercial Arbitration – The Problem of State Contracts* (1990) 3.
[22] See Memorial of Reparations Commission, *Reparation Commission v German Government,* Annual Digest, 1923-4, pp. 341ff. Huang notes two different usages of the term: 1) a grant by one state to another of political rights over territory (such as the international settlements in China); and 2) 'in municipal law, a grant of exclusive or non-

they were understood to assume the form of a transaction between a 'host' government and a private individual/corporation in which the latter would commit themselves to certain 'public' undertakings (eg. to extract resources, build pipelines, railways, telegraph systems and canals or supply water and electricity) in return for the right to sell and profit from the resources extracted or recoup investment by operating the undertaking in question.[23] O'Connell was to describe them, thus, in the following terms:

> 'An economic concession is usually a licence granted by the state to a private individual or corporation to undertake works of a public character, extending over a considerable period of time, and involving the investment of more or less large sums of capital. It may also consist in the grant of mining or mineral and other rights over state property. To this type of concession there are usually annexed rights of marketing and export, as well as provisions concerning royalties. Thirdly, a concession may be merely a grant of occupation of public land for the carrying on of some public purpose, such concession taking the form of a contract between the state and the concessionaire.' [24]

The public character of concession agreements was often marked, furthermore, by the granting of *de jure* or *de facto* monopolies (eg in relation to navigation or the operation of port facilities), or by endowing concessionaires with administrative authority or rights of eminent domain (eg. right to compulsory purchase of land).[25]

In many respects, what delineated the concession, as a distinct juridical instrument, was its contrast to other kinds of transaction. Concessions were clearly not merely 'private contracts' insofar as one party to the agreement would be a public agency,[26] and the agreements themselves would be visibly oriented towards the achievement of certain designated public ends. Nor for

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exclusive rights, privileges or franchise, affecting public interest, to an individual, a public or private corporation…'. Huang, 'Some International and Legal Aspects of the Suez Canal Question', 51 AJIL (1957) 277, p. 292.

[23] Gidel G., *Des effets de l'Annexation sur les Concessions* (1904) p. 123.

[24] DP O'Connell, 'Economic Concessions in the Law of State Succession', 27 BYIL (1950) 93.

[25] McNair, *supra* n. 20, p. 3.

[26] DP O'Connell, 'A Critique of the Iranian Oil Litigation', 4 ICLQ (1955) 267, pp. 268-9. In view of this, Hershey A., 'The Succession of States' 5 AJIL (1911) 295 and Sayre F., 'Change of Sovereignty and Concessions', 12 AJIL (1918) 707 were to treat concessions as a species of 'State contract'. See also, *German Reparations Case* (1924) I RIAA 429, p. 480.

similar reasons could they be regarded as 'treaties' even if the concessionaire itself was a state-owned foreign corporation.[27] Whilst some involved the 'grant' or 'lease' of territory there would, in addition, be some continued expectation of public benefit (usually revenue in the form of rent or royalties) from the operations of the undertaking. And whilst many assumed the form of a public 'license' or 'franchise', substantial variations existed as between, for example, natural resource concessions and those concerned with the operation of public services.[28] For those analyzing the legal status or characteristics of 'concessions' in the early 20th Century, therefore, it was their 'hybrid' character that stood out.[29] For Moser, they were contracts that 'touched upon the public interest';[30] for Lauterpacht, they lay 'somewhere between a "contract"… and a treaty';[31] and for O'Connell, they stood 'midway between the category of a debt owed by the state and the category of the private ownership of land'.[32] As he was to explain:

> 'The correct opinion would seem to be that the rights of a concessionaire are of mixed public and private character: the matter being public insofar as it involves a concession of sovereignty… So far as the concessionaire is concerned, however, the rights which he acquires under the contract are analogous to those to which any contract of private law gives rise.'[33]

If this was (and remains) the received framework for understanding the concession within the metropole, the story was far more complex in the context in the colonial and 'semi-colonial' periphery. In those sites, the concession served not only as a means to establish (private) rights over putatively public land or resources, but also served as a vehicle through which colonial rule would be expanded and deepened.

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[27] *Anglo-Iranian Oil Co Case*, ICJ Rep. (1952) 93. See, Kissam L and Leach E 'Sovereign Expropriation of Property and Abrogation of Concession Contracts', 28 Fordham LR (1959-60) 177, p. 194.

[28] *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)*, 27 ILR (1963) 117, p. 157. It noted that the economic conditions of concessions differed – a mining concession, for example, 'destroys the very substance of the concession' whereas a public service or public works concession may not. (p. 161).

[29] In the *Warsaw Electric Company Case* (1932), RIAA III, p. 1687 the arbitrator (Asser) held that '…the concession granted by the City to the Company has, as is generally the case with all concessions, a double character: it falls within the scope of both public and private law'.

[30] Mosler H., *Wirtschaftskonzessionen bei Änderungen der Staatshoheit* (1948) p. 66.

[31] Lauterpacht E., 'Some Aspects of International Concession Agreements', 1 Bull Harv.ILC (1959) 5.

[32] O'Connell, *supra*, n. 24, p. 95.

[33] O'Connell, *supra*, n. 26, p. 270.

For many of the 'concession hunters' of the late 19th Century[34] concessions were a means by which they could establish, through agreement with those who they took to be local owners of land, their right to use and exploit that land. Typically this was either for purposes of the construction of a commercial infrastructure (eg railroads, ports) or for purposes of the exploitation of natural resources (eg. gold, diamonds, tin, copper, iron ore, bauxite and oil) in areas beyond the frontiers of colonial rule. Whilst the agreements were visibly 'local' in the sense that they purported to secure for the concessionaires a basis for their claim of ownership over the land/resources in question, they also served as a critical resource in persuading the, sometimes reluctant, metropolitan authorities to broaden the reach of imperial power.

When Rhodes was to secure, for example, the famous Rudd Concession from Lobengula, the leader of the Ndebele, the agreement purported to provide Rhodes with a 'complete and exclusive charge over all metals and minerals' within Lobengula's several 'kingdoms, principalities and dominions'.[35] This immediately provided Rhodes and Rudd (and the sponsoring Gold Fields of South Africa Company) with something they might both exploit and capitalize through the sale of the rights concerned to the 'Central Search Association' (in which they held shares).[36] It also provided Rhodes with a means of persuading the British Government to grant a Royal Charter to him in the guise of the British South Africa Company (BSAC).[37] The Chartering of the BSAC, in turn, not only endowed the Company with public authority (ultimately assuming responsibility for the administration of Northern and Southern Rhodesia) but also, and paradoxically, served as a means of confirming the legitimacy of the Rudd Concession itself (which had continued to be widely disputed[38]). Ultimately, as Galbraith noted, the limits which the government sought to establish for the

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[34] For an early critique of the role of concession hunters in the expansion of empire in the 19th Century see Brailsford H., *The War of Steel and Gold* (1914) pp. 52-4, 61-3.
[35] See generally Galbraith J., *Crown and Charter*, (1974) pp. 72-80.
[36] Ibid, pp. 84-6.
[37] See Wolff, *supra*, n. 18, p. 35
[38] See Galbraith, *supra,* n. 35, pp. 72, 120.

chartered company 'had little to do with the rights of an African chief'.[39] 'The Lobengula who mattered' he observed, 'was largely an artificial creation whose power was assumed to be unquestioned in the gold regions of the Mazoe Valley and other areas south of the Zambezi claimed by the Portuguese. This invention was essential to undergird the British claim to a sphere of influence as against Portugal'. [40]

What was thus put into operation through the institution of the concession agreement, in such cases, was not so much a blurring of the (putative) boundaries between public authority and private entitlement but rather the opposite: an attempt to put those conditions in place. For what they sought to enable was not just the acquisition of rights to exploit resources or acquire land for the purposes of the construction of railroads from native 'owners', but the very possibility of such land being owned or possessed in the first place.[41] If, as Lipson observes, one of the preconditions for the export of capital in the 19th Century was the parallel export of Western regimes of property rights,[42] the means by which that was to occur was not by erasure of existing regimes of ownership (such as were imagined to exist), but by their subsumption. For in order to create such regimes of entitlement without appearing, at the same time, to undermine the very principles that were to be put in place, those rights had to be visibly 'acquired' from their indigenous 'owners'. In purporting to provide the basis for rights of exploitation or of ownership, then, the concession agreement

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[39] *Ibid.*

[40] *Ibid*, p. 107. He notes elsewhere (pp. 73-4) that '[w]hatever the translation may have been, Lobengula did not have the power, even if he had the inclination, to alienate land. Also, leaving aside the issue of whether the Ndebele actually controlled the areas of Mashonaland where the gold deposits reputedly were, Lobengula could have granted the concessionaries only the usufruct…. These men [Rudd and Rhodes] in pursuit of their own ends credited Lobengula with an absolute power over his own people which he did not possess and control over other peoples which he did not exercise. "Matabeleland" was aggrandized on the maps to include the Shona and the other peoples, and this imagined empire was colored pink. The hue was important – pink rather than red – because the object was rule by a British company not by the imperial government.'

[41] See e.g. Concessions Ordinance 1900 (No. 14) of the Gold Coast Colony, and Mining Rights Regulation Ordinance, 1905, section 2.

[42] Lipson C., *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (1985) pp. 14-15, 20.

would have a two-fold function - both vesting rights in the concessionaire, but creating also, in the same imaginary, the authority to vest. The sovereign right to dispose of land or resources (from which one may adduce sovereignty *tout court*) was thus produced through the instrument of the concession as being its unexpressed precondition.

Two points emerge from this. The first is that, in the context of late 19th Century colonial practice, concession agreements rarely assumed, in any straightforward sense, the character of an agreement between a private party and a sovereign state, nor were they limited to the establishment of private rights or interests. Rather, one finds a complex interweaving of economic and administrative functions, a confluence of public and private initiatives, in which the rights of the concessionaire were intimately connected to the *production* of public power as much as a consequence of it.[43] The second, and more straightforward point, is that concession agreements operated as an important technology of imperial expansion in both its 'formal' and 'informal guises' – providing both its rationale and its ethos, connecting the resources of the South to the commercial networks of business and commerce in the North through the medium of the contract which ultimately created its own grounds of validity.

3. Concessions and Acquired Rights

By the time in which decolonization was placed upon the international agenda in the aftermath of the Second World War, not only had the economies of colonial territories become organized around the export of primary materials to manufacturing centres in the North, but a large proportion of the major economic assets in the colonial world (mining, agriculture, oil production, transportation etc) were owned or controlled by companies either registered in the Colonial metropole or with majority shareholding there.[44]

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[43] Wolff notes, for example, that the concessions granted to the British East Africa Association and the German East Africa Company in 1887-8 included: 'A monopoly of the right to purchase public lands, of regulating trade, navigation, and fisheries, of making roads, railways and canals; the right to levy taxes on the inhabitants, to establish customs houses, to levy dues; an exclusive privilege to work mines and to issue notes'. Wolff, *supra,* n. 18, p. 246.

[44] See generally Rodney, supra, n. 6, chapter 5; Nkrumah, supra, n. 5, chapter 6.

The prospect of decolonization, thus, immediately put in question the fate that might befall such commercial undertakings: was there a duty on the part of the newly independent states to recognize and honor existing concessionary contracts? Did the former colonial powers enjoy a right to seek protection of such interests after independence? Whether they should have been entitled to any kind of protection under international law was not immediately obvious. Quite apart from the merits of any special protection being afforded to those who had already profited significantly from the extraction of resources from the colony, there was a general presumption as Garcia Amador noted in his reports on State Responsibility at the time, that questions of property and contract (and hence concessions) were matters that presumptively fell within the 'domestic jurisdiction' of states[45] and that, therefore, newly independent states would be in a position to deal with such matters in the manner of their own choosing. The main qualification, here, concerned the extent to which certain pre-existent 'rights of aliens' might be implicated and be due protection; and in that respect, two fields of international law appeared to be relevant – the first of which was the law of diplomatic protection so far as it governed the treatment of aliens, and the second, the law of state succession.

Formally speaking, the question of state succession appeared to be antecedent to that concerning the treatment of aliens: the responsibility of a new state for a putative violation of the rights of an alien claimant (as might appear, for example, from the non-performance of a contractual obligation or the discriminatory expropriation of property) depended upon the hypothesis that the rights in question were duly 'acquired' in the first place. That prior question, however, could not simply be answered by reference to the requisite legal formalities applicable within the colony or protectorate (ie. whether the rights had been acquired according to the law applicable within the colony), but demanded also an answer to the question whether the newly independent state itself was also condemned to respect and acknowledge all pre-existent

[45] See e.g. Garcia-Amador F, 'Fourth Report on State Responsibility', UN Doc. A/CN.4/119 (1959) p. 3, para. 6.

proprietary entitlements - and that was to be answered, it was clear, by reference to the emergent law of state succession. Despite the formal distinction, however, it became evident that the answer to both sets of questions was to take the same form – whether, that is, there existed an international obligation to respect 'acquired rights'. And it was the doctrine of acquired rights that came to be offered as the principal rationale for the protection of concessionary interests during decolonization - being given particular prominence in the influential work of DP O'Connell on state succession[46] but finding its way also into the work of Garcia-Amador on state responsibility.[47]

Whilst US courts in the early part of the 19th Century had, under the sway of CJ Marshall's influential opinion in *US v Percheman*,[48] recognized the continuity of pre-existent private rights in land in territories acquired by the US, it was not until the early 20th Century that scholars such as Gidel[49] and Descamps[50] began to rationalize that practice as a principle of public international law and seek to articulate it in terms of the doctrine of acquired rights. The doctrine of acquired rights, itself, was a concept which they borrowed from von Savigny's work on private international law[51] and which had become, in the intervening years[52] a key premise or axiom in the conflict of laws: '[e]very right which has been

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[46] O'Connell, *supra*, n. 24.
[47] Garcia Amador, *supra,* n. 45.
[48] *US v. Percheman* (1833) 7 Peters' Rep. 51. See also, *Strother v. Lucas* (1838) 12 Peters 410, 435, 438; *Smith v. United States* (1836) 10 Peters 326, 330; *United States v. Auguisola* (1863) 1 Wallace 352, 358; *US v. Soulard* (1830) 4 Peters' Rep 511; *Otega v. Lara*, (1906) 202 US 399; *Vilas v. City of Manila* (1911) 220 US 345. For a rationalization of this practice that forefronts the distinction between public and private legal relations see Rowe L., 'The Political and Legal Aspects of Change of Sovereignty', American Law Register (1902) 466, pp. 474-5; and Wilkinson H., *The American Doctrine of State Succession* (1934).
[49] Gidel G., *Des effets de l'annexation sure les concessions* (1904)
[50] Descamps P., 'La définition des droits acquis. Sa portée générale et son application en matière de succession d'Etat à Etat'', 15 RGDIP (1908) 385.
[51] Savigny F. von, *8 System des heutigen Romischen Rechts* (1849) translated by William Guthrie as Savigny F von, *Private International Law: A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time* (1869), p. 286, 289.
[52] Holland T., *Elements of Jurisprudence* (5th ed. 1890) 359; Dicey AV, *Digest of the Law of England with Reference to the Conflict of Laws* (1896, 2nd ed 1908); Pillet A, 'La Théorie générale des droits acquis' 8 Hague Recueil (1925) 489; Beale J, *A Treatise on the Conflict of* Laws (1935). See also, American Law Institute, *Restatement of the Law of Conflict of Laws* (1934).

acquired under the law of a civilized country' as Dicey was to put it, 'is recognized and, in general, enforced by English Courts'.[53]

Whilst, as a conflicts doctrine, the principle of acquired rights was principally concerned with the recognition of rights vested in an individual under the terms of a foreign legal order, it was only a small step for an equation to be made between the laws of a spatially distinct state and those of a temporally distinct state (the 'predecessor state'). Indeed, in cases in which a portion of the territory of one state was ceded to another, there really was no distinction – one was dealing, in all instances, with the laws of another state. Once, then, one was able to recognize the existence of a general obligation to recognize and respect pre-existent acquired (vested) rights, it was only one small further step to the conclusion that the infringement of such a right following the cession or annexation of territory might constitute an international tort if the right in question was that of an alien.[54]

What was perhaps most significant here in the merging of the doctrine of acquired rights with the doctrine of state succession was the fact that they appeared to share a common generative rationality - the clue to which being found in von Savigny's idea that they gave expression to the 'natural limits' of legislative authority. What was in contemplation was the desirability of securing the grounds for the recognition of a field of 'extra-territorial' or 'trans-national' legal relations that were to be preserved intact irrespective of the legislative/sovereign prerogatives of individual states. Private rights would enjoy, in that sense, a permanence that exceeded any political authority – they survived not in virtue of being 'recognised' but in virtue of being left 'unaffected'. Political authority, for its part, ended at the point at which it encountered private rights.

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[53] Dicey, *supra,* n. 52, p. xxxi.
[54] See Kaeckenbeeck G., 'The Protection of Vested Rights in International Law', 17 B.Y.I.L. (1936) 1, p. 7.

If the animus for the doctrine of acquired rights was evidently to have its origin in the precepts of classical political economy and laissez-faire government, it was also an idea that Schmitt was to later bring into prominence in his account of the (declining) European spatial order at the end of the 19th Century. What the doctrine of state succession signified, for him, was the existence of a 'common economic space' or 'free market' within Europe that was underpinned by 'a certain relation of public and private law, of state and state-free society'.[55] The theory and practice of State succession, in his view, paralleled that within the law of occupation,[56] in the sense that it was premised upon the preservation of the underlying economic order – that of a 'common free market transcending he political borders of sovereign states'.[57] As he was to explain:

> 'Given that state dominion (*imperium* or *jurisdictio*) based on public law, on the one hand, and private property (*dominium*) based on private law, on the other, were separated sharply, it was possible to isolate from juridical discussions the most difficult question, namely that of a total constitutional change tied to territorial change. Behind the foreground of recognized sovereignty, the private sphere, which in this particular case means the sphere of private economy and private property, largely remained undisturbed by the territorial change. With a territorial change, the international economic order – the liberal market sustained by private entrepreneurs and businessmen, which was free in the same sense as free world trade, and the free movement of capital and labour – retained all the international safeguards that it needed to function. All civilized states subscribed to the distinction between public and private law, as well as to the common standards of liberal constitutionalism; for all, property, and thus trade, economy, and industry belonged to the sphere of constitutionally protected private property. This constitutional standard was recognized as fundamental by all states party to the territorial change.[58]

His conclusion, thus, was that a 'territorial change was no *constitutional change* in the sense of the social order and of property'; rather it was a change only in

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[55] Schmitt C., *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (1950, trans G Ulmen, 2003) p. 197.
[56] Cf. Article 43, Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, October 18, 1907.
[57] Schmitt, *supra*, n. 55, p. 197.
[58] *Ibid.*

the public legal sphere which left unaffected the 'internal currency of private legal property'.[59]

Whilst the doctrine was to acquire considerable valence within international law in subsequent years,[60] there were considerable doubts, at the moment of its articulation, as to whether it was a principle applicable in case of the annexation of non-European territory.[61] In the latter context, concessionary contracts, in particular, became a point of contention. A good deal of practice at the end of the 19th Century had seen states claiming the right to cancel or at least review existing concessionary contracts – this was the case for example, following the annexation of Tarapaca by Chile in 1884, the annexation of Madagascar by France in 1896,[62] and the annexation of the Boer Republics by Britain in 1900.[63] Even the US, which as we have seen had traditionally sought to preserve all existing private rights following its acquisition of territory by way of cession was far more equivocal when it came to the Spanish concessions in Cuba and the Philippines in 1898.[64] In that context it had devised a general formula by which it was prepared to accept the validity of concessions only so far as they were both related to the territory and granted for its exclusive benefit.[65] Those that

[59] *Ibid*, p. 198.
[60] See e.g., Kaeckenbeeck *supra,* n 54; Rousseau C., *Principes généraux du droit international* (1944) I, pp. 901-6; Moore J, *Digest of International Law* (1906) I, p. 98; Hackworth G, *Digest of International Law* (1940-1) I, pp. 562-7; Makarov A, 'Les Changements territoriaux et leurs effets sur les droits des particuliers', Annuaire Institut de Droit International (1950) 208; McNair supra, n. 20, pp. 16-18;
[61] Cavaglieri A, *La dottrina della successione di stato a stato e il suo valore guridico* (1910) p. 122; Keith A., *Theory of State Succession with Special Reference to English and Colonial Law* (1907). See also Rivier A., *Principes du Droit des Gens* (1896) II, pp. 437-8.
[62] Moore, *supra,* n. 60, I, p. 387-8.
[63] See Report of the Transvaal Concessions Commission, Parliamentary Papers, 1901, vol. 35 (Cd. 623) in which it stated that 'a State which has annexed another is not legally bound by any contracts made by the State which has ceased to exist'. Moore, *ibid,* pp. 411-414. The report was, no doubt, informed by the British doctrine of Act of State. See, *Cook v Sprigg*, [1899] AC 572 and *West Rand Central Gold Mining Company v The King* [1905] 2 KB 391.
[64] See, Moore, *ibid,* pp. 389-411; Magoon C., *Reports on the Law of Civil Government under Military Occupation by the Military Forces of the United States* (1902) p. 177.
[65] Sayre, supra, n. 26, pp. 712-3 (referring to the Manila Railway Company case); Moore, *supra,* n. , 399-402; Kaeckenbeek, *supra,* n. 54, p. 11; Wilkinson, *supra,* n. , pp. 50-51.

appeared to be solely for the benefit of the former sovereign (Spain)[66] or which concerned the purchase of public positions[67] it refused to recognize.

There are two main explanations for the emergence of this practice. The first of these related to the character of the contracts themselves. Since, as mentioned above, concessions appeared to be 'hybrid' instruments involving a mix of public and private law, the normal 'test' for intangibility was unavailable. What had to be brought into the equation was the question whether the continuity of such legal relations was consistent with the new political settlement[68] – and that, broadly speaking, explained the articulation of the US 'benefit' test. What needed to be distinguished, at the very least, were contracts that were justifiably open to enforcement as against the successor state from those that were clearly not.[69] Not all contracts, it was reasoned, gave rise to proprietary entitlements,[70] and not all proprietary entitlements were capable of being enforced against the successor.

The second explanation, however, concerns the geographical orientation of the practice in question. Schmitt's contention that the law of state succession was a productive facet of a specifically European territorial order – giving expression to the existence of a common economic space – was to suggest that the operative conditions of the doctrine of acquired rights might be similarly confined. This much, at least, was apparent during the late 19th century imperial expansion in which the question of succession was marked most by its almost total absence. As Schmitt notes, in that context, that

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[66] Eg. *Manila Railway Co cases,* Attorney General Griggs 23 Op. 187.
[67] See, *O'Reilly de Camara v Brooke* 209 US 45 (1908), Magoon's Reports, p. 209; *Alvarez y Sanchez v US* 216 US 167 (1910). See generally Wilkinson, p. 46.
[68] See eg. Westlake J, 'The Nature and Extent of Title by Conquest', 17 LQR (1901) 392, p. 395-8; Westlake J., 'The South African Railway Case', in Oppenheim L (ed) *Collected Papers John Westlake on Public International Law* (1914) 490, p. 493; Huber M., *Die Staatensuccession* (1898) pp. 18-19.
[69] See Sayre, *supra,* n. 26, p. 707. He cites, by way of illustration, the advice provided by law officer Magoon to the US government denying its liability for a security deposit of 27,503.06 pesos that had been provided to the Spanish collector of customs. See Magoon's, Reports, *supra,* n. 64, p. 494.
[70] See, *West Rand Gold Mining Company v The King* [1905] 2 KB 391, p. 411. See also Fielchenfeld E., *Public Debts and State Succession* (1931) p. 626.

> '[t]he power of indigenous chieftains over completely uncivilised peoples was not considered to be in the public sphere; native use of the soil was not considered to be private property. One could not speak logically of a legal succession in an *imperium*, not even when a European land-appropriator had concluded treaties with indigenous princes or chieftains and, for whatever motives, considered them to be binding. The land-appropriating state did not need to respect any rights to the soil existing within the appropriated land, unless these rights somehow were connected with the private property of a member of a civilised state belonging to the order of interstate, international law. Whether or not the natives' existing relations to the soil – in agriculture, herding, or hunting – were understood by them as *property* was an issue to be decided by the land-appropriating state. International law considerations benefiting the property rights of natives, such as those recognized in questions of state succession in the liberal age favouring property rights to land and acquired wealth, did not exist on colonial soil.' [71]

Such ideas were to certainly inform the approach adopted by colonising powers in relation to their liability for foreign debt,[72] and was to inform also sundry other cases relating to the acquisition of title to property,[73] liability for torts,[74] and led to a momentary distinction being developed between the annexation and the cession of territory[75] (in which 'annexation' was to be associated with the appropriation of non-European soil, and 'cession' associated with that of European soil).[76] The doctrine of acquired rights, in other words, was inflected with the engrained supposition that the only rights to be given protection were the 'rights of occupant', as Fanon was to put it.

If the doctrine of acquired rights found its negation in the annexation of non-European soil, it was nevertheless revivified within Europe the aftermath of WW1 having been incorporated as an operative principle in a number of the treaties of Peace including the (abortive) Treaty of Sèvres (articles 311-12), the Treaty of Lausanne (Protocol XII, article 9),[77] the Treaty of Versailles (articles

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[71] Schmitt, *supra*, n.55, p. 198.
[72] See Feilchenfeld, *supra,* n. 70, p. 321.
[73] *Re Southern Rhodesia* [1919] AC 211.
[74] *Robert E Brown Claim*, (1923) 2 ILR 66.
[75] See e.g. Rivier, *supra,* n. 61, p. 438.
[76] See Keith *supra,* n. 61; Hurst C., 'State Succession in Matters of Tort' 5 BYIL (1924) 163.
[77] see *Mavrommatis Palestine Concessions Case* PCIJ, Series A, No. 2 & 5 (1925); *The Mavrommatis Jerusalem Concessions Case*, PCIJ, Series A, No.11 (1927); *Lighthouses Case*, PCIJ, Series A/B No. 62 (1934); *Lighthouses in Crete and Samos Case*, PCIJ, Series A/B, No. 71 (1937).

297-8)[78] the Geneva Convention of 1922 (article 6), as well as being included in a number of the Mandate agreements. Those provisions led the Permanent Court in both the *German Settlers*[79] and the *Certain German Interests Cases*[80] to declare it to be a 'general principle of law'[81] and encouraged it also to uphold, in several other cases, the principle of succession to concessionary contracts.[82] This was quickly picked up more broadly leading McNair to proclaim it to be a general principle of law,[83] and Lauterpacht to endorse it as a central pillar in the emergent law of state succession.[84] By the time, then, at which the ILC was to survey the state of existing international law in 1949, the voices of skeptics such as Keith and Cavaglieri were crowded out in the apparent, newly-found, consensus.[85]

One notable feature of the doctrine that was to emerge in the inter-war years, however, was the way in which it had become increasingly inter-twined with the more general question of state responsibility for injury to aliens.[86] The backdrop to this, inevitably, was the emergent practice, originating in Mexico and the Soviet Union, of widespread nationalization (a practice which was to become more generalized in the building of welfare states in Europe) but which posed, in the process, questions both as to the conditions under which a power to expropriate property might be exercised and as to the level of compensation that might be payable. Concession agreements were often at the heart of that

[78] *Germany v the Reparations Commission* (1924) I Int Arb Awards 479
[79] *Settlers of German Origin in Territory ceded by Germany to Poland*, PCIJ, Ser. B, No. 6, p. 15 at p. 36.
[80] *Certain German Interests in Polish Upper Silesia*, PCIJ, Ser. A, No. 7, p. 42. See also, *Oscar Chinn* PCIJ, Series A/B, No. 63, 65, p. 88.
[81] See also, See e.g., *Niederstrasser v. Poland*, Arbitral Tribunal of Upper Silesia, 6th June 1931, A.D. 1931-32, Case No. 33, p. 667; *Goldenberg v. Germany*, German-Romanian (1928) RIAA II, p. 909; *Jablonsky v German Reich*, Upper Silensian Arbitral Tribunal, AD 1935-7, Case No. 42; *Sopron Köszeg Local Railway Company Arbitration*, AD 1929-30, Case No. 34.
[82] See eg. *Mavrommatis Concessions Case*, PCIJ, Ser. A, No. 5; *Lighthouses Case between France and Greece*, PCIJ, Ser. A/B, No. 62 (1934).
[83] McNair *supra,* n. 20, pp. 16-18.
[84] Lauterpacht, H., *Private Sources and Analogies of International Law* (1927) pp. 129-130.
[85] There were clearly residual voices of opposition. See e.g., Kaeckenbeeck supra, n. 54, pp. 14, 17.
[86] For an account of the emergence of the latter see Borchard M., 'Theoretical Aspects of the International Responsibility of States', ZaoRV (1929) 223.

practice – agricultural land in Romania, oil in Mexico - and the principle of acquired rights came into prominence as a doctrine that provided the grounds for limiting the ability of states to legislate away rights formerly granted to aliens. At this point, its function was no longer simply one of determining the basis for the recognition of rights acquired under foreign law[87] or of specifying the obligations incumbent upon successor states, but one that was expressive of a more general obligation not to arbitrarily interfere in 'patrimonial rights of alien private individuals'.[88]

4. Acquired Rights and Decolonization

Whatever the cautions associated with the doctrine of acquired rights when applied in relation to concessionary contracts in the early part of the 20th Century, the doctrine itself was to be enthusiastically embraced by scholars in the West as a doctrine that would have considerable salience in the emergent practice of decolonisation.[89] When called upon to advise the International Law Commission as to what topics it should prioritise for purposes of codification, Lauterpacht suggested, in light of the newly acquired independence of India and Pakistan, that one of those should be the question of state succession. He went on to suggest, furthermore, that the centerpiece of that work should be the doctrine of acquired rights[90] given that it had been widely accepted (even if, he admitted, there was work to be done in determining the extent of its application to various categories of private rights such as 'those ground in the public debt, in concessionary contracts, in relations of government service, and the like').[91]

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[87] The doctrine of acquired rights, however, had largely been discarded as a key organizing principle in private international law by the 1950s. See Carswell R., 'The Doctrine of Vested Rights in Private International Law', 8 ICLQ (1959) 268.
[88] See Garcia Amador F., Sohn L. and Baxter R., *Recent Codification of the Law of State Responsibilty for Injuries to Aliens* (1974) p. 40.
[89] See generally, McNair, supra, n. 20, pp. 16-18; Rousseau C., *Principes généraux du droit international* (1944) I, pp. 901-6; Verdross A., 'Les règles internationales concernant le traitement des étrangers', 37 Hague Recueil (1931) 359; Makarov, supra, n. 61.
[90] Secretary General Memorandum, 'Survey of International Law in Relation to the Work of Codification of the International Law Commission', UN Doc. A/CN.4/1/Rev.1 (1949) pp. 28-9.
[91] Ibid.

The first person to answer the call was not the International Law Commission (which only turned to the matter in 1962) but Lauterpacht's student, DP O'Connell, who, in the following year, published an article in the British Yearbook of International Law where he sought to apply the doctrine of acquired rights to the question of the survival of concession agreements in case of state succession.[92] O'Connell was not entirely candid as to why he regarded the question to be important, but by the time at which he was writing, calls for the termination, re-negotiation or straightforward expropriation of historic concession agreements were widespread, and had been picked up by various independence movements such as those in Burma and Indonesia.[93] And one may sense that O'Connell was seeking to develop the intellectual groundwork for those within the Metropole who would be addressing such issues in coming years.

In that article O'Connell developed the argument that, whilst a concessionary contract does not *per se* survive a change in sovereignty (and hence a successor state would not be automatically 'subrogated in the rights and duties which it created') the concessionaire would, however, retain 'an equitable interest in the money which he has invested and the labour he has expended'. That interest, furthermore, 'constitutes an acquired right which the successor state is obliged by international law to respect'.[94] The consequence of this was that the successor state would have the option of either subrogating itself into the concessionary contract by novation, or, alternatively, expropriating the concession (in whole or part) with the payment of equitable compensation.[95] Whilst we have seen, O'Connell could rely upon the decisions of various courts and tribunals in the inter-war years to underpin this argument for the existence

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[92] O'Connell, *supra,* n. 24, 93.
[93] On Indonesian nationalization see Domke M., 'Indonesian Nationalization Measures Before Foreign Courts', 54 AJIL (1960) 305; Baade H., 'Indonesian Nationalization Measures Before Foreign Courts – A Reply', 54 AJIL (1960) 801.
[94] O'Connell, *supra,* n. 24, p. 124.
[95] The grounds for which were based upon the concept of unjust enrichment, O'Connell, ibid, p. 121. O'Connell was later to suggest that compensation should include *damnum emergens* and *lucrum cessans*, O'Connell D., 'Independence and Problems of State Succession', in O'Brien W. (ed), *The New Nations in International Law and Diplomacy* (1965) 7, p. 28.

of an obligation to respect acquired rights, most of the article was concerned with a constructive re-interpretation of the somewhat more inconsistent practice of the pre-war years with that conclusion in mind.[96]

It was only later in his book of 1956 that O'Connell came to spell out in more detail the underlying rationale for his thesis. His argument ran as follows: in any case of state succession there must be some 'legal continuity bridging the gap created by change of sovereignty',[97] and that is not because the successor has 'willed' the continuance of law, nor indeed, as a consequence of a rule of international law, but in virtue of a 'principle of philosophy without which human society would fall into anarchy'.[98] If the law survives, so do legal rights (with the exception of those that are 'political in character'). The successor state, however, is competent like any other to abrogate or modify such rights by legislative act, but if it chooses to abrogate the vested rights of foreign nationals, it could only do so subject to the payment of full compensation.[99] As regards state contracts, whilst the contract itself could not survive, the equitable interest does. He explains:

> 'A man who invests capital and labour in the construction of works of profit and value to a State acquires an equity in that investment that is not destroyed by change of sovereignty. If there were no security of investment, there would be no investment; and a universal refusal to recognize these equities would be destructive of one of the essential economic bases of modern State and international organization. If international law prescribes an obligation on a State to respect investment of foreign nationals there is no theoretical objection to assuming a similar obligation on the part of its successor.'[100]

It is at this point that O'Connell's scheme becomes transparent. The key to the whole field, as he saw it, was the securing of 'equity' and the prohibition of unjust enrichment. The timeless quality of his principle of philosophy undergirding

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[96] O'Connell, *supra*, n. 24, p. 109.
[97] O'Connell D., *The Law of State Succession* (1956) p. 267.
[98] O'Connell D, 'Recent Problems of State Succession in Relation to New States', 130 Hague Recueil, (1970) p. 127.
[99] O'Connell, *supra,* n. 97, pp. 267-8.
[100] *Ibid.*

legal continuity, was thus supplemented by a contingent, 'modern', economic rationality that underscored the protection of foreign investments through the medium of a surviving equitable interest.

The clear thrust of O'Connell's argument here was to forge an analogy between the obligations of a newly independent state in respect of concessionary contracts, and those that applied more generally in relation to the treatment of concessions owned by foreign nationals.[101] And it was that analogy that led him to import into the legal regime governing decolonization the corpus of doctrine relating to the protection of foreign investments (and specifically the obligation to compensate foreign investors upon expropriation of their interests). Quite apart from the fact that the underpinnings of O'Connell's analysis was to achieve precisely that which was denied by the ICJ in the *Anglo-Iranian Oil Company Case*[102] – namely the effective 'internationalisation' of the concessionary contract[103] - it may be asked, more pertinently, whether the analogy was really an appropriate one? Were colonial concession holders really 'foreign investors' when operating under the umbrella of colonial authority? Was it always to be assumed that their 'investments' were to the benefit of the territory concerned such as to give rise to an equitable interest on the part of the concession holders? Would it really make sense to suggest that a former colonial power should be entitled to assert diplomatic protection in order to protect the legal interests of a concessionaire that it, the colonial power, had granted in the first place? Was it appropriate to conceptualise as equivalent, the act of a state in terminating a concession agreement to which it was party with that of a new state in determining the political and economic conditions of its own formation?

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[101] This is made apparent in his commentary on the Anglo-Iranian Oil Company case. See, O'Connell *supra,* n. 26, pp. 270-1.

[102] ICJ Rep. (1952) 93.

[103] O'Connell's position, here, was informed by two contested propositions: first, that adequate compensation pre-conditioned any right to expropriate (ie. that it functioned not so much as a remedy as a limitation on the sovereign right to expropriate); secondly that the right to compensation was enjoyed by the foreign concession holder rather than by the state of nationality. His position on both scores paralleled that of Sohn and Baxter in their Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens. See Sohn L. and Baxter R., 'Responsibility of States for Injuries to the Economic Interests of Aliens', 55 AJIL (1961) 545.

5. From Concession to Foreign Investment - the Legal Re-ordering of Economic Relations

As much as O'Connell worked with an imaginary that equated colonial concessions with foreign investments, it was clear that in the following years, whether as a consequence of treaty arrangements prior to independence or by way of constitutional enactment, the vast majority of pre-existent concessions were continued uninterrupted form after independence. Many were also subsequently the object of nationalization decrees[104] leading, in some cases, to financial settlements that contributed to the further indebtedness of states emerging from colonial rule. What went unacknowledged, however, was the complex re-mapping of the architecture of concession agreements that was to accompany their 'continuation'. Far from being 'unaffected' by decolonization (in the manner described by Justice Marshall in the *Percheman case*) concessions had to be conceptually re-configured from top to bottom in order to remain in place.

In the first place, in order for the concessions in question to come within the purview of international law at all, they would have to be invested with the character of 'foreignness' (in the sense that they would then be entitled to the vaunted 'international minimum standard of treatment'). Whilst it was certainly not unknown for concession agreements to be awarded to companies incorporated in territories other than that of the metropolitan state, in the vast majority of cases, the companies concerned were either registered and had their operations in the colony itself (albeit frequently as subsidiaries of metropolitan corporations), or alternatively were incorporated within the financial heartland of the Metropolitan state itself. In original guise, thus, most would merely have been 'local' investments for purposes of international law prior to independence governed solely by the terms of municipal law. After that moment, their foreign character would be dependent upon the subsequent arrangements governing the nationality of legal persons situated within the former colony – and that would be determined by the respective terms of both the law of the metropole and the

[104] E.g. Indonesia, Burma, Ghana, Nigeria, Democratic Republic of Congo.

former colony itself.[105] Whilst in case of companies registered, or incorporated within the metropole it might naturally have been assumed that they would automatically become 'foreign' in relation to their site of operations in virtue of the mere fact of independence – and that the former metropolitan power would retain the right to seek protection of its interests under guise of the law of diplomatic protection. There was, however, no guarantee that such companies would continue to have legal personality within the legal order of the newly independent state. Only by avoidance of a requirement of local registration, then, could such corporations effectively secure their status as foreign investors after independence. Given that, in many cases, the main shareholding interests tended to be located within the metropole, the Colonial powers thus routinely either sought to extract guarantees from the new states prior to independence to protect the interests under concession agreements, or superintended the 'relocation' of the centre of operations of the corporations concerned back to the metropole prior to independence.[106]

In the second place, there had to be a subtle interpretive reconfiguration of the concession agreement itself. Whereas, as we have seen, it was widely conceived that concession agreements assumed a hybrid form – part public, part private; part political, part economic. For them to assume the form of a foreign 'investment' as opposed to part of the apparatus of colonial rule, then, their public/political dimensions had to be imaginatively excised. Part of that process was achieved by construing all grants, privileges, powers and responsibilities that had previously been enjoyed by concessionaires – which extended, in some cases, to a right to acquire and colonize land, to extract revenues, or to police and enforce the rule of law - as essentially 'commercial' or 'private' interests

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[105] For a fairly inconclusive review of the nationality of legal entities in case of succession see Mikulka V, 'Second Report on State Succession and its Impact on the Nationality of Natural and Legal Persons', UN Doc. A/CN.4/474 and Corr.1 & 2 (1996) 119, pp. 147-8.

[106] Eg. Belgian Law of 17th June 1960 which purported to move the headquarters of the Compagnie du Katanga to Brussels. See 'Explanatory Statement' to Democratic Republic of the Congo Decree-Law of November 29, 1964, 4 ILM 91965) 232, pp. 234-5. More generally, Nkrumah, *supra,* n. , pp. ; Radmann W., 'The Nationalization of Zaire's Copper: From Union Minière to Gecamines', 25 Africa Today (1978) 25.

irrespective of their content.[107] In the same measure, the concessionaires were to be definitively cast as 'private' agencies – mere corporations – rather than armatures of colonial authority.[108] Through this imaginative re-interpretation then, concession agreements themselves were then given a definitively new form - not as hybrid legal instruments - but simply as 'state contracts'.[109]

In the third place, as O'Connell himself intimated, in order for concession agreements to survive, a necessary first step was for them to be legally extinguished.[110] The importance of this was to both displace any responsibility on the part of the metropolitan state for performance, and to preclude the possibility that the continuation of the concessions would be a matter of choice on the part of the newly decolonized state. The problem, here, was not that one the authors of the original contract had 'disappeared', so much the fact that the metropolitan state would no longer be in a position to guarantee its performance (bringing into play the doctrine of 'frustration'). An obvious response to this might then have been to suggest that the effective unilateral termination of the contract on the part of the metropolitan power (by way of relinquishing its claim to administer the territory concerned) gave rise to an unliquidated debt on its part for which *it*, the metropolitan power, would be primarily responsible (unless, and to the extent, that it was 'localised' and thereby 'passed' to the successor).[111] Perhaps unsurprisingly, this was not an option widely canvassed. The alternative, furthermore, that it remained open for the successor state to step into the shoes of the metropolitan state for purposes of continuing the

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[107] Garcia-Amador, for example, concludes that whilst concession contracts often 'impose obligations of a semi-political character' they are 'not substantially different from ordinary contracts'. Fourth Report, *supra,* n. 45, p. 25, para. 101. See also McNair, supra, n. 20, p. 10).

[108] See e.g., Schwebel's account of the Watercourses in Katanga case in which, having noted that the rights of the Union Miniere 'were so extensive as to partake of quasi-governmental powers akin to those accorded the great trading companies of an earlier concessions era', he was to go on to assert that 'the Company was clearly a company and the State clearly a State'. Wetter JG. And Schwebel S., 'Some Little-Known Cases on Concessions', 40 BYIL (1964) 183, p. 193.

[109] See e.g., Mann F., 'State Contracts and State Responsibility' 54 AJIL (1960) 572; Jennings R., 'State Contracts in International Law', 37 BYIL (1961) 161.

[110] See Stark, *Introduction to International Law* (5th ed., 1963) 272; Delson R., 'Comments on State Succession', 60 ASIL Proc. (1966), 111, p. 112.

[111] See e.g. *Manila Railway Co Claim*, Magoon's Reports, *supra,* n. 64, p. 177.

contract was equally unappealing. For to admit as much would be to suggest that the fate of concessionary contracts would depend entirely upon the willingness of the latter to recognize the contracts as remaining in force, and that there would be no obligation to compensate the 'investor' if the undertaking were to be appropriated by the agencies of the new state.

The advantage, then, of pronouncing the contract to have 'lapsed', as O'Connell was to suggest, was that rights and interests in question could be detached from the agreement itself, and presented as independent juridical/factual datum – or, in O'Connell's formulation, as 'equitable interests' - the denial of which would lead to an unjust enrichment on the part of the state. And in his view it was the threat of unjust enrichment that underpinned the obligation of novation/compensation. This formulation - which appeared to involve the subtle re-conceptualisation of contractual interests as beneficial interests – was dependent, however, upon a particular way of accounting for that interest. In O'Connell's account, the existence of such an equitable interest would be determined by the overall value of the investment concerned, and that value in turn would be determined by reference to the level of compensation putatively required in case of its expropriation.[112] So, as he was to conclude, a refusal to recognize a pre-existent concessionary interest on the part of a successor state would require compensation for 'the amount of capital and the value of the labour expended on the concession' or '… the lowest market value of the works immediately anterior to the expropriation'.[113]

Two, very subtle, analytical moves are put in place here. To begin with, in order to identify the very existence of a beneficial interest, O'Connell has resort to the imagined level of compensation that would be payable as a consequence of an act of expropriation. He draws, in other words, a factual inference as to the existence of a beneficial interest from a normative criterion for compensation, and in the process, his argument becomes almost irreducible circular – a legal interest exists because compensation would be payable if that legal interest were

[112] See Delson, supra, n. 110, pp. 112-3.
[113] O'Connell, *supra,* n. 97, p. 277.

said to exist. His conclusion, in other words, is manufactured by being embedded in the chain of reasoning as an imagined predicate.

In the second place, the evaluative framework he employs is one that shares the orientation of the Hull formula (which was incorporated into the doctrine of unjust enrichment by its early proponents[114]). The principal concern, there, being to evaluate the equities on one side alone – by reference to what the concessionaires 'invested', or by way of calculation of the present value of the investment as determined by current assets and future (projected) profits. What this entirely removes from view is the extent to which the concessionaires might themselves have benefited from the undertaking in question – it focuses on inputs, not profits, dividends or repatriated capital. The point here, is not simply that the concessionaire might have drawn 'excess profits' from its investment at the expense of the host state, but that in order to determine whether or not a newly independent state would be 'unjustly enriched' as a consequence of its refusal to continue a concessionary contract, would seem to require as much attention being paid to what had been extracted (oils, minerals etc) as much as to what had been invested. In that respect, O'Connell's apparent assumption that every concessionary contract gave rise to an equitable interest on the part of the investor was somewhat at odds with the historical role of concessionary interests within the colony, particularly given the suggestion that, in some cases, the companies concerned had engaged in massive withdrawals of capital from the colonies prior to independence.[115]

Conclusion

By the time at which the International Law Commission was to come to draft articles on state succession and address, in the process, the question of concessionary contracts, most of the former colonies had already gained their independence. The assault launched by Mohammed Bedjaoui against the doctrine of acquired rights in his second report had, as a consequence, a certain sense of futility. As much as he managed to wrest the ILC away from the

[114] See *Lena Goldfields Ltd v. USSR* (1930); McNair, *supra,* n. 20.
[115] Nkrumah, *supra,* n. 5, p. 219.

temptation to codify the doctrine of acquired rights into the draft Vienna Convention on State Succession in Respect of Property, Archives and Debt, it was all too late to have any real significance in shaping the pattern of decolonization itself. In practice, the vast majority of concession agreements appear to have been continued in force either by way of agreement prior to independence[116] or as a consequence of constitutional provisions guaranteeing respect for existing rights in property. It had, indeed, been rare for any incoming authorities to recognize that there was a moment, prior to independence, in which much more ground could be made in renegotiating the terms of concessionary contracts – that the protections they would later be afforded as 'foreign investments' were not yet available, that headway could be made in accounting for resources already extracted, and that the arguments in favour of the sanctity of the acquired rights of concession holders were not beyond effective scrutiny.[117]

All of this, however, stands as testament to the extraordinary effectiveness of the idea that what was to be obtained at the moment of decolonization was 'public power', and that all 'private' relations of property and contract should remain 'unaffected' by the transition to independence. That this was to become the

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[116] See e.g. Evian Accords. In return for French recognition of Algerian sovereignty, the new state would recognize the acquired rights of the concessionary companies that had established the infrastructure for oil exploitation. Under the terms, then, of the Evian agreements of 19 March 1962, Algeria was to acquire sovereignty over the territory, including the Sahara. General Declaration, 18th March 1962, Chapter II, A, I. Reproduced in I ILM (1962) 214. All acquired rights were to be respected (See Declaration of Principles Concerning Economic and Financial Cooperation, 18th March 1962, Title IV, article 12, 1 ILM (1962) 221, at 224 ('Algeria will ensure without discrimination the free and peaceful enjoyment of patrimonial rights acquired on its territory before self-determination. No one will be deprived of these rights without fair compensation previously agreed upon.'). Rights 'attached to mining titles granted by France' in application of the Petroleum Code were to be respected and 'preference' would be given under a cooperation agreement to French companies in respect of the granting of new mining titles (General Declaration, ibid, Chapter II, B).

[117] O'Connell observes that '[t]here is very little material collected on the treatment accorded contractors by the new governments, but one may take a fairly accurate guess that the discontinuance thought of has not even crossed the minds of either governmental officials or the contractors themselves in 999 cases out of 1000' (supra, n. 24, p. 27). The one notable exception here concerns the termination of the concession of the British South Africa Company's concession in Northern Rhodesia shortly before Zambian Independence in 1964. See, See Slynn P., 'Commercial Concessions and Politics during the Colonial Period: The Role of the British South Africa Company in Northern Rhodesia 1890-1964', 70 African Affairs (1971) 365, pp. 378-84.

default assumption was itself partly a consequence of the instantiation within the colony of a set of relations of power, authority and ownership in which concessions themselves would serve as vital sources of income for the new regimes. It was also a consequence of the subtle, imaginative re-configuration of concession agreements into private 'foreign investments' whose sanctity was, prospectively, to be guaranteed by international law. The subsequent 'battles' over permanent sovereignty, the right to nationalize, or the requisite standard of treatment of foreign investments, thus, were all battles that took place on ground that had already been largely conceded, and in terms that barely touched upon the historic role such 'investments' had in advancing and deepening colonial rule, or the fantasies that underpinned them.