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DISSERTATION / DOCTORAL THESIS

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„Making the World Safe for Investment:

the Protection of Foreign Property 1922-1959“

verfasst von / submitted by

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ABSTRACT

This thesis studies the creation of the field of international investment law from 1922 to 1959. It investigates how the building blocks for an international legal regime for the protection of foreign private property came into being, understanding investment law as a practice, a way of doing things and attaching meaning to them, rather than as a conceptual framework. This approach leads to a shift in focus on two levels. First, the thesis studies the period before the contemporary instruments governing the field, bilateral investment treaties and the ICSID Convention, came into being. Second, the shift leads to a focus on the formation of rules rather than on their application. Sharpening the focus on what I argue are the events that background what is traditionally taken to be the origin of the field, the thesis identifies the way in which particular preferences were stabilised into apparent necessities through the development of novel legal doctrine.

A key site of the analysis is the assertion of jurisdictional authority over concession agreements, contracts for large-scale infrastructure projects and natural resource exploitation, in particular investor-state arbitrations and attempts at codification. While concession agreements in the 1920s were considered exclusively a matter of domestic law, in the 1950s a powerful community of scholars and practitioners argued that they should fall under an international legal order and be called ‘economic development agreements’. This internationalisation was a claim for the universality of ideas propagating private property and the sanctity of contract, as well as a rejection of the authority of socialist and anti-colonial policies to redistributive ends. Western industry, former imperial governments and liberal thinkers of law and of economics successfully claimed the international sphere for building a new legal order. The authority for such an international legal regime was based on a temporalisation of difference that relied on concepts like ‘civilisation’ and development to downgrade challenges to the rules of property protection by locating such challenges in the past. This was a process of self-authorisation through legal practice and academic writing, laying the groundwork for the later emergence of the regime of international investment law. The aim of this thesis is to pluralise understandings of legality in international investment law by drawing out the way that the ‘universal’ primacy of rights of property protection, which underpins the field today, emerged from a particular view of the world and continues to privilege the interests associated with that world view.

DECLARATIONS

I make the following declarations:

- The thesis comprises only my original work towards the degree of Doctor of Philosophy.
- Due acknowledgement has been made in the text of this thesis to all other material used.
- The thesis is fewer than 100,000 words in length, exclusive of the bibliography and the German abstract.

Andrea Leiter

PREFACE AND ACKNOWLEDGMENTS

This thesis is the product of a journey that spans three continents and four years, and is the result of the influence of many generous scholars, colleagues, friends, institutions and family members. I want to express my gratitude to those who accompanied me on this path. Most importantly, I had the great luck to be supervised by three fantastic female academics who have not only helped me to develop my thinking, but who have modelled academic behaviour on the highest levels. Sundhya Pahuja has helped me to become a junior academic with her warmth, generosity and readiness to include me in the academic life inside and outside of Melbourne Law School. With her constant support, I learned to take myself and my own thinking seriously, probably the greatest achievement of this journey. Ursula Kriebaum has paved the way for me in Vienna, always encouraging me to follow my intuitions and think outside the box. It is due to her that I was able to bridge the academic cultures of Melbourne and Vienna, and appreciate the best of both worlds. Hilary Charlesworth has taught me what it means to be a dedicated mentor, a thorough scholar and a generous peer. Her humility and confidence have shaped my understanding of the scholar I aspire to become.

Melbourne Law School is a uniquely supportive environment for PhD students. Its institutional setup allows for exchange and support within the PhD cohort. I was fortunate that my arrival in Melbourne coincided with the start of Anne Orford's Laureate Program in International Law. The fellows of the Program became my closest intellectual companions. I am glad to have shared this journey with Sebastián Machado, Marnie Lloyd, Luis Bogliolo, Anna Saunders, Kathryn Greenman, Ntina Tzouvala and Fabia Veçoso. I am grateful to Anne Orford for including me into the many terrific events of the Program. I am equally grateful to the Institute of International Law and the Humanities for the vibrant academic life it offered and the opportunities it provided for thinking, discussing and learning. Outside these programs, I thank Natalia Jevgelvskaja, Florence Seow, Valeria Vázquez Guevara, Anna Dziedzic, Arturo Villagran, Liz Sheargold, Robi Rado, Tim Baxter, Clair Oppermann, Jan Mihal, Cait Storr, James Parker, Julia Dehm and Adil Khan for the many intellectual and personal exchanges. I would also like to thank the chair of my Advisory Committee Tim Lindsey and my academic advisor Shaun McVeigh.

My journey would not have been the same without the network of the Institute for Global Law and Policy (IGLP) and the many opportunities it provided, allowing me to build a global network of friends and colleagues. I want to thank David Kennedy for enabling me to

participate in this network and for welcoming me as visiting researcher at the Institute in Boston for the academic year 2018-2019. It was a year characterised by an ongoing conversation about what it could and should mean to be a scholar of international law with Luca Bonadiman, Michael Picard, Love Rönnelid, Zina Miller, Roxana Vatanparast, Maria Adele Carrai and Erick Komolo and the many other scholars and friends who participated in our events. I also want to thank Kristen Verdeaux and Ginelle McDonald for all their help with administrating life at the IGLP.

This journey ended in Cambridge, but it started at the Section for International Law and International Relations at the University of Vienna and I want to thank Jane Hofbauer, in particular, for being not only a friend, but also a mentor from early on. I also want to thank Stephan Wittich, Karolina Januszewski, Florian Dunkel, Mike Moffatt, Markus Beham and Ralph Janik, who shaped my induction into international law. Sahib Singh is to be credited with opening the world of critical international law to me and encouraging me to reach out to Sundhya in Melbourne in the first place. What a difference it made!

Besides the intellectual support, this undertaking was enabled through financial support by different institutions. The Austrian Academy of Sciences provided me with a generous scholarship as Doc Fellow form 2016-2019. I received support from the University of Melbourne Law School in the form of a Melbourne Research Scholarship to offset the tuition fee and a Studentship Stipend in 2019. In addition, I received funding from the Law School's Research Support Fund at various occasions, also contributing to final editorial assistance for this thesis by Sam Osborn.

With a final word I want to thank my most important allies, my family. My husband Nate not only enabled the physical journey through three continents, but also the personal journey of becoming an academic. His kindness and generosity are the real engine behind my work. My parents have provided support for me in all stages of life, and I would not be where I am without their encouragement. My siblings and their families, Kristina, Dani, Lisi, Ed, Seth and Angie have kept me grounded in the world through our many conversations about politics and life. Finally, my daughter Lumen is the source of most joy in my life and the newest addition, little Olivia, has accompanied the last stretches of this journey and given me the strength to finish. Thank you all very much!

Chapter three of the thesis includes material to be published as a contribution to the volume *Revolutions in International Law*, co-edited by Anne Orford, forthcoming with Cambridge University Press in 2020.

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Prologue

In this account, the critical project is 'to make visible precisely what is visible' –

to arrange 'what we have always known'.

But how to make visible what is visible?

And how to arrange what we have known?[1]

As a research assistant at the Department for International Law and International Relations at the University of Vienna between 2012 and 2015, my main subject of research was international investment law. During that period, I encountered the same conundrum over and over again. Many of the cases I engaged with ended with the finding that, even though the policy measure that a state was implementing seemed desirable in the public interest, the state could not escape having to pay high amounts of compensation to companies losing the profitability of their investments. This, it was argued, was so, because the state had consented to precisely these terms in a written agreement, namely in a bilateral investment treaty. This explanation, however, seemed unsatisfying. In most cases, the respondent state was a state from the global South already lacking public funds; the companies, by contrast, were often large and very profitable; the local population, with little or no means for an effective defence, ended up worse off than before the investment arbitration. My journey took me through an exploration of human rights as a counter-balance to international investment law, as well as to business and human rights proposals with the goal of holding companies accountable. But in the end, the argument always returned to the sanctity of the bilateral investment treaty.

Having moved to Melbourne Law School as part of my PhD project, I began to think that the most promising question seemed to be: *How did we get to this legal regime in the first place?* And with this question, I embarked on a journey into the scholarly world of history and historiography in international law. Not long after I started my project, during a workshop on critical histories of international law organised by Anne Orford and the Laureate Program in International Law at Melbourne Law School, I experienced a moment of vertigo. What I realised was that I had never fully understood the narrative power of history writing. What does it actually mean to write history? How do people decide what they present as truth or fact? What place does method have in these debates? Is there such a thing as truth or is it all about

[1] Anne Orford, 'In Praise of Description' (2012) 25(3) *Leiden Journal of International Law* 609, 618.

politically motivated choices? For a while, I thought that I would be unable to write anything before having studied the whole canon of the philosophy of history, and so, for a while, I tried. Of course, I soon realised that even if I studied historiography, I would still be confronted with unsolved questions and that I might as well be looking for an answer to the question: 'What is life and how ought we to live it?'.[2] So, I slowly and steadily developed an incomplete yet thorough account of what I would like to do in my project and what might be a possible way to go about it. What follows is a brief outline of what I have come to learn about historiography in international law and how I see my own project.

The role of the past remains challenged within the scholarly discipline of international law.[3] There is boundedness as well as choice in the writing of history, so that the task means to account for both, understanding what is taken as given and what is added. The boundedness stems both from systemic constraints and pressures,[4] as well as a sensibility of scholars in the field that finds certain accounts intuitively plausible.[5] On the other side is the power of narrative to shape the authority of an historical account.[6] The particular narrative chosen for a history often depends upon what the particular history is written *for*.[7] However, blind spots about our

[2] This insight was prompted by my supervisor Sundhya Pahjua in one of the many instances when she accompanied me through my intellectual battles, without allowing me to get lost down a rabbit hole.

[3] See, eg, Anne Orford, 'Critical Thinking, Modernist Method, and the History of International Law' in Annabel Brett et al (eds), *History, Law, Politics: Thinking Through the International* (Cambridge University Press, 2020) (forthcoming); Lauren Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21(1) *Journal of the History of International Law/Revue d'histoire du droit international* 7; Matthew Craven, 'Theorizing the Turn to History in International Law' in Anne Orford et al (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 21; Sundhya Pahuja, 'Letters from Bandung: Encounters with Another International Law' in Vasuki Nesiah et al (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press, 2017) 552; Anne Orford, 'International Law and the Limits of History' in Wouter Werner et al (eds), *The Law of International Lawyers* (Cambridge University Press, 2017) 297.

For a helpful annotated bibliography on international law and history see Thomas Skouteris, *The Turn to History in International Law* (Oxford Bibliographies, 2017).

[4] Susan Marks writes that: 'while current arrangements can indeed be changed, change unfolds within a context that includes systematic constraints and pressures.' Susan Marks, 'False Contingency' (2009) 62(1) *Current Legal Problems* 1, 2.

[5] Koskenniemi described his writing in *The Gentle Civilizer* as a set of essays that 'form a kind of experimentation in the writing about the disciplinary past in which the constraints of any rigorous "method" have been set aside in an effort to create intuitively plausible and politically engaged narratives about the emergence and gradual transformation of a profession.' Martti Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001) 10.

[6] David Kennedy argues that: 'I return to the nineteenth century drawn to the hypothesis that the classical synthesis I have been taught to anticipate may in fact have been generated by very twentieth century argumentative habits.' Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1996) 65(3) *Nordic Journal of International Law* 385, 388.

[7] Orford, 'International Law and the Limits of History' (above n 3) 310.

sensibilities and biases affect how we understand our respective disciplines.[8] It is thus difficult to know what a history is written for and what our sensibilities are. In addition, legal scholars are trained in a way that makes the choices that go into doctrinal formation harder to see.[9] Against this background, in my thesis I am attempting to write an account of a history of international investment law that 'point[s] to its limits in conscious awareness.'[10]

If my starting point considers that there is boundedness as well as choice, then I write with a dedication to plurality that accepts the need for exclusion. The need for exclusion fundamentally ties ethics to the practice of narration.

> This is because, at the abstract level, exclusion is every bit as important as inclusion; indeed, it is in the latter that our taking of responsibility is most dramatically manifested and defined. Any attempt to include only inclusion in the category of the ethical is inimical to the notion of post-foundational ethics quite simply because it seeks to exclude the act of exclusion that is central to the assumption of responsibility – it would lead, by logical extension, to an inclusion of everything.[11]

In 2018 I participated in a seminar on the theme of *Genealogies of Memory and Perception – Photography and Literature* guided by Professor Eduardo Cadava, offered as part of the annual six-week *School for Criticism and Theory* hosted by Cornell University. Inspired by this seminar, I have come to understand my reading of legal documents and the way I write about them as analogous to *photographic snapshots*.

The first cue I take from the idea of snapshots is that they reflect a particular moment. They interrupt the flow of experience and halt an image in a certain moment. It is this halting of experience that enables ordering and meaning-making.[12] Legal archival artefacts such as contracts, diplomatic notes, transcripts of pleadings, arbitral awards and attempts at codification could be read like this. Legal artefacts are written in the form of an imperative. They are the results of a reflection and not the process of reflection. Or, to speak with yet

[8] David Kennedy, 'The Disciplines of International Law and Policy' (1999) 12(1) *Leiden Journal of International Law* 9.

[9] As Riles puts it: 'In fact, the purposes for the creation of the legal fiction recede from view as students replicate the practice.' Annelise Riles, 'Is the Law Hopeful?' in Hirokazu Miyazaki and Richard Swedberg (eds), *The Economy of Hope* (University of Pennsylvania Press, 2016) 99, 110.

[10] Thomas Skouteris, 'Engaging History in International Law' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law: The European and the American Experiences* (TMC Asser Press, 2013) 99, 118.

[11] Euan MacDonald, International Law and Ethics after the Critical Challenge: Framing the Legal within the Post-Foundational (Brill, 2011) 159.

[12] Henri Bergson, *Matter and Memory* (Zone Books, 1991 (first published in 1911)).

another metaphor, they are the map and not the considerations that went into the making of the map. Thus, like a snapshot, they interrupt the flow of things and fix a particular moment in time.

The second cue points to the constructive nature of a legal document. Like the snapshot, it constitutes its subject. It determines what is and what is not part of it. A photographic image, more than any painting, invites us to believe that it is a mere representation, that what we see on the photograph is ontologically given. However, the photograph never gives us what is before the camera, it transforms it. In the same manner, a legal document constitutes its subject. The legal form precedes the event. It only becomes legible as a legal document by giving it form, by *trans*-forming it. Once the legal document is there, it invites the same confusion as the photograph: it invites us to read it as a mere representation of what is already given.

The third and final cue relates to the construction of a linear progression of time through the indexical organisation of snapshots and legal documents. By fixing a moment in time, we construct events in a linear way. Spaces come to occupy places next to each other on a line. By lining up photographs one next to the other, we build an index of the passing of time. The time stamp becomes the mechanism of ordering. In the same way, legal documents depend on being indexed along a linear chronology. This progression of time is the foundation of the possibility of normative progression that law's authority rests on. It depends on the idea that a later moment remedies the former.

My journey finally led me to write what slowly emerged as a pre-history of international investment law, one that starts in 1922 and ends in 1959. This is before the signing of the first bilateral investment treaty between Germany and Pakistan, the legal event usually taken to mark the beginning of contemporary international investment law. Regarded as such, the institutionalisation and solidification of the field emerge as a conclusion rather than a starting point.

Chapter 1 – Making the world safe for investment

> *Law connects 'reality' to 'alternity' constituting a new reality with a bridge built out of committed social behaviour. Thus, visions of the future are more or less strongly determinative of the bridge which is 'law' depending upon the commitment and social organization of the people who hold them.*
>
> *Robert Cover, 1985*[1]

1. Introduction

In this thesis, I explore a series of international legal events pertaining to the protection of foreign property in the period between 1922 and 1959. In my argument, this period should be considered the pre-history of international investment law, because it prepared the ground for the introduction of the contemporary pillars of international investment law: bilateral investment treaties and the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID) of 1966. Some of the fundamental premises of the contemporary field of international investment law, which is typically said to have emerged in the second half of the 20th century, were developed during the first half of the 20th century. The question at the heart of this thesis then is: *How were the rules of foreign property protection constituted on the international level in the first half of the 20th century?* I argue that international investment law emerged in response to socialist and anti-imperialist claims over foreign private property in that period. My main contention is that the protection of foreign private property was normalised by removing jurisdictional authority over contracts from the domestic level and elevating it to the international plane. I show that socialist and anti-colonial attempts at the redistribution of wealth on the domestic level in the first half of the 20th century constituted the disruption of what many international law scholars and practitioners considered the status quo of the liberal 19th century. During each of these disruptions, these same practitioners and lawyers slowly built an international framework for the protection of foreign private property. It turns out they were steadily making the world safe for investment.

To develop my account, I study three early arbitrations, the *Palestine Railway Arbitration* of 1922, the *Lena Goldfields Arbitration* of 1930 and the *Sheikh of Abu Dhabi Arbitration* of 1951, and an attempt to codify rules on foreign private property into an international treaty, namely

[1] Robert M Cover, 'The Folktales of Justice: Tales of Jurisdiction' in Martha Minow et al (eds), *Narrative, Violence, and the Law* (University of Michigan Press, 1985-1986) 173, 181.

the *Abs-Shawcross Draft Convention of 1959*. Through these instances, I trace the emergence of the main elements of the contemporary system. These elements are (i) the granting of international legal personality to companies, (ii) the constitution of an international forum for dispute settlement, and (iii) the development of substantive law on the international level. Together, they lay the foundation for the implementation of an international legal order for the protection of foreign private property during the second half of the 20th century.

On a methodological level, I work with an account of law-making that focuses on the formation of rules rather than on their conceptual content. I inquire into the practices involved in rule-making and the modes of authoritative assertion that brought them into being.[2] Focusing on formation allows me to describe the contestations against which the rule became a rule. What becomes visible is the way in which one understanding of a rule was authorised over a different understanding.[3] This enables me to uncover the underlying assumptions that have become normalised and were rendered invisible over time through legal practice. [4]

A decisive element in constituting the authority for asserting particular rules was the temporal logic they were built on. First, any legal claim alters its past in the moment it is recognised as a rule. Thus, when each of the decisions I explore was taken, they recast the past by projecting a law backwards. This law was asserted as already existing, but it only came into being at the moment of the decision. This turned the articulation of a novel claim into an iteration of an established rule of law. Second, when paying attention to the specificity of the time and place of the assertions, I show that authority is drawn from a temporalisation of difference that gets

[2] As Orford puts it: 'In particular, law involves the transmission of concepts or ideas between legal actors, so that those concepts or ideas are worn smooth and cease to be politically volatile.' It is lawyers in argumentative practice who 'undertake the work of making particular meanings appear inevitable or acceptable.' Anne Orford, 'Theorizing Free Trade' in Anne Orford et al (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 701, 709.

[3] Understanding law making as formation through practice is an understanding based in a tradition that could be called jurisdictional thinking. I draw especially on the work of Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012). See also Peter Rush, 'An Altered Jurisdiction-Corporeal Traces of Law' (1997) 6 *Griffith Law Review* 144; Sundhya Pahuja, 'Letters from Bandung: Encounters with Another International Law' in Vasuki Nesiah et al (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press, 2017) 552; Sundhya Pahuja, 'Laws of Encounter: a Jurisdictional Account of International Law' (2013) 1(1) *London Review of International Law* 63; Shaunnagh Dorsett and Shaun McVeigh, 'Jurisprudences of Jurisdiction: Matters of Public Authority' (2014) 23(4) *Griffith Law Review* 569.

[4] This understanding is inspired by Anne Orford's account of her approach to her work on *International Authority and the Responsibility to Protect*. She says: 'So while initially I had planned to move from an abstract discussion of the grounding of authority on protection through the institutional question of who decides what protection means to an analysis of the practices of protection, the book now has the reverse form – it starts with practices and then moves on to their systematization and articulation in the form of the responsibility to protect concept.' Anne Orford, 'In Praise of Description' (2012) 25(3) *Leiden Journal of International Law* 609, 615; Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

refracted through a universal lens of 'civilisation'.[5] Here, a timeless universality of the proposed rules is asserted as expression of universal 'civilisation'. Contestations over the rules are then placed in the past and thereby superseded. The overall picture that emerges when one applies a lens of jurisdictional practice and focuses on temporal ordering is that the rules of international investment law came into being in a mode of *self-authorisation*.

2. Developing the framework

The body of scholarly work on the history on international investment law is still relatively small and often consists of a historical chapter at the beginning of a book.[6] There are a number of texts dedicated to certain historic arbitrations,[7] or the history of specific features of the discipline.[8] Nevertheless, my work builds on a growing number of comprehensive historical accounts of international investment law.[9] In addition, the thesis is situated in a scholarly field

[5] This argument was advanced by Sundhya Pahuja with regard to the discipline of international law. Sundhya Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2013).

On a wider scale, the temporalisation of difference as hierarchisation of history through the universal notion of modernity was developed by a number of authors. See Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press, 2000); Timothy Mitchell, *Questions of Modernity* (University of Minnesota Press, 2000); James Morris Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, 1993).

[6] See, eg, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed, 2012); Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2015); Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016).

[7] See, eg, Jason Webb Yackee, 'The First Investor-State Arbitration: The Suez Canal Company v Egypt (1864)' (2016) 17(3) *Journal of World Investment & Trade* 401; VV Veeder, 'The Lena Goldfields Arbitration: the Historical Roots of Three Ideas' (1998) 47(4) *International and Comparative Law Quarterly* 747; J Gillis Wetter and Stephen M Schwebel, 'Some Little-Known Cases on Concessions' [1964] (40) *British Yearbook of International Law* 183. In addition, the Arbitration Academy in Paris features a yearly lecture called *The Berthold Goldman Lecture on Historic Arbitration Stories*, portraying a number of early arbitrations.

[8] See, eg, Stephan Schill et al (eds), *International Investment Law and History* (Edward Elgar Publishing, 2018); Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press, 2018); Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Brill, 2013); Antonio R Parra, *The History of ICSID* (Oxford University Press, 2012); Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, 2010); Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' [2005] (12) *UC Davis Journal of International Law & Policy* 157; Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2004) 74(1) *British Yearbook of International Law* 151.

[9] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010); Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013); Noel Maurer, *The Empire Trap: The Rise and Fall of US Intervention to Protect American Property Overseas: 1893-2013* (Princeton University Press, 2013); Gus Van Harten, 'TWAIL and the Dabhol Arbitration' (2011) 3(1) *Trade Law and Development* 131; James Thuo Gathii, 'War's Legacy in International Investment Law' (2009) 11(4) *International Community Law Review* 353; Isabel Feichtner, 'International (Investment) Law and Distribution Conflicts over Natural Resources' in Stephan W Schill et al (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar, 2015) 256; Sundhya Pahuja and Cait Storr, 'Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited'

focusing on the history of international economic law more broadly, with explicit regard to its implications for the unequal distribution of wealth around the globe.[10]

In my account, international investment law was struggling to emerge as a field between the 1920s to the 1960s. This was a period characterised by democratic and socialist movements challenging imperial economic arrangements and the concept of individual property as legacies of the 19th century. On the one hand, the Empires were being contested through nationalism and the beginning transformation of former colonies into sovereign states.[11] On the other hand, socialist revolutions in various parts of the world were resulting in the implementation of a number of communitarian property systems.[12] Indeed, the relationship between private property and sovereignty was strongly debated in the interwar period since the First World War had ruptured the perceived separation between the private and public spheres for the benefit of state-organised production and distribution. As Slobodian observes: 'In the course of the war, the sacred nature of private property across borders was violated; the space of the private capitalist was desecrated.'[13] Liberals responded to this rupture with 'a series of projects of capitalist internationalism. There needed to be a respect for private property that trumped national law.'[14] Protecting concession agreements through international legal rules was one such project of capitalist internationalism and installing mixed and commercial arbitral tribunals was one of

in James Crawford et al (eds), *The International Legal Order: Current Needs and Possible Response: Essays in Honour of Djamchid Momtaz* (Brill Nijhoff, 2017) 53; Ntina Tzouvala, 'The Academic Debate about Mega-Regionals and International Lawyers: Legalism as Critique?' (2018) 6(2) *London Review of International Law* 189; Kathryn Greenman, 'The History and Legacy of State Responsibility for Rebels 1839-1930: Protecting Trade and Investment against Revolution in the Decolonised World' (Dissertation Thesis, University of Amsterdam, 2019); Love Rönnelid, 'The Emergence of Routine Enforcement of International Investment Law - Effects on Investment Protection and Development' (Dissertation Thesis, Uppsala University, 2018); Nicolás M Perrone, 'UNCTAD's World Investment Reports 1991-2015: 25 Years of Narratives Justifying and Balancing Foreign Investor Rights' (2018) 19(1) *The Journal of World Investment & Trade* 7.

[10] See, eg, Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (above n 5); Anne Orford, 'Food Security, Free Trade, and the Battle for the State' (2015) 11(2) *Journal of International Law and International Relations* 1; Andrew Lang, *World Trade Law after Neoliberalism: Re-Imagining the Global Economic Order* (Oxford University Press, 2011); Matthew Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74(3/4) *Nordic Journal of International Law* 335; David Kennedy, 'The Dialectics of Law and Development' in David M Trubek et al (eds), *The New Law and Economic Development: a Critical Appraisal* (Cambridge University Press, 2006) 174; Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61(1) *University of Toronto Law Journal* 1; Konstantina Tzouvala, 'Letters of Blood and Fire: a Socio-Economic History of International Law' (Dissertation Thesis, Durham University, 2016).

[11] Antony Anghie, Imperialism, *Sovereignty and the Making of International Law* (Cambridge University Press, 2008) 115.

[12] Scott Newton, *Law and the Making of the Soviet World: The Red Demiurge* (Routledge, 2014).

[13] Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018) 29.

[14] Ibid.

the sights of this project. As the British international lawyer De Auer wrote in 1927: 'the real importance of these (…) rules of competency [of arbitral tribunals] is, from the standpoint of international law, that *all these rules aim at the inviolability of private property*.'[15] It was during this transformative period that the internationalisation of the investor-state relationship was initiated.

In this thesis, I understand international investment law as a means of world building.[16] It involves large amounts of wealth and governs its distribution.[17] What is at stake in the operation of this field is the way 'rightful' ownership is defined and the way benefits are awarded to some and not to others. In the past decade, many concerns have been raised regarding various aspects of the international investment regime. To many, the discipline is in 'crisis'.[18] My interest in international investment law is generated by its apparent complicity in creating and sustaining inequality on a global scale, to understand its role in what Orford describes as

> the routine operation of international economic life, organized around global value chains, free trade, border controls, freedom of navigation, investment protection, and open markets [which] produces a system in which poorer countries continue to export vital resources even during periods of scarcity, investments are protected even during periods of civil war, and the people who labour to produce key commodities remain impoverished and undernourished. [19]

This stands against the promise of a better future, which is fundamental to the claim of legitimacy for international investment law by the proponents of the field. Investment is a term that denotes an expectation of profits on invested capital and is thus future-oriented. It has been

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[15] Paul De Auer, 'The Competency of Mixed Arbitral Tribunals' [1927] 13 *Transactions of the Grotius Society: Problems of Peace and War* xvii, xxiii (emphasis in original).

[16] I follow Dorsett and McVeigh and use the notion of world making to express how 'jurisdictional thinking, so to speak, gives legal form to life and life to law.' Dorsett and McVeigh, *Jurisdiction* (above n 3) 1.

[17] The overall global foreign direct investment (FDI) flow amounted to $1.43 trillion in 2018 and 'remains the largest external source of finance for developing countries (39%)'. In 2017 at least 65 new cases were initiated under the mechanism of investor-state dispute settlement (ISDS), bringing the total number of known cases to 855. (UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies*) xi-xii ('*World Investment Report 2018: Investment and New Industrial Policies*'). Most frequently, developing countries feature as the respondent state, and most claimants come from developed home states. For statistics between 1987-2017, see ibid 92-3.

[18] See, eg, Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 3(4) *Transnational Dispute Management* 1521; Stephan W Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52(1) *Virginia Journal of International Law* 57; Christina Binder, 'Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns: Or the Benefits of a Public International Law Approach to Investment Arbitration' in Tulio Treves et al (eds), *International Investment Law and Common Concerns* (Routledge, 2014) 71; Anthea Roberts, 'Investment Treaties: The Reform Matrix' (2018) (112) *AJIL Unbound* 191.

[19] Orford, 'Theorizing Free Trade' (above n 2) 701.

defined as 'the commitment of resources with the goal of achieving a return.'[20] Yet, the notion of investment does not include an understanding of the distribution of profits. It emerged in the 1950s and replaced the notion of property.[21] Property protection has a different directionality and a clear orientation toward the accumulation of wealth. It is not concerned with what is to come, but with what is already here. It is an attempt to safeguard relations from the past into the future. My story is then a story of property and investment, of the past and the present, viewed through the lens of legal form.

The introductory chapter is structured in the following way: it starts with a description of the methodology and explains the focus on concession agreements and legal documents surrounding them as main archive. The chapter suggests that the internationalisation of concession agreements was at the heart of the making of international investment law. Conceptually, this internationalisation was based on a division between the political and the economic sphere, as proposed by many influential thinkers and practitioners in both law and economics on the global scale in the first half of the 20th century. The chapter then moves on to explain the merit of reading legal documents surrounding concession agreements as practices of jurisdiction with a special focus on temporal ordering. These strands are then combined into a description of the argument. Finally, the chapter concludes with an outline of the chapters in the thesis and considerations of the originality and limitations of the contribution.

3. Methodology

This thesis offers what one could call a critical doctrinal analysis. It views legal documents produced around three early investor-state arbitrations, as well as an attempt at codification, as artefacts of jurisdictional practice. In exploring these legal events, the thesis examines the constitution of authority for the formation of novel legal doctrine.

a) Concession agreements and the internationalisation of contracts

The key legal relationship to be studied is contractual relations between foreign investors and states. Such contracts, often called concession agreements, denote 'a broad range of legal instruments under which a State grants certain economic rights and privileges to foreign

[20] Norton Reamer and Jesse Downing, *Investment: A History* (Columbia University Press, 2016) 2.

[21] Andrea Leiter, 'The Silent Impact of the 1917 Revolutions on International Investment Law' (2017) 6(10) *ESIL Reflections*.

investors within the framework of a public function',[22] usually involving the exploitation of natural resources or the construction of large-scale infrastructure projects. Concession agreements were the cause of most early investor-state arbitrations[23] well into the 1950s.[24]

Most importantly, concession agreements are at the heart of what has been called the internationalisation of contracts.[25] Sornarajah argues that 'the removal of the foreign investment transaction from the sphere of the host state's law and its subjection to an immutable, supranational system is seen as essential for the protection of foreign investment under the theory of internationalisation.'[26] Based on his critique, I follow the question of how this happened – how were concession agreements moved from the domestic to the international sphere as a matter of practice?

Focusing on the applicable law for concession agreements offers another way to delimit the period I am considering. With this focus, the journey runs from the *Serbian and Brazilian Loans Ca*ses of 1929, to the inclusion of an umbrella clause in the *Abs-Shawcross Draft Convention* in 1959. In the *Serbian and Brazilian Loans Cases*, the Permanent Court of International Justice (PCIJ) made the famous stipulation that 'any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.'[27] Since concession agreements involved a state on the one hand, but a company or an individual on the other, they would fall under municipal law. However, after a number of 'new' states either changed or annulled concession agreements under domestic laws, the mantra of the primacy of domestic law became a point of contention between Western states with their multinational companies and 'new' states. The inclusion of a so-called 'umbrella clause' in the *Abs-Shawcross Draft Convention* then purported to elevate any contractual breach to the breach

[22] Christoph Ohler, 'Concessions' (2013) *Max Planck Encyclopedia of Public International Law* 1. For a doctrinal characterisation and list of concession agreements concluded between 1492 and 1973 see Peter Fischer, *Die internationale Konzession: Theorie und Praxis der Rechtsinstitute in den internationalen Wirtschaftsbeziehungen* (Springer, 1974).

[23] I found records of 15 investor-state arbitrations before 1934, which were all based on a dispute over a concession agreement.

[24] Even after the ratification of the ICSID Convention in 1966, the 25 cases brought in the first 25 years of its existence were based on a breach of contract or concession. Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Zachary Douglas et al (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014) 30.

[25] Sornarajah (above n 9) 289-99.

[26] Ibid 289.

[27] *Payment of Various Serbian/Brazilian Federal Loans Issued in France [1929] (Judgment)* (ser A) Nos 20/21 PCIJ 4, 41 (*'Payment of Various Serbian/Brazilian Federal Loans Issued in France'*).

of a treaty. This would allow for the application of international law, rather than domestic, to concession agreements.

British international lawyers strongly drove these developments in arbitral practice and scholarly writing, since Britain was one of the largest outward investors in this period.[28] Indeed, a great number of early arbitrations not only involved British companies but were also dominated by a small group of British international lawyers, including, amongst others, Sir Hersch Lauterpacht and Sir Arnold McNair, who worked together as counsel on both sides. Based on these and other arbitrations, the 1950s saw an ever-increasing consensus between a number of scholars that domestic law could not be the appropriate applicable law for concession agreements, which were by then being called 'economic development agreements'.[29] Anghie notes:

> The question then emerged: what was the law applicable to such a contract? Public international law could not govern these agreements because they were entered into by states and private entities. Nor was private international law helpful in these circumstances, because it was used for the purposes of determining which systems of municipal international law applied to the contract. (…) In short, a new system of law, which had an international character, but which was not public international law, had to be developed to deal with these special cases.[30]

One of the best-known propositions was advanced by Philip Jessup with his publication *Transnational Law* in 1956, wherein he proposed a transnational law consisting of a mix of private and public law sources to govern relations on the international level.[31] Other authors made suggestions along similar lines.[32]

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[28] Britain was the largest outward investor until 1945 with total overseas investments estimated at £3545 million in 1938. This number included 46% foreign direct investment and 54% of portfolio investment. TAB Corley, 'Competitive Advantage and Foreign Direct Investment: Britain 1913-1938' (1997) 26(2) *Business and Economic History* 599, 601. The British share furthermore constituted about 41% of global FDI. Ioannis-Dionysios Salavrakos, 'Determinants of German Foreign Direct Investment: A Case of Failure?' (2009) 12(2) *European Research Studies* 3, 7.

The German involvement in the 1950s through Hermann Josef Abs cannot be explained with a high German share in global FDI. It is much more likely that his project was meant to create the possibilities for a large German share in the first place. For a brief historic overview of German FDI, see ibid.

[29] Arnold D McNair, 'The General Principles of Law Recognized by Civilized Nations' [1957] (33) *British Yearbook of International Law* 1.

[30] Anghie (above n 11) 228.

[31] Philip C Jessup, *Transnational Law* (Yale University Press, 1956).

[32] See, eg, Wilfred C Jenks, 'The Scope of International Law' (1954) 31 *British Yearbook of International Law* 1; McNair (above n 29); Alfred Verdross, 'Quasi-international Agreements and International Economic Transactions', *Yearbook of World Affairs* (Stevens, 1964) vol 18, 230; Robert Jennings, 'State Contracts in International Law' [1961] (37) *British Yearbook of International Law* 156.

These suggestions did not go unchallenged. Some years later, in 1968, Mohammed Bedjaoui, for example, argued in his capacity as UN Special Rapporteur on *Succession of States in Respect of Matters Other than Treaties* that 'the succession of States in the context of decolonization demonstrates that in the recognition of acquired rights in respect of concessions the governing factor is not a general obligation to respect acquired rights but the sovereign will of the new State.'[33] The only way to counter such sovereign assertions over foreign-owned property was through shifting the legal authority over concession agreements from the domestic to the international sphere, so that national regulations could not alter the benefits guaranteed in concession agreements.

b) A split between the political and the economic sphere

The internationalisation of concession agreements rested on an understanding of the relationship of the state, the market and the role of law as split between a political and an economic sphere. The assumption of two distinct spheres was the precondition for establishing two different sets of rules, domestic and international, pertaining to the two spheres respectively. The idea of the division had both theoretical as well as material implications, and was advanced by political and economic thinkers before and after the Second World War.

As mentioned above, the group of British lawyers working on these early arbitrations revolved around the London School of Economics (LSE) and figures such as Lauterpacht and McNair. Their academic work as well as their practice as lawyers had a strong influence on the development of the norms in international investment law. The other influential thinkers were a group of (neo)liberal economists known as the Geneva School.[34] Economists such as Friedrich Hayek, Lionel Robbins, Gottfried Haberler and Wilhelm Röpke not only shaped the intellectual agenda in global economic thinking but were actively involved in institutional politics in the League of Nations and its sister organisation, the International Chamber of Commerce, from their founding in the early 1920s.[35] They were core actors in the organisation of the first World Economic Conference in 1929 and engaged in the negotiations on the General Agreement on

[33] Mohammed Bedjaoui, *First Report on Succession of States in Respect of Rights and Duties Resulting From Sources Other than Treaties* Yearbook of the International Law Commission vol II, 1968 Comm, 20 sess, UN Doc A/CN.4/204 (5 April 1968) 115 [43] ('*First Report on Succession of States in Respect of Rights and Duties Resulting From Sources Other than Treaties'*).

[34] The term has been popularised by Quinn Slobodian in his account of neoliberal intellectual history. 'Geneva School neoliberals transposed the ordoliberal idea of "the economic constitution"—or the totality of rules governing economic life—to the scale beyond the nation.' Slobodian (above n 13) 8. I draw on his work, particularly with regard to the relationship between neo-liberal thinkers and international law.

[35] Ibid 34-42.

Tariffs and Trade (GATT) in 1947.[36] Members of these two groups crossed paths at the London School of Economics in the interwar period[37] and there are significant similarities in their understanding of the state, the market and the role of law.

The most important commonality between the two groups is the conception of the world as divided between an economic and a political sphere. This is a core liberal proposition in both law and economics, which is sometimes framed in the terminology of *imperium* and *dominium*.[38] Röpke offers an exemplary account of the understanding for liberal economics. 'What we mean is the *genuinely liberal principle of the widest possible separation of the two spheres of government and economy, of sovereignty and economic exploitation, of Imperium and Dominium, or of "political power" and "economic power"*.'[39] For an account from legal theory, we can rely on McNair when he outlines that 'international law recognizes two distinct kinds of interest in regard to immovable property – the *imperium* or sovereignty which belongs to the State, and the *dominium* or property which belongs to the individual.'[40] It is precisely this division between 'the political' and 'the economic' that is at the heart of debates around self-determination, permanent sovereignty over national resources, foreign property and finance.[41] Starting from the assumption that the categorical distinction between politics and economics has no ontological foundation, the focus on the legal treatment of concession agreements opens the possibility to show *how* the division was defined. As Pahuja argues, 'the capacity to define issues as "economic" or "political"' is a jurisdictional technique of authority and control.'[42] The central question from a legal perspective becomes: who has the prerogative to speak the law

[36] Ibid 218-24.

[37] Ibid 122.

[38] Accounts of this distinction run from Roman law conceptions into the modern period and by far exceed the scope of this thesis. For contemporary accounts in international law, see Mieke van der Linden, *The Acquisition of Africa (1870-1914): The Nature of International Law* (Brill, 2017) chapters 1-3; Newton (above n 12) chapter 4; Slobodian (above n 13). On the problematisation of the relationship between sovereignty and property, see, eg, China Miéville, *Between Equal Rights: a Marxist Theory of International Law* (Brill, 2005) chapters 5-6; Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (above n 5) chapter 3; Anthony Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press, 1986) 50-60.

[39] Wilhelm Röpke, 'Economic Order and International Law' [1954] (86) *Recueil des cours de l'Académie de Droit International de la Haye* 203, 244 (emphasis in original).

[40] Arnold D McNair, 'The Effects of Peace Treaties upon Private Rights' (1941) (7) *Cambridge Law Journal* 379, 381.

[41] Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (above n 5) 96-101.

[42] Ibid.

about what?[43] The liberal answer that was given to this question has both a theoretical as well as a material basis, and it is in their conjunction that we see the emergence of the rules of international investment law.

On the theoretical level, the debate about the limitations of the spheres of authority of sovereign states was at the heart of the formation of the discipline of international law from the late 19th century onwards. Vested in the language of elements of natural law and of positivism, Western international lawyers of the time wrestled with the justification of obligatory norms for nation states derived without state consent. As Koskenniemi puts it, 'even if most late nineteenth-century lawyers agreed that a world without some conception of universal, rational law would be unthinkable, they emphasised law's social and historical basis and struggled over complex formulas to fix the relationship between the two.'[44] If the will of the state was the only legitimate source of international law, there could be no law binding a state against its will. On the other hand, if there could be no law binding a state against its will, there would be nothing legal about international law. It would lack, in Lauterpacht's words, a 'vinculum juris'.[45]

Much of this debate revolved around the inclusion of 'general principles of law recognized by civilized nations' into the Statute of the Permanent Court of Justice.[46] The minutes of the Advisory Committee of Jurists who drafted the Statute trace the discussion on the binding nature of the principles. Where some argued that domestic legal principles could not constitute a valid source of international law, others considered them necessary for a complete legal order that could avoid gaps in the law and rulings of *non liquet*.[47] Lauterpacht argued for the necessity of a binding obligation beyond the will of states as a matter of scientific logic and approached

[43] For an account of the legal configurations underlying different economic conceptions, see Andrew Lang, 'Market Anti-Naturalism' in Justin Desautels-Stein and Christopher L Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press, 2017) 312.

[44] Martti Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001)100.

[45] Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 2011 (first published in 1933)) 197.

[46] *Statute of the Permanent Court of International Justice* [38(3)] (*'Statute of the Permanent Court of International Justice'*).

[47] Permanent Court of International Justice: Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee June 16th-July 24th 1920 with Annexes* (Van Langenhuysen Brothers, 1920) 312. For a discussion of the debates of the Advisory Committee of Jurists on general principles see Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff, 2008) 17-20.

the problem from the angle of applicable law, especially relying on general principles.[48] He constructed, as Koskenniemi argues, 'a *material* completeness of law.'[49] If international law was supposed to be a complete legal system, then it had to be able to find a legal answer to any problem. Since the future was unpredictable, it was impossible for the legal system to codify a rule for any given situation. Lauterpacht resolved this puzzle by placing legal analogy and the figure of the judge at the heart of his theory. In any given legal dispute, it was up to the judge to construct an appropriate legal answer by analogy with the help of general principles and in light of the overall purpose of the legal system.[50]

As indicated in the title of Lauterpacht's PhD thesis *Private Law Sources and Analogies of International Law* at the LSE under McNair, the source for the analogies stemmed from private law revolving around the protection of property and the sanctity of contract. This brings us back to the idea of a distinction between *imperium* and *dominium* and sovereign and private rights.[51] In Lauterpacht's conception, it was important to restrain the sovereign from interfering with the sphere of *dominium*. The liberal understanding saw the market, or the economy, as a separate sphere, constituted of people and resources around the globe. The global distribution and allocation of resources was considered irreconcilable with the territorial concept of a nation state.[52] For these thinkers, the world appeared an interdependent system of goods, resources and capital that could only be governed through rules protecting private property and the free exchange of goods and capital in the name of global welfare.[53] These rules were claimed to be of a universal character, just as the necessity of the distribution of resources around the globe

[48] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green and Co, 1927) 54-9.

[49] Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge University Press, 2006 (first published 1989)) 53.

[50] Lauterpacht, *Private Law Sources and Analogies of International Law* (above n 48). As pointed out by Koskenniemi, Ronald Dworkin's legal theory bears considerable similarity to this idea. Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (above n 49) 53-8. See generally Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).

[51] On general principles and their origin in private law, see Wolfgang Friedmann, 'The Uses of "General Principles" in the Development of International Law' (1963) (57) *American Journal of International Law* 279, 281.

[52] Röpke elaborated this point in his Hague lecture warning of the consequences of political authority over the economic domain. 'The economic process can be "planned" and "controlled" only over that territory which is politically ruled by the authority which "politicizes" the economic process and enforces its plan by political force.' Röpke (above n 39) 237.

[53] Hersch Lauterpacht, 'Succession of States with Respect to Private Law Obligations', *International Law: Being the Collected Papers of Hersch Lauterpacht Systematically Arranged and Edited by E Lauterpacht* (Cambridge University Press, 1970 (originally published in 1928)) vol 3, 125. On the Eurocentrism of the universal character of international law, see Pahuja, 'Letters from Bandung: Encounters with Another International Law' (above n 3).

was of a universal character. Consequently, the world of politics both *was* separated and *had to be* separated from the world of economics.

The material aspect of the limitations of sovereignty did not concern the sources of international law, but the integration of the colonies into the family of nations. The concept of 'civilisation' played a crucial role in this undertaking on two counts. Tzouvala shows that, first, 'degrees of civilization determined the extent of a political community's international legal personality, resulting in varying degrees of legal subjectivity.'[54] Second, 'international legal instruments that performed the "civilizing mission" (…) transformed peripheral political communities by promoting state centralization and capitalist relations of production.'[55] This transformation was mandated by the cultural aspect of the civilising mission, but it was also the necessary condition for securing access to resources and markets.[56] Thus, 'the Mandate System implicitly established a dichotomy between the political and the economic. The political status of the Mandate territories was to change while their economic status was to remain largely unaltered.'[57] The division of these two spheres was crucial for bridging the simultaneous but contradictory effects of decolonisation that the form of nation state and sovereignty brought about. On the one hand, the 'new' states had to 'accept the epistemology of the coloniser'[58] and so came to the established system of imperial powers as the new 'backward' states. On the other hand, the meeting was supposed to be one of equal sovereigns on equal ground. The means to relieve this tension was through separating the political and the economic sphere, so that the status of equality could be made plausible in the political sphere, while 'backwardness' was ascribed to the sphere of the economy. As Pahuja puts it:

> This acceptance required a self-understanding of the proto-nation states as 'backward'. This self-professed backwardness existed uncomfortably alongside the dignity perceived as being

[54] Ntina Tzouvala, 'Civilization' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar, 2019) 83, 87.

[55] Ibid. On the transformative power of the Mandate System, see Anghie (above n 11) 162-78. 'As colonial experts at the time noted, the market, as it was constructed in colonial societies, became the central, dominant institution within those societies, distorting and undermining all other social institutions.' Ibid 173.

[56] Anghie (above n 11) 158. See also Miéville (above n 38) 243.

[57] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32(2) *New York University Journal of International Law and Politics* 243, 279.

For a nuanced account showing how much the economic stability actually depended on the introduction and maintenance of the legal forms of property and contract, see also Matthew Craven, *Colonial Fragments:* Decolonization, Concessions and Acquired Rights' in Jochen von Bernstorff and Philipp Dann (eds) *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford University Press, 2019) 101.

[58] Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (above n 5) 105.

> asserted in the claim to an ethnic and cultural identity, which could stand shoulder to shoulder with the European culture. One way this disjuncture was mediated in the Third World's efforts to confine its self-described 'backwardness' to the abstract, putatively universal, economic sphere.[59]

Liberal lawyers and economists identified the rules for the governance of this universal economic sphere as the protection of private property and the sanctity of contract. To grant authority to this view, they argued that those norms constituted 'general principles of law recognized by civilized nations.'[60]

Socialist and anti-colonial views pushed back against precisely this differentiation. Their understanding was built around a political economy in which both spheres were part of the same mechanism of ordering, namely the sovereign state. Scott Newton iterates this point when he describes the understanding of the socialist thinker Pashukanis: 'For Pashukanis, private right was already inside and constitutive of public law: imperium was called into being by dominium.'[61] The 'economy' did not feature as a separate unit; it was enmeshed in the broader concern for living conditions. From this point of view, the state inaugurated private rights through a positive act as instruments for a larger good. In Soviet law, law could not be understood without the state, grounding a 'real link between structures of economic and political authority, on one hand, and twentieth-century legal normativity, on the other.'[62] What characterised Soviet law was the instrumentalisation of law in the service of an egalitarian industrial society.[63] In this function 'Soviet law, far from being meant for eternity, is temporary to the highest degree.'[64]

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[59] Ibid.

[60] McNair, 'The General Principles of Law Recognized by Civilized Nations' (above n 29) 15-6.

[61] Newton (above n 12) 110.

[62] Ibid 3.

[63] Bystrický argues that counter to the liberal charge that nationalisations would constitute a violation of human rights, they were the means of bringing about the actual fulfillment of human rights. 'Deshalb entbehren die Versuche bestimmter Autoren zu beweisen, dass die entschädigungslose Nationalisierung eine "Verletzung der Menschenrechte" bedeute, jeder Begründung. Das Gegenteil ist wahr; denn die Nationalisierung ist auf die Errichtung einer Ordnung gerichtet, in der die Menschenrechte nicht nur erklärt, sondern wirklich gesichert werden.' Rudolf Bystrický, 'Zu einigen Problemen des internationalen Rechts im Zusammenhang mit der sozialistischen Nationalisierung' in Horst Wiemann (ed), *Fragen des internationalen Privatrechts: acht Beiträge von Vertretern der sozialistischen Rechtswissenschaft* (Deutscher Zentralverlag, 1958) 97, 107.

[64] Otto Kirchheimer, 'The Socialist and the Bolshevik Theory of the State' in Frederic S Burin and Kurt L Shell (eds), *Politics, Law, and Social Change: Selected Essays* (Columbia University Press, 1969 (first published in 1928)), 18.

Where liberals claimed equity and appropriateness to be found in universal timeless general principles,[65] they charged socialist law with immorality and arbitrariness.[66] The accusation of immorality, however, only made sense against an imagined threshold of lawfulness and morality grounded in natural law.[67] Röpke expresses this connection between the liberal economic order, law and morality as follows: 'An intensive economic intercourse (…) is only possible under a number of conditions. There must be a framework of institutions and of a strong legal order, and behind theme, there must be a generally observed and undisputed code of moral norms and principles of behaviour.'[68] The debate over the nationalisation of concession agreements ran precisely along these lines. [69]

> The nationalisation of the means of production, or of the extraction of natural resources, does amount to a particular kind of rejection of the split between the economic and the political. The fusion brought about by nationalisation invests control over socioeconomic production not in the diffused power of the market, as in a capitalist system, but rather in the state. This move combines the apparatus of political authority with the economy (or sphere of production) and rejects a separation of the two spheres as distinct terrains of action.[70]

Thus, with the rise of international investment law throughout the second half of the 20th century, we see that 'in the battle to assert the universality of parochial truths, it was the liberal capitalist view that triumphed because of its successful capture of the space of the international.'[71] The capture was successful because it established and maintained this line between the political and economic in the international legal order.

Viewed against this background, Lauterpacht's elaborations of the legal system map on to the proclaimed distinction of the spheres. The reliance on general principles was the vehicle for the construction of a new legal system aimed at determining the legal framework pertaining to concession agreements. The whole point of this new legal system was to restrain sovereignty

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[65] See, eg, Friedmann, 'The aim is to use comparative law as a guide to the principles that, in the circumstances of the case, are most appropriate and equitable.' Friedmann (above n 51) 285.

[66] Hermann Josef Abs, *Der Schutz wohlerworbener Rechte im internationalen Verkehr als europäische Aufgabe: Betrachtungen zur Entwicklung der Suezkrise* (Recht und Wirtschaft, 1956) 5. For a critique of this classification, see Newton (above n 12) 12-17.

[67] See chapter 4 on the *Sheikh of Abu Dhabi Arbitration*.

[68] Wilhelm Röpke, *International Economic Disintegration* (Macmillan Company, 3rd ed, 1950) 72.

[69] For an account of nationalisations from a socialist perspective, see Bystrický (above n 63). For an example of the liberal critique of the Soviet conception, see Ignaz Seidl-Hohenveldern, 'Communist Theories on Confiscation and Expropriation: Critical Comments' (1958) 7(4) *The American Journal of Comparative Law* 541.

[70] Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (above n 5) 129.

[71] Ibid 158.

in order to protect private rights. In arbitrations over concession agreements, the arbitrator came to be the decisive force for determining where the line between 'the economic' and 'the political' ought to run. The awards show that the arbitrations were often a forum for disputing two rival visions of the relationship between state and market. In most of the arbitrations, the state asserted its sovereign prerogative to decide the fate of a concession agreement, and the private company then fought this exercise in an arbitral forum. It became the arbitrators' mandate, aided by the legal claims made by the lawyers on both sides, to determine the legality or illegality of state measures, and to decide over the substantive consequences of such an act. Scholarly writings and arbitral practice successfully established that it was indeed the arbitrator's authority, and not the state's, to decide these questions and insulate the economic sphere from national decision-making.

The conjunction of the theoretical and material grounds for a separation of the political and economic spheres was the basis for the establishment of an international jurisdiction over foreign private property. The theoretical conception grounded the possibility of a law beyond the will of the state and thus of a superseding international legal order. International law could not be limited to sovereign decision-making, since that would void it of its legal character. In this understanding, all public law was law made by the state and thus positive law. An independent international legal order needed to contain elements of natural law that would prevail over positive law. For Lauterpacht, these elements had to be found in private law, and thus meant maxims such as the protection of private property and the sanctity of contract. Once these maxims were established as superseding sovereign law they could be put to work for the protection of foreign private property in international arbitrations. The material conception of the division enabled former colonial powers to maintain control over resource production and distribution in non-Western states. The notion of 'civilisation' was deployed to capture at once the cultural, institutional and productive transformations necessary for becoming an 'advanced' society. Importantly, the transformation in the sphere of production meant the development of capitalist modes of production based on individual labour and private property.

c) Jurisdiction, temporal ordering and self-authorisation

The project of internationalisation was indeed successful, and thus the question emerges: How was this authorised? How were some claims accepted, namely the ones with an internationalising tendency, and others rejected, namely the ones that insisted on domestic sovereign authority? In other words, what are the mechanisms of authorisation of this

internationalisation? Elevating legal authority over concession agreements from the domestic to the international sphere had to be made convincing.

By relying on jurisdictional thinking in this project, we can understand law as practice and technique, rather than concept and norm.[72] As Dorsett and McVeigh describe it, 'there is a strong temptation to view law as a system and to think of it as a coherent whole. [Instead] jurisdictional practice should indeed be viewed as a practice – a way of doing things rather than a complete ideal form.'[73] This approach allows me to bracket the question of the concrete form the norm would eventually take and look at its formation instead. By treating the established norm as a final point, rather than as a starting point, I can remain open to a whole range of actions of various actors (the arbitrators, practitioners, state representatives and scholars engaged in the field) without having to pre-determine the character of their actions. The unsettling of legal forms by re-opening the process of their formation is particularly important since legal form always precedes the event. In order for something to be legible as a legal event, it has to be framed in the conventional forms of law.[74] As Korhonen puts it:

> The problem with a 'conventional' or doctrinal approach often is that it has to classify its object of interest as a subject of the law or characterise it based on pre-set criteria – e.g. on what is legal and what is not legal – before any analysis can proceed. The pre-classification hence remains out of sight in further considerations. Yet a pre-classification immediately throws the object to the furthest loop of the hermeneutic circle because it necessarily contains presumptions which were by no means 'natural' or 'given' with the initial entrance of the scene of the claimant or the dispute that needs to be addressed.[75]

But this pre-classification, or, I would say, constitutive transformation, seldom becomes part of the debate and is usually rendered invisible.[76] It is this invisibility that I am attempting to counter with a focus on practice. The craft aspect of practices points to the material expressions of legal authority. Practices are the means of representation that make legal authority legible

[72] Dorsett and McVeigh, *Jurisdiction* (above n 3) 26.

[73] Ibid.

[74] A good illustration of this point is the writ system in common law history. Only claims presented in the form of a writ could be heard before the King's Court. Thus, it is not the wrong in the world that comes first, it is the writ that needs to be in place to make the wrong legible. Or as Maitland put it: 'No writ no remedy, no remedy no wrong.' Frederic William Maitland and Francis Charles Montague, *A Sketch of English Legal History* (Lawbook Exchange, 1998 (first published 1915)) 105.

[75] Outi Korhonen, *International Law Situated: an Analysis of the Lawyer's Stance Towards Culture, History and Community* (Brill, 2000) 6.

[76] On the methodological gains of making visible what is already there through description, see Orford, 'In Praise of Description' (above n 4). See also Korhonen 'Although sophisticated doctrinal debates on issues will eventually occur, the determination of the initial question – the making of the initial difference – is crucial for the formation of the starting positions of the debate and the ultimate outcome. The debate cannot transcend its own axioms afterwards nor comprehend the traces of all the reduced data.' Korhonen (above n 75) 7.

and exercisable.[77] I follow Dorsett and McVeigh in considering writing, mapping, precedent and categorisation as relevant jurisdictional techniques.[78] These techniques allow for the introduction of legal forms such as standing, jurisdiction or applicable law. While I do not want to abandon the distinction between the power to decide and other forms of authority, I want to insist that those other forms are as constitutive of legal authority as the rendering of judgment. Writing a dispute resolution clause into a contract calls on the authority of a tribunal and thereby introduces the authority of law. The arbitral award is the document that represents the authority to settle a dispute, but its authority is constituted through preceding jurisdictional practices, such as the exchange of diplomatic notes, the concession agreements, the oral and written pleadings, etc. Furthermore, it is over time that particular practices become normalised, especially through a reliance on precedent.[79]

This brings me to the importance of temporal ordering. Any given claim must alter its past in the moment of its assertion, so that it is not regarded as claim but as the application of a pre-established rule. This ability is fundamental for the redemptive power of law.[80] Retrospectively, once a particular norm is formed and accepted in a conflict, one can easily distinguish between legal and non-legal practices. The authorised interpretation is deemed to represent an expression of an established legal rule, while the contesting interpretation is deemed illegal. But this categorisation becomes available only *ex post facto* and therefore *is* the actual mode of authorisation. This is why we can speak of a mode of self-authorisation.

In a similar, but slightly different manner, the temporalisation of difference is another way of establishing hierarchy and thus authority through self-authorisation. The notion of 'civilisation' carries an implicit temporal ordering of societal forms. 'We were all headed for the same destination, (…) but some people were to arrive earlier than others. That was what historicist consciousness was: a recommendation to the colonized to wait.'[81] For Chakrabarty the 'not yet' inherent in the civilising mission bears the same two components identified earlier. On the one hand, it holds the promise of self-government, on the other, it means a transformation to a

[77] Dorsett and McVeigh, *Jurisdiction* (above n 3) 34.

[78] Ibid 54-80.

[79] Patrick M Norton, 'A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation' (1991) 85(3) *American Journal of International Law* 474, 478.

[80] Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992) 42.

[81] Chakrabarty (above n 5) 8.

capitalist mode of production.[82] The contestations I draw out in the various arbitrations mark moments of rupture in which Western companies advanced the 'not yet' of self-government to enhance the capitalist transformation through the protection of private property. Ultimately, it was self-government as jurisdiction, or, in other words, self-government as authority, to speak the law over the treatment of foreign private property that was withheld from the 'new' states. Instead, this authority was successfully established on the international level through an international legal order prescribing the protection of private property as a marker of 'civilisation'. The temporal trajectory can best be understood in a spatial manner, where places are projected along a chronological line with Europe and the US as the future and the rest of the world as the past.[83] In this ordering system, the future has to be brought into being and the past has to be left behind in progressive motion.[84] The projection of past and future onto places, peoples and ideas is then what allows for the self-authorisation of the norms of international investment law in their specific configuration.

4. The argument

The thesis advances the following argument: the emergence of international investment law can be traced to the elevation of jurisdiction over concession agreements from the domestic to the international legal sphere in the first half of the 20th century. This transition occurred through the development of legal practice in early investor-state arbitrations, attempts at multilateral codification and accompanying scholarship. This practice of Western companies, governments, legal practitioners and scholars ended up normalising the protection of foreign property as international legal rule. The argument develops through two strands, examining this transformation from an angle of political economy as well as through modes of authorisation for the development of novel legal doctrine.

The first strand describes the claim by Western governments and companies for the protection of foreign property on the international level as a reaction to redistributive policies of socialist and anti-colonial governments. Multinational companies met the attempts of governments to nationalise large-scale industries for infrastructure and resource exploitation with lawsuits on the international level. Remaining within the jurisdiction of the nation state would have meant

[82] Ibid.

[83] I draw on a tradition of critical historiography as represented by eg, Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (above n 5); Chakrabarty (above n 5); Mitchell (above n 5) 1-34; Blaut (above n 5) 1-30.

[84] Fitzpatrick (above n 80) 90.

accepting the lawfulness of the nationalisation within the parameters defined by domestic law. In consequence, the companies tried to assert the international sphere to secure the economic value of concessions through advancing an international legal standard outlawing certain measures and prescribing a particular standard of compensation. Arbitration and attempts at codification evolved as sites for these assertions, slowly developing into a framework that later became the regime of international investment law.

Subjecting nationalisations to an international legal regime was an expression of a particular vision of the relationship between states, markets and law advanced by liberal thinkers in law and economics before and after the Second World War. In their vision, concession agreements formed part of an independent economic sphere not to be controlled through sovereign state politics, but through *general principles* promoting private property and the sanctity of contract. Advancing a world view of separated economic and political spheres lay the necessary groundwork for prioritising the protection of foreign private property over redistributive policies.

The second strand of the argument describes the techniques deployed in the elevation of jurisdiction over concession agreements to the international level as practices of self-authorisation. By self-authorisation I mean that the authority for the legal validity of the claims for an international regime protecting private property was sourced from the legal practices themselves. Legal practitioners and scholars used the legal form 'general principles of law recognized by civilized nations' as a vessel to carry the meaning of a universal standard protecting private property and the sanctity of contract. The work of a group of lawyers in the course of various early arbitrations combined with concurring scholarly writings and attempts at codification at the multilateral level developed into an authoritative line of precedent.

Embedded in the notion of 'general principles of law recognized by civilized nations' was a claim to the universal validity of the principles. Lawyers and arbitrators relied on the qualifier 'civilised' to downgrade national laws in favour of an international legal sphere. This logic was built on a hierarchisation of difference of societal forms along the imaginary progression toward 'civilisation'. The imaginary of 'civilisation' placed legal orders prioritising the protection of private property and the sanctity of contract in the present, while positioning contesting legal orders in the past.

With the focus on *formation* in this thesis, along the two strands of the argument, the thesis develops an account of the emergence of international investment law that pluralises possible

conceptions of legality by localising the source of legal authority in the agentive power of legal practice itself.

5. Chapter outline

The thesis is structured around three early arbitrations over concession agreements and an attempt to codify the rules for the protection of foreign property into a multilateral agreement in the period between 1922 and 1959.

Chapter 2 explores one of the first investor-state arbitrations, the *Palestine Railway Arbitration* of 1922. This arbitration marks an early moment in the turn towards investor-state arbitration as the appropriate mechanism to settle disputes between foreign investors and states by granting standing to the private company. In this sense it anticipated the expansion of public international law to contracts. At the time, scholars and practitioners of international law were firmly of the opinion that public international law could only apply between states and that commercial activities of a company were a matter of domestic law. By elevating the company to the international legal sphere and placing it on par with the state, the arbitration lay the ground for conceptualising the relationship between the state and the company in contractual terms. This was fundamental for a possible application of the principle *of pacta sunt servanda,* meaning the sanctity of contract, and thus the protection of foreign private property.

What the arbitration also shows is that the legal practices were firmly grounded in a common understanding of the future of Palestine in which Palestine was considered not 'yet' able to stand on its own. This idea rested on a presumed universal standard of civilization to be deployed around the globe in which the West occupied the future and the global South had to catch up. This hierarchisation of difference under the guise of 'civilisation' and later 'development' is a mechanism that underpinned not only the authority of the tribunal's decision in this instance, but which also grounded the claims made by the tribunals in the other arbitrations.

Chapter 3 focuses on an arbitration launched by a British company against the Soviet Union after the introduction of the first Five-Year Plan and the full departure from a capitalist economy, namely the *Lena Goldfields Arbitration* of 1930. The Lena case shows the important role business interests came to play in interstate trade negotiations after the First World War and thereby continues the logic of the *Palestine Railway Arbitration*. In other aspects, though, this setting differed significantly from the first. The ideological differences between a socialist economy and a liberal economy collided in this encounter, and the tribunal elevated the

arbitration to the international sphere both materially and procedurally. The law applicable to the concession agreement should have been Soviet law. Soviet law foresaw the primacy of a new Soviet policy on concession agreements, putting them in the service of the overall well-being of the working class, thus impeding on what the company considered its private property right. But instead of relying on Soviet law as applicable law, the tribunal relied on the 'general principle of law recognized by civilized nations' contained in the Statute of the Permanent Court of Justice and on the notion of *Kompetenz-Kompetenz* to escape domestic law and move toward internationalisation on both the procedural and the material level.

Chapter 4 introduces the *Sheikh of Abu Dhabi Arbitration* of 1951 between a British company and the Sheikh of Abu Dhabi concerning the production and exploitation of oil fields. At stake was the relationship between two oil concessions granted by the Ruler of Abu Dhabi to a British company and an American company respectively. The arbitration encapsulates the global competition over oil fields in which exclusive concessions became the most important tool. British lawyers, with a British arbitrator presiding, conducted the arbitration. Theses practitioners established a line of precedent for the internationalisation of contracts that ran from the *Lena Goldfields Arbitration* through the *Anglo-Iranian Case* through other cases featuring British business interests. Lauterpacht and McNair played an important role in legal practice, as well as in the academic writing about the practice. They elevated the status of the sanctity of contract and acquired rights to the international sphere by asserting them as 'general principles recognized by civilized nations.' This allowed for the dismissal of Islamic law as applicable law by its characterisation as 'traditional' and unequipped to deal with the complicated economic relationships of the modern world. English law then emerged as the representation of a universal legal order. The adjective 'civilised' came to serve as the justification for the imposition of a Western liberal vision of property rights.

This early practice of investor-state arbitration was accompanied by a series of attempts at codification that culminated in the *Abs-Shawcross Draft Convention* in 1959, later to become the *OECD Draft Convention*. **Chapter 5** argues that this convention was a reaction to the contestations by socialist and anti-colonial governments described above. The authors of the draft attempted to pre-empt such debates in the future by suggesting the applicability of international standards to replace the sometimes less investor-friendly applicable domestic law. But the convention also reacted to the failed attempt in the *Anglo-Iranian Case* of 1952 to characterise a concession agreement as an internationalised agreement. It did this by including what is now called an 'umbrella clause', a clause suggesting that any breach of a contract

between the investor and the state should be considered a breach of the multilateral convention. The *Abs-Shawcross Draft Convention* of 1959 also connected foreign property protection to the idea of development, proclaimed in President Harry Truman's inaugural address in 1949. Through the lens of development, the attention turned away from the past to the future. The controversy was no longer about the fate of concession agreements belonging to the colonial period, but about development as humanitarian enterprise for the future. The protection of foreign investment turned rhetorically from a profitable business initiative into a benevolent instrument for bringing capital and infrastructure to the newly inaugurated 'developing world'.

6. Originality and limitations

A final word should be said about the originality and the limitations of this account. It is, as I tried to indicate with the metaphor of photography, a story based on snapshots. It shines light on certain aspects of international investment law and leaves others in the dark. Both the limitations and the originality rest in this selection. For the structure of the thesis, I rely on three early arbitrations, and I chose one particular attempt at codification. The time span indicated in the title reflects these documents since the first arbitration I consider, the *Palestine Railway Arbitration*, took place in 1922 and the *Abs-Shawcross Draft Convention* was presented in 1959. With the overall small number of early arbitrations, I focused on those with particular representative strength for the internationalisation of concession agreements.[85] Each of these instances shows a certain aspect with larger explanatory value. Furthermore, I was selective in the time period that I discuss. In holding with my methodological aim to make visible what is already there but has become invisible, my intention was to write a *pre-history* of international investment law, a history that shows the making of the concepts and forms that are recognisable to the discipline today. Thus, where most accounts of international investment law start with the first bilateral investment treaty between Germany and Pakistan in November 1959, I end my story in May of that year with the presentation of the convention that was the blueprint for that treaty, the *Abs-Shawcross Draft Convention*. This also explains the absence of the *Convention for the Settlement of Investment Disputes (ICSID)*, a core instrument in contemporary investment law.[86] Furthermore, I try to show liberal propositions as the driving force for the success of the internationalisation of contracts. So, with other scholars I suggest

[85] Arbitrations resulting from Mixed-Claims Commissions are not part of the analysis, since they were all based on peace treaties, or other treaties, authorising the investor to bring claims against the state. This is a fundamentally different setting than the arbitrations studied in this thesis.

[86] For a recent study of the drafting history of ICSID, see St John (above n 8).

that the first half of the 20th century saw the formation and rise of liberal thinking in both economics and law.[87] In staying with my contention that it was a *claim* to universality[88] that was used to authorise the rules of international investment law and not actual epistemological and ontological universality, it is important to note that the story is written from this particular perspective.[89]

7. Conclusion

This thesis offers an account of the legal practices and their underlying ideas deployed by various actors and scholars between 1922 and 1959 that laid the groundwork for the contemporary institutions of international investment law. I rely on the documentation of three early investor-state arbitrations over concession agreements and an attempt at multilateral codification of rules for the protection of foreign property. By looking at these instances as moments of jurisdictional practice, meaning by focusing on their making rather than on their conceptual form, I can trace their *formation*. This in turn allows me to analyse how claims turned into rules and how contestations were dismissed. I suggest that legal practitioners and scholars, as well as economic thinkers shaping the work of international institutions, successfully elevated jurisdiction over foreign property from the domestic to the international sphere. This elevation drew its authority from a logic of temporal ordering that at once claimed timeless validity for the rules on property protection, while simultaneously defining them as expression of 'civilised' modernity. Socialist and anti-colonial contestations for the redistribution of wealth comprised in foreign property holdings were successfully dismissed as unlawful and archaic. The overall picture that emerges is that the world was made safe for investment during the first half of the 20th century through self-authorising legal practices.

[87] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (above n 5) and Slobodian (above n 44).

[88] Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (above n 5).

[89] On provincialising European international law, see Pahuja, 'Letters from Bandung: Encounters with Another International Law' (above n 3) 568.

Chapter 2 – The Palestine Railway Arbitration 1922

If ever an act seemed like sacrilege it is the introduction of a railroad into Palestine, with the sound of whistle and rushing train among the old and quiet hills of Judea. (…) It is, therefore, a well-aimed spear-thrust in the side of this old despotic backward-looking government, and may foretoken for it either the dawn of health or the shadows of inevitable death.

US Consul Selah Merril, 1893[1]

1. Introduction

This chapter engages with the *Palestine Railway Arbitration* of 1922[2] and draws out the techniques applied in the arbitration that framed new ways of protecting private property and laid the groundwork for the internationalisation of concession agreements. The early 1920s were marked by important transformations with regard to the protection of foreign private property: first, the Mandate System was introduced as a new form of governing territories formerly under the control of Germany and the Ottoman Empire after the First World War; and second, concession agreements and their legal fate were included in peace treaties under the jurisdiction of mixed arbitral tribunals. The chapter describes how these transformations enabled the advanced protection of private property on the international plane with special attention to the underlying modes of authorisation. It shows how these transformations can be understood as practices of jurisdiction that rely on a mode of self-authorisation. The *Palestine Railway Arbitration* is particularly illuminating of this point for two reasons. First, from a purely doctrinal perspective, the arbitration is full of formal flaws. It therefore raises the question of the source of the authority of law more pressingly than other arbitrations. Second, it appears that most legal inventions and changes were made out of a sense of necessity without much theorising. These observations point toward an account of law that is attentive to the actual practices of the actors involved.[3]

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[1] Selah Merrill, 'The Jaffa and Jerusalem Railway' 13(3) *Scribner's Magazine* 289, 289-290.

[2] The award and preliminary documents are discussed and reprinted in: Shabtai Rosenne, *Essays on International Law and Practice* (Martinus Nijhoff, 2007) 295. The arbitration is discussed in: J Gillis Wetter and Stephen M Schwebel, 'Some Little-Known Cases on Concessions' [1964] (40) *British Yearbook of International Law* 183, 222-32. In addition, an entire file containing the awards, maps, graphs and diplomatic notes is available at Harvard Law Library and on file with the author.

The arbitration between the Suez Canal Company and Egypt from 1864 is usually referred to as the first investor-state arbitration. Yackee (above n 7). I start my inquiry in the early 20th century because it is the advent of the systematic use of investor-state arbitration.

[3] Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012) 55-9.

The chapter begins with an analysis of the *Treaty of Sèvres* of 1920[4], the underlying document for the arbitration. It examines the work of the jurisdictional clause that defined the mandate of the tribunal and shows how its wording posited certain aspects of the concessionary relationship as facts to be accepted while opening others to the scrutiny of the arbitral tribunal. As a result, the task of securing the economic value of the concession was separated from the political changes that had to occur to enable this protection. While the tribunal was able to determine the amount of compensation to be paid, it was precluded from considering the lawfulness of the political changes it had to accept for upholding the concessionary relationship. The chapter moves to examine how the company was granted standing vis-à-vis the state by the arbitral tribunal. In the early 1920s, companies were not considered legal subjects in international law. Granting legal personality to the company enabled the tribunal to consider it on par with the state. This in turn allowed for the conceptualisation of the relationship in contractual terms and the application of the notion of *pacta sunt servanda,* meaning the sanctity of contract prioritising the protecting of the economic value of the concession. In a third step, the chapter draws out how the protagonists involved in the arbitration could act in concert, even though their practices were full of contradictions and gaps. It shows that beneath these practices lay an understanding of the world that was never made explicit. The sensibility of the time, particularly the zeitgeist of 'a civilising mission', enabled this coherence. The Mandate System, with its idea of tutelage over a territory for a certain amount of time, rested on the logic of the temporalisation of difference.[5] In this conceptualisation, certain territories were considered not yet able to govern themselves, while others were mandated to act on their behalf.[6] These three transformations, the separation of the economic value from the political considerations, the conceptualisation of the relationship between the state and the company in contractual terms, and the hierarchisation of difference between territories along the imagined standard of 'civilisation' moved toward an elevation of jurisdiction over concession agreements from the domestic legal sphere to the international legal sphere.

[4] *Treaty of Peace between the Allied and Associated Powers and Turkey* signed 10 August 1920 (entered into force not in force) ('*Treaty of Sèvres*'). The text of the treaty is reproduced with explanatory maps in Lawrence Martin, *The Treaties of Peace: 1919-1923* (Carnegie Endowment for International Peace, 1924).

[5] Timothy Mitchell, *Questions of Modernity* (University of Minnesota Press, 2000) 1-34.

[6] *Covenant of the League of Nations*, opened for signature 29 April 1919, [22] (entered into force 10 January 1920) ('*Covenant of the League of Nations*').

2. The arbitration in context

a) The Treaty of Sèvres and the establishment of the arbitral tribunal

The *Palestine Railway Arbitration* of 1922 arose out of an arbitration agreement between the British and French governments, based on the *Treaty of Sèvres* of 10 August 1920, the Peace Treaty between the Allied Powers and Turkey after the First World War.[7] The issue at stake was a dispute over the amount of compensation due for the buyout of a concession for the building and running of a railway line between Jaffa and Jerusalem by the British government. The concession was held by the French enterprise Société du Chemin de Fer Ottoman de Jaffa à Jérusalem et Prolongements which launched a claim before an arbitral tribunal provided for in the *Treaty of Sèvres*. The concession had originally been granted by the Imperial Turkish government in 1888 and was due to expire in 1959. Throughout the First World War, the railway was of high strategic importance, and Britain took control over it in November 1917.

After the war, in 1919 the company launched a formal request for the requisition of the line. However, Britain made use of a clause of the *Treaty of Sèvres*, stipulating that in territories detached from the Ottoman Empire and placed under the tutelage of an Allied power, this Allied Power could buy out the concession if it considered this purchase to be in the public interest. The British Foreign Office entered into negotiations with the French Embassy in London and offered to pay £189,655. The French company asked for the payment of £436,524. In an exchange of diplomatic notes between March and June 1921, both sides agreed on the constitution of an arbitral tribunal to determine the appropriate amount to be paid. The tribunal was finally composed of the Norwegian FVN Beichmann, a deputy-judge of the Permanent Court of International Justice, who was appointed as president, together with Lt Col H Osborne Mance and Ferdinand Mayer, both experienced engineers. The tribunal held its sessions in Paris between 26 and 30 September 1922 and the final award was rendered on 4 October 1922. The award reflected a settlement reached by the parties over the total payment of £565,000 to the company. The compensation was considered to be in full satisfaction of all claims of the French company against the British government and vice versa. Remaining claims of the company against the Ottoman Empire, now the Turkish government, passed to the British government.

In the political turmoil after the First World War, the *Treaty of Sèvres*, the underlying document for the arbitration was signed but never implemented. Historians explain the failure by reference

[7] A detailed account of the history of the negotiations and the actual arbitration based on diplomatic notes can be found in Rosenne (above n 2) 295-312.

to a conflict of interest between the Allied Powers on the partition of the Ottoman Empire.[8] France held the majority of Ottoman debt and was interested in preserving Turkey's territorial integrity to ensure the productivity of the country and thus its ability to repay the debt.[9] The British government, on the other hand, was keen to deprive Turkey of its control over the straits at Bosporus and the Dardanelles, and to shrink Turkey's territory to a minimum.[10] Finally, the Allies promised Italy that it would be allowed to occupy a part of Turkey's mainland.[11] Britain and France were the most engaged actors with regard to the Mandate territories,[12] particularly in regards to Palestine.[13] The *Sykes-Picot Agreement* of 1916 was reached between the British and French governments laying the groundwork between the two powers for the allocation of Mandates over Ottoman territories after the war.[14] The status of Palestine was not definitively settled in the agreement, and it was only after the war, in December 1918, that France abandoned its claims to Palestine.[15] After the capitulation of the Ottoman Empire on 30 October 1918,[16] Palestine was officially given the status of 'occupied enemy territory administration'.[17] The *Treaty of Sèvres* made reference to the Covenant of the League of Nations[18] and designated Palestine as an 'A Class Mandate' under British rule. Territories were differentiated as to their stage of development and the former Turkish territories were considered 'most advanced, soon to be able to stand alone.'[19] At this time Kemal Ataturk and the Republicans had made significant advances in taking over state power from the Sultan in Turkey and were fighting

[8] Alfred E Montgomery, 'The Making of the Treaty of Sèvres of 10 August 1920' (1972) 15(4) *The Historical Journal* 775, 775.

[9] Ibid 776.

[10] Ibid.

[11] Ibid 776 n 774.

[12] The Mandate System was introduced after the First World War, and placed the former German and Turkish territories under the tutelage of an Allied Power.

[13] Montgomery (above n 8).

[14] Alexander Lyon Macfie, *The End of the Ottoman Empire: 1908-1923* (Routledge, 2014) 273.

[15] Edward Peter Fitzgerald, 'France's Middle Eastern Ambitions, the Sykes-Picot Negotiations, and the Oil Fields of Mosul, 1915-1918' (1994) 66(4) *Journal of Modern History* 697, 697-8; Norman Bentwich, *Palestine* (Ernest Benn, 1934) 90.

[16] Theo Karvounarakis, 'End of an Empire: Great Britain, Turkey and Greece from the Treaty of Sevres to the Treaty of Lausanne' (2000) 41(1) *Balkan Studies* 171, 181.

[17] Bentwich (above n 15) 86.

[18] *Covenant of the League of Nations* (above n 6) [22].

[19] Article 22 of the Covenant specifies: 'Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.' Ibid.

back against Allied troops.[20] Ataturk was not willing to accept the terms of the peace treaty and the *Treaty of Sèvres* could not be implemented. It was only on 24 July 1923 with the *Treaty of Lausanne* that the British mandate over Palestine was finally effected and thus that the provisions relating to the arbitration came into force.

The *Palestine Railway Arbitration* fell right into the period between the two peace treaties. The *Treaty of Sèvres* was signed on 10 August 1920, the award in the *Palestine Railway Arbitration* was rendered on 4 October 1922 and the Treaty of Lausanne, which finally implemented the terms of the *Treaty of Sèvres*, entered into force on 6 August 1924.[21] Since the arbitration took place before the coming into force of the *Treaty of Lausanne* and was based on an arbitration clause in the *Treaty of Sèvres*, the failure of the implementation of the latter meant that the arbitration was based on a document that lacked a legal basis.[22] The status of the *Treaty of Sèvres* at the time is described in a number of different ways in scholarly literature.[23] The diplomatic correspondence leading to the arbitration proves that neither of the governments involved in the arbitration believed the treaty to be in force. In a note to the French Embassy, the British representative of the Foreign Office stated: 'His Majesty's Government share [sic!] the view of the French Government that these claims [concerning the Jaffa-Jerusalem Railway Company] should be submitted to arbitration without waiting for the coming into force of the Treaty of Sèvres.'[24] The arbitrators were equally aware of the status of the treaty. In the award, the tribunal held that 'although the above Treaty [of Sèvres] has not yet been ratified, the Governments agreed that the above article [311, containing the provisions on arbitration] should be applied in the present case.'[25] Thus, from a purely positivist perspective, the arbitration clause defining the task of the tribunal and constituting the legal basis for its work was not in

[20] Montgomery (above n 8) 785-6.

[21] The terms of the trust of British governance over Palestine were agreed upon by the Council of the League in July 1922, but did not come into force until September 1923. Bentwich (above n 15) 117.

[22] *Treaty of Sèvres* (above n 4) [311].

[23] It is described as not ratified: Wetter and Schwebel (above n 2) 222 n 2.

As not in force: Rosenne (above n 2) 296.

As not in force but signed: Karvounarakis (above n 16) 171; Macfie (above n 14) 319.

Or some status in between: 'The Treaty had not been executed by the plenipotentiaries as at the date of the dispute.' Michael P Reynolds, 'The Jaffa Jerusalem Railway Company Arbitration 1922' [1991] 6 *Arab Law Quarterly* 215, 216.

[24] Rosenne (above n 2) 341.

[25] *Palestine Railway Arbitration (Société du Chemin de Fer Ottoman de Jaffa à Jérusalem et Prolongements v Government of the United Kingdom) (Award)* (4 October 1922) reproduced in ibid 315.

force. So, the legal authority of the *Palestine Railway Arbitration* cannot be accounted for in doctrinal terms.

b) The work of the jurisdictional clause

The arbitration took its starting point from Article 311 of the *Treaty of Sèvres*. Article 311 determined the jurisdictional scope of the tribunal and thus determined the mandate and limitations of the work of the arbitrators. The first paragraph of the article stipulated the main purpose of the clause:

> In territories detached from Turkey to be placed under the authority or tutelage of one of the Principal Allied Powers, Allied nationals and companies controlled by Allied groups or nationals holding concessions granted before October 29, 1914, by the Turkish Government or by any Turkish local authority shall continue in complete enjoyment of their duly acquired rights, and the Power concerned shall maintain the guarantees granted or shall assign equivalent ones.[26]

The clause reveals that there were two major aspects of the tribunal's work. On the one hand, the tribunal had to secure the continuity of the enjoyment of acquired rights in form of concessions granted by the Imperial Turkish government to private companies and individuals before the war. On the other hand, the tribunal had to accept that the authority in charge of this continuity was an Allied Power under whose tutelage the territory of Palestine was to be placed.

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[26] *Treaty of Sèvres* (above n 4) [311].

Article 311 included detailed instructions for the composition and work of the tribunal:

In territories detached from Turkey to be placed under the authority or tutelage of one of the Principal Allied Powers, Allied nationals and companies controlled by Allied groups or nationals holding concessions granted before October 29, 1914, by the Turkish Government or by any Turkish local authority shall continue in complete enjoyment of their duly acquired rights, and the Power concerned shall maintain the guarantees granted or shall assign equivalent ones.

Nevertheless, any such Power, if it considers that the maintenance of any of these concessions would be contrary to the public interest, shall be entitled, within a period of six months from the date on which the territory is placed under its authority or tutelage, to buy out such concession or to propose modifications therein; in that event it shall be bound to pay to the concessionnaire equitable compensation in accordance with the following provisions.

If the parties cannot agree on the amount of such compensation, it will be determined by Arbitral Tribunals composed of three members, one designated by the State of which the concessionnaire or the holders of the majority of the capital in the case of a company is or are nationals, one by the Government exercising authority in the territory in question, and the third designated, failing agreement between the parties, by the Council of the League of Nations.

The Tribunal shall take into account, from both the legal and equitable standpoints, all relevant matters, on the basis of the maintenance of the contract adapted as indicated in the following paragraph.

The holder of a concession which is maintained in force shall have the right, within a period of six months after the expiration of the period specified in the second paragraph of this Article, to demand the adaptation of his contract to the new economic conditions, and in the absence of agreement direct with the Government concerned the decision shall be referred to the Arbitral Commission provided for above.

Thus, the scope of the tribunal's work was to preserve private property and in order to do so, it had to accept a significant change with regard to the territorial status of Palestine.

In order to fulfil this double task, the *Treaty of Sèvres* relied on a legal fiction in the sense of 'a factual statement a judge, a legal scholar or a lawyer tells, while simultaneously understanding full well–and also understanding that the audience understands–that the statement is *not fact*.'[27] A legal fiction is a truth that does not depend on proof, much rather it is considered true by virtue of being recognisable as a legal fiction.[28] This understanding points us precisely to the question of what was considered as given, e.g. factual, despite the full recognition that it was a social construction. By making the *Treaty of Sèvres* the basis of the arbitration, the treaty was treated as an underlying fact. In our scenario, the deployed legal fiction was the jurisdictional scope contained in Article 311 that determined the content of the arbitral proceedings. The jurisdictional scope commissioned the tribunal to arbitrate the appropriate amount of compensation, but it precluded it from examining the political status of Palestine. The clause thereby separated the problem of compensation and the protection of the concession from the rest of the issues at stake. The following statement by the British government in 1921 illustrates this point:

> His Majesty's Government assume that there will be no necessity to agree upon specific terms of reference to the Tribunal as it is already mutually understood that the arbitration is taking place with the object of determining the equitable compensation to be paid to the Jaffa-Jerusalem Railway Company by His Majesty's Government under the terms of Article 311 of the Treaty of Sèvres.[29]

The magnitude of the change that had to be accepted regarding the political status of the territory prescribed by Article 311 unfolds when considering that at this moment in time Palestine was belligerently occupied territory forming part of Turkey, which had not ratified the peace treaty.[30] In the award, the tribunal acknowledged this situation by stating that

> under the terms of Article 311 of the Treaty of Peace with Turkey signed at Sèvres on August 10th 1920, but not yet ratified, the British Government having decided, in virtue of the mandate

[27] Annelise Riles, 'Is the Law Hopeful?' in Hirokazu Miyazaki and Richard Swedberg (eds), *The Economy of Hope* (University of Pennsylvania Press, 2016) 99, 101 (emphasis in original).

[28] Ibid 128.

[29] Note of the British Foreign Office to the French Embassy (21 December 1921) reprinted in Rosenne (above n 2) 349.

[30] Ibid 295 n 2.

> of Palestine *to be conferred on them,* to buy out the concession enjoyed by the above company.[31]

In using the formula 'to be conferred on them', the tribunal signals its awareness that the transition in the political status of the territory had not yet taken place. However, it proceeded with its work despite this acknowledgment and accepted the future transition as a fact of the present. It thereby instituted the new political status of Palestine.

On the other hand, regarding the rights of the company, Article 311 instructed the tribunal with ensuring the protection of private property. It prescribed that 'Allied nationals and companies controlled by Allied groups or nationals holding concessions shall *continue* in complete enjoyment of their duly acquired rights, and the Power concerned shall *maintain* the guarantees granted or shall assign equivalent ones.'[32] Since the jurisdictional clause was framed in the language of 'continuity' and 'maintenance', the task of the tribunal did not appear to be to accept a future proposition but rather to maintain something that was already there. By defining the mandate of the tribunal as securing the economic value of the concession, it was asked to confirm the terms of the *Treaty of Sèvres* while simultaneously being barred from reviewing them. This then appeared as if the considerations of the tribunal bore only on the economic question of compensation and not on the political provisions of the Treaty of Sèvres itself. It also appeared as though the tribunal had no active role to play but was mainly asked to maintain and reinstitute something that was already there. This was achieved through separating the economic value of the concession from the question of its beneficiary. This framing gave authority to the prescriptions of the *Treaty of Sèvres*; it was authorised through the legal practice enacting it. The constitution of the authority, however, immediately fell outside the scope of scrutiny and became an underlying fact. In this sense, the legal authority was *self-constituted,* the treaty and the following arbitration were *self-authorised*.

The arbitration further appeared as separated from the political consequences it created since it was framed by the tribunal as purely technical, rather than political, matter. As stated in the note by the British government, 'the question with which the tribunal will have to deal will be largely of a technical and financial nature.'[33] And with the establishment of the question as one

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[31] *Palestine Railway Arbitration (Société du Chemin de Fer Ottoman de Jaffa à Jérusalem et Prolongements v Government of the United Kingdom) (Preliminary Decision)* (29 May 1922) reproduced in ibid 349.

[32] *Treaty of Sèvres* (above n 4) (emphasis added) [311].

[33] Note from the British Foreign Office to the French Embassy (18 July 1921) reprinted in Rosenne (above n 2) 351.

of technicality comes the appointment of the technical experts to determine the question. Another note by the British government further illuminates this point:

> His Majesty's Government are endeavouring to secure as the British arbitrator an expert in railway administration and finance and I dare to hope that the French Government will think it well to choose as the French arbitrator an expert with similar qualifications, with a view to facilitate an efficient and expeditious handling of the case. The question with which the Tribunal will have to deal will be largely of a technical and financial nature (…) the President of the Tribunal should be a lawyer, as some legal questions will no doubt arise, but that one legal member should suffice.[34]

As mentioned above, the tribunal consisted of the Norwegian lawyer FVN Beichmann, a deputy-judge of the Permanent Court of International Justice, as well as two railway engineers, Lt Col H Osborne Mance and Ferdinand Mayer. By appointing engineers, the parties implied that the mandate was an issue of technical assessment. Thus, through the jurisdictional scope of the arbitration, the arbitrators were not only barred from examining the political consequences of their actions, they were also exempted from it through their expertise.

Let us now return to the question of authority and authorisations. Thinking with Fitzpatrick's *The Mythology of Modern Law* allows us to grasp the practice of law as the source of law itself. He observes that that 'myth (…) is the mute ground which enables "us" to have a unified "law" and which brings together law's contradictory existence into a patterned coherence.'[35] Fitzpatrick argues with Foucault that 'law is thus located and identified in "the order of things", in an order that springs from within the things ordered.'[36] There is a correspondence between the description of the situation in the diplomatic notes, the arguments made in the statement of claims and the findings of the arbitral tribunal. The diplomatic notes were exchanged between the British and the French governments and both expected that Palestine would be under the tutelage of Britain. As a consequence, they assumed that it was not the Ottoman Empire, or the Palestinian people themselves, but in fact the British government that was in charge of the railway line. Because both governments considered the Treaty of Sèvres a legally binding document, they both assumed that Britain was entitled to buy the railway back from the French company. Both agreed that the only relevant question was the question of the value of the railway and thus the compensation to be paid to the French company by the British government.

[34] Ibid.

[35] Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992) 2.

[36] Ibid 90.

Since the treaty stipulated that an arbitral tribunal was the proper institution to determine the amount of compensation, people were invited to take on the roles of the lawyers and arbitrators. In accepting these roles, they accepted the whole preceding story and saw themselves bound to act accordingly. They made and heard arguments about the value of the railway and accepted the decision of the tribunal as decisive in the matter. This correspondence is produced by these documents and not given in the world. As expressed by Samuel: 'Lawyers, like scientists, do not work directly on reality but construct rationalized models of this reality, and it is these models that become the "objects" of legal discourse.'[37] As we can see then, the authority for the arbitration rests in the act of *self-authorization* through talking, writing and acting as if there was a legal foundation; the authority stems from its *en*actment or practice. As Riles notes: 'What legal fictions help to bring to light, in other words, is the technical source of law's agentive power.'[38] It is in this sense that 'jurisdiction is a practical and technical activity'[39] that can account for law's 'agentive power'. It is this activity, this practice that turned an anticipated future, as prescribed in the *Treaty of Sèvres*, into a lawful relation. The contingent became the necessary through acts that were authorised by being *en*acted.

3. The parties to the arbitration

However, maintaining the contract, as stipulated in Article 311, was not as straightforward as it appeared. It meant that something that was established in the past should travel through changing times. However, what exactly should be maintained and what would have to change was decided through the practice of jurisdictional techniques. Emphasising the activity in legal practice, Dorsett and McVeigh hold that: 'jurisdictional practices are active – the technologies of jurisdiction make or figure some relation.'[40] Jurisdictional devices actively shape relations, rather than replicate a pre-existing ideal. Therefore, the idea of 'maintaining a contract' could not determine the social relations to be established on its grounds. The concession contract from 1888 was granted by the Ottoman Empire to the French company. Based on the identity of the parties to the concession agreement, an arbitration could only have taken place between the Ottoman Empire and the French company. Instead, the *Treaty of Sèvres*, which was not in force but contained the foundational clause (Article 311) for the *Palestine Railway Arbitration,*

[37] Geoffrey Samuel, 'Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences' in Mark van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart, 2004) 74.

[38] Riles (above n 27) 101.

[39] Dorsett and McVeigh, *Jurisdiction* (above n 3) 14.

[40] Ibid 56.

instituted a substitution of the parties on both sides. Article 311 of the *Treaty of Sèvres* stipulated:

> If the parties cannot agree on the amount of such compensation, it will be determined by Arbitral Tribunals composed of three members, one designated by *the State* of which the concessionnaire or the holders of the majority of the capital in the case of a company is or are nationals, one by *the Government* exercising authority in the territory in question.[41]

Instead of the French company, the French government was designated a party to the arbitration, and the Ottoman Empire was substituted with the Mandate authority, thus the government of Palestine. Despite this formal dedication, the parties that finally participated in the arbitration again deviated from the prescription of Article 311. Instead of the French government, we find the French company *Société du Chemin de Fer Ottoman de Jaffa à Jérusalem et Prolongements*. And instead of the government of Palestine, we find the British government.[42] All these substitutions point us to an inquiry into legal personality and the construction of equality between subjects.

Returning to the above argument on the role of legal fictions in stabilising certain constellations as facts, we can first observe that treating a government and a company as if they were persons is one of the strongest examples of a legal fiction. Yet, the international community is almost exclusively constituted of fictional legal personae.[43] The theory of legal subjects engages with the question of who is and who can be a legal person and thus a legal subject in international law. Crawford refers to the ICJ Case of 1949 *Reparations for Injuries* and finds that a legal subject is unfortunately defined circularly as 'an entity capable of possessing international rights and duties and (a) having the capacity to maintain its rights by bringing international claims and (b) to be responsible for its breaches of obligation by being subjected to such claims.'[44] In this definition the existence of a legal person is made dependent upon the actual exercise of the rights pertaining to that person. What Crawford calls circular describes precisely the relationship between doctrine and practice I developed above. The act of exercising a right

[41] *Treaty of Sèvres* (above n 4) (emphasis added) [311].

[42] Rosenne already noted this in his account of the arbitration: 'Given the terms of article 311 of the Treaty of Sèvres, it seems that in reality both parties to this arbitration were surrogates – the British Government for the Government of Palestine, and the Company for the French Government.' Rosenne (above n 2) 305 n 22.

[43] For an approach to international legal personae in international law in the interwar period from a perspective of legal anthropology, see Natasha Wheatley, 'Spectral Legal Personality in Interwar International Law: on New Ways of Not Being a State' (2017) 35(3) *Law and History Review* 753.

[44] James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 2019) 105. In the past 20 years, the status of corporations was mainly discussed with regard to binding human rights obligations. See, eg, Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Hart, 2006).

becomes the foundation for the existence of the right. Both the Mandate authority as well as the corporation were novel bodies in the international legal arena, so that the arbitration brought them into being by enabling them to exercise rights. Hence, if we go back to the idea that the goal of the whole undertaking was the maintenance of the contract, we see that only the economic value of the concession agreement to its holder, the French company, travelled through time, while almost all other aspects pertaining to the contract changed.

a) Standing for the company and contractual relations with a state

The official party to the arbitration on part of the claimant was the French government, since it was a signatory to the *Treaty of Sèvres* and the designated party to appoint the arbitrator. However, the French company, as a private entity, was granted legal standing. Without further explanation, in a note to the British Foreign Office on 10 January 1922, the representative of the French Embassy announced that the company had accepted the procedure proposed by Britain.[45] Rosenne cites from a record held in the British National Archive and notes 'the identity of the Parties was not clear and was discussed briefly at a meeting in the Colonial Office on 20 March 1922, but was not brought up again.'[46] This interchangeability was already rooted in the agreements leading up to the arbitration in which the French government and company were treated interchangeably. Two of four relevant documents for the arbitration were signed between the respective governments. The French and British government signed the *Treaty of Sèvres*, which included the arbitration agreement. A treaty amending the concession in 1914 was also concluded between the French government and the Ottoman Empire.[47] However, a supplement to the latter agreement[48] as well as the concession agreement itself were signed by the company.

[45] Note of the British Foreign Office to the French Embassy (10 January 1922) reproduced in Rosenne (above n 2) 350.

[46] Ibid 305 n 2.

[47] I was unable to find a copy of this treaty in the case file at Harvard Law School. The only evidence of it is given by Rosenne, and he summarises the content to be the following: 'In April 1914, the French and Ottoman Governments concluded a treaty by which they agreed on the construction of a deep-water port at Jaffa, the prolongation of the railway to the port, and the exercise of the right of repurchase of the railway in accordance with the terms of the concession.' Ibid 298.

[48] Supplementary Agreement to the Original Concession Agreement of 4 August 1914, available at Harvard Law Library ('Supplementary Agreement to the Original Concession Agreement of 4 August 1914'). The agreement was signed by the Minister of Finance of the Ottoman government and the Chairman of the Board of Directors of the Jaffa to Jerusalem Railway Company. This agreement is part of the file at Harvard Law School and on file with the author.

Arbitration as a means of dispute settlement between states had been practised widely since the 18th century, but it was not until this moment, after the First World War, that international arbitration became a forum where private parties had standing.[49] The *Peace Treaty of Versailles* was the first to allow private individuals to launch claims against governments, in this case against Germany for reparations for war damages.[50] Until then, individuals appeared before tribunals to specify their claims, but they lacked official standing – *dominus litis*[51] – as party to the dispute, which rested with their respective states.[52] It was a far held view at the turn of the century that only states could be considered subjects of international law.[53] However, this view was beginning to shift in the interwar period.[54] Alfred Verdross, an Austrian international lawyer, considered the constitution of the Mixed Claims Commissions established under the peace treaties after the First World War as an indication of a deviation from that rule.[55] He argued that directly conferring rights to individuals in peace treaties constituted an important departure from the prevailing legal norms.[56] In addition, both the German Society for

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In Rosenne's account, the supplement was the 'working out of the details' of the agreement, but it did include the renouncement of the repurchase right (Article 4) as well as an agreement for the extension of the line to the Dead Sea (Article 8), and thus revoked an essential right originally granted. Rosenne (above n 2) 298.

[49] There were a number of scattered exceptions, see, eg, Jason Webb Yackee, 'The First Investor-State Arbitration: The Suez Canal Company v Egypt (1864)' (2016) 17(3) *Journal of World Investment & Trade* 401.

For a theoretical account of the place of the corporation in international law see Fleur E Johns, 'Theorizing the Corporation in International Law' in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 635.

[50] Philip C Jessup, *Transnational Law* (Yale University Press, 1956) 96.

[51] Paul De Auer, 'The Competency of Mixed Arbitral Tribunals' [1927] 13 *Transactions of the Grotius Society: Problems of Peace and War* xvii, xvii.

[52] This is the classic construction of the legal figure of 'diplomatic protection' that was exercised in various ways. Interstate arbitration or mixed claims commissions were the usual fora for such claims. Edwin M Borchard, *The Diplomatic Protection of Citizens Abroad – or – the Law of International Claims* (Banks Law, 1919) 366.

[53] De Auer refers to the debates of the Advisory Committee of Jurists in the drafting of the Statute of the Permanent Court of Justice as only the latest negotiation in which it was decided not to confer legal standing to individuals in front of international courts. De Auer (above n 51) xix.

[54] For a contemporary account of the interwar period and the changes in international legal subjectivity see Wheatley (above n 43).

[55] Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Julius Springer, 1926) 156.

[56] 'Soweit solche völkerrechtliche Ansprüche von Einzelnen begründet sind, besteht daher eine wichtige Durchbrechung der üblichen Rechtslage. Während nämlich grundsätzlich die Einzelnen voll und ganz dem staatlichen Recht unterworfen sind, indem das Völkerrecht die Regelung menschlichen Verhaltens dem staatlichen Rechte überläßt, beauftragt hier das Völkerrecht nicht die Staaten, durch staatliche Normen bestimmte individuelle Rechte zu begründen, sondern räumt den Einzelnen diese Rechte ohne Hinzutreten von staatlichen Durchführungsnormen selbst ein.' Ibid 161. For an account of the changes in the regime of diplomatic protection inspired by American realism, see Frederick Dunn, *The Protection of Nationals: a Study in the Application of International Law* (Johns Hopkins Press, 1932).

International Law[57] and the British Grotius Society[58] discussed the granting of standing to individuals as a radical novelty in international law during that period. Most contemporary commentators considered this departure undertheorised and rather a creation of practice than of 'international legal science'.[59]

At that time, scholars were not primarily thinking of companies when discussing new subjects of international law. Lauterpacht spoke of 'such exotic examples as pirates, blockade runners, carriers of contraband, recognised belligerents and so on.'[60] The status of companies in the international legal order only became pertinent when concession agreements received greater attention in the aftermath of the Second World War.[61] However, as early as 1928, Verdross considered some form of contractual relationship and the principle of *pacta sunt servanda* as the basis of a genuinely international legal obligation of subjects other than states.[62] In order to secure the economic value of concessions by law on the international plane, the company had to first be granted standing so it could be considered on par with the state. This construction then allowed for the conceptualisation of the relationship between the company and the state in contractual terms. Finally, upholding the notion of *pacta sunt servanda*, the sanctity of contract enabled the securitisation of the economic value of a concession agreement by framing it as maintaining a contract. Consequently, when the company was granted standing in the *Palestine Railway Arbitration* and appeared on par with the state, we see yet another iteration of law-making through practice. This practice became decisive for the protection of foreign property over the years to come. What is embedded in the substitution of the French government with the French company is then the creation of contractual relations between the company and the state under the jurisdiction of international law.

[57] Godehard J Ebers, 'Sind im Völkerrecht allein die Staaten parteifähig' [1926] (7) *Mitteilungen der Deutschen Gesellschaft für Völkerrecht*.

[58] De Auer (above n 15).

[59] Dunn (above n 56) 7.

[60] Vladimir R Idelson et al, 'The Law of Nations and the Individual' [1944] (30) *Transactions of the Grotius Society* 50, 66.

[61] Love Rönnelid, 'The Emergence of Routine Enforcement of International Investment Law: Effects on Investment Protection and Development' (Dissertation Thesis, Uppsala University, 2018) 83.

[62] Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (above n 55) 116. A detailed discussion of this proposition follows in chapters 3 and 4.

b) The temporalisation of difference: neither Ottoman Empire nor Palestine

The appearance of the company as party to the dispute also had consequences for the question of the applicable law. A dispute between two states would be subject to international law; however, a dispute between a state and a private entity, especially concerning a contract, was considered to fall under domestic law.[63] In the situation at hand, in the *Palestine Railway Arbitration*, it would have been difficult to determine which domestic law had to be applied. It could have been Ottoman law, the applicable law at the time the contract was entered into.[64] It could also have been British law, since the mandate 'conferred direct and full power over legislation and administration upon the mandatory.'[65] There is no record of considerations of this kind by either the parties or the tribunal. Yet, instead of choosing either of these options, the tribunal followed the suggestion of the British and French counsel. 'The British agent did not "suggest that the law of any particular country is binding on the Tribunal, but it [was] submitted that a legal principle common to a number of countries constitutes an authority which the tribunal should not lightly disregard."'[66] He cited opinions by experts from English, French, American, German and Belgian law to sustain his calculation of the appropriate compensation.[67] The French counsel similarly argued 'that whether or not the tribunal is bound by this or that particular law, the general basic principle of fairness and equity is that lawful owners of property should only be forcibly expropriated of what they possess on the term [of] compensation.'[68] The tribunal stated that it 'considers that the text of article 311 of the Treaty of Sèvres leaves it open to the tribunal to decide freely what are the material elements which should be taken into consideration 'on the basis of the maintenance of the contract "adapted."'[69]

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[63] In the *Serbian and Brazilian Loans Cases* (1928), the PCIJ held: 'Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.' *Payment of Various Serbian/Brazilian Federal Loans Issued in France [1929] (Judgment)* (ser A) Nos 20/21 PCIJ 4, 41.

[64] In the case *The Watercourses in Katanga (Compagnie du Katanga v. Colony of Belgian Congo)* (1931), the tribunal was faced with a claim against the Colony of Belgian Congo stemming from a concession agreement granted by the independent state of Congo in 1891. The tribunal applied the law in place at the time when the concession was granted. Wetter and Schwebel (above n 7) 189.

[65] *Covenant of the League of Nations* (above n 6) [19].

[66] Reynolds (above n 23) 219.

[67] The question at heart of the Preliminary Decision was concerned with fixed properties in the compensation claim. The tribunal decided in favour of the respondent and restricted the basis for the compensation to lost profits. *Palestine Railway Arbitration* (*Société du Chemin de Fer Ottoman de Jaffa à Jérusalem et Prolongements v Government of the United Kingdom) (Preliminary Decision)* (29 May 1922) reproduced in Rosenne (above n 2) 327-38.

[68] Response by the French Company cited in Wetter and Schwebel (above n 2) 226.

[69] Rosenne (above n 2) 299.

As Schwebel and Wetter have commented: 'In this the parties, if not the Tribunal, (…) came close to relying on the general principles of law recognized by civilized nations.'[70]

But it was not only with regard to the domestic law applicable to the case that the protagonists relied on the idea of 'civilisation'. 'Civilisation' through modernisation was a common understanding of place and time for all the actors involved. The epithet 'civilised' indicates the ordering principle that underlay the whole arbitration, differentiating between the 'civilised' Allied powers and the not yet 'civilised' former Ottoman territories. In the *Covenant of the League of Nations*, Palestine as a community formerly belonging to the Turkish Empire was considered to 'have reached a stage of development where [its] existence as an independent nation can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as [it is] able to stand alone.'[71] We can trace this logic further when we consider the deviation of the prescription of Article 311 on the side of the respondent. Here the tribunal allowed for the interchangeability of the local authority within the territory, the government of Palestine, with the Mandate power itself, the British government. The term 'independent nation' as prescribed in Article 22 of the Covenant did not say much about the actual authority that could be exercised and especially not about the authority over the economy.[72] As Anghie notes regarding the similarities and differences between colonies and mandates, the economic sphere seemed to be outside the scope of independence and self-determination.

> The fundamental paradox, however, was that even while the Mandate System proclaimed that it was inaugurating a new relationship between advanced and backward states, the assumption remained that mandate territories would play the same economic role as colonial territories. (…) Thus, it could be argued, when seen in economic terms, the purpose of the Mandate System was not so much to dismantle colonialism, as to reproduce it with a new set of ideological justifications, which derived from the liberal-humanist sentiment of the time, and a new set of legal techniques created by international institutions.[73]

So, the Mandate System was at once intended to further the well-being of the local population while at the same time preserving the economic benefits of the former colonial powers.

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[70] Wetter and Schwebel (above n 2) 232.

[71] *Covenant of the League of Nations* (above n 6) [22].

[72] Antony Anghie, 'Nationalism, Development and the Postcolonial State: The Legacies of the League of Nations' (2006) 41(3) *Texas International Law Journal* 447, 452.

[73] Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (above n 57) 279.

Viewed from this angle, it comes as no surprise that the institutional arrangement between the Mandate power and the local institutions was one of the biggest challenges in the Mandate System.[74] 'Native governance' had to be replaced with 'modern institutions', but since it was 'hardly possible to restructure these institutions radically and immediately, they sought instead to advance the market precisely through the partial adoption of existing native customs.'[75] We get a glimpse of the tension in this relationship in Mitchell's description of the reaction of the Palestinian population to the British occupation in the 1920s.

> In Palestine, (…) large demonstrations were launched against the British occupation. The protests demanded independence and a halt to Zionist immigration, which the British had decided to support as a means of creating a European settler population through whom it might retain a territorial hold on the eastern Mediterranean. (…) As it became clear that Palestinians' opposition to the seizure of their territory would require a larger military presence, Britain had opted to support the Zionist project to build up a Jewish colony in Palestine.[76]

Since the Mandate System had just been brought into being, the specific form Britain's indirect rule would take was not yet settled. To the contrary, it was to be shaped by the way it was practised.

This brings us back to the *Palestine Railway Arbitration* and the implications of the substitution of the Palestinian government with the British government as respondent. It appears that the substitution was by no means unintentional on behalf of Britain. As documented in the diplomatic exchange prior to the arbitration, the British Foreign Office 'suggested that the Company should forthwith submit unofficially a copy of its claim so that the British authorities could make a preliminary investigation of it "and thus perhaps avoid delays which might be occasioned by the necessity of reference to the Government of Palestine."'[77] We might also note that large-scale infrastructure, such as a Jaffa-Jerusalem railway line, was a cornerstone of the economy and controlling it an important part of governance. We can see then that through the substitution in the arbitration, the tribunal implicitly determined that it was within the competence of the British government rather than the government of Palestine to decide over large-scale infrastructure projects in Palestine. Embedded in this assumption is precisely what

[74] For a nuanced account of the restraining and critical potential of petitions in the Mandate System in Palestine, see Natasha Wheatley, 'The Mandate System as a Style of Reasoning: International Jurisdiction and the Parcelling of Imperial Sovereignty in Petitions from Palestine' in Cyrus Schayegh and Andrew Arsan (eds), *The Routledge Handbook of the History of the Middle East Mandates* (Routledge, 2015) 106.

[75] Antony Anghie, Imperialism, *Sovereignty and the Making of International Law* (Cambridge University Press, 2008) 169.

[76] Timothy Mitchell, *Carbon Democracy: Political Power in the Age of Oil* (Verso Books, 2011) 87.

[77] Rosenne (above n 2) 301.

Anghie described in the quote above with the double task of the Mandates System, i.e. granting certain political control but maintaining colonial economic relations.

We get closer to how this was achieved when we view the arbitration as a bridge between a vision of the past, the present and the future at a certain time.[78] The claim to authority was successful because it resonated with the themes of its time for the actors involved. It resonated with the idea of modernity by means of industrialisation and trade, it resonated with the idea of 'civilisation' as the 'burden of the White Man', and it re-inscribed and advanced the decay of the Ottoman Empire. Selah Merrill, the US consul in Jerusalem, captures and predicts this 'zeitgeist' in an article he wrote in 1892 about the opening of the Jaffa-Jerusalem railway line in a US magazine:

> If ever an act seemed like sacrilege it is the introduction of a railroad into Palestine, with the sound of whistle and rushing train among the old and quiet hills of Judea. Everybody believes, however, that Providence is guiding the march of civilization, hence there can be nothing unholy in the fact that its advanced guard has reached the walls of ancient Jerusalem. We had already the post-office, the management of which has notably improved during the past ten years; we had also the telegraph; and whole one should not expect too much of Oriental lightning, and must sometimes be satisfied if it makes a full hundred miles in forty-eight hours, still the natives, both high and low, are gradually waking to the idea that it means promptness and rapidity – that it is a kind of annihilator of space. But it was reserved for the year of our Lord one thousand eight hundred and ninety-two to introduce here the railway, with all its strange and stirring life. (…) The significance of this event is not that fifty-three miles of railway have been built, or that the capital and the seaport have been united by iron rails; it is that this has been done in Turkey, which has always, by all prejudice and force of religion, by all the arts of its diplomacy, and by every other means at its command, done all in its power to keep out Western civilization. It is therefore a well-aimed spear-thrust in the side of this old despotic backward looking government, and may foretoken for it either the dawn of health or the shadows of inevitable death.[79]

The *Palestine Railway Arbitration* has a smooth appearance because it was staged on an already established vision of the future. In the debate over the appropriate amount of compensation we can find evidence of the vision described by Merrill. In a telegram from 1 October 1922 the company argued:

> but there is every reason to anticipate that with the increasing prosperity of the country under stable British government, the traffics estimated previously have been maintained and

[78] Robert M Cover, 'The Folktales of Justice: Tales of Jurisdiction' in Martha Minow et al (eds), *Narrative, Violence, and the Law* (University of Michigan Press, 1985-1986) 173, 181.

[79] Merrill (above n 1) 289.

> improved. It is reasonable to expect that as development of the country progresses, population increases and new enterprises are introduced, this will be a constantly increasing percentage.[80]

In response, the British government argued that 'Palestine as a whole may be considerably more intensively developed than it was before the war.'[81] We can see that there is a consensus between the parties that the British rule is not only legitimate, but also beneficial to Palestine. Possible contestations of such a vision never entered the arena of the arbitration. Neither the Turkish government nor the Zionist or Arab populations of Palestine ever accessed it. But it was not by force or harsh negotiation that they were kept out, it was through the devices of law, through the granting of legal personality and standing to some but not others. The line drawn between those who appear and those who are left out reflected the idea of progress and 'civilisation' and implemented a hierarchisation of difference.

Timothy Mitchell locates the normative character of the hierarchisation in the temporal and spatial ordering of the world that these terms participate in. 'The concept of historical time recaptures histories happening overseas and returns them to the historical home of the West. Such representations construct the capitalist modern as a temporal object as much as a spatial one, giving it the coherence of a single parentage and unique abode.'[82] The place of modernity was Europe and the time of the present was modernity.[83] The subjects of modernity, the agents of modernity, are therefore Europeans, whereas the 'inhabitants of the colonies (…) were assigned a place "elsewhere" in the "first in Europe then elsewhere" structure of time.'[84] The wording of Article 22 in the *Covenant of the League of Nations* located the elsewhere, which was Palestine, in the *not yet*: 'States (…) which are inhabited by peoples *not yet* able to stand by themselves under the strenuous conditions of the modern world.'[85] Thus, on the spatial imaginary of history, Palestine was in the past and had *not yet* entered the stage of modernity. It is this hierarchisation of time and place, the relegation of Palestine to the global 'waiting

[80] Rosenne (above n 2) 310.

[81] Ibid.

[82] Mitchell, *Questions of Modernity* (above n 5) 12. See a similar account based on the idea of 'Diffusion' in James Morris Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, 1993) 1-30.

[83] Mitchell, *Questions of Modernity* (above n 5) 7.

[84] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press, 2000) 8.

[85] *Covenant of the League of Nations* (above n 6) [22] (emphasis added).

room'[86] that authorised the practices of the tribunal in the *Palestine Railway Arbitration* and made the practices appear as a natural and necessary step in the course of history.

The idea of linear progression of time is closely tied to the idea of positive law. The myth holding modern law together is not a myth with distinguishable positive characteristics, but much rather constituted through a negative differentiation of that which it is not, of the 'other'.[87] So, in a permanent differentiation leading away from its origin, law becomes progression, a progression without a 'general dynamic giving it identity and effect.'[88] Similar to the connection Fitzpatrick draws between the idea of a mythology of law void of transcendental grounding and the idea of progression, Agamben argues that there is an inherent connection between the idea of history as process, which evolved in the 19th century, and infinite progress.

> Only process as a whole has meaning, never the precise fleeting *now;* but since this process is really no more than a simple succession of now in terms of before and after, and history of salvation has meanwhile become pure chronology, a semblance of meaning can be saved only by introducing the idea – albeit one lacking any rational foundation – of continuous, infinite progress.[89]

The place of law is thus strongly connected to the vision of the future. The appearance of coherence and reliance on a seemingly posited law in the *Palestine Railway Arbitration* is grounded in the abstract, through-going, non-explicit understanding of time and law.

4. Conclusion

This chapter explored a foundational technique in the constitution of legal authority: certain constructed aspects become authoritative by being posited as unalterable facts. As such they disappear from sight and can no longer be scrutinised. In the *Palestine Railway Arbitration* this was achieved by positing Article 311 of the *Treaty of Sèvres* as a starting point and thereby delimiting the jurisdiction of the tribunal. Article 311 constructed the introduction of the Mandate System and the consequent placement of Palestine under British tutelage as fact. It did so by asking the tribunal to determine the appropriate amount of compensation owed to a French company for the buy-out of a concession originally granted by the Imperial Ottoman Empire but now held by the British government. By accepting the mandate to determine the compensation, the tribunal inscribed the change in the political status of the Palestinian

[86] Chakrabarty (above n 84) 8.

[87] Fitzpatrick (above n 35) 10.

[88] Ibid 90.

[89] Giorgio Agamben, *Infancy and History: The Destruction of Experience* (Verso, 1993) 97.

territory. This inscription, however, was rendered unchallengeable, because it was posited as fact. This separation of different spheres, namely the political and the economic, was at the heart of liberal conceptions of international ordering in both economics and law in the first half of the 20th century. The *Palestine Railway Arbitration* shows how this separation could be embedded in legal practice without ever being mentioned.

Two important transformations in international law became evident in the interwar period. First, the relationship between companies and states started to take the form of a contractual relationship between equals. The first step for this transition was to bestow companies with standing – *dominus litis*[90] – in international law. In the *Palestine Railway Arbitration*, this was initiated by exchanging the French government with the company as party to the arbitration. This exchange was undertaken without an explicit conceptualisation. Instead, it was enacted in practice. It was not until later, after the Second World War, that legal subjectivity for corporations in international law was actively debated. However, at that time, there was already an established practice in arbitrations of granting standing to companies vis-à-vis states, which became more widespread after the *Palestine Railway Arbitration* in 1922. Second, the Mandate System introduced the logic of a temporalisation of difference in which the West was allocated the place of the present and future, and the former colonies were located in the past *not yet* ready to govern themselves. This logic was fundamental for elevating the jurisdiction over concession agreements from the domestic to the international sphere. By reference to general principles, the parties and the tribunal found that the tribunal should not rely on local laws in Palestine, but on something akin to 'general principles recognized by civilized nations.' It was precisely the qualifier 'civilised' that allowed for the differentiation on a temporal scale, since Palestine was *not yet* 'civilised' enough to govern itself, thus it could not possess a domestic legal order 'civilised' enough to constitute the applicable law in the proceedings.

The explanatory power of the *Palestine Railway Arbitration* reaches beyond its single instance in the sense that it layed the groundwork for what was to become the institutional thinking in investment law in the course of the 20th century. The next chapters will build on this method of inquiry and deepen the understanding of how the jurisdiction over concession agreements was internationalised.

[90] De Auer (above n 15) xvii.

Chapter 3 – The Lena Goldfields Arbitration 1930

The Russian Delegation must call attention to the fact that the trial of disputes of this kind [arbitration over nationalisations] will inevitably end in opposing to one another two forms of property, whose antagonism assumes today for the first time in history, a real and practical character. In such circumstances there can be no question of an impartial super-arbiter.

Soviet delegate Georgy Chicherin at the Genoa Conference, 1922[1]

1. Introduction

This chapter follows the *Lena Goldfields Arbitration*[2] of 1930 and examines the legal practices deployed by the parties and the tribunal in their relation to the internationalisation of concession agreements. The tribunal was constituted after a dispute arose between a British company and the Soviet state over the fate of a concession agreement granted in 1925 concerning goldmines in Siberia, and it is the only international arbitration the Soviet Union ever participated in. The chapter takes as a starting point that the socialist revolution in the Soviet Union led to a fundamental change in the structure of the legal order, especially with regard to property rights. Instead of private individual ownership, Soviet law prescribed collectivised state ownership. The chapter argues that the tribunal elevated the jurisdiction over the Lena Goldfields concession agreement to the international level in order to override the application of socialist Soviet law. This elevation was achieved by relying on legal techniques concerning the competence of the arbitral tribunal and the applicable law to the concession agreement. While the Soviet Union maintained that the dispute was a matter of domestic jurisdiction, the company and the tribunal claimed the jurisdiction of an international legal order.

The chapter starts with an account of the broader context of the re-establishment of economic and political ties between the Allied Powers and the Soviet Union after the socialist revolution. After failed negotiations about trade relations on the interstate level, concession agreements

[1] Jane Degras (ed), *Soviet Documents on Foreign Policy: 1917-1924* (Oxford University Press, 1951) vol 1, 316.

[2] *Lena Goldfields Case (Lena Goldfields v Soviet Government) (Award)* (2 September 1930) excerpts, English translation of German original reproduced in Arthur Nussbaum, 'Arbitration Bewteen the Lena Goldfields Ltd and the Soviet Government' [1950] (36) *Cornell Law Quarterly* 31, ('*Lena Goldfields Case*'). The complete German version is available online. *Schiedsgerichtssache zwischen Lena Goldfields Co Ltd und der Regierung der USSR (Schiedsspruch)*, (last visited 8 April 2019) ('*Schiedsgerichtssache zwischen Lena Goldfields Co Ltd und der Regierung der USSR'*). See also *The Lena Goldfields Arbitration* Annual Digest of Public International Law Cases (1929-1930) 3, 426 (cases nos 1 and 258), (*'The Lena Goldfields Arbitration'*). The arbitration is exceptionally well-documented, since the arbitration hearings were open to the public and consequently almost entirely reproduced in *The Economist* and *The Times*.

between the Soviet state and private parties came to play an important role in this respect. They served as a vehicle for securing investments of Western companies and attracting foreign capital to the Soviet Union. The chapter then narrows the focus to the concession agreement between the Soviet state and the British company Lena Goldfields, and the dispute that led to the arbitration. In an analysis of the arbitral proceedings, the chapter develops the differences between the liberal and the socialist legal understandings of property rights put forward by the parties in the arbitration. In discussing the establishment of the tribunal, the treatment of a jurisdictional objection by the Soviet Union and the considerations regarding the applicable law, the chapter draws out the relationship between the competing claims of the parties and the underlying competing visions of the relationship between law, state and market. The chapter concludes that the tribunal resolved the conflict by elevating the jurisdiction over the concession agreement to the international level, where it re-inscribed the primacy of private property protection. While the socialist state asserted domestic legal authority, the British company and the tribunal invoked the international legal order.

2. The arbitration in context

The socialist revolution in Russia in 1917, with its vision of establishing the first worker's state to empower the peasantry and the proletariat, is one of the markers of economic history in the 20th century. Large-scale nationalisations and land reforms were a key instrument in the transformation towards a socialist society. However, the Soviet Revolution is rarely considered a milestone of developments in legal history and even less so in international legal history. But as Scott Newton reminds us: 'the elimination of private ownership of the means of production remains a breathtaking and unexampled demonstration of the puissance of law.'[3] Lenin's introduction of the New Economic Policy in 1921, inviting European capital to restore large-scale industry as fast as possible, fuelled the debate over the status of private rights.[4] One of the cornerstones of this initiative were concession agreements granting foreign companies the right to operate certain businesses in return of a share in the profits for the state. Against the criticism that these measures meant a return to capitalism, Lenin argued that this was 'state capitalism' a 'capitalism under the control and surveillance of the state.'[5] Concession agreements and the disputes resulting from them became emblematic of the debate over the extent of authority the

[3] Scott Newton, *Law and the Making of the Soviet World: The Red Demiurge* (Routledge, 2014) 12.

[4] Vladimir Ilich Lenin, *Lenin: Collected Works, Philosophical Notebooks* (Progress, 1965) vol 32, 407.

[5] Ibid 296-7.

state should have over economic relations. The story of the Lena Goldfields concession for the exploration of goldmines in Siberia and the ensuing arbitration show the importance of the international legal order for this debate.

a) Private property and debt

One way of understanding the political and economic stakes of the concession granted to Lena Goldfields is to look at the period that lies between the nationalisation of the gold mines in 1920 and the signing of the concession agreement in 1925. During this period, the Soviet government, Western governments and private enterprises were considering various strategies for reorganising economic ties.[6] The point of disagreement lay in the question of the limits of state authority. Western governments insisted that the new Soviet government had to accept two rights claims. The first concerned Soviet acceptance of the public debt, including of the Tsarist regime.[7] Shortly after its coming to power on 3 February 1918, the Soviet government issued a decree annulling all state debts incurred by the Tsarist and provisional governments.[8] The Allies renounced the decree as 'shaking the very foundations of the law of nations'[9] and appealed to an international body of law preceding the Soviet state as basis for the obligation. The second condition was aimed at returning private property confiscated after the revolution, a position communicated in a joint note by the Allied powers to the Soviet foreign ministry on 15 February 1918.[10] The protesting diplomats declared that their governments considered the decrees confiscating private property to be 'non-existent' and that they 'reserve[d] the right to demand firmly that compensation be rendered for all damage and all losses which the operation of these decrees may cause to foreign states in general and to their subjects living in Russia in particular.'[11] The Soviet government refused to accept either of these conditions. This refusal needs to be understood as part of the attempt to reinvent the relationship between workers, that state and the economy. The Soviet government did not perceive itself as a successor of an

[6] A detailed account of the complicated relationships between the government and corporate actors can be found in Thomas S Martin, 'The Urquhart Concession and Anglo-Soviet Relations, 1921-1922' (1972) 20(4) *Jahrbücher für Geschichte Osteuropas* 551.

[7] The overall foreign debt was considered to amount to RUB13.832 million. James Bunyan and Harold H Fisher, *The Bolshevik Revolution, 1917-1918 Documents and Materials* (Stanford University Press, 1934) 603.

[8] Stephen White, *The Origins of Detente: the Genoa Conference and Soviet-Western Relations: 1921-1922* (Cambridge University Press, 2002) 26.

[9] Bunyan and Fisher (above n 7) 604.

[10] White (above n 8) 26.

[11] Bunyan and Fisher (above n 7) 604.

existing state machinery, but much rather the inventor of 'the first worker's state.'[12] As such, it saw itself as an exception in the landscape of European states and consequently not bound by any set of pre-established norms.

Despite some differences between the Allied powers,[13] there was a general understanding that the problems with the Soviet government should be resolved in an international setting to prevent the weakening of the joint economic and political strength of the Allies.[14] Given that neither the Soviet Union nor the United States were members of the League of Nations, British Prime Minister Lloyd George suggested a meeting outside the auspices of the League of Nations, an effort that resulted in the Genoa and Hague Conferences of 1922. Falling back on the above-mentioned preconditions, in a preparatory meeting for the Genoa Conference in Cannes on 6 January 1922, the Allied powers drafted the so-called *Cannes Resolutions*.[15] The

[12] Newton (above n 3) 33.

[13] Even though France and Britain held the largest amounts of Russian foreign debt in 1922, 43% and 33% respectively, three-quarters of British debt was held by the government, whereas in the French case, this same amount was owed to private individuals. This difference allowed the British government more political space to manoeuvre negotiations and led to disagreements between the French and British governments. White (above n 8) 27.

[14] Carole Fink, *The Genoa Conference: European Diplomacy: 1921-1922* (Syracuse University Press, 1993) 24-30.

[15] Supreme Council of the Allied Powers, *'Resolutions Adopted by the Supreme Council at Cannes, January, 1922, as the basis of the Genoa Conference'* (His Majesty's Stationery Office) (1922).

The full text reads as follows:

1. Nations can claim no right to dictate to each other regarding the principles on which they are to regulate their system of ownership, internal economy and government. It is for every nation itself to choose the system which it prefers in this respect.

2. Before, however, foreign capital can be made available to assist a country, foreign investors must be assured that their property and their rights will be respected and the fruits of their enterprise secured to them.

3. The sense of security cannot be re-established, unless the Governments of countries desiring foreign credit freely undertake —

(a) That they will recognise all public debts which have been or will be undertaken or guaranteed by the State, by municipalities, or by other public bodies, as well as the obligation to restore or compensate all foreign interests for loss or damage caused to them when property has been confiscated or withheld.

(b) That they will establish a legal and juridical system which sanctions and enforces commercial and other contracts with impartiality.

4. An adequate means of exchange must be available, and, generally there must be financial and currency conditions which offer sufficient security for trade.

5. All nations should undertake to refrain from propaganda subversive of order and the established political system in other countries than their own.

6. All countries should join an undertaking to refrain from aggression against their neighbours.

If, in order to secure the conditions necessary for the development of the trade in Russia the Russian Government demands official recognition, the Allied Powers will be prepared to accord such recognition only if the Russian Government accepts the foregoing stipulations

articles reflected the tension between the unconditional commitment to sovereign equality and the request of the acceptance of sovereign debts and private claims of restitution as an international legal obligation. The first article stipulated that 'Nations can claim no right to dictate to each other regarding the principles on which they are to regulate their system of ownership, internal economy and government.' Notably, the stipulation referred to 'internal' economy, already anticipating the limitation of this vision postulated in the following paragraphs. The acknowledgment of the freedom to choose a system of property was limited by the demand in the second article, namely that any system had to ensure that the 'property [of foreign investors] and their rights will be respected'. Read in conjunction, the basis of the *Cannes Resolutions* was that sovereign decision-making was limited by an imposed international legal order defining what it means to respect property and rights.

The *Cannes Resolutions* furthermore explicitly demanded the recognition of public debt and compensation for nationalisations. More importantly, an 'impartial' juridical system was supposed to protect the sanctity of contract. Impartial in this context meant that the state's prerogative to define rights and obligations stemming from contracts was limited by an outside understanding. The last stipulation encapsulates the bargain the Allied powers intended to strike. They were willing to offer *de jure* recognition of the Soviet government if the Soviets were willing to accept the *Cannes Resolutions*.

Recognition was important for the Soviets in order to acquire the foreign capital necessary to foster its damaged economy. It was a precondition for participating in the various peace conferences convened after World War I, in which the new world order was negotiated. The catch attached to the recognition was the acceptance of a limitation of sovereign decision-making in the economic sphere. This last condition sat uncomfortably with the Soviet delegation's own non-negotiable principles. The chief Soviet delegate to the Genoa Conference, Georgy Chicherin, summarised these principles as respect for Soviet sovereignty, unconditional acceptance of the social achievements of the Revolution and exclusive Soviet control over the economic system.[16] In Chicherin's terms, the question was how a temporary collaboration between two different systems of property could be designed.[17] The Soviet delegation argued that even if it were to accept the Allied claims on compensation, it would make counterclaims on behalf of its own population due to damages incurred during the foreign intervention and

[16] White (above n 8) 120.

[17] Ibid 134.

the civil war.[18] The respective expectations were hard to square and the crucial line of contestation concerned the quest for authority over the economic sphere. The Genoa Conference was held between 10 April and 19 May 1922, but ultimately it failed to produce an agreement due to these and other tensions, leaving the question of the reconstruction of trade relations without a formal solution.[19]

The Allied governments represented their stipulations as 'conditions upon which every *civilised* Government conducted its affairs.'[20] The term 'civilised' is a marker of racialised hierarchy in international law, but as Tzouvala argues, it is also a concept with a 'materialist transformative dimension' that played a significant role in the 'diffusion of capitalist relations of production.'[21] A fundamental part of the 'civilising mission' was an institutional transformation inscribing guarantees for property and commerce, particularly in conformity with international law.[22] Tzouvala's insistence on the institutional rather than cultural aspect of the standard helps explain the Soviet Revolution, which by its own claim was directed at a transformation of the capitalist relations of production. The Allied insistence on the sanctity of contract and repayment of debts as an expression of 'civilised' relations or as the foundations of the law of nations shows the close connection between the international legal order and liberal economics. The creation of a legal framework regulating concession agreements was to become one of the most important means of implementing an international legal order shielding parts of the economy from sovereign decision-making.

b) Concessions for the private sector

One of the most important parts of Lenin's proclaimed New Economic Policy, officially adopted at the Tenth Congress of the All-Russian Communist Party in May 1921, was the decree on concession agreements.[23] The decision received criticism of various kinds, but Lenin insisted that 'we cannot seriously entertain the idea of an immediate improvement of the economic situation, unless we operate a policy of concessions.'[24] The goal of the decree was to

[18] Ibid 137.

[19] For a detailed account of the various complications and causes for the failure of the Genoa Conference, see generally ibid.

[20] Ibid (emphasis added) 64.

[21] Konstantina Tzouvala, 'Letters of Blood and Fire: a Socio-Economic History of International Law' (Dissertation Thesis, Durham University, 2016) 37.

[22] Ibid 44.

[23] Lenin (above n 4) 399-437.

[24] Ibid 301.

attract foreign capital into the resource sector to enable large-scale production based on the latest technology in a short amount of time.[25] Parts of the population and the government criticised the concession policy for re-establishing capitalist modes of production, by re-introducing rights titles. Scott Newton observes: '[a]s a trained lawyer, he [Lenin] recognised that the restoration of private trade would demand the restoration of private right: it was a banal syllogism.'[26] Lenin's argument in defence of the policy revolved around two fundamental ideas. The first was the structure of ownership and the second was a general functionalist understanding of law. For Lenin the concession was 'something in the nature of a contract of lease.'[27] 'The capitalist becomes, for a specified period, the lessee of a certain part of state property under a contract, but he does not become the owner. The state remains the owner.'[28] Thus, the construction of the concession contract was embedded in the conventional logic of civil law, but state capitalism meant that ownership could be held only by the state. The contours of this ownership, however, were determined by the theoretical position that law is supposed to further socialist purposes. This instrumentalisation can also be seen in the temporal horizon of the validity of the legal regime: 'Far from being imagined as timeless and perfected [the Soviet civil State] was created mortal, destined in the fullness of time to be superseded.'[29]

The Soviet conception of the subordination of the role of law to the achievement of a classless society was, then, embedded in state socialism from the very beginning. This understanding also extended to concessionary policy. Lenin argued that one of the attractive features of concession agreements was that 'the annulment of an agreement means a sudden rupture of the practical relations of economic alliance, or economic coexistence, with the capitalist.'[30] State capitalism was only a stage on the path to socialism and concession agreements were a tool that could and should be left behind when the time was ripe.[31] As we will see below, this understanding is at odds with the liberal conception of a timeless validity of the sanctity of contract and acquired rights. However, before moving to the analysis of the differences between

[25] Ibid 345-6.

[26] Newton (above n 3) 75.

[27] Lenin (above n 4) 345-6.

[28] Ibid 368.

[29] Newton (above n 3) 75.

[30] Lenin (above n 4) 348.

[31] Ibid.

these approaches, I will lay out the general setting in which concession agreements were negotiated and in particular how the Lena Goldfields concession came into being.

c) The Lena Goldfields Concession Agreement

Against the background of the failure of the international solution and Lenin's promulgation of state capitalism, private initiatives were of increased importance and the negotiation of concession agreements with the Soviet government became an attractive option.[32] An important and influential organisation in this regard was the Association of British Creditors of Russia, counting in its ranks 13 members of Parliament, 40 company directors and a wide range of industrial representatives.[33] The president of the organisation from 1921 onwards was Leslie Urquhart, chairman of a mining and metallurgy company in Russia that was nationalised after the Revolution. Urquhart's tactics for regaining his economic assets can be seen as a blueprint for the dealings of the Lena Goldfields Company. As early as 9 September 1922, Urquhart signed a concession agreement with the Soviet Commissar of Foreign Trade, which was intended to recover the company's losses from nationalisation.[34] The Urquhart concession was never ratified by the Soviet Council of People's Commissars, apparently mainly because of objections from Lenin.[35] Despite that failure, the idea of recovery of assets through concession agreements as proposed by Urquhart was in the background of Lena's concession agreement. The concessionary policy led to sixteen concessions to foreign companies between 1924 and 1928: seven in mining, four in metallurgy and five in machine building. Payments to the Soviet state in the same period increased from RUB6.8 million to RUB16 million, and concessions became an integral part of the Soviet industry.[36]

The story of the Lena Goldfields concession begins before the Revolution. Lena Goldfields was incorporated in London in 1908 in order to purchase 75% of the shares of the Russian Lenskoie Company, established in 1855. Lenskoie was by far the largest gold mining company in the

[32] Martin (above n 6) 552.

[33] Ibid 553.

[34] Ibid 552. The story of the economic, political and personal relationship of these two men allows for a deep and nuanced understanding of the complicated negotiations that were held on several fronts.

[35] Ibid 556.

[36] Monika Schulze, 'Die Lage der Arbeiter und der Klassenkampf in kapitalistischen Betrieben der Sowjetunion in der Periode der Neuen Ökonomischen Politik' (1977) 18(3) *Jahrbuch für Wirtschaftsgeschichte/Economic History Yearbook* 9, 9. The author refers to Statističeskij Spravočnik SSSR 1927 as the source of these numbers, which I am unable to verify.

Russian Empire and controlled an area of approximately 46,000 acres in Eastern Siberia.[37] In Tsarist Russia, it was not possible for a foreign company to acquire property, only to hold shares in operating companies.[38] Due to this policy, Lena Goldfields was a shareholder but not the owner. After the Soviet Revolution, the Lena goldmines were nationalised in 1920. Formally, the nationalisation affected the property of the Russian company Lenskoie, but the economic loss was greatest for Lena Goldfields as the largest shareholder in Lenskoie.[39]

Given the refusal of the Soviet government to pay compensation for the nationalisation of the company, Lena Goldfields attempted to broker a new concession agreement recovering the losses incurred by the earlier nationalisation of its subsidiary Lenskoie without making an actual claim for compensation. This strategy followed Urquhart's earlier attempt to obtain a generous concession in lieu of official compensation. The key figure in the negotiation of Lena's agreement was Alexander Malozemoff, the former general manager of Lenskoie, who was in charge of the company at the time of the nationalisation in 1920. It was Malozemoff who reinitiated the mining enterprise that he then led as company director from 1925–1930.[40] Upon ratification of the new concession agreement in 1925, Lena waived all its claims against the Soviet government and indemnified the government against claims from its Russian subsidiaries by acquiring all the shares of these companies.[41]

The Lena concession was a pragmatic solution to the incompatible positions that led to the failure of the Genoa conference. It enabled the resumption of gold mining with the best technology available while providing enough assurance to the private sector to invest capital in the Soviet Union. Instead of acknowledging a duty to compensate for nationalisation, the Soviet government offered a profitable concession agreement, conditional upon a waiver of all

[37] 'Lena Goldfields, Limited: Report of the Statuatory Meeting on 4 November 1908', *The Economist* (London, 7 November 1908). *The Economist* printed reports of the annual general meetings of the company from the first one in 1909 until its ninth ordinary general meeting in 1919.

[38] 'The Lena Gold Mines and Anglo Russian Companies', *The Economist* (London, 18 May 1912) 1054. 1912 was also the year of the infamous Lena Massacre, in which workers protested against the poor working conditions in the mine and were violently suppressed by the military, with a death toll of over 200. This brutal event has little to do with the later arbitration, but it is worthwhile mentioning that the British shareholders refused any responsibility, given that they were only shareholders, and even went as far to denounce any harmful conditions in the mines. 'Lena Goldfields, Limited: The Strike: Report of the Annual General Meeting held on 3 December 1912', *The Economist* (London, 7 December 1912) 1183.

[39] Plato Malozemoff, son of the then general manager, Alexander Malozemoff, offers a comprehensive account of the battle for the takeover of the goldmines between the Bolsheviks and the White Army during the civil war. Eleanor Swent, 'Interview with Plato Malozemoff' (1987-1988) *Engineering and Technology History Wiki* 28-35.

[40] Ibid 54-7.

[41] VV Veeder, 'The Lena Goldfields Arbitration: the Historical Roots of Three Ideas' (1998) 47(4) *International and Comparative Law Quarterly* 747, 757.

compensation claims resulting from nationalisation. That the concession agreement was considered profitable enough to satisfy the company is evidenced by a statement from the Chairman of the Lena company, Herbert Guedella, at the 12th general meeting on 15 January 1926:

> We have been criticised, but the criticism acknowledges that our case is not strictly analogous with others for not seeking compensation. After due consideration we came to the conclusion that recognition of the present state of circumstances was to the best benefit of our shareholders. Additional properties have been included in the concession, so that, on a whole, we are entitled to consider that a fair bargain has been made.[42]

The actual agreement is an 83-page document[43] and was negotiated over the course of two years.[44] The concession gave Lena the right to operate the former Lenskoie gold mines for the period of 30 years. In addition, the company acquired the rights to develop and work three additional mining sites – Sissert, Revda and Altai – for iron, copper, zinc, lead, silver and gold, as a going concern, for a period of 50 years.[45] The drafter of the agreement can be assumed to be Dr Vladimir Robertovich Idelson, a Russian émigré who escaped arrest after the Soviet Revolution by fleeing to London in 1920.[46] He was also the lawyer Lena appointed as counsel in the arbitration in 1930 and he played an important role in shaping the legal arguments that paved the way for the internationalisation of concession agreements.

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[42] 'Lena Goldfields, Limited: Resumption of Active Operations - Report of the 12th Ordinary General Meeting held on 12 January 1926', *The Economist* (London, 16 January 1926) 116.

[43] The entirety of the concession agreement has not yet been found, and thus this research is based on excerpts reprinted in Hauptkonzessionskommittee des Rates der Volkskommissare der UdSSR, *Materialien zur Frage der Zuständigkeit des Schiedsgerichts in Sachen 'Lena Goldfields': UdSSR* (1930) 37-42. It contains articles 75, 76, 80, 82, 83, 85, 86, 89, 90. References to the concession agreement are made in the award. *Lena Goldfields Case (Lena Goldfields v Soviet Government) (Award)* (2 September 1930) reproduced in Nussbaum (above n 2). Finally, excerpts of the protocols of shareholder meetings of Lena reprinted in *The Economist* and in *The Times* offer an account of the contents of the concession agreement.

[44] 'Lena Goldfields. Negotiations with the Soviet Government. Concession for Working the Properties. Mr Guedella's Speech: on the Occasion of the Extraordinary General Meeting held on 30 July 1925', *The Times* (London, 31 July 1925) 19.

[45] 'Lena Goldfields, Limited: Statement of the Board of Directors', *The Economist* (London, 16 May 1925) 987.

[46] The similarity (almost identity) in the wording of the Lena concession agreement and the Anglo-Iranian concession agreement of 1933 as well as two other concession agreements in the Middle East from the 1930s indicate his authorship. See chapter 4 on the *Sheikh of Abu Dhabi Arbitration*.

3. The arbitral proceedings

After five years of operation, Lena Goldfields sent a notice of arbitration to the Soviet government on 7 March 1930 claiming that it was impossible to commence its work. [47] An accurate account of the events leading up to the arbitration is difficult, particularly because the accounts by the company diverge strongly from the accounts of the government. Instead of trying to recount the facts, I will rely on the claims made in the arbitration and the material provided by the parties to give some sense of the conflict. There were three major claims that informed the proceedings. Lena's claims against the government can be summarised in two major allegations. Lena contended, first, that the Soviet government had created conditions such that the performance of the contract became nearly impossible, and second, that Lena was consequently entitled to compensation.[48] The Soviet Union launched a counterclaim alleging non-performance of the contract on the part of Lena.

The establishment of the tribunal could be seen as an agreement or at least an attempt at an agreement about a fundamental conception of law. After all, the submission of both parties to a common authority indicates joint acceptance of this authority. Recalling, however, the difference in the legal understanding between the functionalist Soviet view and the timeless liberal view, such an agreement appears unlikely. Indeed, before the tribunal met for its first session, the Soviet Union withdrew its arbitrator, and the arbitration proceeded as a truncated tribunal with only two arbitrators. Chicherin's statement from the Genoa Conference in 1922 is prescient: 'the trial of disputes of this kind [arbitration over nationalisations] will inevitably end in opposing to one another two forms of property, whose antagonism assumes today for the first time in history, a real and practical character. In such circumstances there can be no question of an impartial super-arbiter.'[49] One issue was the contours of a property right held by the state under Soviet law. The purpose of the revolution was precisely a break with capitalist modes of production and thus liberal models of ownership. What then could serve as common ground for the interpretation of rights and obligations from a concession agreement? In the end, the remaining arbitrators, together with Lena's counsel Idelson, constructed an interpretation of both the events and the legal regime appropriate to govern them that hinged on the successful establishment of legal authority outside the nation state and in disregard of the Soviet

[47] Hauptkonzessionskommittee des Rates der Volkskommissare der UdSSR (above n 43) 14.

[48] *Lena Goldfields Case* reproduced in Nussbaum (above n 2) 42 [8].

[49] Degras (above n 1) 316.

Revolution and of Soviet law. The conflict was not resolved by a ruling on substance, but by establishing the right to define law outside and above the revolutionary realm.

a) The establishment of the tribunal and the construction of facts

The composition of the tribunal is an important part of this story because it meant the installation of the 'super-arbiter', the authority to be accepted by both parties. The selection followed the formal appointment procedure as laid out in the concession agreement, and each side chose their nominee. The arbitrator selected by Lena was the English barrister and parliamentarian for the Conservative Party Sir Leslie Scott, while the Soviet government appointed Dr SB Chlenov, a Russian lawyer who was imprisoned in 1936 and executed by the Soviet government in 1937.[50] Lena then made two suggestions for the head of the tribunal, but both were rejected by the Soviets.[51] In turn, Lena rejected the proposal made by the Soviets, a scientist by the name of Albert Einstein.[52] According to Article 90 of the concession agreement, the Soviet Union had then to nominate six individuals from either the Freiberg University of Mining and Technology or the Royal High Technical School of Stockholm and submit a list to Lena. Lena chose the German Professor of Geology, Otto Stutzer, and he became the head of the tribunal. Before Stutzer's appointment, but after the submission of the list, the Soviet government discovered that Stutzer had an unfavourable disposition toward the government.[53] After Lena appointed him, the Soviet government decided to withdraw their arbitrator. In the proceedings, the Soviets relied on a jurisdictional objection to the tribunal as such, rather than on the person of the arbitrator, so that Stutzer was never officially discussed.

Despite the Soviet withdrawal, the tribunal commenced the proceedings with the remaining two arbitrators as was provided for in Article 90(f) of the concession agreement. The absence of the Soviet arbitrator led to the establishment of the facts of the arbitration based solely on the evidence provided by Lena. Furthermore, the arbitration relied on 'procedural flexibility' regarding the rules of evidence.[54] The tribunal found that, since the Soviet government refused

[50] VV Veeder, 'The Lena Goldfields Arbitration' (Keynote, Arbitration Academy: Goldman Lecture, 12 July 2011).

[51] Telegram to Lena 17 March 1930, Hauptkonzessionskommittee des Rates der Volkskommissare der UdSSR (above n 43) 23.

[52] Most likely, the rejection was simply a reaction to the earlier rejections by the Soviets. Telegram to Lena 21 March 1930 in ibid.

[53] Kamenev wrote to the chairman of the Council of the People's Commissar that Stutzer had written a report 'in which he spoke in sharply negative terms about the situation in the USSR and our Five-Year-Plan.' Kamenev cited in Veeder, 'The Lena Goldfields Arbitration: the Historical Roots of Three Ideas' (above n 41) 775.

[54] Ibid 753.

to cooperate, it was unable to obtain the necessary evidence to ascertain the 'truth upon the issues before it.'[55] The jurisdictional objection was dismissed and the Soviet government's refusal to participate in the proceedings was considered a breach of contract and its duty to cooperate. The tribunal held that even though 'the Government has thus refused its assistance to the Court, it still remains bound by its obligations under the Concession Agreement', particularly by the arbitration clause and by the duty to 'present to the Court (…) all the information necessary respecting the matter in dispute.'[56] As a consequence of this finding, the tribunal decided to allow 'second-best' evidence as a substitute for documents and witnesses that were unavailable.[57] This second-best evidence rule meant that the tribunal did not require the adduction of primary evidence, but instead relied on written and oral statements to reproduce the content of documents confiscated by the Soviet government.[58]

Based on the evidence produced in the proceedings, the tribunal accepted the claimants' allegations of raids, arrests and show trials against Lena employees, as well as the withdrawal of construction material and resources necessary for the workings of the mines. The main witness for Lena was the former managing director Alexander Malozemoff, who was a known opponent of the Revolution and socialism.[59] The tribunal's main position was that the introduction of the first Five-Year-Plan was a 'complete reversal' of the concessionary policy and rendered Lena's undertakings 'radically incongruous'.[60] Therefore 'however obedient it [Lena] might be to the laws of the U.S.S.R., or however purely commercial and non-political it might be in its behaviour, as the Court finds that Lena in fact was', Lena came to be regarded as 'a capitalist outcast'.[61] The tribunal found that 'Lena in general duly carried out its obligations under the Concession Agreement, save in so far as it was directly or indirectly prevented by the Government or by subordinate authorities.'[62] It further held that the breakdown of the commercial undertaking was exclusively caused by the actions of the Soviet government, which were required by the installation of the Five-Year-Plan. The tribunal

[55] *Lena Goldfields Case* reproduced in Nussbaum (above n 2) 44 [15].

[56] Ibid.

[57] Veeder, 'The Lena Goldfields Arbitration: the Historical Roots of Three Ideas' (above n 41) 753.

[58] Ibid.

[59] Malozemoff's attitude is expressed in an interview his son gave about his experience of the Revolution and the nationalisation of the Lena golf fields: Interview with Malozemoff (above n 39) 27-35.

[60] *Lena Goldfields Case* reproduced in Nussbaum (above n 2) 46-7 [19].

[61] *Lena Goldfields Case* reproduced in ibid 46 [19].

[62] *Lena Goldfields Case* reproduced in ibid 47 [20].

awarded the company £13 million, comprising approximately £3.5 million in investments (according to the companies own calculations) and £9.5 million in lost profits.[63]

Two documents were published by the Soviet Union in 1930 that offered a counter-narrative to these facts. The first was an official publication by the Soviet Union's Main Concession Committee titled *Documents concerning the Competence of the Arbitration Court set up in connection with the Questions outstanding between the Lena Goldfields Company Limited and the USSR*, which contained part of the correspondence between the government and the Lena Company between 1928 and 1930.[64] The correspondence was followed by opinions of two Soviet professors discussing the legal validity of the Soviet jurisdictional objection to the tribunal. With regard to the economic situation, Dr SA Bernstein, under the instruction of the Politburo, published a document with the title *The Financial and Economic Results of the Working of the Lena Goldfields Company Limited*[65]. In Bernstein's account the undertaking started failing in early 1928, when the company was unable to acquire the necessary capital to finance the expenditures agreed upon in the concession agreement.[66] According to his report, Lena failed both to mine the amount of gold it had promised as well as to develop the mining equipment as outlined.[67] He further alleged that from 1929 onwards, the company was unable to pay appropriate royalties to the government and wages to the workers.[68] Bernstein concluded with a calculation of the overall indebtedness of the company both in the Soviet Union (RUB15 million) as well as abroad (£1,666,000) against the approximate value of its assets (RUB17-18 million), and found that the assets barely covered the debt incurred towards the Soviet government.[69] As a result, even if a tribunal were to find in Lena's favour, its losses could not be higher than RUB2-3 million.

These two accounts show that there was substantial disagreement about the facts underlying the dispute. Bernstein's report was sent to the tribunal during the proceedings[70] but was not

[63] *Lena Goldfields Case* reproduced in ibid 51-2 [26].

[64] The German version was used for this study. Hauptkonzessionskommittee des Rates der Volkskommissare der UdSSR (above n 43).

[65] SA Bernstein, *The Financial and Economic Results of the Working of the Lena Goldfields Company* (Blackfriars Press, 1930).

[66] Bernstein (above n 65) 10.

[67] Ibid 20.

[68] Ibid 24.

[69] Ibid 34-5.

[70] Veeder, 'The Lena Goldfields Arbitration: the Historical Roots of Three Ideas' (above n 41) 756.

mentioned in the award. Instead, the tribunal based its decision on Lena's account of events. As a result, the tribunal held that it was 'satisfied that even if the Government case had been put and proved before it, whatever claims for damages could have been substantiated are amply covered by the very generous allowances in favour of the Government which the Court has made in the assessment of the amount due to Lena.'[71] If taken at face value, the numeric difference in the calculated damages would be RUB2-3 million according to the Soviets, and £13 million according to the tribunal. It remains open to speculation how things might have developed had the Soviet government participated in the proceedings and whether the tribunal would have established a different factual basis. Regardless of these speculations, what remains at the centre of the claim is that the tribunal viewed a change in policy in the Soviet Union as a breach of the concession agreement. Indeed, the tribunal held that the introduction of the Five-Year-Plan 'necessarily meant, when measured in terms of contractual obligation, the breach by the Government of many of the fundamental provisions, express and implied, of the Concession Agreement.'[72] At the heart of the dispute was a question of the relationship between the new Soviet law and the concession agreement, and how this relationship was defined in legal terms. This in turn depended on who decided and according to what law. As we will see below, the problem was not framed in terms of competing property systems, but rather in terms of jurisdiction, which carried with it an implicit understanding of property rights.

b) Jurisdictional objection and 'Kompetenz-Kompetenz'

When the Soviets had agreed to the arbitral proceedings in March 1930, Lena was still operating the concession. However, at the end of April it withdrew all personnel and power of attorney of its representatives and declined further responsibility for the operations of the company in the Soviet Union.[73] The Soviets based their jurisdictional objection on these events, which they termed a unilateral termination of the concession agreement. The Soviet argument claimed that the arbitral tribunal was established to decide the performance of the concession agreement and possible claims of damages resulting from a violation of the agreement.[74] The crucial legal argument for the Soviets was that the tribunal had never been asked to decide on the termination

[71] *Lena Goldfields Case* reproduced in Nussbaum (above n 2) 47 [20].

[72] *Lena Goldfields Case* reproduced in ibid 46-7 [19].

[73] Telegram from Lena 29 April 1930 and Telegram from Lena 1 May 1930 in Hauptkonzessionskommittee des Rates der Volkskommissare der UdSSR (above n 43) 30-1.

[74] Telegram from Lena 12 February 1930 in ibid 21.

of the agreement.[75] Given that Lena Goldfields had unilaterally terminated the agreement after the tribunal was established, the tribunal had lost its subject matter – namely, the performance of the contract. The topic the tribunal would thus have to consider, according to the Soviets, was the termination of the concession agreement.[76] The Soviets argued that this was outside the original jurisdictional scope of the tribunal, since it was not part of the *compromis* establishing the tribunal. With this jurisdictional objection, the Soviets withdrew from the arbitration and suggested the establishment of a new arbitral tribunal with the jurisdictional scope to decide upon the damage claims and property relations that come with termination.[77]

In response to the Soviet objection, the tribunal followed the understanding and argument presented by the British counsel Idelson.[78] This position has been reproduced in almost all accounts of the *Lena Goldfields Arbitration* ever since.[79] Arthur Nussbaum, an American legal scholar, who commented on the arbitration in 1950, described the argument as follows: 'an arbitration agreement loses its force if one of the parties (as alleged was done by Lena) rescinds the underlying contract.'[80] Thus, it was claimed that the USSR had withdrawn its arbitrator on the basis that the concession agreement had ceased to exist through the unilateral announcement of termination by Lena Goldfields.[81] The argument went on: since the concession agreement had ceased to exist, the basis for the establishment of the tribunal, namely Article 90 of the concession agreement, also ceased to exist, and consequently, the tribunal was without foundation. The Soviet argument did however not aim at the dissolution of the agreement and therefore the dissolution of the arbitration clause in Article 90, but instead at the jurisdictional scope agreed upon in the *compromis*. This misunderstanding had little significance for the arbitration itself, but it has become the basis of a whole body of literature arguing for the survival of the arbitration clause independent of the agreement, a principle that has come to be

[75] Veeder, 'The Lena Goldfields Arbitration: the Historical Roots of Three Ideas' (above n 41) 782.

[76] Telegram from Lena 6 May 1930 in Hauptkonzessionskommittee des Rates der Volkskommissare der UdSSR (above n 43) 27-8.

[77] Telegram to Lena 5 May 1930 in ibid 31-2.

[78] *Lena Goldfields Case* reproduced in Nussbaum (above n 2) 43 [9-11].

[79] An exception is the article by VV Veeder, in which he points out the misunderstanding, but does not further inquire into its reasons and meaning: Veeder, 'The Lena Goldfields Arbitration: the Historical Roots of Three Ideas' (above n 41) 775-7.

[80] Nussbaum (above n 2) 38.

[81] Telegram from Lena 29 April 1930 and Telegram from Lena 1 May 1930 in Hauptkonzessionskommittee des Rates der Volkskommissare der UdSSR (above n 43) 30-1.

known as 'separability'.[82] However, as Veeder expresses it: 'Thus, with regret, it must be concluded that the Lena case flies false colours on the doctrine of separability for which it is often cited.'[83]

Returning to the arbitration, the Soviet jurisdictional objection raises the question of who can decide upon the jurisdiction of the tribunal. Or, to put it differently, who has the competence to decide the question of whether or not the tribunal exceeded its powers? At the time of the arbitration, it was common in civil and commercial arbitration to refer a question of competence to national courts, with the resulting possibility that the original decision rendered by the arbitral tribunal might be annulled.[84] In his commentary on the *Lena Goldfields Arbitration* in 1950, Nussbaum suggested that: 'Generally, in civil or commercial arbitration a dissenting party may turn to the ordinary law courts for a re-examination of the question of competence; the court, if it approves of the dissent, will then annul the arbitral proceedings and the award for excess of power.'[85] The *lex arbitri* and thus the applicable procedural law in the *Lena Goldfields Arbitration* was the British Arbitration Act of 1889 prescribing recourse to domestic courts for allegations of excess of power.[86] A Soviet court would have had to decide whether there was an excess of power in the Lena case and whether the tribunal would have to be reconstituted. In addition, according to British law at the time, an award lacking the signature of an arbitrator would have to be considered a nullity.[87] Instead of following this tradition, the tribunal resorted to an idea stemming from public international law, namely that of *Kompetenz-Kompetenz*, meaning the authority of the tribunal to decide upon its own jurisdiction.[88] The tribunal held

[82] Separability or severability of the arbitration clause means that arbitration clause contained in a contract does not have to follow the contract. If a contract ceases to exist, the arbitration clause can be treated separately and can still serve as the basis for an arbitration. See, eg, Lawrence Atsegbua, 'International Arbitration of Oil Investment Disputes: The Severability Doctrine and Applicable Law Issues Revisited' [1993] (5) *African Journal of International and Comparative Law* 634, 634.

[83] Veeder, 'The Lena Goldfields Arbitration: the Historical Roots of Three Ideas' (above n 41) 785.

[84] Nussbaum (above n 2) 40-1. The application of domestic law to procedural questions was an international standard as expressed in the Geneva Protocol on Arbitration Clauses of 1923. *Protocol on Arbitration Clauses*, opened for signature 24 September 1923, 27 LNTS 157 (signed and entered into force 28 July 1924) (*'Protocol on Arbitration Clauses'*).

[85] Nussbaum (above n 2) 40-1.

[86] Outram W Crewe (ed), *The Law of Arbitration: Being the Arbitration Act, 1889, with Notes of Statutes, Rules of Court, Forms and Cases, and an Index (1890)* (William Clowes and Sons, 2nd ed, 1998) 4.

[87] Veeder, 'The Lena Goldfields Arbitration: the Historical Roots of Three Ideas' (above n 41) 753.

[88] Alfred Verdross, 'Die Verbindlichkeit der Entscheidungen internationaler Schiedsgerichte und Gerichte über ihre Zuständigkeit' (1928) 7(3) *Zeitschrift für Öffentliches Recht* 439; Phillip Landolt, 'The Inconvenience of Principle: Separability and Kompetenz-Kompetenz' [2013] (30) *Journal of International Arbitration* 511, 513.

that 'the jurisdiction of the Court remained unaffected' by the Soviet jurisdictional objection and that it 'accordingly dealt with the preliminary questions of procedure.'[89]

Within the field of public international law, the notion of *Kompetenz-Kompetenz* had its predecessors in state-to-state arbitrations, most famously in the *Alabama Arbitration* between Great Britain and the United Kingdom in 1872.[90] Article 81 of the *Hague Convention for the Pacific Settlement of International Disputes* of 1899 contained the principle,[91] and it was then enshrined in Article 36(4) of the *Statute of the Permanent Court of International Justice* stipulating that 'in the event of a dispute as to whether the Court has jurisdiction the matter shall be settled by the decision of the Court.'[92] Even though the principle was widely accepted in international law at the time of the *Lena Goldfields Arbitration*,[93] the particular jurisdictional objection of 'excess of power' remained unsettled.[94] While some authors were of the opinion that the Court's competence should be unlimited, others argued that an excess of power would render the decision a nullity.[95] Despite this debate, the majority of scholars in the 1960s found that a jurisdictional objection by one party should not alleviate the other party's duty to comply with the decision.[96] This is mainly due to the fact that the question rarely constituted a practical problem.[97]

The application of the principle of *Kompetenz-Kompetenz* in the *Lena Goldfields Arbitration* was highly inventive. First, it deviated from the established practice in commercial arbitration of referring the matter to a national court, in this case a Soviet court, and instead relied on a principle established in international law. Second, the objection based on the argument of an excess of power was unresolved in the realm of public international law. Thus, even though the tribunal did not justify its decision and simply asserted that 'the jurisdiction of the Court

[89] *Lena Goldfields Case* reproduced in Nussbaum (above n 2) 43 [11].

[90] Ibrahim FI Shihata, 'The Power of the International Court to Determine its Own Jurisdiction: Compétence de la Compétence' (Dissertation Thesis, Harvard University, 1964) 28.

[91] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green and Co, 1927) 209.

[92] For a detailed drafting history, see Shihata (above n 90) 52.

[93] Shabtai Rosenne, *The Law and Practice of the International Court: 1920-2005* (Brill, 4th ed, 2006) vol 2, 814. See also De Auer (above n 15) xxvi.

[94] Shihata (above n 90) 116.

[95] Ibid 120.

[96] Ibid 125.

[97] Ibid 123.

remained unaffected',[98] this assertion allowed the tribunal to escape the Soviet courts and establish itself as an autonomous entity in the international sphere. In this example, we can see the highly political nature of questions of jurisdiction. As Rosenne puts it: 'The question whether and to what extent the Court has jurisdiction is frequently of political importance no less than the decision on the merits, if not more.'[99] The escape from Soviet law on the grounds of jurisdiction allowed the tribunal to uphold its liberal understanding of law.

c) General principles as applicable law

As we saw, the application of the rules of public international law to concession agreements in the 1930s was unconventional and inventive on both the procedural as well as the substantive level. Indeed, the *Lena Goldfields Arbitration* was hardly considered a matter of international law at the time of its conclusion. Lauterpacht only reluctantly included it in the Annual Digest of 1930.[100] He only did so because the award referenced 'general principles of law recognized by civilized nations' as contained in Article 38(3) of the Statute of the Permanent Court of International Justice, and Lauterpacht considered that it stood 'half-way between international and municipal arbitrations.'[101]

With the award in the *Palestine Railway Arbitration*, the Lena award is one of the first in a line of awards and concession agreements referencing general principles as applicable law.[102] Following Idelson's submission, the tribunal found that even though 'in regard to performances of the contract by both parties inside the U.S.S.R. Russian law was "the proper law of the contract," (…) for other purposes the general principles of law such as those recognized by Article 38 of the Statute of the Permanent Court of International Justice'[103] were applicable. The tribunal went on to hold that 'many terms of the contract contemplated the application of international rather than merely national principles of law.'[104]

The principle in question was that of unjust enrichment or, as it was called in the award, *enrichissement sans cause*, which 'arises where the defendant has in his possession money or

[98] *Lena Goldfields Case* reproduced in Nussbaum (above n 2) 43 [11].

[99] Rosenne, The Law and Practice of the International Court: 1920-2005 (above n 93) 803.

[100] *The Lena Goldfields Arbitration* Annual Digest (above n 2).

[101] Ibid 428, case 258.

[102] See chapter 4 on the *Sheikh of Abu Dhabi Arbitration*.

[103] *Lena Goldfields Case* reproduced in Nussbaum (above n 2) 50 [22].

[104] *Lena Goldfields Case* reproduced in ibid.

money's worth of the plaintiffs to which he has no just right.'[105] The tribunal established unjust enrichment as the principal basis for Lena's claims for compensation. The arbitrators characterised it as a principle stemming from French law, which could also be found in Scottish law as well as in other continental legal traditions, including Soviet law.[106] The tribunal further held that the actions of the Soviet government 'on ordinary legal principles (…) constitute[s] a right of action for damages, but the Court prefers to base its award on the principle of "unjust enrichment", although in its opinion the money result is the same.'[107] As mentioned before, based on its construction of the principle of unjust enrichment, the tribunal awarded a large sum in lost profits to the company.[108]

That the tribunal operated with a liberal understanding of property rights becomes more evident when considering how its legal value is explained. As O'Connell put it: '[t]he juridical justification for the obligation to pay compensation is to be found in the concept of unjust enrichment, which lies at the basis of the doctrine of acquired rights.'[109] Acquired rights were the stronghold against attempts to redistribute in precisely the manner in which the Soviets were reorganising economic relations.[110] As a consequence, the legal obligation to respect acquired rights and pay compensation, including for lost profits, was introduced as a 'general principle of law recognized by civilized nations' constraining domestic law from the outside. In this construction we encounter the qualifier 'civilised' not just as a racialised cultural marker, but also as a marker of political and economic organisation. The principle of unjust enrichment for the protection of assets was introduced through the very notion of 'civilisation' as expansion of a capitalist mode of production.

The tribunal's ruling had two important implications. First, the tribunal held that the general principle was actually also part of Soviet law and thus, the reference to general principles was, in some regard, an expression of domestic law. Second, it declared that, in monetary terms, the outcome was identical to domestic law being applied. Neither of these implications, however, is on firm ground. If the applicable law in the case is Soviet law, then that would have meant

[105] *Lena Goldfields Case* reproduced in ibid 50-1 [23].

[106] *Lena Goldfields Case* reproduced in ibid.

[107] *Lena Goldfields Case* reproduced in ibid 51 [25].

[108] *Lena Goldfields Case* reproduced in ibid 51-2 [26].

[109] Daniel P O' Connell, *International Law* (Stevens, 2nd ed, 1970) vol 2, 780.

[110] On the necessary separation of the economic and political sphere and the role of acquired rights see Alfred Verdross, 'Règles internationales concernant le traitement des étrangers' [1931] (37) *Recueil des cours de l'Académie de Droit International de la Haye* 325.

the application of the Five-Year-Plan. The Five-Year-Plan was the core of Soviet law. As Newton puts it: 'The Plan in this sense did not merely fill the interstices of the legal space of economic permission, but acted as a kind of general background condition on the exercise of other rights.'[111] Even though the concession agreement contained the explicit guarantee that the contractual relationship should not be altered unilaterally by decree or administrative act, it also stipulated that it would be subject to all existing and future legislation if not explicitly specified otherwise.[112] Thus, the relationship between the Five-Year-Plan and the concession agreement would have to be interpreted in accordance with Soviet law. The tribunal, however, started from the premise that the Plan's implementation 'necessarily meant, when measured in terms of contractual obligation, the breach by the Government of many of the fundamental provisions, express and implied, of the Concession Agreement.'[113] Such a breach of legal obligations could only be established if the obligations could be argued to arise from outside the national legal sphere. This constituted a fundamental departure from the established rule at the time that any 'any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.'[114] Soviet lawyers argued that foreign capital needed to assume all the risks involved with investing in a foreign jurisdiction and could not rely on the international legal order to provide them with a privileged position.[115] Furthermore, even if the application of Soviet law would have led to a duty of compensation on behalf of the Soviet state, it is by no means obvious how it would have been calculated. The principle of unjust enrichment was vague and lacked clear content[116] so that the inclusion of future profits was an assertion by the tribunal, rather than an application of a legal principle.[117] We can recall from Bernstein's report that the Soviet government made its own calculation in which it restricted the claim to investments made up to the present. Thus, the reliance on general

[111] Newton (above n 3) 154.

[112] *Lena Goldfields Case* reproduced in Nussbaum (above n 2) 46 [18(i)].

[113] *Lena Goldfields Case* reproduced in ibid 46-7 [19].

[114] *Payment of Various Serbian/Brazilian Federal Loans Issued in France [1929] (Judgment)* (ser A) Nos 20/21 PCIJ 4, 41.

[115] Rudolf Bystrický, 'Zu einigen Problemen des internationalen Rechts im Zusammenhang mit der sozialistischen Nationalisierung' in Horst Wiemann (ed), *Fragen des internationalen Privatrechts: acht Beiträge von Vertretern der sozialistischen Rechtswissenschaft* (Deutscher Zentralverlag, 1958) 97, 107.

[116] Christoph Schreuer, 'Unjustified Enrichment in International Law' (1974) 22(2) *American Journal of Comparative Law* 281, 281.

[117] Schwebel commented this in the following way: 'The case is of high interest because of the holding that the basis of compensation due to a concessionaire for premature termination of its contractual rights is lost profits;' J Gillis Wetter and Stephen M Schwebel, 'Some Little-Known Cases on Concessions' [1964] (40) *British Yearbook of International Law* 183, 230-1.

principles as contained in Article 38(3) was a means to ascertain the protection of Lena's assets and future profits by dislocating Soviet law as applicable law.

4. Conclusion

This chapter has shown that The *Lena Goldfields Arbitration* was one of the first iterations of the establishment of an autonomous sphere of economic law, located outside the nation state, and operating under liberal economic assumptions such as the sanctity of contract and the protection of private property. After failed attempts to negotiate the protection of foreign property on the international level, Western companies relied on concession agreements to continue economic relations with the Soviet Union. With the *Lena Goldfields Arbitration*, the chapter moved to show that, when Soviet law was to be applied to those economic relations, the Lena Company and the arbitral tribunal invoked an international legal order to secure the economic value of the concession for the company. The assertion of the principle of *Kompetenz-Kompetenz* allowed the tribunal to escape review by a national court, and the introduction of general principles enabled the dislocation of Soviet law as applicable law. The tribunal relied on the idea of unjust enrichment to construct the property right of the company to include lost profits.

Viewed in this light, the protection of foreign private property on the international level aimed at containing the potential of redistribution as proclaimed by the Soviet Revolution through the assertion of international legal principles. Thus, as much as the Soviet Revolution was indeed revolutionary and produced a 'revolution in the forms of ownership,'[118] Western states mobilised law on the international level to contain this transformation to the national sphere. As Lauterpacht put it: 'from the point of view of municipal law a new revolutionary system of government is a totally new legal creation separated from its legal predecessor by the abyss of the revolutionary phenomenon.' But when it comes to the international sphere, 'the Law of Nations cannot strip itself of a function which is common to all law, namely, the protection of established rights and the continuity of law.'[119] In Lauterpacht's vision, there could be no plurality of laws, and the function of law was universally understood to be in service of protecting established rights. The revolutionary proposition would not reach the international sphere but be contained to the internal affairs of the nation state. Chapter 4 examines the legal

[118] Newton (above n 3) 74.

[119] Hersch Lauterpacht, 'Succession of States with Respect to Private Law Obligations', *International Law: Being the Collected Papers of Hersch Lauterpacht Systematically Arranged and Edited by E Lauterpacht* (Cambridge University Press, 1970 (originally published in 1928)) vol 3, 126.

arbitral practice and academic work of Lauterpacht and other British international lawyers on the ‘general principles of law recognized by civilized nations’ and concession agreements in the oil sector that further enabled the internationalisation of contracts and the protection of private property on the international level. The next chapter examines how these principles were formalised into international legal rules recognisable to contemporary international investment lawyers.

Chapter 4 – The Sheikh of Abu Dhabi Arbitration 1951

What is the 'Proper Law' applicable in construing this contract? The terms (...) invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilised nations—a sort of 'modern law of nature'.

Arbitrator Lord Asquith of Bishopstone, 1951[1]

1. Introduction

This chapter aims to show the role of oil concessions and arbitrations conducted on disputes arising from them for the internationalisation of contracts. The *Sheikh of Abu Dhabi Arbitration*[2] between the British oil company Petroleum Development (Trucial Coast Ltd) and the Sheikh of Abu Dhabi of 1951 was one of the first of a number of arbitrations against oil-producing countries in the Middle East in the period after the Second World War and serves as a point of entry for this analysis. The argument this chapter advances is twofold. First, it aims to suggest that the construction of the international legal order over concession agreements shielded the economic sphere from sovereign assertions over production and resources and thereby maintained imperial patterns of domination in favour of Western states and their companies. Second, it argues that the driving force behind the making of this international legal order was the theory and practice of British international lawyers relying on notions of natural law, on creative argumentation and on repetition to establish the authority of the international legal order.

The chapter begins with an overview of the role of oil concessions in the competition over the oil market. In a second step, it traces the line of precedent developed by British international lawyers in a number of legal disputes from the 1930s onwards that formed the basis for a claim to an international legal order with regard to concession agreements. In the final part, by focusing on the academic work of these lawyers, the chapter moves to analyse the theoretical underpinning for the elevation of jurisdiction from the domestic to the international level. The notion of 'general principles of law recognized by civilized nations' emerges as the main vehicle that helped mediate the relationship between the domestic and the international sphere.

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[1] *In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi (1951) (Award)* reproduced in *International & Comparative Law Quarterly* [1952] (1) 247, 250-1 (*'In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi'*).

[2] Ibid.

2. The Abu Dhabi Concession in context

The contest over hegemony in the Middle East between the United States and the Great Britain in the first half of the 20th century was often conducted through commercial activities of companies. They used concession agreements to control oil resources, delineate territorial boundaries and exclude competitors. After the Second World War, international arbitration over concession agreements became a site for the assertion of control over oil and territory.

a) 'So much to so few for so long'

This section contextualises the political and economic stakes involved in developing an international legal order pertaining to oil concession agreement. The world of oil in the first decade of the 20th century was divided between a number of international firms and banking institutions, which had created arrangements that would allow them to collectively control the supply of oil on the world market and its price.[3] The most important production sites at the turn of the century were in Baku, Sumatra, Rangoon, Central Europe and the United States. The dominating companies were Royal Dutch (merging with Shell in 1907), the Deutsche Bank, the Caspian producer Nobel as well as Rockefeller's Standard Oil. These actors successfully divided the markets and production sites through cartel structures controlling the amount of oil available on particular markets.[4] Growing reports of large oil deposits in the Middle East around the turn of the century and the accompanying fear of new rivals threatened their continuing ability to control the market price.[5] As a reaction, European companies negotiated an ever-increasing number of concession agreements securing exclusive access in Iraq, today's Iran and Egypt. The concession agreements included exclusivity clauses transferring all rights with regard to the extraction, production and sales of oil to one company. However, as Timothy Mitchell argues, the 'aim was [not] to discover oil [but] rather [to] delay its development.'[6] The resource concessions were usually accompanied by transport concessions for railways and pipelines often with the aim of blocking transport routes for others. Mitchell tells the story of Iraq as the 'key place to sabotage the production of oil'.[7] His account shows that acquiring

[3] For an overview focusing on the transnational structure of oil cartels in the first half of the 20th century, see Gregory P Nowell, *Mercantile States and the World Oil Cartel: 1900-1939* (Cornell University Press, 1994).

[4] Timothy Mitchell, *Carbon Democracy: Political Power in the Age of Oil* (Verso Books, 2011) 46.

[5] The text of a number of concession agreements concluded in the United Arab Emirates between 1939 and 1971 is reproduced in Mana Saeed Al-Otaiba (ed), *The Petroleum Concession Agreements of the United Arab Emirates: 1939-1981 (Abu Dhabi)* (Croom Helm, 1982) vol 1.

[6] Mitchell, *Carbon Democracy: Political Power in the Age of Oil* (above n 4) 44.

[7] Ibid 47.

exploitative rights was not primarily in the interest of actually using the resources, but more about controlling them.

The Ottoman Empire granted one of the most important concession agreements in the Middle East to the London-based Turkish Petroleum Company, incorporated in 1912 by the English banker Ernest Cassel.[8] The concession aimed at securing exclusive oil rights to establish a monopoly covering the whole region.[9] The composition of the company reflected the relative imperial power at the time. The British D'Arcy group held 47.5% of shares, the Deutsche Bank 22.5% and Royal Dutch Shell, representing Dutch and French companies, the remaining 25%.[10] The Armenian oil engineer Colouste Gulbenkian, who had helped establish the Turkish Petroleum Company in the Ottoman Empire, obtained 5% beneficiary interests without voting rights.[11] The Turkish Petroleum Company was a consortium of the four biggest European oil firms and therefore a focal point of control for oil resources in the Middle East. The most important clause of the agreement was Paragraph 10, foreseeing that none of the parties to the agreement would endeavour to seek concessions in the Ottoman Empire without the participation of the others, a so-called 'self-denial clause'.[12] The purpose of the clause was to eliminate the possibility of competing oil developments threatening the monopolistic control over production and prices. The financial model behind the agreement was not based on a profit calculation for maximum exploitation, but rather on the ability to determine the price of oil unilaterally.[13]

By comparing the composition of the Turkish Petroleum Company of 1912 with the composition of its successor, the Iraq Petroleum Company of 1928, we see a reflection of the shifting international power balance. After the First World War, Germany had lost its shares, and the British shares were significantly reduced for the benefit of French and American participation. Now the British Anglo-Persian Oil Company, Royal Dutch Shell, Compagnie Francaise de Petroles and the Near East Development Corporation, a shared enterprise between the American Standard Oil of New Jersey and Socony Mobile Oil Company, each held 23.75%.

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[8] Stephen Hemsley Longrigg, *Oil in the Middle East: Its History and Development* (Oxford University Press, 3rd ed, 1968) 70.

[9] Mitchell, *Carbon Democracy: Political Power in the Age of Oil* (above n 4) 57.

[10] Benjamin Shwadran, *The Middle East, Oil and the Great Powers* (Frederick A Praeger, 1955) 194-5.

[11] Ralph Hewins, *Mr Five Per Cent: The Story of Calouste Gulbenkian* (Rinehart, 1958).

[12] Shwadran (above n 10) 196.

[13] Mitchell, *Carbon Democracy: Political Power in the Age of Oil* (above n 4) 97.

CS Gulbenkian still held the remaining 5%.[14] The negotiations for a new concession and the restructuring of the consortium hinged on two controversial issues. First, the Iraqi government wanted to gain influence over the company's undertakings. These early concessions were, as a contemporary commentator put it, 'extremely one-sided concessionary agreements, entered into under conditions of significant inequality of bargaining power.'[15] They covered large areas of land for long periods of time and transferred exclusive ownership over the oil resources.[16] These conditions allowed the companies to stall and delay the production of oil. Iraq had made this experience earlier with the so-called 'Baghdad Railway', a railway line developed by Deutsche Bank between 1903 and 1940, plagued by delays and sabotage.[17] In order to prevent a similar experience with the new oil concession granted to the Iraq Petroleum Company, Iraqi officials attempted to introduce drilling clauses and minimal production clauses into the agreement. They furthermore tried to receive voting rights in the form of a 20% share within the consortium.[18] After months of negotiations, the Baghdad government gave up on all of these requests in 1925, probably due to 'pressure from the British' and their 'desperat[ion] for the revenues from oil to begin'.[19]

The second controversy was the self-denial clause of Paragraph 10 of the original agreement. It foresaw that, within a demarcated area, none of the participating parties would independently seek further oil concessions. The American companies in negotiation with the Turkish Petroleum Company were trying to convince the US State Department to approve the self-denial clause. The clause sat uncomfortably with President W Wilson's Open Door policy, which insisted on equal access to resources.[20] The American companies ultimately convinced the US State Department and entered into a Group Agreement in 1928, which came to be known as the *Red Line Agreement* and contained a self-denial clause modelled after the original paragraph 10.[21] The name *Red Line Agreement* allegedly goes back to a hand-drawn line on a

[14] Shwadran (above n 10) 246-7.

[15] Jason Webb Yackee, 'Pacta Sunt Servanda and the State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality' (2009) 32(5) *Fordham International Law Journal* 1550, 1578 n 110.

[16] AZ El-Chiati, 'Protection of Investment in the Context of Petroleum Agreements' [1987] (204) *Recueil des cours de l'Académie de Droit International de la Haye* 9, 48.

[17] Mitchell, *Carbon Democracy: Political Power in the Age of Oil* (above n 4) 54-9.

[18] Ibid 97.

[19] Ibid.

[20] Shwadran (above n 10) 244-5.

[21] 'All the parties hereto agree that the Turkish Company shall, except as hereinafter mentioned, have the sole right to seek or obtain oil concessions within the defined area, and each of the Groups hereby covenants and agrees with the Turkish Company and with the other Groups that excepting only as herein provided or authorised such Groups

map by Gulbenkian,[22] demarcating the area in which the self-denial clause would apply. The area covered all of the Middle East, except for North Africa and territories already under the control of the Anglo-Iranian company.[23] The concession shaped the oil production in the region for more than 20 years but was eventually abandoned after the Second World War.[24] The concession documents the powerful position of the oil companies. Indeed, Sir Winston Churchill is quoted as having characterised them with the words: 'Never in modern times have governments granted so much to so few for so long.'[25] Despite this acknowledgment, Britain relied precisely on the sanctity of contract, and the dismissal of the historical and distributive conditions of the agreement, to override sovereign claims for more equitable distribution, for example in the case of Iraq or later Iran.

Mitchell's focus on control of oil, rather than on access to oil, is helpful for the broader argument on the consequences of the internationalisation of concession agreements. What was at stake was 'the extension of a particular economic order, not control over natural resources per se.'[26] Concession agreements safeguarded a sphere of economic activity independent of sovereign control. Sovereign control as a rival jurisdiction to control concession agreements came to the fore in the aftermath of the Russian Revolution in 1917 with an increased pressure for self-governing publics. Experiences like Iraq's failed attempt to negotiate a share in the concessions would certainly have made governments more aware that they would not be able to benefit from the exploitation of their own resources. The assertion of sovereign control over economic production, as was undertaken in the Soviet Union and other places such as Mexico or Romania in the interwar period, provided a powerful alternative. Such a course would not only secure the ability to harness the profits from resource exploitation, it was also based on a

will not nor will any of its Associated Companies either personally or through the intermediary of any person, firm, company, or corporation seek for or obtain or be interested, directly or indirectly, in the production of oil within the Turkish Company or an Operating Company under the Turkish Company.' *IPC Draft Inter Group Agreement*, available at the Baker Library Special Collections Harvard Business School (entered into force 31 July 1928) ('*IPC Draft Inter Group Agreement*').

[22] This is an information from the Wikipedia entry on Glubenkian which I could not verify.

[23] Mitchell, *Carbon Democracy: Political Power in the Age of Oil* (above n 4) 97 n 36. Stephen Longrigg, a former employee of the IPC provides a detailed account of the negotiations from the perspective of the various companies involved see Longrigg (above n 8) 67-70.

[24] Longrigg (above n 8) 174.

[25] El-Chiati (above n 16) 48.

[26] Sundhya Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2013) 104-5.

firm rejection of imperialism and economic tutelage.[27] The emergence of 'new' states making demands against the established profit-sharing order between the producing companies, which was organised through concession agreements, brought with it a new site for contestation, namely the legal regime over concession agreements. It is here that lawyers, arbitrators and legal scholars intervened to establish a new international legal system through reliance on general principles of law that could anchor jurisdiction over concession agreements in the international sphere. The *Sheikh of Abu Dhabi Arbitration* is an example of this history and allows me to illustrate the techniques and arguments in context.

b) The Abu Dhabi Concession Agreement

Even though the Trucial States were part of the zone delimited in the *Red Line Agreement*, the *Sheikh of Abu Dhabi Arbitration* of 1951 shows that the force of the arrangement was crumbling and that the rivalry between British and American companies could not be contained. Indeed, three early oil arbitrations were based on disputes over the relationship of potentially conflicting concession agreements granted to different companies.[28] Concessions in the Trucial States also came under pressure in light of this rivalry. The name 'Trucial' refers to 19th century treaties establishing a number of Sheikdoms as informal British protectorates in the name of 'maintaining peace'.[29] The official legal status of the Sheikhdoms was 'Independent Emirates under British protection',[30] under the authority of British India and later the Foreign Office.[31] An important part of the arrangement were the *Exclusive Agreements* between Britain and the Trucial States, ratified by Viceroy of India on 12 May 1892. The Sheikhs agreed

> not to enter into any agreement or correspondence with any power other than Britain; not to consent to the residence within their territories of any agent of another government on no account to cede, sell, mortgage or otherwise give occupation of any part of their territory to anybody but the British Government.'[32]

[27] Ntina Tzouvala, 'Civilization' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar, 2019) 83, 86.

[28] *Petroleum Development Ltd v The Sheikh of Abu Dhabi (Award)* 18 ILR 144 (*'Petroleum Development Ltd v The Sheikh of Abu Dhabi'*); *Ruler of Qatar v International Marine Oil Company, Ltd (Award)* 20 ILR 543 (*'Ruler of Qatar v International Marine Oil Company, Ltd'*); *Saudi Arabia v Arabian American Oil Company (Aramco) (Award)* 27 ILR 117 (*'Saudi Arabia v Arabian American Oil Company (Aramco)'*).

[29] Donald Hawley, *The Trucial States* (Geroge Allen and Unwin, 1970) 168-9.

[30] Muna M Alhammadi, *Britain and the Administration of the Trucial States: 1947-1965* (Emirates Center for Strategic Studies and Research, 2013) 50.

[31] Ibid 33.

[32] The Agreement is reproduced in Hawley (above n 29) 320-1.

At the time of their ratification, the Exclusive Agreements were geared towards securing the maritime transport route to India,[33] but the growing focus on oil soon shifted the prime deployment of the agreements. During the First World War, Britain had converted part of its Navy from coal to oil and consequently purchased a majority of shares in the Anglo-Persian Oil Company on 20 May 1914.[34] In a 1921 letter to the Foreign Office, a representative of the Anglo-Persian Company raised concerns that 'the activity shown by foreign oil companies in obtaining a foothold in undeveloped lands [of the Trucial States] seems to indicate that some action should be taken in this direction in the near future.'[35] Indeed, in 1922 Britain tried to sign a new agreement with the Trucial States, explicitly prohibiting the granting of concessions to non-British companies without the government's approval.[36] However, American companies had already negotiated concessions in Iraq and Bahrain[37] followed by the Aramco Concession obtained by the Arabian American Oil Company in Saudi Arabia in 1933 and Britain could not uphold its exclusivity policy.[38] The company Petroleum Concessions Limited was formed in 1935 in accordance with the *Red Line Agreement*, and was composed of the same shareholders as the Iraq Petroleum Company.[39] A subsidiary company called Petroleum Concessions Limited, through its subsidiary Petroleum Development (Trucial Coast) Ltd, obtained exploration options in all Trucial States.[40] In an attempt to secure its influence, the British government entered into separate agreements with a number of oil companies, including Petroleum Development (Trucial Coast) Ltd to ensure that the companies would remain incorporated in the United Kingdom and that the chairman would at all times remain a British subject.[41]

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[33] Alhammadi (above n 30) 16.

[34] See a detailed account in Shwadran (above n 10) 22.

[35] Letter to the Under Secretary of State for Foreign Affairs for Oil Concessions from Anglo Persian Oil Company Ltd, 12 May 1921 in *British Library: India Office Records and Private Papers: Qatar Digital Library* (London).

[36] Alhammadi (above n 30) 22-3.

[37] Michael Quentin Morton*, Keepers of the Golden Shore: A History of the United Arab Emirates* (Reaktion Books, 2016) 134.

[38] Hawley (above n 29) 172.

[39] Ibid 211.

[40] Ibid 173, 211.

[41] *Agreement relating to the Abu Dhabi Oil Concession [between] His Majesty's Government in the United Kingdom and Petroleum Development (Trucial Coast)*, signed 11 April 1940, British Library: India Office Records and Private Paper: Qatar Digital Library (*'Agreement relating to the Abu Dhabi Oil Concession'*).

The Abu Dhabi concession, underlying the arbitration in question, was granted on 11 January 1939.[42] The agreement was not reached easily, because the Sheikh had demanded more favourable terms than the company was ready to grant.[43] He eventually agreed to terms applied in oil exploration contracts in the region.[44] The overall conditions in the Middle Eastern concessions were less equitable than those in Latin America, where North American firms were less able to impose their conditions upon the sovereign states.[45] But compared to the earlier concessions in Iraq, the agreement shows that the Latin American practice did not go unnoticed. The granting period was long (75 years)[46] and the concession provided the right 'to search for discover, drill for and produce mineral oils and their derivatives and allied substances within the area, and the sole right to ownership of all the substances produced, and free disposal thereof both inside and outside the territory.'[47] However, the cascading payment system foreseeing different obligations on behalf of the company, addressing successful and unsuccessful oil drilling scenarios, was an improvement for the Sheikh. The company made a down payment of INR300,000 and agreed to annual payments of INR100,000, increasing by 12% every four years.[48] Upon discovery of oil, the annual payments were to be transformed into INR3 per ton. The clause stipulated that after unsuccessful drilling for four years, the company could either surrender its rights or increase its annual payments by 25% with further increases until the discovery of oil.

During the Second World War the interest in oil in the Trucial States waned, but was rekindled after the American claim of jurisdiction and control over the seabed and subsoil of the continental shelf in 1945.[49] As a reaction to this proclamation by President Harry Truman, the British Foreign Office advised all Sheikhs on the Gulf to make a similar proclamation, hoping

[42] For the text of the concession agreement, see Al-Otaiba (above n 5) 11-18.

[43] Morton (above n 37) 137.

[44] Ibid 138; Longrigg (above n 8).

[45] Mitchell, *Carbon Democracy: Political Power in the Age of Oil* (above n 4) 114.

[46] Iraq Petroleum Company partners retained shares in the Abu Dhabi oil in a concession that only expired in 2014. Morton (above n 37) 150.

[47] *Agreement between [the] Ruler of Abu Dhabi and Petroleum Development (Trucial Coast) Ltd*, signed 11 January 1939, British Library: India Office Records and Private Papers: Qatar Digital Library, [3] (*'Agreement between [the] Ruler of Abu Dhabi and Petroleum Development (Trucial Coast) Ltd'*).

[48] Ibid [4].

[49] Harry S Truman, 'Proclamation by the President with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf' (January 1946) 40(1) (Supplement: Official Documents) *American Journal of International Law* 45.

that the oil-bearing rock formations would extend under the waters in the Gulf.[50] The oil companies reacted with two strategies. Those that had already secured on-shore concessions tried to argue that their concessions included the continental shelf. Others, who tried to gain access, viewed these proclamations as an opportunity to secure new concessions over territory that was so far considered to be owned by all or unownable.[51] The Ruler of Abu Dhabi granted a second concession for the exploitation of oil on the continental shelf to the American Superior Oil Company on 2 December 1950.[52] Superior Oil was a company outside the *Red Line Agreement* and consequently was not constrained by the self-denial clause.

The British government again entered into a separate political agreement with the American company Superior Oil in 1950 where it required that

> the company undertakes nothing to prejudice the fixing of the exterior boundaries of the sea-bed area appertaining to Abu Dhabi [and to] refrain from drilling operations or other works permanently affecting the sea-bed or sub-soil in any area or areas which the Sheikh or His Majesty's Government may define.[53]

The agreement predated the signing of the concession and was based on a template that the UK Foreign Office drafted for all additional concessions to be granted after the proclamations.[54] However, despite this apparent approval of the second concession by the British government, Petroleum Development (Trucial Coast) Ltd filed for arbitration against the Sheikh of Abu Dhabi in a letter dated 18 July 1949.[55] It claimed that the concession granted to the American oil company Superior Oil for extracting oil from Abu Dhabi's continental shelf infringed on the concession granted to it earlier to drill for and exploit mineral oil 'within a certain area in Abu

[50] Morton (above n 37) 144; Longrigg (above n 8) 199.

[51] Longrigg (above n 8) 199.

[52] *Agreement between the Sheikh of Abu Dhabi and the Superior Oil Company* (2 December 1950*)* reproduced in Penelope Tuson (ed), *Records of the Emirates: Primary Documents 1820-1958* (Farnham Common: Archive Editions, 1990) vol 9, 579. See also Hawley (above n 29) 215; Morton (above n 37) 144.

[53] *Political Agreement between His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland and the Superior Oil Company regarding the Oil Concession Agreement with the Sheikh of Abu Dhabi* (15 April 1950) in Tuson (above n 52) 574 [10].

[54] Internal Communication Continental Shelf and Marine Area from British Middle East Office, 21 May 1949 in *British Library: India Office Records and Private Papers: Qatar Digital Library*, 75.

[55] *In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi* (above n 1) [2].

Dhabi.'[56] The arbitration proceedings were held in Paris in August 1951.[57] Lord Asquith of Bishopstone, the sole arbitrator, found that the two concession agreements were not incompatible. He relied on the concept of territorial waters and the continental shelf for delimiting the respective rights.

These concession agreements were a means to secure influence over territory and resources and acquiring them became an explicit governmental strategy, sometimes called 'commercial diplomacy', strongly driven by the United States through Secretary of State Cordell Hull (1933-1944).[58] The control over oil was one of the main sites for this competition, and the legal treatment of concessions became even more important. Britain's position was a strategic insistence on the sanctity of contract to secure the profitable position of its companies.[59] This aim was to be achieved by the imposition of an international legal order overriding domestic laws. If it was possible to establish that 'new' states were 'born into a world of law',[60] then it would mean that the validity of concession agreements could be protected by this pre-existing law.[61] The doctrine of general principles of law occupied a crucial place in the shift of authority from the domestic to the international sphere.

3. General principles in arbitral practice

a) The arbitral proceedings

The phrase 'general principles of law recognized by civilized nations' stems from Article 38(3) of the *Statute of the Permanent Court of International Justice*, drafted in 1920. It was carried over into Article 38(3)(c) of the *Statute of the International Court of Justice* after the Second World War. According to Articles 38, 'general principles of law recognized by civilized nations' are a source of law to be applied by the Court for resolving disputes between states. An 'Advisory Committee of Jurists' was commissioned with the drafting of the *Statute of the*

[56] Ibid [1]. An almost identical dispute took place between the Petroleum Development Company in Qatar and the American Superior Oil Company concerning the continental shelf of Qatar. *Petroleum Development (Qatar) Ltd v Ruler of Qatar (Award)* 18 ILR 161 ('*Petroleum Development (Qatar) Ltd v Ruler of Qatar*'). See also Longrigg (above n 8) 199.

[57] Morton (above n 37) 144-5.

[58] Anne Orford, 'Theorizing Free Trade' in Anne Orford et al (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 701, 729.

[59] The British government held 51% of the stocks of the Anglo-Iranian company.

[60] O'Connell cited in Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (above n 26) 138.

[61] Ibid.

PCIJ. The minutes of the *procès-verbaux* reveal that defining the character of international law and the source of its binding force caused disagreement. Especially the question whether general principles should be included in the catalogue of sources was highly disputed.[62] Proponents of a state-centred voluntarism rejected the inclusion of such principles on the grounds that they stem from domestic laws and consequently do not derive from the consent of states.[63] Others argued for the inclusion of such principles to avoid 'gaps' in the law and the court's rejection of jurisdiction due to a lack of rules applicable to the case (*non liquet*).[64] Thus, the focal point of general principles was the relationship between domestic and international law.

The relationship between domestic and international law in the Trucial States needs to be understood with regard to the role of Great Britain. The legal status of the Sheikhdoms as 'Independent Emirates under British protection'[65] meant that the British government had full representative power with regard to foreign relations and that internal legal matters were treated as mixed jurisdiction. In 1950 the Sheikhs gave consent to British jurisdiction over all foreign subjects in criminal matters[66] and 'where no specific law applied the court was guided by "justice, equity, and good conscience"', which in practice meant the principles of the English common law.[67] However, there was no British jurisdiction over internal matters outside the sphere of criminal law, so that contract law in particular would not fall under British jurisdiction.[68] The dominant view of scholars of international law at the time was still that contracts were subject to the national laws of the country in which the contract was performed.[69]

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[62] Permanent Court of International Justice: Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee June 16th-July 24th 1920 with Annexes* (Van Langenhuysen Brothers, 1920) 312-21. For a discussion of the debate see Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff, 2008) 17-20.

[63] Advisory Committee of Jurists (above n 62) 312-21.

[64] Ibid.

[65] Alhammadi (above n 30) 50.

[66] Hawley (above n 29) 179.

[67] Ibid 179-80.

[68] Morton (above n 37) 156.

[69] *Payment of Various Serbian/Brazilian Federal Loans Issued in France [1929] (Judgment)* (ser A) Nos 20/21 PCIJ 4, 41. See also Arthur Nussbaum, 'Arbitration Bewteen the Lena Goldfields Ltd and the Soviet Government' [1950] (36) *Cornell Law Quarterly* 31, 36.

In the *Sheikh of Abu Dhabi Arbitration,* the arbitrator, Lord Asquith, took this understanding as a starting point, but ended with the application of 'a sort of "modern law of nature"'[70], which was in effect represented by English law. His reasoning was based on the text of Article 17 of the concession agreement. This article reads as follows: *'The Ruler and the Company both declare that they intend to execute this Agreement in a spirit of good intentions and integrity, and to interpret it in a reasonable manner.*'[71] From this clause Lord Asquith deduced that the parties 'repel[ed] the notion that municipal law of any country could be appropriate', and that instead the 'terms of the clause prescribe[d] a sort of modern law of nature.'[72] Let us follow Lord Asquith's argument to unravel some of the foundational ideas. In a search for the appropriate legal regime to govern the concession agreement, Lord Asquith argued the following:

> If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments. Nor can I see any basis on which the municipal law of England could apply. On the contrary, Clause 17 of the agreement, cited above, repels the notion that the municipal law of any country, as such, could be appropriate. The terms of that clause invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilised nations—a sort of 'modern law of nature'. I do not think that on this point there is any conflict between the parties. But, albeit English municipal law is inapplicable as such, some of its rules are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence—this 'modern law of nature'.[73]

The argument rested on two different ideas. One was the intention of the parties as critical for the interpretation of the contract and the other was a resort to a natural law-grounded order of legal principles. The first strand was expressed when the Arbitrator tried to establish that the application of municipal law could not have been intended, because the particular municipal

[70] *In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi* (above n 1) 250-1.

[71] *Agreement between [the] Ruler of Abu Dhabi and Petroleum Development (Trucial Coast) Ltd* (above n 47) 312-21.

[72] *In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi* (above n 1) 250-1.

[73] Ibid. For affirmative commentary on the arbitration see McNair, Arnold D McNair, 'The General Principles of Law Recognized by Civilized Nations' [1957] (33) *British Yearbook of International Law* 1, 12; Wolfgang Friedmann, 'The Uses of "General Principles" in the Development of International Law' (1963) (57) *American Journal of International Law* 279, 283-5; Philip C Jessup, *Transnational Law* (Yale University Press, 1956) 80; Fritz Alexander Mann, 'The Proper Law of Contracts Concluded by International Persons' [1959] (35) *British Yearbook of International Law* 34, 52. For contemporary critical commentary, see Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010) 289-99; Antony Anghie, Imperialism, *Sovereignty and the Making of International Law* (Cambridge University Press, 2008) 226.

law in question could not 'reasonably be said to exist' in the administration of 'a purely discretionary justice with the assistance of the Koran.' In particular, the Arbitrator doubted the existence of 'principles applicable to the construction of modern commercial instruments.'[74] In the absence of applicable domestic law, so the argument went, the parties could not have intended its application. But because the Arbitrator had tied his reasoning to an abstract rule, namely the inapplicability of any domestic law, he needed to establish a different legal order to adjudicate the dispute. By invoking general principles as an expression of principles grounded in natural law, the Arbitrator distinguished between such domestic laws that had the quality to represent the modern law of nature and those that did not. On this basis he presented English municipal law as the representation of 'the modern law of nature'. Its application was therefore not warranted 'as such' but because 'its rules [were] so firmly grounded in reason, as to form part of this broad body of jurisprudence.'[75] This line of reasoning was based on a phrase in the concession agreement recording the parties' commitment to 'good intentions and integrity' and interpretation in a 'reasonable manner'. From these cues, Lord Asquith developed a universal legal order superseding domestic laws, and concluded that the parties intended this legal order to be applied to their contract and that Islamic law was not an expression of this order, but that English law was. In his argument, Islamic law was merely domestic law, while English law was bestowed with a double quality. It was domestic law, but it was also representative of a higher universal legal order.

A second iteration of this logic can be found in the *Sheikh of Abu Dhabi Arbitration.* The question in the arbitration was whether the first concession granted to Petroleum Development (Trucial States) Ltd covered rights 'with respect to all underwater areas over which the Ruler has or may have sovereignty jurisdiction control or mineral oil rights.'[76] If so, the second concession held by Superior Oil would cover an identical area and be in conflict with the first. The original concession agreement was written in Arabic, so the first question raised in the arbitration was about competing translations of the relevant passages of the concession agreement. The company agreed to accept the Sheikh's translation, which was subsequently used by the arbitrator.[77] In ascertaining the limits of the first concession, Lord Asquith relied

[74] *In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi* (above n 1) 250-1.

[75] Ibid.

[76] Ibid 247.

[77] Ibid [5(a)].

on the concept of 'territorial waters', stating that 'I should have thought this expression could only have been intended to mean the territorial maritime belt in the Persian Gulf, which is a three-mile belt'.[78] Apparently, counsel for the Sheikh had made an argument suggesting that the wording in the concession meant 'petroliferous areas'.[79] Indeed, the two translations differed in terminology. The claimant's translation explicitly relied on 'territorial waters', whereas the respondent's translation, the one accepted by the tribunal, read 'all islands and the sea waters which belong to that area.'[80] Nevertheless, Lord Asquith dismissed the argument by Sheikh's counsel that 'all under water areas' meant 'petroliferous areas'. He stated that 'to read it (…) as something totally different [then territorial waters] seems to me unjustifiable, if not perverse.'[81] Lord Asquith went on to say:

> I am not impressed by the argument that there was in 1939 no word for 'territorial waters' in the language of Abu Dhabi, or that the Sheikh was quite unfamiliar with that conception. Mr. Jourdain had none the less been talking 'prose' all his life because the fact was only brought to his notice somewhat late. Every State is owner and sovereign in respect of its territorial waters, their bed and subsoil, whether the Ruler has read the works of Bynkershoek or not. The extent of the Ruler's Dominion cannot depend on his accomplishments as an international jurist.[82]

Lord Asquith thus displaced the argument made with regard to the intention of the parties and instead relied on the definition of 'territorial waters' in public international law. He relied on a superseding international rule to interpret the concession agreement. Lord Asquith's interpretation throughout the award was textual, 'consider[ing] the bare language of the Agreement itself.'[83] The wording 'all islands and the sea water which belong to that area' might have meant 'petroliferous areas' or it might have meant 'a three-mile belt'. Of course, each side was arguing the most beneficial interpretation for their interest. The point is that Lord Asquith relied on a concept of public international law to interpret the concession agreement. This time he asserted a universalised rule by the direct application of rules of public international law.

The pattern is the same in both interpretive exercises; a local or domestic understanding of the term was considered to be at best idiosyncratic or at worst ignorant, and was displaced by a reference to a universal rule. This aspect of Lord Asquith's reasoning is an iteration of what

[78] Ibid 252.

[79] Ibid 258.

[80] Ibid 248-9.

[81] Ibid 258.

[82] Ibid 253.

[83] Ibid 252.

Pahuja calls the 'operationalisation of the universal',[84] a constitutive technique for international law. When Lord Asquith said 'modern law of nature', British law moved from the 'particular' to the 'universal' thereby authorising the dismissal of Islamic law. This line of reasoning was developed from no more than a reference to 'goodwill' and 'reason'. This mode of reasoning was not unique. It appeared as a pattern and slowly grew into a line of precedent. Only as such was it able to become an authoritative mode of reasoning and to be an expression of a broader paradigm that led to the establishment of international investment law.

b) Making a precedent

The lawyers on both sides of the *Sheikh of Abu Dhabi Arbitration* were British international lawyers. Walter Monckton, Hersch Lauterpacht, GRF Morris and R Dunn appeared on behalf of the company, whereas the Ruler of Abu Dhabi was represented by NR Fox-Andrews, CHM Waldock, Stephen Chapman and JFE Stephenson. Together with RV Idelson, Hartley Shawcross, Arnold McNair and John Megaw, these lawyers worked on most of the cases involving British companies and some aspect of international law at the time. In addition to the *Sheikh of Abu Dhabi Arbitration* (1951), NR Fox and Walter Monckton served as counsel in the *Ruler of Qatar Arbitration* (1953).[85] In *The Rose Mary Case* (1953), Idelson and Lauterpacht were part of the drafting team, and Hartley Shawcross and John Megaw appeared as counsel.[86] McNair was the presiding judge in the *The Anglo-Iranian Case* (1952) at the ICJ in which Waldock was counsel for the British government and Laupterpacht and Idelson were part of the legal team.[87] Indeed, the *Sheikh of Abu Dhabi Arbitration* took place after the nationalisation of the Anglo-Iranian oil company in Iran in March 1951, but before the International Court of Justice issued a judgment on 22 July 1952. The *Rose Mary Case* evolved from the same facts as the Anglo-Iranian dispute and was decided in 1953,[88] so that the legal

[84] Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (above n 26) 99.

[85] *Ruler of Qatar v International Marine Oil Company, Ltd* (above n 28).

[86] *The Rose Mary (Anglo-Iranian Oil Co Ltd v Jaffrate)* [1953] *(Judgment)* 1 WLR 246 ('*The Rose Mary*'). The Rose Mary was a ship carrying oil cargo from the newly founded National Iranian Oil Company, which was forced into the port of Aden (then British protectorate). The Aden Supreme Court ruled that the cargo was the property of the Anglo-Iranian company and was unlawfully carried by the merchants. Lauterpacht commented on the Court's decision to find Iranian domestic law in breach of international law with hesitant affirmation. Hersch Lauterpacht, 'The Rose Mary Case', *International Law: Being the Collected Papers of Hersch Lauterpacht Systematically Arranged and Edited by E Lauterpacht* (Cambridge University Press, 1970 (unpublished case note, originally 1953)) vol 3, 242.

[87] *Anglo-Iranian Oil Co Case (United Kindgom v Iran) (Preliminary Objection)* [1952] ICJ Rep 93 (*'Anglo-Iranian Oil Co Case'*).

[88] *The Rose Mary* (above n 86).

work for the three cases must have been done at the same time. These lawyers most likely worked together on many more occasions.[89] They were likely to know each other well and be familiar with the arguments and findings in the other cases. By focusing on legal practice, as invented and undertaken by the lawyers, we see how 'legal knowledge comes into agentive being in the process of its being handed from one legal actor to another (…). What matters, rather, is the practice, the move, the *replication*.'[90] What emerges is a pattern of reasoning that was established through the same argument and that travelled with the people. The next section shows the similarities in the wordings of concession agreements involving British companies as well as the reasoning established on the basis of the wordings by British lawyers and arbitrators. It is a pattern that runs through the *Lena Goldfields Arbitration* 1930, the *Anglo-Iranian Case* 1953, the *Sheikh of Abu Dhabi Arbitration* 1951 and the *Ruler of Qatar Arbitration* 1953.

Chapter 3 observed that the *Lena Goldfields Arbitration* against the Soviet Union from 1930 was an important step in the establishment of general principles as applicable law.[91] RV Idelson acted as counsel for the British company Lena. Article 89 of the *Lena Concession Agreement* read: *'the parties base their relations with regard to this agreement on the principle of good will and good faith, as well as on reasonable interpretation of the terms of the agreement.'*[92] In the *Lena Goldfields Arbitration*, the wording served as the basis for a two-step argument. First, it was established 'that Lena would not have entered into the Concession Agreement at all but for the presence in the contract of th[e] arbitration clause and of the preceding clause (Article 89)'. In a second step, Idelson relied on this wording to argue successfully for the applicability of general principles. The award held that 'it was admitted by Dr. Idelson that (…) Russian law was "the proper law of the contract"'.[93] But Idelson had in fact asserted a distinction between 'performances of the contract by both parties inside the U.S.S.R' and 'other purposes'. For these other purposes, 'the general principles of law such as those recognized by Article 38(3)

[89] Shawcross, H Lauterpacht and Waldock worked together in the *Corfu Channel Case* before the ICJ from 1947-1949, Lauterpacht and Monckton collaborated on legal opinions for oil concessions in Kuwait and McNair acted as senior counsel in the *Aramco Arbitration* in 1963. See for these collaborations Elihu Lauterpacht, *The Life of Sir Hersch Lauterpacht, QC, FBA, LLD* (Cambridge University Press, 2010) 44, 324, plate 16.

[90] Annelise Riles, 'Is the Law Hopeful?' in Hirokazu Miyazaki and Richard Swedberg (eds), *The Economy of Hope* (University of Pennsylvania Press, 2016) 99 (emphasis in original) 112.

[91] See chapter 3 on the *Lena Goldfields Arbitratio*n.

[92] *Lena Goldfields Case (Lena Goldfields v Soviet Government) (Award)* (2 September 1930) excerpts, English translation of German original reproduced in Arthur Nussbaum, 'Arbitration Bewteen the Lena Goldfields Ltd and the Soviet Government' [1950] (36) *Cornell Law Quarterly* 31, ('*Lena Goldfields Case*') 42 [6].

[93] *Lena Goldfields Case* reproduced in ibid 50 [22].

of the Statute of the Permanent Court of International Justice at The Hague should be regarded as "the proper law of the contract".'[94] As noted in chapter 3, on this basis, the arbitrators invoked the principle of *enrichissement sans cause* or of 'unjust enrichment', and awarded a total sum of £13 million to the company. The award stated that 'Lena is entitled (…) to be compensated in money for the value of the benefits of which it had been wrongfully deprived'.[95] Since Lena had only invested £3.5 million according to its own calculations,[96] the total sum included compensation for lost profits of £9.5 million, an unusually large sum at the time.[97] The inclusion of lost profits into the calculation is of significance for the further development of the rules of international investment law.[98] However, what I want to show here is that the concession agreement was subjected to a universal law by reference to general principles. The doctrine of 'unjust enrichment' was elevated to the level of universality and thereby made applicable to the case. This is the same technique by which British law came to be the 'modern law of nature'.

Idelson was most likely also the drafter of the concession agreement from 1925 underlying the *Lena Goldfields Arbitration*. Veeder notes the resemblance in the wording of Article 89 of the Lena Goldfields concession agreement with Article 21 of the Anglo-Persian Oil Concession Convention of 1933, of which it is known that Idelson was the drafter.[99] Article 21 in the Anglo-Iranian Concession Convention read: '*The contracting parties declare that they base the performance of the present Agreement on principles of mutual good will and good faith as well as on a reasonable interpretation of this Agreement.*'[100]

This concession of 1933 between the Anglo-Persian Oil Company and the government of Persia was the result of a renegotiation of the original concession, the so-called D'Arcy Concession

[94] *Lena Goldfields Case* reproduced in ibid.

[95] Alan O'Neil Sykes, 'Public v Private Enforcement of International Economic Law: Of Standing and Remedy' (2005) (34) *Journal of Legal Studies* 631-3, [25].

[96] SA Bernstein, *The Financial and Economic Results of the Working of the Lena Goldfields Company* (Blackfriars Press, 1930) 23.

[97] VV Veeder, 'The Lena Goldfields Arbitration: the Historical Roots of Three Ideas' (1998) 47(4) *International and Comparative Law Quarterly* 747, 748. See also Yackee, 'Pacta Sunt Servanda and the State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality' (above n 15) 1575.

[98] Christoph Schreuer, 'Unjustified Enrichment in International Law' (1974) 22(2) *American Journal of Comparative Law* 281.

[99] Veeder, 'The Lena Goldfields Arbitration: the Historical Roots of Three Ideas' (above n 97) 769.

[100] *Convention Concluded between the Imperial Government of Persia and the Anglo-Persian Oil Company, Ltd* (29 April 1933) reproduced in *Anglo-Iranian Oil Case (United Kindgom v Iran) (Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland)* [1952] ICJ Rep 93, 258 (*'Anglo-Iranian Oil Case ICJ (UK Memorial)'*).

of 28 May 1901.[101] The negotiations over the new concession in 1933 were close to failing, and Britain had submitted the dispute to the Council of the League of Nations.[102] The dispute was eventually settled with the 1933 Convention. Most likely as a result of the experience in the *Lena Goldfields Arbitration*, in addition to the reference to 'good will' and 'reason' in the above-cited Article 21, Idelson had included an explicit reference to general principles 'as contained in Article 38 of the Statues [sic] of the Permanent Court of International Justice' in Article 22 of the new agreement.[103]

The renegotiated agreement of 1933 still carried rather unfavourable conditions,[104] and the new Iranian government decided to nationalise Iranian oil in 1951. As a reaction, the United Kingdom brought a case against Iran before the International Court of Justice in 1953, the *Anglo-Iranian Case*.[105] To establish the jurisdiction of the Court, the UK argued that the 1933 concession agreement was of a double character; on the one hand, a private contract between a company and a state, on the other hand, an international agreement between two states since it settled proceedings between two states brought before the Council of the League of Nations.[106] The UK further relied on the Lena award as a precedent for the elevation of the contract to the

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[101] *Agreement between the Government of His Imperial Majesty the Shah of Persia and William Knox D'Arcy (D'Arcy Concession)*, signed 28 May 1901, [4] (*'D'Arcy Concession'*). For an account of the motivations for the re-negotiation on both sides, see Shwadran (above n 10) 41.

[102] Shwadran (above n 10) 46-50.

[103] *Anglo-Iranian Oil Case ICJ (UK Memorial)* (above n 100) 268.

The fact that this is the only concession agreement to carry the title *Convention* rather than contract or agreement invites the speculation that, in line with the reference to Article 38(3) PCIJ Statute, it was supposed to invoke the proximity to international law.

[104] The agreement stipulated that the company would be exempted from paying tax for 30 years. For a detailed account of the negotiations and their outcome, see James H Bamberg, *The History of the British Petroleum Company: The Anglo-Iranian Years 1928-1954* (Cambridge University Press, 1994) vol 2, 50.

[105] For a critical analysis of the implications of the dispute, see Sundhya Pahuja and Cait Storr, 'Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited' in James Crawford et al (eds), *The International Legal Order: Current Needs and Possible Response: Essays in Honour of Djamchid Momtaz* (Brill Nijhoff, 2017) 53.

[106] 'On the one hand, the Concession Convention of 1933 is the concessionary Convention operating between the Anglo-Iranian Company and the Iranian Government, or, in other words, a contract between two parties, one of which is a State and the other of which is not a State but a national of the United Kingdom. On the other hand, it also embodies the substance of an implied agreement between the Government of the United Kingdom and the Iranian Government because there was an implied agreement between these two Governments (fully operative as creating an obligation in international law) to the effect that the Iranian Government undertook to observe the provisions of its concessionary Convention with the Company '. This contention of the United Kingdom rests on two grounds, namely: (a) There had been an international dispute between the two Governments, arising from the fact that the Government of the United Kingdom, in the exercise of its right of diplomatic protection of its nationals, had taken up the case of the Anglo-Persian Oil Company when Persia purported to cancel the D'Arcy Concession of 1901, the Government of the United Kingdom alleging that this purported cancellation was an act contrary to international law. (b) The dispute between the two governments had been brought before the Council of the League (…)' *Anglo-Iranian Oil Case ICJ (UK Memorial)* (above n 100) 74 [6].

international sphere based on general principles. The memorial explicitly pointed out the similarity in the wording of Article 89 and Article 21 as cited above.[107] The Court rejected the plea, and it declined jurisdiction in the case, stating that it 'cannot accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character.'[108]

In the *Anglo-Iranian Case*, the internationalisation was not about universalising a particular set of rules, but about establishing the jurisdiction of the ICJ in general, in order to challenge the authority of national legislation:

> Even assuming that unilateral termination was admissible it would still have been possible – and proper – for the Iranian Government to approach the Anglo-Iranian Oil Company and say: 'We find ourselves under a necessity, for inescapable reasons of State, to put an end to the Convention. We cannot, therefore, admit that under Article 22 of the Convention the arbitrators or the sole arbitrator have the right to pass upon the legality of the measure taken and, in particular, to decree the restitution of the concession. However, as a matter of law, and, in the words of Article 21 of the Convention, 'on principles of mutual goodwill and good faith' as well as on a 'reasonable interpretation of this Agreement', we are prepared to abide by an award of arbitrators as ta the compensation due to the Company for the breach of the Convention.' Instead the Iranian Government has refused to submit the dispute, even within the limited compass as suggested, to arbitration and has provided that compensation is to be determined by the Iranian Parliament.[109]

The decisive point is the authority to determine the compensation, and it is with regard to this point that the UK memorial refers to the Lena Goldfields precedent. Recalling that the calculation of compensation through an invocation of the doctrine of 'unjust enrichment' led to a very favourable award, it is possible that the British appeal to the ICJ was guided by the hope for a similar finding. In the end, Iran did not refuse to pay compensation, but allocated the authority to establish the appropriate amount with the Iranian Parliament. The authority to determine the appropriate amount of compensation is one of the most prominent lines of conflict in cases of nationalisation and occupies an important conceptual place in the development of what will count as a general principle of law. After the attempt to rely on international law provided unsuccessful, Britain resorted to force and orchestrated a coup with

[107] Ibid 119 [44].

[108] *Anglo-Iranian Oil Co Case* (above n 87) 112. McNair as the presiding judge in the case concurred with the majority in rejecting the British arguments to establish jurisdiction. See *Anglo-Iranian Oil Co Case (United Kindgom v Iran)* 27/116, 121-2 (President McNair) ('*Anglo-Iranian Oil Co Case (President McNair)*').

[109] *Anglo-Iranian Oil Case ICJ (UK Memorial)* (above n 100) 119 [44].

the help of the United States, reinstalling the Shah in 1953.[110] The *Consortium Agreement* re-establishing Anglo-Iranian ownership after the coup, this time shared between the National Iranian Oil Company and various American, Dutch and French companies, concluded in 1954 and also contained a reference to general principles as applicable law.[111]

A final example of the elevation of jurisdiction to the international level by reference to a vague clause in the concession agreement is almost identical to the *Sheikh of Abu Dhabi Arbitration*. The relationship between two oil concessions was at stake in the *Ruler of Qatar v International Marine Oil Co Arbitration* of 1953 between a British company and the Ruler of Qatar. When considering the applicable law, the arbitrator, Sir Alfred Bucknill, held that 'I am satisfied that the law [Qatari law] does not contain any principles which would be sufficient to interpret this particular contract.'[112] He found 'weighty considerations' against viewing 'Islamic law, that being the law administered in Qatar, as the appropriate law.'[113] The basis for these arguments was the concession agreement between the British Central Mining and Investment Corporation and the Ruler of Qatar from 17 March 1936. It reads: '*The Shaikh and the Company declare that they base action upon this Agreement on the basis of good faith and pure belief and upon the interpretation of this Agreement in a manner consistent with reason*.'[114]

British lawyers had included a clause referencing 'good faith' and 'reason' in all these concession agreements.[115] Based on these clauses, they argued that it was the party's intention

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[110] For a discussion of the false claim to lawful behaviour by Britain and the US and the simultaneous ousting of Iran as 'outlaw', see Pahuja and Storr (above n 105).

[111] *Iran Consortium Agreement* 1954 [46] cited in Jessup (above n 73) 14-5.

[112] *Ruler of Qatar v International Marine Oil Company, Ltd* (above n 28) 545.

[113] Ibid 544.

[114] The concession agreement is cited in the award as restated in the International Law Reports in *Agreement between [the] Ruler of Abu Dhabi and Petroleum Development (Trucial Coast) Ltd* (above n 47) 534-6.

[115] Here are all four iterations next to each other:

Lena Goldfields concession agreement (1925): 'The parties base their relations with regard to this agreement on the principle of good will and good faith, as well as on reasonable interpretation of the terms of the agreement.'

Anglo-Persian concession agreement (1933): 'The contracting parties declare that they base the performance of the present Agreement on principles of mutual good will and good faith as well as on a reasonable interpretation of this Agreement.'

Sheikh of Abu Dhabi concession agreement (1935): 'The Ruler and the Company both declare that they intend to execute this Agreement in a spirit of good intentions and integrity, and to interpret it in a reasonable manner.'

Ruler of Qatar concession agreement (1936): 'The Shaikh and the Company declare that they base action upon this Agreement on the basis of good faith and pure belief and upon the interpretation of this Agreement in a manner consistent with reason.'

General principles had also been invoked in the *Palestine Railway Arbitration* discussed in the first chapter, even though, it is not clear whether the above-mentioned protagonists were aware of this.

to apply 'general principles', a form of universal law, to concession agreements. In the search of such universal law, they asserted English law, some abstraction claiming to represent a number of civil law traditions or public international law. The pattern was always the same. First, there was a rejection of the authority of the local government and its domestic law. Then there was an elevation of a Western idea to the status of the universal, rendering the local particular and thereby lesser. The point here is not that they replaced one set of rules with another; the argument is that they extracted the authority to decide upon the rules from the domestic sphere and relocated it in the international sphere. This new international sphere could now be put to work against assertions of the newly sovereign states that were aimed at reorganising the relationship between the state and the market. In the arbitrations, the legal practitioners rejected attempts at redistributing the means of production through sovereign intervention by a claim to a pre-existing law superior to domestic law, namely the international legal order. There was in fact no such pre-existing law. All these examples show that it was a claim made out of thin air. There is little more to this assertion than the fact that it was repeated over and over again, and every time it was challenged, the lawyers and arbitrators managed to override the challenge. They validated the authority of a legal claim by building a line of precedents accepted by the legal profession, here, a small circle of British international lawyers.

4. General principles in scholarship

The writings of Lauterpacht and McNair allow insights into the conceptual framework underlying the above-described practice. In 1957, McNair wrote the most important piece for the internationalisation of concession agreements, with the title *The General Principles of Law Recognized by Civilized Nations*. The article introduced the language of economic development as an underlying justification for the establishment of an international legal order. However, the foundations of his argument can be found in the writings of scholars during the interwar period on acquired rights and state succession. McNair's article is a culmination of both the practical developments discussed above and the theoretical developments to be discussed in this section.

a) General principles as rules of private law

General principles occupy a particularly important place in international legal theory. In the discussion of the sources of the binding force of international law, the battle line in the interwar

period ran between positivist and natural lawyers.[116] Lauterpacht located his own view of international law as being between the 'believer in the law of nature and the principles of natural justice forming part of international law' and the 'rigid positivist'.[117] He saw himself as someone occupying 'a middle course who, now powerfully supported by Article 38 of the Statute of the Permanent Court, recognizes the practice of States as the principle source of law, but is prepared to extend the sphere of applicable international law by approved scientific methods of analogy with, and deduction from, general principles of law.'[118] Indeed, for Lauterpacht, general principles had delivered *un coup mortel* to positivist theory.[119] They provided a solution to the problem of a court ruling of *non liquet* due to gaps,[120] or lacunae, in international law, arising from a strictly positivist view. They were the logically necessary expression of the completeness of the law, since 'law, like physics, does not tolerate a vacuum.'[121]

Lauterpacht saw Article 38(3) as an acknowledgment of the already established and long-standing arbitral practice refuting the positivist problem of gaps in international law.[122] In his second doctoral thesis *Private Law Sources and Analogies of International Law* at the LSE under the supervision of McNair in 1927, he wrote 'there exists a customary rule of international law to the effect that "general principles of law," "justice," and "equity" should, in addition to and apart from custom and treaties, be treated as binding upon international tribunals.'[123] Lauterpacht's argument was that the reference to Article 38(3) was a recognition of the already

[116] Martti Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001); Bruno Simma, 'The Contribution of Alfred Verdoss to the Theory of International Law' (1995) 6(1) *European Journal of International Law* 33, 47.

[117] Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 2011 (first published in 1933)) 65.

[118] Ibid.

[119] Hersch Lauterpacht, 'Règles générales du droit de la paix' [1937] (62) *Recueil des cours de l'Académie de Droit International de la Haye* 100, 164.

[120] Koskenniemi describes Lauterpacht's approach as follows: 'That the legal order is unable to recognize the existence of gaps results from its inability to limit their scope. In particular, there is no method to distinguish between "essentially" important (political) and non-important (legal) issues.' Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960* (above n 116) 367.

[121] Hersch Lauterpacht, 'Succession of States with Respect to Private Law Obligations', *International Law: Being the Collected Papers of Hersch Lauterpacht Systematically Arranged and Edited by E Lauterpacht* (Cambridge University Press, 1970 (originally published in 1928)) vol 3, 126.

[122] Lauterpacht, 'Règles générales du droit de la paix' (above n 119) 165.

[123] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green and Co, 1927) 298-9.

established customary rule that general principles form part of the body of international law.[124] His thesis then set out to document and systematise the practice of international courts and tribunals to better grasp the content and character of such principles. Indeed, McNair characterised Lauterpacht's LSE thesis as 'in effect, a commentary upon Article 38(1)(c) of the Statute of the Court.'[125]

The connection between a broader theory of international law and the place of general principles becomes crucial when we pay attention to the sources Lauterpacht offered for these general principles. As indicated in the title of his thesis, he looked at analogies to private law sources.[126] This was not simply to fill the gaps of the international legal system, but was based on an understanding that 'regards the relation of the State to its territory as identical with or as analogous to the private law right of property.'[127] The most obvious place to trace this conception is the debate over acquired rights in cases of state succession.[128] When we pay attention to the terminology, we see that the notion of succession already implied a certain continuity. In Lauterpacht's vision, international law served as a 'legal bridge' for the continuity of international obligations.[129] Here, too, Lauterpacht argued in favour of a strict analogy to private law principles since the problems were 'identical'.[130] In the case of state succession, as in the case of death of any legal subject, 'the purpose of the law should be, and in fact is, to preserve acquired rights and maintain the continuity of law.'[131]

He asked, 'is he [the new sovereign] bound by the obligation of the former sovereign, because he finds it convenient to be so, or because international law imposes upon him that duty'?[132] For Lauterpacht, international law, rather than the will of the state, was the source of rights that made the coming into being of 'new' states possible.[133] Recognition became the topic of

[124] Ibid 63-71.

[125] McNair, 'The General Principles of Law Recognized by Civilized Nations' (above n 73) 15 n 3.

[126] Lauterpacht, *Private Law Sources and Analogies of International Law* (above n 123). Lauterpacht, 'Succession of States with Respect to Private Law Obligations' (above n 121) 130.

[127] Lauterpacht, *Private Law Sources and Analogies of International Law* (above n 123) 92.

[128] For an analysis of the doctrine of state succession and its relationship to decolonisation, see Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford University Press, 2009).

[129] Lauterpacht, 'Succession of States with Respect to Private Law Obligations' (above n 121) 127.

[130] Lauterpacht, *Private Law Sources and Analogies of International Law* (above n 123) 125.

[131] Lauterpacht, 'Succession of States with Respect to Private Law Obligations' (above n 121) 126.

[132] Lauterpacht, *Private Law Sources and Analogies of International Law* (above n 123) 126.

[133] Lauterpacht, 'Succession of States with Respect to Private Law Obligations' (above n 121) 127.

Lauterpacht's first book after the war.[134] As Koskenniemi put it, recognition was the 'master technique establishing the connection between the abstract rule and its concrete manifestation.'[135] Recognition provided the technique to make international law the source of new sovereignty. Combining these two strands of thought, international law as the source for the right for the constitution of a new state and international law as concerned with a continuation of obligations, we can see how acquired rights become the focal point of the international legal regime. Lauterpacht regarded the protection of acquired rights as the basic function of law, which had to be regulated 'by a rule of law independent of the will of the actual successor.'[136]

b) Acquired rights and unjust enrichment

McNair's body of work was also informed by an interest in treaty law and contract, and he shared Lauterpacht's orientation towards analogies from private law sources.[137] McNair based his conceptualisation of international law and property on the distinction of *imperium* and *dominium*, understood as 'the imperium or sovereignty which belongs to the State, and the dominium or property which belongs to the individual.'[138] The distinction between *imperium* and *dominium* lies at the heart of the notion of acquired rights, which are considered to be part of the sphere of *dominium* and thereby unaffected by changes in *imperium*. The analytic terms of *imperium* and *dominium* are the basis for an imagined distinction between the political and the economic sphere. The Austrian international lawyer, Alfred Verdross, had written extensively on general principles and acquired rights in international law, and was cited by both Lauterpacht and McNair. Verdross' arguments and ideas show the connection between the liberal economists and the international lawyers of the interwar period. In his Hague lecture on *Règles internationales concernant le traitement des étrangers* of 1931, Verdross explicitly distinguished between the general rules for the treatment of foreigners and the special rules pertaining to the economic sphere.[139] Verdross argued on the basis of a distinction between

[134] Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press, 1947).

[135] Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960* (above n 116) 383.

[136] Lauterpacht, *Private Law Sources and Analogies of International Law* (above n 123) 129.

[137] William W Buckland and Arnold D McNair, *Roman Law and Common Law: a Comparison in Outline* (Cambridge University Press, 1936); Arnold D McNair, 'The Effects of Peace Treaties upon Private Rights' (1941) (7) *Cambridge Law Journal* 379; Arnold D McNair, *The Law of Treaties* (Clarendon, 1961).

[138] McNair, 'The Effects of Peace Treaties upon Private Rights' (above n 137) 381.

[139] Alfred Verdross, 'Règles internationales concernant le traitement des étrangers' [1931] (37) *Recueil des cours de l'Académie de Droit International de la Haye* 325.

imperium and *dominium* that the latter should be 'autonomous'.[140] He referred to the World Economic Conference in Geneva in 1927, co-organised by the International Chamber of Commerce and the League of Nations, which was the place for advancing liberal politics for thinkers such as Röpke, Hayek and Haberler.[141] In line with these thinkers, in Verdross' argument, the necessity of a distinction between the political and the economic arose out of the assumption that a functioning economic system depended on private property and free trade.[142]

One of the most difficult questions was the relationship between sovereignty and acquired rights. Most authors were of the opinion that a change in the sovereign did not affect private rights *per se*.[143] However, this position did not provide an answer to the question whether the 'new' state had to respect those rights after succession. In 1941 McNair wrote that 'once the cession has taken place the dominium is at the mercy of the new sovereign.'[144] A similar argument was made by Kaeckenbeeck, the president of the Arbitral Tribunal of Upper Silesia, in 1937 while reflecting on the status of acquired rights.[145] 'The question when the legislature should overrule vested rights or capitulate before them is always and exclusively a question of policy, of public interest, which the state alone is competent to decide [and] almost every social change, almost all so-called progress, plays havoc with some vested rights.'[146] These positions built on the distinction between *imperium* and *dominium*, but did not limit sovereignty in and of itself, rather, they appeared to re-inscribe the primacy of *imperium* over *dominium*. This primacy, however, came with a catch: that of compensation.

The state's prerogative over legality and illegality of the act of confiscation required an international minimum standard of compensation. Indeed, Kaeckenbeeck's article on acquired rights ended with a section on compensation calling for the establishment of a flexible international standard. He argued that the question of the legality of 'the suppression' of a vested right is solely for the national jurisdiction to decide. The question of compensation for

[140] Ibid 389.

[141] Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018) 30. According to Slobodian, the main concern was the reduction of tariff walls and workers' wage demands.

[142] Verdross, 'Règles internationales concernant le traitement des étrangers' (above n 139) 396.

[143] *German Settlers in Poland (Advisory Opinion)* [1923] PCIJ (ser B) No 6, 36 (*'German Settlers in Poland'*).

[144] McNair, 'The Effects of Peace Treaties upon Private Rights' (above n 137) 384.

[145] For a detailed account of the proceedings see George Kaeckenbeeck, 'The Character and Work of the Arbitral Tribunal of Upper Silesia' (1935) 21 *Transactions of the Grotius Society* 27-44.

[146] George Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (1936) 17 *British Yearbook of International Law* 1, 15.

the imposition of 'the economic sacrifice demanded on behalf of the community' is, to some extent, one that could be bound to an 'international minimum standard for equitable compensation'.[147] The debate over the appropriate standard of compensation took on particular prominence in the form of the two conceptions of the Hull Formula and the Calvo Doctrine and continues until today.[148] The Hull Formula goes back to a 1938 letter by US Secretary of State Cordell Hull after the nationalisation of US interests in Mexico and prescribed 'prompt, adequate and effective compensation.'[149] The Calvo Doctrine was developed by the Argentine jurist Carlos Calvo in the 19th century and prescribed the primacy of domestic law over an international standard of compensation.[150] What is often overlooked in the literature is the related but slightly different concept of unjust enrichment.[151] The principle is at the heart of the connection of acquired rights and compensation as described by O'Connell: 'The juridical justification for the obligation to pay compensation is to be found in the concept of unjustified enrichment, which lies at the basis of the doctrine of acquired rights.'[152] It has been relied on to argue for the application of the Hull Formula, rather than the Calvo Doctrine, and thus in favour of an international minimum standard rather than domestic discretion.[153] It is considered to provide a remedy precisely when there is no clear breach of law, but 'in cases when justice in a very fundamental sense requires it.'[154] Thus, at least the common law conception of the notion is rooted in an idea of natural law.[155] I already referred to its application in the *Lena Goldfields Arbitration* as a means to determine the appropriate compensation, which resulted in an enormous damages award in favour of the company.

[147] Ibid 15-6.

[148] In 1961 Shawcross defended the proposition that acquired rights of foreigners were always protected under the standard of compensation of the 'Hull formula'. Hartley Shawcross, 'The Problems of Foreign Investment in International Law' [1961] (102) *Recueil des cours de l'Académie de Droit International de la Haye* 335, 351.

[149] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed, 2012) 2.

[150] Ibid 1-2.

[151] For an account of the relationship of state succession and unjust enrichment, see Lauterpacht, *Private Law Sources and Analogies of International Law* (above n 123) 133.

[152] Daniel P O'Connell, 'Economic Concessions in the Law of State Succession' [1950] (27) *British Yearbook of International Law* 93, 121.

[153] Schreuer, 'Unjustified Enrichment in International Law' (above n 98) 285.

[154] Daniel P O'Connell, 'Unjust Enrichment' (1956) 5(1) *American Journal of Comparative Law* 2, 2.

[155] Ibid 4.

For our purposes, the most important category of acquired rights are concession agreements, which Lauterpacht characterised as a 'rather frail and undefined category of rights' in 1927.[156] Verdross also only mentioned concession agreements as one iteration of an acquired right in 1931.[157] There was indeed little to be said about concession agreements as a matter of public international law in the interwar period. Some peace treaties stipulated specific rules for the treatment of concessions, as we saw in the *Palestine Railway Arbitration*, but there were only a few cases involving such contracts. As described in chapter 3, Lauterpacht had only reluctantly included a note on the *Lena Goldfields Arbitration* in the Annual Digest of 1930.[158] By the time McNair wrote his article *The General Principles of Law Recognized by Civilized Nations* in 1957, the situation had changed, and the fate of concession agreements had become a major concern, often discussed as internationalisation of contracts.[159] The oil arbitrations, as a practical concern, had put concession agreements and arbitrations between states and companies at the centre of attention.[160] In his article, McNair did not offer a conclusive list of general principles in existence, but he gave two examples of 'likely candidates[s], among many, for recognition.'[161] It comes as no surprise that the two doctrines he proposed were 'unjust enrichment' and 'acquired rights'.[162] We see here that the scope of the natural law element that was at play in different versions in all the above accounts was the protection of contract and property from the sovereign sphere.

McNair did not rely on a notion of natural law, as Lord Asquith did, but emphasised the implied or explicit consent of the parties to the contract. This could be found in the clauses discussed above or in the reference to arbitration in the concession agreement itself.[163] However, traces of natural law resembling Lord Asquith's argument can also be found in McNair and Lauterpacht. The resort to 'equity' and 'justice', or one could argue to 'good faith' and 'reason'

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[156] Lauterpacht, 'Succession of States with Respect to Private Law Obligations' (above n 121) 133.

[157] Verdross, 'Règles internationales concernant le traitement des étrangers' (above n 139) 364.

[158] *The Lena Goldfields Arbitration* Annual Digest (above n 2).

[159] Sornarajah (above n 73) 289-99.

[160] Love Rönnelid, 'The Emergence of Routine Enforcement of International Investment Law: Effects on Investment Protection and Development' (Dissertation Thesis, Uppsala University, 2018) 83. Verdross also turned his attention to concession agreements and argued in a similar vein as McNair, see Alfred Verdross, 'Quasi-international Agreements and International Economic Transactions', *Yearbook of World Affairs* (Stevens, 1964) vol 18, 230.

[161] McNair, 'The General Principles of Law Recognized by Civilized Nations' (above n 73) 15-6.

[162] Ibid. See also Friedmann (above n 73) 295-9.

[163] McNair, 'The General Principles of Law Recognized by Civilized Nations' (above n 73) 7.

as guiding lights was deployed in explicit opposition to the positivist tradition.[164] Lauterpacht used the langue of ethics when discussing state succession. In citing Charles Cheney Hyde, he affirmed the argument that 'the ethical point of view tends in the direction of recognizing, (…) the principle of succession in the relation between States, that the practice of States tends in the same direction, and that a formal merger between ethics and law in this domain is only a question of time.'[165] Koskenniemi distinguishes Lauterpacht from launching '*simply* a naturalist critic of nationalism and sovereignty', but passages like the one cited above are important for showing the proximity between Lord Asquith's 'modern law of nature', McNair's 'new legal system' and Lauterpacht's vision of general principles for a seamless international law. It is precisely in this leap, in the short distance between the positivist stance and Lauterpacht's suggestion, that we find the door for the imposition of international legal rules on attempts by newly independent states to reorganise their economic systems.

c) From 'civilisation' to development

McNair's 1957 article located the necessity of a new international legal order in the context of a conflict between the countries of the global North, on the one hand, and Socialist countries and countries of the global South on the other. The internationalisation of concession agreements, and thus the protection of contract and property, prevented 'new' states from changing ownership and distributional structures. Proponents of this imposition justified it through the racialised qualifier 'civilised' that morphed into the concept of development. The wording in McNair's article is indicative of this transformation. Concession agreements were now called 'economic development agreements'[166] and McNair explicitly connected general principles, concession agreements and development. In the introduction to his article, McNair contended that general principles are

> likely to [enable] a legal system for the regulation of some of the now numerous contracts made between corporations (or, less commonly, individuals) belonging to countries which have capital and skill to spare, and the Governments of certain countries which have natural resources awaiting development but not enough capital or skill available for that purpose.[167]

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[164] Lauterpacht, *Private Law Sources and Analogies of International Law* (above n 123) 289-99. 'Law is not a spiritless and self-sufficient mechanism.' Lauterpacht, 'Succession of States with Respect to Private Law Obligations' (above n 121) 128. For an interesting account of a positivist conception of the notion 'civilised' and its consequences for the binding character of international law see Josef Kunz, 'Zum Begriff der "nation civilisée" im modernen Völkerrecht' (1927) 7(1) *Zeitschrift für Öffentliches Recht* 86.

[165] Lauterpacht, 'Succession of States with Respect to Private Law Obligations' (above n 121) 128.

[166] McNair, 'The General Principles of Law Recognized by Civilized Nations' (above n 73).

[167] Ibid.

In this linkage, McNair showed the continuity between the civilising mission of the 19th century and the development discourse of the 1950s.

He was careful to stress the economic perspective of his argument, speaking of material 'civilization' by which he did not want to 'suggest any moral superiority.'[168] McNair distanced himself from superiority established on moral grounds, but he did not distance himself from superiority as such. In a move traced by many postcolonial writers, the difference was now located in technical superiority.[169] McNair relied on difference in the degree of legal sophistication to justify the imposition: 'It is believed that the provisions, for instance, of the Islamic law respecting economic development agreements are very inadequate, if indeed there are any at all.'[170] He argued that the application of general principles was necessary 'to a contract in which the legal systems of the two countries involved present a strongly marked contrast, both in content and in *stage of development.*'[171] Based on this distinction, McNair promoted a double standard for the application of general principles to contracts between states and companies. In the relationship between a Western state and a company, the sovereign kept the prerogative of defining the legal environment for the operations of a company. In the relationship between a 'new' state and a company, the sovereign state and the company were equalled on two grounds. On the one hand, the company achieved quasi-sovereignty by elevating contracts to the status of treaties and thus making it much harder to unilaterally change their terms.[172] On the other hand, 'new' states were treated as private actors and considered to have renounced the sovereign prerogative to act in the public interest within that relationship.[173] The term 'civilised' thus enabled McNair to conceptualise contractual relations between a state and a company in the West differently than in the rest of the world.

If we now also consider Verdross' terminology, we can see the relationship between 'civilisation', development and liberalism. Verdross ascribed the failure of the League of Nations' Codification Conference of 1930, aiming at codifying multilaterally the responsibility

[168] Ibid 2.

[169] For a detailed account of the transformation of the notion of 'civilisation' to economic development in international law, see Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (above n 26).

[170] McNair, 'The General Principles of Law Recognized by Civilized Nations' (above n 73) 4.

[171] Ibid (emphasis added) 1.

[172] Anghie, *Imperialism, Sovereignty, and the Making of International Law* (above n 73) 234.

[173] Ibid. Confirming this point and on the role of corporations in the history of international law generally, see Fleur E Johns, 'Theorizing the Corporation in International Law' in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 635, 639.

of states for damage done in their territory to the person or property of foreigners, to a difference in the readiness to liberalise. 'Les Etats moins avancés' were proposing 'leurs idées peu libérales' which hindered the 'Etats avancés' from codifying their progressive and modern ideas.[174] In explicit terms, Verdross proposed that 'les Etats avancés' should establish this convention on their own and it would, hopefully by virtue of de facto application, become 'des vraies normes universelles'.[175] Thus, the actual relevance of the autonomy of the economic sphere was in regard to control over property in 'new' states, which appeared to not be liberal enough.

Self-determination and nationalisation as modes of resistance against colonial rule were difficult to square with the imposition of a transnational legal system on domestic matters. In his capacity as UN Special Rapporteur on Succession of States in respect of matters other than treaties, Mohammed Bedjaoui argued in 1968 that concessionary rights could neither be regarded as acquired rights nor could there be talk of compensation that would not consider the profits made through the concessionary enterprise.[176] It was precisely the battle over the economic sphere of the newly independent states that provided the background for the disputes over concession agreements. The resort to economic development dispersed this tension and enabled the maintenance of Western control without claiming cultural inferiority.[177] As Pahuja argues 'the separation of an economic sphere allows backwardness to be situated away from culture, preserving the dignity obtained by self-determination by attributing that backwardness to economic exploitation by the colonizer.'[178] This exploitation could now be remedied with the help of Western nations. President Truman introduced the tools for this undertaking in his inaugural address when he called 'for capital investment in areas needing development.'[179] He defined the horizon as development through economic growth for overcoming material underdevelopment. But in order to secure the necessary foreign 'help', as Truman would have it, the new sovereign state had to accept McNair's new legal system.

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[174] Verdross, 'Règles internationales concernant le traitement des étrangers' (above n 139) 393.

[175] Ibid 394.

[176] Bedjaoui, UN Doc A/CN.4/204 (above n 33) 115-7.

[177] Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (above n 26) 54.

[178] Ibid 65.

[179] Harry S Truman, 'Inaugural Address' (US Department of State, 20 January 1949).

5. Conclusion

British international lawyers elevated the jurisdiction over concession agreements from the domestic to the international sphere through a combination of a clause in concession agreements and an inventive legal argument. This practice was based in the broader policy of companies and imperial governments securing monopolies over oil resources through attaining concession agreements. The concession granted to the British company Petroleum Development (Trucial Coast) Ltd by the Sheikh of Abu Dhabi and the arbitration arising out of a dispute over this concession stands as an example of these practices. The Arbitrator Lord Asquith characterised Islamic law as archaic and unsuited for modern economic transactions, such as interpreting oil concessions. In consequence, he applied English law as an iteration of a 'modern law of nature' by reference to 'general principles of law recognized by civilized nations'. Contextualising the legal arguments developed in the *Sheik of Abu Dhabi Arbitration* in light of other arbitrations between British companies and states concerning resource concessions in the first half of the 20th century revealed that the same lawyers who drafted the concession agreements also developed the reasoning in the arbitrations. This combination allowed them to establish a circle of self-referential precedents that constituted the authoritative legal foundation for the internationalisation of concession agreements. McNair stressed the fact that he was not suggesting anything novel with his reliance on general principles, but that there was an 'emerging consensus of opinion' supporting it, and that his goal was 'to take stock of this trend.'[180] This consensus of opinion could certainly be found in the practice of these British international lawyers. Focusing on the network of lawyers in their different roles as protagonists in the arbitrations demystifies the aura of the awards, which are often taken as timeless and placeless iterations of 'the law'.

The theoretical underpinnings for the practice in the arbitrations are found in the scholarly writings of the same legal practitioners, such as Lauterpacht and McNair. They developed the relationship between general principles of law, the protection of private property and the notion of 'civilisation' that enabled the elevation of jurisdiction over concession agreements to the international sphere. The argument for the international sphere rested on a hierarchisation of difference embedded in the notion of 'civilisation' that later turned into the notion of development after the Second World War. As Anghie describes it, two of the discussed arbitrations, the *Sheikh of Abu Dhabi Arbitration* and the *Ruler of Qatar Arbitration*, are 'now

[180] McNair, 'The General Principles of Law Recognized by Civilized Nations' (above n 73) 2.

regarded with a certain embarrassment.'[181] Recalling Lord Asquith's condescending rhetoric, this comes as no surprise. But it is the tone and not the argument that scholars distance themselves from. The hierarchisation of difference remains the underlying assumption for the development discourse and underpins the internationalisation of contracts until today. Chapter 5 develops how the principles of the sanctity of contract and the prohibition of unjust enrichment turned into more elaborate rules in a draft convention for the protection of foreign property.

[181] Antony Anghie, Imperialism, *Sovereignty and the Making of International Law* (Cambridge University Press, 2008) 226. Charles Brower reflects on the arbitration as follows: 'To Islamic eyes, the entire experience no doubt was redolent, if not an extension, of the old "Capitulations" system of extraterritorial courts administered by European powers.' Charles N Brower and Jeremy K Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97(3) *American Journal of International Law* 643, 644.

Chapter 5 – The Abs-Shawcross Draft Convention 1959

There is only one means apt to implement protection [of foreign property], and that is an International Convention. Such a convention, I may call a Magna Carta for the protection of foreign interests.

Hermann Josef Abs, 1957[1]

1. Introduction

The 1959 *Abs-Shawcross Draft Convention* marks an important year in the early history of international investment law. Many accounts locate the origin of the field in 1959 with the ratification of the first bilateral investment treaty between Germany and Pakistan of the same year. This chapter aims at situating the *Abs-Shawcross Draft Convention* as a continuation, rather than a beginning, of the development of norms in the field of international investment law. The Draft Convention is one of the first to contain provisions that are recognisable to contemporary investment lawyers, but their content is an iteration of the older claims of the principles of acquired rights and the prohibition of unjust enrichment. The chapter demonstrates that the *Abs-Shawcross Draft Convention* brought the internationalisation of legal authority over concession agreements into formal shape.

The chapter is structured as follows. It introduces the collaboration of the British international lawyers with Herman Josef Abs and the resulting amalgam of British oil and German banking interests, which constituted the main economic driving forces in the advancement of investment protection in the 1950s. As the name indicates, the Draft Convention was proposed by the British lawyer Sir Hartley Shawcross and the German banker Hermann Josef Abs. The proposed norms of the Draft Convention were closely linked to the practice established by British international lawyers in the first half of the 20th century and discussed in the previous three chapters. The chapter then moves to discuss the jurisdictional techniques deployed in the Draft Convention to further the internationalisation of international economic law as reaction and opposition to socialist and anti-colonial politics. The authority for these propositions was drawn from development discourse embedded in the emerging Cold War. Development through

[1] James Daniel (ed), *Private Investment: The Key to International Industrial Development: A Report of the San Francisco Conference, October 14-18, 1957* (McGraw-Hill, 1958) 76-7.

private investment and its legal protection became a means of 'containment policy'. The chapter concludes by describing the connection between the legal theoretical propositions represented in the Draft Convention and (neo)liberal thinking at the time.

2. The Draft Convention in context

Hermann Josef Abs was a prominent figure in German economics and a member of the elite who successfully continued to be influential despite occupying key positions in Nazi Germany.[2] As the head of the German Bank for Reconstruction between 1948-1952, he implemented the Marshall Plan and negotiated German foreign debt, concluding the London Agreement in 1953.[3] He had a strong influence in establishing the German economy as an export economy in both goods and capital and fostered the adoption of instruments for the legal protection of foreign capital.

As early as 1957, Abs advanced his attempt to propose a *Magna Carta for the Protection of Private Property Abroad* at the Conference for Industrial Development in San Francisco, an international meeting of 550 businessmen from all over the world.[4] The proposal for an agreement to establish a common standard of treatment for private property abroad was not new. Other drafts had unsuccessfully proposed a codification of the law of treatment of aliens and the protection of foreign property, such as the draft by

[2] An in-depth account of Abs' involvement and responsibilities during the Third Reich is still lacking and his role continues to be controversial. Despite the importance of this research I will be interrogating Abs' role in the years after WW II especially regarding his engagement with the protection of private property abroad. A biography including an extensive chapter on Abs' professional responsibilities during the Third Reich appeared in 2004 written by the German historian Lothar Gall. Even though the account contains very helpful archival material and is well documented the praising tone gives away a biased position. See Lothar Gall, *Der Bankier Hermann Josef Abs: eine Biographie* (CH Beck, 2004). A reviewer of the biography put this concern as follows: 'It is difficult to ignore a rising suspicion that Gall has given more weight to the moments that could speak in Abs' favour than to others.' Simone Lässig, 'Der Bankier Hermann Josef Abs: Eine Biographie' (2008) 26(3) *German History* 446. On the other end of the spectrum are the accounts of Eberhard Czichon who lost a lawsuit in 1970 initiated by Abs, and his account was labelled politically tendentious and lacking scientific rigor. See Eberhard Czichon, *Hermann Josef Abs: Porträt eines Kreuzritters des Kapitals* (Union Verlag, 1969). The most nuanced account so far was produced by Harold James as part of a self-initiated retrospective of the Deutsche Bank. Harold James, *The Deutsche Bank and the Nazi Economic War Against the Jews: the Expropriation of Jewish-owned Property* (Cambridge University Press, 2001); Harold James, *The Nazi Dictatorship and the Deutsche Bank* (Cambridge University Press, 2004).

[3] For an account of his influence on German economic policy and the various official mandates he held after the Second World War, see Gall (above n 2) 142-206.

[4] For a full report on the four-day conference see Daniel (above n 1).

a research group at the Harvard Law School in 1929[5] or one prepared by the International Chamber of Commerce in 1949.[6] The draft convention presented by Abs in 1957, entitled *International Convention for the Mutual Protection of Private Property Rights in Foreign Countries,* had been suggested by a German private association, the Gesellschaft zur Foerderung des Schutzes von Auslandsinvestitionen, which was founded in the same year.[7] Professor Hans Doelle, a German professor of private international law, was one of Abs' main collaborators in drafting the document.[8] This draft convention of the German Association for the Protection of Private Property Abroad was then further developed by Abs and Shawcross, and re-proposed in 1959. It is this latter draft that made its way into common accounts of the history of investment law as the *Abs-Shawcross Draft Convention* or with its official title, *Draft Convention on Investments Abroad*.[9] As the name indicates, it was never adopted as a multilateral convention, but it influenced many other documents in the international investment regime, most importantly the early bilateral investment treaties.[10]

The Draft Convention did not emerge solely as a German project, it was heavily influenced by the British tradition that had developed in both arbitral practice and academic writings.[11] Shawcross, the co-drafter, had most prominently held the office of

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[5] Research in International Law at Harvard Law School, 'The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners' (1929) 23(2) *American Journal of International Law* 131.

[6] International Chamber of Commerce, *International Code of Fair Treatment for Foreign Investments*, Brochure No 129 ('*International Code of Fair Treatment for Foreign Investments*'); Arthur S Miller, 'Protection of Private Foreign Investment by Multilateral Convention' (1959) 53(2) *American Journal of International Law* 371, 372.

[7] The full text of the draft including a commentary was published in Hermann Josef Abs, *Proposals for Improving the Protection of Private Foreign Investments* (Institut International d'Etudes Bancaires, 1958).

The society states as its purpose 'The society unites independent personalities in German business, law and politics, their object being to help remove the disregard of vested foreign rights and interest in international business which has become more noticeable after the last war and make constructive suggestions upon how this unfortunate development can be reverted which is undermining the free world economy and international confidence.' Miller (above n 6) 371.

[8] Manfred Pohl, *Hermann J Abs: eine Bildbiographie* (v Hase und Koehler, 1981) 92.

[9] 'The Proposed Convention to Protect Private Foreign Investment: A Roundtable: Introduction' (1960) 9(1) *Journal of Public Law* 115.

[10] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed, 2012) 8. Anna De Luca, 'Umbrella Clauses and Transfer Provisions in the (Invisible) EU Model BIT' (2014) 15(3-4) *The Journal of World Investment & Trade* 506, 508. Abs argued in favour of a wide net of similarly worded bilateral treaties as alternative to an international convention as early as August 1959. Hermann Josef Abs, 'Die Konjunktur bleibt ruhig' [1959] (32) *Vortragsreihe des Deutschen Industrieinstituts* 1, 3-4.

[11] See chapter 4 on the *Sheikh of Abu Dhabi Arbitration*.

Attorney General for Great Britain from 1945-1951 and was Britain's lead prosecutor in the Nuremberg Trials. However, besides these offices, he also served as the President of the Board of Trade in 1959 and most importantly, in a private capacity, he worked as legal advisor to the oil company Royal Dutch Shell over the course of many years and as early as 1956.[12] As a lawyer, Shawcross had collaborated with those international lawyers who had gathered experience and authority in the nascent field of international investment arbitration, such as Sir Hersch Lauterpacht, Sir Arnold McNair and Sir Humphrey Waldock.[13] Hersch Lauterpacht's son, Elihu Lauterpacht, was actively involved in the preparation of the Draft Convention and particularly in the dispute resolution clause.[14] Shawcross and Abs met for the first time after Abs' speech at the San Francisco Conference for Industrial Development in 1957 and started a collaboration in the form of a study group that called itself Association for the Promotion and Protection of Private Foreign Investment.[15] This study group, consisting of lawyers, diplomats and businessmen, produced the draft that has come to be known as the *Abs-Shawcross Draft Convention*.[16]

Abs and Shawcross represented the two industries driving the efforts towards a convention on the protection of investment abroad, namely banking and oil. In the previous chapter, we saw the role that oil concessions played in the internationalisation of the legal regime on foreign property protection.[17] However, to understand why a banker became an activist for the promotion of an international legal order protecting private property and the sanctity of contract, we have to appreciate the role of finance and the self-understanding of bankers with regard to foreign investments.[18] Abs described this link as follows:

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[12] Shawcross (above n 148) 247, 308, 39.

[13] See chapter 4 on the *Sheikh of Abu Dhabi Arbitration*.

[14] Yuliya Chernykh, 'The Gust of Wind: the Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention' in Stephan W Schill et al (eds), *International Investment Law and History* (Edward Elgar, 2018) 241.

[15] Hartley Shawcross, *Life Sentence: the Memoirs of Lord Shawcross* (Constable, 1995) 308.

[16] Ibid.

[17] See chapter 4 on the *Sheikh of Abu Dhabi Arbitration*.

[18] The relationship between industry and high finance was particularly close in the Germany ever since the end of the 19th century. Karl Polanyi, *The Great Transformation* (Beacon Press, 2001 (originally published 1944)) 17.

> At the present time, when on the one hand the current depreciation of money is particularly serious, and on the other hand direct and indirect acts of interference by public authorities with private property rights are spreading, the banks have a higher duty. They have in fact a duty (…) to use their influence with Government, in every possible way, to ensure that (…) their customers' interest in property shall remain inviolate.[19]

Abs asserted that 'in this matter the banks perform an essential economic and even political function, without which economic order on Western lines cannot be maintained.'[20] With similar pathos, he proclaimed that banks needed to contribute 'as a bulwark against both excessive governmental influence and the spread of collectivist views, and towards ensuring the soundness and stability of the world's economy and of currency.'[21] For Abs, the protection of property from foreign government interference was directly linked to the general protection of capital. Since financing of large-scale development projects was one of the most important ventures at the time, banks enjoyed a privileged position of power.

a) German foreign debt

The question of foreign debt was another side of the involvement of banks. Abs keenly sought to resolve the question of German foreign debt, which he considered a condition for the possibility of the reestablishment of German credit and thereby opportunities to export and import globally.[22] An important preliminary question was whether the German Republic was a successor to the German Reich and thus responsible for the foreign debt previously acquired.[23] A similar debate had taken place after the Soviet Revolution: the need to repay the debts of a predecessor regime had already been claimed as a fundamental principle of the law of nations.[24] As we saw in the chapter on the *Lena Goldfields Arbitration*, it was one of the contentious points in the debate about the establishment of political and economic relations between the Soviet Union and the Allied governments.[25]

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[19] Abs, *Proposals for Improving the Protection of Private Foreign Investments* (above n 7) 15.

[20] Ibid.

[21] Ibid 17.

[22] Pohl (above n 8) 76.

[23] Ibid 78.

[24] See chapter 4 on the *Sheikh of Abu Dhabi Arbitration*.

[25] See chapter 3 on the *Lena Goldfields Arbitration*.

In order to solve the question of German foreign debt, the London Debt Conference took place in a number of sessions, spanning from June 1951 to February 1953. The German chancellor Adenauer appointed Abs as head of the German delegation.[26] At the time the United States was by far the largest creditor of Germany followed by the United Kingdom and France. The Allied powers reduced their demands significantly,[27] and Abs tried to illustrate the weak state of the German economy by exhibiting maps of the reduced and split German territory. Apparently, the German delegation even published a rhyme commenting the situation in a London newspaper.

> There was a man called Abs
> he believed as it were in maps
> but as much as he pleaded
> he never succeeded
> to prove that maps were not traps.[28]

Most likely not owing to this rhyme, but rather to the negation skills of the protagonists, the London Debt Agreement was finally signed and ratified in September 1953.

b) German property abroad

Germany wanted to include the issue of German property abroad in the London Debt Agreement, but the value of those properties was not clearly established at that time, so it was eventually left out.[29] Similarly, the question of reparations was not dealt with in the *London Agreement*, and the Allies had decided not to satisfy their demands from ongoing economic production.[30] The Allies wanted to rely on the confiscation of the German property during wartime as reparations, as was established in the *Paris Agreement* of 1946.[31] Besides being the largest creditor, the United States also held the largest amount of German property, which was estimated at approximately $300

[26] Abs reflected on this experience on a number of occasions, especially in a 300-page account of the events. Hermann Josef Abs, *Entscheidungen: 1949-1953 Die Entstehung des Londoner Schuldenabkommens* (v Hase und Koehler, 1991). See also Hermann Josef Abs, *Zeitfragen der Geld- und Wirtschaftspolitik: Aus Vorträgen und Aufsätzen* (Knapp, 1959) 11; Hermann Josef Abs, *Aussenpolitik und Auslandsschulden: Erinnerungen an das Jahr 1952* (Universitätsverlag Konstanz, 1990).

[27] USA: $3.2 to 1.2 billion, UK: £200 to 150 million, France $16 to 11,8 million. Pohl (above n 8) 81.

[28] Ibid 82.

[29] Ibid 77.

[30] Ibid.

[31] Ibid 90.

million.[32] Abs travelled to Washington on behalf of chancellor Adenauer in 1955 to discuss the possible return of the German assets. The actual return of the property was a difficult question, since the above-mentioned Paris Agreement between the Allies of 1946 foresaw the opposite, namely the use of German private property for the satisfaction of reparation costs. In addition, around $225 million of the total sum had already been liquidated and used for compensatory payments to American soldiers who had been kept as prisoners of war around the world.[33]

In his official address in Washington in 1955, Abs focused on the liberal spirit of the United States with respect for property and the individual, especially in opposition to a growing 'communist threat'.[34] He framed his argument as a matter of principle and asked the audience to forget that he was speaking as a German.[35] Instead Abs appealed to the American tradition of liberal statesmen like Alexander Hamilton, Cordell Hull and John Foster Dulles and their commitment to the protection of private property.[36] With some pathos, he asked the United States to lead the way in 'winning the hearts of the people in achieving this common aim.'[37] At the end of his speech, Abs returned to the question of German private property in the United States and asserted the German willingness to join the Western economic system, as well as the Western system of collective security. Abs insisted, however, that the German people would be easier persuaded of this path if the United States made the important gesture of returning German property.[38] Thus, Abs' efforts in the field of investment protection were also driven by the attempt to return confiscated German foreign property to the German economy after failing to include it in the London Debt Agreement.

[32] Abs, *Zeitfragen der Geld- und Wirtschaftspolitik: Aus Vorträgen und Aufsätzen* (above n 26) 68.

[33] Ibid 67. The soldiers were compensated for the fact that the conditions in prison were not up to the standards of the Geneva Conventions and that they were subjected to inhumane treatment. American congress allocated a compensation of $1 and $1.50 per day for prisoners incarcerated under these conditions. See ibid 68-9.

[34] Ibid 44-5.

[35] Ibid 45.

[36] Ibid 46.

[37] Ibid 52.

[38] Ibid 53-4.

3. The Draft Convention and its reception

In the same speech in Washington in 1955, Abs had suggested that the United States champion an international convention, a Magna Carta, for the protection of property around the world.[39] He repeated and refined this proposition in the speech in 1957 at the Conference for International Industrial Development in San Francisco, where Abs suggested that there was only 'one means likely to implement such protection and that is an international convention (…) such a convention which I may call a Magna Carta for the protection of foreign interest.'[40]

The *Abs Shawcross Draft Convention* consisted of ten articles and an annex.[41] It developed provisions that are still common in investment treaties today, e.g. on fair and equitable treatment, on full protection and security, on expropriation and compensation, and definitions of the terms 'nationals' and 'property'.[42] It is a document that gave concrete expression to the idea of general principles for the protection of private property. The lawyer Michael Brandon, who served as secretary of the Association for the Promotion and Protection of Private Foreign Investments at the time, characterised the draft as 'one of the most advantageous ways of commanding, by reaffirmation of the general principles of law, the agreement of both borrowing and lending countries.'[43] The Association for the Protection and Promotion of Foreign Investments summarised their core commitments as four interrelated principles.

> 1. Specific engagements by States must be carried out by application of the rule 'Pacta sunt servanda'.
>
> 2. Prompt, adequate and effective compensation in the event of direct or indirect dispossession.
>
> 3. Aliens and their property must be treated without discrimination.

[39] Ibid 52.

[40] Daniel (above n 1) 76-7. A slightly different version of the speech is reproduced in Abs, *Zeitfragen der Geld- und Wirtschaftspolitik: Aus Vorträgen und Aufsätzen* (above n 26) 285.

[41] The text of the Draft Convention was published in the *Journal of Public Law* of 1960. (above n 9). In the same issue both authors, as well as other scholars and practitioners commented on the draft. Another comment by Ignaz Seidl-Hohenveldern was published in the same journal a year later. Ignaz Seidl-Hohenveldern, 'The Abs-Shawcross Draft Convention To Protect Private Foreign Investment: Comments on the Round Table' (1961) 10 *Journal of Public Law* 100.

[42] An overview of the formulations can be found in Chernykh (above n 14) 253.

[43] Michael Brandon, 'Recent Measures to Improve the International Investment Climate' (1960) 9 *Journal of Public Law* 125, 125.

4. Settlement of disputes by means of neutral arbitration.[44]

We can recognise the principle of acquired rights in the form of *pacta sunt servanda* and the prohibition of unjust enrichment in the right to compensation, precisely the two principles McNair listed as established 'general principles of law recognized by civilized nations'.[45] Thus, we can trace the development of the rules for the protection of property abroad through these core propositions to the *Abs-Shawcross Draft Convention*.

a) Formalised internationalisation

An important novelty in the *Abs-Shawcross Draft Convention* was the so-called umbrella clause, 'bringing concession contracts under the umbrella of protection'[46] of treaties between states.[47] The umbrella clause in Article II of the draft read as follows: 'Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other Party.'[48] This notion was intended to cover contractual undertakings between foreign private investors and the state.[49] As such, it would elevate a breach of a contractual obligation to a breach of the convention, a technique that was retrospectively called 'naïve internationalisation (…) attracting through treaty law the full application of the *pacta sunt servanda* norm without much regard to its exceptions.'[50] Elihu Lauterpacht had argued for a precursor of the umbrella clause in the negotiations for the renewed consortium agreement between the Anglo-Iranian Company and Iran in 1954.[51] In an opinion written for the negotiations, he suggested an 'umbrella treaty' between the United Kingdom and Iran that would automatically render a breach of the consortium agreement a breach of treaty obligations,

[44] Restated in ibid 126. In a speech to the German Industrial Institute, Abs named the same four principles. See Hermann Josef Abs, 'Die internationalen Wirtschaftsbeziehungen' (1961) 28 *Vortragsreihe des Deutschen Industrieinstituts*, 3.

[45] Arnold D McNair, 'The General Principles of Law Recognized by Civilized Nations' [1957] (33) *British Yearbook of International Law* 1.

[46] Seidl-Hohenveldern, 'The Abs-Shawcross Draft Convention To Protect Private Foreign Investment: Comments on the Round Table' (above n 41) 104.

[47] Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Zachary Douglas et al (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014) 26.

[48] 'The Proposed Convention' (above n 9) 116.

[49] Anthony C Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) 20(4) *Arbitration International* 411, 421-2.

[50] Ibid 425.

[51] Chernykh (above n 14) 262.

'providing for mandatory parallel jurisdiction of the ICJ.'[52] The umbrella treaty never eventuated, but E. Lauterpacht took the idea a step further with the formulations in the *Abs-Shawcross Draft Convention*. In addition to the wording of the clause, he proposed the procedural right to arbitration not only for the state but also for the company. The final version of the dispute resolution clause in Article VII (2) in the published draft read as follows:

> A national of one of the Parties claiming that he has been injured by measures in breach of this Convention may institute proceedings against the Party responsible for such measures before the Arbitral Tribunal referred to in paragraph 1 of this Article, provided that the Party against which the claim is made has declared that it accepts the jurisdiction of the said Arbitral Tribunal in respect of claims by nationals of one or more Parties, including the Parties concerned.[53]

Lauterpacht considered this to be 'the principal element of novelty'[54] that he introduced in the second working draft of the convention.[55] When read in conjunction with Article VII (2), we can see that in case a state does not consent to arbitration, state-to-state arbitration before the ICJ is the default option. This dual system can be read as a 'watertight'[56] attempt to prevent a repetition of the Anglo-Iranian dispute, in which the ICJ had denied jurisdiction.[57] Importantly, this construction also provided for standing of companies vis-à-vis states. As I described in the previous chapters, corporations were afforded standing in a number of earlier arbitrations based on contractual arrangements,[58] but it was not until the *Abs-Shawcross Draft Convention* that this practice was formalised into an instrument of public international law.[59]

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[52] Ibid. E Lauterpacht expressed it as follows: 'A breach of the contract or settlement shall be *ipso facto* deemed to be a breach of the treaty.' Lauterpacht cited in Sinclair (above n 49) 415.

[53] 'The Proposed Convention' (above n 9) 117.

[54] Chernykh (above n 14) 267.

[55] Ibid.

[56] Sinclair (above n 49) 416.

[57] See chapter 4 on the *Sheikh of Abu Dhabi Arbitration.*

[58] One of the first arbitrations granting standing to a company might have been the *Suez Canal Arbitration* from 1864, see Jason Webb Yackee, 'The First Investor-State Arbitration: The Suez Canal Company v Egypt (1864)' (2016) 17(3) *Journal of World Investment & Trade* 401. See also chapter 1 on the *Palestine Railway Arbitration*.

[59] See also Chernykh (above n 14) 256. The following section relies on the archival research undertaken by Julia Chernykh in the personal archives of Sir Elihu Lauterpacht.

b) Scholarly reactions

The commentaries of the time on the proposed Draft Convention and the role of foreign investment generally noted that the convention had a pro-investor bias. Arthur Larson, a professor of Law at Duke University at the time, perceived the proposed rules as one-sided favouring the investor. He argued that

> the principal flaw in the Draft Convention is its one-sidedness. In form it is even-handed. That is, at every point the rights it confers and the duties it exacts apply identically to 'each party'. In the same way, as Anatole France pointed out, the law forbids both the rich man and the poor man to sleep in the park. In substance, however, the entire concern of the Convention is the protection of the rights of the investor. There are no provisions motivated by concern for the rights of the host country.[60]

Larson emphasised one of the most important critiques of contract in the liberal conception, namely its appearance of reciprocity and even-handedness. The concept of a contract assumes equality between the parties. Yet, this assumption is hardly grounded in reality. Robert Hale stated that 'a careful scrutiny will, it is thought, reveal a fallacy in this view, and will demonstrate that the systems (…) are in reality permeated with coercive restrictions of individual freedom' and that 'coercive restrictions are bound to effect the distribution of income and the direction of economic activities.'[61] In the context of the protection of property abroad, it is precisely through the concept of contract that historic arguments of prior exploitation and structural asymmetries were cut out of the debate.

Georg Schwarzenberger, a British international lawyer, directed attention to another important aspect of the Draft Convention. He pointed to the backgrounds of the drafters, Abs and Shawcross, and called for the clarification of the actual purpose of the Draft Convention with industrial interests as driving force. As discussed above, the oil and banking industry drove the protection of concessionary rights. Thus, Schwarzenberger hit the mark when he stated that:

> Something is perhaps to be said for reformulating the first two paragraphs of the Preamble in less circuitous language so as to bring the salient points into the open. The banking interests concerned are ready to export surplus capital to countries which can offer investors more attractive yields than can be obtained at home or in any of the other industrialised countries. Most of the oil interests involved are even more inescapably

[60] Arthur Larson, 'Recipients' Rights Under an International Investment Code' [1960] (9) *Journal of Pubic Law* 172, 172.

[61] Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38(3) *Political Science Quarterly* 470, 470.

> linked with the marginal countries which are the source of a considerable, if not the greater, part of their revenues. Thus, both groups try to improve by way of a multilateral convention what, in the light of Anglo-Dutch and American experiences in the past, is somewhat precarious: legal protection against default of their obligations by debtor states and grantors of concessions.[62]

The governor of the Central Bank of the Philippines responded to Abs' proposition at the Conference for Industrial Development in San Francisco by pointing to the power such a framework yielded.

> It is not, that these countries [of the global South] do not appreciate what foreign investment can do to hasten the pace of their economic development. Rather it is their national desire to have a larger share in economic undertakings. Their citizens want to become industrialist, business men and financiers in their own lands. They realize that if they are to have this opportunity, now is the time for them to engage in the establishment and operation of industries, financial institutions, large-scale modern farming, and other forms of business – not after such economic activities shall have fallen into the hands of foreign elements.[63]

The position of the Governor shows that the promise of one day becoming like the West, at least in economic terms, was taken seriously. But it also indicates an awareness of the lack of agency the South would suffer through the adoption of the proposed rule.

In a slightly amended version, the OEEC, later OECD, considered the Draft Convention as a multilateral framework between 1960-1965.[64] It was ultimately not adopted, but the OECD suggested it as blueprint for bilateral investment treaties, and it had a strong influence on the provisions in later treaties.[65] Countries of the South rejected its adoption and argued that it the Draft 'entail[ed] the suspicion of collective imperialism and neocolonialism.'[66] Indeed, contemporary accounts consider the refusal of capital-importing countries to submit to such a regime the main reason for its failure.[67] Despite all these challenges, the drafters insisted that the rules contained in the Draft Convention were merely a reflection of the status quo and by no means a proposition of something

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[62] Georg Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investments Abroad: a Critical Commentary' [1960] 9 *Journal of Pubic Law* 147, 148. Similar comments have been made by Arthur S Miller, an American professor of Law, on the first proposed draft. See Miller (above n 6) 375.

[63] 'Investment Code for World Urged: German Banker Proposes International Convention to Protect Capital', *New York Times* (16 October 1957) 49.

[64] MJ van Emde Boas, 'The OECD Draft Convention on the Protection of Foreign Property' (1963) 1(3) *Common Market Law Review* 265, 269.

[65] Dolzer and Schreuer (above n 10) 8; De Luca (above n 10) 508.

[66] van Emde Boas (above n 64) 284.

[67] Dolzer and Schreuer (above n 10) 8.

novel. 'The Draft Convention restates, in the first instance, what is believed to be fundamental principles of international law regarding the treatment of the property, rights and interests of aliens. These principles have a broad basis in the practice of civilized states.'[68] With specific regard to the standing of private companies, the authors argued that it was 'no real departure from legal tradition.'[69] In a similar vein, Shawcross defended the existence of a rule for prompt, adequate and effective compensation in his Hague lecture of 1961.[70] As evidence for his claim, he cited the settlement agreements of both the Anglo-Iranian case and the Suez crisis.[71] However, both these instances were accompanied by military interventions before the settlements were reached. As the statements by E. Lauterpacht and other commentators evidence, international lawyers at the time were well aware of the inventive character of the propositions. Framing the rules as established international law was thus not only an attempt to render the previous nationalisation policies illegal *pro futuro*, it implicitly declared them illegal in the past.

c) Financing for development

These far reaching novelties were mainly grounded in development discourse. In a speech delivered to a regional German industrial association in 1959, Jonathan Savi de Thové, a Togolese anti-colonial politician and then head of parliament, gave a clear outline of the implications of development as Western modernisation in Africa. Even though Savi de Thové was not involved with negotiations on the protection of investment abroad, his characterisation is apt. First, he pointed out that development according to Western standards would mean the artificial creation of a market society with commercial needs and the transformation of large portions of the society into workers to earn money to fulfil those needs.[72] De Thové further observed that the achievement of such a transformation would depend on funding by Western states and that, finally, the character of the negotiations about such funding and the conditions to receive it left the Togolese people with an inferiority complex – *Minderwertigkeitskomplex*.[73] With this statement, de Thové

[68] 'The Proposed Convention' (above n 9) 119.

[69] Ibid 123.

[70] Hartley Shawcross, 'The Problems of Foreign Investment in International Law' [1961] (102) *Recueil des cours de l'Académie de Droit International de la Haye* 335, 344.

[71] Ibid 348-9.

[72] Jonathan Savi de Thové, 'Entwicklungshilfe aus afrikanischer Sicht' [1961] (26) *Vortragsreihe des Deutschen Industrieinstituts*, 2.

[73] Ibid 4.

encapsulated three fundamental aspects of the Western developmental project. First, he noted one of the most important and yet rarely emphasised aspects of the notion of 'civilisation', namely that 'civilisation' does not only mean a particular cultural configuration, but the development of capitalist relations of production.[74] Second, de Thové's statement drew attention to the dimension of the Cold War and the strategic dependence on Western capital that was embedded in the notion of development. Third, de Thové described the hierarchy within the developmental structure, with Europe and the US as the productive centres and the South as the recipient of this productivity.[75] This section develops these three aspects and their relationship to the legal framework in international investment law.

In his speech at the Conference for Industrial Development in San Francisco in 1957, Abs opened with a reference to President Truman's *Four Point Program* and the development project. He claimed that Europe and the United States were under 'a joint obligation to make available as large a percentage as possible of their financial and technical capacities for building up the economies within the less developed countries and for the promotion of the living standards of their peoples.'[76] The quote expressed the transformational character of the development project. Economies were to be 'built up' and livings standards to be 'promoted', thus, it was precisely the kind of change that de Thové described from a 'pre-individualist time of subsistence' to a 'modern society'.[77] In order to succeed in this undertaking, the state would have to 'kindle new needs', to 'induce its citizens to become labourers' and to 'loosen familial and tribal ties'.[78] He described a transformation into a capitalist market society in the name of modernisation. This idea of a transformation was not novel, rather, it was the continuity of a process already underway in the 19th century. As Tzouvala puts it: 'radical social transformation of non-Western polities to include them in the circle of "civilized" states' was characterised by 'institutional, legal and political preconditions for the development, stabilization and

[74] Ntina Tzouvala, 'Civilization' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar, 2019) 83, 99.

[75] James Morris Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, 1993) 28.

[76] Abs, *Zeitfragen der Geld- und Wirtschaftspolitik: Aus Vorträgen und Aufsätzen* (above n 26) 293.

[77] This is my own translation of the German original. Savi de Thové (above n 72) 2.

[78] Ibid.

reproduction of the capitalist mode of production.'[79] Thus, what came first was the idea of modernisation as the establishment of a market society. Only in a second step, after the necessity of such a transformation was constituted as a general framework, did it make sense to speak of the tools to consolidate such a society through private rights, the protection of property and the sanctity of contract. The way concession agreements were secured through a reliance on 'general principles of law recognized by civilized nations', namely the protection of a acquired rights and the prohibition of unjust enrichment, shows that the tools for a transformation into a market society rested on the notion of 'civilisation'.[80] In the 1950s the language of 'civilisation' started to disappear from usage and began to be seen as an embarrassment,[81] but its transforming function remained and morphed into other concepts. As Pahuja has argued, the notion of development was one of the most powerful new concepts holding the same structural idea, namely offering 'a way to maintain both the putative objectivity of the key concepts of international law and a hierarchy of states but, crucially, it [development] did so without resorting to the now uncomfortable ideas of race or civilisational superiority.'[82]

The other implication of a claim for financing for development arose out of East-West rivalry. For Abs, the Free world and the Soviet world, which both depended on the acquisition of capital from abroad, were proposing two different paths of development for newly independent states.[83] Richard Gardner gave clear evidence of the competition between East and West in an essay on the importance of investment protection in 1959.

> We need not fear Communist investment in these countries [of the South] as long as it is relatively small in comparison with investment by the West. But when the Communist bloc becomes the main source of foreign capital for an underdeveloped country, it will use its influence thus gained to detach the country from the free world. Should this strategy prove successful in the case of some larger underdeveloped countries like India

[79] Tzouvala, 'Civilization' (above n 74) 99.

[80] See chapter 4 on the *Sheikh of Abu Dhabi Arbitration*.

[81] Tzouvala, 'Civilization' (above n 74) 93.

[82] Sundhya Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2013) 93.

[83] Hermann Josef Abs, *Der Schutz wohlerworbener Rechte im internationalen Verkehr als europäische Aufgabe: Betrachtungen zur Entwicklung der Suezkrise* (Recht und Wirtschaft, 1956) 6-7.

> and Indonesia, the Communists would profoundly alter the balance of political and economic power. We cannot afford to let this happen.[84]

Against this background, Abs' argument oscillated between a strategic and an altruistic component. On the one hand, he claimed that the West found itself in its 'decisive struggle for survival against communism'[85] so that the establishment of the liberal order in as many countries as possible became a matter of utmost political urgency. On the other hand, Abs framed foreign investments as generous gestures that could only be responded to by securing capital through a liberal rights regime. When answering the polemic question why Western countries kept providing capital to insecure markets where they received nothing but 'ingratitude' – *Undank*,[86] he responded that it was first and foremost due to 'humanitarian reasons'.[87] Second, Abs argued that the stakes in the battle against Communism were no less than the possible 'enslavement' of all peoples.[88] Third, he suggested that Western countries falsely believed that the East had sufficient means to provide for the development plans of the newly independent states and underestimated the West's relative power.[89]

India was one of the main sites for the East-West rivalry in development politics.[90] Together with the chairman of Lloyds Bank, Sir Oliver Franks, and the former president of the Federal Reserve Bank of New York, Allan Sproul, Abs travelled through India and Pakistan on behalf of the World Bank in 1960. They concluded their trip with a report to Eugene Black, then president of the World Bank.[91] In holding with the mantra of development, they found that, despite all the differences between the two countries, the

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[84] Richard N Gardner, 'International Measures for the Promotion and Protection of Foreign Investment' (1960) 53 *Proceedings of the American Society of International Law at its Annual Meeting (1921-1969)* 255-66, 177.

[85] Abs, *Der Schutz wohlerworbener Rechte im internationalen Verkehr als europäische Aufgabe: Betrachtungen zur Entwicklung der Suezkrise* (above n 83) 6. The German original reads as follows: 'Der Westen [steht] im entscheidenden Überlebenskampf mit dem Kommunismus'.

[86] Ibid 10.

[87] Ibid.

[88] Ibid 12.

[89] Ibid.

[90] Gall (above n 2) 303.

[91] Bankers' Mission to India and Pakistan (February-March 1960) A letter to Mr Eugene R Black in *World Bank Group Archives* (Washington DC).

main problem for both consisted in 'the shortage of capital resources in relation to the needs of development.'[92]

Abs lamented that few understood that the background of all attempts at nationalising foreign property were at the heart of the Cold War, which was a battle against the liberal economic positions of the West.[93] This framing also gave Abs the background to victimise the capital exporters who allegedly found themselves in 'fear of communist penetration', a state of affairs 'exploited by the concerned countries.'[94] When Abs spoke of 'a joint obligation to make available as large a percentage as possible of their [Europe's and the US'] financial and technical capacities for building up the economies within the less developed countries',[95] he characterised private investors' readiness to invest in the global South as a charitable act to be fully honoured. It was not the 'White Man's burden', but his responsibility to bring not 'civilisation' but development. Using the discourse of development, Abs constructed the necessity for foreign investment as something that is demanded by the 'underdeveloped' and generously answered to by the 'developed'. Indeed, Abs argued that 'it must not be forgotten that private capital both in Europe and in the US has sufficient opportunities to work profitably at home without having to assume the additional risks regularly connected with foreign investment.'[96]

Abs imagined the communist and socialist propositions as a threat to the 'spiritual and moral fundament of the occidental world through selfish material interests of individuals and nations.'[97] The Soviet approach to law was to him an approach devoid of lawfulness and morality.[98] Thus, he juxtaposed a liberal understanding of a timeless protection of acquired rights with a solely 'tactical' commitment to the sanctity of contract when it appeared useful or necessary.[99] Abs' tone is indicative of the dismissal of an alternative

[92] Ibid 1-2.

[93] Abs, *Der Schutz wohlerworbener Rechte im internationalen Verkehr als europäische Aufgabe: Betrachtungen zur Entwicklung der Suezkrise* (above n 83) 17.

[94] Abs, *Proposals for Improving the Protection of Private Foreign Investments* (above n 7) 19. The expression in the German original was 'der Kern des Kalten Krieges'.

[95] Abs, *Zeitfragen der Geld- und Wirtschaftspolitik: Aus Vorträgen und Aufsätzen* (above n 26) 293.

[96] Newspaper article reproduced in Pohl (above n 8) 94.

[97] Abs, *Der Schutz wohlerworbener Rechte im internationalen Verkehr als europäische Aufgabe: Betrachtungen zur Entwicklung der Suezkrise* (above n 83) 3. This quote is my own translation of the German original.

[98] Ibid 5.

[99] Ibid.

approach to law by calling it 'unlawful interventions into the rights of foreigners driven by selfishness and resentment.'[100] He perceived it to be a European calling to make suggestions for the reestablishment of trust and a legal order on the global scale.[101] According to Abs, the idea of a collective social welfare state as well as socialist-communist world views were incompatible with the principle of regard for human rights recognised by the Free world because they hindered individual productivity, which he considered the basis of freedom and a prosperous society.[102] At the very core of the problem was the protection of private property, since it was only through property, Abs claimed, that individuals could develop a sense of responsibility.[103] He was nostalgic for the pre-World War I era and understood himself to be working towards rebuilding the liberal economic order.[104]

However, despite Abs' endorsement of the American 'containment' policy, he was in fact pursuing core economic goals for the German export industry. The German government was eager to embark on large-scale financing for development projects, such as the Aswan dam in Egypt, as political endeavours.[105] For Abs, such risky investments were unattainable for the small German capital market, and he successfully opposed them.[106] Thus, according to Abs, the strategy had to be a push for more secure investments, so that Germany would not 'lose against the richer economies in the long run.'[107] Abs insisted that an international solution would have to be found to 'avoid unprofitable lending.'[108] He discouraged the practice of state guarantees for export credits, arguing that the risk would thereby be carried by the taxpayers of the export state, rather than the ones of the recipient of the credit. Abs called this policy of the export states irresponsible lending

[100] Ibid 9.

[101] Ibid 3.

[102] Ibid. Elisabeth Tamedly, a student of Röpke, gives a detailed account of flaws in the socialist imagination of the world economy based on the confusion of the private and public spheres. Elisabeth L Tamedly, *Socialism and International Economic Order* (Caxton Printers, 1969).

[103] Abs, *Der Schutz wohlerworbener Rechte im internationalen Verkehr als europäische Aufgabe: Betrachtungen zur Entwicklung der Suezkrise* (above n 83) 4-5.

[104] Gall (above n 2) 299.

[105] Gall (above n 2) 294-6.

[106] Ibid 295.

[107] Ibid 296. The German original reads as follows: 'Gerade wir Deutsche, haben allen Anlass darauf hinzuwirken, dass der internationale Wettbewerb in der Einräumung internationaler Zahlungsziele nicht zu- sondern ab-nimmt. Wir wären auf die Dauer gegenüber den reicheren Ländern sicherlich die Verlierer.'

[108] Abs, *Zeitfragen der Geld- und Wirtschaftspolitik: Aus Vorträgen und Aufsätzen* (above n 26) 287.

behaviour.[109] In the speech mentioned earlier in San Francisco in 1957, he also pronounced that particularly smaller Western European countries would contribute even more 'to the benefit of the less developed countries (…) if the climate for investing in certain countries would be more favourable as it is today and if the foreign investors would have the possibility to rely on a proactive system assuring them that their performances are fully honoured.'[110] Abs' plea for an international convention for the protection of investments abroad was thus also an attempt to soften the competition on the export credit market to keep Germany competitive.

Finally, de Thové pointed to the hierarchy of the structure implemented through development discourse when he insisted that the negotiations were leaving the Togolese with an inferiority complex. It is embedded in the notion of stadial development that the South has to become like the West and that the authority on how to do things right therefore lies with the one further ahead. Abs defined two kinds of countries that were in need of development: 'Countries which, (a) while they have long been independent, are still in the stage of adjusting their economy to the level of that in the highly developed countries, or (b) have either been freed only recently from colonial control, or are in the course of becoming independent.'[111] He reasoned that 'these latter nations are aware that, for the purpose of building their economy, they need capital assistance, the goods and the technical experience which the highly developed countries of the West can supply.'[112] Thus, in addition to the epistemological hierarchy, development discourse constructed a material hierarchy. Most importantly, however, both of these characteristics rely on a temporalisation of difference. Abs suggested that these countries were 'making the great mistake of trying to do, in a few years, what the West needed centuries of gradual progress to achieve.'[113] This is another instantiation of this argument in the *Palestine Railway Arbitration*, which rested on a hierarchisation of history, placing the global South in a perpetual position of 'not yet'.[114] The linear model of development set the goal of 'becoming developed' to a distant future so that the modern*ising* societies 'needed a

[109] Abs, *Der Schutz wohlerworbener Rechte im internationalen Verkehr als europäische Aufgabe: Betrachtungen zur Entwicklung der Suezkrise* (above n 83) 13.

[110] Abs, *Zeitfragen der Geld- und Wirtschaftspolitik: Aus Vorträgen und Aufsätzen* (above n 26) 293.

[111] Abs, *Proposals for Improving the Protection of Private Foreign Investments* (above n 7) 18.

[112] Ibid.

[113] Ibid.

[114] See chapter 2 on the *Palestine Railway Arbitration*.

period of preparation and waiting before they could be recognized as full participants in political modernity.'[115] These modes of hierarchisation of difference constituted the foundation for the proposed necessity of an international law, a law transcending the national sphere and setting the rules in a universal fashion.

4. The influence of liberal economists

a) 'Peaceful Change'

Even though Abs himself was hardly a theoretical thinker, his understanding was influenced by the German economic school of ordo-liberalists.[116] Abs was part of a small circle of economic representatives, which the Minister of Economics Ludwig Erhard assembled weekly as *Runder Tisch*.[117] Erhard also spoke at the inauguration ceremony of the Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen (German Society for the Protection of Foreign Property Abroad) in 1956 and echoed the liberal proposition of the necessity to protect private property.[118] The Association for the Promotion and Protection of Private Foreign Investment, founded by Shawcross and Abs to undertake research on this topic, had its seat in Geneva. With regard to suggestions about the international economic order, the most important thought collective for Abs' propositions was the so-called Geneva School. As Slobodian characterises it, 'Geneva School neoliberals transposed the ordoliberal idea of "the economic constitution" – or the totality of rules governing economic life – to the scale beyond the nation.'[119] Some of the most prominent representatives of the Geneva School include Wilhelm Röpke, Friedrich Hayek, Lionel Robbins and Gottfried Haberler. The ties between some of these thinkers, as well as some British international lawyers, such as Lauterpacht, were established during the interwar period at the London School of Economics (LSE).[120] Under the theme of 'Peaceful Change', economists and lawyers in Europe and the United States proposed

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[115] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press, 2000) 9.

[116] Gall (above n 2) 150.

[117] Ibid 243.

[118] Wirtschaftsredaktion, 'Vermögensschutz', *Die Zeit* (5 April 1956) Nr. 14.

[119] The term has been popularised by Quinn Slobodian in his recent account of neoliberal intellectual history. Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018) 8.

[120] Ibid 122.

ways to reconfigure the global economic order during the 1930s.[121] Lauterpacht and Robbins contributed to a lecture series at LSE of the same title.[122] The core concern scholars debated under this title was the emergence and consequences of what they considered to be political and economic nationalism as a threat to global peace in the aftermath of the financial crisis.

'Peaceful Change' as a notion contained two important aspects when it came to the rules on the protection of foreign property. First, it spoke to one of the most prominent goals of international investment law, namely the goal of achieving 'peaceful settlement' of disputes. Second, it brought to the fore the emergence of new sovereigns and new jurisdictions and consequently new legal regimes. The subtitle of the League of Nations 1936 Peaceful Change Conference makes the challenges explicit, it reads: *Procedures, Population, Raw Materials, Colonies*.[123] Arbitration was to be preferred over gunboats, and legal settlements were considered better than military ones. Despite the fact that this proclamation did not lead to an end of military interventions for commercial interests,[124] it appealed as an ideology that carried legitimating force for the regime.[125] The maintenance of peace did not have to be a democratic project. One of Polanyi's fundamental claims about the 19th century was that peace was preserved by and for 'haute finance'.[126] Peace was then in the service of a particular vision of integrated markets and not the other way around.[127] The claim that the international investment regime would

[121] Most prominently, the Tenth International Studies Conference of the League of Nations in 1936 was dedicated to the theme *Peaceful Change*. See also Frederick Dunn, *Peaceful Change: a Study of International Procedures* (Council on Foreign Relations, 1937). The committee of research of the Council on Foreign Relations included i.a. Walter Lippmann and Philip C Jessup. See also John Boardman Whitton, *Peaceful Change and Raw Materials* (Longmans, Green and Co 1938); Karl Strupp, *Legal Machinery for Peaceful Change* (Constable, 1937); CRMF Cruttwell, *A History of Peaceful Change in the Modern World* (Oxford University Press, 1937).

[122] CAW Manning (ed), *Peaceful Change: An International Problem* (Macmillan, 1937).

[123] League of Nations International Institute of Intellectual Co-Operation*, Peaceful Change: Procedures, Population, Raw Materials, Colonies: Proceedings of the Tenth International Studies Conference* (1938).

[124] Examples for such interventions could be the interference of the CIA in Iran in 1953, the Suez Crisis of 1956 or the 1973 coup d'état in Chile.

[125] Ursula Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes' (2018) 33(1) *ICSID Review: Foreign Investment Law Journal* 14.

[126] 'The representatives of haute finance were charged with the administration of the bulk of Turkish finance. In numerous cases they engineered compromises between the Powers; in others, they prevented Turkey from creating difficulties on her own; in others again, they acted simply as the political agents of the Powers; in all, they served the money interests of the creditors, and, if at all possible, of the capitalists who tried to make profits in that country.' Polanyi (above n 18) 10-11.

[127] 'Trade was now dependent upon an international monetary system which could not function in a general war. It demanded peace, and the Great Powers were striving to maintain it. But the balance-of-power

foster the peaceful settlement of investment disputes was not at odds with the claim that investment law was driven by the interests of a few commercial actors. The privilege of legal protection that investment law afforded to corporate interests and banking grew out of this relationship between the maintenance of peace and an integrated global economy. Thus, the interests of oil and banking as presented so far were precisely the driving forces of this process.

In his aforementioned lecture, Robbins insisted on the importance of an open-door policy for trade and investment in light of decolonisation. He understood his contribution to be an examination of the question 'in what ways territorial inequalities may have economic consequences which are dangerous to world peace.'[128] The response Robbins gave was that 'the root of the trouble is not inequality of territory, but the prevalence of discrimination.'[129] Robbins' vision of a peaceful order was based on a restraint of 'nationalist restrictionism' in favour of 'an international federation'.[130] Hersch Lauterpacht's contribution built on this idea and considered peaceful change as 'the existence of a legislature imposing, if necessary, its fiat upon the dissenting State.'[131] Lauterpacht did not conceive of an international legislature as amounting to 'international government or administration', but that its 'competence would have to extend to such questions as migration, tariffs, raw materials.'[132] However, Lauterpacht's vision was not based on democratic equality between states in international law-making. To the contrary, he argued that 'there could be no room for the continued operation of the abstract principle of State equality.'[133] Instead, Lauterpacht suggested that 'it is the business of statesmanship and of the science of ethics and international politics to evolve a generally applicable standard of representation in substitution for the mechanical, unworkable and essentially immoral principle of equality.'[134]

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system, as we have seen, could not by itself ensure peace. This was done by international finance, the very existence of which embodied the principle of the new dependence of trade upon peace.' Ibid 16.

[128] Lionel C Robbins, 'The Economics of Territorial Sovereignty' in CAW Manning (ed), *Peaceful Change: an International Problem* (Macmillan, 1937) 41.

[129] Ibid 56-7.

[130] Ibid 60.

[131] Hersch Lauterpacht, 'The Legal Aspects' in CAW Manning (ed), *Peaceful Change: An International Problem* (Macmillan, 1937) 135, 141.

[132] Ibid 159.

[133] Ibid 160.

[134] Ibid 161-2.

The topic of a world economic order had already been prominently discussed at the first World Economic Conference in 1927, 'the first economic gathering to take the entire world as its subject,'[135] co-organised by the League of Nations and the International Chamber of Commerce (ICC).[136] The ICC understood itself as the 'business man's league of nations' advancing 'world peace through free trade.'[137] Geneva School representatives, such as von Mises, Haberler, Röpke, Hayek and Robbins, were all directly involved.[138] The conference set out to discuss 'the peaceful solution of economic, social and territorial problems, with special reference to questions of (a) population, migration and colonization; and (b) markets and the distribution of raw materials.'[139] As discussed in the previous chapter, Alfred Verdross, one of the most prominent liberal international legal scholars engaging with general principles of law and acquired rights, praised the suggestions of the World Economic Conference and the insistence on the distinction between the political and the economic sphere.[140] The ideas of the World Economic Conference carried through to the founding of the Mont Pèlerin Society and can be found in the works of the International Chamber of Commerce. The Mont Pèlerin Society, founded in 1948 and considered the most significant neoliberal thought collective,[141] can

[135] Slobodian (above n 119) 30.

[136] A summary of the conference proceedings appeared in Wallace McClure, 'National Economic Independence in the Light of the International Economic Conference' (1927) 21(4) *American Journal of International Law* 668.

[137] George Ridgeway, *Merchants of Peace: the History of the International Chamber of Commerce* (Little, Brown and Company, 1959). This is an in-house publication of the ICC on its history. Beyond that, literature on the history of the ICC is relatively scarce. Two dissertations have engaged with the early years of the organisation: Shane R Tomashot, 'Selling Peace: The History of the International Chamber of Commerce: 1919-1925' (Dissertation Thesis, Georgia State University, 2015); Monika Rosengarten, *Die Internationale Handelskammer: wirtschaftspolitische Empfehlungen in der Zeit der Weltwirtschaftskrise 1929-1939* (Duncker & Humblot, 2001). In addition, historians of arbitration have recently engaged with the history of the ICC. See Jérôme Sgard, 'A Tale of Three Cities: the Construction of International Commercial Arbitration' in Grégoire Mallard and Jérôme Sgard (eds), *Contractual Knowledge: One Hundred Years of Legal Experimentation in Global Markets* (Cambridge University Press, 2016) 153; Love Rönnelid, 'The Emergence of Routine Enforcement of International Investment Law: Effects on Investment Protection and Development' (Dissertation Thesis, Uppsala University, 2018). For an older account of the importance of ICC arbitrations, see Karl-Heinz Böckstiegel, 'Arbitration of Disputes Between States and Private Enterprises in the International Chamber of Commerce' (1965) 59(3) *American Journal of International Law* 579.

[138] Slobodian (above n 119) 30.

[139] League of Nations International Institute of Intellectual Co-Operation (above n 123) 1.

[140] Alfred Verdross, 'Règles internationales concernant le traitement des étrangers' [1931] (37) *Recueil des cours de l'Académie de Droit International de la Haye* 325, 396.

[141] Dieter Plehwe, 'Introduction' in Philip Mirowski and Dieter Plehwe (eds), *The Road from Mont Pèlerin: the Making of the Neoliberal Thought Collective* (Harvard University Press, 2009).

be said to have been 'a continuation of the League's spirit'[142] with the ICC as its institutional base.[143]

b) Central planning

The division of the spheres of economics and politics rested on the idea that the price mechanism and not the state should allocate resources and determine prices. Liberal thinkers saw a threat in government authority over the economic sphere.[144] They considered such collectivism impossible due to a 'knowledge problem that only the free price mechanism could solve.'[145] This did not mean the absence of regulation and law; to the contrary, it meant 'that prices only worked in the uniform structure of law.'[146] Robbins makes this point clear when he contends that 'the issue is not between *a* plan and *no* plan, it is between different kinds of plan. The liberal plan [foresees] decentralizing much of the responsibility for the organisation of production through the complex institutions of a system of private property.'[147] Hayek showed his regard for general principles as the necessary legal tool for this project when he wrote in 1962 that 'principles are practically all that we have to contribute'.[148] Indeed, there is proximity in Hayek and Lauterpacht's thinking with regard to the impossibility of planning and the default to principles for societal ordering.[149] Slobodian captures the relationship between economics, law and principles for the Geneva School in discussing a quote by Hayek.

> Hayek began one of his books by comparing the law to a knife. 'Just as a man, setting out on a walking tour, will take his pocketknife with him, not for a particular foreseen use but in order to be equipped for various possible contingencies, or to be able to cope with kinds of situations likely to occur,' he wrote, 'so the rules of conduct developed

[142] Slobodian (above n 119) 127. For a detailed account of the League's involvement with the international economic order see Patricia Clavin, *Securing the World Economy: the Reinvention of the League of Nations: 1920-1946* (Oxford Univeristy Press, 2013).

[143] Slobodian (above n 119) 128.

[144] As Röpke put it in his Hague lecture, collectivism as a system meant 'that it is no longer the price mechanism but the authority which decides what use is to be made of the productive forces of the nation. The economic life becomes now as completely a matter of government and administration as the army or the law courts.' Wilhelm Röpke, 'Economic Order and International Law' [1954] (86) *Recueil des cours de l'Académie de Droit International de la Haye* 203, 236.

[145] Slobodian (above n 119) 81. For a contemporary account of the problems arising from resource allocation through the price mechanism, see Feichtner (above n 9).

[146] Slobodian (above n 119) 81.

[147] Lionel Robbins, *Economic Planning and International Order* (Macmillan, 1937) 6.

[148] Friedrich Hayek, *Studies in Philosophy, Politics and Economics* (Routledge, 1967) 264.

[149] For a contemporary reflection, see Anne Orford, 'Theorizing Free Trade' in Anne Orford et al (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 701, 725.

> by a group are not means for known particular purposes but adaptations to kinds of situations which past experience has shown to recur in the kind of world we live in.' Neoliberals took up the knife of the law in the years after 1945, relying on it to provide a framework for the market. They were compelled to do so for the same reason Hayek, over his lifetime, put increasing faith in the law: the reckless exercise and geographical expansion of democracy was corroding the principles separating politics from economics.[150]

In a similar vein, Lauterpacht was concerned about unbound nationalism that relied on positivist conceptions of law. Koskenniemi describes Lauterpacht's rejection of sovereignty and nationalism as a main part of his project in the 1920 and 1930s.

> He had critiqued a "positivism" that had extolled the virtues of statehood and sovereignty and, allying itself with aggressive nationalism, been responsible for the catastrophe of the First World War. This was to be replaced by a gapless and professionally administered system of cosmopolitan law and order in the image of the liberal State.[151]

Lauterpacht's idea of a formally complete international system, not as a result of total systematic codification as suggested by his former teacher Hans Kelsen but by judicial activity,[152] also resembles the vision of the Geneva School proponents for the role of law in the economic world order. Crucially, neither rejected the idea of order, instead, it was an embrace of law as an ordering instrument but a rejection of the 'illusion of control'.[153] As Slobodian puts it: 'This was not a minimalist, but an activist vision of statecraft mobilized to push back against the incipient power of democratically enabled masses and those special interests, including unions and cartels, who sought to obstruct the free movement of competition and the international division of labor.'[154] Lauterpacht relied on judicially applied general principles to keep the international legal order complete. Proponents of the Geneva School viewed the legal order as a background set of rules to be relied upon enabling 'desirable' economic developments in a situation in which central foresight and control was illusory. Lauterpacht's critique of the impossibility of a complete formal doctrinal system, in which every case had a predetermined answer, was

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[150] Slobodian (above n 119) 143-4.

[151] Martti Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001) 357.

[152] Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 2011 (first published in 1933)) 77-8 and 85. The distinction to Kelsen's conceptualisation is discussed in Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960* (above n 151) 367.

[153] Slobodian (above n 119) 80.

[154] Ibid 92-3.

very similar to the Geneva School's critique of planning. Thus, the search was about the proper rules for the game so that global capitalism could flourish.[155] The question of where the line runs between planning and the neo-liberal vision, and whether it is a distinction that can be meaningfully sustained, is open for debate.[156] However, a common feature between the Geneva School economists advancing legal principles to safeguard the free flow of people, goods and capital and the British international lawyers reviving natural law to argue for the protection of property and the sanctity of contract was a certain distrust toward societal planning. Both groups developed these ideas over the course of two decades, spanning from the interwar period into the 1950s and 1960s.

In a similar vein, both liberal traditions understood themselves to be 'neutral', based on principles of 'fairness', 'non-discrimination' and 'freedom'. Anne Orford describes this similarity as follows:

> International law emerged as a profession committed to the spread of liberal ideas in the late nineteenth century. It shares with liberalism a tendency to reflect upon itself within a language and framework organized around the notion of freedom, including free labour and a free market. Liberalism avoids consciously thinking about the way it institutes and regulates authority, labour, and goods, while liberal legalism ignores both 'the legal ordering of economic policy' and the inherently political nature of that legal ordering.[157]

When considering the kind of legal rules that were applied to concession agreements through general principles, the liberal character becomes visible. In sum, they are geared towards safeguarding private capital. Sanctity of contract, compensation at market value, protection of future earnings made up a particular set of rules in service of economic liberalism. In contrast, liberal thinkers did not consider rules associated with redistribution and social planning, such as labour laws, union rights or land reform laws, to be candidates for general principles of law.

Against this background, the suggestions and developments proposed by Abs and Shawcross in the sphere of international investment law in the late 1950s have to be understood as a conceptualisation of the division of the political and the economic sphere that travelled from the League of Nations and the debates about peaceful change into the

[155] Ibid.

[156] For a theoretical elaboration of the relationship between legal ordering and economic theories, see Andrew Lang, 'Market Anti-Naturalism' in Justin Desautels-Stein and Christopher L Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press, 2017).

[157] Orford, 'Theorizing Free Trade' (above n 149) 704.

negotiations of multilateral treaties in trade and investment in the 1950s. Within the discipline of international law, the debate was mainly framed in terms of acquired rights and sanctity of contract as individual freedoms.[158] The Geneva School, on the other hand, suggested a kind of constitutionalisation of the international economic order to shield it from sovereign transgressions.[159] Or as Tzouvala puts it:

> [J]udicialisation and internationalisation of the regulation of international trade and investment incorporate core neoliberal assumptions about the need to separate politics from economics and, perhaps more accurately, to 'protect' economic decision-making from the influence of mass, democratic politics.[160]

5. Conclusion

The project of a Magna Carta for the protection of foreign investments has its roots in both arbitral practice over concession agreements in international law and (neo)liberal ideas about the separation of the political and the economic spheres. The British practice that developed in the interwar period in response to, first, the socialist transformation in Russia, and, later, anti-colonial struggles in the oil sector, was crucial for the development of the rules of international investment law. British international lawyers were actively involved in drafting the *Abs-Shawcross Draft Convention*, explicitly attempting to prevent the replication of the experiences with the Anglo-Iranian Company. Shawcross himself had acted as counsel in oil arbitrations and was a legal advisor to the Shell oil company. Abs, on the other hand, was trying to rebuild the German economy and was primarily focusing on the export industry. In order for the small capital industry in Germany to be competitive, Abs argued for lowering the investment risk through legal instruments. By upholding the protection of private property, he furthermore maintained a strong argument for the return of German confiscated property abroad, another important aspect for strengthening the German economy.

Abs and Shawcross joined forces and drew on British legal expertise by involving lawyers like Elihu Lauterpacht who had first-hand experience of legal strategies developed in earlier arbitrations. It is due to E Lauterpacht that the internationalisation of authority over concession agreements was profoundly strengthened by the inclusion of the umbrella

[158] See, eg, Wolfgang Friedmann, 'Disintegration of European Civilisation and the Future of International Law' (1938) 2 *The Modern Law Review* 194, 195.

[159] Slobodian (above n 119) 211.

[160] Ntina Tzouvala, 'The Academic Debate about Mega-Regionals and International Lawyers: Legalism as Critique?' (2018) 6(2) *London Review of International Law* 189.

clause and thereby the jurisdiction of the International Court of Justice by default. The umbrella clause itself did not become the most important instrument as such, but the default jurisdiction of an international tribunal has its roots in his proposition. Commentators at the time saw the inventive and pro-investor character of the Draft Convention. However, Abs and Shawcross argued in a manner consistent with the natural law proposition of McNair discussed in the previous chapter, i.e. that the rules in the Draft Convention constituted existing law and that their formalisation was a mere restatement. That the Draft Convention finally failed does not take away from its importance as a standard-setting document. The wave of bilateral treaties that were signed in the 1960s were all modelled after this blueprint and up until today, one can recognise familiar formulations of contemporary standards in the *Abs-Shawcross Draft Convention*.

Abs and Shawcross and other proponents of the Draft Convention were arguing within a nascent development discourse that had two important components. On the one hand, it was a continuation of the civilising mission, especially in the form of a societal transformation to a market economy. The necessity of such a transformation was rooted in the modern discourse of stadial development and rested on a temporalisation of difference, where 'developing countries' were perpetually in development towards becoming like the West. As a consequence, both the epistemological and the material authority rested with the West and grounded the hierarchical relationship used to legitimise the universal application of the rules for investment protection. On the other hand, the development discourse was embedded in the emerging Cold War and the rivalry between a socialist and a capitalist order. Financing for development became a major instrument for American 'containment policy'. By insisting on material dependence on the West, investment protection became a tool to secure the Western sphere of influence.

Finally, the idea of universal rules for the protection of property and capital stands in a tradition of liberal thinking that dominated the League of Nations and its original sister institution, the International Chamber of Commerce, from their foundation. The Geneva School (neo)liberals actively engaged in the debate over what was then called 'Peaceful Change'. Their vision of such change rested on a restraint of sovereignty and democratic decision-making, in favour of free movement of capital and goods. International lawyers such as Alfred Verdross, Arnold McNair and Hersch Lauterpacht shared this vision. On a more theoretical level, the visions of the economists and the lawyers overlapped in their understanding of the 'illusion of control' or, to put it differently, the impossibility of

central planning, which was the mantra of the socialist conceptions. However, what was considered planning, and what the natural flow of goods, was, of course, a political decision and not a given in the world. Where the perceived neutrality of the protection of the economic sphere protects capital and property, the political planning meant a redistribution of wealth, not only along former colonial lines, but also along the class lines within any given society. Against this background, the internationalisation over the authority of concession agreement evolves as a profoundly political instrument in favour of the protection of the status quo, namely economic structures favouring Western companies and Western capital elites.

Chapter 6 – Conclusions: the world is safe for investment

The normative world building which constitutes 'Law' is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that place bodies on the line.

Robert Cover, 1986[1]

1. Introduction

This thesis is an account of the *formation* of the field of international investment law in the first half of the 20th century. It asks how the rules on foreign property protection were constituted in this period. Treating the development of legal forms as an outcome of legal practice, it inquired into the processes that enabled the constitution of international investment law on the international plane. It particularly traced the emergence of the company as a subject of international law, the development of arbitral proceedings as forum for investor-state disputes, and the coming into being of the substantive legal principles underpinning the material law of the field. The formal institutionalisation of the field was not taken as a starting point but rather as a final point for the inquiry. The thesis consequently focused on the period between 1922 and 1959, thus the period before the coming into being of the contemporary instruments of international investment law: bilateral investment treaties and the ICSID Convention of 1966.

The focus on formation not only shaped the period of inquiry but also revealed two patterns. First, the emergence of the field of international investment law was a successful liberal response to socialist and anti-colonial attempts at redistributing wealth on the domestic level. Second, the constitution of the rules was a slow and scattered process based on successful assertions and claims about legality by a number of lawyers and economists in arbitrations, institutional negotiations and scholarly writings. Combining these insights, I argue that international investment law is based on a particular view of the relationship between law, market and state that prioritises the protection of private property over policies of redistribution and that this particular view came into being through self-authorising legal practices relying on a hierarchisation of difference.

This final chapter revisits the main findings of the thesis and ties them to the inquired legal events. The first part restates how property protection came to be prioritised over

[1] Robert M Cover, 'Violence and the Word' (1986) 95(8) *Yale Law Journal* 1601, 1605.

redistributional policies. The second part draws out the contradiction in the simultaneous proposition of a universal timeless legal order that at once claims to represent modernity. The chapter goes on to summarise how law emerges as a self-authorising practice through the lens of jurisdiction and temporal ordering. It concludes with a reflection of the relationship between the structures developed in this thesis and the two main pillars of legitimation for the contemporary regime of international investment law, namely the depoliticisation of conflicts and the promotion of development.

2. Property protection and redistribution

The first part of the argument relates to the particularity of the vision of the relationship between market and state and the role of law in this relationship. In all instances analysed in this thesis, the protection of foreign private property was prioritised over redistributional policies deployed by the various governments by normalising property protection as an international standard. This is a pattern that runs from the inclusion of the fate of concession agreements into the peace treaties after the First World War, to the proposition of the *Abs-Shawcross Draft Convention* as a multilateral convention. This prioritisation was enabled through the conceptual understanding of a division between the market and the state and the resulting role for law and in particular international law.

An assumed division between the market and the state and the contestation of this view was at the heart of the *Lena Goldfields Arbitration* of 1930. In the arbitration, the Soviet Union implemented a policy changing the status of the concession agreement held by the British company. The policy had the quality of Soviet law and was thus binding for the company. However, the tribunal superseded Soviet law by elevating the arbitration to the international sphere procedurally and materially. It applied the notion of *Kompetenz-Kompetenz* to argue that it was within the tribunal's competence to decide over, and ultimately dismiss, the jurisdictional objection by the Soviet Union. It furthermore applied the concept of unjust enrichment as a 'general principle of law recognized by civilized nations' rather than Soviet material law to the request of compensation and awarded a large sum to the British company. Beneath the application of the doctrines of *Kompetenz-Kompetenz* and general principles lay an understanding that elevated private property rights and the sanctity of contracts over economic policies of the state. By contrast, Soviet law conceptualised the political and the economic as a single sphere of political economy. The state was the inaugurating authority for rights in the economic

sphere. Consequently, there could be no protection of private rights without state law. Thus, a change in policy over concession agreements would lead to a change of the content of the agreement. In this conflict, the tribunal located the authority for the protection of the value of the concession in the international sphere and thereby secured it against the new Soviet policies. Thus, the attempt of the Soviet state to redistribute holdings of wealth by turning them into public property was overruled through allocating the jurisdictional authority over such policies in the international sphere.

This understanding of a separation between the political and the economic spheres was also paramount to the scholarly work of liberal economist and lawyers before and after the Second World War. In the chapter on the *Abs-Shawcross Draft Convention* of 1959, I analysed the interwar debate on 'Peaceful Change', in which these scholars discussed 'the alteration of the status quo by peaceful international procedures rather than by force.'[2] One of the main concerns was the redistribution of resources between 'the Haves' and 'the Have Nots'.[3] This iteration of the concern by Lauterpacht shows that the protagonists were aware that it was a question of the allocation of resources and wealth, and the legal status of this allocation. Who should have jurisdictional authority for this allocation? If left in the domestic sphere, there could be no remedy against policies implemented by the state. A different authority could only be established if the jurisdiction was elevated to the international sphere. The theoretical conception to legitimise such an elevation was based on private law principles such as the protection of private property and the sanctity of contract. These principles were elevated above the realm of positive, state-made law, and grounded in claims of natural law by framing them as 'general principles of law recognized by civilized nations'.

3. The oxymoron of a 'modern law of nature'

The notion of 'general principles of law recognized by civilized nations' offered not only the possibility to argue that the principles were of universal character, superseding positive law. It also enabled the hierarchisation of difference along the marker of 'civilisation'. This technique can be traced through all three arbitrations, as well as through the propositions in the *Abs-Shawcross Draft Convention*. However, the strongest

[2] Frederick Dunn, *Peaceful Change: a Study of International Procedures* (Council on Foreign Relations, 1937) 2.

[3] Hersch Lauterpacht, 'The Legal Aspects' in CAW Manning (ed), *Peaceful Change: An International Problem* (Macmillan, 1937) 135, 184.

iterations can be found in the *Palestine Railway Arbitration* as well as in the *Sheikh of Abu Dhabi Arbitration*.

The *Palestine Railway Arbitration* of 1922 was grounded in a jurisdictional clause contained in the *Treaty of Sèvres*, the peace treaty that never entered into force, since it had not been ratified by the Ottoman Empire. Yet, the tribunal, established with the scope of safeguarding the concessionary rights of private companies, assumed its work despite this formal legal problem and treated Great Britain as a representative of the territory of Palestine, as foreseen in the Mandate System. It thereby inscribed the political status of Palestine as a British mandate and granted the authority to decide over large-scale infrastructure projects to Britain. Underlying these acts was a worldview commonly held by the protagonist that rested on the temporalisation of difference along the imaginary marker of progression towards 'civilisation'. As indicated in the text of the Mandate System, certain territories, such as Palestine, were to be placed under the tutelage of an Allied power 'until such time as they are able to stand alone.'[4] The West was placed in the future on an invisible timeline, whereas the rest of the world had to occupy a place in the past.

This same logic was at work when Lord Asquith of Bishopstone proclaimed in the *Sheikh of Abu Dhabi Arbitration* of 1951 that Islamic law was inapt for dealing with the complexities of commercial undertakings such as those at stake in the arbitration. The temporal dimension of this dismissal became prevalent when he considered Islamic law to be *archaic* and thus not suited for *modern* commercial questions. It was therefore English law that he found applicable as an expression 'of principles rooted in the good sense and common practice of the generality of civilised nations – a sort of "modern law of nature."'[5] This understanding is an oxymoron. On the one hand, it rested on a conception of natural law, a law of time immemorial, a universal understanding of rights based in fundamental unalterable moral convictions expressed as 'civilisation'. It is this quality, the claimed universality of the law, that allowed it to supersede other state-made, positivist, in this case Islamic, law. On the other hand, this law simultaneously claimed to be representative of modernity, as the spearhead of 'civilisation' and progress.

[4] *Covenant of the League of Nations*, opened for signature 29 April 1919, [22] (entered into force 10 January 1920).

[5] *In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi (1951) (Award)* reproduced in *International & Comparative Law Quarterly* [1952] (1) 247, 251.

It is a combination of these two elements that paved the way for an international legal order protecting private property. First, it allowed for the elevation of one law over another by grounding it in universal conceptions of natural law and thus above positive law. The same mechanism was at work in anchoring the principles on the international level and thus above the domestic level. Second, the authority of the new legal order was based on the hierarchisation of difference along the invisible marker of civilisation, understood as a universal, timeless marker uniquely representing modernity.

4. Law as a self-authorising practice

The described legal events further show that the established authority was self-proclaimed. It stemmed from a claim that a certain rule constituted law. By focusing on the formation of rules rather than on their conceptual content, I described how they came into being through practice. Connecting the *Sheikh of Abu Dhabi Arbitration* of 1959 with earlier arbitrations involving the same legal practitioners revealed that the constitutive elements of the protection of foreign property were taken from the notions of 'good faith' and 'reason'. It was restated over and over again that these elements contained the protection of private property and the sanctity of contracts, slowly establishing a line of precedent and thus legal authority. The convergence of legal practice in a number of early investor-state arbitrations and academic writing in international legal theory led to the successful establishment of the idea that municipal law was inadequate for dealing with the legal fate of concession agreements. Instead, these scholars and practitioners argued that a new kind of international legal order was emerging.

They relied on the notion of 'general principles of law recognized by civilized nations' and filled it with the particular content of property protection and sanctity of contract. They produced not only the arbitral practice but also the theoretical underpinnings for this practice. Two important examples for this proposition were Lauterpacht's LSE thesis *Private law sources and analogies of international law: with special reference to international arbitration* of 1927 and Sir Arnold McNair's *The general principles of law recognised by civilized nations* of 1957. By reading their academic work in conjunction with their practice in arbitration, I show that even though the arbitral practices appeared scattered at first, they formed part of the overall vision of an international legal order superseding domestic policies. This practice was authorised by a handful of authors who produced their own authority.

To sum up, I return to the notion of jurisdiction, to the authority to speak the law. The picture that emerges from this thesis shows a legal order that came into being through the writings and workings of a handful of protagonists. They were able to authorise this legal order successfully by grounding it in a worldview that saw private property as one of the highest values of any societal ordering and by proclaiming this view as universally valid. Implementing this view built the groundwork for the field of international investment law as a successful liberal response to socialist and anti-colonial attempts at redistributing wealth held by foreigners in the form of concession agreements.

5. Recognising the traces: depoliticisation and development

In this thesis, I developed an account of the field delimited by the *Palestine Railway Arbitration* in 1922 and the proposition of the *Abs-Shawcross Draft Convention* in April 1959. 1959 marks another, better-known event in the history of international investment law, namely the signing of the first bilateral investment treaty between Germany and Pakistan in November 1959. Based on this treaty and the coming into being of the ICSID Convention, contemporary international investment law is often argued to be in service of two fundamental tasks. First, the regime is understood to provide a means for *depoliticised* conflict resolution.[6] Second, there is an assumption that international investment law is necessary or at least beneficial for *development*.[7] The above-mentioned ICSID Convention of 1966 is understood to be a response to these two problems. 'The ICSID Convention was conceived by the Directors of the World Bank as an instrument for international economic development. The host state also effectively shields itself against diplomatic protection by the State of the investor's nationality.'[8] For my final reflection, I trace these ideas back to my period of inquiry and show how they then appear in a somewhat different light.

The idea of a depoliticisation in international investment law, as used in most parts of scholarly literature, has a very particular meaning. It is not used to argue that a conflict has no political implications, but rather to describe the process of 'transferring them

[6] Ursula Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes' (2018) 33(1) *ICSID Review: Foreign Investment Law Journal* 14.

[7] Stephan W Schill et al, *International Investment Law and Development: Bridging the Gap* (Edward Elgar, 2015).

[8] Christoph Schreuer et al (eds), *The ICSID Convention. A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge University Press, 2nd ed, 2009) xi.

[disputes] from the political arena of diplomatic protection to a judicial forum with objective, previously agreed standards and a pre-formulated dispute settlement process.'[9]

Carl Schmitt relied on the term *Entpolitisierung*, usually translated as 'depoliticisation', in the work *Zum Begriff des Politischen*[10] in 1932 and Merriam Webster's dictionary locates the first known use of the term 'depoliticize' in the year 1937 as meaning 'to remove the political character of : take out of the realm of politics'.[11] This understanding appears to be strongly connected to the liberal vision I described throughout this thesis, regarding the political and the economic sphere as separated, or at least separable, entities. Taking something out of the realm of politics can only make sense if there is indeed a realm free of politics. But precisely this was contested by socialist and anti-colonial assertions over foreign wealth. In these accounts there was only one sphere of political economy, and it was for the national government to decide how to allocate and distribute resources. Against this background, claiming authority for universally general principles of private law anchored on the international level was a response to these propositions.

If we take the indicator of the 1930s seriously, we can see that the invention of the term depoliticisation coincides with this debate. In legal terms, the economy was to be shielded from sovereign assertions through the protection of private property and through upholding the sanctity of contract. Thus, what we find today under the notion of depoliticisation carries the liberal ideology of the interwar period, which advanced an understanding of international law as being in the service of keeping national policies of redistribution at bay while protecting accrued wealth.

A similar phenomenon can be observed when looking at the notion of development as it is understood in the literature on international investment law. Much ink has been spilled over the question whether the signing of international investment agreements accounts for an increase in the attraction of foreign direct investment.[12] However, what has rarely been challenged is the very concept of development itself. As indicated in the chapters on the *Sheikh of Abu Dhabi Arbitration* and the *Abs-Shawcross Draft Convention*, the

[9] Ursula Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes' (2018) 33(1) *ICSID Review: Foreign Investment Law Journal* 14, 15.

[10] Carl Schmitt, *Der Begriff des Politischen* (Duncker & Humblot, 1932) vol X.

[11] *Merriam-Webster.com* (online at 26 October 2019) 'depoliticize'.

[12] See, eg, Jennifer L Tobin and Susan Rose-Ackerman, 'Do BITs Benefit Developing Countries?' in Catherine A Rogers and Roger P Alford (eds), *The Future of Investment Arbitration* (Oxford University Press, 2009) 131.

notion of development started to replace the notion of 'civilisation' after the Second World War, indicated, for example, by the new denomination of concession agreements as 'economic development agreements'.[13] Even though development in the field of international investment law is understood as describing the economic 'stage' of a country, it is based on the same temporalisation of difference that was introduced through the idea of 'civilisation' as described throughout this thesis. It also places the developed West on top of an imaginary timeline and 'developing' countries somewhere in the past, having not yet arrived but being on their way to the present and future. Thus, the authority for the contemporary investment law regime rests on the same hierarchisation of difference that the idea of 'civilisation' made possible in the first place.

Hence, when connected to the period from 1922 to 1959, the idea of depoliticisation describes a world in which private property has to be protected from national policies of redistribution, while development describes a world in which some places have not yet caught up to others. This world is enabled through an international legal regime promoting the protection of private property and the sanctity of contract, also known as international investment law. It is this legal regime that makes the world safe for investment.

[13] Arnold D McNair, 'The General Principles of Law Recognized by Civilized Nations' [1957] (33) *British Yearbook of International Law* 1, 1.

Bibliography

Articles, Books, Reports

Abs, Hermann J. and Hartley Shawcross, 'The Proposed Convention to Protect Private Foreign Investment: A Roundtable: Introduction' (1960) 9(1) *Journal of Public Law* 115

Abs, Hermann Josef, *Der Schutz wohlerworbener Rechte im internationalen Verkehr als europäische Aufgabe: Betrachtungen zur Entwicklung der Suezkrise* (Recht und Wirtschaft, 1956)

Abs, Hermann Josef, *Proposals for Improving the Protection of Private Foreign Investments* (Institut International d'Etudes Bancaires, 1958)

Abs, Hermann Josef, 'Die Konjunktur bleibt ruhig' [1959] (32) *Vortragsreihe des Deutschen Industrieinstituts* 1

Abs, Hermann Josef, *Zeitfragen der Geld- und Wirtschaftspolitik: Aus Vorträgen und Aufsätzen* (Knapp, 1959)

Abs, Hermann Josef, 'Die internationalen Wirtschaftsbeziehungen' [1961] (28) *Vortragsreihe des Deutschen Industrieinstituts* 1

Abs, Hermann Josef, *Aussenpolitik und Auslandsschulden: Erinnerungen an das Jahr 1952* (Universitätsverlag Konstanz, 1990)

Abs, Hermann Josef, *Entscheidungen: 1949-1953 Die Entstehung des Londoner Schuldenabkommens* (v Hase und Koehler, 1991)

Agamben, Giorgio, *Infancy and History: the Destruction of Experience* (Verso, 1993)

Al-Otaiba, Mana Saeed (ed), *The Petroleum Concession Agreements of the United Arab Emirates: 1939-1981 (Abu Dhabi)* (Croom Helm, 1982) vol 1

Alhammadi, Muna M, *Britain and the Administration of the Trucial States: 1947-1965* (Emirates Center for Strategic Studies and Research, 2013)

Anghie, Antony, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32(2) *New York University Journal of International Law and Politics* 243

Anghie, Antony, 'Nationalism, Development and the Postcolonial State: The Legacies of the League of Nations' (2006) 41(3) *Texas International Law Journal* 447

Anghie, Antony, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2008)

Atsegbua, Lawrence, 'International Arbitration of Oil Investment Disputes: The Severability Doctrine and Applicable Law Issues Revisited' [1993] (5) *African Journal of International and Comparative Law* 634

Bedjaoui, Mohammed, *First Report on Succession of States in Respect of Rights and Duties Resulting From Sources Other than Treaties* Yearbook of the International Law Commission vol II, 1968 Comm, 20 sess, UN Doc A/CN.4/204 (5 April 1968)

Bamberg, James H, *The History of the British Petroleum Company: The Anglo-Iranian Years 1928-1954* (Cambridge University Press, 1994) vol 2

Benton, Lauren, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21(1) *Journal of the History of International Law/Revue d'histoire du droit international* 7

Bentwich, Norman, *Palestine* (Ernest Benn, 1934)

Bergson, Henri, *Matter and Memory* (Zone Books, 1991 (first published in 1911))

Bernstein, SA, *The Financial and Economic Results of the Working of the Lena Goldfields Company* (Blackfriars Press, 1930)

Binder, Christina, 'Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns: Or the Benefits of a Public International Law Approach to Investment Arbitration' in Treves, Tulio et al (eds), *International Investment Law and Common Concerns* (Routledge, 2014) 71

Blaut, James Morris, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, 1993)

Böckstiegel, Karl-Heinz, 'Arbitration of Disputes Between States and Private Enterprises in the International Chamber of Commerce' (1965) 59(3) *American Journal of International Law* 579

Borchard, Edwin M, *The Diplomatic Protection of Citizens Abroad – or – the Law of International Claims* (Banks Law, 1919)

Brandon, Michael, 'Recent Measures to Improve the International Investment Climate' (1960) 9 *Journal of Public Law* 125

Brower, Charles N and Jeremy K Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97(3) *American Journal of International Law* 643

Buckland, William W and Arnold D McNair, *Roman Law and Common Law: a Comparison in Outline* (Cambridge University Press, 1936)

Bunyan, James and Harold H Fisher, *The Bolshevik Revolution, 1917-1918 Documents and Materials* (Stanford University Press, 1934)

Bystrický, Rudolf, 'Zu einigen Problemen des internationalen Rechts im Zusammenhang mit der sozialistischen Nationalisierung' in Wiemann, Horst (ed), *Fragen des internationalen Privatrechts: acht Beiträge von Vertretern der sozialistischen Rechtswissenschaft* (Deutscher Zentralverlag, 1958) 97

Carty, Anthony, *The Decay of International Law: a Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press, 1986)

Chakrabarty, Dipesh, *Provincializing Europe: Postcolonial thought and historical difference* (Princeton University Press, 2000)

Chernykh, Yuliya, 'The Gust of Wind: the Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention' in Schill, Stephan W et al (eds), *International Investment Law and History* (Edward Elgar, 2018) 241

Clavin, Patricia, *Securing the World E conomy: the Reinvention of the League of Nations: 1920-1946* (Oxford Univeristy Press, 2013)

Corley, TAB, 'Competitive Advantage and Foreign Direct Investment: Britain 1913-1938' (1997) 26(2) *Business and Economic History* 599

Cover, Robert M, 'The Folktales of Justice: Tales of Jurisdiction' in Minow, Martha et al (eds), *Narrative, Violence, and the Law* (University of Michigan Press, 1985-1986) 173

Cover, Robert M, 'Violence and the Word' (1986) 95(8) *Yale Law Journal* 1601

Craven, Matthew, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74(3/4) *Nordic Journal of International Law* 335

Craven, Matthew, *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford University Press, 2009)

Craven, Matthew, 'Theorizing the Turn to History in International Law' in Orford, Anne et al (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 21

Craven, Matthew, 'Colonial Fragments: Decolonization, Concessions and Acquired Rights' in von Bernstorff, Jochen and Dann, Philipp (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford University Press, 2019) 101

Crawford, James, *Brownlie's Principles of Public International Law* (Oxford University Press, 2019)

Crewe, Outram W (ed), *The Law of Arbitration: Being the Arbitration Act, 1889, with Notes of Statutes, Rules of Court, Forms and Cases, and an Index (1890)* (William Clowes and Sons, 2nd ed, 1998)

Cruttwell, CRMF, *A History of Peaceful Change in the Modern World* (Oxford University Press, 1937)

Czichon, Eberhard, *Hermann Josef Abs: Porträt eines Kreuzritters des Kapitals* (Union Verlag, 1969)

Daniel, James (ed), *Private Investment: The Key to International Industrial Development: A Report of the San Francisco Conference, October 14-18, 1957* (McGraw-Hill, 1958)

De Auer, Paul, 'The Competency of Mixed Arbitral Tribunals' [1927] (13) *Transactions of the Grotius Society: Problems of Peace and War* xvii

De Luca, Anna, 'Umbrella Clauses and Transfer Provisions in the (Invisible) EU Model BIT' (2014) 15(3-4) *The Journal of World Investment & Trade* 506

de Schutter, Olivier (ed), *Transnational Corporations and Human Rights* (Hart, 2006)

Degras, Jane (ed), *Soviet Documents on Foreign Policy: 1917-1924* (Oxford University Press, 1951) vol 1

Dolzer, Rudolf and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed, 2012)

Dorsett, Shaunnagh and Shaun McVeigh, *Jurisdiction* (Routledge, 2012)

Dorsett, Shaunnagh and Shaun McVeigh, 'Jurisprudences of Jurisdiction: Matters of Public Authority' (2014) 23(4) *Griffith Law Review* 569

Douglas, Zachary, 'The Hybrid Foundations of Investment Treaty Arbitration' (2004) 74(1) *British Yearbook of International Law* 151

Dunn, Frederick, *Peaceful Change: a Study of International Procedures* (Council on Foreign Relations, 1937)

Dunn, Frederick, *The Protection of Nationals: a Study in the Application of International Law* (Johns Hopkins Press, 1932)

Dworkin, Ronald, *Law's Empire* (Harvard University Press, 1986)

Ebers, Godehard J, 'Sind im Völkerrecht allein die Staaten parteifähig' [1926] (7) *Mitteilungen der Deutschen Gesellschaft für Völkerrecht*

El-Chiati, AZ, 'Protection of Investment in the Context of Petroleum Agreements' [1987] (204) *Recueil des cours de l'Académie de Droit International de la Haye* 9

Feichtner, Isabel, 'International (Investment) Law and Distribution Conflicts over Natural Resources' in Schill, Stephan W et al (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar, 2015) 256

Fink, Carole, *The Genoa Conference: European Diplomacy: 1921-1922* (Syracuse University Press, 1993)

Fischer, Peter, *Die internationale Konzession: Theorie und Praxis der Rechtsinstitute in den internationalen Wirtschaftsbeziehungen* (Springer, 1974)

Fitzgerald, Edward Peter, 'France's Middle Eastern Ambitions, the Sykes-Picot Negotiations, and the Oil Fields of Mosul, 1915-1918' (1994) 66(4) *Journal of Modern History* 697

Fitzpatrick, Peter, *The Mythology of Modern Law* (Routledge, 1992)

Franck, Susan D, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 3(4) *Transnational Dispute Management* 1521

Friedmann, Wolfgang, 'Disintegration of European Civilisation and the Future of International Law' (1938) (2) *The Modern Law Review* 194

Friedmann, Wolfgang, 'The Uses of "General principles" in the Development of International Law' (1963) (57) *American Journal of International Law* 279

Gall, Lothar, *Der Bankier Hermann Josef Abs: eine Biographie* (CH Beck, 2004)

Gardner, Richard N, 'International Measures for the Promotion and Protection of Foreign Investment' (1960) 53 *Proceedings of the American Society of International Law at its Annual Meeting (1921-1969)* 255

Gathii, James Thuo, 'War's Legacy in International Investment Law' (2009) 11(4) *International Community Law Review* 353

Greenman, Kathryn, 'The History and Legacy of State Responsibility for Rebels 1839-1930: Protecting Trade and Investment against Revolution in the Decolonised World' (Dissertation Thesis, University of Amsterdam, 2019)

Hale, Robert L, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38(3) *Political Science Quarterly* 470

Harvard Law School Research in International Law, 'The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners' (1929) 23(2) *American Journal of International Law* 131

Hawley, Donald, *The Trucial States* (Geroge Allen and Unwin, 1970)

Hayek, Friedrich, *Studies in Philosophy, Politics and Economics* (Routledge, 1967)

Hewins, Ralph, *Mr Five Per Cent: the Story of Calouste Gulbenkian* (Rinehart, 1958)

Idelson, Vladimir R et al, 'The Law of Nations and the Individual' [1944] (30) *Transactions of the Grotius Society* 50

James, Harold, *The Deutsche Bank and the Nazi Economic War Against the Jews: the Expropriation of Jewish-owned Property* (Cambridge University Press, 2001)

James, Harold, *The Nazi Dictatorship and the Deutsche Bank* (Cambridge University Press, 2004)

Jenks, Wilfred C, 'The Scope of International Law' [1954] (31) *British Yearbook of International Law* 1

Jennings, Robert, 'State Contracts in International Law' [1961] (37) *British Yearbook of International Law* 156

Jessup, Philip C, *Transnational Law* (Yale University Press, 1956)

Johns, Fleur E, 'Theorizing the Corporation in International Law' in Orford, Anne and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 635

Kaeckenbeeck, George, 'The Character and Work of the Arbitral Tribunal of Upper Silesia' [1935] (21) *Transactions of the Grotius Society* 27

Kaeckenbeeck, George, 'The Protection of Vested Rights in International Law' [1936] (17) *British Yearbook of International Law* 1

Karvounarakis, Theo, 'End of an Empire: Great Britain, Turkey and Greece from the Treaty of Sevres to the Treaty of Lausanne' (2000) 41(1) *Balkan Studies* 171

Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1996) 65(3) *Nordic Journal of International Law* 385

Kennedy, David, 'The Disciplines of International Law and Policy' (1999) 12(1) *Leiden Journal of International Law* 9

Kennedy, David, 'The Dialectics of Law and Development' in Trubek, David M et al (eds), *The New Law and Economic Development: a Critical Appraisal* (Cambridge University Press, 2006) 174

Kirchheimer, Otto, 'The Socialist and the Bolshevik Theory of the State' in Burin, Frederic S and Kurt L Shell (eds), *Politics, Law, and Social Change: Selected Essays* (Columbia University Press, 1969 (first published in 1928))

Korhonen, Outi, *International Law Situated: an Analysis of the Lawyer's Stance Towards Culture, History and Community* (Brill, 2000)

Koskenniemi, Martti, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001)

Koskenniemi, Martti, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge University Press, 2006 (first published 1989))

Koskenniemi, Martti, 'Empire and International Law: The Real Spanish Contribution' (2011) 61(1) *University of Toronto Law Journal* 1

Kriebaum, Ursula, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes' (2018) 33(1) *ICSID Review: Foreign Investment Law Journal* 14

Kunz, Josef, 'Zum Begriff der "nation civilisée" im modernen Völkerrecht' (1927) 7(1) *Zeitschrift für Öffentliches Recht* 86

Kurtz, Jürgen, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016)

Landolt, Phillip, 'The Inconvenience of Principle: Separability and Kompetenz-Kompetenz' [2013] 30 *Journal of International Arbitration* 511

Lang, Andrew, *World Trade Law after Neoliberalism: Re-imagining the Global Economic Order* (Oxford University Press, 2011)

Lang, Andrew, 'Market Anti-Naturalism' in Desautels-Stein, Justin and Christopher L Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press, 2017) 312

Larson, Arthur, 'Recipients' Rights Under an International Investment Code' [1960] (9) *Journal of Pubic Law* 172

Lässig, Simone, 'Der Bankier Hermann Josef Abs: Eine Biographie' (2008) 26(3) *German History* 446

Lauterpacht, Elihu, *The Life of Sir Hersch Lauterpacht, QC, FBA, LLD* (Cambridge University Press, 2010)

Lauterpacht, Hersch, *Private Law Sources and Analogies of International Law* (Longmans, Green and Co 1927)

Lauterpacht, Hersch, 'The Legal Aspects' in Manning, CAW (ed), *Peaceful Change: An International Problem* (Macmillan, 1937) 135

Lauterpacht, Hersch, 'Règles générales du droit de la paix' [1937] (62) *Recueil des cours de l'Académie de Droit International de la Haye* 100

Lauterpacht, Hersch, *Recognition in International Law* (Cambridge University Press, 1947)

Lauterpacht, Hersch, 'Succession of States with Respect to Private Law Obligations', *International Law: Being the Collected Papers of Hersch Lauterpacht Systematically Arranged and Edited by E Lauterpacht* (Cambridge University Press, 1970 (originally published in 1928)) vol 3

Lauterpacht, Hersch, 'The Rose Mary Case', *International Law: Being the Collected Papers of Hersch Lauterpacht Systematically Arranged and Edited by E Lauterpacht* (Cambridge University Press, 1970 (unpublished case note, originally 1953)) vol 3

Lauterpacht, Hersch, *The Function of Law in the International Community* (Oxford University Press, 2011 (first published in 1933))

Leiter, Andrea, 'The Silent Impact of the 1917 Revolutions on International Investment Law' (2017) 6(10) *ESIL Reflections*

Lenin, Vladimir Ilich, *Lenin: Collected Works, Philosophical Notebooks* (Progress, 1965) vol 32

Longrigg, Stephen Hemsley, *Oil in the Middle East: Its History and Development* (Oxford University Press, 3rd ed, 1968)

MacDonald, Euan, *International Law and Ethics after the Critical Challenge: Framing the Legal within the Post-Foundational* (Brill, 2011)

Macfie, Alexander Lyon, *The End of the Ottoman Empire: 1908-1923* (Routledge, 2014)

Maitland, Frederic William and Francis Charles Montague, *A Sketch of English Legal History* (Lawbook Exchange, 1998 (first published 1915))

Mann, Fritz Alexander, 'The Proper Law of Contracts Concluded by International Persons' [1959] (35) *British Yearbook of International Law* 34

Manning, CAW (ed), *Peaceful Change: An International Problem* (Macmillan, 1937)

Marks, Susan, 'False Contingency' (2009) 62(1) *Current Legal Problems* 1

Martin, Lawrence, *The Treaties of Peace: 1919-1923* (Carnegie Endowment for International Peace, 1924)

Martin, Thomas S, 'The Urquhart Concession and Anglo-Soviet Relations, 1921-1922' (1972) 20(4) *Jahrbücher für Geschichte Osteuropas* 551

Maurer, Noel, *The Empire Trap: The Rise and Fall of US Intervention to Protect American Property Overseas: 1893-2013* (Princeton University Press, 2013)

McClure, Wallace, 'National Economic Independence in the Light of the International Economic Conference' (1927) 21(4) *American Journal of International Law* 668

McNair, Arnold D, 'The Effects of Peace Treaties upon Private Rights' (1941) (7) *Cambridge Law Journal* 379

McNair, Arnold D, 'The General Principles of Law Recognized by Civilized Nations' (1957) 33 *British Yearbook of International Law* 1

McNair, Arnold D, *The Law of Treaties* (Clarendon, 1961)

Miéville, China, *Between Equal Rights: a Marxist Theory of International Law* (Brill, 2005)

Miles, Kate, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013)

Miller, Arthur S, 'Protection of Private Foreign Investment by Multilateral Convention' (1959) 53(2) *American Journal of International Law* 371

Mitchell, Timothy, *Questions of Modernity* (University of Minnesota Press, 2000)

Mitchell, Timothy, *Carbon Democracy: Political Power in the Age of Oil* (Verso Books, 2011)

Montgomery, Alfred E, 'The Making of the Treaty of Sèvres of 10 August 1920' (1972) 15(4) *The Historical Journal* 775

Morton, Michael Quentin, *Keepers of the Golden Shore: A History of the United Arab Emirates* (Reaktion Books, 2016)

Newton, Scott, *Law and the Making of the Soviet World: The Red Demiurge* (Routledge, 2014)

Norton, Patrick M, 'A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation' (1991) 85(3) *American Journal of International Law* 474

Nowell, Gregory P, *Mercantile States and the World Oil Cartel: 1900-1939* (Cornell University Press, 1994)

Nussbaum, Arthur, 'Arbitration Bewteen the Lena Goldfields Ltd and the Soviet Government' [1950] (36) *Cornell Law Quarterly* 31

O'Connell, Daniel P, 'Economic Concessions in the Law of State Succession' [1950] (27) *British Yearbook of International Law* 93

O'Connell, Daniel P, 'Unjust Enrichment' (1956) 5(1) *American Journal of Comparative Law* 2

O' Connell, Daniel P, *International Law* (Stevens, 2nd ed, 1970) vol 2

Ohler, Christoph, 'Concessions' (2013) *Max Planck Encyclopedia of Public International Law*

Orford, Anne, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011)

Orford, Anne, 'In Praise of Description' (2012) 25(3) *Leiden Journal of International Law* 609

Orford, Anne, 'Food Security, Free Trade, and the Battle for the State' (2015) 11(2) *Journal of International Law and Intermatoional Relations* 1

Orford, Anne, 'Theorizing Free Trade' in Orford, Anne et al (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 701

Orford, Anne, 'International Law and the Limits of History' in Werner, Wouter et al (eds), *The Law of International Lawyers* (Cambridge University Press, 2017) 297

Orford, Anne, 'Critical Thinking, Modernist Method, and the History of International Law' in Brett, Annabel et al (eds), *History, Law, Politics: Thinking Through the International* (Cambridge University Press, 2020 (forthcoming)

Pahuja, Sundhya, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2013)

Pahuja, Sundhya, 'Laws of Encounter: a Jurisdictional Account of International Law' (2013) 1(1) *London Review of International Law* 63

Pahuja, Sundhya, 'Letters from Bandung: Encounters with Another International Law' in Nesiah, Vasuki et al (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press, 2017) 552

Pahuja, Sundhya and Cait Storr, 'Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited' in Crawford, James et al (eds), *The International Legal Order: Current Needs and Possible Response: Essays in Honour of Djamchid Momtaz* (Brill Nijhoff, 2017) 53

Parra, Antonio R, *The History of ICSID* (Oxford University Press, 2012)

Pauwelyn, Joost, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Douglas, Zachary et al (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014)

Perrone, Nicolás M, 'UNCTAD's World Investment Reports 1991-2015: 25 Years of Narratives Justifying and Balancing Foreign Investor Rights' (2018) 19(1) *The Journal of World Investment & Trade* 7

Plehwe, Dieter, 'Introduction' in Mirowski, Philip and Dieter Plehwe (eds), *The Road from Mont Pèlerin: the Making of the Neoliberal Thought Collective* (Harvard University Press, 2009)

Pohl, Manfred, *Hermann J Abs: Eine Bildbiographie* (v Hase und Koehler, 1981)

Polanyi, Karl, *The Great Transformation* (Beacon Press, 2001 (originally published 1944))

Raimondo, Fabián, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff, 2008)

Reamer, Norton and Jesse Downing, *Investment: A History* (Columbia University Press, 2016)

Reynolds, Michael P, 'The Jaffa Jerusalem Railway Company Arbitration 1922' [1991] (6) *Arab Law Quarterly* 215

Ridgeway, George, *Merchants of Peace: the History of the International Chamber of Commerce* (Little, Brown and Company, 1959)

Riles, Annelise, 'Is the Law Hopeful?' in Miyazaki, Hirokazu and Richard Swedberg (eds), *The Economy of Hope* (University of Pennsylvania Press, 2016) 99

Robbins, Lionel, *Economic Planning and International Order* (Macmillan, 1937)

Robbins, Lionel C, 'The Economics of Territorial Sovereignty' in Manning, CAW (ed), *Peaceful Change: an International Problem* (Macmillan, 1937)

Roberts, Anthea, 'Investment Treaties: The Reform Matrix' (2018) (112) *AJIL Unbound* 191

Rönnelid, Love 'The Emergence of Routine Enforcement of International Investment Law: Effects on Investment Protection and Development' (Dissertation Thesis, Uppsala University, 2018)

Röpke, Wilhelm, *International Economic Disintegration* (Macmillan Company, 3rd ed, 1950)

Röpke, Wilhelm, 'Economic Order and International Law' [1954] (86) *Recueil des cours de l'Académie de Droit International de la Haye* 203

Rosengarten, Monika, *Die Internationale Handelskammer: Wirtschaftspolitische Empfehlungen in der Zeit der Weltwirtschaftskrise 1929-1939* (Duncker & Humblot, 2001)

Rosenne, Shabtai, *The Law and Practice of the International Court: 1920-2005* (Brill, 4th ed, 2006) vol 2

Rosenne, Shabtai, *Essays on International Law and Practice* (Martinus Nijhoff, 2007)

Rush, Peter, 'An Altered Jurisdiction-Corporeal Traces of Law' (1997) (6) *Griffith Law Review* 144

Salacuse, Jeswald W, *The Law of Investment Treaties* (Oxford University Press, 2015)

Salavrakos, Ioannis-Dionysios, 'Determinants of German Foreign Direct Investment: A Case of Failure?' (2009) 12(2) *European Research Studies* 3

Samuel, Geoffrey, 'Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences' in van Hoecke, Mark (ed), *Epistemology and Methodology of Comparative Law* (Hart, 2004)

Savi de Thové, Jonathan, 'Entwicklungshilfe aus afrikanischer Sicht' [1961] (26) *Vortragsreihe des Deutschen Industrieinstituts*

Schill, Stephan et al (eds), *International Investment Law and History* (Edward Elgar Publishing, 2018)

Schill, Stephan W, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52(1) *Virginia Journal of International Law* 57

Schill, Stephan W et al, *International Investment Law and Development: Bridging the Gap* (Edward Elgar, 2015)

Schmitt, Carl, *Der Begriff des Politischen* (Duncker & Humblot, 1932) vol 10

Harvard Law School Research in International Law, 'The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners' (1929) 23(2) *American Journal of International Law* 131

Schreuer, Christoph, 'Unjustified Enrichment in International Law' (1974) 22(2) *American Journal of Comparative Law* 281

Schreuer, Christoph et al (eds), *The ICSID Convention. A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge University Press, 2nd ed, 2009)

Schulze, Monika, 'Die Lage der Arbeiter und der Klassenkampf in kapitalistischen Betrieben der Sowjetunion in der Periode der Neuen Ökonomischen Politik' (1977) 18(3) *Jahrbuch für Wirtschaftsgeschichte/Economic History Yearbook* 9

Schwarzenberger, Georg, 'The Abs-Shawcross Draft Convention on Investments Abroad: a Critical Commentary' [1960] 9 *Journal of Pubic Law* 147

Seidl-Hohenveldern, Ignaz, 'Communist Theories on Confiscation and Expropriation: Critical Comments' (1958) 7(4) *The American Journal of Comparative Law* 541

Seidl-Hohenveldern, Ignaz, 'The Abs-Shawcross Draft Convention To Protect Private Foreign Investment: Comments on the Round Table' (1961) (10) *Journal of Public Law* 100

Sgard, Jérôme, 'A Tale of Three Cities: the Construction of International Commercial Arbitration' in Mallard, Grégoire and Jérôme Sgard (eds), *Contractual Knowledge: One Hundred Years of Legal Experimentation in Global Markets* (Cambridge University Press, 2016) 153

Shawcross, Hartley, 'The Problems of Foreign Investment in International Law' [1961] (102) *Recueil des cours de l'Académie de Droit International de la Haye* 335

Shawcross, Hartley, *Life Sentence: the Memoirs of Lord Shawcross* (Constable, 1995)

Shihata, Ibrahim FI, 'The Power of the International Court to Determine its Own Jurisdiction: Compétence de la Compétence' (Dissertation Thesis, Harvard University, 1964)

Shwadran, Benjamin, *The Middle East, Oil and the Great Powers* (Frederick A Praeger, 1955)

Simma, Bruno, 'The Contribution of Alfred Verdoss to the Theory of International Law' (1995) 6(1) *European Journal of International Law* 33

Sinclair, Anthony C, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) 20(4) *Arbitration International* 411

Skouteris, Thomas, 'Engaging History in International Law' in Beneyto, José María and David Kennedy (eds), *New Approaches to International Law: The European and the American Experiences* (TMC Asser Press, 2013) 99

Skouteris, Thomas, *The Turn to History in International Law* (Oxford Bibliographies, 2017)

Slobodian, Quinn, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018)

Sornarajah, Muthucumaraswamy, *The International Law on Foreign Investment* (Cambridge University Press, 2010)

St John, Taylor, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press, 2018)

Strupp, Karl, *Legal Machinery for Peaceful Change* (Constable, 1937)

Sykes, Alan O'Neil, 'Public v Private Enforcement of International Economic Law: Of Standing and Remedy' (2005) (34) *Journal of Legal Studies* 631

Tamedly, Elisabeth L, *Socialism and International Economic Order* (Caxton Printers, 1969)

Tobin, Jennifer L and Susan Rose-Ackerman, 'Do BITs Benefit Developing Countries?' in Rogers, Catherine A and Roger P Alford (eds), *The Future of Investment Arbitration* (Oxford University Press, 2009) 131

Tomashot, Shane R, 'Selling Peace: The History of the International Chamber of Commerce: 1919-1925' (Dissertation Thesis, Georgia State University, 2015)

Tuson, Penelope (ed), *Records of the Emirates: Primary Documents 1820-1958* (Farnham Common: Archive Editions, 1990) vol 9

Tzouvala, Konstantina, 'Letters of Blood and Fire: a Socio-Economic History of International Law' (Dissertation Thesis, Durham University, 2016)

Tzouvala, Ntina, 'The Academic Debate about Mega-Regionals and International Lawyers: Legalism as Critique?' (2018) 6(2) *London Review of International Law* 189

Tzouvala, Ntina, 'Civilization' in d'Aspremont, Jean and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar, 2019) 83

van der Linden, Mieke, *The Acquisition of Africa (1870-1914): The Nature of International Law* (Brill, 2017)

van Emde Boas, MJ, 'The OECD Draft Convention on the Protection of Foreign Property' (1963) 1(3) *Common Market Law Review* 265

Van Harten, Gus, 'TWAIL and the Dabhol Arbitration' (2011) 3(1) *Trade Law and Development* 131

Vandevelde, Kenneth J, 'A Brief History of International Investment Agreements' [2005] (12) *UC Davis Journal of International Law & Policy* 157

Vandevelde, Kenneth J, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, 2010)

Veeder, VV, 'The Lena Goldfields Arbitration: the Historical Roots of Three Ideas' (1998) 47(4) *International and Comparative Law Quarterly* 747

Veeder, VV, 'The Lena Goldfields Arbitration' (Keynote, Arbitration Academy: Goldman Lecture, 12 July 2011)

Verdross, Alfred, *Die Verfassung der Völkerrechtsgemeinschaft* (Julius Springer, 1926)

Verdross, Alfred, 'Die Verbindlichkeit der Entscheidungen internationaler Schiedsgerichte und Gerichte über ihre Zuständigkeit' (1928) 7(3) *Zeitschrift für Öffentliches Recht* 439

Verdross, Alfred, 'Règles internationales concernant le traitement des étrangers' [1931] (37) *Recueil des cours de l'Académie de Droit International de la Haye* 325

Verdross, Alfred, 'Quasi-international Agreements and International Economic Transactions', *Yearbook of World Affairs* (Stevens, 1964) vol 18, 230

Weiler, Todd, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Brill, 2013)

Wetter, J Gillis and Stephen M Schwebel, 'Some Little-Known Cases on Concessions' (1964) 40 *British Yearbook of International Law* 183

Wheatley, Natasha, 'The Mandate System as a Style of Reasoning: International Jurisdiction and the Parcelling of Imperial Sovereignty in Petitions from Palestine' in Schayegh, Cyrus and Andrew Arsan (eds), *The Routledge Handbook of the History of the Middle East Mandates* (Routledge, 2015) 106

Wheatley, Natasha, 'Spectral Legal Personality in Interwar International Law: on New Ways of Not Being a State' (2017) 35(3) *Law and History Review* 753

White, Stephen, *The Origins of Detente: the Genoa Conference and Soviet-Western Relations: 1921-1922* (Cambridge University Press, 2002)

Whitton, John Boardman, *Peaceful Change and Raw Materials* (Longmans, Green and Co 1938)

Yackee, Jason Webb, 'Pacta Sunt Servanda and the State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality' (2009) 32(5) *Fordham International Law Journal* 1550

Yackee, Jason Webb, 'The First Investor-State Arbitration: The Suez Canal Company v Egypt (1864)' (2016) 17(3) *Journal of World Investment & Trade* 401

Cases

Anglo-Iranian Oil Case (United Kindgom v Iran) (Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland) [1952] ICJ Rep 93

Anglo-Iranian Oil Co Case (United Kindgom v Iran) (Preliminary Objection) [1952] ICJ Rep 93

Anglo-Iranian Oil Co Case (United Kindgom v Iran) [1952] 27/116 (President McNair)

German Settlers in Poland [1923] *(Advisory Opinion)* PCIJ (ser B) No 6

The Lena Goldfields Arbitration Annual Digest of Public International Law Cases (1929-1930) 3, 426 (cases nos 1 and 258)

Payment of Various Serbian/Brazilian Federal Loans Issued in France [1929] *(Judgment)* (ser A) Nos 20/21 PCIJ 4

Petroleum Development (Qatar) Ltd v Ruler of Qatar (Award) 18 ILR 161

Petroleum Development Ltd v The Sheikh of Abu Dhabi (Award) 18 ILR 144

The Rose Mary (Anglo-Iranian Oil Co Ltd v Jaffrate) [1953] *(Judgment)* 1 WLR 246

Ruler of Qatar v International Marine Oil Company, Ltd (Award) 20 ILR 543

Saudi Arabia v Arabian American Oil Company (Aramco) (Award) 27 ILR 117

Schiedsgerichtssache zwischen Lena Goldfields Co Ltd und der Regierung der USSR (Schiedsspruch)

Treaties and Contracts

Agreement between [the] Ruler of Abu Dhabi and Petroleum Development (Trucial Coast) Ltd, signed 11 January 1939, British Library: India Office Records and Private Papers: Qatar Digital Library

Agreement between the Government of His Imperial Majesty the Shah of Persia and William Knox D'Arcy (D'Arcy Concession), signed 28th May 1901

Agreement relating to the Abu Dhabi Oil Concession [between] His Majesty's Government in the United Kingdom and Petroleum Development (Trucial Coast), signed 11 April 1940, British Library: India Office Records and Private Paper: Qatar Digital Library

Covenant of the League of Nations, opened for signature 29 April 1919 (entered into force 10 January 1920)

In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi (1951) *(Award)* reproduced in International & Comparative Law Quarterly 1 (1952) 247-61

International Code of Fair Treatment for Foreign Investments, Brochure No 12, International Chamber of Commerce

IPC Draft Inter Group Agreement, available at the Baker Library Special Collections Harvard Business School (entered into force 31 July 1928)

Protocol on Arbitration Clauses, opened for signature 24 September 1923, 27 LNTS 157 (signed and entered into force 28 July 1924)

Statute of the Permanent Court of International Justice

Supplementary Agreement to the Original Concession Agreement of 4 August 1914, Available at Harvard Law Library

Treaty of Peace between the Allied and Associated Powers and Turkey signed 10 August 1920 (entered into force not in force)

Newspaper Articles

'Investment Code for World Urged: German Banker Proposes International Convention to Protect Capital', *New York Times* (16 October 1957)

'The Lena Gold Mines and Anglo Russian Companies', *The Economist* (London, 18 May 1912)

'Lena Goldfields, Limited: Report of the Statuatory Meeting on 4 November 1908', (London, 7 November 1908)

'Lena Goldfields, Limited: Statement of the Board of Directors', *The Economist* (London, 16 May 1925)

'Lena Goldfields, Limited: Resumption of Active Operations - Report of the 12th Ordinary General Meeting held on 12 January 1926', *The Economist* (London, 16 January 1926)

'Lena Goldfields, Limited: The Strike: Report of the Annual General Meeting held on 3 December 1912', *The Economist* (London, 7 December 1912)

'Lena Goldfields. Negotiations with the Soviet Government. Concession for Working the Properties. Mr Guedella's Speech - on the Occasion of the Extraordinary General Meeting held on 30 July 1925', *The Times* (London, 31 July 1925)

Merrill, Selah, 'The Jaffa and Jerusalem Railway' 13(3) *Scribner's Magazine* 289

Wirtschaftsredaktion, 'Vermögensschutz', *Die Zeit* (5 April 1956) Nr. 14

Other

Advisory Committee of Jurists, Permanent Court of International Justice, *Procès-Verbaux of the Proceedings of the Committee June 16th-July 24th 1920 with Annexes* (Van Langenhuysen Brothers, 1920)

Bankers' Mission to India and Pakistan (February-March 1960) A letter to Mr Eugene R Black in *World Bank Group Archives* (Washington DC)

Hauptkonzessionskommittee des Rates der Volkskommissare der UdSSR, *Materialien zur Frage der Zuständigkeit des Schiedsgerichts in Sachen 'Lena Goldfields': UdSSR* (1930)

Internal Communication Continental Shelf and Marine Area from British Middle East Office 21 May 1949 in *British Library: India Office Records and Private Papers: Qatar Digital Library*

International Institute of Intellectual Co-operation, League of Nations, *Peaceful Change: Procedures, Population, Raw Materials, Colonies: Proceedings of the Tenth International Studies Conference* (1938)

Letter to the Under Secretary of State for Foreign Affairs for Oil Concessions from Anglo Persian Oil Company Ltd 12 May 1921 in *British Library: India Office Records and Private Papers: Qatar Digital Library* (London)

Swent, Eleanor, 'Interview with Plato Malozemoff' (1987-1988) *Engineering and Technology History Wiki*

Merriam-Webster.com (online at 26 October 2019) 'depoliticize'

Supreme Council of the Allied Powers, *'Resolutions Adopted by the Supreme Council at Cannes, January, 1922, as the basis of the Genoa Conference*' (His Majesty's Stationery Office) (1922)

Truman, Harry S, 'Inaugural Address' (US Department of State, 20 January 1949)

Truman, Harry S, 'Proclamation by the President with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf' (January 1946) 40(1) Supplement: Official Documents) *American Journal of International Law* 45

UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies*

German abstract / deutsche Zusammenfassung

Diese Dissertation beschäftigt sich mit der Entstehung des Internationalen Investitionsschutzrechtes zwischen 1922 und 1959. Sie geht der Frage nach, wie die Bausteine für den rechtlichen Schutz ausländischen Eigentums auf internationaler Ebene entwickelt wurden. Dabei versteht die Arbeit Recht eher als Praxis, denn als Konzept. Sie begreift Recht als Summe von Handlungen denen bestimmte rechtliche Bedeutung zugemessen wird. Dieser Zugang führt zu einer Veränderung des Blickwinkels auf das Investitionsschutzregime in zweierlei Hinsichten. Zum einen verschiebt sich der zeitliche Horizont der Arbeit, und es wird die Periode *vor* der Schaffung der heute gängigen Instrumente des Investitionsschutzes, nämlich bilateraler Investitionsschutzverträge und der ICSID Konvention, ins Auge gefasst. Zum anderen wird nicht die Anwendung dieser Instrumente analysiert, sondern die Ausformung derselben beschrieben. Durch den Fokus auf Ereignisse, die vor dem liegen, was gemeinhin als Ausgangspunkt des modernen internationalen Investitionsschutzrechtes verstanden wird, soll gezeigt werden, wie bestimmte Präferenzen durch die Einführung von Rechtsprinzipien, in scheinbare Notwendigkeiten verwandelt wurden.

Schiedsgerichtsverfahren und Versuche zur multilateralen Kodifikation von Normen zum Schutz fremden Eigentums werden in der Arbeit zu den wesentlichen Schauplätzen dieser Entwicklung. Speziell die Unterwerfung von Konzessionsverträgen, insbesondere Verträge für die Entwicklung von Infrastruktur und Ressourcenabbau, unter ein internationales Rechtsregime war wesentlich für die Entstehung des heutigen Investitionsschutzes. Während diese Verträge in den 1920er Jahren noch als ausschließlich dem nationalen Recht unterliegend verstanden wurden, hatte sich in den 1950er Jahren unter praktizierenden Juristen und Akademikern eine starke Strömung herausgebildet, die Konzessionsverträge, die dann auch „economic development agreements“ genannt wurden, einer internationalen Rechtsordnung unterwerfen wollten. Diese Internationalisierung des Rechtsregimes bedeutete die universelle Geltendmachung von Eigentumsschutz und Unverletzlichkeit von Verträgen, und eine gleichzeitige Ablehnung von sozialistischen und anti-kolonialen Politiken zur sozialen Umverteilung. Westliche Unternehmen sowie die sie vertretenden Regierungen und liberale Denker in Recht und Wirtschaft, beanspruchten die internationale Rechtssphäre erfolgreich für die Etablierung einer neuen Rechtsordnung. Die Autorisierung dieses Anspruchs gründete sich auf eine *temporalisation of difference*, eine „Verzeitlichung von Unterschiedlichkeit“ anhand der Konzepte von „Zivilisation“ und „Entwicklung“. Diese Konzepte dienten dazu, die Angriffe auf den privaten Eigentumsschutz in Form von Nationalisierungen und ähnlichen

Sozialpolitiken, als „unzivilisiert“ und der Vergangenheit angehörend zu stilisieren. Dieser Prozess wird in der Arbeit als ein Prozess der „Selbst-Autorisierung“ charakterisiert, der seine Autorität ausschließlich aus seiner eigenen rechtlichen Praxis speist. Die Handlungen von Juristen in den frühen Investitionsschutzverfahren, mit den sie begleitenden akademischen Abhandlungen, wurden dadurch zur Grundlage für die spätere Entstehung des modernen Investitionsschutzregimes. Das Ziel dieser Arbeit ist es, das Verständnis von Rechtmäßigkeit zu pluralisieren, indem sie aufzeigt, dass der internationale Investitionsschutz eine *universelle* Geltung des Eigentumsschutzes annimmt, die allerdings aus einer *spezifischen* Weltanschauung gewachsen ist, die heute noch die Interessen jener bedient, die sich als dieser Weltanschauung zugehörig sehen.