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ORIGINAL ARTICLE

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Protecting concessionary rights: General principles and the making of international investment law

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Abstract

This article engages with the history of international investment law in the first half of the twentieth century. It traces how international lawyers inscribed their vision of an international legal order protecting private property of Western companies against attempts at nationalization in the wake of socialist revolutions and the decolonization of large parts of the world. The article focuses on the role of 'general principles of law as recognized by civilized nations' as building blocks for an international legal order today called international investment law. Rather than describing a direct line between contemporary standards of protection and the invocation of general principles, the article develops conditions of possibility for the emergent field of international investment law. These conditions are located both in arbitral practice, as well as in international legal scholarship of the early twentieth century. Based on the analysis of such arbitrations over disputes resulting from concession agreements and scholarly writings in the interwar period, the contribution draws out the modes of authorization upon which the legal claims advanced by international lawyers rested. At the heart of the vision were ideas of 'modernity', 'civilization', 'equity', and 'justice' that enabled a hierarchization of difference, locating Western claims to legality above rivalling claims of socialist and 'newly independent' states. These ideas ultimately constituted the paradox of a 'modern law of nature' that claimed timeless universality while authorizing the ordering of foreign property in line with Western conceptions of modernity.

Keywords: arbitration; civilization; concession agreements; development; general principles

1. Introduction

The codification of 'general principles of law recognized by civilised nations' in Article 38(3) of the Statute of the Permanent Court of Justice marks a well-known event in the history of international law.[1] The list of sources drafted in 1920 was carried over into the corresponding Article 38 of the Statute of the International Court of Justice and is the hallmark of sources doctrine until today.

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[1]Permanent Court of International Justice: Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee June 16th–July 24th 1920 with Annexes (1920).

Yet, general principles have not played as important a role in the development of international law as treaties and custom did and have received much less scholarly attention.[2]

In the following, the article traces the role of 'general principles of law recognized by civilized nations' in the first half of the twentieth century as a fundamental building block for the coming into being of the field on international investment law. In the first part, the article shows that general principles were invoked in the practice of early investor state arbitrations to claim the applicability of an international legal order superseding domestic law. These arbitrations over concession agreements took place before 1959 and thus, before the pillars of the contemporary investment law system, namely bilateral investment treaties and the ICSID Convention, came into being.[3] The article draws on the example of the Sheikh of Abu Dhabi Arbitration concluded in 1959 to demonstrate not only the application of general principles in an arbitration, but to also trace the way in which they enabled the invocation of a higher legal order. At this and other occasions of arbitrations concerning disputes over concession agreements, the reference to an international order enabled positioning the protection of foreign property as universal rule against domestic attempts at large-scale redistributions of wealth. Building on the first part, tracing the reliance on general principles in arbitrations, in the second part the article draws out how general principles were considered in scholarly writings in the same period, especially in the works of Sir Hersch Lauterpacht, Sir Arnold McNair, and Alfred Verdroß. Lauterpacht and McNair were actively shaping the arbitral practice, while also producing influential scholarship. Verdroß, in turn, worked extensively on general principles from an international economic perspective and his vision encapsulates their role for the protection of foreign property.[4] By drawing out the private law character of the conceptualization of general principles, the article shows how they were a vessel for prioritizing the continuation and protection of accrued wealth over attempts at redistribution for the public good. In the second part, the article also shows that the authority for successfully establishing an international order of this character was drawn from a hierarchization of difference that creates a paradoxical understanding of general principles as 'akin to a modern law of nature'. A universal right claim and the civilizing mission converged into the imposition of a particular understanding of the appropriate treatment of foreign property.[5]

2. Internationalization of contracts

Most early investor-state arbitrations of the first half of the twentieth century, meaning arbitrations in which a company engaged in a legal dispute with a state in an international arbitral forum, have a commonality; they were based on a concession agreement[6] until well into the 1950s.[7]

[2]J. d'Aspremont, 'What Was Not Meant to Be: General Principles of Law as a Source of International Law', in R. Pisillo Mazzeschi and P. De Sena (eds.), *Global Justice, Human Rights and the Modernization of International Law* (2018), 163.

[3]Not many arbitrations that would be considered of an 'international' rather than a 'commercial' character in this period are recorded. However, the very transition from commercial arbitration to international investment arbitration is traced in this article. For a list of relevant arbitrations see *infra* note 15.

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

[5]See also D. Schneiderman, 'The Global Regime of Investor Rights: Return to the Standards of Civilised Justice?', (2014) 5(1) *Transnational Legal Theory* 60–80, at 62.

[6]In the collection of records of 15 investor-state arbitrations before 1934, all were based on a dispute over a concession agreement.

[7]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. J. Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law', in Z. Douglas et al. (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (2014), 30.

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Concession agreements denote 'a broad range of legal instruments under which a State grants certain economic rights and privileges to foreign investors within the framework of a public function',[8] usually involving the exploitation of natural resources or the construction of large-scale infrastructure projects. The fate of these legal instruments was highly controversial during and after decolonization and the socialist revolutions in a number of countries around the globe.[9] One could think of the nationalizations in the course of the socialist revolutions in the Soviet Union and Mexico, the large land reforms in Eastern Europe, or the later nationalization of the Anglo-Iranian oil company. Other instances were linked to decolonization and the claim to control resources and industry by 'newly' independent states. In all these instances contracts granting rights to foreign investors were affected by legal measures of the 'new' government.

As developed by M. Sornarajah in his early work on the internationalization of contracts, Western governments, companies and their legal representatives tried to safeguard foreign property from such government measures, by developing the theory of the internationalization of contracts, meaning 'the removal of the foreign investment transaction from the sphere of the host state's law and its subjection to an immutable, supranational system'.[10] It was a conjunction of 'extra-State law or norms ... with an independent forum'[11] that were at the core of the coming into being of what we call international investment law today. Building on Sornarajah's and Anghie's work, the contribution this article seeks to make is to show how concession agreements were successfully moved from the domestic to the international sphere and to highlight the role of general principles in enabling this move.[12]

Focusing on the applicable law for concession agreements the *Serbian and Brazilian Loans Cases* of 1929 offer a useful point of entry to trace this move. 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'.[13] 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. This rule on the applicable law was restated in almost every award. However, in many cases its restatement was then followed by a reference to a law of higher order, a law that was ultimately located outside the realm of national laws.[14] This law would consist of general principles of a transnational character that enable the 'construction of modern commercial instruments'.[15]

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

[9]For an account of the role of concession agreements in expanding colonial indirect rule see M. Craven, 'Colonial Fragments: Decolonisation, Concessions and Acquired Rights', in J. von Bernstorff and P. Dann (eds.), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (2020), 101.

[10]M. Sornarajah, *The International Law on Foreign Investment* (2010), 289.

[11]A. Z. 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* 9–170, at 44. A discussion of a possible interpretation in accordance with Islamic law can be found in W. M. Ballantyne, *Essays and Addresses on Arab Laws* (2000), 85.

[12]Sornarajah, *supra* note 10, at 228.

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

[14]Some examples of cases referencing general principles in consideration of the applicable law are the *Palestine Railway* case (*Société du Chemin de Fer Ottoman de Jaffa à Jerusalem et Prolongements v. Government of the United Kingdom*, 1922); the *Lena Goldfields* case (*Lena Goldfields Ltd. v. Soviet Union*, 1930); the *Watercourses in Katanga* case (*Compagnie du Katanga v. The Colony of the Belgian Congo*, 1931); the *Greek Telephone Company* case (*Greek Telephone Company v. Government of Greece*, 1935); the *Sheikh of Abu Dhabi* case (*Petroleum Development (Trucial Coast) Ltd v. the Sheikh of Abu Dhabi*, 1951); the *Ruler of Qatar* case (*Ruler of Qatar v. International Marine Oil Company, Ltd.* 1953); the *ARAMCO* case (*Saudi Arabia v. Arabian American Oil Company*, 1963).

[15]In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi (1951) (Award) reproduced in (1952) 1 *Interntional & Comparative Law Quarterly* 247–6, at 251. Other examples of such an invocation are the *Lena Goldfields* arbitration of 1930, and the proceedings in the *Anglo-Iranian* case in 1952 and the *Ruler of Qatar* arbitration of 1953.

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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.[16] 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, Hersch Lauterpacht and Arnold McNair. Based on early disputes in the *Lena Goldfields Arbitration* or the *Anglo-Iranian* case, the 1950s saw an ever-increasing consensus between a number of Western scholars that domestic law could not be the appropriate applicable law for concession agreements, which then came to be called 'economic development agreements'.[17] Anghie describes that what came to be developed to safeguard the concessions was 'a new system of law, which had an international character, but which was not public international law'.[18]

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.[19] Other authors made suggestions along similar lines.[20] What all these propositions had in common, was the claim of a higher legal order, superseding domestic law. The study of these early arbitrations shows that the vessel for the making of such a higher legal order were 'general principles of law recognized by civilized nations'. So how did 'general principles of law as recognised by civilised nations', a formal source of public international law, find their way into arbitrations over concession agreements that were considered to be exclusively subject to domestic law?

2.1 General principles in early arbitrations

General principles, or the technical term 'general principles recognized by civilized nations' with explicit reference to Article 38 of the PCIJ and later the International Court of Justice (ICJ), were invoked in a number of awards in the few early arbitrations between a company and a state.[21] A systematic analysis reveals that these invocations constituted an argumentative pattern that enabled the elevation of concession agreements to the international sphere.

As mentioned before, the majority of early arbitrations involved a British company as well as a number of British lawyers who worked together on both sides of the arbitrations. In the *Sheikh of Abu Dhabi Arbitration* of 1951 Walter Monckton, Hersch Lauterpacht, G. R. F. Morris, and R. Dunn appeared on behalf of the company, whereas the Ruler of Abu Dhabi was represented by N. R. Fox-Andrews, C. H. M. Waldock, Stephen Chapman, and J. F. E. Stephenson. Together with R. V. 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), N. R. Fox and Walter Monckton served as counsel in the *Ruler of Qatar Arbitration* (1953).[22] In *The Rose Mary* case (1953), Idelson and Lauterpacht were part

[16]Britain was the largest outward investor until 1945 with total overseas investments estimated at £3,545 million in 1938. This number included 46% foreign direct investment and 54% of portfolio investment. T. A. B. Corley, 'Competitive Advantage and Foreign Direct Investment: Britain 1913–1938', (1997) 26(2) *Business and Economic History* 599–608, at 601. The British share furthermore constituted about 41% of global FDI. I. Salavrakos, 'Determinants of German Foreign Direct Investment: A Case of Failure?', (2009) 12(2) *European Research Studies* 3–26, at 7.

[17]A. D. McNair, 'The General Principles of Law Recognized by Civilized Nations', (1957) 33 *British Yearbook of International Law* 1–19, at 1.

[18]A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2008), 228.

[19]P. C. Jessup, *Transnational Law* (1956).

[20]See, eg., W. C. Jenks, 'The Scope of International Law', (1954) 31 *British Yearbook of International Law* 1; McNair, *supra* note 17; A. Verdroß, 'Quasi-international Agreements and International Economic Transactions', (1964) 18 *The Yearbook of World Affairs* 230–47; R. Jennings, 'State Contracts in International Law', (1961) 37 *British Yearbook of International Law* 156–82.

[21]See a list of such early arbitrations, *supra* note 15.

[22]*Ruler of Qatar v. International Marine Oil Company, Ltd.* (Award), (1953) 20 ILR 543.

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of the drafting team, and Hartley Shawcross and John Megaw appeared as counsel.[23] McNair was the presiding judge in 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.[24] Indeed, the *Sheikh of Abu Dhabi Arbitration* took place after the nationalization of the Anglo-Iranian oil company in Iran in March 1951, but before the ICJ 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,[25] so that the legal work for the three cases must have been done at the same time. These lawyers worked together on many more occasions and were likely to know each other well and be familiar with the arguments and findings in the other cases.[26]

One commonality between them was that 'general principles of law recognized by civilized nations' were invoked. This was the case in the *Lena Goldfields* arbitration 1930, the *Anglo-Iranian* case 1953, the *Sheikh of Abu Dhabi* arbitration 1951 and the *Ruler of Qatar* arbitration 1953. In each of these instantiations their application was grounded in an article of the concession agreement. As we will see in more detail below, explicit stipulations in the concession agreements referencing 'good faith' and 'reason' were interpreted to demand the application of general principles, rather than domestic law. Remarkably, the relevant article in the concession agreements referencing 'good faith' and 'reason' read almost identical in all four cases and it can be almost stated with certainty, that the drafter of the concession agreements underlying these arbitrations was R.V. Idelson.[27]

The tight knit relationships between the practitioners invite a focus on legal practice, as invented and undertaken by the lawyers. By applying this lens, we can 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*'.[28] Thus, a pattern of reasoning was established through the same argument and travelled from one award to the other through the people who were involved. This focus on practice demystifies the legal claim and its status. It turns it from an expression of 'the law' into an argument particular to the actors involved in these cases.

One might ask about the contestations against this line of reasoning and wonder how it was able to travel so smoothly? The response to this has to do with the definition of what counted as the legal sphere. In the eyes of Western lawyers and the Western media, contestations of socialist governments were not understood to take the form of legal arguments. They were located outside the legal field and construed as political manoeuvres. From the Soviet perspective, the withdrawal of its arbitrator from the *Lena Goldfields* arbitration in 1930 was a contestation of the legitimacy of the constitution of the arbitral tribunal.[29] In scholarship and media in the West it was

[23] *The Rose Mary (Anglo-Iranian Oil Co Ltd v. Jaffrate)* (Judgment), [1953] 1 WLR 246. 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. H. Lauterpacht, 'The Rose Mary Case', *International law: being the collected papers of Hersch Lauterpacht systematically arranged and edited by E. Lauterpacht* (1970 (unpublished case note, originally 1953)) vol. 3, 242.

[24] *Anglo-Iranian Oil case (United Kindgom v. Iran)* (Preliminary Objection of 22 July 1952), [1952] ICJ Rep. 93.

[25] See *Rose Mary* case, *supra* note 23.

[26] 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 E. Lauterpacht, *The Life of Sir Hersch Lauterpacht, QC, FBA, LLD* (2010), at 324, plate 16.

[27] This conclusion is grounded in the study of the wordings in the respective concession agreements and the almost identical phrasing. Cf. V. V. Veeder, 'The Lena Goldfields Arbitration: The Historical Roots of Three Ideas', (1998) 47 *International and Comparative Law Quarterly* 747, at 769.

[28] A. Riles, 'Is the Law Hopeful?', in H. Miyazaki and R. Swedberg (eds.), *The Economy of Hope* (2016), 126–46, at 141.

[29] See N. A., 'Statements Regarding the Lena Goldfields Concession', 5 (11) *Economic Review of the Soviet Union* 228, at 229. Cf. A. Leiter, 'Contestations over Legal Authority: The Lena Goldfields Arbitration 1930', in A. Orford et al. (eds.), *Revolutions in International Law* (2021), 315–38.

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characterized as a rejection of the rule of law.[30] In a similar vein, the insistence of the Mossadegh government on the payment of compensation according to domestic laws after the nationalization of the oil concession of British Petroleum finally ending with a coup d'état by the British and US governments, is a form of contestation illegible as lawful from a study of awards over concession agreements.[31]

In addition to the non-recognition of contestations in legal terms, the ease of building a pattern of reference stems from the fact that the same British lawyers sometimes appeared as counsel on both sides of the dispute.[32] The claim to a higher legal order through general principles was normalized, it became the common ground for argumentation. The focus on repetition and the engagement of the same lawyers on both sides of the arbitration indicates the early formation of a professional field with shared commitments and assumptions as has become common place today in both commercial as well as investment arbitration. The developments described here should be understood to have emerged prior to and in conjunction with the field of arbitration more broadly as traced in sociological terms by Dezalay and Garth.[33] In the following I will develop the deployment of a claim for a higher legal order in the *Sheikh of Abu Dhabi* arbitration to substantiate my argument. Yet, a similar substantiation could be made by example of any of the other above-mentioned arbitrations.

2.2 The Sheikh of Abu Dhabi arbitration

The dominant view in the first half of the twentieth century was that contracts were subject to the national laws of the country in which the contract was performed.[34] 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"',[35] which was in effect a representation of English law. His reasoning was based on the text of Article 17 of the concession agreement. This Article read 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.*'[36] 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'.[37] 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

[30]A. Nussbaum, 'Arbitration Bewteen the Lena Goldfields Ltd. and the Soviet Government', (1950) 36 *Cornell Law Quarterly* 31, at 31, 40.

[31]S. Pahuja and C. Storr, 'Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited', in J. Crawford et al. (eds), *The International Legal Order: Current Needs and Possible Response: Essays in Honour of Djamchid Momtaz* (2017), 53.

[32]One example of British lawyers acting on both sides is the *Sheikh of Abu Dhabi* arbitration discussed below.

[33]Y. Dezalay and B. G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1998).

[34]*Serbian/Brazilian Loans* case, *supra* note 13. See also A. Nussbaum, *supra* note 30, at 36.

[35]*Sheikh of Abu Dhabi* arbitration, *supra* note 15, at 250–1.

[36]*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, 312–21.

[37]*Sheikh of Abu Dhabi* arbitration, *supra* note 15, at 250–1.

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> 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".[38]

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 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'.[39] 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 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'.[40] 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. Islamic law was not an expression of this order, but 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. This aspect of Lord Asquith's reasoning is an iteration of what Pahuja calls the 'operationalisation of the universal',[41] a constitutive technique for international law. When Lord Asquith said, 'modern law of nature', British law moved from the 'particular' to the 'universal' thereby authorizing the dismissal of Islamic law.[42]

In other arbitrations, the rhetoric was less dismissive and condescending, but the mode of reasoning stayed the same: the displacement of a domestic legal order by reference to a higher legal order. This higher legal order was determined by turning a particular domestic law into a universally applicable norm, claiming its status as 'general principle of law recognized by civilized nations'. In each arbitration the reference to general principles served as a basis of an argument for the application of a higher legal order that could supersede domestic law. Thus, on a practical level, it is the work of a small number of British international lawyers that enabled general principles to become the vehicle for the internationalization of contracts. To show how the above-described practice was embedded in a larger view of the world prevalent in particular parts of

[38]Ibid. For affirmative commentary on the arbitration see McNair, *supra* note 17, at 12. W. Friedmann, 'The Uses of "General Principles" in the Development of International Law', (1963) 57 *American Journal of International Law* 279–99, at 283–5; Jessup, *supra* note 19, at 80; F. A. Mann, 'The Proper Law of Contracts Concluded by International Persons', (1959) 35 *British Yearbook of International Law* 34, at 52. For contemporary critical commentary see Sornarajah *supra* note 10, at 289–99. Anghie, *supra* note 18, at 226.

[39]*Sheikh of Abu Dhabi* arbitration, *supra* note 15, at 250–1.

[40]Ibid.

[41]S. Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (2013), 99.

[42]Schneiderman, *supra* note 5, at 63.

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the international legal academy, the next section develops the role of general principles in the scholarship of Lauterpacht, McNair, and Verdross.

3. General principles in scholarship

In 1957, McNair wrote the most important piece for the internationalization 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 developments in arbitral practice discussed above and the theoretical developments to be discussed in this section.

3.1 General principles as rules of private law

General principles occupy a particularly important place in international legal theory.[43] In the discussion of the sources of the binding force of international law, the battle line in the interwar period ran between positivists and natural lawyers.[44] Lauterpacht located his own view of international law between the 'believer in the law of nature and the principles of natural justice forming part of international law' and the 'rigid positivist'.[45] 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.[46]

Indeed, for Lauterpacht, general principles had delivered *un coup mortel* to positivist theory.[47] They provided a solution to the problem of a court ruling of *non liquet* due to gaps,[48] or lacunae, in international law, arising from a strictly positivist view. General principles were the logically necessary expression of the completeness of the law, since 'law, like physics, does not tolerate a vacuum'.[49]

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.[50] 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

[43]M. Dordeska, *General Principles of Law Recognized by Civilized Nations (1922-2018): The Evolution of the Third Source of International Law Through the Jurisprudence of the Permanent Court of International Justice and the International Court of Justice* (2019).

[44]M. Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870–1960* (2001); B. Simma, 'The Contribution of Alfred Verdoss to the Theory of International Law', (1995) 6(1) *European Journal of International Law* 33–54, at 47.

[45]H. Lauterpacht, *The Function of Law in the International Community* (2011), 65.

[46]Ibid.

[47]H. Lauterpacht, 'Règles générales du droit de la paix', (1937) 62 *Recueil des cours de l'Académie de Droit International de la Haye* 100–206, at 164.

[48]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 *supra* note 44, at 367.

[49]H. 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* (1970), vol. 3, 126.

[50]Lauterpacht, *supra* note 47, at 165.

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custom and treaties, be treated as binding upon international tribunals'.[51] Lauterpacht's argument was that the reference to Article 38(3) was a recognition of the already established customary rule that general principles formed part of the body of international law.[52] His thesis then set out to document and systematize the practice of international courts and tribunals to better grasp the content and character of such principles. Indeed, McNair characterized Lauterpacht's LSE thesis as 'in effect, a commentary upon Article 38(1)(c) of the Statute of the Court'.[53]

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.[54] 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'.[55] The most obvious place to trace this conception is the debate over acquired rights in cases of state succession.[56] 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.[57] Here, too, Lauterpacht argued in favour of a strict analogy to private law principles since the problems were 'identical'.[58] 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'.[59]

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'?[60] 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.[61] Recognition became the topic of Lauterpacht's first book after the war.[62] As Koskenniemi put it, recognition was the 'master technique establishing the connection between the abstract rule and its concrete manifestation'.[63] 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'.[64]

3.2 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.[65] McNair based his

[51]H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), 298–9.
[52]Ibid., at 63–71.
[53]McNair, *supra* note 17, at fn. 3.
[54]Lauterpacht, *supra* note 51, at 130.
[55]Ibid., at 92.
[56]For an analysis of the doctrine of state succession and its relationship to decolonization see M. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (2009).
[57]Lauterpacht, *supra* note 49, at 127.
[58]Lauterpacht, *supra* note 51, at 125.
[59]Lauterpacht, *supra* note 49, at 126.
[60]Lauterpacht, *supra* note 51, at 126.
[61]Lauterpacht, *supra* note 49, at 127.
[62]H. Lauterpacht, *Recognition in International Law* (1947).
[63]Koskenniemi, *supra* note 44, at 383.
[64]Lauterpacht, *supra* note 51, at 129.
[65]W. W. Buckland and A. McNair, *Roman Law and Common Law: a Comparison in Outline* (1936); A. McNair, 'The Effects of Peace Treaties upon Private Rights', (1941) 7 *Cambridge Law Journal* 379; A. McNair, *The Law of Treaties* (1961).

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conceptualization 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'.[66] 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 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 rules for the treatment of foreigners in general and the rules pertaining especially to the economic sphere.[67] Verdroß argued on the basis of a distinction between *imperium* and *dominium* that the latter should be 'autonomous'.[68] He referred to the World Economic Conference in Geneva in 1927, co-organized 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.[69] In line with these thinkers, in Verdroß' argument, the necessity of a distinction between the political and the economic sphere arose out of the assumption that a functioning economic system depended on private property and free trade.[70]

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*.[71] 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'.[72] A similar argument was made by Kaeckenbeeck, the president of the Arbitral Tribunal of Upper Silesia, in 1937 when reflecting on the status of acquired rights:[73]

> 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.[74]

These positions built on the distinction between *imperium* and *dominium*, but did not limit sovereignty in and of itself. Rather they appeared to insist on 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 ends 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 the imposition of 'the

[66]McNair, ibid., at 381.
[67]A. Verdroß, *supra* note 4, at 325.
[68]Ibid., at 389.
[69]Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018), 30.
[70]Verdroß, *supra* note 4, at 396.
[71]*German Settlers in Poland*, [1923] (Advisory Opinion) PCIJ (ser B) No 6.
[72]McNair, *supra* note 65, at 384.
[73]For a detailed account of the proceedings see G. Kaeckenbeeck, 'The Character and Work of the Arbitral Tribunal of Upper Silesia', (1935) 21 *Transactions of the Grotius Society* 27–44.
[74]G. Kaeckenbeeck, 'The Protection of Vested Rights in International Law', (1936) 17 *British Yearbook of International Law* 1–18, at 15.

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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'.[75] 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.[76] The Hull Formula goes back to a 1938 letter by US Secretary of State Cordell Hull after the nationalization of US interests in Mexico and prescribed 'prompt, adequate and effective compensation'.[77] The Calvo Doctrine was developed by the Argentine jurist Carlos Calvo in the nineteenth century and prescribed the primacy of domestic law over an international standard of compensation.[78] What is often overlooked in the literature is the related but slightly different concept of unjust enrichment.[79] 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.'[80] 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.[81] 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'.[82] Thus, at least the common law conception of the notion is rooted in an idea of natural law.[83]

For my purposes, the most important category of acquired rights are concession agreements, which Lauterpacht characterized as a 'rather frail and undefined category of rights' in 1927.[84] Verdroß also only mentioned concession agreements as one iteration of an acquired right in 1931.[85] 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, like the Treaty of Sèvres that was applied in the *Palestine Railway* arbitration, but there were only a few cases involving such contracts. Lauterpacht only reluctantly included a note on the *Lena Goldfields* arbitration in the *Annual Digest* of 1930.[86] 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.[87] The oil arbitrations, as a practical concern, put concession agreements and arbitrations between states and companies at the centre of attention.[88]

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'.[89] It comes as no surprise

[75]Ibid., at 15–16.

[76]In 1961 Shawcross defended the proposition that acquired rights of foreigners were always protected under the standard of compensation of the 'Hull formula'. H Shawcross, 'The Problems of Foreign Investment in International Law', (1961) 102 *Recueil des cours de l'Académie de Droit International de la Haye* 335–93, at 351.

[77]R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2012), 2.

[78]Ibid., at 1–2.

[79]For an account of the relationship of state succession and unjust enrichment see Lauterpacht, *supra* note 51, at 133.

[80]D. P. O'Connell, 'Economic Concessions in the Law of State Succession', (1950) 27 *British Yearbook of International Law* 93–124, at 121.

[81]C. Schreuer, 'Unjustified Enrichment in International Law', (1974) 22(2) *American Journal of Comparative Law* 281–301, at 285.

[82]D. P. O'Connell, 'Unjust Enrichment', (1956) 5(1) *American Journal of Comparative Law* 2–16, at 2.

[83]Ibid., at 4.

[84]Lauterpacht, *supra* note 49, at 133.

[85]Verdroß, *supra* note 4, at 364.

[86]*The Lena Goldfields* arbitration, Annual Digest of Public International Law Cases - Years 1929 and 1930, starting pages 3 and 426 (case nos 1 and 258).

[87]Sornarajah, *supra* note 10, at 289–99.

[88]L. 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 Verdroß, *supra* note 20, at 230.

[89]McNair, *supra* note 17, at 15–16.

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that the two doctrines he proposed were 'acquired rights' and 'unjust enrichment'.[90] Perrone has traced the role of these two notions into contemporary investment law in the form of direct and indirect expropriation.[91] As discussed above, these two doctrines rested on ideas of equity and justice. Even though McNair did not rely on a notion of natural law, as Lord Asquith did, but emphasized the implied or explicit consent of the parties to the contract,[92] traces of natural law resembling Lord Asquith's argument can still be found in McNair's as well as in Lauterpacht's writings. The resort to 'equity' and 'justice', or one could argue to 'good faith' and 'reason', as guiding lights was deployed in explicit opposition to the positivist tradition.[93] Lauterpacht used the language 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.[94]

Lauterpacht cannot be said to have been '*simply* a naturalist critic of nationalism and sovereignty',[95] 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 against attempts by newly independent states to reorganize their economic systems. It is only through anchoring the international legal order in an element of natural law that its imposition over domestic law could be made plausible. Moving the jurisdiction over concession agreements from the domestic to the international sphere was enable by a hierarchization of legal orders where those legal orders that best protected Western foreign property were turned into expressions of universal rules based on justice and equity. As the next section discusses the notion of 'civilization' played a crucial role in establishing this hierarchy.

3.3 From 'civilization' 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 internationalization 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 racialized qualifier 'civilized' 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'[96] and McNair explicitly connected general principles, concession agreements and development. In the introduction to his article, McNair contended that general principles are:

[90]Ibid. See also Friedmann, *supra* note 38, at 295–9.

[91]N. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules* (2021).

[92]McNair, *supra* note 17, at 7.

[93]Lauterpacht, *supra* note 51, at 289–99. 'Law is not a spiritless and self-sufficient mechanism.' Lauterpacht, *supra* note 49, at 128. For an account of a positivist conception of the notion 'civilized' and its consequences for the binding character of international law see J. Kunz, 'Zum Begriff der "nation civilisée" im modernen Völkerrecht', (1927) 7(1) *Zeitschrift für Öffentliches Recht* 86–99.

[94]Lauterpacht, *supra* note 49, at 128.

[95]Koskenniemi, *supra* note 44, at 357.

[96]McNair, *supra* note 17, at 1.

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> 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.[97]

In this linkage, McNair showed the continuity between the civilizing mission of the nineteenth century and the development discourse of the 1950s.[98]

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'.[99] 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.[100] 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.'[101] 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*'.[102] 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.[103] 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.[104] The term 'civilized' thus enabled McNair to conceptualize 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 'civilization', development and liberalism. Verdroß ascribed the failure of the League of Nations' Codification Conference of 1930, aiming at codifying multilaterally the responsibility of states for damage done in their territory to the person or property of foreigners, to a difference in the readiness to liberalize. 'Les Etats moins avancés' were proposing 'leurs idées peu libérales' which hindered the 'Etats avancés' from codifying their progressive and modern ideas.[105] 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'.[106] 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 nationalization as modes of resistance against colonial rule were difficult to square with the imposition of a transnational legal system on domestic matters. In his

[97]Ibid.

[98]For a concurring account of the prevailing legacy of the 'standard of civilisation' in international investment law see Schneiderman, *supra* note 5.

[99]Ibid., at 2.

[100]For a detailed account of the transformation of the notion of 'civilisation' to economic development in international law see Pahuja, *supra* note 41.

[101]McNair, *supra* note 17, at 4.

[102]Ibid., at 1 (emphasis added).

[103]Anghie, *supra* note 18, at 234.

[104]Ibid. Confirming this point and on the role of corporations in the history of international law generally see F. Johns, 'Theorizing the Corporation in International Law', in A. Orford et al. (eds.), *The Oxford Handbook of the Theory of International Law* (2016), 635, 639.

[105]Verdroß, *supra* note 4, at 393.

[106]Ibid., at 394.

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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.[107] 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 superficially dispersed this tension and enabled the maintenance of Western control without claiming cultural inferiority.[108] 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'.[109] This exploitation could now be remedied with the help of Western nations. Tzouvala draws our attention to the closely knit relationship between the 'standard of civilisation' and capitalism as constitutive for contemporary international law.[110] The legal framework that enables capitalist expansion is part and parcel of the development project. As invoked by President Truman in his inaugural address, what is needed is 'capital investment in areas needing development'.[111] 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 states had to accept McNair's new legal system.

4. Conclusion

British international lawyers elevated the jurisdiction over concession agreements from the domestic to the international sphere through reference to 'general principles of law recognized by civilized nations'. The reliance on general principles indicates how internationalization became authoritative. On one hand it was a matter of repetitive legal practice of cross-referencing that slowly grew into a line of precedent. This practice was based in the broader policy of companies and imperial governments protecting concession agreements from nationalizations. 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 characterized Islamic law as archaic and unsuited for modern economic transactions, such as interpreting oil concessions. In consequence, he applied English law by reference to 'general principles of law recognized by civilized nations' as an iteration of a 'modern law of nature'. It was by reference to the notion of civilization that Islamic law was discarded as particular and not up to the standard. In turn, British law moved up into the international sphere representing a universal law by connecting it to natural law. The simultaneous claim of modernity and universal timelessness becomes visible as the paradox authorizing this reasoning.

The legal arguments developed in the *Sheik of Abu Dhabi* arbitration were not a unique instantiation of this argument. To the contrary, other arbitrations between British companies and states concerning resource concessions in the first half of the twentieth century with the involvement of the same lawyers allowed them to establish a circle of self-referential precedents that constituted the authoritative legal foundation for the internationalization 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

[107]M. 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) 115–17.

[108]Pahuja, *supra* note 41, at 54.

[109]Ibid., at 65.

[110]N. Tzouvala, *Capitalism as Civilisation: A History of International Law* (2020).

[111]H. Truman, 'Inaugural Address', US Department of State, 20 January 1949.

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stock of this trend'.[112] This consensus of opinion could certainly be found in the practice of the same British international lawyers. In light of this, the mode of reasoning was not a timeless and placeless iterations of 'the law', but the product of a joint effort between the British government, British companies and British international lawyers. It was this practice that was fundamental for enabling the internationalization of contracts.

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. Together with the writings of Alfred Verdroß this body of work developed the relationship between 'general principles of law recognized by civilized nations', the protection of private property and the notion of 'civilization' that enabled the elevation of jurisdiction over concession agreements to the international sphere. The argument for the international sphere rested on a hierarchization of difference embedded in the notion of 'civilization' that later turned into the notion of development after the Second World War. As Anghie describes it, the *Sheikh of Abu Dhabi* arbitration is 'now regarded with a certain embarrassment'.[113] 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 hierarchization of difference remains the underlying assumption for the development discourse and underpins the internationalization of contracts until today.

[112]McNair, *supra* note 17, at 2.

[113]Anghie, *supra* note 18, at 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.' C. N. Brower and J. K. Sharpe, 'International Arbitration and the Islamic World: The Third Phase', (2003) 97(3) *American Journal of International Law* 643–56, at 644.

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