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13.01 As mentioned in the previous chapter, O’Connell refers to the Lighthouse Arbitration award highlighting the essential distinctions between the different types of succession of States. In my view, the principles of succession or non-succession may apply depending largely on the type of succession of

164 O’Connell, State Succession, 1967 (n 15) 301.
States involved for each case. As such, one solution to the question of State succession to contracts may be appropriate for one type of succession of States, but not for another. Bedjaoui recognizes this context-based analysis by stating that 'if (...) politics rather than law dominates this field, it is natural also to expect different solutions according to the type of succession'.

The following sections will examine the solution that should find application depending on the different types of succession.

1. SECESSION

This section examines separately the question of whether the continuator State or the new State should be bound by a contract that had been signed by the predecessor State before the date of succession.

1.1 The continuator State remains bound by contracts

In cases of secession, the predecessor State continues to exist after the date of succession and should logically, and as a matter of principle, remain bound by the obligations arising from any existing State contracts at the date of succession. This is not a matter of succession to contracts, but rather one of the continuation of the same international legal personality by that State. This basic principle is illustrated by two cases that are discussed in the following sections.

1.1.1 Russian Federation v. Pied-Rich BV

The case of Russian Federation v. Pied-Rich BV involved Pied-Rich BV, a Dutch company, that had concluded a tripartite contract with the Baltic Shipping Company (BSC) and a number of Russian importers in 1989 for the delivery of women’s and children’s clothing. Under the contract, it sold and delivered the goods to the Russian importers. Payment for the goods was guaranteed both by BSC, which transported the goods to the Soviet Union,


166 ILC, Second Report Bedjaoui, 1969 (n 4) 87.

and by the Soviet Union’s Ministry of Merchant Marine ‘to which BSC was responsible’.\textsuperscript{168} In other words, under these contracts, the Soviet Union’s Ministry of Merchant Marine was responsible for guaranteeing the payment to Pied-Rich BV. Deliveries were made before the break-up of the USSR, but the Ministry failed to make those payments.\textsuperscript{169}

13.06 Pied-Rich instituted arbitration proceedings in Moscow. In order to secure any payment under a future arbitral award in its favour, it applied to the District Court in Rotterdam for permission to seize the ‘Kapitan Kanevsky’, a vessel belonging to the Russian Federation that had been used by BSC. As mentioned by two writers, the court made certain rulings based on the assumption that the Russian Federation remained responsible for the guarantees made by the Soviet Union’s Ministry of Merchant Marine.\textsuperscript{170} The court granted Pied-Rich’s request to seize the vessel. Two other judgments were rendered by the District Court in Rotterdam in relation to this case. These judgments were appealed before the Court of Appeal of The Hague. What is of importance for the present analysis is the court’s remarks regarding State succession.\textsuperscript{171} The Court of Appeal held that Russia ‘should be treated as the USSR’s successor’.\textsuperscript{172} The court noted that Russia had not disputed that claim and that it had ‘expressly presented itself to the international community as having succeeded to the rights and duties of the USSR’.\textsuperscript{173} What the court likely intended to say was that Russia was the continuing State of the USSR (rather than its ‘successor’). The court referred to the Minsk Agreement\textsuperscript{174} and specifically noted that the guarantee, which had been made by the Ministry in June 1990 (before the break-up), was binding on the former USSR, and now on Russia.\textsuperscript{175}

1.1.2 Republic of Serbia v. ImageSat International

13.07 The competence of a tribunal with regard to the question of State succession to a contract containing an arbitration clause was at the centre of the Republic

\textsuperscript{168} J. Klabbers, M. Koskenniemi and A. Zimmermann (dirs), Pilot Project on Documentation concerning State Practice relating to State Succession and Recognition, (Council of Europe 1999) 271. This formulation suggests that BSC was a State-owned company.

\textsuperscript{169} It is not too clear from the information available about the case when exactly the payments stopped and whether this occurred before or after the break-up of the USSR (which took place in December 1991).

\textsuperscript{170} J. Klabbers and M. Koseknniemi, ‘Succession in Respect to State Property, Archives and Debts, and Nationality’ in: Klabbers et al (n 168) 132. The decision can be found in: Klabbers et al (n 168) 269.

\textsuperscript{171} Other questions dealt with by the court, including the question of sovereign immunity, are examined in: Cheng (n 2) 362ff.

\textsuperscript{172} Klabbers et al (n 168) 272.

\textsuperscript{173} Ibid., 270, see also at 272.


\textsuperscript{175} Klabbers et al (n 168) 273.
of Serbia v. ImageSat International case, a decision rendered in 2009 by the High Court of England and Wales. The case involved a contract concluded in June 2005 between the State Union of Serbia and Montenegro, and an Israeli company, ImageSat, for the purchase of a satellite ground control station and the exclusive usage rights of two satellites. The contract provided that disputes be referred to arbitration under the ICC Rules, with English law as the governing law and England as the default location for the arbitration. The State Union did not pay the sums that were due under the contract. In May 2006, the claimant initiated arbitration proceedings before the ICC’s Court of Arbitration. Importantly, this request was filed three days after the referendum in Montenegro in favour of independence. On 3 June 2006, Montenegro declared its independence. As explained above, Montenegro is an example of a secession with Serbia being the continuator State of the State Union.

About a month after the beginning of the proceedings, the Public Attorney of Serbia wrote to the ICC stating that the ‘State Union of Serbia and Montenegro ceased to exist’, and that ‘certain rights, obligations and liabilities of the State Union have been undertaken by the Republic of Serbia’ and that, consequently, the Republic of Serbia ‘will act as the Respondent in this phase of the proceedings’. The proceedings continued with the ‘Republic of Serbia’ acting as the respondent and the parties signed the terms of reference. It was only after the statement of claim was filed by the claimant that Serbia argued, for the first time, that it ‘was not an original party to the contract and had not subsequently become liable, and that the arbitrator had therefore no jurisdiction over that claim’. At this stage, the arbitrator decided that the question of the proper parties to the proceedings should be determined as a preliminary issue. In his partial award, he held that Serbia was the continuator of the State Union and was therefore bound by the agreement.

The award was challenged by Serbia before an English court under the Arbitration Act of 1996 seeking its setting aside on the ground that the arbitrator did not have jurisdiction to find that Serbia was the ‘continuator’ of

176 Republic of Serbia v. ImageSat International NV, High Court of Justice, Queen’s Bench Division, Commercial Court, [2009] EWHC 2853 (Comm), 16 November 2009.
177 See, Chapter 3, Section 2.5.
178 Republic of Serbia v. ImageSat International NV (n 176) [40].
179 Ibid., [41]–[52].
180 Ibid., [54].
181 Ibid., [57].
182 Ibid., partial award, 7 May 2008 [60]. The arbitrator subsequently issued a final award in 2009 in favour of ImageSat in the amount of euro 35 million.
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the State Union and was a proper party to the proceedings. In his judgment, Justice Beatson of the High Court of Justice examined the question of whether Serbia’s challenge was precluded ‘by a submission to jurisdiction’.183 He noted that the terms of reference described the respondent as: ‘The Republic of Serbia, as successor to certain rights, obligations and liabilities of the former State Union of Serbia and Montenegro.’184 Another paragraph of the terms of reference mentioned that ‘[Serbia] consents to its substitution in the place of’ the State Union, ‘without prejudice to all its rights and defences, including the right to maintain that the Agreement is not binding upon [it]’. Finally, on the question of jurisdiction, the terms contained this passage:

\[\text{the parties agree and acknowledge that the Arbitral Tribunal is properly appointed in accordance with:}\]

(i) the dispute resolution provisions in the Agreement;
(ii) the governing law; and
(iii) the ICC Rules, and that the Arbitral Tribunal shall have jurisdiction to deal with the disputes in the present arbitration. None of the parties is at present aware of any ground for challenging the jurisdiction of the tribunal and objecting to the appointment of the Arbitral Tribunal.185

13.10 The court held that Serbia’s challenge to the jurisdiction of the tribunal was ‘precluded by its submission to jurisdiction’ in the terms of reference.186 For the court, the document granted the arbitrator ‘substantive jurisdiction’187 to deal with the question of ‘whether Serbia was a party to the underlying contract which gave rise to the dispute and thus the “continuator”/“successor” point’.188 It is also interesting to note that the court made general remarks (in the form of \textit{obiter dicta}) on whether an arbitral tribunal (with English law as its \textit{lex fori}) would have inherent jurisdiction over any issue of State succession.189 The court asked the following question: ‘In the absence of a contractual submission, the first question would have been whether an arbitrator is able to deal with an issue that in another context would not be justiciable in English

\[\text{Notes:}\]

183 Ibid., [64].
184 Ibid., [47].
186 Ibid., [106]. Thus, ‘Serbia contractually submitted to the arbitrator’s jurisdiction by its agreement in the Terms of Reference’ [112].
187 Ibid., [106].
188 Ibid., [112].
189 Ibid., [111]. These comments were made when dealing with Serbia’s argument on the non-justiciability of State succession issues before English courts.
The reasoning of the court suggests that the answer should be in the affirmative.

The court dismissed Serbia’s application to set aside the award without formally taking position on the question of whether Serbia should indeed be considered as the continuator State of the State Union. Yet, it noted that ‘the position taken by Serbia in its communications to the UN [192] and the ICJ [193] and the position taken by those organizations and by the Council of Europe’s Committee of Ministers suggest that Serbia and those organizations regarded it as the continuator of the State Union.’

In sum, these two cases illustrate that whenever the predecessor State continues to exist, that State should normally remain bound by the obligations arising from any existing State contracts at the date of succession.195 The

190 Ibid., [113].
191 Ibid., [123]:
   it would be striking if the arbitrator is not able to make a ruling as to whether Serbia was to be treated as a party to the agreement. It would be particularly striking if an arbitrator was not entitled to investigate and could not determine even on the provisional section 30 basis whether a person or entity that has raised an objection is a party to the underlying contract and the arbitration agreement.

   See also at [126]:
   Serbia’s position on non-justiciability also involves both the arbitrator and the court having to accept its assertion that it was not a party to the underlying contract and the arbitration agreement. There is also force in the response (see ImageSat’s skeleton argument, para. 118(5)) that it would be wrong to ‘allow a State to escape liability under a commercial contract merely by pronouncing that it was not an original party to the contract, and then sheltering behind a cloak of non-justiciability in order to prevent an arbitration or adjudication based on the true legal position’.

192 Ibid., [22], referring to a letter of 3 June 2006 of the President of Serbia to the Secretary General of the United Nations stating:
   The membership of the State Union Serbia and Montenegro in the United Nations, including all organs and organisations of the United Nations system, is continued by the Republic of Serbia on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro, activated by the declaration of independence adopted by the National Assembly of Montenegro on June 3 2006. Therefore, please note that in the United Nations the name ‘Republic of Serbia’ is to be henceforth used instead of the name ‘Serbia and Montenegro’.

193 Ibid., [37], referring to Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Croatia v. Serbia) Preliminary Objections, Judgment, 18 November 2008, where the court stated: ‘Serbia has accepted “continuity between Serbia and Montenegro and the Republic of Serbia” and that Montenegro was “a new State admitted as such to the United Nations” which did “not continue the international legal personality of the State union of Serbia and Montenegro”.’

194 Ibid., [135].
195 A different question arose in the case of Compagnie Noga d’Importation et d’Exportation SA v. Russian Federation, appeal judgment, 361 F.3d 676 (2d Cir. 2004), ILDC 840 (US 2004), 16 March 2004, which did not involve any State succession issue per se. The question was whether the Russian Federation could be held responsible for breach of contracts signed by the Russian Government. The case involved a Swiss company which had signed three contracts with different governmental entities both before and after the break-up of the USSR. Before the break-up of the USSR, Noga entered into in December 1990 supply contracts to provide US$550 million worth of food and consumer goods to foreign trade agencies of both the USSR and

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1. SECESSION

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reason is simple: the contract was signed by one State before the date of succession, who continues to exist after that date. There is no logical reason to support the opposing point, where that State should not continue to be bound by contracts it has itself signed in the past. The next section examines whether there should be some situations where this proposition should, in fact, not apply.

1.2 The new State is generally not bound by contracts, however, certain situations may require otherwise

13.13 The new secessionist State is clearly not a party to a contract signed by the predecessor State and, consequently, should not be bound by it (as mentioned in the previous section, the continuator State should remain bound by such a contract). I have found a limited number of examples of case law and State practice involving contractual claims against a new secessionist State. The examples found strongly support the principle of non-succession.

13.14 The legal qualification of the break-up of the Austria-Hungary Dual Monarchy after the First World War is controversial since it is not entirely clear whether it should be understood as an example of a dissolution of a State or...
instead as a case involving the secession of Poland, Czechoslovakia, and Yugoslavia (with both Austria and Hungary being considered as the continuing States). The majority of writers are of the opinion that this is a case of dissolution.\(^1\) Poland considered itself to be in a situation of secession when it became an independent State in 1918.\(^2\) Polish courts have considered Austria to be the continuator State of the Monarchy and held in several cases that it should remain responsible for any international wrongful acts that had been committed prior to 1918.\(^3\) In the *Niedzielskie v. (Polish) Treasury* case, a contract was entered into by the authorities of the former Monarchy for work to be done on certain government buildings before the War. Following the War, the territory where the buildings were situated became a part of Poland, who had taken them over. The Supreme Court of Poland came to the conclusion that ‘the successor State takes over the debts of its predecessor only in so far as it has expressly accepted them’.\(^4\) The court held that there was no obligation for the new successor State to maintain the contracts that had been signed by the predecessor State.\(^5\) In another case, the Supreme Court held that ‘there is no general international custom ordering a State which acquires property under an international treaty to respect contracts of lease concluded by the predecessor State, unless there is a special treaty stipulation to that effect’.\(^6\) The same position of non-succession was also taken by the courts of Czechoslovakia, who considered itself to be a new secessionist State in the context of the break-up of the Dual Monarchy. One court held that the successor State was not bound by an obligation created by a private contract

\(^{1}\) An overview of the legal arguments advanced by both sides in doctrine is found in Oskar Lehner, ‘The Identity of Austria 1918/19 as a problem of State Succession’, (1992) 44 O.Z.s.R.V. 63–84, 81.

\(^{2}\) This is the reason why the example of Poland is examined in this section under the rubric of ‘secession’ rather than ‘dissolution’ (it should be added that one case involving Austria will be discussed, for reasons explained below, in detail below in the section dealing with dissolution). See, Chapter 13, Section 3.2.

\(^{3}\) *Niemiec and Niemiec v. Bialobrodziec and Polish State Treasury*, Supreme Court of Poland, Third Division, 20 February 1923, in (1923–1924) 2 Annual Digest, at 64; *Olsinski v. Polish Treasury (Railway Division)*, Supreme Court of Poland, Third Division, 16 April 1921, in O.S.P., I, no. 15; (1919–1922) Annual Digest 63.


\(^{6}\) *(Polish) States Treasury v. Osten*, Supreme Court of Poland, 9 June 1922 in (1919–1922) 1 Annual Digest, case no. 37. See also *Graffowa and Wolanowski v. Polish Ministry of Agriculture and State Lands* (1923) Supreme Court of Poland, Zb. O.S.N. 1923, No. 30; O.S.P., III., No. 230, (1923–1924) Annual Digest case no. 26:

*The new State is not bound by the obligations of the old State on the ruins of which it had arisen or from which it has recovered a part of its territory. It does not take over obligations of that other State either in the domain of public law or in that of private law. It is a juridical person distinct from the old State, and as such, by an act of its sovereign power, it enters into possession of the public and private property of the old State, part of the territory of which it has taken over. The new State obtains its imperium not as a result of recognition by the older State or by other States, but as a result of having gained power over the territory and having suppressed the old power and organized the new power.*

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\(^{307}\) Patrick Dumberry - 9781788116619

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signed before secession between the predecessor State and a parish under which it undertook to contribute to the costs of the maintenance of a school.\(^{202}\)

13.15 After the Spanish–American War, Spain and the United States signed the Treaty of Paris (1898), by which Spain ceded Cuba, Puerto Rico, the Philippines, and Guam to the United States.\(^{203}\) Cuba became an independent State in 1902. The new State of Cuba refused to be held responsible for the payment of subsidies under a State contract, which had been signed by Spain (the predecessor State) in favour of a company (the Cuba Telegraph Company). As noted by O’Connell, ‘the attitude of Cuba was that an engagement contracted with Spain remained the engagement of that country, and did not pass to the successor [State]’, adding that ‘this conclusion is justified on the doctrine propounded by the United States that concessions not exclusively for local benefit were not binding’.\(^{204}\) In fact, Cuba rejected any responsibility on the grounds that the concession granted by Spain to that company was ‘a measure of war’ against the Cuban people.\(^{205}\) In other words, it refused any succession mainly because the obligations under the contract were considered as an odious debt. O’Connell also refers to cases decided by Israeli courts in the context of the independence of Israel in 1948. The Supreme Court held that Israel was not a ‘successor State’ to the United Kingdom and that it was not responsible for the concession contracts granted by the United Kingdom before 1948.\(^{206}\) It should be noted that the question as to whether the case of Israel is a case of secession is controversial.\(^{207}\) In any event, Israel took the view that its independence should not even be considered as one of ‘State succession’ and adopted a *tabula rasa* approach accordingly.

13.16 In sum, these few examples support the principle that a new secessionist State is not bound by obligations arising from contracts that were signed before the date of succession by the predecessor State. The other question is whether there are any factors and circumstances that could militate in favour of the new State (not the continuing State) being considered as responsible for the rights and obligations arising from a State contract. In my view, there are indeed. As further examined below,\(^{208}\) this could be the case when the investment was


\(^{204}\) O’Connell, *State Succession*, 1967 (n 15) 315.

\(^{205}\) Ibid.

\(^{206}\) Ibid., 336–8.

\(^{207}\) See, Crawford, *Brownlie’s Principles of Public International Law* (n 58) 421ff, concluding (at 434) that this is a case of secession.

\(^{208}\) See, Chapter 14, Section 2.
made on the territory of what would become the new State and where the obligations under the contract were to be performed there. In these cases, it is likely that this territory (and its population) benefited from the consequences of such an investment on its territory before the date of succession and that the new State would continue to do so after its independence. Such a situation may involve an unjust enrichment (a point further discussed below\textsuperscript{209}). For Stern (in the different context of succession to international responsibility), the question remains open as to whether, in certain circumstances, the new successor State should be exempt from its responsibility for an illegal act of expropriation committed at the time it was still part of the predecessor State.\textsuperscript{210} In fact, the existence of such a 'territorial nexus' between the contract and the territory of the new State is precisely the reason the US Restatement of the Law adopted the rule of succession in specific circumstances in the context of succession.\textsuperscript{211} While taking the general position that rights and obligations under a contract 'remain with the predecessor State',\textsuperscript{212} the Restatement includes an exception in the situation 'where part of a State becomes a separate State' whereby the 'rights and obligations of the predecessor State under contracts relating to the territory of the new State, pass to the new State'.\textsuperscript{213} In my view (as further discussed below\textsuperscript{214}), whenever there exists any such 'nexus' between the contract and the territory of the new State, the latter should be bound by the contract regardless of the fact that the contract was signed by the predecessor State, which continues to exist.

2. TRANSFER OF TERRITORY

This is a unique type of succession of States because it does not involve the creation of a new State, but merely the cession of territory from one existing State to another. This section examines the fate of contracts involving an investment made on the territory that is the object of cession. It goes without saying that contracts dealing only with parts of the territory of the predecessor

\textsuperscript{209} See, Chapter 14, Section 4.

\textsuperscript{210} B. Stern, 'Responsabilité internationale et succession d’Etats', in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (eds), \textit{The International Legal System in Quest of Equity and Universality Liber amicorum Georges Abi-Saab} (Nijhoff 2001) 335-6. She gives the example of a wrongful nationalization of a gold mine, which would now be situated in the territory of the new successor State and ask the question whether in this situation it should still be for the continuing State to provide compensation to the injured third State.

\textsuperscript{211} American Law Institute, \textit{Restatement of the Law Third, the Foreign Relations Law of the United States}, vol I (American Law Institute Publ., 1987) at [209(2)] dealing with both 'State Property and Contracts'.

\textsuperscript{212} See, ibid., [209(2)], adding that this is 'subject to agreement between predecessor and successor States'.

\textsuperscript{213} Ibid., [209(2)(c)] (emphasis added).

\textsuperscript{214} See, Chapter 14, Section 2.
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or the successor State that have been unaffected by the cession of territory should be continued without any interruption.215

2.1 The successor State is bound by contracts

13.18 As further explained in the following sections, the practice of States and that of courts and arbitral tribunals generally supports the proposition that the successor State is bound by the State contracts signed by the predecessor State dealing with the territory over which a change of sovereignty has occurred.216 Writers also support this position.217 The interesting question is why the principle of succession seems to be so firmly established in the context of cession of territory. One reason may be that in such a case, the investment made under a contract and its performance is inherently linked to the territory that is the object of cession. Thus, the execution of the contract resulted in some benefit to that territory and its population before the date of succession. These beneficial aspects will continue after the date of cession. This is why the rights and obligations under such a contract should be binding on the State

215 As a matter of illustration, State contracts signed by Germany which were dealing only with activities to be performed in the city of Hamburg are simply not affected by the double cession of the territory of Alsace-Lorraine in 1871 and 1918. The same goes for contracts signed by France dealing with rights and obligations to be performed only in Paris. What matters in the context of this book is what happens to contracts performed in Alsace-Lorraine.

216 This is the conclusion reached by O’Connell, State Succession, 1967 (n 15) 345, examining numerous examples.

217 Lalive (n 54) 165–6:

The [acquired rights] rule is, thus, firmly established and appears undisputed. Before trying to determine its exact scope, it may be useful to explain briefly its justification. This is easy to discover. As in the domains of intertemporal law or of conflict or laws, it is a fundamental requirement of any legal order; i.e., one of continuity and stability of legal relations and situations. In the case of annexation or cession of territory, these general considerations are strengthened by the acquiring state’s political interest. It is in that state’s interest not to antagonize the local population by all abrupt and immediate change of legal regulations or by an automatic and radical suppression of previously acquired rights. Likewise, in purely municipal situations, the legislator endeavors to avoid too brutal changes and retroactive legislation. It usually adopts transitional measures to bring about a gradual and peaceful entry into force of the new statutes. A fortiori, it would seem, the state acquiring a new territory ought to do the same, especially since it often appears as a foreign legislator to local populations (emphasis added).

See also: Kaeckenbeek (n 55) 411:

Le principe de respect international des droits acquis est, après la consécration que lui a donnée la Cour permanente de Justice internationale et vu la conformité de la pratique des États-Unis avec le précédent de United States versus Percheman, définitivement établi, et nous n’avons aucune hésitation à accepter comme un principe indubitable du droit international positif actuel qu’une cession de territoire ne rend pas caduc les droits privés valablement acquis avant cette cession. Nous avons même vu que le principe s’étend aux droits mixtes dont le caractère privé l’emporte nettement sur le caractère public et qu’il implique, dans les cas où l’État est un des sujets du rapport juridique, la subrogation de l’État cessionnaire à l’État cédant, pour autant que le caractère politique ou d’ordre public du dit rapport ne s’oppose pas (emphasis added).

See, however, ILC, Second Report Bedjaoui, 1969 (n 4) 87, for whom ‘it must be acknowledged that political considerations, rather than juridical grounds, are the deciding factor in the attitude of Governments on this question’.
that takes over that territory after the date of succession. This is indeed the solution adopted by the US Restatement of the Law.\textsuperscript{218} While taking the general position that rights and obligations under a contract ‘remain with the predecessor State’,\textsuperscript{219} the Restatement includes an exception whereby in cases of cession of territory, ‘the rights and obligations of the predecessor State under contracts \textit{relating to that territory}, are transferred to the successor State’.\textsuperscript{220} The successor State is bound by such rights and obligations because the contract is ‘related’ to the territory ceded over which it is now sovereign. Succession is the result of the territorial ‘nexus’ established between the contract and the territory ceded to the successor State (a question further examined below\textsuperscript{221}).

The following sections analyse the practice of successor States (Section 2.3) and that of third States whose nationals had been affected by a transfer of territory (Section 2.2). I will also examine several decisions by international courts and tribunals (Section 2.4). While such practice supports the principle of succession to contracts, it remains undeniable that judicial decisions have often been influenced by treaty provisions expressly providing for such a solution (a point further discussed below).

\subsection{Third States whose nationals had been affected by a transfer have adopted the succession principle}

Many States have adopted a position in favour of succession to contracts whenever their own nationals were concerned by a cession of territory taking place elsewhere.

One example is the position of the United States in the context of France’s annexation of Madagascar in 1896\textsuperscript{222} and the cession of the territory of Palestine after the First World War.\textsuperscript{223} The United Kingdom also consistently took the view that the successor State was bound under international law to protect and maintain the rights which had been granted by the predecessor State to foreigners in the ceded territory before the date of succession. In the context of the cession of the Ionian Islands by the United Kingdom to Greece in 1864, the UK law officers stated that there was ‘no doubt upon the general question of the continued obligation of all lawful contracts existing at the time

\footnotesize{\textsuperscript{218} Restatement of the Law (n 211) [209(2)].
\textsuperscript{219} Ibid., [209(2)], adding that this is ‘subject to agreement between predecessor and successor states’.
\textsuperscript{220} Ibid., [209(2)(a)] (emphasis added).
\textsuperscript{221} See, Chapter 14, Section 2.
\textsuperscript{222} O'Connell, \textit{State Succession}, 1967 (n 15) 308.
\textsuperscript{223} Ibid., 324.}
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of the cession of these islands to the Kingdom of Greece’, and that based on ‘the principles of international law (...) and the practice of all civilized States, ceded territories pass, cum onere, to the new sovereign’. The same position was also adopted by the United Kingdom in the context of France’s annexation of Madagascar in 1896 and the annexation of Korea by Japan in 1910.

13.22 The example of the cession of Cuba and the Philippines by Spain to the United States in 1898 is intriguing. In the context of negotiations preceding the signing of the peace treaty between Spain and America, one important issue concerned the fate of contracts which had been signed by Spain with foreign companies before 1898. The United States took the position that ‘it does not propose to repudiate any contract found upon investigation to be binding under international law’, adding that it ‘would deal justly and equitably in respect of contracts that were binding under the principles of international law’. In fact, the United States argued that for any contract to be respected by the successor State ‘a concession must not only be related or attached to the territory ceded, but also granted for its exclusive benefit’. This is a clear example of the importance of the ‘nexus’ between a contract and the territory ceded. According to the United States, the concessions granted to a British company, Manila Railway Company, to build a railway in the Philippines was not in the exclusive interests of that territory, but had been inspired by the ‘imperialistic motives of Spain’. For that reason, the United Kingdom argued that it was not obliged to respect that contract. The United Kingdom (whose nationals’ interests were at stake) argued that the United States contention was ‘contrary to the recognized principles of international law’ and that the distinction on which it was based was arbitrary because it ‘leave[s] it open, in all cases of conquest and cession, to the succeeding government to repudiate the obligations of their predecessors on alleged ground motives’. In fact, the United Kingdom argued that there was a ‘nexus’ between the contract and the territory of the Philippines:

The obligation is one of a local nature, although contracted by the government of Spain. On the faith of it, the company has expanded a large sum of money on works

224 Ibid., 307–8, referring to a law opinion of 15 August 1863, F.O. 83/2287.
225 Ibid., 309–10.
226 Ibid., 322.
227 Ibid., 311–13.
228 Ibid., 311, referring to J.B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, vol I (GPO 1898) 389.
229 Ibid., 311–12
230 The question is examined below at Chapter 14, Section 2.
231 O’Connell, State Succession, 1967 (n 15) 312.
232 Ibid., 312, referring to a law opinion of 30 November 1900, F.O. confidential papers (7516) no.44.
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for the benefit of the Philippines and the obligation to respect the concession seems to us to belong clearly to that class of local obligations which have always been held to pass with the territory.\footnote{Ibid.}

In sum, there are several examples where the States whose own nationals’ rights were affected by a cession of territory taking place elsewhere have adopted a position in favour of succession. Yet, one must be careful not to give too much weight to these precedents since the States involved may have taken this position for purely opportunistic reasons, having little to do with any legal principle. Thus, they may have favoured succession simply to protect their own nationals’ interests. This is clear from the fact that the same States have sometimes taken the opposite position of non-succession whenever they were the ones that were directly involved in a cession of territory as successor State. As further examined below,\footnote{See, Chapter 13, Section 6.2.} this is indeed the controversial position that was adopted by the United Kingdom in the context of its annexation of the Republic of South Africa.

2.3 Successor States and their domestic courts have adopted the succession principle

When taking possession of the Philippines and Cuba from Spain in 1898, the United States respected the concessions that had been granted by Spain to foreign companies.\footnote{O’Connell, State Succession, 1967 (n 15) 311.} The Treaty of Peace of 1947 also recognized the validity of the contractual obligations that were undertaken by Finland with companies in the territory of Petsamo, which was ceded to the Soviet Union.\footnote{Ibid., 335.} Many examples in the context of the unification of Italy also support the principle of succession. According to the 1866 Treaty of Vienna, the Austrian Empire ceded Venetia to the French Empire, which then ceded it to the Kingdom of Italy. Under the Treaty, Italy succeeded to the 'rights and obligations resulting from contracts regularly stipulated by the Austrian administration for [the] object of public interest specially concerning the ceded territories'.\footnote{Treaty of Peace, October 3, 1866, in: M.N.R.G. vol 18, 405, Art. 8.} The principle of the continuation of contracts was adopted by a number of Italian courts.\footnote{O’Connell, State Succession, 1967 (n 15) 356.} In one case, the Court of Cassation of Florence held that 'by public law the State which succeeds in a part of the territory of another State is
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bound, independently of special conventions, by the obligations legally con-
tracted by the latter in relation to the territory to which it succeeds’.239
Following this case, Italian courts have consistently adopted the principle of
succession.240

13.25 An approach favouring the succession to contracts was also adopted by
predecessor States whose territory was ceded to another State. One example is
in the context of the cession of the territory of Alsace–Lorraine by France to
Germany in accordance with the Treaty of Frankfurt (1871).241

13.26 The principle of succession was also adopted by a Greek tribunal in the Nisyros
case involving the Ottoman Empire who had granted, in 1908, a concession
contract to exploit a sulphur mine on the Island of Nisyros to the appellants’
predecessor.242 The Island was under Ottoman Empire sovereignty until 1912
when it fell under Italian military occupation. The Dodecanese islands
(including Nisyros) were finally ceded to Italy in accordance with the Treaty of
Lausanne in 1923. In 1933, the Italian Governor of the Dodecanese enacted,
on the basis of an Italian Royal Decree of 1924, a Decree-Law repealing the
Ottoman law of 1906 concerning mines.243 Pursuant to Article 14 of the 1947
Paris Peace Treaty signed by, inter alia, Greece and Italy, the Dodecanesian
Islands were ceded by Italy to Greece.244 Greece passed a Royal Decree
whereby holders of mining concession rights should claim the renewal of their

239 Verlengo v. Finance Department, Court of Cassation at Florence, 1878, in: Giurisprudenza Italiana, 3rd Series,
vol 30, Pt. 1, Sec. 1, column 1206, referred to in ‘Brief filed by Fred K. Nielsen, American Agent, Hawaiian
Claims Case’, in: Fred K. Nielsen, American and British Claims Arbitration, Report (GPO 1926) 95ff at
119–20. See also: Cecil J.B. Hurst, ‘State Succession in Matters of Tort’, (1924) 5 British YIL 175.
240 Hurst, ibid., 174ff. One example is the case of Czario v. Valentinis involving a contract of lease concluded
between the Austrian authorities and a private party before the cession of territory: The Court of Cassation
held: ‘The Italian sovereignty having succeeded to the Austrian in the annexed territories by force of arms, it
is to be assumed that the Italian State replaces the Austrian with regard to juridical relations of private law
existing between the latter State and the private citizens.’ (Czario v. Valentinis, Italian Court of Cassation,
241 O’Connell, State Succession, 1967 (n 15) 357, referring to a decision by the Conseil d’Etat dated 28 April
1876, which held that according to a principle recognized under international law the successor State takes
over the rights and obligations arising from contracts which had been signed by the predecessor State
regarding the ceded territory.
(n 43) 73.
243 Ibid., ILR, 136: The decree provided, inter alia, that:
all concessions in favour of any person, granted whether by the Ottoman Government or the Italian
Government, and relating to mines, unless it is shown that they have been regularly exploited during the
period of five years immediately preceding the entry into force of this Decree, are considered null and
void, without the necessity of any governmental act, and without any rights of the owners to repurchase
(…).
244 Paris Peace Treaty, signed on 10 February 1947 at Paris, entered into force on 15 September 1947, in: 49
UNTS 126; (1948) UKRTS, no. 50 (Cmd. 7481).
rights. The applicant made such a claim, which was decided by the Greek Administrative Tribunal for Mines. In its 1952 decision, the tribunal found that the mines in question had not been regularly exploited between 1919 and 1945 and that, therefore, the rights relating to them had ceased to exist by virtue of the Italian Governor’s Decree of 1933. The Greek Council of State reversed the judgment of the administrative tribunal on the grounds that while the successor States (Italy, then Greece) had the right to pass legislation affecting the acquired rights of foreigners after the date of succession, they were nevertheless required to so in accordance with international law:

The doctrine of international law, which has developed under the influence of Western civilization, recognizes that the sovereign right of a successor State is not limited to substituting its own legislation for that in force in the annexed territory, so far as acquired rights are concerned: for, as soon as the annexing State has established its sovereignty over the territory, it has the right to substitute its legislation in order to achieve consistency in its legislation as a whole. Nevertheless, in legislat[ion] concerning acquired rights, the successor State should deal with them on the basis of respecting them, in accordance with international agreements and with international usage. But, in any case where there is doubt on the question of the correct interpretation to be placed on a legal provision giving legislative power over annexed territory, being a doubt arising concerning the extent of such power, that provision should be construed in the light not only of the principles of public law of the State granting such power, but also subject to the general principles of international law.245

The Council of State held that the Italian Decree of 1933 was indeed in violation of international law. Specifically, Article 9 of Protocol XII of the Treaty of Lausanne, which provides that Italy, as the successor State, was subrogated in all respects with regard to the rights and obligations of Turkey vis-à-vis nationals of other signatory Powers. The Council of State reversed the judgment of the administrative tribunal.

In sum, while the Nisyros decision does refer, rather vaguely, to ‘general principles of international law’ on the survival of acquired rights, the Council of State ultimately based its decision on the application of a treaty provision. The same observation can also be made, more generally, with respect to other judicial decisions examined in this section. Although they support the principle of succession to State contracts, the position taken by them seems to have been largely influenced by the existence of a treaty provision providing for such a solution.

245 Nisyros Mines Case (n 242) 136 (emphasis added).
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2.4 The limited relevance of some decisions by international courts and arbitral tribunals dealing with the matter

This section examines a number of decisions by international courts and arbitral tribunals dealing with succession to State contracts in the context of a cession of territory. These decisions generally provide limited guidance on the matter because tribunals have essentially applied treaty provisions when deciding that the successor State should be bound by obligations arising from contracts that had been signed by the predecessor State. In only one case, Affaire des Forêts du Rhodope Central case (1933), does the tribunal actually refer to the existence of a general principle of succession that is applicable notwithstanding the existence of any treaty provision to that effect. Yet, these decisions are important for other reasons. Indeed, some of them are frequently referred to by scholars and investors as the cornerstone of an (alleged) principle of international law whereby the successor State would have the obligation to respect all acquired rights of foreign investors. This is indeed the case for two PCIJ cases: Questions relating to Settlers of German Origin in Poland (1923) and Mavrommatis Palestine Concessions (1925). In fact, a closer analysis of these decisions will show that they do not provide much support for such a proposition. Also, while the analysis of the decisions of the PCIJ and that of the arbitral tribunal in the three Lighthouse cases examined below provide limited guidance on the question of succession to contracts, they will be of great assistance when the time comes to discuss the factors and circumstances that should be taken into account by a tribunal to determine the matter.246

2.4.1 Questions Relating to Settlers of German Origin in Poland (PCIJ, 1923)

The doctrine of acquired rights was formulated by the PCIJ in Questions Relating to Settlers of German Origin in Poland, which dealt with the question of the eviction of German settlers by Poland from territories which had belonged to Germany, but were ceded to Poland after the War. The court made the general proposition that private rights do not simply disappear in the event of a change of sovereignty:

Private rights acquired under existing law do not cease on change of sovereignty. No one denies that the German Civil Law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that, although the law survives, private rights acquired under it have

246 This question is examined below at Chapter 14.
perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice. 247

Yet, as noted by O’Connell, the court in this case did not have to examine the general question of the survival of acquired rights by the successor State. It only had to determine the scope of one provision (Art 15 of the Minorities Treaty) under which Poland had the obligation not to terminate the rights of such minorities.248 As noted by Bedjaoui, in that case the court ‘was called upon to give an opinion on the violation of an international undertaking rather than on the existence of a principle of public international law’.249 This is clear from these extracts of the decision:

The general question whether and under what circumstances a State may modify or cancel private rights by its sovereign legislative power, requires no consideration here.

The Court is here dealing with private rights under specific provisions of law and of treaty, and it suffices for the purposes of the present opinion to say that even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty.

By the Minorities Treaty, Poland has agreed that all Polish nationals shall enjoy the same civil and political rights and the same treatment and security in law as well as in fact. The action taken by the Polish authorities under the Law of July 14th, 1920, and particularly under Article 5 is undoubtedly a virtual annulment of the rights which the settlers acquired under their contracts and therefore an infraction of the obligation concerning their civil rights. It is contrary to the principle of equality in that it subjects the settlers to a discriminating and injurious treatment to which other citizens holding contracts of sale or lease are not subject.250

Ultimately, the most that can be said is that the court supported the general proposition that private rights simply do not automatically disappear as a result of a change in sovereignty.251 As noted by O’Connell, this statement of the court ‘by itself is of minimal significance’.252 Thus, as noted above,253 a new State is indeed always free to adopt new legislation that can affect the rights of individuals. The same general position was taken by the PCIJ in the

247 Advisory Opinion No. 6 (n 52) 36.
249 ILC, Second Report Bedjaoui, 1969 (n 4) 74.
250 Advisory Opinion No. 6 (n 52) 36.
251 Swan Sik (n 58) 128.
252 O’Connell, ‘Recent Problems of State Succession’ (n 41) 134: ‘It means that rights derived from the antecedent legal system are ipso facto unaffected by the change of sovereignty, but this can only be to the extent to which the law itself survives,’ adding that: ‘If a right derives from public law and the public law is expelled from the territory, then something additional to legal continuity is required for the right to subsist.’
253 See, Chapter 10, Section 3.
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case of *German Interests in Polish Upper Silesia*,\(^{254}\) as well as by some other tribunals.\(^{255}\)

2.4.2 *Mavrommatis Palestine Concessions (PCIJ, 1925)*

13.33 The question of succession to contracts arose in the *Mavrommatis Palestine Concessions* case decided by the PCIJ in 1925. It involved a claim filed by Greece on behalf of one of its nationals against the United Kingdom.\(^{256}\) The context of the claim was the end of the Ottoman Empire and the cession of several territories to the Allies, which established protectorates over them. For instance, the United Kingdom established protectorates over Mesopotamia (now Iraq) and Palestine, while France did the same regarding Syria and Lebanon. Before the War, Mr. Mavrommatis, a Greek national, had been granted by the Ottoman Empire two groups of concessions to undertake public works in the territory of Palestine (the Jaffa and the Jerusalem concessions). One question arising in this case was whether the British Government, as Mandatory of Palestine (the successor State), was under any obligation to honor these concessions granted by the Ottoman authorities.\(^{257}\) The question was answered in the affirmative by Article 1 of Protocol XII of the 1923 Treaty of Lausanne which dealt explicitly with the issue.\(^{258}\)

13.34 As a national of one of the ‘Contracting Powers’ to the Treaty (Greece), Mr. Mavrommatis was entitled to have his concession contracts (those that were signed before 29 October 1914, that is, the Jerusalem concession) honoured by the successor State. One group of concessions (Jaffa) had only been signed after that date and was therefore not covered by the treaty provision. While the court held that it did not have jurisdiction to consider these concessions, it nevertheless made this general observation:

> It will suffice to observe that if, on the one hand, Protocol XII being silent regarding concessions subsequent to October 29th, 1914, leaves intact the general principle of subrogation, it is, on the other hand, impossible to maintain that this principle falls within the international obligations contemplated in Article II of the Mandate as interpreted in this judgment. The Administration of Palestine would be bound to


\(^{255}\) See, for instance, *Affaire Goldenberg (Allemagne v. Roumanie)*, 27 September 1928, 2 UNRIAA 901, at 909: ‘Le respect de la propriété privée et des droits acquis des étrangers fait sans conteste partie des principes généraux admis par le droit des gens.’

\(^{256}\) *The Mavrommatis Palestine Concessions*, 1924, PCIJ, Ser. A, No. 2.

\(^{257}\) O’Connell, *State Succession*, 1967 (n 15) 123.

\(^{258}\) Treaty of Peace of Lausanne, signed on 24 July 1923, in: UKTS 1923, No. 16 (Cmd. 1929); 28 LNTS 11; (1924) 18 JIL Supp., 4. The provision reads as follows: ‘Concessionary contracts and subsequent agreements relating thereto, duly entered into before the 29th October, 1914, between the Ottoman Government or any local authority, on the one hand, and nationals (including Companies) of the Contracting Powers, other than Turkey, on the other hand, are maintained’.
recognize the Jaffa concessions, not in consequence of an obligation undertaken by the Mandatory, but in virtue of a general principle of international law to the application of which the obligations entered into by the Mandatory created no exception.259

Since the PCIJ declined its jurisdiction over the Jaffa concession claim, it did not examine the question of whether any such ‘general principle of international law’ exists regarding the protection of concession rights in a situation where no treaty provision provides for an express solution. With respect to the Jerusalem concession, it simply applied Protocol XII providing for the maintenance of such contractual rights. For this reason, it has been rightly highlighted that the case does not provide much support in favour of the existence of any principle of succession to contracts under general international law.260 The court simply applied a treaty provision.

2.4.3 Lighthouse case (PCIJ, 1934) and Lighthouse in Crete and Samos case (PCIJ, 1937)

The Lighthouse case involved concession rights obtained in 1860 by a French company (Société Collas et Michel) from the Ottoman Empire for the management, development, and maintenance of the system of lights on the coasts of the Ottoman Empire in the Mediterranean, the Dardanelles, and the Black Sea. The concession for the maintenance of the lighthouses on the coasts of the Ottoman Empire had been renewed many times since then.261 At the heart of the dispute was a contract concluded in April 1913 between the Ottoman Government and the French firm for the renewal of the concession for 25 years. France and Greece disagreed on the fate of the contract after some of the territories where the lighthouses were situated had been ceded by the Ottoman Empire to Greece. France and Greece signed a special agreement in 1931 and the matter was decided by the PCIJ in 1934.262

The court identified three questions to be decided: determine the intentions of the parties with regards to the scope of the contract; whether this contract was ‘duly entered into’ according to Ottoman law; and whether it was enforceable against Greece. Only the last question is of interest for the purpose of this book. The court examined Article 9 of Protocol XII of the Lausanne Treaty,263

259 The Mavrommatis Palestine Concessions (n 256) 28 (emphasis added).
260 O’Connell, State Succession, 1967 (n 15) 325.
263 Treaty of Lausanne (n 258). The provision reads as follows:

In territories detached from Turkey under the Treaty of Peace signed this day, the State which acquires the territory is fully subrogated as regards the rights and obligations of Turkey towards the nationals of the other contracting Powers and companies in which the capital of the nationals of the said Powers is
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and concluded that it meant two different things. First, the ‘succession State’ (Greece) was ‘subrogated as regards [to] concessionary contracts entered into with the Ottoman Government prior to October 29th, 1914, in so far as concerns the territories detached from Turkey under the Treaty of Lausanne’.264 Second, Greece was also subrogated in regards to the concessionary contracts entered into with the Ottoman Government ‘prior to the coming into force of the respective treaties of peace, in so far as concerns territories detached from Turkey after the Balkan wars’.265 The concession rights in the present case concerned the latter situation. It is important to note that at the time the contract was concluded (in April 1913), ‘the greater part of Turkey in Europe had been occupied by the Balkan Allies and, so far as concerns the Mediterranean coasts and the islands, by Greece’.266 Yet, as the court mentioned, ‘the fate of all the occupied territories was not yet decided’.267 Regardless, certain territories where the lighthouses were situated were occupied by Greek troops at that date; they were no longer controlled by Turkey.

13.38 One of the questions raised by the parties in the proceedings was whether ‘the territorial sovereign is entitled, in occupied territory, to grant concessions legally enforceable against the State which subsequently acquires the territories it occupies’.268 Greece argued essentially that, on the one hand, the Ottoman Empire was no longer sovereign over these territories in April 1913 and therefore could not sign the renewal of the contract. On the other hand, it also argued that, as the occupying force in the territory, Greece could not either. The court did not examine this question based on the clear language contained in the Protocol.269 The court concluded on this point that: ‘The Greek Government is not therefore entitled to object to its subrogation as regards the contract of April 1st/14th, 1913, on the ground that certain territories were occupied by Greek troops at that date.’270 The court held that the concession contract granted to the company was ‘duly entered into and was preponderant, who are beneficiaries under concessionary contracts entered into before the 29th October, 1914, with the Ottoman Government or any local Ottoman authority. The same provision will apply in territories detached from Turkey after the Balkan wars so far as regards concessionary contracts entered into with the Ottoman Government or any Ottoman local authority before the coming into force of the treaty providing for the transfer of the territory. This subrogation will have effect as from the coming into force of the treaty by which the transfer of territory was effected except as regards territories detached by the Treaty of Peace signed this day, in respect of which the subrogation will have effect as from the 30th October, 1918.

264 Lighthouse Case (n 261) [83].
265 Ibid., [83].
266 Ibid., [24].
267 Ibid., [62].
268 Ibid., [80].
269 Ibid. The question is examined in detail by Judge Séfériadès in his separate opinion.
270 Ibid., [83].
accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories assigned to it after the Balkan wars or subsequently. In other words, the 1913 contract was one of those contracts covered by Article 1 of Protocol XII of the 1923 Treaty of Lausanne and Greece was obligated to maintain it.

Ultimately, the court only applied the terms of the Lausanne Treaty and did not discuss the general question of whether or not a successor State was under the obligation to maintain rights that had been granted under a contract by the predecessor State before the cession of the territory. As such, the reasoning of the court provides limited guidance to the question examined in this section.

In the subsequent *Lighthouse in Crete and Samos* case of 1937, the court simply confirmed that its ruling of 1934 extended specifically to the territories of Crete and Samos. Greece had argued that the lighthouses situated in the territories of Crete and Samos remained outside the ambit of the contract concluded (…) as the territories in which they are situated were detached from Turkey well before that date. Thus, an autonomous Cretan State had been created before the contract was renewed in 1913. The contract could therefore not apply to the territory of Crete over which Turkey could no longer exercise any rights. On this point, the court identified the question as being the following: ‘had every political link between the Ottoman Empire and the

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271 Ibid., [90].
272 *Lighthouses in Crete and Samos*, Judgment, 8 October 1937, PCIJ, Ser. A/B, no. 71. An analysis of the case can be found in: Verzijl (n 262) 483–95.
273 Ibid., [34].
274 Ibid. A few words should be said about the particular history of the Greek-speaking region of Crete which was under Ottoman occupation since the seventeenth century. A series of revolts against the Turks in the nineteenth century reached its climax in the insurrection of 1896–97 that led to war (in 1897) between Greece and the Ottoman Empire. The European Powers intervened in the war, forcing the Ottoman Empire to evacuate Crete in 1898. An autonomous Cretan State was formed under nominal Ottoman rule but in fact governed by a high commission of the occupying powers (England, France, Russia and Italy). Crete was in favour of its union with Greece but the occupying powers rejected its demand. The Young Turks revolution of 1908, however, enabled the Cretans to proclaim their union with Greece and in 1909 foreign occupation troops were withdrawn. In 1913, Crete was officially incorporated into Greece.
275 The court summarized that argument as follows:

> According to the contention of the Greek Government, the situation of the territories of Crete and Samos is of an entirely different order. The latter territories, which enjoyed a wide autonomy, were not and could not have been detached from Turkey by a transfer of sovereignty in from that State to Greece, seeing that in 1913 Turkey had long since lost her sovereignty in regard to them. It follows, according to this argument, that in April 1913 the Ottoman Government no longer had any title, competence or capacity to conclude the contract of April 1st/14th, 1913, and accordingly the contract, though valid in itself, was not duly entered into or validly concluded in respect of those territories (ibid., [36]).
islands of Crete and Samos disappeared at the time of the conclusion of the contract in dispute, that is to say, on April 1st/14th, 1913?276 The court added that:

only if it were shown that no such link subsisted on that date, would it be possible to regard these territories as having been already detached from the Ottoman Empire before the conclusion of the contract, and to consider the latter as not having been duly entered into in regard to the aforesaid territories.277

The court took the view that ‘notwithstanding its autonomy, Crete had not ceased to be a part of the Ottoman Empire’.278 It is only in May 1913 (i.e., one month after the contract was signed in April 1913) that Crete was officially incorporated into Greece by Article 4 of the Treaty of London.279 Article 4 of the Treaty indicates that ‘His Imperial Majesty the Sultan declares that he cedes to Their Majesties the Allied Sovereigns the island of Crete and renounces in their favour all rights of sovereignty and all other rights which he possessed over that island.’280 For the court, ‘it would be difficult to find more decisive evidence of the persistence of the Sultan’s sovereignty up to that date than is furnished by this formal renunciation made by the latter in an international instrument signed by Greece’.281

13.41 In any event, the court stated that Article 9 of Protocol XII of the Lausanne Treaty ‘makes no exception or reservation’ and ‘applies to all the territories which were detached from Turkey after the Balkan wars, without regard to the special status possessed by some of them under the Ottoman Empire’.282 The court further explained that under this provision ‘the idea of the detachment of the territories is closely, connected with and correlated to that of their

276 Ibid., [37].
277 Ibid.
278 Ibid., [38]. See also at [39]:
The Greek Government would have needed to prove that, at the time of the conclusion of the contract in dispute, the territories of Crete and Samos were already, in law, territories detached from the Ottoman Empire, in the full meaning of the word ‘detached’, which in the opinion of the Court connotes the entire disappearance of any political link. For, as has been already observed, it is the date of the detachment of the territories which is decisive in this case. The wide forms of autonomy conferred on the territories in question could only be taken into consideration for the solution of the present dispute, if they justified the conclusion that the autonomous territories were already, at the date of the contract, detached from the Ottoman Empire to the extent that every political link between them and the Sublime Porte had been severed, so that the Sultan had lost all power to make contracts in regard to them.

280 Lighthouses in Crete and Samos (n 272).
281 Ibid., [41].
282 Ibid., [34].
assignment to another sovereign’. Thus, this provision ‘leaves no room for a break in continuity of the sovereignty over the territories referred to therein’ and ‘provides for the direct and immediate succession of Greece to the obligations contracted by the Ottoman Empire in respect of the territories over which Ottoman sovereignty is ceded’. The court therefore concluded that the lighthouses in Crete and Samos were situated in ‘territories which not only were assigned to Greece after the Balkan wars but also were not detached from the Ottoman Empire until that time’. Article 9 of Protocol XII of the Treaty of Lausanne was therefore applicable to the April 1913 contract. Consequently, the court decided that the contract ‘must be considered as having been duly entered into, and as accordingly operative in regard to Greece in respect of the said territories’.

Once again, in this case, the court simply applied a treaty provision to arrive to the conclusion that the successor State was bound to respect a contract which had been signed by the predecessor State. The importance of this case to the present discussion is therefore limited.

2.4.4 The Lighthouse Arbitration case (French-Greek Arbitral Tribunal, 1956)

The Lighthouse Arbitration case was decided in 1956 by the French-Greek Arbitral Tribunal, which had been set up under the rules of the Permanent Court of Arbitration in The Hague. The case involved several claims (contractual and delictual): France had no less than 27 claims and Greece ten counter-claims. Only a few of these claims are relevant for the present purpose.

The Lighthouse Arbitration case is a good illustration of the principle that the continuing State should remain responsible for its own internationally wrongful acts committed before the date of succession. This is expressed by the arbitral tribunal in its reasoning concerning Claim no. 12-a, whereby France sought compensation against Greece (the successor State) for acts committed directly by the authorities of the Ottoman Empire (the predecessor State). The alleged internationally wrongful act was the unauthorized removal by the Ottoman Empire of a buoy belonging to the French company Collas et Michel. The arbitral tribunal ruled that the Ottoman authorities had not committed any wrongful act in doing so and that the acts were legitimate for

283 Ibid.
284 Ibid.
285 Ibid., [43].
286 Lighthouse Arbitration case (n 162), 90.
287 Ibid., 81.
reasons of security. In one obiter dictum, the arbitral tribunal nevertheless indicated that even if the Ottoman Empire had committed such an internationally wrongful act, Greece could not be held liable for it. It was Turkey (the continuing State of the Ottoman Empire\textsuperscript{288}) which would be liable for its ‘own’ acts committed before the loss of a substantial portion of its territory. This was in accordance with Article 9 of Protocol XII of the 1923 Lausanne Peace Treaty.\textsuperscript{289} Therefore, the obiter dictum by the arbitral tribunal supports the proposition that in cases of cession of territory, the continuing State should remain responsible for its own internationally wrongful acts committed before the date of succession.\textsuperscript{290} The same principle was applied by the tribunal in dealing with Claim no. 11.\textsuperscript{291}

13.45 Claim no. 4 dealt with tax exemptions granted to a Greek shipping company and its ship (the Haghios Nicolaos) by a law proclaimed by the local authorities of Crete in 1908. After 1913, when the Island became officially part of Greece, the law remained in place. This tax exemption was alleged by the French company to be in violation of its existing concession rights. Therefore, France sought reparation from Greece. Right from the outset, the arbitral tribunal indicated that the liability of Greece should not be based on the above-mentioned provision of the Lausanne Peace Treaty which dealt with the rights and obligations of Turkey and not those of Crete. The arbitral tribunal held that such a liability ‘could result only from a transmission of responsibility in accordance with the rules of customary law or the general principles of law regulating the succession of States in general’.\textsuperscript{292} The arbitral tribunal concluded that the tax exemption was a breach of a contractual obligation that had been committed by Crete. The tribunal described Crete as an ‘autonomous island State the population of which had for decades passionately aspired to be united, by force of arms if necessary, with Greece, which was regarded as the mother country’.\textsuperscript{293} Greece had also recognized that this was in violation of the concession agreement. The arbitral tribunal added that this violation by the Cretan authorities was made in favour of a Greek company and that the Greek authorities maintained the situation after 1913. The arbitral tribunal thus concluded on this point that:

\textsuperscript{289} Treaty of Lausanne (n 258).
\textsuperscript{290} See, analysis in: Dumberry, State Succession to International Responsibility (n 165) 130ff.
\textsuperscript{291} See, analysis: ibid.
\textsuperscript{292} Lighthouse Arbitration case (n 162) 90.
\textsuperscript{293} Ibid., 92.
The Tribunal can only come to the conclusion that Greece, having adopted the illegal conduct of Crete in its recent past as [an] autonomous State, is bound, as [a] successor State, to take upon its charge the financial consequences of the breach of the concession contract. Otherwise, the avowed violation of a contract committed by one of the two States, linked by a common past and a common destiny, with the assent of the other, would, in the event of their merger, have the thoroughly unjust consequence of cancelling a definite financial responsibility and of sacrificing the undoubted rights of a private firm holding a concession to a so-called general principle of non-transmission of debts in cases of territorial succession, which in reality does not exist as a general and absolute principle.294

Therefore, the tribunal did not take a stance on the question of succession to contractual obligations per se. It simply held that the successor State had continued a breach of contract which was initially started before the date of succession and, hence, should be responsible for any damages arising from such an act (a question further examined below295).

The tribunal also pointed out that the solution would have been the same even if the obligation had been regarded as delictual rather than contractual. There is no doubt that Greece was held responsible for its own internationally wrongful acts (delict of omission) committed after 1913 when Crete was officially ceded to Greece. Thus, Greece was responsible for maintaining in place the discriminatory practice after it had undeniable sovereignty over the Island.296 The question remains whether Greece was also held accountable, as the successor State, for acts committed by Crete before 1913. This is a question of succession to State responsibility that is controversial and has been addressed by the present author elsewhere.297 In my view, this case is an illustration that in the context of a cession of territory there is an exception to the general principle that the continuing State should be responsible for the acts committed on the ceded territory before the date of succession. The exception is when the internationally wrongful acts were committed by a largely autonomous government. At the time of the events, Crete had indeed a largely autonomous government.298 In the award, the tribunal mentions that this was an important point that had been expressly discarded by the PCIJ in

294 Ibid.
295 See, Chapter 14, Section 1.
296 Lighthouse Arbitration case (n 162) 92.
297 Dumberry, State Succession to International Responsibility (n 165) 138ff.
298 Lighthouse Arbitration case (n 162). The arbitral tribunal indicated about Crete (in the original French version of the award) that:

son émancipation comme entité autonome a déjà commencé en 1868 … [d]epuis lors, l’île de Crète a vécu une vie politique séparée … et mené l’existence d’un État autonome, investi de pouvoir très larges, mais sous la suzeraineté de l’Empire Ottoman.
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its 1937 judgment. In such a case, the successor State (i.e., the State to which the territory is ceded) should be held responsible for the consequences of obligations arising from the internationally wrongful acts that had been committed before the date of succession. The Institut recently adopted the same position on the matter. The question of responsibility for actions of an autonomous government in the context of State contracts is further examined below.

13.48 Finally, Claim no. 27 dealt with the actions taken by Greece in 1929 (i.e., well after the event of succession) that resulted in the seizing of the lighthouse administration, without however paying compensation to the firm. Importantly, the original concession contracts entered into between Turkey and Collas et Michel in 1860 provided that Turkey might take over the administration of the lighthouse, subject to the payment of compensation as agreed beforehand by the parties or as determined by arbitration. After having explained the nature of this clause, the tribunal held that Greece had been subrogated into the position of Turkey under the concession contract and could therefore only take over the lighthouse administration under the same

The cession of territory in 1913 by the Ottoman Empire is described by the arbitral tribunal as ‘sa renunciation finale à un résidu de droits de suzerainté qu’il avait encore retenus après avoir érigé l’île en Etat autonome’ (UNRIAA 181).

Dans son exposé des motifs, la Cour fait expressément coincider la date de la disparition des derniers liens politiques turco-crétois avec celle de l’attribution de l’île à la Grèce, mais elle se refuse nettement à entrer dans un examen de la portée du régime de large autonomie octroyé à l’île antérieurement à 1913, sauf au point de vue de son importance pour le problème spécifique du ‘détachement’ final (loco cit., 103). Par conséquent, les effets internationaux dudit régime de large autonomie à tous autres points de vue ont été écartés par la Cour en termes exprès, et c’est précisément ce régime d’autonomie qui joue un rôle important dans la solution des controverses soulevées par les réclamations nos 11 et 4 (UNRIAA 195).

La substance de la clause de reprise est, en conséquence, demeurée la même pendant toute la durée de la concession depuis 1860: l’État concédant aura le droit, à tout instant, de mettre fin unilatéralement à l’existence de la concession, mais à une condition fondamentale et stricte: de ne pas procéder à cette opération unilatérale avant d’avoir payé au concessionnaire – ou, au moins, avant de lui en avoir garanti le paiement – toutes les indemnités qui auront été préalablement fixées par les Parties elles-mêmes ou, en cas de désaccord, par des arbitres. Cette condition est, en effet, absolument essentielle et la seule efficace comme sauvegarde des droits du concessionnaire contre l’abus éventuel, par l’État concédant, de son pouvoir public, ainsi que l’histoire des concessions l’a prouvé partout et en abondance’ (UNRIAA 246).
conditions and, consequently, had to pay compensation to the French company.305 Again, the tribunal simply applied a clause within a contract without taking position on the general question of succession to contracts.

In sum, apart from the issue of a continuous breach of contractual obligations and that of breach committed by autonomous entities (further discussed below306), the award seems to be overall more relevant to the other question of succession to responsibility. Yet, one reason for having discussed in some detail the award is because it is one of the rare awards examining how the general question of succession to State contracts can be resolved. As further explained above,307 the present author put forward a new framework of analysis to deal with the question and the reasoning of the arbitral tribunal (which will be exposed later) will be most useful in that respect.

2.4.5 Affaire des Forêts du Rhodope Central (1933)

Another case involving a cession of territory is Affaire des Forêts du Rhodope Central (Fond).308 The Ottoman Empire granted to some individuals property and exploitation rights over forests situated in Central Rhodope.309 This territory had become part of Bulgaria in 1913 as a result of the Treaty of Constantinople which was signed between the Ottoman Empire and Bulgaria after the Second Balkan War.310 The treaty contained a provision guaranteeing the respect of ‘acquired rights’ existing before the cession of territory.311 The owners of the forest company became Greek nationals as a result of the cession of territory. Bulgaria refused to recognize the concession to the owners. The fate of these concession rights was the object of a dispute between Greece and Bulgaria and an Arbitrator (Mr. Unden) was appointed by the Council of the League of Nations under Article 181 of the Treaty of Neuilly (which was signed in 1919 and under which Bulgaria had ceded some of its territories to

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305 Ibid.: Par sa mainmise sur le service des phares de la Société a partir du ler Janvier 1929 sans paiement – ou garantie de paiement – préalable d’une indemnité, arrêtée dans des conditions qui en assurent l’équité, le Gouvernement hellénique, en tant que successeur dans la concession par subrogation, a accompli un acte d’autorité directement contraire d’une de ses clauses essentielles (UNRIAA 246).

306 See, Chapter 14, Sections 1 and 3.

307 See, Chapter 12, Section 2. The question is further discussed below at Chapter 14.

308 Affaire des Forêts du Rhodope Central (Fond), Award, 29 March 1933, in 3 UNRIAA 1389.

309 See, O’Connell, State Succession, 1967 (n 15) 331.

310 Treaty of Peace Between Bulgaria and Turkey, signed at Constantinople on 29 September 1913, between Bulgaria and Turkey.

311 Ibid., Art. 10: ‘Les droits acquis antérieurement à l’annexion des territoires ainsi que les actes judiciaires et titres officiels émanant des autorités ottomanes compétentes, seront respectés et inviolables jusqu’à la preuve légale du contraire’; Art. 11: ‘Le droit de propriété foncière dans les territoires cédés, tel qu’il résulte de la loi ottomane sur les immeubles urbains et ruraux, sera reconnu sans aucune restriction.’
its neighbouring States). Article 181 provided that ‘private rights’ that had been guaranteed in previous treaties (including the Treaty of Constantinople) should not be affected by the transfer of territory. Interestingly, in a preliminary award on the application of that provision, the arbitrator mentioned that this provision was representing a common principle of international law:

Un principe général du droit commun international, celui du respect, sur un territoire annexé, des droits privés régulièrement acquis sous le régime antérieur, se trouve expressément sanctionné par le Traité de Neuilly, suivant l’exemple des traités de paix de 1913–1914.

13.51 The same reasoning is also found later in the award on the merits:

Il est difficile, toutefois, de comprendre l’utilité d’une règle si évidente. Personne ne saurait sérieusement soutenir que la diminution ou l’accroissement des territoires acquis [aurait] pût avoir un effet quelconque sur les obligations des États quant au respect des droits privés dans ces territoires. À première vue, les termes employés par les rédacteurs de l’article semblent plutôt indiquer que; les droits privés se référant aux territoires en question doivent être respectés nonobstant la cession partielle ou intégrale de ces territoires intervenue en 1919. Ce serait là une consécration expresse du principe bien connu du respect des droits acquis dans des territoires cédés, c’est-à-dire le renouvellement, à la charge de l’État cessionnaire, d’une obligation incombant à l’État cédant.

13.52 The arbitrator therefore affirmed the existence of a general principle of international law protecting acquired rights in the context of a cession of territory. This would impose such an obligation upon States independently of whether or not a treaty provision provides for such a protection (such as Art. 181 of the Treaty of Neuilly in that case). In fact, of all the decisions examined in this section, this award seems to be the only one that explicitly

313 Ibid. The article reads as follows:

314 Affaire des Forêts du Rhodope Central (n 307), Award, 4 November 1931, at 1396.
315 Ibid., Award of 29 March 1933, at 1401.
316 In its award on the merits, the arbitrator came to the conclusion that Bulgaria had violated private rights guaranteed under Art. 181 of the Treaty of Neuilly. He awarded compensation to Greece for the damage suffered by its nationals.
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takes a position on the question of succession to contracts. It clearly supports
the principle of succession to State contracts in the context of a cession of
territory.

3. DISSOLUTION OF STATE

This section will first examine the general principle of non-succession which
should normally prevail as well as some situations where the opposite approach
should be adopted (Section 3.1). I will then examine State practice supporting
these conclusions (Section 3.2).

3.1 While new States are generally not bound by contracts, there are
situations where succession should prevail

In the context of the dissolution of a State, the question of succession to
contracts becomes all the more complicated given the fact that the predecessor
State no longer exists. At first, this would seem to be a straightforward
situation where the new successor States should not be bound by any of the
obligations arising from a contract that was signed by a State that no longer
exists. In other words, if there were a type of succession that would call for the
non-succession solution, it is logical to assume that it would be with regards to
dissolution. This solution seems appropriate given the difficult task that a
tribunal is faced with when deciding issues of succession to contracts in the
context of a dissolution. Thus, not only does it have to examine whether
succession is possible, but it must also, subsequently, determine which of the
different successor State(s) should be responsible for the rights and obligations
arising from a State contract.

However, the question remains whether this solution of non-succession is fair
and justified in all circumstances. In the different context of succession to State
responsibility, I have argued that the strict and automatic application of the
principle of non-succession would result in an injured third State being left
with no debtor to provide compensation for the damage it suffered as a result
of the commission of a wrongful act.317 The unfairness, which would result
from the application of a strict principle of non-succession in cases of
dissolution, has been acknowledged by the arbitral tribunal in the *Lighthouse
Arbitration* case:

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What justice, or even what juridical logic, would there be, for example, in the hypothesis of an international wrong committed against another Power by a State which subsequently splits up into two new independent States, in regarding the later as being free from an international obligation to make compensation which would without any doubt have lain on the former, predecessor, State which had committed the wrong218

The same argument has also been put forward by scholars.319 The Institut recently adopted the solution of succession to responsibility in the context of dissolution.320

13.56 In my view, there are a number of different factors and circumstances that may influence whether the successor States could be considered bound by obligations arising from State contracts, even in the situation where the predecessor State has ceased to exist. As further examined below,321 such continuity of obligations could be possible, for instance, whenever the investment was made on the specific territory of one of the successor States and where the obligations under the contract were only performed there. Whenever this is the case, it is likely that the new State benefited from the consequences of such an investment on its territory. The question of the ‘nexus’ between a contract and the territory of a new State is further examined below.322 Under this scenario, why should the new State be exempt from their responsibility for the duties arising from the contract? As further discussed below,323 the principle of unjust enrichment may also play an important role in this context.

3.2 Analysis of State practice

13.57 The question of succession to rights and obligations contained in a State contract was examined by an arbitral tribunal in the 1929 case of Sopron-Koszeg Railway Company v. Austria and Hungary.324 In 1907, the Sopron-Koszeg Railway Company was granted a 90-year railway concession by the

318 Lighthouse Arbitration case (n 162) 93.
319 According to Verzijl (n 43) 219–20, in the situation where a ‘State responsible for such a wrong splits into two before the reparation due is adjusted,’ it would really be absurd to assume that the successor State can nevertheless take shelter behind the argument put forward by the dominant doctrine, according to which the offences of its predecessor(s) do not regard it’. Georg Schwarzenberger, International Law as Applied by International Courts and Tribunals vol I, 3rd edn (Steven & Sons 1957) 175–6, is of the view that whenever a State ‘split into two States’ after the commission of an ‘international tort’, the successor States should be held responsible for that internationally wrongful act ‘based on ground of estoppel’ and ‘on the rules governing the principle of good faith’.
320 IDI, State Succession to Responsibility, Resolution, 2015 (n 14), Art. 15.
321 See, Chapter 14, Section 2.
322 Ibid.
323 See, Chapter 14, Section 4.
324 Sopron-Koszeg Railway Company v. Austria and Hungary, in 2 UNRIAA 961; (1930) 24 AJIL 164.
Royal Hungarian Government. As a result of the territorial changes brought about by the treaties of St. Germain and Trianon after the First World War, the middle section of the railway now passed through Austria and the two ends remained in Hungary. The fate of the railways of the former Austro-Hungarian Monarchy which now passed through the territory of different States was decided under Article 320 of the Treaty of St. Germain and Article 304 of the Treaty of Trianon. These provisions provided that an agreement on the administrative and technical reorganization would have to be reached by these companies with each State. Having reached an agreement with Hungary but failing to do the same with Austria, the company brought the dispute before the Council of the League of Nations, which appointed an arbitral tribunal to decide the case.

From the outset, it should be mentioned that even though Austria was clearly the continuator State of the Monarchy under the Treaty of St. Germain, which the arbitrators had to apply to resolve the dispute, the tribunal seems to have nevertheless considered it as a new State (and the break-up of the Monarchy as a case of dissolution). The same position was adopted at around the same time by the Tripartite Claims Commission. As mentioned above, the legal qualification of the break-up of the Austria-Hungary Dual Monarchy after the War is controversial. The ‘Allied and Associated Powers’ (the British Empire, France, Italy, Japan, United States, etc.) took the view that this was not a case of a dissolution of a State. They believed that post-War Austria and Hungary were in fact identical with the now extinct Dual Monarchy. They insisted on both States being considered as continuing States in order to ensure that they would be held responsible for the internationally wrongful acts that had been committed by the Dual Monarchy during the War. The Peace Treaty of St. Germain (entered into by the Allied Powers and Austria) thus contained a clause providing for Austria’s responsibility for the loss and damages resulting from the War. Austria took the opposite position that it

325 Treaty of Peace between the Allied and Associated Powers and Austria; Protocol, Declaration and Special Declaration, St. Germain-en-Laye, 10 September 1919, entered into force on 16 July 1920, in UKTS 1919 No. 11 (Cmd. 400).
329 See, Chapter 13, Section 1.2.
330 See the discussion in Krystyna Marek, Identity and Continuity of States in Public International Law (Droz 1968) 220ff.
331 Verzijl (n 43) 126.
332 Treaty of Peace of St. Germain (n 325), Art. 177. The United States also considered Hungary as the continuing State of the Monarchy and signed with it a separate peace treaty in 1921: Treaty Establishing Friendly Relations between the United States of America and Hungary, signed in Budapest on 29 August
was a new State in 1918. Accordingly, the Austrian Constitutional Court decided that Austria was not responsible for the obligations of the Monarchy and for claims that were filed against it.333

13.59 It is in this context that the tribunal made a number of remarks on the fate of private rights when State succession occurs. The tribunal first highlighted the fact that a change in sovereignty over a given territory does not automatically lead to the disappearance of all private rights of persons that existed under the laws of the predecessor State:

(... en principe, les droits tenus par une compagnie privée, d'un acte de concession, ne sauraient être mis à néant ou lésés du seul fait que le territoire sur lequel est assis le service public concédé a changé de nationalité; ... la majorité des auteurs et les solutions de la pratique internationale les plus conformes à la conception moderne du droit des gens sont en ce sens.334

13.60 Yet, the tribunal also mentioned that existing contractual rights do not necessarily remain intact after the date of succession and that a State has the freedom to make changes to these instruments:335

Les dispositions contractuelles qui régissaient la Compagnie ... avant la guerre ne peuvent être déclarées ni totalement invalides par l'effet des changements de souveraineté qui ont affecté les territoires sièges de son entreprise, ni davantage totalement valides et exécutoires dans leur lettre et teneur jusqu'à la fin de la concession.336

13.61 In another case decided by the same arbitral tribunal dealing with the claim of the Zeltweg-Wolfsberg and Unterdrauburg-Woellan Railway Company against Austria and Yugoslavia, it was held that Article 320 of the Treaty of St. Germain reflected a general principle of international law:

(... l'article 320 se borne à confirmer, ainsi que l'a reconnu la jurisprudence antérieure, ce principe du droit public international que les droits tenus par une compagnie privée,

1921, in USTS, no. 660; in (1922) 16 AJIL 13–16. The United States also ratified a treaty in 1924 with Hungary and Austria dealing with the determination of the amounts to be paid by these two States as a result of the previous separate treaties it had entered into with them in 1921: The Agreement of 26 November 1924 can be found in 48 LNTS 70; 6 UNRIAA 199.


334 Sopron-Koszeg Railway Company (n 324) 967.


336 Sopron-Koszeg Railway Company (n 324) 969. See also: Barcs-Pakrac Railway Case, 2 UNRIAA 1569, at 1575–6.
The reasoning of both tribunals favours the principle of succession to State contracts. However, it is true that in both cases the tribunals were merely applying treaty provisions which specifically provided for such a solution regarding railway companies. Both tribunals seem to have nevertheless considered this solution of succession as being in accordance with international law. One reason which may explain why they took this position is because of the territorial nexus that existed between the contract and specific successor States. Thus, after the dissolution of the Empire, the different railway tracks continued to exist and were now located in the territories of new States. It seems logical that a State should continue to be bound by contracts relating to railways that were located on its territory. These two cases tend to support the proposition (mentioned above) that there are situations where the principle of succession should apply, even in the context of a dissolution.

4. UNIFICATION AND INCORPORATION OF STATES

This section will first examine the general principle of succession which applies in the context of unification and incorporation (Section 4.1), which will be then followed by an analysis of State practice (Section 4.2).

4.1 The successor State is bound by the contracts

In the different context of succession to State responsibility, the solution of succession is favoured by scholars for unification as well as for incorporation of States. The Institut also adopted that approach in its recent Resolution. The same position was also adopted by ILC Special Rapporteur Bedjaoui. It has been argued that in the event that the new unified State found it desirable to exercise the rights that belonged to its predecessor States,

337 Affaire des chemins de fer Zeltweg-Wolfsberg et Unterdrauburg-Woellan (Autriche et Yougoslavie), October 1933, 6 August 1934, 12 May 1934 and 29 June 1938, in 3 UNRIAA 1795–815, at 1803.
338 The question is examined below at Chapter 14, Section 2.
339 See the analysis in: Dumberry, State Succession to International Responsibility (n 165) 93ff.
340 See the analysis in: ibid., 83–4.
341 IDI, State Succession to Responsibility, Resolution, 2015 (n 14), Arts 13, 14.
342 ILC, First Report Bedjaoui, 1968 (n 39) 101 [47]: ‘The two merging States have decided to join forces in the future and the liabilities of each are fully assumed by the new political entity they have created.’
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it should equally have to fulfill their responsibilities and obligations. The same is true for cases of incorporation.

13.65 A similar outcome should also prevail regarding State contracts. Underlying this principle is the fact that the States involved in these two types of succession usually had a comparable level of economic development, and common views and interests. ILC Special Rapporteur Bedjaoui, who generally rejects the survival of acquired rights, admits that it ‘is natural’ to ‘expect different solutions according to the [different] type of succession’. He explains as follows why the solution of maintaining acquired rights should be adopted in the context of merger and incorporation of States:

Acquired rights in the case of merger or integration of States do not appear in the same light as in the case of colonization or decolonization, for instance. When a voluntary merger of two States occurs, the States in question are, by construction, aiming at common objectives and share the same views concerning the development of the community which they are forming. Consequently, it must be anticipated that acquired rights will be respected, or even that the question will not arise. By construction, so to speak, integration implies the pre-existence of two juridical orders which are fairly near (otherwise there would probably not be a merger) and in any event are not mutually antagonistic. The operation will have been facilitated, or even dictated, by an identity of present interests and the prospect of a common political and juridical future. It is obvious that one State does not merge with another if its rights and interests or those of nationals would suffer as a result. It is for this reason that, ex hypothesi, the problem of acquired rights in this case takes on a special one. It is true that the integration creates a new State which legally replaces the other two, but – to use a metaphor – it may safely be asserted that the ‘substance’ of the two components continues to exist therein. The new State is in this case almost the arithmetical sum of the other two, so far as rights and obligations are concerned, and if it should refuse to recognize acquired rights it would be despoiling itself, as it were, in seeking to despoil the two States to whose disappearance it owes its existence.

13.66 The explanation given by Bedjaoui clearly emphasizes the existing ‘territorial nexus’ between the acquired rights of persons and the territory of the predecessor State which has now become that of the successor State. Thus, for Bedjaoui, in the context of unification, the ‘substance’ of the two components continues to exist in the personality of the new State. As he notes, the

344 Gruber (n 22) 98.
346 Ibid.
347 The concept of territorial ‘nexus’ is further explained below, See Chapter 14, Section 2.
new State is in this case almost the arithmetical sum of the other two’.\textsuperscript{348} This is indeed the reason why the new State should continue to be held responsible for the rights and obligations existing under contracts which were binding on either of the predecessor States before the unification. The same principle should apply for incorporation. In fact, the US Restatement has adopted this solution of succession in that context: ‘where a State is absorbed by another State, (…) rights and obligations under contracts of the absorbed State, pass to the absorbing State’.\textsuperscript{349}

4.2 State practice and decisions by courts and tribunals support the succession principle

I have found one example of State practice, one arbitration award and one domestic court decision in the context of unification and incorporation. They all support the application of the succession principle.

The creation of the United Arab Republic (UAR) in 1958 was the result of the unification of Egypt and Syria.\textsuperscript{350} This unification lasted for only three years. The UAR respected the concession contracts which had been granted by Egypt and Syria before the unification.\textsuperscript{351} One illustration is the nationalization of the \textit{Société Financière de Suez} by Egypt in July of 1956.\textsuperscript{352} The question of the actual nationality of the company was quite controversial and different approaches were put forward (French and/or Egyptian nationality, even ‘international’).\textsuperscript{353} What is clear is that it was not a ‘purely’ Egyptian company. Before the nationalization, the relationship between this company (and its predecessors) and the State of Egypt was governed by a series of concession contracts.\textsuperscript{354} The nationalization was therefore, inter alia, a breach of contract committed by the predecessor State. An agreement was entered into on 13 July 1958 (i.e., after the unification) between the UAR and the corporation under which the former undertook, inter alia, to pay some EGY£28.3 million to the shareholders of the latter.\textsuperscript{355} This is clearly a case of a new State being held liable for the obligations arising from internationally

\textsuperscript{348} ILC, Second Report Bedjaoui, 1969 (n 4) 87.
\textsuperscript{349} Restatement of the Law (n 211) [209(2)(b)].
\textsuperscript{350} The Proclamation of 1 February 1958 makes it clear that this is not merely a ‘union of States’; it expressly mentioned that the two States were uniting into one State.
\textsuperscript{351} O’Connell, \textit{State Succession}, 1967 (n 15) 344; Eugene Cotran, ‘Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States’, (1959) 8 ICLQ 368, adding that the UAR had an obligation under international law to do so.
\textsuperscript{353} Ibid., 171ff.
\textsuperscript{354} Ibid.
\textsuperscript{355} UN Doc. A/3898, S/4089, September 23, 1958.
wrongful acts committed by the predecessor State.\footnote{See, Dumberry, \textit{State Succession to International Responsibility} (n 165) 95. It should be added that two separate treaties were also signed \textit{after} the unification by the UAR with France and the United Kingdom under which the former provided compensation to the nationals of the latter for actions which had been taken by Egypt in 1956: \textit{Accord général entre le gouvernement de la République française et le gouvernement de la République arabe unie}, in: \textit{La documentation française}, 18 October 1958, no. 2473; (1958) RGDIP 738ff, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Arab Republic Concerning Financial and Commercial Relations and British Property in Egypt, in: (1959) UKTS no. 35 (Cmd. 723); 343 UNTS 159; (1958) 14 \textit{Rev. égyptienne} d.i., 364; (1960) 54 \textit{AJIL} 511–519.} This is also a good example of a succession to the obligations arising from a State contract which had been signed by one of the predecessor States before the unification.

13.69 Another relevant case is \textit{Compagnie d'Enterprises CFE SA v. Yemen}. This case involved a contract for the construction and maintenance of the Al Mukalla Harbour, which was signed in 1981 between Compagnie d'Enterprises CFE SA (‘CFE’), a Belgian company, and the Yemen Port Authority, a State-owned company of the People’s Democratic Republic of Yemen (‘PDRY’). The contract provided that any arising disputes would be settled by arbitration under the ICC’s Rules of Conciliation and Arbitration. On 9 December 1992, CFE filed such a request with the ICC and arbitration proceedings were set up to take place in Nicosia, Cyprus. In November 1993, the parties signed the Terms of Reference and agreed that the party described in both the contract and the arbitration request as ‘the Government of the People’s Democratic Republic of Yemen’ would now be identified as ‘the Government of the Republic of Yemen, comprising inter alia the former Government of the People’s Democratic Republic of Yemen’\footnote{See, \textit{Yemen v. Compagnie d'Enterprises CFE SA}, Appeal judgment, No 10717, ILDC 630 (CY 2002), 28 June 2002, Cyprus Supreme Court. See, analysis in: \textit{Oxford Rep IL} [F2].}.\footnote{\textit{Compagnie d'Enterprises CFE SA v. Yemen}, ICC Case no 7748/BGD/OLG, Interim Decision, 30 June 1995, see, ibid., [F4].} The reason behind such a change was to take into account the merger of the PDRY with the Yemen Arab Republic on 22 May 1990 to create a new State, the ‘Republic of Yemen’.

13.70 The central preliminary issue before the arbitrator was whether the Republic of Yemen succeeded to the PDRY in its rights and obligations arising from the contract. In the proceedings, Yemen claimed that it was ‘not the proper party to the proceedings and that it had no relationship with the contract’ that was signed by the PDRY, which no longer existed when the arbitration proceedings were initiated in December 1992.\footnote{\textit{Ibid., Oxford Rep IL} [F3].} In an interim decision, the arbitrator rejected Yemen’s claim and decided to proceed with the merits of the case.\footnote{\textit{Compagnie d'Enterprises CFE SA v. Yemen}, ICC Case no 7748/BGD/OLG, Interim Decision, 30 June 1995, see, ibid., [F4].} The Yemeni Government appealed against the decision before a court in Aden, which allowed the appeal and annulled the arbitrator’s decision in
October 1996. Meanwhile, the arbitration proceedings on the merits continued in Nicosia. Yemen did not appear at the merits stage of these arbitration proceedings. The final award was issued in default of appearance ordering Yemen to pay US$32.5 million to CFE. Yemen filed an application to annul this award before the District Court of Nicosia, Cyprus. The district court rejected Yemen’s application and upheld the arbitration award. Yemen then brought an appeal before the Supreme Court of Cyprus.

The Supreme Court held that the new State of Yemen was bound by the contract which had been signed by one of the predecessor States based on the doctrine of acquired rights. This is the summary of the reasoning of the court on the matter:

Acquired rights remain in force, regardless of the prevailing legal situation in the successor state. Such rights are transferred to the new state, insofar as the (original) contracting state continued to exist or, at least, retained sovereignty over the geographical area wherein the contractual right was granted or pertained and wherein the (original) contracting state has already benefited from the performance of the contract, especially when works have been done in its territory that remain in the same geographical area; this is so even if the political situation has changed or the government or the (original contracting) state was transformed into a new entity in international law.

The right to resort to arbitration was an ‘acquired right’ arising from the contract and could not be rejected by Yemen as the successor State that was created by the unification of the two predecessor States. There was no change in the geographical area covered by the two predecessor States, nor did the political system change fundamentally, so as to support the argument that the People’s Democratic Republic of Yemen had been forced to sign the contract. The new State was created in conditions of absolute calm and peace, following an agreement by the two predecessor States to merge in a complete union wherein the international personalities of the predecessor States merged in a single international entity, the Republic of Yemen. The latter benefited from the works done in the People’s Democratic Republic of Yemen, and she possesses them now.

If the new State has benefited from the works of the predecessor State, then it has to bear responsibility for them. The better view is that he (sic) who takes the benefit must take the burden. So where an identifiable region has benefited by public expenditure to an ascertainable extent, then whoever takes over that part of the territory takes over part of the public debt which corresponds to the benefit. The

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362 Ibid. Oxford Rep II [F5].
corollary to this is that no debt is assumed if no benefit attaches, even if the territory is expressly charged with the debt’.363

13.72 While the decision of the Supreme Court seems to be based generally on the doctrine of acquired rights,364 it is noteworthy that it considered the arbitration clause contained in the contract as binding on the successor State. One factor that was considered to be important by the court was the fact that the contract had been performed on the territory of the predecessor State which was now that of the new successor State as a result of the unification. The existence of such a nexus between the contract and the territory of the new State is indeed one important factor that should be taken into account by a tribunal.365 The court also explicitly used the concept of unjust enrichment (a point further discussed below366).

13.73 The question of succession to contracts also arose in one ICC arbitration award rendered in 1994.367 It involved a contract signed by some high-ranking officials from East Germany’s Ministry of Defence368 with a US company (CIC International Ltd.). The contract was signed just a few days (on 28 September 1990) before the incorporation of East Germany within West


364 Ibid. See Oxford RIL, case analysis by A. Constantinides [A.4]–[A.5]:

Another interesting, albeit less clear, point in the decision is the parallel discussion of the doctrine of acquired rights and the question of state succession in respect of debt. In particular, the court made use of the ‘final beneficiary rule’ (‘he who takes the benefit must take the burden’), which is usually applied to allocated or localized public debts in case of state dissolution, in order to justify the continued validity of acquired rights. Such merging is at odds with state practice, which differentiates between public debts and (private) acquired rights. On a second reading, however, it could denote that the doctrine of acquired rights can be imbued with the more sophisticated principles applied to state succession in respect of public debt. Thus, instead of an automatic transfer of acquired rights to the successor state (as favoured by the traditional rule), the decision could be read as implying a balancing of interests and the taking into account of, for example, the local or final beneficiary. Under this reading, the decision suggests a welcome qualification to the doctrine of acquired rights, which (even if still predominant) has repeatedly come under attack as illegitimate due to its colonial origins. Be that as it may, in the circumstances of this case, the court could hardly have reached any different conclusion.

365 See, Chapter 14, Section 2.

366 See, Chapter 14, Section 4.


Germany (3 October 1990). Under the contract, which contained an arbitration clause, the company bought 25 per cent of the military assets of East Germany. After the date of succession, the company claimed that the successor State (Germany) was responsible for the execution of the contract and started ICC arbitration proceedings against that State.

Germany did not contest the jurisdiction of the tribunal based on the fact that the arbitration clause was contained in a contract involving another State. Germany apparently signed the terms of reference without raising the issue of its own succession to the arbitration clause. It however contested its responsibility for the execution of the contract based on contractual grounds that were unrelated to the issue of succession per se. The arbitrator rejected the claim on the ground, inter alia, that the contract specifically included a clause whereby the contract had to be ratified by West Germany, which never happened. In one obiter, the arbitrator mentioned that, in any event, succession to the contract would not have been possible because the treaty of unification between East Germany and West Germany did not provide for any universal succession of the goods, assets, and liability of the predecessor to the successor State. Importantly, the contract had been signed after the treaty of unification. This solution has been endorsed by writers considering the specific aspects of the case and the fact that German law was applicable to solve the dispute. It has also been suggested that a different solution of succession would have applied had the contract been signed before the treaty of unification.

What matters for the purpose of this book is that Germany did not contest the jurisdiction of the arbitrator on the ground that there could be no

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369 In the context of annulment proceedings which took place after the award was rendered, the Paris Court considered that Germany had itself consented to arbitration when it signed the Terms of Reference: ‘à défaut d’être insérée dans un contrat, la convention d’arbitrage peut aussi résulter d’un accord conclu par les parties postérieurement à la naissance du litige tel celui concrétisé, comme en l’espèce, par la signature d’un acte de mission’ (in: ibid.).

370 Case summary (ibid.) referring to this passage from the Paris Court:

Considérant que pour statuer comme il l’a fait, l’arbitre a retenu successivement: — que la République Fédérale d’Allemagne était un tiers au contrat; — qu’elle n’aurait pu être obligée par le dit contrat que si elle l’avait approuvé, ce que n’ignorait pas la société CIC International Ltd., ce qui précisément n’avait jamais été le cas; — que la théorie de l’unification des États ne pouvait pas être invoquée pour obliger la République Fédérale d’Allemagne à exécuter le contrat conclu; — que les dispositions légales en matière de contrôle des armements interdisaient en tout état de cause à la République Fédérale d’Allemagne d’approuver le marché litigieux, les ventes d’armement étant soumises à des restrictions légales et ces ventes étant notamment interdites à des marchands travaillant pour leur propre compte sans qu’aucun contrôle des destinataires réels ne puisse être exercé; — que le contrat était nul pour avoir été signé au nom de la République Démocratique d’Allemagne par des personnes dépourvues de pouvoir pour l’engager; Qu’il a en conséquence rejeté l’intégralité des prétentions de la société CIC International Ltd.

371 Leurent and Holet (n 367) 789.

372 Ibid.
succession to an arbitration clause contained in a State contract signed by another State.

5. NEWLY INDEPENDENT STATES

13.75 This section will first examine the general principle of non-succession which should normally prevail for Newly Independent States as well as some situations where the opposite approach could be adopted (Section 5.1). I will then examine some examples of State practice in this context (Section 5.2).

5.1 Generally, new States are not bound by contracts, but there may be some exceptions

13.76 From a technical standpoint, the situation of a Newly Independent State is comparable to that of a secessionist State since in both cases, the predecessor State continues to exist despite the emergence of a new State on what used to be its territory. As mentioned above, in the context of a secession, the continuator State remains bound by any existing State contracts at the date of succession. There is no reason why the situation should be any different for Newly Independent States. Yet, I have argued (and will further discuss below\(^{373}\)) that, in the context of secession, and only in certain situations, the successor State should be responsible for the obligations arising from contracts.\(^{374}\) For instance, this is the case when there is a nexus between the contract and the territory of the new State. Another relevant factor is when there is a situation of unjustified enrichment. These factors and circumstances will be further discussed below.\(^ {375}\) The question addressed in this section is whether the same solution of succession should also prevail for Newly Independent States given their particular status under international law. In other words, should a Newly Independent State ever be held responsible for any obligation arising from State contracts that was signed by the colonial power?

13.77 One of the most controversial questions of the last decades has been whether or not the ‘traditional’ rules of State succession should apply to the specific case of Newly Independent States emerging from decolonization. One of the strongest voices in favour of adopting different rules for this particular group of new States was ILC Special Rapporteur Bedjaoui. In his First and Second

\(^{373}\) See, Chapter 14, Section 5.
\(^{374}\) See, Chapter 13, Section 1.2.
\(^{375}\) See, Chapter 14, Sections 2 and 4.
Reports (published in 1968 and 1969), he explained that ‘Decolonization does not involve a mere nominal change of sovereignty, as in cases of traditional succession where one monarch replaced another in a given territory.’ He draws the following differences between what he calls a ‘traditional State succession’ from new types of succession:

Generally speaking, it [i.e., cases of traditional State succession] does not involve the establishment of a new State – although the plebiscite, for example, may have that result – but the redistribution of territory within a region. Usually, too, the region itself is one that can be considered relatively ‘homogeneous’ in levels of living and civilization (as in the case of the succession of States in Europe, for instance). Without necessarily being identical, the juridical orders of the countries concerned are substantially the same. The inhabitants of the piece of territory affected by succession were citizens of one country and become citizens of the same class of the other country (subject to various option rights). In principle, acquired rights are respected (…). It is one of the hypothetical cases relating to the past, when State succession, although regulated in some areas by the principle of tabula rasa, was governed mainly by the principle of legal continuity and stability.

The hypothetical cases relating to the present, on the other hand, are regulated by the opposite principle of rupture and change, except for some important nuances. These cases of succession result from decolonization and, unlike the previous cases, involve the creation of a State. The new entity is under-developed; its level of living and degree of civilization differ from those of the former metropolitan country, and it seeks to become stronger. The juridical orders of the two countries are not identical and are sometimes not even comparable, although the former metropolitan country may have introduced some similarities, especially in former settler colonies. The legal status of the inhabitants of the new State changes from that of colonized persons to that of citizens. The relationship based on domination is dissolved, and the principle of succession does not apply to those components of the former juridical order which reflect that relationship. Since emancipation ex hypothesi involves a change in political, economic and social aims within the territory, it normally constitutes a hiatus, a break in continuity, especially since in many cases independence is achieved after a long period of very tense relations with the colonial Power.

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376 ILC, Second Report Bedjaoui, 1969 (n 4) 90.
377 ILC, First Report Bedjaoui, 1968 (n 39) 100 (emphasis in the original).
378 Ibid., 101 (emphasis in the original). See also: Bedjaoui, ‘Problèmes récents de succession d’États’ (n 11) 545: Contrairement à ce qui se passait pour les successions classiques, la décolonisation pose, pour la première fois sans doute, le problème des distorsions économiques entre États. Et dès lors que l’État prédecesseur et l’État successeur accueillent, contrairement à la forme classique de succession, des niveaux économiques différents, le problème des droits acquis prend tout son relief économique. C’est pourquoi, si le respect des droits acquis peut dans d’autres types de succession s’imposer pour des raisons d’équité, il apparaît ici au contraire comme mettant en échec tout un devenir national (emphasis in the original).
Similarly, Makonnen provides five reasons why new States emerging from decolonization are of a fundamentally different nature than other types of succession:

State succession in the event of decolonization is a new phenomenon which is different in many ways from the traditional theories and practices of State succession. The characteristics differentiating this new phenomenon, at least at the theoretical level, from the traditional forms of State succession are numerous, but the few most important ones will be dealt with here. First, unlike most cases of traditional State succession, those which arise from decolonization do not aim merely at the change of sovereignty in a territory. The main objective of this event is rather the creation of new sovereignty over a territory by totally displacing the old sovereignty over that territory. The newly created international legal personality starts its life as nothing more or less than a full-fledged independent and sovereign State, with all the inherent and inalienable rights of a sovereign State. Second, State succession arising from decolonization has clear goals and purposes and invokes well-defined legal and political principles which govern the consequences of succession. The consequences of such succession are prejudged by these principles even before the event takes place. Therefore, the rules governing the conduct of succession are to be derived from the purposes and goals of decolonization. Third, State succession arising from decolonization presupposes (as a matter of fact but not as a matter of law) the existence of a stronger predecessor and a weaker successor. Therefore, upon the event of succession, the transaction is possibly conducted between unequal parties (again in fact, not in law). Fourth, unlike the traditional European cases of State succession, in the event of decolonization, the ‘relational-complex’ and the geographical, cultural, etc., differences between the predecessor and the successor States are decisive factors which strongly promote disruption of the status quo relations rather than safeguard their continuity. Fifth, owing to the nature of earlier relationships (colonial) between the predecessor and the pre-natal successor State, the period of succession tends to be a matter of at least a decade rather than just a five minute ‘one-shot deal’.

The distinctive nature of Newly Independent States has a concrete impact on whether the ‘traditional rules’ of succession should apply to them. According to Bedjaoui, ‘en droit … il ne saurait y avoir de succession à l’ordre colonial, en dehors de l’œuvre volontaire du nouveau successeur’. Similarly, for Makonnen:

Decolonization is the opposite of colonization and its purpose is to undo what has been done through colonization (...). The guiding principles governing the consequences of State succession are the complete elimination of ‘colonialism in all its forms and manifestations’ and creating the condition for the realization of the right to self-determination by the newly emerging successor State. Hence, the rules of State

379 Makonnen (n 69) 130–31.
381 Bedjaoui, ‘Problèmes récents de succession d’États’ (n 11) 520.
succession cannot be neutral in cases of succession arising from decolonization owing to such prejudgment with regard to the results of the succession.\textsuperscript{382}

This issue was debated by scholars in the context of the question whether or not Newly Independent States should, upon their independence, respect the ‘acquired rights’ which had been granted during colonial time. In his First Report, Bedjaoui noted that the principle of the respect for rights acquired by individuals in good faith ‘correspond very little or not at all to the situation resulting from decolonization’.\textsuperscript{383} For him, in the context of decolonization ‘there are no rules of international law providing for continuity of the former juridical order \textit{ipso jure} and, as a result, ‘concessions granted under the legislation of the predecessor State should not necessarily be binding on the new State’.\textsuperscript{384} In this context, ‘the governing factor is not [a] general obligation to respect acquired rights \textit{but the sovereign will of the new State}'.\textsuperscript{385} Bedjaoui further examined the question in his Second Report, noting that the principle of the respect for acquired rights was ‘developed largely on the basis of the similarity of economic conditions in the two States, whereas the situation is radically different in the case of decolonization’.\textsuperscript{386} In fact, one fundamental reason for treating acquired rights differently in the context of new States emerging from decolonization is directly linked to how these rights were acquired during the colonial period:

Having been subjected to a period of domination during which its own property and that of its nationals were not consistently or completely protected, but were, on the contrary, often confiscated at the time of conquest by the colonial Power and its nationals, the new State tries to translate into legal terms its need to recover fully everything it considers it lost through colonization, and usually refuses to grant any indemnity or assume responsibility for any liabilities.\textsuperscript{387}

For Bedjaoui, ‘while in the case of other types of succession respect for acquired rights may be necessary for reasons of equity, in this case it clearly frustrates the whole development of the nation’.\textsuperscript{388} He further explained the reasons why respecting acquired rights in the context of new States emerging from decolonization would have such a negative impact on their development:

\begin{itemize}
    \item \textsuperscript{382} Makonnen (n 69) 131.
    \item \textsuperscript{383} ILC, First Report Bedjaoui, 1968 (n 39) 101.
    \item \textsuperscript{384} Ibid., 115.
    \item \textsuperscript{385} Ibid. (emphasis in the original).
    \item \textsuperscript{386} ILC, Second Report Bedjaoui, 1969 (n 4) 90. See also: Bedjaoui, ‘Problèmes récents de succession d’États’ (n 11) 528; Gruber (n 22) 98–9.
    \item \textsuperscript{387} ILC, First Report Bedjaoui, 1968 (n 39) 101.
    \item \textsuperscript{388} ILC, Second Report Bedjaoui, 1969 (n 4) 90.
\end{itemize}
Rather than the ‘renewing function’ (function reconductive) of decolonization, it is its ‘reversing function’ (fonction inversive) that necessarily takes precedence, in order to put an end to the relationships based on domination. And these relationships are not just political; indeed, it may be said that they are primarily economic. Consequently, the process of decolonization is inevitably a process of gradual destruction of certain types of economic and financial relationships which helped to maintain those relationships based on subordination. The relationship between the metropolitan country and its overseas possessions was nothing more than a particular system of exploitation known as the ‘colonial compact’ regime.

If the colonial system cannot operate without a hierarchical economic order, characterized by the predominance of the interests of the metropolitan country and of its nationals and by the existence of a structural imbalance between the colony and the metropolitan country, conversely decolonization can only be the restoration of egalitarian structures, which implies the rejection of certain economic situations resulting from the colonial regime. Thus, it is clear that decolonization and the renewal of acquired rights are contradictory. Either decolonization or acquired rights must be sacrificed. (…) The fundamental incompatibility between decolonization and acquired rights derives from the fact that the successor State is confronted with a choice, over which it cannot hesitate, between the possible equity which requires it to respect private rights and the real necessity which forces it to consider the public interest and national development.389

13.82 The same conclusion regarding the non-maintenance of acquired rights in the specific context of decolonization has been reached by other scholars, such as Lalive390 and Crawford.391 For all of these reasons, Bedajoui (having noted the rather hypocritical position taken by Western Powers in the 1960s on this question392) has argued that not only should the new State not have to respect


390 Lalive (n 54) 169, also noting that in the context of new States emerging from decolonization ‘the holders of acquired rights in many cases are citizens of the former colonial power’ whose ‘rights well may have been acquired in extremely favourable, though formally regular, conditions’. For him, maintaining after independence ‘such established and often privileged positions is likely to appear to local public opinion as an intolerable survival of the former colonial regime and as an unbearable restriction of the new sovereignty.’

391 Crawford, Brownlie’s Principles of Public International Law (n 58) 429: ‘the continuation of the pre-independence economic structure, which commonly involves extensive foreign ownership of major resources, would produce a situation in which political independence and formal sovereignty were not matched by a normal competence to regulate the national economy.’

392 ILC, Second Report Bedjaoui, 1969 (n 4) 87:

Yet it is ironical to see how the same imperial Powers of the nineteenth century which, in their colonial policies, vigorously denied the existence of any rule affording protection to acquired rights – or shrugged it off in order to practice the principle of tabula rasa in this matter – have felt able, in connexion with the reverse modern phenomenon of decolonization, to demand the application of the same ‘traditional rules’ that they once sought to emasculate. It is child’s play for the student of politics to note that one and the same Power has shifted its position, according as it was involved in the capacity of successor State (repudiating all acquired rights in the colonial territory which it had just conquered), of third State (conversely demanding respect for acquired rights, in the context of the colonial rivalries of the time) or of...
acquired rights, but it should also not be obligated to compensate for any expropriation because of the unfair manner that such rights and properties were acquired in the first place:

There are no grounds for agreeing to pay compensation on the attainment of independence, because colonization has enriched the metropolitan country and made a substantial historical contribution to the industrialization, power and prosperity of the conquering State. Consequently, according to this view, the latter has no acquired right to compensation but, on the contrary, has incurred a debt to its former overseas possession. (...) It is thus difficult to see how equity or the principle of unjustified enrichment could be applied in the case of such property, which is simply being returned through decolonization to the original owners who were dispossessed.393

It should be added that this radical position whereby Newly Independent States should never be obligated to compensate for expropriation has been rejected by many others writers.394 O’Connell, for instance, rejects the very idea that a specific regime should prevail for these States regarding acquired predecessor State (claiming in the case of decolonization the protection of rights similar to those which it had itself previously repudiated, since in some cases it was the same territory that was involved). But to pass on from the student of politics, however, the jurist can only be taken aback and voice serious doubts concerning the soundness, or even the existence, of rules that come and go according to circumstances.

On this argument, see the comments of Gruber (n 22) 99–101, arguing, on the contrary, that ‘la pratique des puissances pendant la colonisation ne permet pas de conclure au rejet des droits acquis’. See also, more generally, Makonnen (n 69) 128–9:

The newly independent African countries are justified in contending that since there was no continuity of rights and obligations of the predecessor nations (the African peoples and nations) when colonization took place, there could be no automatic continuity of rights and obligations in the event of decolonization. The clean slate doctrine should then, by parity of reasoning equally apply to both events of State succession (State succession arising from colonization and State succession arising from decolonization).’

393 ILC, Second Report Bedjaoui, 1969 (n 4) 93–4. See also: ILC, First Report Bedjaoui, 1968 (n 39) 116:

But many jurists who still subscribe to the concept of acquired rights contend that the successor State cannot retroactively annul the advantages granted to foreigners without paying the latter monetary compensation. They tend to consider that the validity of the nationalization of industries engaged in exploiting natural wealth (petroleum, mineral ores, etc.) depends on the payment of ‘fair, effective and prompt compensation’. However, others will certainly deem the very concept of compensation ‘unfair’ within the colonial context, or will at least consider that it is of no real significance unless it is held to apply to both parties. This approach to the question would make it necessary for all profits earned by concessionary enterprises, the reinvestment of which outside the territory was prejudicial to the latter, to be taken into account in any dispute concerning compensation. It has also been pointed out that a country whose economy has long been dominated by foreign owners cannot seriously contemplate developing its economy and raising the level of living of its inhabitants if it is forced to reimburse the total value of installations left behind by concessionary companies. Hence, the idea of fair compensation would not call for repayment of the value of industrial installations, but would imply that all the elements of a situation characterized by the transfer of profits and the total or partial amortization of the investments made should be taken into account.

394 Gruber (n 22) 101–2, 105ff. See also, more generally, O’Connell, State Succession, 1967 (n 15) 266–7.
Chapter 13 SUCCESSION TO STATE CONTRACTS

13.84 In any event, the special situation of Newly Independent States emerging from decolonization seems to have had an impact on the drafting of the 1962 GA Resolution 1803 on the permanent sovereignty over natural resources. Paragraph 4 of the Resolution provides that when nationalizing a foreign investor’s interests, a new State must pay the owner an ‘appropriate compensation’. Yet, one of the preambular paragraphs of the Resolution makes a reservation ‘in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule’. Bedjaoui argued that this paragraph excludes these States from having to pay compensation.

13.84 In sum, there are convincing reasons for recognizing that former colonies should not, as a matter of principle, be held responsible for obligations arising from contracts which were signed by the colonial power. Similarly, as examined elsewhere by the present author, writers largely support the principle of non-succession to responsibility for Newly Independent States whereby it should be for the colonial power, which continues its existence, to provide reparation for the consequences of its own internationally wrongful acts committed before the date of succession. Indeed, this is the solution

395 O’Connell, ‘Recent Problems of State Succession’ (n 41) 140, arguing (at 142ff) that Newly Independent States have in general respected the acquired rights of foreigners and adding:

This factual survey is not intended to lay the basis for a rule of positive law (...) but to demonstrate the fallacy of the suggestion that there are irresistible sociological pressures directed either to the repudiation altogether of the concept of international law protection of private rights, or to the distinguishing of the cases of decolonization from other types of State Succession. Only a minority of new States has experienced such pressures, and in each case the dominant element in the situation has been political (...).

The argument, then, that there is a juristic basis for treating acquired rights in decolonized countries as a special case appears to lack cogency (...).

396 GA Res. 1803 (n 105).

397 ILC, Second Report Bedjaoui, 1969 (n 4) 90–91:

There is incompatibility between the concept of acquired rights and the affirmation of the inalienable and permanent right of peoples to dispose of their natural resources. If such a right is inalienable, it is inconceivable that rights belonging to anyone other than the people can arise, much less that they can have the status of inviolable acquired rights’ (emphasis in the original).

Gruber (n 22) 102–9 takes a different position on the matter.

398 Dumberry, State Succession to International Responsibility (n 165) 168ff.

recently adopted by the Institut in its Resolution on State succession to responsibility.\textsuperscript{400}

The question remains whether or not there are some situations where, on the contrary, the Newly Independent States should be held responsible for the obligations arising from State contracts. Interestingly, the Resolution of the Institut on State succession to responsibility provides (in the specific context of Newly Independent States) that ‘the conduct, prior to the date of succession of States, of a national liberation movement which succeeds in establishing a newly independent State shall be considered the act of the new State under international law’.\textsuperscript{401} For reasons further discussed below,\textsuperscript{402} the use of the concept of unjust enrichment (which is relevant for other types of succession) may, however, not be appropriate in the specific context of Newly Independent States.\textsuperscript{403} Similarly, the existence of a nexus between the performance and execution of a contract and the territory of the Newly Independent States should not necessarily lead to the application of the solution of succession. The specific nature of Newly Independent States should be carefully considered in such a case.\textsuperscript{404}

5.2 State practice is ambiguous

As mentioned above, Bedjaoui is of the view that in the context of decolonization ‘private rights, concessionary or other, cannot be regarded as acquired rights’ insofar as they ‘are protected only if the new sovereign consents’.\textsuperscript{405} He refers to a number of examples where the new States have indeed consented to the protection of private rights under concession agreements in the context of the independence of the Philippines, Algeria, and Indonesia.\textsuperscript{406} While the principle of the respect of private rights was contained in an agreement signed between Indonesia and the Netherlands,\textsuperscript{407} he noted that Indonesia subsequently repudiated all such private rights.\textsuperscript{408} For him, while some new States may have agreed to protect such rights, their actual practice supports the

\begin{footnotesize}
\begin{enumerate}
\item IDI, State Succession to Responsibility, Resolution, 2015 (n 14), Art. 16(1): ‘When the successor State is a newly independent State, the obligations arising from an internationally wrongful act committed by the predecessor State shall not pass to the successor State.’
\item IDI, State Succession to Responsibility, Resolution, 2015 (n 14), Art. 16(3).
\item See, Chapter 14, Section 4.
\item This is the position of Bedjaoui, ‘Problèmes récents de succession d’États’ (n 11). Contra: Gruber (n 22) 108–9, for whom the question whether the principle should apply depends on the circumstances of each case.
\item The question is examined below, see Chapter 14, Section 2.2.
\item ILC, First Report Bedjaoui, 1968 (n 39) 115.
\item Ibid., 115.
\item Draft Agreement on Transitional Measures, 2 Nov. 1949, Art 4, 272 UNTS, 1950, 200.
\item ILC, Second Report Bedjaoui, 1969 (n 4) 97.
\end{enumerate}
\end{footnotesize}
principle of non-succession.\textsuperscript{409} There are indeed many examples supporting this conclusion. Thus, several provisions of the Déclaration de principes relative à la coopération économique et financière (dated 19 March 1962), which is part of the Évian Accords that ended the war, indicate that Algeria (the successor State) would protect the rights of French companies after its independence.\textsuperscript{410} At the time, France took the position that this was in accordance with international law.\textsuperscript{411} Yet, despite these assurances, Algeria did not provide such protection to foreign nationals in practice.\textsuperscript{412} Other writers have interpreted the overall picture of State practice differently as generally respecting the acquired rights of foreign companies by providing compensation after expropriation.\textsuperscript{413} Gruber admits, however, that there are a number of important cases where this tendency was not followed,\textsuperscript{414} including the famous example of the expropriation of the company Union Minière du Haut-Katanga in the context of the independence of Congo.\textsuperscript{415}

\textbf{13.87} The situation that followed the independence of Congo (1960) is indeed rather confusing.\textsuperscript{416} While some writers have referred to it as supporting the principle of the respect of acquired rights,\textsuperscript{417} most of them have used it to

\begin{itemize}
\item \textsuperscript{409} Ibid., 97–8.
\item \textsuperscript{410} See, analysis in O’Connell, \textit{State Succession}, 1967 (n 15) 344; Gruber (n 22) 113. The text of the Agreement is found in: JORF, 20 March 1962, 3019–32. Art. 18 reads as follows: ‘Algeria shall assume the obligations and enjoy the rights contracted on behalf of itself or of Algerian public establishments by the competent French authorities.’
\item \textsuperscript{411} Statement of the Minister of Foreign Affairs, in ‘Chronique de jurisprudence française’ (1970) AFDI 903:
\end{itemize}

Les Accords d’Évian ne font, en matière d’intérêts privés, que confirmer une des règles s’inscrivant dans les principes généraux du droit valables en matière de succession d’États, règle dite du respect international des droits acquis et selon laquelle les droits privés doivent être respectés en cas de changement de souveraineté.

For an analysis of case law in relation to Algeria regarding the question of succession to responsibility, See, Dumberry, \textit{State Succession to International Responsibility} (n 165) 177.

\begin{itemize}
\item \textsuperscript{413} Gruber (n 22) 112–17. See also: Karl Zemanek, ‘State Succession after Decolonization’, (1965–III) 116 Rec des cours 288; ‘no new State [in the context of decolonization] appears to have argued that acquired rights (…) lapsed \textit{ex ipso} through state succession’; O’Connell, ‘Recent Problems of State Succession’ (n 41) 142: ‘In fact, only two of all the newly independent States have pursued a policy of expropriation of foreign property, Algeria and Guinea, and the situation of the former, with a large alien population, could hardly be regarded as an ordinary one. All other new States have managed to adjust themselves satisfactorily to the inherited institutions of capitalist exploitation, and indeed to profit by them."
\item \textsuperscript{414} Gruber (n 22) 114–15. See also: O’Connell, ‘Recent Problems of State Succession’ (n 41) 142: ‘To argue from these instances to a general denial of acquired rights is clearly to argue from the exceptional instead of from the normal, and hence to lose perspective.’
\item \textsuperscript{415} Gruber, ibid.
\item \textsuperscript{416} For an analysis of case law in relation to Congo regarding the question of succession to responsibility, See: Dumberry, \textit{State Succession to International Responsibility} (n 165) 173.
\item \textsuperscript{417} See, analysis in: O’Connell, ‘Recent Problems of State Succession’ (n 41) 343.
\end{itemize}
5. NEWLY INDEPENDENT STATES

illustrate the rejection of such rights by the new State.418 Belgium’s courts have rendered several decisions dealing with different problems of State succession arising from the independence of Congo.419 One interesting case is that of Crépet v. État belge et Société des forces hydro-électriques de la colonie.420 In 1958 (i.e., before the independence of Congo), the plaintiff filed a suit against the colonial Belgian Congo and a company for the non-payment of public work that he had performed under a contract that was signed with the colonial Belgian Congo. After the independence of Congo, the action was subsequently filed against the new State of Congo before a Belgian court. Deciding without the appearance of Congo, the Civil Tribunal of Brussels refused to hold the new State responsible for the obligations arising from the internationally wrongful acts on the ground that, as a matter of principle, these acts do not automatically devolve to the new State without any specific agreement to that effect between the predecessor State and the successor State. The court also held that the new State of Congo should, however, be responsible for the contractual breach which had been committed before its independence. The court considered it as a ‘local debt’ dealing with work undertaken only in this region of Africa which should, therefore, automatically be transferred to the successor State.421 The court ordered Congo to act as the respondent in these proceedings. The court seems to have based its reasoning on the existence of a nexus between the territory of the new State and the contract where it was performed entirely.422 The reasoning of the court also suggests that the concept of unjust enrichment may have played a role in determining that the

418 Gruber (n 22) 114–15.
421 Journal des tribunaux, ibid.: ‘Attendu qu’il y a lieu, pour décider de la recevabilité de l’action à l’égard de la République du Congo, de déterminer si les obligations de la ci-devant colonie du Congo belge dont se prévaut le demandeur sont passées à la charge du nouvel État; Attendu qu’il ressort de l’examen des faits de la cause que le premier chef de demande concerne des travaux qui devaient être exécutés exclusivement en Afrique, aux confins du Congo ex-belge et du Ruanda-Urundi dans l’intérêt de ces territoires. Qu’il s’agit dès lors d’une dette locale, en principe transférée ipso facto à l’État successeur, même en l’absence de traité avec l’État prédécesseur.
See also, for a similar reasoning: Demol v. Etat belge, in (1964) Journal des tribunaux 603.
422 This question examined at Chapter 14, Section 2.
new State should be responsible for the obligations arising from a contract that was initially signed by the colonial power.\footnote{This question examined at Chapter 14, Section 4.}

13.88 Another relevant example of State practice is in the context of the independence of Namibia. Article 140(3) of the Namibian Constitution provides that the acts of the South African Government (which illegally occupied Namibia for decades) should be deemed those of the new Namibian State:

Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government Service Commission shall be deemed to have been done by the Public Service Commission referred to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament.\footnote{Constitution of Namibia, adopted by the Constituent Assembly of Namibia on 9 February 1990, entered into force on 21 March 1991, UN Doc. S/20967/Add.2. Importantly, this provision also reserves the right for the new State to repudiate (by an act of legislation) acts of South Africa.}

13.89 The case of \textit{Mwandinghi v. Minister of Defence, Namibia}\footnote{\textit{Mwandinghi v. Minister of Defence, Namibia}, 14 December 1990, in: 1991 (1) SA 851 (Nm), in: 91 ILR 343.} before the High Court of Namibia and that of \textit{Minister of Defence, Namibia v. Mwandinghi}\footnote{\textit{Minister of Defence, Namibia v. Mwandinghi}, 25 October 1991, in: 1992 (2) SA 355 (NmS), in: 91 ILR 358.} before the Supreme Court of Namibia involved damages arising from the shooting of Mr. Mwandinghi, a Namibian national, by forces operating for the South African Defence Forces in 1987.\footnote{On these two decisions, see: Neville Botha, ‘To Pay or Not to Pay?: Namibian Liability for South African Delicts’, (1990–1991) \textit{16 South African YIL} 156–62; Neville Botha, ‘Succession to Delictual Liability: Confirmation’, (1991–1992) \textit{17 South African YIL} 177–9; Hercules Booysen, ‘Succession to Delictual Liability: A Namibian Precedent’ (1991) \textit{24 Comp \& Int’l J S Afr} 204–14.} Before independence, the plaintiff submitted a claim for damages against the Minister of Defence of South Africa. Upon independence, he sought to substitute the Minister of Defence of Namibia as the defendant based on Article 140(3) of the new Namibian Constitution. He applied to the High Court by notice of motion for an order to allow the substitution. The Minister of Defence of Namibia opposed the motion on the ground that the Namibian Constitution did not make the new State responsible for the obligations arising from the internationally wrongful acts that had been committed by the predecessor State. The argument was based on the fact that, on the one hand, Article 140(3) would not cover ‘delicts’ (i.e., internationally wrongful acts) and, on the other hand, that Article 145 of the Constitution contains a disclaimer according to which an obligation may
be accepted by Namibia only to the extent that it is recognized as binding under international law.428

The present author has examined elsewhere the reasoning of the court dealing with the issue of succession to international responsibility.429 For the purpose of the present book, only the part of the decision concerning contractual obligations will be examined. In its judgment, the High Court (comprised of one sitting judge) referred to writers indicating that private property rights do not lapse automatically when a territory is transferred, but added that this principle was ‘not always followed’ by States and that ‘to a great extent the continuance of vested private rights depended on the attitude of the successor State’.430 He added that ‘in the field of contractual succession of one State to the rights and obligations of its predecessor, writers on international law are not unanimous as to the basis on which such liability exists’.431 The judge also noted that all parties to the proceedings agreed that Namibia was bound by the contracts, including the concession contracts, as a result of Article 140(3) of the Namibian Constitution:

As far as the position regarding Namibia after 21 March 1990 is concerned, it seems that the parties are at least ad idem that not only personal rights between private persons inter se survived the change, but also previous contracts of the predecessor government, concessions granted by it as well as licenses, etc. This unanimity derives from the interpretation of the parties of art 140 of the Constitution. (…) In general I think it can be said that art 140 not only accomplishes a complete transfer of powers from the previous Government, but also an acceptance by the new Government of all that was previously done under those laws in the exercising of the powers conferred thereby. There are further many other sections contained in the Constitution whereby rights acquired before independence are protected and retained.432

428 Art. 145 of the Namibian Constitution reads as follows:
(1) Nothing contained in this Constitution shall be construed as imposing upon the Government of Namibia:
(a) any obligations to any other State which would not otherwise have existed under international law;
(b) any obligations to any person arising out of the acts or contracts of prior Administrations which would not otherwise have been recognised by international law as binding upon the Republic of Namibia.
(2) Nothing contained in this Constitution shall be construed as recognising in any way the validity of the Administration of Namibia by the Government of the Republic of South Africa or by the Administrator-General appointed by the Government of the Republic of South Africa to administer Namibia.

429 Dumberry, State Succession to International Responsibility (n 165) 191ff.
430 Mwandinghi v. Minister of Defence (n 425) at 343.
431 Ibid.
432 Ibid.
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13.91 This is also the interpretation that writers have given to this provision.\textsuperscript{433} For the judge, Article 140(3) was ‘an acceptance by the new State of the rights and obligations in existence prior to 21 March 1990’.\textsuperscript{434} He went on to explain that the words ‘anything done under such laws’ at Article 140(3) should be given their ordinary meaning and should therefore not be limited to the lawful acts performed by the previous government. He concluded that the expression used was general enough to cover the claim of the plaintiff for ‘delicts’ committed by the South African Defense Forces.\textsuperscript{435} Therefore, the judge decided that the Minister of Defence of Namibia was substituted as the defendant in the present case to the Minister of Defence of South Africa.\textsuperscript{436}

13.92 In sum, while this case may be more relevant to the analysis of the question of succession to State responsibility, it is noteworthy that the court recognized the principle of succession to contracts even if Namibia was clearly a case of a Newly Independent State. Such an outcome may be surprising considering that these States have been largely considered as exempt from any succession to the obligations of their colonial powers. Yet, the reasoning of the court was essentially based on the specific provision contained in the Constitution providing for the general principle of succession.

13.93 Overall, the practice of Newly Independent States is rather confusing with examples supporting both the solution of succession and that of non-succession.

6. ANNEXATION OF STATES IN THE CONTEXT OF COLONIZATION

13.94 As mentioned above, annexation is not a recognized type of succession in modern international law because of the illegality of the use of force.\textsuperscript{437} I have nevertheless decided to examine relevant State practice arising in the context of annexation. This is because these cases and examples of practice are often referred to by the very few scholars who have examined the question of succession to State contracts in the past. They are also often mentioned by the parties in arbitration proceedings. While there is no doubt that these examples

\textsuperscript{434} Mwandinghi v. Minister of Defence (n 425) 349.
\textsuperscript{435} Ibid., 351–2.
\textsuperscript{436} Namibia appealed this decision before the Supreme Court, which dismissed the appeal and confirmed the decision of the lower court.
\textsuperscript{437} See, Chapter 6, Sections 6.2.4. and 6.2.6.
are an interesting source of information, it should be kept in mind that they arose in a very specific context and, therefore, have a less significant impact today.

6.1 Colonial successor States have rejected succession to contracts

In his book, O’Connell identified a significant number of cases in the context of annexation where successor States have systematically refused to be held responsible for any obligations under contracts which had been signed by the predecessor State. Bedjaoui explained that ‘in the case of colonization, political considerations took precedence over the juridical approach to the principle of acquired rights’.438 He highlighted the fact that ‘the political position of refusing to take account of acquired rights was justified by one weak argument after another, all of them based on the inapplicability of the principle of acquired rights’.439 Thus, the first argument that was used by Western colonial States was that ‘the vast areas conquered by [them] were not organized into States, so that the non-existence of a State in the colonized territory justified the metropolitan country’s rejection of any claim to acquired rights: no State, therefore no succession, therefore no acquired rights’.440 The second argument used by Western colonial States to deny any succession to contracts was that ‘a more or less feeble sovereignty existed before the colonization but that the territory was still too backward for the rules of the international law of the time to be applied to it’.441 Thus, the colonial State took this position of non-succession because they considered the predecessor State to be backwards and believed that they should, therefore, not assume any liabilities arising from the contracts that were signed by such regimes.

This was clearly the position taken by the United Kingdom after its annexation of Burma in 1886: ‘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’.442 Thus, since Upper Burma was ‘an uncivilized country’, the United Kingdom believed that it was therefore ‘possible that in dealing with such a State rules more favourable to the succeeding Government could be applied than to the case where two civilized States have been incorporated

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438 ILC, Second Report Bedjaoui, 1969 (n 4) 90.
439 Ibid., 88.
440 Ibid.
441 Ibid.
442 O’Connell, State Succession, 1967 (n 15) 358–60, referring to a letter from the Secretary for Upper Burma to the Secretary to the Government of India, dated 8 June 1886.
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with Her Majesty’s Dominions’. The same position was adopted by Italy following its annexation of Ethiopia in 1935. A similar argument was advanced in the 1920s by Sir Cecil Hurst in the different context of succession to State responsibility. He argued that the imposition of a rule of succession to the obligations arising from internationally wrongful acts upon the ‘better governed and more advanced’ States would have the effect of discouraging them from intervening in ‘backward States’ to put an end to the ‘anarchy and misrule’ existing in such countries, and that this situation would result in setting a ‘premium on misgovernment’. Sir Cecil, who acted as Counsel to Great Britain, used the same argument in the R. E. Brown case (further discussed below).

Finally, Bedjaoui refers to a third argument used by colonial successor States, which was to ‘accept more or less explicitly the existence of a State and of a succession and to recognize the principle of acquired rights, but at the same time to reduce the field of application of that principle to cases of succession

443 Ibid., 360, referring to Opinion of 30 Nov. 1900, FO Confidential papers (7516) no. 22A.
444 Ibid., 332.
445 Hurst (n 239) 178:

A principle which would render a conqueror liable for damages for all the unliquidated claims based on wrongful acts of the State he is driven to subdue would be neither just nor reasonable, and would entail consequences which would be fruitful of mischief. Such a principle would enable a small and backward State to withstand all pressure from a better governed and more advanced neighbour, and would act as a direct encouragement to any such backslider among the family of nations to render itself secure from intervention and absorption by perpetuating anarchy and misrule within its borders. The more the condition of such a State cried aloud for intervention for the sake of the inhabitant of the country, whether native of foreign, the more would neighbouring Governments be held back for necessary action by the contemplation of the burdens it might entail. In short, if there were any such rule of international law, it would merely set a premium on misgovernment.

446 See, Chapter 13, Section 6.2.
447 ‘Brief filed by Fred K. Nielsen, American Agent, R. E. Brown Case’, in: Nielsen (n 239) 165ff, at 184. In relation to the possibility he raised during the pleading that European Powers could invade newly Communist Russia to stop the atrocities committed there at that time, he stated that any rule of succession to obligations arising from the commission of internationally wrongful acts would make ‘Governments hesitate long before they set out to redress very grievous wrongs that may be committed in any particular part of the world.’ In its pleading in the R. E. Brown case, Great Britain provides this other example:

Supposing the Ruler of Government of a country is grossly extravagant, is wasting the substance of the people in some riotous form of spending, and it is creating trouble and the Government of one of the big Powers says: This must stop, we cannot allow this to go on, it is a danger to civilization and we are going to stop it, if, in such circumstances, a country or several countries in alliance, stepped in and tried to provide good and decent and proper Government in that particular State that was behaving wrongly, can it be said that they would have to pay all the damages that had been wrongfully incurred by the country that, at the time they took it over, had rendered itself bankrupt and helpless so far as money matters are concerned? I submit that would be wrong; I submit it would not be in the interests of civilization, and certainly it would not be moral in the circumstances. If one comes to deal with the subject, and think it out, I submit there can obviously be no general rule regard to State succession.


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other than colonization’.448 In other words, the non-application of the principle of acquired rights in the case of colonization ‘was an exception to a rule that was otherwise considered to be well established’.449

6.2 State practice supports the principle of non-succession

The position of non-succession was, for instance, taken by France when annexing Madagascar in 1896.450 This was also the position adopted by Italy after annexing Ethiopia in 1935451 and that of the United Kingdom after its annexation of Burma in 1886.452 Another clear example (examined in the next paragraphs) of this non-succession approach regarding State contracts is the one adopted by the United Kingdom when the Boer Republic of South Africa was annexed to the British Empire in 1902 at the end of the Boer War (1899–1902).453 It is interesting to note that the position adopted by the United Kingdom in this specific case was contrary to its position taken in the past (as mentioned above454), for example when the interests of its own nationals were at stake in the context of the annexation of Madagascar by France and the cession of the Philippines and Cuba to the United States.455

The general position of Great Britain was to reject any responsibility for wrongful actions taken by the Boer Republic before the date of succession.456 Great Britain also rejected having the obligation to automatically respect and maintain all acquired rights detained by individuals. In this context, the High Commission announced that it would consider all concession rights on its merits.457 Great Britain set up the Transvaal Concession Commission to examine the concession contracts which had been signed by the Boer Republic. The Commission published a report containing some recommendations

448 ILC, Second Report Bedjaoui, 1969 (n 4) 89.
449 Ibid.
451 O’Connell, State Succession, 1967 (n 15) 332.
452 Ibid., 358–60.
453 Ibid., 316–22, 360–62.
454 See, Chapter 13, Section 2.2.
456 See many examples cited in Dumberry, State Succession to International Responsibility (n 165) 71ff.
457 O’Connell, State Succession, 1967 (n 15) 316–17. He also mentions that the Colonial Office was informed by the legal adviser to the High Commission that it could treat all concessions granted by the Boer Republics as having expired on annexation. However, he notes that the Colonial Office also received at around the same time a more balanced legal opinion from the Law Officers rejecting this view.
regarding 27 concessions.\textsuperscript{458} The Report contains the following nuanced position on the fate of acquired rights:

It is clear that a State which has annexed another State is not legally bound by any contract made by a State which has ceased to exist, and that no court of law has jurisdiction to enforce such contracts if the annexing State refuses to recognize them, see \textit{Cook v. Sprigg} (1899) A. C. 572. But the modern usage of nations has tended in the direction of the acknowledgment of such contracts. After annexation, it has been said the people change their allegiance, but their relations to each other and their rights of property remain undisturbed, \textit{U.S. v. Pencheman}, 7 Pet. 51; and property includes rights which lie in contract, \textit{Soulard v. U.S.}, 4 Pet. 54. (…) Concessions of the nature of those which were the subject of enquiry presented examples of mixed public and private rights; They probably continue to exist after annexation until abrogated by the annexing State, and, as a matter of practice in modern times, where treaties have been made on cession of territory, have been often maintained by agreement. (…)

Though we doubt whether the duties of an annexing State towards those claiming under concessions or contracts granted or made by the annexed State have been defined with such precision in authoritative statements or acted upon with such uniformity in civilized practice, we are convinced that the best modern opinion favours the view that as a general rule the obligations of the annexed State towards private persons should be respected. Manifestly the general rule must be subject to qualification, as that an insolvent State could not by aggression which practically left to a solvent no other course than to annex it, convert its worthless into valuable obligations; again an annexing State would be justified in refusing to recognize obligations incurred by the annexed State for the immediate purposes of the war against itself; and that probably no State would acknowledge private rights the existence of which caused or contributed to cause the war which resulted in annexation.\textsuperscript{459}

13.100 Interestingly, while the Commission stated that the United Kingdom was not bound under international law by such contracts, it nevertheless mentioned the existence of a ‘general rule’ under which ‘the obligations of the annexed State towards private persons should be respected’.

13.101 Courts of the Union of South Africa (which had the status of a Dominion of Great Britain) have repeatedly rejected claims based on private rights that had been granted by the South African Republic before the annexation.\textsuperscript{460} The

\textsuperscript{458} Ibid., 317.
\textsuperscript{459} Report of the Transvaal Concessions Commission; see Parl. Pap. South Africa, 1901 [Cd. 623], 5–7. The Report also mentioned that: ‘The acceptance of this principle clearly renders it necessary that the annexing Government should in each case examine whether the rights which it is asked to recognize have, in fact, been duly acquired.’ The Report refers to situation when a concession may properly be cancelled: ‘(a) the grant of the concession was not within the legal powers of the late Government, or (b) was in breach of a treaty with the annexing State, or (c) when the person seeking to maintain the concession acquired it unlawfully or by fraud, or (d) has failed to fulfil its essential conditions without lawful excuse.’
\textsuperscript{460} \textit{Vereeniging Municipality v. Vereeniging Estates Ltd.} 1919, Supreme Court of South Africa, Transvaal Provincial Division, (1919) South African LR 159; (1919/1922) \textit{Annual Digest} Case 33, at 60.
question of the survival of the acquired rights was also decided by English courts. In the case of *West Rand Central Gold Mining Co. Ltd. v. The King*, the High Court of Justice of England dealt with a case where, before the outbreak of the Boer War, a gold mine in the Republic of Transvaal owned by the claimant was confiscated by officials acting on the behalf of the Government of that Republic.\(^461\) The claimant argued that the Republic was liable to return the gold or its value. It further claimed that, as a result of the conquest and annexation of the territories by Great Britain, the *contractual obligation* was now binding upon the successor State based on a presumption in favour of a transfer of liabilities.\(^462\) Counsel for Great Britain argued, on the contrary, that there was 'no principle of international law by which a conquering State becomes *ipso facto* liable to discharge all the contractual obligations of the conquered State'.\(^463\)

Lord Alverstone CJ, writing for the court, rejected the claim of the claimant. He indicated that the proposition submitted by the claimant ‘that by international law the conquering country is bound to fulfill the obligations of the conquered, could not be sustained’.\(^464\) He added that ‘when making peace the conquering Sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them’.\(^465\) The Lord Justice also indicated that there was no 'reason at all why silence should be supposed to be equivalent to a promise of universal novation of existing contracts with the Government of the conquered State'.\(^466\) The decision was summarized as follows in the headnote of the case:

13.102

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\(^{462}\) Ibid. This is the full quotation of the argument developed by Counsel for the claimant:

The Sovereign has, it is admitted, power when annexing a conquered State to impose what terms and conditions he pleases as to the taking over of the obligations of the conquered State; but if nothing is said about a particular obligation then it must be deemed to have been taken over, and it can be enforced in the municipal Courts of the conquering State.

Counsel for the claimant also submitted that:

by international law, where one civilized State after conquest annexes another civilized State, the conquering State, in the absence of stipulations to the contrary, takes over and becomes bound by all the contractual obligations of the conquered State, except liabilities incurred for the purpose of or in the course of the particular war.

\(^{463}\) Ibid.

\(^{464}\) Ibid.

\(^{465}\) Ibid.

\(^{466}\) Ibid.
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There is no principle of international law by which, after annexation of conquered territory, the conquering State becomes liable, in the absence of express stipulation to the contrary, to discharge financial liabilities of the conquered State incurred before the outbreak of war.467

13.103  Another illustration of the manner in which the protection of acquired rights was decided in the context of the annexation of the Boer Republic is the R.E. Brown case,468 decided by the US-Great Britain Arbitral Commission in 1923. This award is known for being the first statement of an international tribunal in support of the (alleged) principle of non-succession to obligations arising from the commission of internationally wrongful acts.469 The Commission indicated, in an obiter dictum, that it could not endorse a doctrine based on ‘an assertion that a succeeding state acquiring a territory by conquest without any undertaking to assume such liabilities is bound to take affirmative steps to right the wrong by the former state’.470 For the present section, what is of importance is the fact that the case also involved (alleged) contractual rights detained by a foreigner.

13.104  The R.E. Brown case involved a US national who had ‘pegged out’ in 1895 some 1,200 mining claims for gold mining concessions in the Boer Republic of South Africa at the time it was still considered to be an ‘independent’ republic. The Government of the Boer Republic of South Africa later made three proclamations by which it rejected Mr. Brown’s applications for these concessions. Mr. Brown alleged that he was deprived of his license rights to which he believed he was entitled. He subsequently brought an unsuccessful lawsuit before the High Court of the Boer Republic of South Africa.471 All these events took place before change affecting the sovereignty of the Boer

467  Ibid.
468  R.E. Brown (United States v. Great Britain), Award, 23 November 1923, 6 UNRIAA 129. A brief reference should be made to another case: Union Bridge Co. v. Great Britain, US-Great Britain Arbitral Tribunal, Award, 8 January 1924, in: 6 UNRIAA 138; (1925) 19 AJIL 215; (1923–1924) Annual Digest 170. This case is commented in: Verzijl (n 262) 221. This case dealt with the internationally wrongful acts committed by officials of the Orange Free State against a US company. The company sold materials for steel bridge to the Orange Free State, which refused to pay. After these events, the annexation of the Orange Free State by Great Britain took place. At first, the United States invoked diplomatic protection for the company on the ground of the succession of Great Britain to contractual liability of the Orange Free State. This position was soon abandoned. The United States pursued its claim instead on the ground of Great Britain’s direct liability for acts committed after the annexation. The tribunal therefore did not discuss any issues of State succession.
469  See analysis in: Dumberry, State Succession to International Responsibility (n 165) 73.
470  R.E. Brown (n 468) 130.
471  Ibid., 120–21. The summary of the case described these events as follows:

Proclamation issued on June 18, 1895, by President of South African Republic designating certain tract of land, called Witfontein, as public gold field beginning July 19, 1895. Suspension of proclamation on July 18, 1895, by Executive Council at Pretoria. Application for 1,200 prospecting licences, made under the proclamation by Mr. Robert E. Brown, United States citizen, on July 19, 1895. Licences refused on the
Republic. The United States presented a claim in 1903 on behalf of its national to Great Britain. Great Britain refused to take responsibility for the alleged wrongful acts. Indeed, in a letter addressed to the US Ambassador, Lord Lansdowne, Chief of the British Foreign Office, noted that he was not aware of any rule of international law whereby ‘the conquering State takes over liabilities for wrongs which have been committed by the Government of the conquered country and any such construction appears to be unsound in principle’.472 In the proceedings, the United States took the general position that Great Britain should take responsibility for what took place in the Boer Republic before the date of annexation:

[I]nasmuch as Great Britain has acquired the entire and complete territory of the South African Republic by conquest, and has succeeded to and holds the full and entire sovereignty thereof, thereby replacing and substituting itself for the South African Republic which has by such acts wholly ceased to exist, Great Britain is bound to pay the debts of the defunct Republic, and especially so when such debts are in the nature of judgement debts.473

The United States based its argumentation on Mr. Brown’s ‘acquired rights’. Indeed, in its pleading, it refers to Mr. Brown as having ‘acquired valuable mining rights under the legislation of the South African Republic of which he was deprived by authorities of that Republic’.474 The United States argued that Great Britain had an obligation to respect such rights after its annexation of the Boer Republic:

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473 ‘United States’ Memorial’, quoted in: Hurst (n 239) 164.
International law requires that, when a nation absorbs another nation through conquest, the absorbing State shall respect and safeguard rights of person and of property in the conquered State.\textsuperscript{475} 

… it is well-established that appropriate judicial acts of an extinguished State, defining such rights, should not be disregarded by the absorbing State.\textsuperscript{476}

13.106 The United States also maintained that Great Britain should be liable for acts committed \textit{after} the annexation by its own officials against Mr. Brown.\textsuperscript{477} Great Britain’s contention was that Mr. Brown had never acquired such rights.\textsuperscript{478} While this situation was no doubt the result of the actions of the local authorities of the Boer Republic, Great Britain maintained that it had no control over the authorities at that time and, therefore, should not be held responsible for the obligations arising from such acts.\textsuperscript{479}

13.107 The Arbitral Commission came to the conclusion that Mr. Brown had indeed acquired a right and that the authorities of the Boer Republic denied it. However, the Arbitral Commission followed Great Britain’s line of argumentation and decided that Mr. Brown had suffered a ‘denial of justice’ from the Government of the Boer Republic.\textsuperscript{480} In fact, the Commission referred, more
broadly, to an ‘amazing controversy between the Court and the Executive’ which resulted in the ‘virtual subjection of the High Court to the executive power’.\textsuperscript{481} It also mentioned that the ‘obedient legislature immediately enacting, at the demand of the Executive, a new law in February 1897 which was the prelude of the state of so-called legal anarchy, which endured for approximately a year, and eventually led to the armed intervention of Great Britain and the ultimate annexation of the South African Republic’.\textsuperscript{482} For the Commission, ‘throughout this controversy the Brown case was referred to as the turning point, and the 1897 law as the actual instrument by which the independence of the High Court was destroyed’.\textsuperscript{483} Thus, ‘effective guarantees of property rights had disappeared’ and the ‘capricious will of the Executive had become the sole authority in the land’.\textsuperscript{484} According to the Commission, ‘these intolerable conditions led directly to the war, in which the independence of the State itself was suppressed.’\textsuperscript{485} The Commission concluded on this point that:

Growing out of this very transaction, a system was created under which all property rights became so manifestly insecure as to challenge intervention by the British Government in the interest of elementary justice for all concerned, and to lead finally to the disappearance of the State itself. Annexation by Great Britain became an act of political necessity if those principles of justice and fair dealing which prevail in every country where property rights are respected were to be vindicated and applied in the future in this region.\textsuperscript{486}

For the Commission, this case was a ‘real denial of justice’, adding that ‘if there had never been any war, or annexation by Great Britain, and if these proceedings were directed against the South African Republic, we should have no difficulty in awarding damages on behalf of the claimant’.\textsuperscript{487} Yet, the Commission concluded that Great Britain should nevertheless not be held responsible for such a denial of justice for the following reasons:

\begin{quote}
Government of the South African Republic with the obvious intent to defeat Brown’s claims, a definite denial of justice took place. We can not overlook the broad facts in the history of this controversy. All three branches of the Government conspired to ruin his enterprise. The Executive Department issued proclamations for which no warrant could be found in the Constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to fundamental principles of justice recognized in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions.
\end{quote}

\textsuperscript{481} Ibid., 124–5.
\textsuperscript{482} Ibid.
\textsuperscript{483} Ibid., 126.
\textsuperscript{484} Ibid.
\textsuperscript{485} Ibid.
\textsuperscript{486} Ibid., 129.
\textsuperscript{487} Ibid.

\section*{6. ANNEXATION OF STATES IN THE CONTEXT OF COLONIZATION}
Chapter 13 SUCCESSION TO STATE CONTRACTS

We are equally clear that this liability never passes to or was assumed by the British Government. Neither in the terms of peace granted at the time of the surrender of the Boer Forces, nor in the Proclamation of Annexation, can there be found any provision referring to the assumption of liabilities of this nature. It should be borne in mind that this was simply a pending claim for damages against certain officials and had never become a liquidated debt of the former State. 488

13.109 The Commission therefore denied the claim. The case is clearly more significant to the analysis of the different question of succession to State responsibility rather than that of succession to acquired rights per se. Thus, while contractual rights under a State contract were at the origin of the case, the question decided by the Commission was essentially whether the successor State should be responsible for an internationally wrongful act (a denial of justice) committed by the predecessor State against a foreign national, before the annexation. 489 Yet, the case is interesting because of the position adopted by the parties in the proceedings with regards to the survival of acquired rights after the annexation took place. The United States clearly supported the principle of succession. On the contrary, the United Kingdom argued that no such principle existed. It is noteworthy that this position was the exact opposite to the one it had previously taken when the interests of its own nationals were at stake in other instances of cession of territories (a point discussed above 490).

488 Ibid.
489 Ibid. Yet, it should be added that the Commission admitted that in fact the claim did not ‘properly speaking’ involve ‘any question of State succession’. This is because the United States did not base its argumentation on the existence of any doctrine of succession to international responsibility: ‘The United States plants itself squarely on two propositions: first, that the British Government, by the acts of its own officials with respect to Brown’s case, has become liable to him; and, secondly, that in some way a liability was imposed upon the British Government by reason of the peculiar relation of suzerainty which is maintained with respect to the South African Republic’. Both arguments were rejected by the Commission. This point is examined in: Hurst (n 239) 165.
490 See, Chapter 13, Section 2.2.