CHAPTER IV
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CONCESSION CONTRACTS AND EXPROPRIATION

Concession contracts, because of their past history, stand in a special category and have become major targets of expropriation by many developing countries, particularly the newly independent States.

The industrial nations developed a strong link between the colony and the home country which affected the general welfare of the developing countries to a high degree. The colonial Governments used their dependencies merely as producers of raw materials and agricultural cash crops. The production capacity of the colonies was restricted only to those articles which were most in demand in the home countries. This policy of the colonial powers contributed to checking development of the colonies towards economic diversification and thus aggravated the weakness of the colonial economies. By reducing the colonies as exporters of raw materials, the colonial powers completely subordinated interests of these countries to their own interests. A major characteristic of a subordinate colonial economy was the complete absence of any significant manufacturing industry in the colonies.
Weak and comparatively underdeveloped, the countries of Asia, Africa and Latin America were forced to part with their natural resources, such as minerals, tea, rubber, and tobacco plantations etc., in the form of concessions, in order to fulfill needs of the Western colonial powers for raw materials. Thus, the history of concessions is replete with exploitation of the resources of former colonies, vital for their economic growth and survival, by imperial powers, such as Great Britain, France, Germany, Netherlands, Belgium, Russia and the United States of America. Vestiges of the same can in many cases be found in privileges created in favour of the foreign concessionaires, to which they continue to be subjected even after their independence. How the concessions and other economic advantages were extorted under duress and coercion from rulers of the enslaved territories is described in the following brief historical survey before we touch the contemporary scene.

China

In Asia, China and India were made the targets of imperialism. Chinese market with its
commercial potentialities was forced open after its defeat in the Anglo-Chinese war of 1839-42 which was provoked by Chinese demand that the British merchants at Canton surrender the stocks of opium held by them for sale. Five Chinese cities were made "treaty ports" in which British and other foreign merchants could freely trade, reside and erect their warehouses. China was also forced to cede Hong Kong to Great Britain and was deprived of control over its own tariff. In the 1850's the Chinese were forced to permit the British, French and Americans to establish a foreign inspectorate for collecting customs. In 1858 Russia compelled China to cede the north bank of the Amur. Germany did not wish to lag behind. After two German Catholic missionaries were killed on the Shantug Peninsula in 1897, Germany forced China to lease Kiaochow for 99 years, and to grant mining and railway concessions in Shantug.

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Moon has given a very interesting account of what Lord Salisbury called the "battle of concessions" in China. It is stated that when China, not daring to offend France and Russia, sanctioned the "Belgian" concession for the Peking-Hankow line, the British fleet was menacingly concentrated and reparation in the form of concessions was demanded for British capital. Refusal to do so was to be treated as deliberate hostility against Britain. In response to this threat China agreed to concessions for about 2,800 miles of railway to be constructed by British capital. This concession covered provinces like Shansi and Honan which were very rich in minerals. Gaining of railway and mineral concessions became a political matter and led to establishment of respective "spheres of interest" by France, Germany, Great Britain, Japan and Russia. Each of these countries looked to the day when economic partition of China would be followed by its territorial partition.

India

The British colonialism in India led to its complete economic control. After the East India Company appeared on the Indian scene the wealth of India started draining in the form of fabulous tributes and gratuities from Indian rulers, taxes raised from the people, profits of internal trade carried on by the servants of East India Company etc. India was turned into a leading supplier of raw materials for British industries. Indigenous weavers and manufacturers were flogged if they did not agree to deliver the goods or give bonds on the terms of the Company. Concessions for railway construction were given to British firms with guarantees of interest on capital. All these activities led C.H. Peries to call it "the plunder of India".

Malaysia and Indonesia

In the seventeenth century the Dutch East India Company after ousting Portugal from the spice islands exacted fixed quantities of spices.

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from native Malay chieftains, forced the natives to work for it and thus carried out its ruthless exploitation, vastly enriching Dutch stockholders. After the control passed to the Dutch Government even more elaborate arrangements were made regarding coffee, tobacco, tea plantations etc. It was decreed that every village must cultivate a thousand trees per family, giving two-fifths of the crop to the Government as a tax, and selling the other three-fifths to the Government. There was gradual substitution of private enterprise for Government plantations. Thus concession granted by the Sultan of Kelantan (Malaya) to one Mr. Duff involved an area of 3,000 sq. miles together with 'sole commercial rights of every description'. Grant of these concessions was obviously due to economic and political compulsions of the colonial age.

Under a "Culture system" introduced in Java by Count Van der Bosch in 1830's, one-fifth of the natives' land was set aside to be cultivated for the government. Natives were compelled to work

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See Allen and Donnithorne, Western Enterprise in Indonesia and Malaya (New York, 1957), pp. 69, 113-114.
one-fifth of their time without pay. Most of the soil was ultimately claimed as government property. Europeans were allowed by a law of 1870 to appropriate waste lands for a term of seventy-five years; by 1920 a million and a quarter acres in Java were held under this law by 929 companies and Europeans.

The Philippines

Under the McKinley administration, in the 1890's the United States made a sensational debut as an imperialist world power. It acquired the Philippines, Guam, Hawaii and Samoa as well as strategic harbours and most productive island groups in a period of two years. The war between Spain and the United States, fought to free Cuba, afforded the latter an opportunity to conquer the Philippines. By the Peace Treaty of 10 December 1898, the Philippines was ceded to the United States for which the latter promised to pay twenty million dollars to Spain.

Under the American domination in the Philippines, the United States industrial interests obtained

5 Moon, n. 2, pp. 376-77.
easy access to the Philippine raw materials and opened the Philippine market to American manufactured goods. At the same time American companies with investments in the Philippines, which owned a large percentage of the planted area under sugar, coconut and abaca drew substantial profits from the free entry of their products into the United States. The economic interests of the Philippines were completely subordinated to the United States interests. Thus the economic provisions of the Tydings-McDuffie Act of 1934 guaranteed the protection of American metropolitan interests by progressively closing the American market to competing Philippine products and by continuing the preferential treatment of American imports into the Philippines. The United States did not hesitate to take any measures if thereby its economic self-interest was promoted. Under the Philippine Trade Act or the Bell Act of 1946, Americans were given the same rights to exploit, develop and utilize the natural resources of the Philippines as Filipinos were enjoying. This was done in open violation of the Philippines Constitution which reserved the exploitation of natural resources to Filipinos.
or to corporations in which at least 60 percent shares were held by them. The United States had also passed Tydings Act in 1934 which provided for financial aid to cover war damages. The United States, however, indicated that unless the Bell Act was ratified by the Philippines no more than $500 would be given to meet war damages. The Philippines was thus forced to amend its own Constitution and to ratify the Bell Act. This is again a clear instance of imperialist powers applying pressure to extort share in the natural resources of the subjugated territories.

Persia

A technique usually employed by the foreign powers to dominate the political and economic life of weak countries was to flood the native extravagant rulers with loans. Thus in Persia where there was intense Anglo-Russian rivalry, an English financier, Baron Julius de Reuter, founded the Imperial Bank of Persia in 1889 to lend money to the Shah, and to finance mines at exceedingly high rates of interest.
A rival Bank of Loans was set up by the Russian Ministry of Finance. This enabled Russians to get concessions to build a railway from the Russian border to Tehran and to prospect for oil and coal. In 1907 Persia was ultimately divided into spheres of influence between Great Britain and Russia by an agreement. In the northern, (Russian) zone containing about half the total area, Great Britain agreed not to seek concessions for itself nor oppose concessions demanded by Russia. The British Zone comprised the south-eastern fifth of the country where Britain was to have the concessions. Then there was a neutral zone open to both. Here was the Persian cat torn between the voracious Russian bear and the British lion. In 1921 Americans also jumped into the concessions fray. Persian underground oil wealth was thus monopolized by foreigners from whose prosperity a few crumbs of economic benefit fell to her share.

**Turkey**

In the early nineteenth century Turkey was one of the important targets of imperialist powers. In 1903, Germany obtained a concession to construct
3,733 kilometers long "Baghdad Railway" which would have stretched up to the Persian Gulf from Konia covering Mosul, Baghdad and Basra etc. It is interesting to note the financial arrangements of this concession. The German promoters were to form the Baghdad Railway Company, incorporated in Turkey. To this Company the Turkish Government was to transfer bonds amounting to 275,000 francs per kilometer of railway to be built, and by selling the bonds to European investors the Company would obtain the cash capital for its work. The Company had to be guaranteed against operating the railway at a loss. If the gross annual receipts should fall below 4500 francs per kilometer of railway in operation, the Turkish Government was to contribute whatever sum was needed to bring the receipts up to this figure. If the receipts should exceed the stated figure, the excess up to 10,000 francs would be paid to the Government, and any excess over 10,000 francs would be divided between the Government and the railway. The Company's property was exempted from Turkish taxation. The Company also received the right to exploit mineral resources found within a
Zone twenty kilometers on each side of the railway. The railway was to become the property of the Turkish Government only at the end of ninety-nine years. The concession was heavily weighted in favour of the company. It is a different matter that due to conflict of interests among the imperialist powers the railway project could not be completed.

Two decades later, in 1923, the Americans also entered the international battle for concessions in Turkey. Turkey signed a contract called the Chester Concession granting to the Ottoman-American Development Company contracts to undertake the construction of a network of railways. The total length of these lines, 2714 miles, was considerably greater than that of the Baghdad railway system. The concessionaires were to have mining rights twenty kilometers on each side of the railway, the value of mineral resources thus assigned was estimated at ten billion dollars. The French felt that they had been shabbily treated since one of the routes now granted to Chester had previously been promised to a French syndicate. The Chester
concession also conflicted with Anglo-German-Turkish bargain of 1914 under which exclusive right to prospect for oil in upper Mesopotamia including Mosul had been promised to the Turkish Petroleum Company, which was practically the British Government. In the original Franco-British secret agreement of 1916 for the partition of Turkey, Mosul had been assigned to France, on the condition that France would respect the Turkish Petroleum Company's concession there. But later the French were persuaded to leave Mosul in the British sphere in return for a share of Mosul's oil. Under the treaty of Lausanne, 1923, under which the League Council was empowered to decide the fate of Mosul, the former awarded Mosul to Iraq. Since Iraq was controlled by Britain, the British-controlled Turkish Petroleum Company had no difficulty in obtaining from the British-controlled Government of Iraq a seventy-five year concession to exploit the oil resources of Mosul and Baghdad. These facts clearly bring to light how the imperialist powers competed and bargained with each other and settled
their claims in virtual division of Asiatic Turkey in
spheres of economic influence.

Morocco

From 1900 onwards the history of Morocco
is submerged in the history of European colonialism.
It became the focus of European appetites. Sultan
Mohamet Abd el Azis's extravagance compelled him in
1903 to borrow £800,000 from British, French and
Spanish syndicates. To pay off this debt, the
French persuaded him in the following year to take
up a new and bigger loan. To ensure five per cent
interest on this loan he had to set aside sixty
per cent of all customs revenues, which were placed
under French control. The Sultan was also induced
to contract loans for purchasing arms and ammunition
although he was in no position to conduct wars.

When, in 1908, Aziz's brother Hafid, took
over he was presented with a bill for 163 million

6 See Herbert Feis, Europe: The World's Banker
1870-1914 (New Haven, 1931), pp. 313-60.
francs (for previous loans and for the damage sustained by French merchants during the punitive expeditions). To enable him to meet this, France was prepared to grant him a further loan, and as security for repayment, sequestered the remaining forty per cent of the customs revenue. The bonds on the loan were issued nominally at 500 francs each; but the French public could buy them for 485, and French bankers for 435. It was disclosed in the French Chamber of Deputies that the value of the bonds had been boosted artificially, so that on subscription day they sold for 507 francs, permitting the French bankers to make an immediate profit of 72 francs "out of the pillaged and robbed Moroccans". The Sultan could not lay his hands on a single franc of the new loan, the whole of it being earmarked to pay off earlier debts -- mostly for indemnities. Most of the harbour dues and the Tobacco monopoly had been mortgaged by foreign creditors, mostly French. Feis has rightly remarked that "when the purse strings closed, Morocco was within the purse".

7 Ibid., pp. 387 ff.
In 1912 Morocco became protectorate of France which opened a new era of concessions, profits and dividends for the French financiers and settlers. Under the Protectorate Treaty of 1912 between France and Morocco, the French Government was authorized to militarily occupy the Moroccan territory "for the maintenance of good order and the security of commercial transactions". Further, His Sherifian Majesty was debarred from "contracting, directly or indirectly, any public or private loan, and from granting in any form whatever any concession without the authorization of the French Government".

The native agriculture was doomed to extinction with cession of considerable acreage of Moroccan land to French settlers. Land was either appropriated from the natives or purchased from them at prices unilaterally determined by the authorities. Another procedure generally followed by the French settlers was to acquire, against a small payment, co-ownership of a certain area of native-owned land, and then, seeking support in French law, claim his
right to buy out the original owner for a paltry sum. It was these settlers and concessionaires who continued to oppose Moroccan independence. The bare prospect of it alarmed them as they found their vested interests endangered.

Africa

Most of Africa was unknown and unexplored until the late nineteenth century. Apart from a few states with ancient glorious civilizations, such as the states of North Africa, and Ethiopia, Liberia, Zanzibar, Madagascar or Buganda, there were several small chieftains all over Africa. The industrial revolution led to the penetration and exploitation of the dark continent and by 1882 the scramble for possessions had started. Typical example of the European colonization of Africa is provided by the Congo.

The Congo

In 1877 the village of Boma was a thriving little port on the northern bank of Congo. Ships
from Europe brought cloth, cutlery, brassware, beads, firearms, gunpowder and other goods for which natives from the interior were willing to exchange their produce. Nobody really knew what happened beyond Boma. About this time, Henry Morton Stanley started his discovery of the Congo. No European power had as yet put forth the right of control over the Congo. Stanley stressed political and commercial significance of this vast basin with a view to arouse interest of his own country—England. The latter was simply not interested in Congo. The message was, however, not lost on King Leopold II of Belgium who had the ambition to make "all the unappropriated lands on the surface of the globe" the field of his operations. With this in view, the King made a beginning by calling a meeting which was attended by twenty persons of different nationalities who formed themselves into a committee called the Comité d'Études du Haut Congo. The aim of the Committee was to operate "with an essentially philanthropic and

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scientific point of view and with the intention of extending civilization and finding new outlets for commerce and industry by the study and exploration of certain parts of the Congo. The name of the Committee was later on changed to the Association Internationale du Congo. It was almost exclusively financed by King Leopold. Stanley was entrusted with the task of achieving the mission of the Association.

In furtherance of his mission, Stanley concluded some four hundred treaties with the native chiefs for concessions and cession of their lands. The illiterate chiefs could not even sign and as token of their signature put a cross against their names. In return for the concessions etc., they were to receive a monthly payment of cloth and protection of the Association. The Association thus acquired an area of over one million square miles. Stanley achieved this result by liberally giving coloured cloth and the occasional bottles of spirits as gifts. The native chiefs who hardly understood the meaning of these so-called treaties were satisfied with gifts

9 Ibid., p. 25.
of silk, velvet, rugs, bales of cloth, crockery, gunpowder and stacks of brass rods. During his expedition Stanley constructed roads and railways and in the process made natives to render forced labour. In May 1885 the President of the International Association of the Congo renounced in favour of King Leopold II the rights which had been conferred on it by treaty. The King became the sovereign of the Congo Free State. By declaring all 'vacant lands' to be the property of the State, Leopold virtually deprived the natives of their livelihood. Many of these 'vacant lands' were really tribal areas, whose produce traditionally belonged to the members of the tribe. They therefore considered themselves entitled to dispose of it freely. It was partly the prospect of increased trade which had induced the chiefs to sign treaties with Stanley, accepting the sovereignty of the Association. However, in many cases by accepting sovereignty of the Association the tribal chiefs had not intended to part with their lands which included not only the village and the cultivated area immediately surrounding it, but also the forests where they hunted or fished, and procured ivory, rubber, gum and other saleable products. With
a view to increasing production of rubber in the Congo the natives were forced to work for the State. If they refused, they were flogged, taken hostages and even shot or mutilated. The concessionary companies often sent punitive expeditions against the villagers. A large proportion of the revenue from 'red rubber' tainted with blood of the natives was never used for the benefit of the Congo but went to embellishing Belgium. Immense sums were spent on rebuilding Brussels, improving the royal palaces, and acquiring property in Belgium and France, which could better have been used to develop the Congo or even to pay the natives a better price for their rubber.

The main object of the Government in the Congo was to make money out of the labour of natives. According to report of Roger Casement, who conducted an official inquiry into the conditions of the natives in the Congo Free State, the natives were required to make twenty-six deliveries of rubber over the year as tax and offered in wages £2 10s., as against its actual worth of £32.
The plight of some other African colonies was not very different. An English trader, George Goldie Taubman, achieved in lower Niger results similar to those of Stanley in the Congo. He concluded by cajolery or intimidation some four hundred half-explained treaties with the native chieftains of lower Niger in lieu of presents of beads, cloth and liquor and persuaded them to accept British protection. In this way, the foreign powers acquired ownership or controlling interest in almost all essential plantations and minerals in Africa.

Latin America

Latin America was also a fertile ground for concession-hunters. Large-scale investment in this part led to serious conflict between propertied aliens and the host governments. Social, economic and political instability in Latin America facilitated intervention by the powerful states in aid of their aggrieved nationals. In 1910, approximately one-half of Mexico's total national wealth was owned by foreigners. They had acquired minerals and agricultural lands at nominal prices. This led to
revolution and later expropriation of land, oil, and industry. Armed interventions on behalf of aliens took place on smallest pretexts. Arrest of two American marines at Tampico in 1914 resulted in seizure of the Mexican port, Vera Cruz. In Mexico there was acute rivalry between British and American oil interests. The United States favoured ruling or opposition factions which supported American oil interests. This caused grave political instability which was exploited to protect or to get new economic privileges. In the case of Columbia, when it refused to ratify a treaty permitting the United States to build a canal across the Isthmus of Panama, the United States incited a revolution in Panama and installed a secessionist government of its choice to obtain the desired results. The new republic of Panama leased to the United States a canal zone of ten miles over which the United States could exercise sovereign rights. It is understood that during a period of hundred and fifty years until 1939, the United States had landed troops on more than hundred occasions upon foreign soil in aid of American lives and property. The United States

claimed the right of exclusive intervention in Latin America under its Monroe doctrine. It also quietly exercised the right of vetoing concessions to foreigners since 1912.41

Following the Spanish-American War of 1898 to protect American business interests in Cuban sugar and tobacco, the United States extracted several concessions from Cuba. In effect, the United States was assured of a virtual monopoly of Cuban trade. Under Platt Amendment of 1903, the United States obtained, inter alia, right to intervene in order to maintain a government capable of protecting life, property etc. (obviously of the Americans) and also "lands necessary for coaling or naval stations". Remarks P.T. Moon: "What more could forthright imperialism have obtained?" Some writers of that time even caustically remarked that the "ownership of Cuba lies almost completely in the hand of the National City Bank" of New York.

11 Moon, n. 2, p. 414; also pp. 429, 432, 452.
12 Scott Nearing and Joseph Freeman quoted in Moon, n. 2, p. 431.
Rebellions were frequently encouraged by the United States in the Latin American countries where its economic or concession rights were in danger. In Costa Rica the mines, banks, commerce, and railways were largely controlled by foreigners. The United Fruit Company's banana plantations were also of great importance. More important, however, were oil interests. When President Wilson found that the revolutionary government of Tinoco was more favourably inclined to grant oil concessions to the Cowdray (British) interests, he not only refused recognition to Tinoco's government but even encouraged rebellion against him in 1919. Soon after, new government of President Acosta cancelled the British concessions. New Monroe Doctrine that the United States had veto on foreign concessions was, thus, established.

In Nicaragua, President Zelaya, who opposed American interests was made to step down in favour of a pro-American General Estrada. Later Adolfo Diaz was maintained as President with the help of American marines. Under the Bryan-Chamorro
Treaty of 1915 in return for three million dollars to be spent under American direction, Nicaragua submitted to American financial control, granted it exclusive rights to build an interoceanic canal, and also gave the United States a ninety-nine year lease of the Corn Islands and the right to have a naval base on the Gulf of Fonseca. Nicaragua's customs revenues were collected under American supervision. The financial hold of America over other Central American republics like Honduras, Salvador and Guatemala was also complete.

Financial protectorates were established over Santo Domingo and Haiti. The United States had full control of their customs houses and of revenues by 1907 and 1915 respectively. This was to protect the interests of bankers holding Haitian bonds. While the American occupation of Haiti continued under the guard of pro-American Presidents and American armed forces, American capitalists bought land, sugar, mills, railways, lighting plants, and other property. Similar feat was achieved in Santo Domingo in 1924. A treaty concluded during this year provided for the collection and control of Dominican
revenues by an American receiver and his staff until
loans had been completely paid. A third of the
Dominican sugar industry was owned by American capital.

As can be seen from the above, there are
numerous Latin American concessions incapable of
being individually mentioned. They were granted
for nominal commitments by the concessionaire.

The practices of the powerful developed
states in exploitation of natural resources of the
developing countries naturally eroded sovereignty
of these states over their natural resources. After
attaining independence it became their foremost
preoccupation to regain control over resources
grabbed by foreign powers or concessionaires under

13 "Nominal as these commitments were, conces-
sionaires were known to bargain hard in
order to get them lower still". Raymond
Vernon, "Long-Run Trends in Concession Con-
tracts", Proceedings of the American Society
of International Law, 1967, p. 83. For an
account of early origin of concessions see
G. White, Nationalisation of Foreign Property
(London, 1961), p. 82. The information on
the subject could be supplemented by referring
to report of the Secretary General on Permanent
Sovereignty over Natural Resources (A/2058,
14 September 1970).
agreements or contracts not based on satisfactory quid pro quo. As more and more states attained independence they developed into an organized group in the United Nations which exerted pressure to affirm sovereignty of states over their natural resources. The matter was first brought up by the representative of Uruguay before the seventh session (1962) of the United Nations General Assembly. Later, the U.N. Commission on Permanent Sovereignty over Natural Resources was established in 1968 which submitted a report in 1961 to the Economic and Social Council. Since then, due to its vital importance to the states the question of permanent sovereignty over natural resources continues to remain on the agenda of the Economic and Social Council (ECOSOC) of the United Nations General Assembly resolution 1710 (XVI) of 19 December 1961 called upon member

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16 See draft resolution (A/C.2/L.165 and corr. 1-3) submitted to the Second Committee. For a comprehensive historical background of the subject including discussions in the United Nations, see generally M.S. Rajen, Sovereignty Over Natural Resources (New Delhi, 1978).
States "to pursue policies designed to ensure to the developing countries an equitable share of earnings from the extraction and marketing of their natural resources by foreign capital ...". In 1970, ECOSOC also constituted the Committee on Natural Resources to assist it. At the instance of these bodies the General Assembly from time to time requested the Secretary-General to submit reports reviewing new contractual arrangements for the exploitation of natural resources, (including renegotiation of old contracts), on the implementation of the principles of permanent sovereignty over natural resources and on profiles of recent cases of nationalization or take-overs of foreign enterprises. These reports inter alia reveal that:

1. Pre-independence concessions and the circumstances surrounding them are "highly conducive to conflict as the newly sovereign States attempt to deal with entrenched interests".

15 E/5425 (1973), p. 15, para. 43. Also see paras. 53 and 54.
2. Conflicts with foreign enterprises have forced some states to nationalize these enterprises.

3. Unilateral action had been taken only after attempts at negotiated solution had failed.

4. The natural resources sector, which covers a large number of concession contracts with foreign companies or nationals, accounted for over a third of the total take-overs and nationalizations of foreign enterprises since 1960 till mid-1976.

In a dispute between Jamaica and certain United States Companies, the Government of Jamaica went to the extent of placing disputes pertaining to natural resources in a special category and accordingly denied jurisdiction of the Centre for Settlement of Investment Disputes between States and Nationals of

16 Ibid.

other states. These facts bring to light anxiety of the developing countries to preserve their existing natural resources as well as to strengthen legal rights over these resources. In view of this, legal questions such as the validity of post and pre-independence concessions in international law and States' powers of revocation and review of these concessions become quite important. Before dealing with these matters we shall first examine nature and characteristics of these concessions, for, there is a view that cases of interference with a concession are outside the field of expropriation.

In simple terms a concession has been described as "an instrument of co-ordination whereby a state and a foreign investor establish a complimentary system of relationships in the conduct of an enterprise

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A/9716 (1974), p. 9. By notifications dated 8 May 1974 and 8 July 1974 respectively, Jamaica and Guyana excluded legal disputes directly arising out of an investment relating to the minerals, and other natural resources from jurisdiction of the Centre. (See Centre's Doc. ICSI D/B/Rev. 5, 1977, p. 11). The proceedings before the Centre were later discontinued after amicable settlement.
for a defined period" and it has been suggested that "the grant of privilege by the state is but an incident of the coordinated activity contemplated by the agreement". Although the purpose of all the post-independence concessions is apparently economic cooperation, complex character and nature of these concessions quite often come in the way.


20 Ibid. Raymond Buell attributes the existence of concessions primarily to the insistence of foreign investors to control the money lent for industrial purposes. See International Relations (1925), pp. 397-398.

21 Former colonies are quite skeptical and they often wonder after having been impoverished to a point of break whether they are offered with foreign capital once again just for economic and political domination rather than development. In fact, they are considered as "powerful foreign economic enclaves" and "perfect prototype of imperialism". (Edith Penrose, "Concessions under attack", The Times (Supplement on World Petroleum, p.V); London, Sept. 11, 1969. Also see, remarks of C.J. Lipton, Proceedings of the American Society of International Law, 1973, p. 239. Peter Fischer, "Historic Aspects of International Concession/Agreements", Oryx/Aus Society Papers (London, 1972), p. 226.
NATURE OF CONCESSIONS

(1) Concessions in general

The nature of a concession has a bearing on the rights and duties of the parties involved in a transaction. Rights and duties created by a concession are diverse and so are terms of a concession. The purpose of a concession may be economic, political, or even social.

According to Peter Fischer, the economic element of the concession was fully developed only in the middle ages with the emergence of the concept of jura regalia, or rights enjoyed by a sovereign in virtue of his prerogative.

Economic concessions are numerous and they create some sort of proprietary right in the concessionaire. Here the cooperative element is

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quite predominant although it will depend on the question whether "equivalence of advantages" has been maintained. It is found that most of the pre-independence concessions speak of "grant" of a concession by the ruler or the government concerned to a private party or even another government (and the latter may further grant it to some private party). The phrase "grant" appears in several concessions. This might give the impression of these concessions being unilateral in character which is not necessarily true in all cases. Unlike most of the Arab concessions, royalty was missing in African concessions but some share of profits was given to the ruler concerned in lieu of these concessions.

24 Article II of the Concession of Benadir Ports granted by the government of His Highness the Sultan of Zanzibar to the Government of His Majesty the King of Italy, 12th August, 1892 makes a provision to this effect, see E. Hertslet, The Map of Africa by Treaty, (London, 1967), vol. 2, p. 1025.

Some concessions were political in nature because of the very weak position of the tribal chiefs who granted concessions. Sometimes they expressly protected the interests of a few powers. Thus, a political Administrator was appointed in a concessional area of the British South Africa Company which again pointed to the political nature of the concession.

Concessions of social nature included such as the ones granted by the queen of Madagascar to English mission societies for the erection of hospitals etc.

It is said that almost "any kind of economic activity may be the subject of concession". Main categories of such economic activities are


27 Hertslet, vol. 1, ibid., p. 266.


stated as (1) public utilities and (2) the exploitation of natural resources. Most of the problems pertaining to concessions have arisen in connection with the following:

(1) The juridical character of a concession contract.

(2) The general principles of law recognized by civilized nations in relation to concessions.

(3) State succession to concessionary obligations.

(4) The right of independent management of the concessionary enterprise.

(5) The scope of the regulatory authority of the State and its relation to acquired rights.

(6) Expropriation of contractual rights and the State's power to renounce its contractual obligations.
(7) The application of *rebus sic stantibus* to concession contracts.

(8) The nature of the compensation due upon breach or revocation of a concession contract.

To this list may be added problems of review and revision of concessions which will be given particular attention in the present study.

Juridical character of a concession has received considerable attention from the jurists. Numerous problems are posed in this connection. Is concession unilateral in character or bilateral? Is it a contract, an economic development agreement, or an international agreement?

(11) Concession whether Unilateral or Bilateral?

It is possible that a concession may be bilateral in form but unilateral in character or vice versa. Where the concessionaire's reciprocal

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commitments are nominal or nil, it may be considered unilateral in character. There is virtually no consideration involved. A concession may have been made under duress or extracted in a similar way. In these circumstances it may be doubtful whether any legitimate international obligations have been incurred. Though bilateral in form, the concession in such a case is unilateral in fact.

A concession unilateral in form, on the other hand, might create some benefits or rights in favour of the grantor in lieu of the concession. The phrase "grant" of concession, it is said, creates the impression that it is unilateral in character. But it would be binding in international law if the rights and obligations are mutual.

The use of the term 'concession' itself is criticised on the ground that "it is apt to conceal the

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31 See O.J. Lissitzyn, "Iranian Oil, Foreign Investments and the Law", Foreign Affairs Reports (New Delhi), vol. 2, p. 33. A Nigerian representative said in the Second Committee: "In point of fact the majority of such agreements were like agreements 'between a lion and a rabbit'; and it is a universally accepted principle that agreements concluded under duress should be regarded as invalid". quoted in M.A. Mughrebi, Permanent Sovereignty over Oil Resources (Beirut, 1965), p. 24. The term "unilateral concession" is also used by Delson, n. 53, p. 756.
bilateral character of the transaction". Sometimes, however, the term used is "concession contract". The latter term *prima facie* indicates the bilateral character of the concession and is preferable to 'economic development agreement' used by McNair, Latte, J.N. Hyde and many others, while pinpointing the bilateral feature tends to overemphasise "benevolent aspects of the relationship". According to one

32 J.N. Hyde, "Economic Development Agreements", Recueil Des Cours (Leyden), vol. 105, no.1 (1962), p. 283 (n. 8). Cfr. Saudi Arabia v. Arabian American Oil Company (Aramco), Arbitration Tribunal August 23, 1962, (hereinafter referred to as Aramco case) where it was stated that "the concession remains a unilateral act of wills between the state and the individual". The reason stated is that state has only a supervisory role. International Law Reports (London), vol. 27 (1963), p.159. Hyde's objection, however, is that concession "emphasizes the grant of a host state, but not the interrelated obligations of the private and government parties". Ibid., p. 282. Professor Jace of France also considers it as a "unilateral administrative act".

observer Hyde's phrase would be appropriate to describe government to government agreements, such as the Development Loan Fund, the International Development Agency, and the World Bank. Moreover, it would not seem to embrace pre-independence concessions as development motive was then lacking.

(iii) *Concession whether a Contract?*

Verdross is of the view that economic development agreements "being neither contracts governed by municipal law nor treaties governed by international law, form a third group of agreements, characterized by the fact that the private rights established by them are governed by a new legal order, created by the concurring wills of the parties, i.e. the agreed *lex contractus*". Thus, he does not deny their contractual character. No distinction has been made
between a concession and a contract by many. Both the terms have been used as synonymous. A committee draft of 1929 Codification Conference, Harvard Draft Convention on "Responsibility of States for Injuries to the Economic Interests of the Aliens" and Organization for Economic Co-operation and Development (OECD) Draft Convention on the Protection of Foreign Property provide a few examples. The 1929 Conference contains a provision as follows: "A State is responsible for damage suffered by a foreigner as the result of the enactment of legislation which directly infringes rights derived by the foreigner from a concession granted or a contract made by the State". Article 12 of the Harvard Draft Convention, (Draft No. 12) also does not make any distinction. An explanatory note to the Article states: "It does not appear...

possible either on logical grounds or in terms of policy to make a distinction between contracts and concessions, for the latter are nothing more than a species of the former.  

Similarly, commentary to OECD Draft Convention on the Protection of Foreign Property provides as follows: "An undertaking may be embodied in a contract or in a concession — it is not possible on legal grounds to draw a distinction between the two, and such an undertaking may represent consensual or a unilateral engagement on the part of the Party concerned. Several publicists also tend to treat

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concessions as contracts. O'Connell uses the term "concessionary contracts". The position of Gidel and Keith is similar. In the Anglo-Iranian Oil Co. also, according to International Court of Justice the concession agreement was nothing more than a contract.


40 See Huang, n. 29, p. 251. Amador has observed that "concession contracts are not substantially different from ordinary contracts. There is ... almost unanimous agreement that they merely constitute one variety of contract which States may conclude with private individuals". Yearbook of International Law Commission, vol. 2 (1959), p. 25. Where a concession contains a provision barring its premature termination it cannot be regarded as an ordinary contract, according to G. White, n. 13, p. 28.

41 Lissitzyn, n. 31, p. 22.
(iv) Concessions whether international agreements?

In the context of relations between States and aliens what instruments are international in character? García-Medina in his fourth report on "International Responsibility" excludes concessions from the category of "international" instruments. He observes:

There appears to be no sound basis for adding, as has been suggested by some writers, a third category comprising those contracts of concessions, which because of their nature, object or importance to the world economy, involve 'international interest'.

He further asserts that presence of such interests in a concession does not have the effect of "internationalizing" the contractual relationship.

42 Yearbook of the International Law Commission, vol. 2 (1959), p. 31. According to traditional thinking even though a concession is devoid of any international character initially, it would seem to acquire this character on denial of justice to aliens.

43 This term is attributed to F.A. Mann in "The Law Governing State Contracts", British Yearbook of International Law, vol. 21 (1944), p. 20. He discusses the circumstances in which "internationalization" may be implied (ibid., p. 22, n. 3).
Speaking about oil concessions, Mughraby expresses the view that they "cannot be classified as international agreements". Darja is equally critical of the view that concessions could be considered as international in character. He says: "In their anxiety to salvage the agreements, from the peril of 'exclusive localisation', they [developed states] have tended to push the solution to the other extreme of 'exclusive internationalisation'. The latter is apt to be as disquieting and unsatisfying to the new states as the former is to the alien investors."

On the other hand, while criticising the judgment of the International Court of Justice in Anglo-Iranian Oil Co. Case, Fawcett observes: "It


45 Darja, n. 34, chap. II, p. 4
is surprising that the intention of the parties, so expressly declared, to 'internationalize' the contract should be defeated...". Similarly, George W. Ray would concede their international character as "they are international by nature, not in the sense of being between States (although two States may be involved in their enforcement) but in the sense that their performance will require action in more than one state". Still further, a concession agreement has been likened to a treaty by some writers. The United Kingdom in the Anglo-Iranian Oil Co. Case contended that a dispute under the concession agreement would be a dispute under a treaty within the meaning of the declaration. According to it, the doctrine of _pasa aequa sunt servanda_  

46 J.E.S. Fawcett, "The Legal Character of International Agreements", British Yearbook of International Law, vol. 30 (1953), p. 400. According to the parties, in case of a dispute, Art. 33 of statute of the International Court of Justice was to be applicable. Fawcett reaffirms his view in the Hague Academy of International Law Colloquium on International Trade Agreements (Leiden, 1969), p. 366.  

was applicable to the agreement in question. The Court held that a concession agreement did not enjoy the status of a treaty. J.N. Hyde is of the view that a "development agreement can be assimilated to a treaty" and questions the approach in the American Law Institute and Harvard Drafts which discard possibility of assimilating "development contracts" to treaties. These drafts have adopted a via media between the assimilation of the contract to a treaty and the view that international law is not applicable as between a state and an alien. In consonance with this attitude Professor Baxter has pointed out that

48 In Lesinger & Co. Case, PCIJ (1936), Series C, no. 78, where circumstances were similar, (dispute between a Swiss firm and Yugoslavia) Switzerland invoked pecta sunt servanda. The matter was, however, settled by negotiation. G. White feels that writers subscribing to the view that pecta sunt servanda applies even to concession contracts belong to a new school of thought. See n. 13, p. 86. She does not seem to share views of this new school of thought. See also Fatsouros for a similar view in W.G. Friedmann, Legal Aspects of Foreign Investment (London, 1959), p. 70.


50 Hyde, ibid., p. 319.
Article 12 of the Harvard Draft "attempts to bridge the gap between the extremes". For the same reason he states that "International law does not enter the scene until the applicable system of law fails to protect the minimum international rights". One may also bear in mind the warning of Gillian White:

Many members of that society [the international society of states] are for various reasons reluctant to admit foreign capital to exploit mineral and other resources within their borders, and this reluctance would be greatly increased if it became generally accepted that concession agreements with aliens are a direct source of international rights. 53

The better view, therefore, seems to be against internationalizing concession rights. Moreover,

51 Proceedings of the American Society of International Law, 1950, p. 117.

52 Ibid., p. 118.

application of *pacta sunt servanda* by the concessionaire can invite the host state to invoke rebus sic stantibus. In many cases there may, in fact, be more justification for rescinding a concession which calls for application of a doctrine like rebus sic stantibus, though not necessarily with all its legalistic implications. Decolonization itself involves *de facto* application of the principle of rebus sic stantibus. Whether one or the other doctrine is applicable also impinges on the question of applicable law.

Another pertinent question in considering the nature of a concession contract is whether it

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is a proprietary right like any other proprietary interest. For, an answer to this question will depend on a state's right to expropriate concessions which it no doubt has in case of any kind of property.

(v) Concession whether a proprietary interest?

Draft 12 of the Harvard Law School relating to "Responsibility of States for Injuries to the Economic Interests of Aliens" places the concessions in the category of contracts but does not recognize it as a property right. Sohn and Baxter in their explanatory note to Article 12 of the Draft observe as follows:

It has occasion been suggested that a concession constitutes a property right as well as a contract and that in the former aspect it is subject to expropriation, nationalization .... The logical consequence of the adoption of such a view would be to place a concession in the category of "property of an alien" .... This theory has, however, been rejected in the present draft, which proceeds instead on the theory that concessions should be treated in the same way as contracts. 56

This view of the contract seems to stem from an anxiety to take concession contracts out of the pale of expropriatory actions by the States. There is, however, hardly anything to suggest that a concession cannot at the same time be treated both as a contract as well as a property right. Another example of somewhat stretched view is the attitude of the Mexican courts. Mexican Supreme Court considered that the owner of a concession had the right to discover and to produce oil, but because he acquired ownership only of oil which he produced and had no ownership of oil still in subsoil, his right to produce was of no value.

Most of the writers from developing and developed countries alike seem to support the view that a concession is like any other proprietary interest. In the context of succession to financial and economic acquired rights, the Special Rapporteur

57 See Roscoe B. Gaiters, Expropriation in Mexico: The Facts and The Law (McClurg, 1940), p. 149. Before this decision of December 2, 1939, the law in Mexico was similar to the American Law, (p. 41).
of the International Law Commission, Bedjaoui, referring to views expressed in the Sixth Committee of the General Assembly observed "States had no obligation, on the international plane, to distinguish between acquired rights and other property rights, which could be modified by their legislation when the general interest so required". This makes it clear that for the purposes of expropriation of concessions, the latter have to be treated like any other property rights. Taking the same view, Baade says concession does not differ from any other proprietary interest. "The local sovereign is just as competent to expropriate such concessions as it is to expropriate land or industrial enterprises".

58 Second Report on Succession of States in Res.-of Matters Other Than Treaties by M. Bedjaoui, A/C No. 4/216, pp. 4-5; Doc. A/7370, p. 23, (1968). "One of the categories of private ownership in land was concession obtained from native rulers. Some properties of this type can trace their origin to the early nineteenth century ...". Allen and Donnithorne, n. 4, p. 69 (emphasis added).

To support this view a United States decision may be cited with profit. In West River Bridge Co. v. Dix, it was held that there was "nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property". Taking clue from judgment of the International Court of Justice in Anglo-Iranian Oil Co. Case, Gillian White observes, "whatever may be the dominant feature of a concession, it is generally accepted that the sum total of the rights acquired under it by the concessionaire constitute a legal interest of a proprietary nature". This position is clearly accepted by the United Kingdom in its recognition that "a state is entitled to nationalize and, generally, to expropriate concessions granted to foreigners to the same extent as other property owned by foreigners".

60 47 U.S. (6 How.) 507 at 533-34 (1848).
61 White, n. 13, p. 84 (emphasis added).
In the light of the above discussion the view taken by Baxter and Sohn seems to be unrealistic. An unequivocal statement by Delson at an International Law Association Conference vindicates our view: "the right of the state to take property for public use is so fundamental that it cannot even be surrendered by contract...".

There can be only one exception to the proprietary nature of the concession i.e., where a State expressly denies any right of ownership, as is done by many States, over any particular or all means of production. Here the contract will be devoid of any proprietary content and it will be a contract pure and simple. Here the State concerned has expressly reserved such a right for itself. The concessionaire in this case may not be able to complain of infringement of his proprietary interest. It will be a case of breach of contract and the remedy will depend on the applicable law.

It would follow from the discussion of the proprietary nature of concessions that a State's sovereign right to expropriate concessions is not affected by any rule, as Baxter and Sohn seem to conclude.

UNILATERAL TERMINATION OR MODIFICATION OF CONCESSION CONTRACTS

During the negotiation of a concession contract, the host Government is required to offer incentives and substantial privileges to the foreign investor in the form of concessions in respect of tax, currency and trade regulations. The foreign investor, who undertakes to assume risk and commits large funds, is in a better bargaining position. The element of risk which may be high when the concession was negotiated gets reduced as soon as production becomes commercially feasible. At that stage, the bargain becomes unequal since original risk is no longer there. Since national economic policy and the course of development are vitally affected by the concession contracts, the government has the responsibility to
ensure that the concessions do not become burdensome to the nation. The host state represents the public interest of the country in a concession contract. It is, therefore, likely that where concessions are of a long duration, the state will endeavour to change the terms of such a concession so as to restore its financial balance.

The question of unilateral termination or modification of a concession generally arises in those cases where parties are unable to reach a mutual agreement. There is a considerable difference of opinion whether a concession contract can be unilaterally changed by a state. This question can be examined from different angles: (1) When the successor state is faced with the question of recognizing a pre-existing concession, (ii) from the angle of applicable law, (iii) state's inherent power to revoke or change concessions in public interest.

O'Connell has given several examples where concessions were either not recognized or drastically changed before they were recognized by
the successor states. Thus, one British Harrison
Smith & Co. possessed mining concessions in Madagascare. The latter was annexed by France in 1896.
France stated that it did not attach any value to
ancient contracts and asked the company to "regularize" its concession. The United States has in
some cases followed the doctrine of "odious" con-
cessions and repudiated its obligations unilaterally.
In Cuba Telegraph Co.'s concession, it did not
consider itself bound by the concession contracts.
In a concession claimed by one Bennett the British
Government invoked Transvaal Concession Commission's
report to reject the claim and contended that
"international law is not settled on the point".
Many of the concessions have been abrogated by the
states in their capacity as successor states or
as annexing powers (annexation of Boer Republic in
1900) or as dominant states. The British Govern-
ment, while cancelling concessions justified the

64 Examples in this section have been taken

65 Transvaal Commission Report, Cmd. 623 (1901),
p. 8. Examples of some developed states
terminating the concessions can also be
found in Bedjaoui, U.N. Doc. A/CH. 4/216
action on the basis of the French precedent in Madagascar. Strange as it may seem, the British Government in its claims against the United States in the case of Spanish concessions took just the opposite position. In the case of State succession by decolonization, the question of successor State's freedom to deal with concessions becomes quite important and has been dealt with in later part of this Chapter.

As far as the applicable law is concerned, there is a difference of opinion. As already observed, according to Professor Verdross, economic development agreements or concessions are governed by lex contractus and are not subject to domestic or international law. This view seems to support absolute sanctity of contracts. Schwarzenberger, Battifol,

66 Bedjaoui, ibid., p. 54

Foighel and Garcia-Amador hold the view that concession agreements are generally governed by domestic law of the state entering into concession contract with a foreign investor. The logic behind this view is that the governing law should coincide with the economic milieu of the place where the operation is to take place. Those who liken concession agreements to international agreements or quasi-international agreements, such as Lalive and McNair, consider that general principles of international law recognized by civilized nations are applicable to those contracts. An unequivocal power to unilaterally alter the concession contracts would, however, seem to flow from the application of domestic law alone.

There is considerable support for the view that a state cannot contract away its ultimate freedom to modify or terminate the contract for reasons of public interest. In English and American legal systems, public authorities may override their contractual obligations in the exercise of the reserved prerogative

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68 See authorities cited in Lalive, n. 56, p. 436. Also see, Serbian Leones Case, PCLJ (1929), Ser. A, no. 20-21, p. 41.
to safeguard the interests of the community. So also, under the French administrative law, the state is in a privileged position. Although a concession is a contractual relationship in form, the government party derives from it powers and advantages that are superior to those obtained by ordinary contracting parties. As a corollary of this privileged position, a state's right to intervene and introduce changes in the contractual relationship whenever public interest requires it, is recognized subject to concessionaire's right to indemnity where financial equilibrium of the enterprise is disturbed. Geiger in his recent study has come to the conclusion that the common principle

of administrative contracts is mutability and asks why it should be different in the case of concession contracts. He further remarks:

Why should the private investor be entitled to a preferential treatment he could obtain neither under his own nor any other developed legal system? To insist on the absolute sanctity of concession agreements with or without stability clauses for the sole reason that the contracting state is a developing nation with need for foreign capital seems to be nothing else than a more subtle form of colonialism.

In Company General of the Orinoco Case (1902), the France-Venezuela Claims Commission held:

As to the Government of Venezuela, whose duty of self-preservation rose superior to any question of contract, it had the power to abrogate the contract in whole or in part. It exercised that power and cancelled the provision of unrestricted assignment. It considered the peril superior to the obligation and substituted therefore the duty of compensation.

Unequal nature of the bargain in some concession contracts will indicate why a state should

70 Rainer Geiger, a. 67, p. 102.
possess the competence to unilaterally change them. At times there is no government participation in basic decisions regarding the operation of concessions. The investor provides all the capital and pockets all the profits, paying the government a fixed royalty. The first agreements in Liberia provided for five cents per ton for iron ore that was then selling at approximately ten dollars per ton.

Hendryx has relied on six United States cases to show that in the overriding interests of their peoples the Governments can be released from their contractual obligations. This is on the condition that there should be substantial public interest.

involved and not merely repentence of the former bargain.

Some recent examples of concessions or contracts of concessionary nature having been terminated are available. Take, for instance, Argentina's decree annulling oil production contracts, Indonesia's


See International Legal Materials, vol. 3 (1964), pp. 1-12. It reads as follows:

"In its absence [power to annul], the private interest of speculators and seekers of easily won advantages, generally so devoid of scruples and patriotism, always in wait for favourable opportunities for enrichment, would assure the success of their illicit enterprises carried on through the error, deceit, or connivance of officials, granted that once a concession was obtained, however illegal, there would be no means of cancelling it". The decree claimed that it did not affect legitimate rights of aliens although irrational exploitation of its resources was given as one of the reasons for termination of the contract. Ghana's Concession Act of 1962 envisages its President cancelling land concessions held by foreign investors when public interest so demanded. See T.O. Elias, "Law of Foreign Investment in Africa: An Outline", Nigerian Bar Journal, vol. 7 (1966), p. 17.
action against Caltex, Shell and Stanvac,

Congoles (Leopoldville) Decree cancelling

Belgian Companies' rights to grant mining conces-

sions, Petroleum Law Amendment by Libya,

Congoles (Kinshasa) Ordinance nationalizing Union

Miniere du Haut Katanga, Peru's decree law

75 International Legal Materials, vol. 4 (1965),

pp. 435-50. Cf. Staff Regulations Case

(Govt. of Greece v. Hellenic Electric Railways

Ltd., 1923) in British Yearbook of International

Law, vol. 40 (1961), p. 203 where the govern-

ment argued that a public utility concession

"did not abolish legislative sovereignty,

and the conditions attached to the convention

could be unilaterally modified by a law ...".

(emphasis added).

76 International Legal Materials, vol. 4 (1965),

p. 232. The decree inter alia concluded.

"Being free to change the former juridical

order it was competent to put aside the

remnants of the colonial regime, and notably,

to bring to an end to the existence of the

C.S.K., a legal person under Congolese law".

This decree like Argentina's claimed that it

did not affect legitimate investments

(ibid., p. 234).

77 Ibid. (1966), pp. 442-61. Also see Libyan

Decree of 1 Sept. 1973 and comments thereon

by Nawaz, n. 44, pp. 70-80.

declaring I.P.C. contract void, Moroccan cancellation of thirty year old concession to the part of Tangier Company. The examples can be multiplied. In fact, it may be true to say that most of the cases of expropriation usually involve a unilateral action on the part of a State. As Navez puts it, "States can alter or abrogate the terms of concessionary contracts before their expiry. For alteration or abrogation of concessionary terms is but a means of nationalization". Compensation may, however, be negotiable as illustrated by the global settlements. The States have usually legislative competence to regulate the concessions, and amendments are frequently passed in respect of original enactments. In any case, contractual obligations being of economic nature even their unilateral termination should be capable of reimbursement.

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81 Navez, n. 44, p. 77.

82 For example, The Teak Forest Concession Case, a Thailand case, where concessionaire had submitted to the future exercise of legislative power under article 1 of the concession. British Yearbook of International Law, vol. 40 (1964), p. 215; Greek Telephone Case, Ibid., pp. 220-21.
Reason for some of the recent practices relating to concessions is neatly stated by one commentator as follows:

The fact is that a considerable part of the problems of concessionaires is a reflection of nothing more than the transition of host governments from an initial condition of half-sovereignty to a condition in which the state feels competent to exercise the normal powers of government. 83

This is, however, not the sole reason for the new States expropriating alien property. They do not find much to share in the economic goals of their erstwhile colonial bosses. "The peoples of these countries have largely inherited outmoded institutions from their past and their colonial masters that are out of tune with their contemporary demands. This explains the ineffectuality of laws in bringing about

83 Raymond Vernon, n. 13, p. 83. Examples are not lacking where by mutual agreement contracts have been terminated. Thus, a purely technical assistance contract was terminated prematurely because of "the ability of the Government to take over the operation". W. Friedmann, Joint International Business Ventures, (New York, 1966), p. 112. Cf. Delaume, n. 54, p. 128.
a rapid social and economic progress in these societies. The essentially different processes of economic development during the alien rule and after attaining independence create a legal dichotomy between pre-independence and post-independence concessions.

LEGAL DICHOTOMY OF CONCESSIONS

Fear of disrespect for the pre-independence concessions by newly independent states has evoked comments from former colonial powers from time to time. One such comment by Netherlands may be cited to show their concern regarding these concessions. At the Permanent Sovereignty Commission's third session held in May 1961, it stated that, as a general rule such concessions should not be jeopardised by new laws and invoked the principle of acquired rights.


85 See A/AC.97/SR.28 at 3. Algeria called for differentiation between contracts freely entered into and those concluded while one of the parties was under the colonial rule (A/C.2/SR. 846 at p. 7).
However, several newly independent countries have contested Western viewpoint and insisted on their sovereign right to review pre-independence concessions. For various other reasons also a distinction between pre-independence and post-independence concessions would appear to be justified. Some of these are as follows:

(1) The United Nations General Assembly Resolution 1503 (XVII) of 1962 on

Subsequently, General Assembly adopted Resolutions 2158 (XXI) of 25 November 1966, 2386 (XXIII) of 19 November 1968, 2625 (XXV) of 24 October 1970, 2692 (XXV) of 11 December 1970, 3016 (XXVII) of 18 December 1972 and 3171 of 17 December 1973 reiterating the right of each State to the full exercise of national sovereignty over its natural resources. In the same connection reference may be made to Security Council Resolution 330 (1973) of 21 March 1973; Art. 2 of International Covenants on Economic, Social and Cultural Rights as well as Civil and Political Rights respectively; Paragraph 4(e) of Declaration on the Establishment of a New International Order and Section VII, paragraph 1(b) of Programme of Action on the Establishment of a New International Economic Order adopted by the General Assembly on 1 May, 1974; Art. 2 of the Charter of Economic Rights and Duties of States (1974). Further, Article 13 of the Vienna Convention on Succession of States in respect of Treaties (adopted on 23 August 1978) provides that nothing in the Convention "shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources".

f.n.contd...
Permanent Sovereignty Over Natural Resources impliedly admitting the right of former colonies to freely deal with the pre-independence concessions:

(ii) Aim of decolonization with which the United Nations itself is actively engaged through a variety of modes;

(iii) Challenge to the concept of acquired rights;

(iv) New concept of equality between predecessor and successor states i.e., the view that successor state should be treated just as any other state - no more and no less. In this way, successor State cannot be burdened with greater obligations than the predecessor State; and

(v) Newly independent State having no hand in the acts of predecessor giving concessions;

(vi) Variation in amount of compensation on expropriation.

It would be worthwhile to examine whether absolute respect for pre-independence concessions is justified.

Pre-independence concession contracts with the former colonizer may not be at par with those of the other aliens. The latter may be treated leniently. A preambular paragraph of the General Assembly Resolution of 1962 seems to provide safeguards "on any aspect of the question of the rights and obligations of successor States and Governments.

87 In the case of N.V. Verenigde Deli - Maatschappij and N.V. Senemah - Maatschappij v. Deutsche Indonesische Tabak - Handelsgesellschaft m.b.h. it was stated: "the equality concept means only that equals must be treated equally and that the different treatment of unequals is admissible .... For the statement to be objective, it is sufficient that the attitude of the former colonial people toward its former colonial master is of course different from that toward other foreigners". Quoted in M. Domke, "Indonesian Nationalization Measures before Foreign Courts", American Journal of International Law, vol. 54 (1960), p. 315.
in respect of property acquired before the accession to complete sovereignty of countries formerly under Colonial rule. From this Resolution it is clear that all pre-independence concessions are subject to review by the newly independent country, but foreigners other than the former colonizer may get lenient treatment if their conduct towards the colony was not objectionable. It is, however, very significant that the General Assembly did not deem it fit to protect the pre-independence transactions. Impliedly, these transactions were not considered regular as they were entered into at a time when States had not acquired "complete sovereignty". The analogy of "state childhood" or that

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G.A. Resolution

38 1803 (XVII) dated 14 Dec. 1962. Malaya also explained that this preambular paragraph applied only to States formerly under colonial rule ... and not to those which had never been colonies, but had signed unequal agreements. (A/C.2/SR. 856, p. 6). It is submitted that an unequal agreement may be invalid on other grounds independently of the General Assembly Resolution under study.
of a minor in municipal law could be applied to them. If two states were not in the same legal position when rights and obligations came into existence, an agreement cannot be said to have been freely entered into. Several Pre-independence transactions subject the new States to economic subservience. Political independence without economic liberation is meaningless. For the same reason an author describes the 1962 Resolution as "a manifesto of economic nationalism in the more legalistic form of permanent economic sovereignty". Similarly, Mohammed Bedjaoui, special Rapporteur on the subject of succession of States in respect of matters other than treaties, has described the Resolution as "the Charter of combat

Paragraph 8 of the 1962 Resolution provides that "foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith". Reference to sovereign States here would naturally cover only post-independence investments and they too must have been freely entered into. This element of freedom of contract is to be deemed all the more strong in case of pre-independence investments.

Mughraby, n. 31, p. 38.
of the poor against the rich". The United Nations had no doubt double role to play in the process of decolonization. First, the political liberation or independence of the colonies, and second, their economic independence. "Declaration on the Granting of Independence to Colonial Countries and Peoples" has been followed by resolutions on subjects such as "Activities of foreign economic and other interests which are impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries ...". In paragraph 6 of this Resolution the General Assembly:


92 Resolution 1514(XV) of the General Assembly which is said to have been cited 95 times in other resolutions. See American Journal of International Law, vol. 63 (1969), pp. 444-478.

93 Resolution 2288 (XXII) of the General Assembly, 7 December 1967.
Calls upon all States to fulfill their fundamental obligation to ensure that the concessions granted, the investments authorized and the enterprises permitted to their nationals in the Territories under colonial domination do not run counter to the present or future interests of the indigenous inhabitants of those Territories.

Paragraph 7(b) calls upon the colonial powers to prohibit the "obstruction of the access of the indigenous inhabitants to their natural resources". Paragraph 8 calls upon them "to review ... all the privileges and concessions which are against the interests of the indigenous inhabitants". Needless to say, such a review in many cases is overdue. In this connection, it is necessary to emphasize the distinction between pre-independence and post-independence concessions. Such distinction, as Fatouros suggests, was made even in traditional international law. He aptly states:

In the case of international, inter-governmental, commitments made before a state's independence, the law allowed certain possibilities of revision or reconsideration. The situation with respect to a state's commitments or obligations to private parties, entered into before independence, was less clear, but there is some
authority in the past practice for restricting or revising at least some such commitments once the state has acquired its independence. In the case of commitments made after independence, however, the duty to respect the obligations undertaken was strictly accepted in traditional international law.... 94

Hans W. Basde, writing on "Permanent Sovereignty over Natural Wealth and Resources", observes that "enterprises that were inherited from colonial times, before the development plan, are in a precarious position unless they can assimilate themselves to their new surroundings". It is, of course, possible that a newly independent state may consider it more expedient to leave the prior concessions undisturbed. But its sovereign right to modify them according to its own needs remains unfettered according to the version of 1962


95 Miller and Stanger (ed.), n. 59, p. 16.
General Assembly Resolution. If this discretion is not assumed, the newly independent countries would be hardly able to achieve a social and economic order of its choice. Further, to quote Baade again: "Independence would seem an empty gesture or even a cruel boax to many a new country if it were prevented from singling out the key investments of the former colonial power for nationalization". Such a discrimination against the former colonial property is also approved by AmaSinghe. It is generally acknowledged that

Looked at from a different angle, imperial powers in the earlier days did not consider their colonies as organised States and rejected any claim to acquired rights, their plea being no states, no succession and therefore no acquired rights. In the case of a British concession to build a dam on Lake Tana in Ethiopia, the Italian Government maintained that principles of international law did not apply to a backward area. Another argument was that Ethiopia was unable to exploit its own resources. (See Bedjouij n. 56). Also see, Ibrahim Sihata in Don Wallace, Jr., editor, n.165, pp. 138, 141.

Baade, n. 59, p. 24 (emphasis added).

during the pre-independence period properties and natural resources were acquired by foreigners either without any payment or for "ridiculously low" prices. It is but fair that a State after acquiring independence should have a free hand in dealing with those unjust situations. No compensation appears to be payable by expropriating State in such cases. In the light of what has been stated, pre-independence concessions should be considered as voidable. They

99 Bedjaoui, n. 58, p. 66. Fatouros poses very pertinent questions in this connection. He asks: "Is a concession granted to foreign investors by a corrupt, totalitarian government inherently more respectable than one granted by the colonial authorities before a territory has acquired its independence? ... Is a commitment, undertaken even toward a foreign state, by a government ... compelled by overwhelming pressures of foreign governments or private groups, always to be treated as binding, voluntary undertakings?" See Falk and Black, n. 94, p. 327.

100 Cf. however, Bedjaoui who takes the view that: "Any agreements which violate these principles of political self-determination and economic independence should be void ab initio, without its even being necessary to wait until the new State is in a position formally to denounce their leonine character. Their invalidity should derive intrinsically from contemporary international law and not only from their subsequent denunciation." (Eighth Report by M. Bedjaoui on Succession of States in Respect of Matters Other Than Treaties, A/CN.4/292 (1976), p. 107.)
can continue to survive only at the discretion of the State concerned, may be, on terms of further restrictions or other advantages to the States. The latter may ask for increased share in the profits or it may bar repatriation of profits by the concessionaire and so on. The newly independent countries "want to change the status quo in order to be able to share the blessings of modern civilisation on an equal footing". It is for this reason that they want complete decolonization - political and economic. Decolonization, therefore, acquires special significance.


102 Fatouros n. 94, p. 364, thus, states, "It has become quite clear by now that the legal status of colonial conquest and occupation has changed; colonialism as such, the occupation and exploitation of 'backward' territories by Western powers on the ground that the 'natives' are unable to govern themselves and to establish an independent State, is not legal any more, under international law - at least as far as present or future action is concerned. The legal status of the fruits of past actions is by no means as clear". He observes that the "legal principle of the condemnation of colonialism"
The colonial powers have been reluctant to voluntarily quit the economic field. The small states have been trying to regain their political and economic sovereignty through various organs of the United Nations. As we have mentioned earlier the latter has constantly faced two-fold problem of economic and political liberation of the colonies. "To the leaders of the striving newly independent underdeveloped nations, the two roles were so inter-related that they conceived of them as one". The colonial context has had tremendous repercussions on various aspects of traditional international law. State succession following decolonization is one such field. The private investments of the former colonial powers more or less ceased to be indigenous or domestic investments and became foreign investments. They no longer enjoyed the legal and political protec-

f.n. 102 contd.

relates predominantly "to the liquidation of earlier situations, not to the future" (p.365). He further predicts that "the condemnation of colonialism will probably become even more effective and positive a legal principle than it is now", (p. 369).

103 Mughraby, n. 31, p. 14
tion of metropolitan government. They became subject to the new regime of the successor State which could choose to retain or disown the old system. The crucial question here is whether the two legal regimes - old and new - have anything in common.

"An identity of present interests and the prospect of a common political and juridical future", accompanied by common social goals, may lead to a reasonable conclusion that rights and obligations are inherited by the successor State. But where that is absent, different approach is necessitated. Bedjaoui explains the phenomenon thus:

The reason why the practice of the States concerned and an incipient trend of thought among judges and writers are now combining in an attempt to give the decolonized countries different treatment in the matter of State succession may well be that the reverse phenomenon of colonization likewise necessitated

104 Bedjaoui, n. 58, p. 48.
He exemplifies it by citing the case of British succession to Burma. In this particular case, Britain did not consider itself bound by the acquired rights because "when a civilized Government succeeds a Government like that of the Kingdom of Upper Burma, it is under no obligation to accept and to discharge, subject to the conditions imposed by civilization and good Government, the obligations incurred by its predecessor under entirely unlike conditions". Of course, it is true that not all the countries were colonized to the

105 Ibid., p. 48 (Pillet is quoted to have stated: "In the case of the annexation of colonial peoples whom there can be no question of assimilating to the people of the metropolitan country because of the difference in social conditions, there is nothing to prevent and everything to commend the drawing of a distinction between public policy in the colonies and public policy in the metropolitan country". Ibid., p. 49).

same extent nor decolonized in the same manner. All of them have to give direction to their legal, political and economic systems in accordance with their individual needs.

It is well-known how the context of decolonization was ignored by various leading powers in the case of Goa and mechanical application of the United Nations Charter was invoked. Such an attitude only helps the recalcitrance of the states who have vested interest in maintaining the old order. Judge Moreno Quintana, his dissenting opinion in Case Concerning Right of Passage Over Indian Territory, rightly attempted to put a check on such tendency when he remarked that to "support the Portuguese claim in this case, which implies survival of the colonial system .... is to fly in the face of the United Nations Charter".

107 ICJ Reports (1960), p. 91. Thus, speaking in the security Council Indian representative Mr. Jha stated, "My country has never accepted and will never accept any legal, moral or ethical basis for the processes by which India became colonized ...". (Security Council Official Records, 967th meeting, December 18, 1961).
Hence, rules of international law requires to be modified in a way which will put a restraint on States using it as a means of resisting decolonization in whatever form. Distinction between pre-independence and post-independence commitments will greatly facilitate this process. Professor Falk seems to admit this distinction in the following statement:

A constructive compromise might be achieved by requiring an external or impartial decision-maker to uphold a specific claim of unjust enrichment justifying the repudiation of a legal obligation ... incurred after national independence was achieved, whereas an internal decision-maker would suffice for the repudiation of obligation dating from the colonial period. 108

Although it is not clear whether the decision-maker envisaged in the above statement is judiciary or legislature or any one else, it is amply evident that there is no question of outmoded traditional international law applying to such concessions dating back to colonial period. If

the obligations of pre-independence are repudiated by the internal decision-maker the decision should not be open to challenge. It is also doubtful whether any diplomatic protection will be permissible in such a case. Post-independence obligations stand on a different footing. Baade observing that "there is a vast difference between 'old' and 'new' foreign enterprises" says that a "foreign enterprise that is granted an operating franchise or concession after independence does so in the knowledge of the country's long-range economic objectives and with the mutual understanding that it is to play a specific part in the attainment of these objectives". Realistic awareness of the future economic objectives in a new agreement after independence, however, can not be said to have prevailed where the investment had neo-colonialist overtones. "Patterns of domination established under colonialism can be extended into the era of independence, particularly if

nationally and enterprises of the former colonial power continue to dominate the economy of the new State. It is therefore, well to keep in mind the limitations of even "new" investments. Vulnerability of the "old" investments, on the other hand, results because of their likely use in the past as vehicles of indirect rule by the foreign overlord. To put a firm stop to this as regards "old" investments and to act cautiously as regards "new" investments should guide the future course of action of the newly independent States.

Concept of acquired rights is linked with the laissez-faire philosophy. This becomes clear from the following dictum of Chief Justice Marshall:

110 Ibid., p. 6.

111 See ibid., p. 15. It is further doubted whether their dealings with the local government were above reproach.

The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. 113

Rights of property referred to above, thus, become vested or acquired rights after change of allegiance. They are directly related to the legislation which may affect them because but for this change they could have been affected like other rights. Acquired rights are sought to be given a sacrosanct treatment. This may result in perpetual inequity. To quote Alfred Marshall, "the authority of the science has been wrongly assumed by some who have pushed the claims of vested rights to extreme and anti-social uses". The very discussion of acquired rights is necessitated because of challenge to existing social order and demand for a new one. "Progress means a change for the better, but a change none the less; in other words, it usually rejects acquired


114 Quoted in R.T. Ely, Property and Contract in their Relations to the Distribution of Wealth (N.Y., 1914), vol. 1, pp. 74-75.
rights. If such rights were maintained, all human societies would be paralysed. Sociology demolishes the concept of acquired rights, for it teaches us that no social group and no State can indefinitely retain its privileges, which are constantly called in question. How could the law fully endorse a concept which is unknown in sociology?"

Indefinite respect for the privileges obtained during colonial period is equally in derogation of the principle of international law which envisages an equitable social order based on the mutual interests of the various peoples.

115 Bedjaoui, n. 58, p. 7. A.H. Roth cites Keckenbeeck as having said: "It may safely be stated that a rule forbidding any interference with vested rights would jeopardize social progress, because there is hardly any social change and progress which does not prejudice some acquired rights". Roth concludes that "vested rights are not protected by international law to the extent that they are immutable and everlasting". The Minimum Standard of International Law Applied to Aliens (Leiden, 1949), p. 169.
Its universal appeal is lost if it results in hardship to one particular section of the international community thereby overwhelmingly patronizing the other. Eminent international lawyer, Professor Wolfgang Friedmann explains the position of the newly independent countries as follows:

... the aspirations of the developing nations, decolonized or otherwise, are not simply to be dismissed as the aberrations of lawless brigands, but express a genuine conflict of interests and approaches, a new phase in the evolution of international law, a challenge that demands a response. 116

He further observes that the so-called "ideological dogmatism of many of the newly independent nations has been matched by a corresponding dogmatism on the part of Western Legal spokesman, few of whom have even begun to acknowledge that there has been in many cases colonial exploitation of natural resources and native populations, sometimes over centuries. In such circumstances simply to proclaim that the absolute protection of 'vested rights' is an unchallengeable principle of inter-

national law, or even of natural law, is a position that might be argued *ex parte* in a litigation, but that is unhelpful for any serious attempt to evolve principles acceptable to the contemporary family of nations". This statement shows that acquired rights are not challenged arbitrarily and without reason. There is a strong sociological and natural law basis for challenging acquired rights. Moreover, "rights and interests acquired during the periods of .... abuse cannot for obvious reasons carry with them in the mind of its victims anything like the sanctity the holders of those rights attach to them".

117 Ibid., p. 128. Schweb has gone to the extent of stating that "the cleavage concerning protection of foreign property and concessions and respect for private rights is not a clear-cut East-West conflict". Ibid., p. 143.


Although the doctrine was supported in the past by many jurists such as Anzilotti, Verdirres, Anderson, Scelle, Doman, Hyde, Woolsey and Rindschedler, it has already become a relic of the past in its true sense. For, it has come to be severely attacked by several modern writers. S. Friedman in his scathing attack on the doctrine asks its supporters as to when it became a rule of international law and further questions which are the states that consider their capacity to enact new laws to be restricted by it?

Professor O'Connell thinks (several others can be found to support him) that "a new state is born into a world of law" and that it cannot "pick and choose the acceptable institutions, if only

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120 He observes in his Expropriation in International Law (London, 1953), pp. 122-23: "... the concept of acquired rights is especially uncertain, both in definition and application, and its emotional appeal alone would seem to explain its persistence and the fact that it is continually invoked by statesmen". In contrast see S. A. Wortley, Expropriation in Public International Law (Cambridge, 1953), p. 126. Also see McNair quoted by Hyde, n. 32, p. 322.
because its next-door neighbor, also a new state, will claim a like privilege. Professor Falk squarely meets this argument as being "premised on political expediency" and contends that at least "the partial repudiation or alteration of the inherited system is of greater benefit to a particular new state than is the maintenance of a legal framework of inherited rights and duties". Thus, universal respect can hardly be expected from the states unless their participation with enlightened self-interest is ensured. Application of traditional outdated international law after the emergence of new States will be out of context in the socioeconomic situation prevailing in the world. Commenting on acquired rights, Fogel observes that "it must be reasonable to assume that the maxim of the protection of vested rights -- already as a consequence of the change in the conditions and circumstances underlying the existence of the maxim --


is of no importance in deciding what minimum
standard in international law is to be observed un-
conditionally by States in their dealings with
foreigners". The whole basis underlying the
concept of acquired rights in traditional inter-
national law has been radically watered down. Some
new bases involving different different approach
are advanced.

New approach contests old tendency of
imposing certain obligations on a successor State
which are not warranted logically. Accordingly,
"if a state is acknowledged to have the right to
nationalize property for which it has freely granted
a concession, the State which succeeds it must be
acknowledged a fortiori to possess the same right.
The successor State cannot be held to have more
obligations than the predecessor State in relation
to acquired rights recognized by the latter".
Moreover, it is rightly pointed out that granting

123 Foignel, n. 112, p. 54.

124 Bedjaoui, n. 58, p. 18.
of concession by the predecessor State is "an act of will unconnected with the will of the successor State".

The doctrine of acquired rights may be said to have its counter-part in doctrine of reversion to sovereignty, according to which "the successor [State] would not be bound by territorial grants or recognition of territorial changes by the previous holder ... in a case of post-colonial reversion, the principle of self-determination may create a presumption in favour of the successor State". Professor Alexandrowicz traces the origin of this doctrine to the dissenting opinion of Judge Moreno Quintana in the Case Concerning Right of Passage Over Indian Territory where he stated:

India, as the territorial successor, was not acquiring the territory for the first time, but was recovering an independence lost long since. Its

125 Ibid., p. 19.


legal position at once reverted to what it had been more than a hundred years before, as though the British occupation had made no difference. 128

According to Gess, the concept of a "dormant title to territorial sovereignty appears to be well founded in the history of mid-nineteenth and early twentieth-century Europe" but in his view this concept does not apply to the newly independent States since some of the new States were only non-self-governing territories and did not enjoy full statehood. Apart from the fact that not all newly independent States were non-self-governing territories, the new States argue that in the case of decolonization, there was not only reversion to political sovereignty but also reversion to ownership of natural resources. Thus, in Northern Rhodesia (Zambia) White Paper on British South Africa Company's claims to Mineral Royalties it was stated that "on independence the ownership of these natural resources must revert to the own-

128 ICJ Reports (1960), p. 91 (emphasis added).

129 Gess, n. 86, p. 446.
ship of the people of Zambia". Algeria also favours the concept of basic sovereignty of peoples that may exist independently of any actual state sovereignty. Mohammed Bedjaoui expresses the following view:

It is ... difficult to see how equity or the principle of unjustified enrichment could be applied in case of such property, which is simply being returned through decolonization to the original owners who were dispossessed. 132

The doctrine of reversion to sovereignty is being increasingly invoked by some states in respect of natural resources.

Participation

Another ground which is now advocated or


131 See Gess, n. 36, p. 446.

132 Bedjaoui, n. 53, p. 66.
favourably viewed by many international lawyers is that the successor state had no hand in the acts of its predecessor in creating aliens' rights. This argument is in fact extended to the whole body of international law because of non-participation of negligible participation of the newly independent States in its formulation and development. It is admitted that "the mainstream of modern international law is European", although

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134 Bosalyn Jiggins, ibid., p. 12.
others have also made significant contributions to its development. It is, however, one thing to question a few specific acts of the colonial States and another to question the whole body of international law. But we have not yet passed the "transition stage between individualistic and collectivistic international law", and thus the need for peaceful readjustment both of specific situations and traditional international law concepts. A "sociologically determined" law would require


136 The new countries which suffered under the pattern of inequality, and which daily feel the urgent need of social progress, are keenly aware that alterations of the legal situation and of international law are essential. Roling, Ibid., p. 71, New groups not bound by ... old patterns are often better judges of what is best for the general interest. (p. 72).

137 Ibid., p. 7. Professor Roling comes to the conclusion that traditional international law to be binding must be amended (p. 121). He advocates introduction of 'social protective law' and 'welfare law'. 
participation or at least association of the 'new' States to validate the predecessor's acts. The dependent States have been compelled to disown many specific acts, such as grant of concessions or making of international legal norms, because of their superimposed inability to participate in this process. They do not accept in toto everything of the past nor do they reject it wholly. They have accepted to the extent possible and rejected only those rights and rules which have become, because of the changed situations, impossible to be accepted or implemented. Nothing is arbitrarily thrown away. Lissitzyn observes that the less developed countries have not denied the existence or the binding force of international law. This is true with some exceptions. Concessions of

the colonial period, for example, may not be considered automatically binding irrespective of their background and circumstances in which they were granted. "The newly independent nations ... would be loath in many cases to limit their freedom of action with respect to property acquired by foreigners during the colonial period". Professor Lissitzyn therefore cautions the colonial powers not to "exact, at the time of the granting of independence or subsequently, agreements that the less developed States are likely to regard as burdensome, unfair, and inconsistent with their best interests". Moreover,

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139 Another mode of putting it is to say that they are automatically binding unless repudiated after the state concerned has attained independence. This means that implicitly they would have put their seal of participation by approving or rejecting them.

140 Lissitzyn, n. 133, p. 84. See also pp. 72, 91, 102-4.

141 Ibid., p. 104.
such agreements (or concessions in the present discussion) would be vitiated being devoid of requisite participation by the erstwhile colony.

It appears pertinent to mention that in the matter of succession of States to treaties the International Law Commission had in view of the principle of self-determination, adopted the *tabula rasa* rule or clean slate principle for newly independent States. These States begin their treaty relations with a clean slate. Accordingly, Convention on Succession of States in Respect of Treaties (1978) includes Article 16 which reads as follows:

*A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.*
This rule clearly exempts the new States established through decolonization from the obligation of assuming treaty obligations of their former colonial masters. If the tabula rasa rule can apply to treaties there is no reason why it should not be applied to concession contracts which are not more solemn than treaties. The distinctions made above between pre-independence and post-independence concessions become highly relevant for answering concrete questions like the amount of compensation to be paid on expropriation of these concessions.

Variation in Compensation

There has been wide cleavage of opinion among the jurists as to the amount of compensation payable on nationalization or expropriation of alien property. This problem becomes more acute in relation to concessions of the colonial period.

Different treatment of pre-independence concessions seems to have been clearly envisaged by the General Assembly Resolution 1803 of 1962 referred to above. Compensation in such cases would seem to be optional although discretion has been judicious in the
interests of the newly independent countries themselves. Peculiarities of decolonization, however, would permit little or no compensation in many cases. "The concept of equity, which is advanced in order to justify compensation, leads those countries [newly independent] to reject compensation in the case of decolonization. They feel that even in the most favourable case -- the apparently theoretical one in which conquest was not accompanied by the seizure of native property -- there is no reason to agree to pay compensation when independence is attained, because colonization has enriched the metropolitan country and made a substantial historical contribution to the industrialization, the power and the prosperity of the conquering State". In view of this, Bedjaoui indeed contends that the former colonies have incurred a debt. To say the least, one must write off the past completely, however inequitable it might be, if traditional international law is made applicable in the type of situation mentioned above. Traditional doctrine of

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142 Bedjaoui, n. 53, p. 65.
'unjustified enrichment' of found unsuitable here, for, how could it be applied "in the case of such property, which is simply being returned through decolonization to the original owners who were dispossessed"?

There is another difficulty in paying compensation. Decolonization necessitates certain structural reforms of great magnitude and therefore payment of compensation "would almost be tantamount to repurchasing the whole country". Sticking to the traditional doctrine would mean choosing one


\[144\] Bedjaoui, n. 58, p. 68. "Compensation" says Bedjaoui "is only one of the factual elements in a vast economic and financial transaction". (p. 73). Another argument for non-payment of compensation or repayment of investments is corresponding income no longer exists. (78 n.) Still another argument is that juridical systems of the predecessor and successor State may be different.

As to structural changes one may recall Soviet "principle of right" according to which "revolutions which are a violent rupture with the past carry with them a new juridical status in the external and internal relations of states" and that "Governments and systems of government which have emerged from a revolution are not bound to respect the obligations of Governments which have lapsed". See McCarthy, n.138, p.83.

\[f.n. contd...\]
of the two evils - either refraining from expropriation of the pre-independence concessions (which may be necessary in some cases because of economic compulsions) due to lack of capacity to pay compensation in full, or paying full compensation with severe economic strains on the national budget. The latter is illustrated by the Iranian nationalization where amount of compensation payable exceeded the total national reserves of Iran.

Bedjoeul seems to arrive at a "positive law of non-compensation" on the basis of the General

f.n. 144 contd.


Ibid., p. 74. For instances of state practice see, for example, agreement between Belgian Union Miniere and the Congolese Government of 15 February, 1967; Agreement incorporating West Irian in Indonesia, 15 August, 1962; Ghana's enactments of 1962; Algerian decree of 1 October, 1963; French-Moroccan Agreement of 24 July, 1964; Very old examples are confiscation of American lands by Chile in 1886; Article 27 of the Mexican Constitution which authorised revision of the earlier concessions and no provision was made for compensation. This list is by no means exhaustive. See generally K. Katzarov, The Theory of Nationalisation (The Hague 1964).
Assembly Resolution 1803 (XVII) of 14 December 1962, global settlements and several other instances of State practice. According to him, compensation has been replaced by cooperation. This is implied from the accommodation nature of the global settlements. This is also indicative of the change in the attitude of the capital-exporting countries toward problems of compensation. As regards the question of compensation, the United States of America, for instance, was quite stiff from 1917 to 1933, soft till 1945 and later considerate but not soft. This has been described by an observer as the "evolution of thesis, antithesis, and synthesis". In the case of pre-independence concessions it is doubtful if it is necessary to pay even token compensation. Wolfgang Friedmann observes:

... with regard to economic intervention — in the form of concession agreements, trade agreements or other aspects of economic relations between developed and developing countries — the presumption of inequality, and therefore

146 McCarthy, n. 138, p. 317.
a claim to cancellation or revision of the relevant agreement should be made where the terms have been negotiated under the auspices of a colonial government, protectorate or some other form of foreign political dominance. 147

In any case, in case of "one-sided privileges, concessions and other advantages enjoyed under the protection of the colonial and protecting power", which are made the subject of legal redress through nationalization or expropriation, traditional formula of prompt, full and effective compensation cannot be held applicable.

THE PROBLEM OF REVISION OF CONCESSIONS

According to Venon, in the process of negotiations four stages are involved — the first stage

147 W. Friedmann, "Intervention and Developing Countries", Virginia Journal of International Law, vol. 10 (1970), p. 217. "With regard to treaties or agreements entered into after independence or — in the case of countries which, like the states of Latin America, have long had political but not economic independence — under comparable conditions, the presumption should, on the contrary, be one of equality" (ibid., p. 218).

148 Ibid., p. 222.
where the government negotiates from position of weakness; second stage where the hitherto half-impotent sovereign begins to exercise some of the attributes of sovereignty; third stage where the host state puts pressure for linkage of the concession with the local economy; and the fourth stage described as a new stage in which the government "becomes interested in taking over some of the ownership prerogatives of the concessionaire". Not all host states have gone through the first stage; Libya is one such exception. But the weaker and less fortunate ones were Iran, Iraq, Saudi Arabia and Venezuela etc.

149 Vernon, n. 13, p. 87. Feilchenfeld rightly points out that "If the concession is likely to outlast the economic and political conditions under which it has been granted, stipulations concerning the liquidation and possibly the repurchase of the concession become important". See E.H. Feilchenfeld, Concession: The Encyclopaedia of Social Sciences (New York, 1930), p. 155.
In this section we are mainly concerned with third and fourth stages of negotiations relating to concessions. The third stage requiring linkage of concessions with the local economy is very important. "This urge has been translated into action by governments along a number of different lines". The concessionaires are required to train and finance the new indigenous entrepreneurs, use local trading houses to handle import of materials, to give a portion of their output such as rubber etc. to local processors and so on. Many of the old concessions have culminated into joint business ventures. The terms of old concessions have undergone drastic changes in many cases and they have thus been regularised as voluntary agreements. It would appear that by the time fourth stage is reached the concessions might lose much of their character as concessions. It is very

150 Vernon, ibid., p. 86.

151 See generally, Friedmann, n. 83. The joint-venture model has replaced the older model of profit-sharing.
important to avoid breakdown of the fourth stage of negotiations; otherwise the State may use its last remedy of outright expropriation. Incidence of unilateral revocation of concessions can be reduced if viability of concessions is ensured through either their periodic review or when the need so arises. Rainer Geiger has suggested that the contracting parties should insert into the "economic development agreements" clauses providing for a mechanism of adjustment or renegotiation.\footnote{153} The unfortunate fact has been that the foreign concessionaires suffer from a "status quo complex" and are, it is alleged, congenitally incapable of showing a proper appreciation of the host countries' interests. The ultimate result being that they are led to take unilateral action.

The Need for Revision

If mutual equivalence of advantages is absent in a concession contract it is bound to pose

\footnote{152} Distinction has been made between review and revision. See Gess, n. 56, p. 444. Review might be a preparatory stage for revision.

\footnote{153} Geiger, n. 67, p. 104.
a threat to its viability at some stage or the other, leading to inevitable necessity of revising them. As Huang observes:

Due to the disparity of the legal and "real" status of the parties to a concession agreement, the continuing relationship over a long period of time, and the mutual interest in the prosperity of the parties in the "joint venture", there are imponderables which no legal virtuosity can guard against. A concession agreement transcends the bounds of mere legal rights and obligations. The balance between theoretical de jure power and de facto financial power requires clearly-established equitable principles for the guidance of the parties .... 154

He, however, does not advert to what these equitable principles should be. Under the existing international law, there are some principles, like sovereign equality of States and permanent sovereignty of States over their natural wealth and resources. They are usually sacrificed at

154 Huang, n. 29, p. 296. Michael C. Johnson attributes instability of concessions to the "lack of appropriate legal methods to effectively deal with differences ....". "A Legal Alternative to Instability in International Oil", Natural Resources Journal (Albuquerque), vol. 6 (1966), p. 371.
the alter of economic compulsions or political expediencies. It is hardly ever realised, as Darja puts it, that "the strength of a long-term agreement lies not mainly in the original black and white terms as such but the extent to which their content continues to embody reciprocity in interest, and the extent to which the parties realise that it is their joint responsibility to see that the agreement works, and that the relationship endures and is viable — a responsibility which they owe to those whose interests are in their charge ...". The problem is often bogged down on the question whether the States have a right to demand revision of a particular concession agreement.

There are very few instances where foreign concessionaires have willingly revised the original concession agreements, even where concrete circumstances so demanded. With the passage of time, as the bargaining power of the developing countries is increasing and they are attaining sophistication in negotiations with the big companies, the foreign

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155 Darja, n. 33, chapter V, p. 82.
concessionaires are relaxing their rigid attitude. Organization of Petroleum Exporting Countries, due to its strong position, has been instrumental in facilitating the task of equitable revision of concession contracts. A similar need for the other developing countries of Asia, Africa and Latin America can hardly be overemphasized. Mughraby visualises the need for revision of concession agreements in the following circumstances:

1. Where a gross inequality of bargaining power had prevailed at the time of signing the agreement leading to a state of unequal contractual advantages. 156

2. Where changes in circumstances render such terms of already executed concession agreements impracticable, or necessitate the addition of new terms without which the equivalence of the contractual advantages is greatly impaired. 157

156 "A bargain with a drowning man to save his life for a million dollars would not be a valid contract". Ely, n.114, vol. 2, p. 568.

157 Mughraby, n. 31, p. 176. Also see Lalive, n.49, p. 467. Three foreign oil companies namely, Esso, Burma Shell and Caltex had reduced the price of imported crude oil after much pressure from the Indian Government. The reduction was demanded in view of the declining trend in the international market.
The first category would cover many of the pre-independence concessions regarding which the competence of the decolonised states has been repeatedly affirmed by the United Nations General Assembly and other bodies. Examples of the second category are numerous. Take, for example, the arrangement between Saudi-Arabia and Franco. By reason of the passage of time and increase in the value of oil in relation to gold, the arrangement had become uneconomic and was revised in 1950. Under the revised arrangement the concept of equal sharing of profits was accepted for the first time in the Arab world (taking the clue from Venezuela). This

158 "The ending of the era of colonialism left many privileged situations which needed revision in a number of the newly independent states. The changed circumstances called for flexible solutions ..." (emphasis added). Mr. Yasseen, Yearbook of International Law Commission, vol. 2 (1963), p. 230.

159 Paradoxically this arrangement was also to the advantage of the oil companies because it involved no additional tax cost and income tax payments to Saudi Arabia could be offset against the companies' tax liability to the United States Treasury on their foreign income. The Saudi Government's right to impose higher taxes was also restricted.
example was followed in several agreements later. Shell's Qmani Agreement was revised on 30 March 1967 in Sultan's favour. The agreement which previously provided for a flat-rate royalty of three rupees a ton was revised to incorporate 50/50 profit sharing arrangement. The philosophy underlying the increasing expectation of the host States is that a "landlord, hitherto content with collecting the rental, \textit{is} seeking to participate in the management of his own property". Gradually, the governments have become more knowledgeable about their national

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\item Middle East Economic Digest (London), vol. 11 (1967). For amendment of concession contracts due to changed circumstances Libya passed Petroleum Law Amendment in 1961. See International Legal Materials, vol. 5 (1966), p. 442. Professor Penrose observes: "Originally, there were reasonably good economic and political reasons why the concessions took the form they did, but it was inevitable that the terms would have to change as circumstances changed" (n.21).\footnote{David Hirst, Oil and Public Opinion in the Middle East (London, 1966), p. 64.}\footnote{Professor Penrose admits that in some of the agreements the position of the foreign companies is similar to that of contractor to the government (n.21). Note 12. Foreign Companies are, however, resentful of the governments wearing two hats—as regulator and partner. Friedmann, n. 83, p. 161.}
\end{enumerate}
development and their right to control their own resources. Efforts are, therefore, being made by them in the direction not only of increased profits but also towards greater partnership in the ownership and management of the concessionaire companies. These developments indicate that a balanced approach to the problem of stability and change in relation to concessions is of fundamental importance. It has attracted comment in a report of the Secretary-General of the United Nations himself:

The scope of the rights granted the foreign concessionaires has become a natural target for the marked political and popular reaction in many underdeveloped countries against domination by foreign companies of the exploitation of local mineral resources.

The report further observes:

... what has been most evident has been a constant groping towards variations which will best satisfy the local government's demands for increased local participation in the ownership and control, of, and profits from mineral exploitation and the foreign company's demands for a profits margin commensurate with the risks involved. 162

Yet another statement of significance with similar purport came from Consultative Assembly of the Council of Europe according to which —

experience has abundantly shown that it would be somewhat unrealistic to expect undertakings of unspecified or long duration to be indefinitely observed by the parties concerned, in spite of the pressure of events and changes affecting the political, economic and social life of the peoples concerned. It therefore appears to be more realistic to assume that difficulties might arise and to set up appropriate procedure to enable undertakings to be amended and to ensure that such procedure shall accord a minimum of satisfaction to the parties concerned. 163

It is rightly observed that a concession company "must become more politically sensitive and the government must become commercially sensible". Renegotiation and revision of some concessions, therefore, becomes vital. If all contracts and concessions could be made at terms that were fair, not only in the light of facts and circumstances then existing, but also in relation to all pertinent

164 Johnson, n. 154, p. 405.
developments occurring later, expropriation would hardly be required. Since that is not possible revision of the original concession may become essential. To the extent that the process of renegotiation eliminates inequalities, it may be said to adjust the terms of concession to a level that is once again fair and proper to the existing facts and circumstances. It is often contended that where concessions require reconsideration the matter should be submitted for adjudication. However, to expect major conflicts under the concession contracts to be resolved by adjudication alone, rather than under ordinary rules of contract law,

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may prove not only unrealistic but militate against considerations of justice. Moreover, courts must apply lex lata. They are ill-equipped to change the law. It will not only be illogical, but dangerous to submit to international adjudication the problems in regard to changes in law.

Expropriation

Supposing the case for revision of a concession is quite strong but the parties are unable to reach a just settlement or "a consensual readjustment of their respective rights and obligations" and the inevitable happens i.e.,

Moreover, as the practice shows, concession agreements seldom come to arbitration. See David N. Smith, "Mining the Resources of the Third World: From Concession Agreements to Service Contracts", Proceedings of the American Society of International Law, 1973, p. 228. Recently, Secretary-General of the International Centre for Settlement of Investment Disputes suggested in its tenth annual meeting that use of the Centre should be authorized for proceedings of fact-finding nature in connection with renegotiations of existing agreements. See Centre's Doc. AC/76/4, 15 December 1976, Annex A, p. 4. Also see Piero Sella in Don Wallace, Jr., editor, n. 166, p. 136.

Delaume, n. 54, p. 129.
concession is expropriated. What next? This expropriation of concession is not in the usual sense of of the term, that is, taking over of the property of some one. It is an act of annulment, rescinding or modification of the concession contract, usually by a legislative measure. Although it is argued by Sohn and Baxter that concession is not a property right and therefore cannot be expropriated, the majority of the juristic opinion seems to be against such a view, as already observed. If the law were to be otherwise

it would mean that each nation possessed a veto on the legislature and courts of every other nation insofar as its nationals had rights that were affected. This theory that the vested rights of aliens are immutable, and superior to the acts of the sovereign, would mean, if it were accepted, that in proportion to the size of alien holdings, a nation's social developments would be frozen in status quo. If this were the law of nations then no people which cherished its independence would ever again permit foreigners to acquire property. 168

This being the logic of the legislative measures taken by the host State one can only say that concessions can be expropriated. Whether and what compensation is payable on such expropriation will depend on the merits of each case. Cancellation of the concessions on the grounds of irrational exploitation of the host State's resources, as alleged by Argentina, or adamant refusal to revise the concessions, or refusal to renew exploitation contracts, may all have to be viewed differently necessitating different criteria of compensation. Although some writers favour giving compensation for the unexpired term of the concession on the basis of various arbitral decisions, it would seem unrealistic in the prevailing conditions. This would amount to treating the legislative act as an international tort and awarding damages on that basis rather than compensation.

169 See n. 74.

170 Algeria gave a prior warning to the concession holders that if exploitation contracts were not renewed and plans for future development were not submitted it would nationalize them. Africa Research Bulletin (The City of Exeter, England) May 15-June 14, 1965, p. 305.
CONCLUSION

Concessions are predominantly related to economic activities of the alien investors. They are in the nature of contracts and are bilateral in character. Some contracts of the colonial period concluded between the tribal chiefs of Africa and explorers were even termed as treaties. Many of these so-called treaties were signed by illiterate chieftains under coercion or out of ignorance. Since real will of the chieftains was lacking, it would be difficult to attribute genuine contractual character to such concessions. These concessions or acquired rights cannot be treated at par with freely concluded post-independence concessions and should be considered as voidable. The freedom of the newly independent states to appropriately deal with pre-independence concessions is also recognized in the General Assembly resolutions which reiterate the principle of permanent sovereignty of States over their natural resources. This principle can now be legitimately proclaimed as a rule of contemporary international law. Further, the *tabula rasa* rule which is held applicable in the case of treaties can be said to apply to concessions with even greater justification.
Concessions cannot be likened to treaties or international agreements. They are like other proprietary rights and, as such, subject to expropriation by a State. The power of a State to take unilateral action regarding concessions is often contested. But it is submitted that expropriation by a State is invariably unilateral in character, except where the right is expressly given up or modified under a treaty and therefore requires consultations with the other party. In the absence of treaty constraints, concessions can be validly expropriated in accordance with the law of the country where they operate. It may be necessary for States to terminate or modify concessions for reasons of economic necessity or change of circumstances after decolonization. In the case of pre-independence concessions, no compensation or, if at all, only token compensation may be payable. On the other hand, post-independence concessions should be generally respected. However, a provision for a periodic review or renegotiation would go a long way to ensure their viability. If this is done, States may hardly feel the necessity of resorting to expropriation.