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The Political Economy of Ways and Means: Procurement
Contracts, Entrepreneurship, and Development in Africa

A dissertation submitted in partial satisfaction of the requirements for the
degree Doctor of Philosophy in Political Science

By

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ABSTRACT OF THE DISSERTATION

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Conventional wisdom with regard to political and economic development in Africa gives weight to the colonial origin of the modern state and institutions. Although there is no agreed upon definition of what colonialism is in the social sciences, domination and hierarchy are assumed in colonial relationships. However, since the seventeenth century until World War I, African political leaders entered into economic and political agreements with foreign firms, multinational companies, and signed political agreements that were to define future relationships with European states and economic actors. These contracts present an interesting challenge: where (if anywhere) do we place these procurement practices in the hierarchy of important episodes in interest groups formation, institution building and state development? Were they one of the many organizational initiatives during colonialism, the impact of which was more or less mitigated by competing interests among European powers only? This work analyzes historical contractual agreements in Africa from 1620 to 1919 using process tracing and analytic narratives methods. It establishes a historical precedent in public procurement practices in Africa through in-depth review of the procurement transactions of city-states in North Africa and various coastal groups. By showcasing African agents' bargaining strategies in contractual agreements, this work fundamentally challenges existing notions of empire, colonialism, domination, and inequality. The project is innovative as it constructs a framework of *strategic heuristics* that improves existing theory of decision-making under uncertainty.

The dissertation of Sybille Ngo Nyeck is approved.

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RESUME

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Chapter 1. General Introduction

"A history of government contracts is a chronicle of the country's changing goals and needs. The government has long used the procurement process to further social and economic objectives...A historical review of the government's contracts traces the country's most important priorities contemporaneous with those contracts...We shall see how seemingly unconnected events began a chain reaction that altered the course of government contracting and the history of the nation it served."

James F. Nagle¹

How do countries attain economic freedom? Does freedom of contract, and more specifically government contracting, explain the character of development in a foreseeable fashion? In this era of increasing regional and global markets integration, do existing state procurement laws and administrative practices promote entrepreneurship, bureaucratic reforms, and political participation in the public sector in developing countries? These questions are important to developed countries committed to guiding and supporting development through foreign aid. They are equally important to developing countries with growing, but costly socio-political and economic demands in a changing international financial environment.

Economic freedom, generally defined as a country's ability to choose how to produce and trade resources,² covers different aspects of economic activity including, but not limited to business freedom, trade freedom, monetary freedom, freedom from government, fiscal freedom, property rights, investment freedom,³ financial freedom, freedom from corruption,⁴ and labor freedom.⁵ This work is primarily concerned with freedom of contract and its relation to the character of development in developing and poor countries situated in Africa. Its major contention is threefold and queries the following:

- (a) Whether government contracting explains in a foreseeable fashion development depends on particular configurations of collective monopolistic and individual monotonic bargaining powers operating unequally in the economic and political spheres. Thus, whether or not a

¹ Nagle, James F. (1992). *A History of Government Contracting*. Washington: The George Washington University, 1-2.

² See The Fraser Institute and the Heritage Foundation widely used indexes for measuring economic freedom.

³ World Bank and Doing Business data < <http://www.doingbusiness.org/>> accessed January 2012. The Fraser Institute and the Heritage Foundation have developed key indexes widely used to measure economic freedom generally defined as the ability of a country to choose how to produce and trade resources.

⁴ See Transparency Corruption Index, < <http://cpi.transparency.org/cpi2011/results/>> accessed January 2012.

⁵ Kapás Judith and Pál Czeglédi (2007). "Economic Freedom: A Hayekian Conceptualization." *New Perspectives on Political Economy* Vol. 3, No. 2, 207.

country sets itself on the path to economic freedom is not foreseeable based upon inequality broadly defined. Economic freedom rather takes the shape of an outcome of a confrontation between freedom, monopolistic, and monotonistic tendencies in society.

- (b) Government contracting or public procurement, brings together more than just contractors and indexed parties (be they public, private, or nominal), rules, institutions, commercial transactions, and quantifiable outcomes. It is argued in this work that at a more substantive level, public procurement brings together “regimes of freedom,” meaning, government contracting is constantly restating principles of freedom and power in society.
- (c) Public procurement is predicated upon two kinds of freedoms: freedom of agents involved in economic exchange and freedom of information⁶ available to agents. These two types of freedoms are important because from the perspective of future development, they are the movers and changers of contextual variables and institutions.

Put differently, this work is an examination of the role of ideas, agency, information, and strategic choice in bringing about liberty and dignity to individuals and communities in a constrained political environment. Thus, the process of selecting ideas, assigning agency, making and sharing information, and contracting development is what this work is concerned with.

I intend to answer the above questions by focusing on the process of decision-making in a context of unequal distributions of means for development. That is, I contend that beyond technical knowledge, ideas, agency, and information, strategy matters in understanding the origin and effect of public procurement on development. If strategy matters, however, it is not for its own sake; that is, because actors chose to optimize preferences after considering alternative options as rational choice models assume. Rather, strategy matters because (a) choice itself is a stochastic process, and (b) because the location of strategy is heuristically conditioned. That is, strategy cannot always be seen or implemented *a priori* and concomitantly with choice.

⁶ Hayek, F. A. (2011). *The Constitution of Liberty*. Chicago: University of Chicago press, 49-50.

By separating choice from strategy when analyzing the decision-making process to explain the origin and effect of historical public procurement practices, this work contributes to theory of strategic bargaining (Schelling⁷; Lake & Powell⁸) and to the heuristic and biases approach in the decision-making literature (Tversky & Kahneman⁹, Gilovich, Griffin & Kahneman¹⁰, Dohonue, Rogan & Kaufman¹¹).

By juxtaposing and showing the gaps in theory of strategic interaction and in the heuristic and biases approach to decision-making, I propose a new approach termed Strategic Heuristics to analyzing the decision-making process. This approach problematizes normative assumptions about 'strategy' and 'choice' in the existing literature to show the theoretical and empirical benefits of combining interactive elements of the heuristic and the strategic traditions. The result is opportunity to make sense of a number of historical situations in developing countries previously misunderstood because of the rigidity of normative models and assumptions.

A strategic heuristics approach to procurement analysis is adopted for its conceptual richness and empirical depth because it focuses on the decision-making process in the context of uncertainty and disequilibrium as understood in Austrian economics and transaction cost literature (Kirzner¹², Mises¹³). Thus, conceptually, this work is grounded in decision-making process with bounded rationality and strategic choice (Dixit¹⁴, Lake & Powell¹⁵, Schelling¹⁶).

⁷Schelling, Thomas. (1980). *The Strategy of Conflict*. Cambridge: Harvard University Press.

⁸ Lake, David. Editors. (1999). *Strategic Choice in International Relations*. Princeton: Princeton University Press.

⁹Kahneman, Daniel, Paul Slovic, and Amos Tversky. Editors. (1982). *Judgment Under Uncertainty: Heuristic and Biases*. Cambridge: Cambridge University Press.

Tversky, Amos and Daniel Kahneman. Editors. (2000). *Choices, Values, and Frames*. Cambridge: Cambridge University Press.

¹⁰Gilovich, Thomas, Dale Griffin, and Daniel Kahneman. Editors. (2002). *Heuristic and Biases: Psychology of Intuitive Judgment*. Cambridge: Cambridge University Press.

¹¹Dohonue, William, Randall Rogan, and Sandra Kaufman. Editors. (2011). *Framing Matters: Perspectives on Negotiation Research and Practices in Communication*. New York: Peter Lang.

¹²Kirzner, Israel. (2000). *How Markets Work: Disequilibrium, Entrepreneurship and Discovery*. London: Institute of Economic Affairs.

_____. (1979). *Perception, Opportunity, and Profit: Studies in the Theory of Entrepreneurship*. Chicago: The University of Chicago Press.

¹³Mises, Ludwig. (1996). *Human Action: A Treatise on Economics*. San Francisco: Fox & Wilkes.

¹⁴Dixit, A. & Barry J. Nalebuff. (1991). *Thinking Strategically: The Competitive Edge in Business, Politics, and Everyday Life*. New York: W.W. Norton.

¹⁵Lake, David and Robert Powell. Eds. (1999). Op. cit.

¹⁶Schelling, Thomas. (1956) "An Essay on Bargaining." *The American Review* Vol. 46, No. 3, 281-306.

_____. (1957). "Bargaining, Communication, and Limited War." *Conflict Resolution* Vol. 1, No. 1, 19-36.

_____. (1960). "The Retarded Science of International Strategy." *Midwest Journal of Political Science*. Vol. 4, No.2, 107-137.

Although public procurement studies are relatively new, changes in international and domestic policies have mainly retained the attention of legal scholars. This development is not surprising given the fact that Law is the academic discipline par excellence where contract-related concerns are intensely studied. Leading the debate from a legal perspective is the influential work of the British scholar Sue Arrowsmith¹⁷ and the Nottingham (UK) School.

Modern Contract Law within Common Law practices, from which stems legal reasoning in the Anglo-American public procurement debates is said to have evolved from commercial dealings.¹⁸ Although these commercial and economic backgrounds are not unknown to legal scholars, the historical connection between law and trade spilling over public policy has received more attention from economists and economic historians concerned with the role of institutions in shaping economic development as seen in the Law-Growth nexus literature (Fafchamps¹⁹, Dann²⁰, Greif²¹). This work is going to flag and show the limitations of legal centralism framework's normative benchmarks especially its assumption about the "legal origin" of development and governance (LaPorta et al.²²). Here, I seek to establish the missing link between politics, ideas, and law in the historical development of public procurement practices.

A strategic heuristics framework allows one to empirically explore the consequences of omission of a political framework for procurement reform in developing countries and to engage in comparative historical analysis of contracting practices in Africa. Data supporting the historical analysis consist of a

¹⁷Arrowsmith, Sue. (2003). *Government Procurement in the WTO*. Studies in Transnational Economic Law Volume 16. New York: Kluger Law International.

_____. (1998). "National and International Perspectives on Regulation of Public Procurement: Harmony or Conflict?" in *Public Procurement: Global Revolution*. Arrowsmith, Sue and Arvel Davies. Eds. New York: Kluger Law International.

Arrowsmith, Sue and Arvel Davies. (1998). *Public Procurement: Global Revolution*. New York: Kluger Law International.

Arrowsmith, Sue and Martin Trybus. (2003). *Public Procurement: The Continuing Revolution*. New York: Kluger Law International.

¹⁸The economic origin of contract doctrine is subject to debate. James Gordley for instance writes about the contribution of philosophy and ethics in shaping early writings on contracting. This development is traced from the Greek philosopher Aristotle, then Aquinas and the late scholastics in Germany, France, and Italy such as Pufendorf, Barbeyrac, Domat, and Poithier; and from the Northern school such as Grotius. See (1992). *The Philosophical Origins of Modern Contract Doctrine*. Oxford: Clarendon press.

¹⁹Fafchamps, Marcel. (2004) *Market Institutions in Sub-Saharan Africa: Theory and Evidence*. Cambridge: MIT Press.

²⁰Dann, Kenneth. (2006). *The Law-Growth Nexus: The Rule of Law and Economic Development*. Washington D.C.: Brookings Institution Press.

²¹Greif, Avner. (2006). *Institutions and the Path to Modern Economy: Lessons from Medieval Trade*. Cambridge: Cambridge University Press.

_____. (2008). "Contract Enforcement and Institutions Among the Maghrebi Traders: Refuting Edwards and Ogilvie." MPRA paper No. 9610, posted 17.

²²La Porta, Rafael, et al. (1999). "The Quality of Government." *Journal of Law, Economics, and Organization* Vol. 15, No.1, 222-279.

_____. (2004). "Do Institutions Cause Growth?" *Journal of Economic Growth* Vol. 9, 271-303.

_____. (2008). "The Economic Consequences of Legal Origins." *Journal of Economic Literature* Vol. 46 No. 2, 285-332.

collection of over a thousand contractual agreements taken from all regions in Africa from the seventeenth century until 1919. Although scholars have not analyzed contractual dealings in Africa in a systematic fashion, this omission can no longer be attributed to lack of data, as it has been implied in the past. Instead, what is now needed is an appropriate framework for extracting, analyzing, and comparing in a reasonable fashion, the many puzzles and contractual counterfactuals that historical practices in Africa reveal. This work is innovative as it constructs a framework that improves existing theory of decision-making process under uncertainty, and brings to light new data that support further research on the historical origin of procurement practices in the developing world.

Scholars writing about Africa's development have been and remain fascinated by the nineteenth-century when sovereign power was relatively consolidated in England and the United States. This work, however, pays its dues to early periods. Data from the seventeenth-century onward put Africa's development in conversation with major political transitions stemming from the crisis of obligation in England and the United States, when sovereignty and the state were highly contested. Data also allow one to better understand how the rise of the modern state after the English civil war and in the aftermath of American independence displaced and reshaped the bargaining powers of political leaders in Africa. Here I rely on a wide range of contracts and concessions between African political agents, economic actors, and foreign entrepreneurs in the absence of the modern state.

Contractual agreements derived from primary documents, secondary sources, and archival material organized by regions and involving major political and economic players (Hertslet²³, Davenport²⁴, Newberry²⁵) in Northern Africa (Benjeloun²⁶, Abitbol²⁷, M'barak & Charqi²⁸, Mustapha²⁹),

²³ Hertslet, E. (1967). *The Map of Africa by Treaty*. 3rd ed. London: Frank Cass.

_____. (1894). *Map of Africa by Treaty*. Vol. II, Charleston: Bibliobazaar.

²⁴ Davenport, F.G. (Ed.). (1917). *European Treaties bearing on the History of the United States and its Dependencies to 1648*. Washington D.C. Carnegie Institution.

²⁵ Newberry, C.W. (1965). *British Policy Towards West Africa Select Documents 1786-1874*. Oxford: Clarendon Press.

_____. (1971). *British Policy Towards West Africa Select Documents 1875-1914*. Oxford: Clarendon Press.

²⁶ Benjeloun, Abdelmajid. (1995). *Fragments d'Histoire du Rif Oriental et Notamment des BENI SAID dans la Deuxième Moitié du XIXème Siècle d'Après les Documents de Mr. Hassan Ouchen*. Rabat : El Marrif Al Jadida.

²⁷ Abitbol, Michel. (2009). *Histoire du Maroc*. France: Perrin.

²⁸ Zaki, M'barek and Mimoun Charqi. (2008). *Maroc: Colonisations & Résistances 1830-1930*. Salé: Foundation du Rif.

²⁹ Jmahri, Mustapha. (2011). *Magazan-El Jadida Deux Siècles d'Histoire Consulaire*. Casablanca: Les Cahiers d'El-Jadida.

Southern Africa (Kalley³⁰), Central and West Africa (Busson³¹, Anene³², Adeleye³³, Atanda³⁴, Aṣiwajux³⁵, Ekeh³⁶), East Africa (Millette³⁷, Seaton & Maliti³⁸, Rubenson³⁹). Thus, the very nature of data is qualitative and textual. I document the historical origin of public procurement practices, the evolution of economic and legal thought on contracting and freedom of contract preceding the rise of the state in Africa.

Primary and secondary sources on the politics of contracting tell the story of how African leaders negotiated the transition from old monopolistic trade to competitive “legitimate” trade. Important to my interpretation and analysis of the data is the relation between political monopoly and market forces. I trace the process through which local political leaders historically sought to secure monopolistic deals over trade with foreign entrepreneurs through incomplete contracts for tangible economic goods (arms trade, slave trade, manufactures) and intangible political goods (security, knowledge etc.). Although procurement practices in Africa have not sufficiently been theorized, the data show that not only public procurement is not new in Africa, but also that the struggle between monopoly and market-based approaches is recurring in procurement reform initiatives today.

Groundbreaking works by Ghislaine Lydon⁴⁰ and Anthony Appiah,⁴¹ just to cite a few, are good examples of emerging scholarship that conceptually and methodologically seek to break the spell of intelligibility between old contractual practices in Africa and contemporary debates over freedom,

³⁰Kalley, Jacqueline. (2001). *South Africa's Treaties in Theory and Practice 1806-1998*. Boston: Scarecrow Press.

³¹Busson Henri. Le régime du Niger. In: *Annales de Géographie*. 1895, t. 4, n°15., 202-209. doi :10.3406/geo.1895.5691 <http://www.persee.fr/web/revues/home/prescript/article/geo_0003-4010_1895_num_4_15_5691> Accessed June 14, 2011.

³²Anene, J.C. (1966) *Southern Nigeria in Transition 1885-1906: Theory and Practice in a Colonial Protectorate*. Cambridge: Cambridge University Press.

³³Adeleye, R.A. (1971). *Power and Diplomacy in Northern Nigeria 1804-1906: The Sokoto Caliphate and Its Enemies*. Ibadan: Humanities Press.

³⁴Atanda, J.A. (1973). *The New Oyo Empire: Indirect Rule and Change in Western Nigeria 1894-1934*. New Jersey: Humanities Press.

³⁵Aṣiwaju, A.I. (1976). *Western Yorubaland under European Rule: 1889-1945 a Comparative Analysis of French and British Colonisation*. New Jersey: Humanities Press.

³⁶Ekeh, Peter. (Ed.) 2005. *Warri City and British Colonial Rule in Western Niger Delta*. Lagos: The Urhobo Historical Society.

³⁷Millette, A. J. (1973). *Treaties in Force 1889-1971: Draft List of Treaties and Other International Agreements of Ethiopia*.

³⁸Seaton, E.E. and S. T. Maliti. (1973). *Tanzania Treaty Practice*. Dar es Salaam: Oxford University Press.

³⁹Rubenson, Sven. Ed. (2000). *Internal Rivalries and Foreign Threats 1869-1879*. Acta Aethiopica. Vol. III. Addis Abeba: Addis Abeba University Press.

_____. (1987). *Correspondence and Treaties 1800-1854*. Acta Aethiopica. Vol. I, Addis Abeba: Addis Abeba University Press.

⁴⁰Lydon, Ghislaine. (2008). “Contracting Caravans: partnership and profit in nineteenth –and early twentieth-century trans-Saharan trade.” *Journal of Global History* Vol. 3, 89-113.

_____. (2009). *On Trans-Saharan Trails: Islamic Law, Trade Networks, and Cross-Cultural Exchange in Nineteenth-Century West Africa*. Cambridge: Cambridge University Press.

⁴¹Appiah, Anthony. (2007). *Buying Freedom: Ethics and Economics of Slave Redemption*. Princeton University Press.

public and private contracting. Other contemporary contributions on public procurement reform in Africa (Bolton⁴², Quinot⁴³, Igwe⁴⁴, Afemikhe⁴⁵, Quinot & Arrowsmith⁴⁶) mainly focus on the technicalities of the trade and regulation. However, there seems to be no conversation between scholarship that focuses on the historical and philosophical origins of contracting practices, and emerging analyses in economic and legal procurement trends Africa today. Nevertheless, the link between economic and political considerations is progressively scrutinized theoretically and empirically within and outside of academia, (McCrudden⁴⁷) including through special reports from transnational nongovernmental organizations.⁴⁸ Still, we hardly know what is at stake in the debate over public procurement reform beyond technical or regulatory expectations. The multiplicity of debates is yet to lead us to a good explanation of the phenomenon. Thus, it is useful to ask what needs to be done to ensure progress in understanding given the diversity of perspectives? How to bring about some kind of intellectual order in procurement studies in this context? The strategic-choice approach adopted here within the framework of strategic heuristics seek to unify the disparate work by evaluating how well they explain *the* choices and decisions of actors in the procurement process.

Seminal and recent work in American public policy analysis (Ostrom⁴⁹), political development and urban planning (Caro⁵⁰, Miller⁵¹), economic and diplomatic history (Jennings⁵² Jennings et al.⁵³ Stanley⁵⁴), congressional and security studies (Cooper⁵⁵, Minow⁵⁶), and in foreign policy (Verkuil⁵⁷,

⁴²Bolton, Phoebe. (2007). *The Law of Government Procurement in South Africa*. Cape Town: LexisNexis.

⁴³Quinot, Geo. (2009). *State Commercial Activity: A Legal Framework*. Claremont: Juta.

⁴⁴Igwe, J.U.K. (2010). *Financial Sector Law Reform, Public Administration and Rule of Law in Nigeria*. Vol. 2., Lagos: Law Development Research Publications & Consulting Limited.

⁴⁵Afemikhe, Sam S. (2011). *Public Procurement Policies and Practices: Creating and Sustaining Economic Growth Through Doing the Right Things & Doing Things Right*. Lagos: Gold Press.

⁴⁶Quinot, Geo and Sue Arrowsmith. (2013). *Public Procurement Regulation in Africa*. Cambridge: Cambridge University Press.

⁴⁷McCrudden, Christopher. (2007). *Buying Social Justice: Equality, Government Procurement & Legal Change*. Oxford: Oxford University Press.

⁴⁸See for instance the Oakland Institutes' reports on "land grabbing" in Africa < <http://www.oaklandinstitute.org/great-land-grab-rush-world's-farmland-threatens-food-security-poor>> and invasion of foreign "land grabbers" in Ethiopia, Tanzania, Zambia, Sierra Leone, Mali, Mozambique, South Sudan etc. < <http://www.oaklandinstitute.org/land-rights-issue>> accessed January 2012. Also see "Ruée sur les Terres d'Ethiopie," by Giles Van Kote special envoy to Ethiopia *Le Monde* Vendredi 6 Janvier, 2012 [January 6, 2012], 18-19.

⁴⁹Ostrom, Vincent. (2009). *The Intellectual Crisis in American Public Administration*. 3rd edition. Alabama: University of Alabama Press.

⁵⁰Caro, Robert. (1975). *The Power Broker: Robert Moses and the Fall of New York*. New York: Vintage Books.

⁵¹Miller, Gary. (1981). *City by Contract: The Politics of Municipal Incorporation*. Cambridge: MIT Press.

⁵²Jennings, Francis. (1984). *The Ambiguous Iroquois Empire*. New York: W.W.W. Norton.

⁵³Jennings, Francis et al. (eds). (1985). *The History and Culture of the Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and their League*. Syracuse: Syracuse University Press.

⁵⁴Stanley, D. Amy. (1998). *From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave Emancipation*. Cambridge: Cambridge University Press.

⁵⁵Freeman, Jody and Martha Minow. Eds. (2009). *Governing by Contract: Outsourcing and American Democracy*. Cambridge: Harvard

Freeman & Minow⁵⁸, Stanger⁵⁹) give historical and strategic content to understanding the evolution of government contracting in the United States and its effects on diplomacy, state institutions, foreign policy, and globalization. Other important historical works have contributed to understanding the origin of government contracting from both political and economic perspectives (Pahre⁶⁰, Cooley & Spruyt⁶¹) but mainly focusing on the experience of Western and mostly developed countries.

Thus, the historical precedent on public contracting in the developing world is either misunderstood, or understudied. The absence of a historical precedent, as I will show later, stems from agential bias embedded in existing normative legal centralism popular in procurement analyses. This project demonstrates that history matters for its pedagogical value because it helps establish similarity between development challenges developed states once encountered and those that developing states are now facing. It is further argued and demonstrated that these similarities are not just historical; they are strikingly contemporary as well. Thus, the retrieval of the history of public contracting in developing states logically compels us to rethink the place of human action, and bring back in the decision-making process at the center of procurement analysis. Such an approach to procurement study not only expands the number of cases available for scientific enquiry, but it does so by taking into consideration the agency of actors in developing non-western countries, their historical development, and the choices made by individual leaders.

Because economic growth in the twenty-first century has greatly been influenced by Anglo-American economic ideas, I mostly rely on the legal history of contracting and theses on freedom of contract put forward by thinkers in this tradition to frame my interpretation of Africa's historical data and to show their relevance to current debate. In all periods, I make a point to engage not just with the

University Press, 2009.

⁵⁶Minow, Martha. (2003). *Partners not Rivals: Privatization and the Public Good*. New York: Beacon Press.

⁵⁷Verkuil, Paul. (2007). *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What we Can Do About it*. Cambridge: Cambridge University Press.

⁵⁸Freeman, Jody and Martha Minow. Editors. (2009) Op. cit.

⁵⁹Stanger, Allison. (2009). *One Nation Under Contract: The Outsourcing of American power and the Future of Foreign Policy*. New Haven: Yale University Press.

⁶⁰Pahre, Robert. (2008). *Politics and Trade Cooperation in the Nineteenth Century: The "Agreeable Customs" of 1815-1914*. Cambridge: Cambridge University Press, 2008.

⁶¹Cooley, Alexander and Hendrik Spruyt. (2009). *Contracting States: Sovereign Transfers in International Relations*. Princeton: Princeton University Press.

literature on government contracting and international cooperation, but also with the contributions of African scholars to the extent that I have been able to locate their work.

Finally, there is no assumption that the reader has previous knowledge of the literature on government contracting or public procurement. In dealing with the historical origin and effect of public procurement on development in Africa my use of a formal language remains close to substance in terms of context and ideas. Thus, I have prioritized understanding by ensuring that theory remains conversant with data throughout this work. Questions asked and answers provided are framed in such a way that the readers, most of the time, won't need to worry about historical details to follow the argument.

The work is organized in two major parts. Given the seminal nature of this project, the work of reconceptualization is done in the first four chapters. Chapter 2 following this introduction presents the ways in which data were collected and organized. Chapter 3 presents the underlying argument, methodology and concepts sustaining my interpretative work. Here I review existing literature on the decision-making process within the strategic choice and heuristic and biases frameworks and provide building blocks for strategic heuristics, a framework applied to analyzing data. I briefly discuss how analytic values derived from my expectation-based approach to inequality are related or different to other treatments of inequality that critics of contract theory have raised. Chapter 4 situates the origin of early modern public procurement practices of the fiscal-military state and transitional politics arising from contestation of power between the Crown and the Parliament in England and her expansionist imperatives in America and Africa.

The second part of this work consists of data analysis. Chapter 5 focuses on historical fight against maritime piracy in Northern-Africa and the contractual logics that sustained public-private partnerships. Chapter 6 extends the review of historical contractual cases to East Africa and highlights the procurement practices of the Abyssinian empire and Zanzibar, both semi-lettered societies with monopolistic claims over trade. Chapter seven further pushes the frontiers of theory to include contractual cases mainly involving oral societies. Chapter eight takes the analysis of historical

contracts to the West Coast of Africa. Here, I explain the processes by which territories were integrated into a hierarchical structure of governance when late-nineteenth century politics rendered obsolete pervasive bargaining of the earlier periods. This contribution is aimed at policymakers, academics, and anyone interested in investing in development and in the idea of economic freedom.

Chapter 2. Data Collection and Organization

“In consenting to enter into any bargain, each party yields to the threats of the other.”
*Robert Hale*⁶²

“What is suggested is merely that the inclusion of all choice situations, however truncated or twisted the choice may be, within the definition of contract may be useful in developing an understanding of the many futures of contracts...One can, at least in theory, shoot a person without thinking about interaction, but one cannot exchange with him without doing so.”
*Ian Macneil*⁶³

I. Data sources and periodization

Historical data collection was conducted over the period of three years and gathered from different archival sources including the François Mitterrand Library in Paris, Hertslet’s map of Africa by treaty first published in 1895, the UCLA Law School’s collection of consolidated treaties edited and annotated by Clive Parry⁶⁴ and secondary sources. Data collected from primary and secondary sources cover the major trading regions from the early-seventeenth century until 1919 in Africa. This periodization is purposive because unable to rely on an existing database or previous relevant work in comparative perspective in Africa to present a plausible argument for the conceptual approach presented here.

Data from the seventeenth century allow me to render Africa’s political development conversant with debates over political obligation and contracting taking place in England and the United States during this period. In the Anglo-American tradition, debate over freedom of contract, its rise and fall spans from the mid-seventeenth-century until about 1970. In order to draw *similarity* between contractual happenings in Africa, Europe, and the United States, I have maintained the same chronology. By keeping the chronology constant, African data remain conversant with historical themes

⁶² Hale, Robert. (1943). “Bargaining, Duress and Economic Liberty.” *Columbia Law Review* Vol.43 (603-628).

⁶³ Macneil, Ian. (2001). *The Relational Theory of Contract: Selected Works of Ian Macneil*. David Campbell, editor. London: Sweet & Maxwell, 119, 124.

⁶⁴ v. 1. Irwin, P. General chronological list, 1648-1809 [i.e., 1648-1808]--v. 2. Hill, Brian H.W. General chronological list, 1648-1809 supplement, 1809-1851.--v. 3. Hill, Brian H.W. General chronological list, 1852-1885.--v. 4. Hill, Brian H.W. General chronological list, 1886-1903.--v. 5. Hill, Brian H.W. General chronological list, 1904-1919.--[pt. 2] Meyer, Michael A. Special chronological list, 1648-1920 (2 v.).--[pt. 3] Hill, Brian H.W. Party index. v. 1, Afghanistan-Finland.--v. 2, France-German states.--v. 3, Great Britain-Italy.--v. 4, Japan-South Rhodesia.--v. 5, Spain-Zanzibar.

emerging from the reformulation of status, property, contract, and the role of state intervention in the West.

The question of the origin of contract and contract theory in the West remains open to debate among scholars proposing high theory⁶⁵ (philosophy, economics and law⁶⁶); midrange theory (politics), and low theory (culture and linguistics)⁶⁷ explanations. Rather than choosing one particular school of thought to analyze data, I focus on the relevance of emerging *themes* from differing explanations such as the positive premises of contract discreteness (promise and consent), the relational dimensions of transactions, and the functional role of the modern state to understanding the political development of Africa. These major themes impact the way data is organized.

II. The Positive, Relational, and Spectrum Premise

Historical evidence is organized thematically and no distinction is made between economic contracts and political contracts. In this work, treaties, agreements, conventions, proclamations, concessions are all transactional instruments that create trust, promise, expectation, reliance, confidence between strangers, obligations, transfers of authority, and transformation of property...etc. Classical theorists disagree on the classification of certain types of contractual transactions based on the nature of the agreements, which in turn determines enforceability.⁶⁸ I am not concerned here about enforceability but about 'activability' of power within contractual relationships; power which politically influences strategy, choice, and outcomes.⁶⁹ This posture, although appreciative of the

⁶⁵This 'ranking' references to theoretical focus on a specific social stratum as influencing the debate and policy over contracting.

⁶⁶Patterson, Dennis. (2010). *A Companion to Philosophy of Law and Legal Theory*. New York: Wiley-Blackwell.

Gordley, James. (2011). *The Philosophical Origins of Contract Doctrine*. Oxford: Clarendon Press.

⁶⁷See Muldrew, Craig. (1998). *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England*. New York: Palgrave Macmillan.

Johnson, Nancy E. (2004). *English Jacobin Novel on Rights, Property, and the Law*. New York: Palgrave Macmillan.

Kahn, Victoria. (2004). *Wayward Contracts: The Crisis of Political Obligation in England 1640.1674*. Princeton: Princeton University Press.

⁶⁸The reader interested in different liberal strands of theory of contract that distinguish between 'promise as contract' and 'contract as distinct from promise' should refer to

Fried, Charles. (1981). *Contract as Promise: A Theory of Contractual Obligation*. Cambridge: Harvard University Press.

Kimel, Dori. (2005). *From Promise to Contract: Towards a Liberal Theory of Contract*. Portland: Hart Publishing.

⁶⁹For a different treatment of power, see Victoria Kahn (2004, Op. cit.), who positions Nietzsche's work *The Genealogy of Morals* as going "against th[e] mystified discourse of conscience and contract, [and] counterpos[ing] a demystified discourse of power" thereby "exposing the violent condition of the emergence of contract theory" (p.2) in early debates.

important contribution of Llewellyn⁷⁰ in shaping contract theory, does not go as far as to suggest that contracts are “social instruments” only. It however, subscribes to the distinction between on the one hand, classical and neo-classical concerns with matters of contract enforceability and litigation, and on the other hand contract as a bargaining instrument in power-laden relationships cutting across transaction types.⁷¹

Besides classification, case selection also distinguishes my political analysis from a purely legal one. Unlike legal scholars for whom coercion is a *de facto* impediment to the enforceability of contracts, political and policy analysts have discovered not one, but many uses and functions of coercion, hierarchy, and inequality within⁷² international systems. Political analysis, unlike law, comfortably deals with power activated or dormant. Thus, transactions that may appear as “legally unenforceable” are not necessarily “politically unexploitable.” To the extent that politics everywhere preceded modern legal organization, it becomes unavoidable in further understanding the origin of normative contractual assumptions. By focusing on the idea of contract as promise⁷³ with effects on transaction costs, I stretch the boundaries of contract law to give them a political edge in order to account for the complexities of contract arrangements especially when the state is a regulator and the government a party as in public procurement contracts.

This political emphasis also distinguishes my analysis from a purely relational one. In his critique of the neo-classical contractual man, Ian Macneil, the founder of the relational contract school, replaced self-interest with a spontaneous “commitment to the goal of the other party⁷⁴” in a politically agnostic society. That is, he repudiated “politics” as “bourgeois” in the market economy. Macneil rejected “self-interest” and the “invisible hand” as the internal catalysts of contractual relationships as

⁷⁰Llewellyn, Karl. (1931). “What Price Contract? An Essay in Perspective” *Yale Law Journal* Vol. 40 (May): 704-51.

⁷¹Campbell, David. (2001). “Ian Macneil and the Relational Theory of Contract” in *The Relational Theory of Contract: Selected Works of Ian Macneil*. David Campbell, editor. London: Thompson and Reuters, 8.

⁷²See for instance Tucker, Robert. (1977). *The Inequality of Nations*. New York: Basic Books.

Cooley, Alexander. (2005). *Logics of Hierarchy: The Organization of Empires, States, and Military Occupations*. Ithaca: Cornell University Press.

⁷³Fried, Charles. (1981). Op. cit., the author attempts to review classical contract theory and proposes “solutions that accord with the idea of contract as promise with the decency and common sense” (p.6). I share Fried’s objectives except that in this analysis, ‘power’ is what determines ‘common sense’ without guiding it.

⁷⁴Campbell, David. (2001). Op. cit, 14

neo-liberalism would have it and equated their normative order to the Leviathan's. As Campbell notes, "it is this alteration of the 'fundamental unit' of the analysis of contract that is that the core of the relational theory of contract."⁷⁵

From this point of departure, one could see how the study of transitioning societies in East Africa led Macneil to appreciate other dimensions (spectrum) of contracts beyond the classical model. However, as this study would show, the divide between society and politics in relational contract theory still imperfectly captures the contractual sophistication of African societies. Thus, while this study embraces the broader understanding of "contract" as stated within the tradition of relational contract theory for its breadth, it rejects its dogmatic confinement of the constitution of "relation" to solidarity and reciprocity as the bases for transaction valuation.

Despite its breadth, a relational theory of contract does not adequately deal with power in part because the only perspective on political contracts it retains is the Hobbesian model. Although relational contract theory widens scientific investigation to a spectrum of contractual possibilities, "consideration of the asymmetries of power in contract [remains] relatively underemphasized."⁷⁶ The fact that Macneil developed a relational theory based upon his reading of anthropological materials and observation of "primitive societies" in East Africa may explain his sidelining of politics and power. Until recently, primitive societies in England and France were those that scholars studied with the intention of deriving normative political theories for the "average primitive" in the world. To his credit, Macneil attempted to reverse this trend by studying "primitive societies" in the non-Western world and deriving theory that still travels across spaces and academic disciplines. Nevertheless, to the extent that Africa informs the development of a relational theory of contract, the continent does so as a producer of communitarian (relational) matters only. This view is profoundly deceptive and the empirical analysis of the spectrum of contractual relationships undertaken by Africans from 1600s to 1920s in various economic and political contexts will show in subsequent chapters.

⁷⁵ Campbell, David. *Ibid*, 14.

⁷⁶ Campbell, David. *Ibid*, 50.

III. Organization

Various types of contract cases selected here have been categorized and “framed” according to what they reveal about promise making, vulnerability, liability, and power (might, status, and knowledge) dispersion between contracting parties. The discrete dimension is therefore taken into account but does not constitute the sole departing point for analysis.

In any contractual situation framing matters because it influences decision and determines the boundaries of negotiation. Keeping in mind the idea of a contract as a frame, I review and extract content from historical agreements organized thematically by terms of contracts, distribution of power, the transformative impact on parties and future choice. In other cases, where data are incomplete, I resort to the analysis of context to determine the nature of missing or incomplete information. Historical lessons are drawn as the analysis progresses.

The choice of historical cases for comparative analysis is not driven by traditional techniques of matching and contrasting to establish causality. Thus, I refer to my cases as “situations” and the decisional environment as a constellation of strategic challenges. “Situations” for comparison are chosen based upon differences in settings, yet similarity of strategic problems to be solved through contracting when a unilateral solution was either impossible or undesirable. Consequently, data configuration is theory-oriented but my goal is to contribute to theory from a non-western agential perspective. Case selection, frames and contexts, power and similarity of contractual challenges, will provide the empirical materials to illuminate the conceptual tension and limitations identified in “strategic choice” models, and the justification for more research on the organization of the decision-making process around strategic heuristics.

What Data are Not

Although dominant and regional trends appear in the data, this work is not a study of a particular country (see coding in the appendix). Inferences are generalizations of the decision-making process

based upon the constraints and opportunities of the strategic environment. The thematic and configurational organization of data is in keeping with the qualitative nature of evidence and with the question under review, which is to understand the decision making process under uncertainty, power and knowledge disequilibrium. Finally, this is an analysis obviously based on a substantial yet incomplete database. Further work will be required to understand the development of contractual practices in Africa. Source, year, date and place, number of signatures, initial terms of contracts, polarity, duration, and year of ratification are the variables used to organize data in an Excel format. Charts and figures were derived from the Excel file using the software DataDesk

IV. General Trends

The period under investigation is full of remarkable transitions on the African continent. In this project, I retain two major ones: (a) the security dilemma of European powers fighting piracy in Northern Africa (1670-1830); a situation that led to the intensification of trade with West, South, and East Africa; (b) the fight against slave trade (1807) resulting in the appraisal of 'legitimate trade' and the challenge of coastal monopolies leading to long-lasting political and economic transformations that are still visible in Africa today.

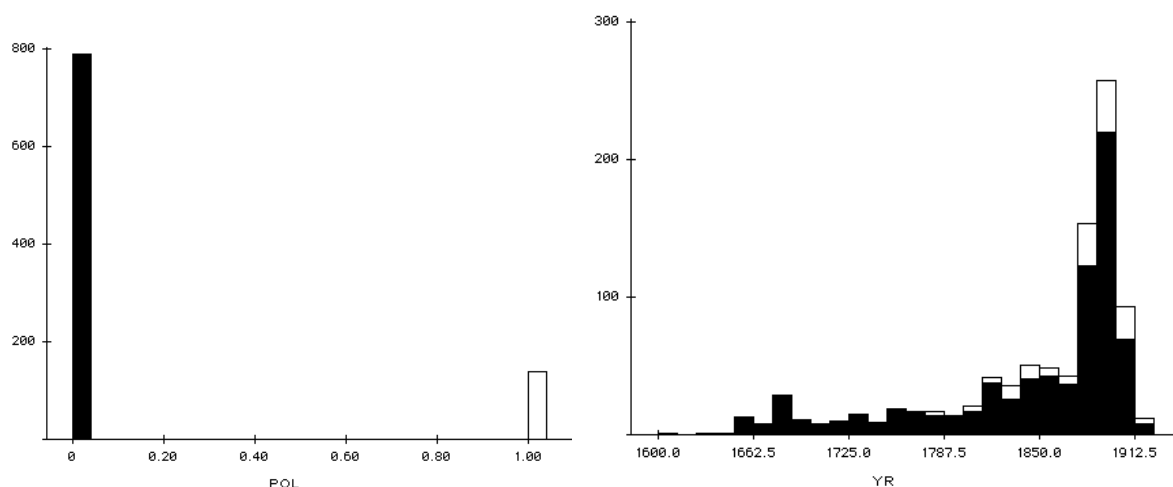
I have grouped African polities into two main categories: the early movers, or nations with a contractual history that began in the seventeenth or eighteenth centuries, and latecomers, denoting regions that entered late entry into contractual agreements mostly during place in the nineteenth-century after the abolition of the Atlantic slave trade. This simplified classification allows me to track the ways in which development in contract theory in England and the United States resonated in different parts of Africa given these two turns in international politics and commerce.

The Strategic Environment

The general operational environment is coded as a function of polarity in two ways. First, polarity, or the multiple ways power is distributed among players, is determined by the political-economy and

military ordering of the international system where [0] stands for bilateral, and [1] for multilateral transactions. Table 2 below shows that most transactions took place in a bilateral context, meaning, no more than two parties were involved. Also note that the highest number of contractual transactions is recorded from the mid-nineteenth century to early twenty first century. Thus, the distribution of polarity in the data is in agreement with Levy's⁷⁷ classification of Great Powers and what we know about the structure of world polarity in this period the period from 1600s to 1919. On the left, one notices that there were more bilateral agreements (about 800) and less multilateral agreements (less than 200) in ma dataset. On the right side, are trends of bilateral and multilateral transactions by year. It is noticeable that most bilateral transactions occurred in late nineteenth early twentieth century.

Table 2. General polarity trends (1620s-1919)⁷⁸



The study of bilateral contractual agreements in a bipolar and multipolar world enables the testing of assumptions about the function of inequality given asymmetric alignment of power between contractors. Bilateral transactions may also inform us about hierarchy and status and cases are particularly suited to identify the conditions under which contracting softens or hardens these

⁷⁷ Levi, Jack. (1985). "The Polarity of the System and International Stability: An Empirical Analysis." In Alan Ned Sabrosky, ed. *Polarity and War: The Changing Structure of International Conflict*. Boulder, Col.: Westview, 41-66.

⁷⁸ Left: Polarity: Y= number of contractual agreements X= bivariate polarity. Right: Y= number of contractual agreements X= years.

entrenched features of the world system. Theory assumes that hierarchy structures incentives⁷⁹ when the market fails. If theory is right, I expect the decision-making process of small players about whether to contract or not to contract to be significantly influenced by the interest of the international Great Powers. Here, I hope to determine what gave a competitive advantage to hierarchy or self-organization over opportunistic behavior and how different political leadership styles emerged from the manipulation of residual rights after contracting in bilateral bargaining⁸⁰ in Africa's historical development.

Asymmetric alignment of power and might among contractors has implications for domestic politics especially in transitional times. That is, beyond traditional hegemonic components of power in the international system, polarity is also a matter of framing discourse. How African domestic institutions converged or diverged in contracting patterns depended on their ability to adapt to emerging ideas that set in motion the transition from reputation-based transactions to contract domestically and internationally. At stake here was not just the problem of information management within domestic political institutions but also the question of the transformation of these institutions into producers and framers of discourse over contract. The nature of domestic institutions allows me to analyze the ways in which domestic African contractors responded to ideological change over the meaning and function of contract mostly taking place in Europe in this period.

From the complexity of African regions and time period, three main characteristics of domestic political and economic networks emerge: (a) Centralized, (b) Fragmented and (c) Commercial. Domestic institutions also reveal local monopolistic entrenchments and the way they adapted or resisted change resulting from contracting tangible and intangible goods and services with foreigners. The maritime piracy and international slave trade had built-in monopolies that were challenged through contracting. How contracting restated the principle of freedom within society and how strategy guided this process is what the next chapters will discuss in detail.

Figure 2. General spread of Africa's contractual activities (1620s-1919)⁸¹

⁷⁹ Coase, R. "The Nature of the Firm." *Economica* Vol. 4 (1937): 386-405.

Williamson, Oliver. (1975). *Markets and Hierarchies*. New York: Free Press.

⁸⁰ Napel, Stefan. (2002). *Bilateral Bargaining: Theory and Application*. First edition. New York: Springer.

⁸¹ Spread Y= Year X= African contractors. See coding of African and foreign contractors in the appendix.

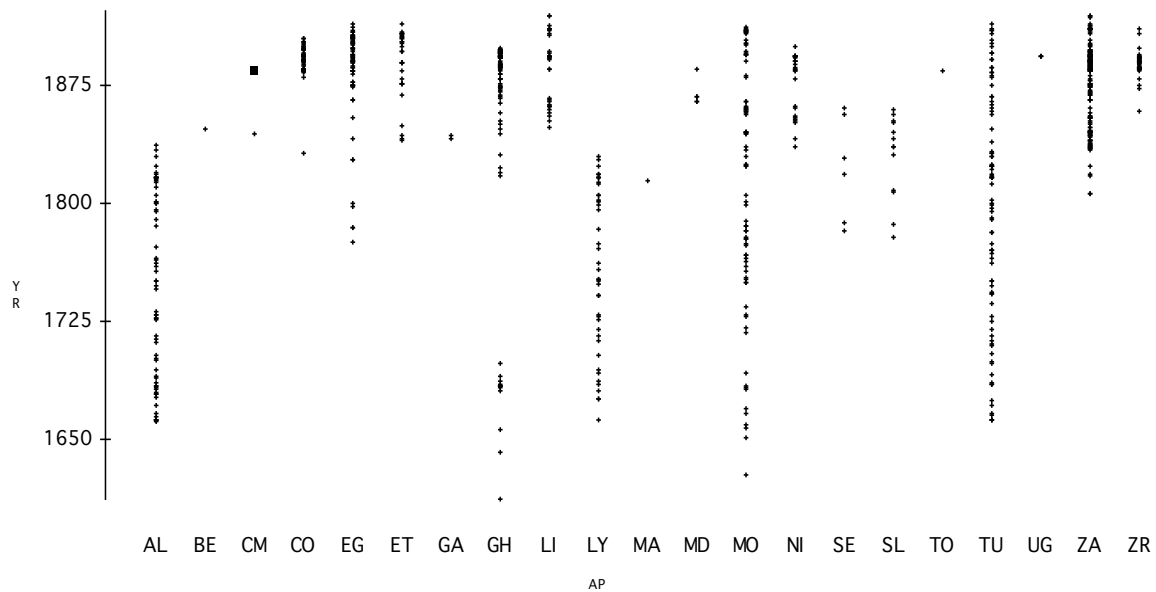


Figure 2 above shows that certain regions were more involved in contracting than others: Ghana in West Africa, Zanzibar in East Africa, Morocco in the North Africa, and South Africa. It is noticeable that all major African polities engaged in early international and regional trades were situated in the Maghreb region. Algiers, Tunis, Tripoli, Egypt, and Morocco appear as the most internationalized centers of commerce in the seventeenth century. While Morocco has the longest contractual history followed by Tunisia, the latter surpasses Morocco only in multilateral transactions. The contractual activities of Algeria and Libya ceased roughly in the early nineteenth-century. Egypt was relatively a latecomer in contractual diplomacy but remained involved until early twentieth century.

In East Africa, Zanzibar and Ethiopia had roughly the same volume of contracts. Madagascar, Mauritius started relatively late in the mid-nineteenth-century. In West Africa the early mover was Ghana and her contractual activities intensified mid-nineteenth-century along with Nigeria's. From the data from Sierra Leone and Senegal, contractual records started roughly in late eighteenth century. The peak of contractual activity was, however, recorded in Ghana and Congo the minimum in

Cameroon, Benin, Togo, and the Gambia. Only South Africa⁸² yields data for the southern part of the continent. Surprisingly, the amount of contractual activity in South Africa alone surpasses West Africa's. This work will focus on the above-mentioned regions of Africa excluding South Africa.

⁸² Cases are considered as configurations. Thus, I retained contemporary names of states to in coding data to approximate the historical setting in which contractual agreement took place. This project is not being a historical analysis of a particular country, but rather a snapshot of specific commercial and political dealings across countries inferences are limited to general patterns. Thus, 'Old South Africa' included territories that are now called Namibia and Zimbabwe, coding data from the southernmost tip of Africa, as 'South Africa' does not distract from my main purpose. The same holds true for Zanzibar, which is part of Tanzania today.

Chapter 3. Argument, Methodology, and Concepts

“A man who makes an assertion puts forward a claim...The claim implicit in an assertion is like a claim to right or to a title”
Toulmin 2008⁸³

I. Argument

This work is sustained by the following assertions:

- (a) Whether public contracting explains in a foreseeable fashion development depends on particular configurations of collective monopolistic and individual monotonic bargaining powers operating unequally in the economic and political spheres. Thus, whether or not a community sets itself on the path of economic freedom is not foreseeable based upon inequality broadly defined. Economic freedom rather takes the shape of the outcome of a confrontation between freedom, monopolistic, and monotonistic tendencies in society.
- (b) Public procurement brings together more than just contractors and indexed parties (be they public, private, or nominal), rules, institutions, commercial transactions, and quantifiable outcomes. It is argued in this work that at a more substantive level, public procurement brings together “regimes of freedom,” in other words the act of contracting in society constantly reifies principles of freedom and power.
- (c) Public procurement as restatement is predicated upon two kinds of freedoms: freedom of agents involved in economic exchange and freedom of information⁸⁴ available to agents. These two types of freedoms are important because from the perspective of future development, they are the movers and changers of contextual variables and institutions.

In putting forward these assertions, I have implicitly made a claim to a right; that is, the right to convince you my reader about the merit of my argument. In the following section, I begin by presenting the framework within which my assertions are going to be supported. Put differently, it is important I tell you the nature of the problem that preoccupies my mind. The problem is the following: what happens

⁸³ Toulmin, Stephen. (2008). *The Uses of Argument*. Updated Edition. Cambridge: Cambridge University Press, 11.

⁸⁴ Hayek, F. A. (2011). *The Constitution of Liberty*. Chicago: University of Chicago press, 49-50.

politically when a state, a community, or an organ of a state buys from external suppliers goods and services it needs to fulfill its mission? Beyond the demand and supply of goods and services, do parties change in the process? Are these sorts of transactions merely economical, or do they tell us something about the parties? What can we learn from the commercial dealings of states, politically organized communities with non-state actors/profit-driven merchants?

To these questions I answer as follows:

-Yes, something happens when in order to fulfill its public mission, a state buys goods and services from private vendors. What changes is power, information, and strategy.

-Yes, beyond demand and supply, parties involved in the process do change and their thought and decision-process tell us something about this change.

-No, transaction is not merely economical; it is also conceptual and politically meaningful; procurement involves and transforms power.

-Because public procurement locks thinking agents in a relationship that is unequal due to (1) asymmetric alignment of needs and ways of fulfilling them; (2) asymmetric alignment of contractors' status; (3) asymmetric flow of information, the supply of goods and services only tells us something about visible aspects of 'choice', not the strategy of parties.

II. Methodology

This work is a qualitative analysis of the decision-making process, knowledge, and freedom of actors in explaining procurement outcomes in historical settings. I use mixed-methods to analyze historical data on procurement in Africa. Emphasis on the decision-making process helps determine the origin as well as the effect of public procurement in historical contexts. I use process-tracing methods (Klein et. al.⁸⁵, George & Bennett⁸⁶, Schulte-Mecklenbeck et al.⁸⁷) in conjunction with

⁸⁵ Klein, Gary et. al. Editors. (1993). *Decision Making in Action: Models and Methods*. New Jersey: Ablex Publishing.

⁸⁶ George, Alexander and Andrew Bennett. (2005). *Case Studies and Theory Development in the Social Sciences*. Cambridge: MIT.

⁸⁷ Schulte-Mecklenbeck, Michael, et al. (2011). *A Handbook of Process Tracing Methods for Decision Research: A Critical Review and User's Guide*. New York: Psychology Press.

configurational comparative analysis (Rihoux & Ragin⁸⁸) to organize historical data, and to trace information acquisition and anchoring of strategic responses to historical procurement needs and opportunities.

III. Concepts and Literature Review

Before one could map out the road toward economic freedom, it is important to understand what economic freedom is in the first place and define key concepts constitutive of the two main hypotheses in this work namely freedom (choice, strategy), inequality (disequilibrium). The operational definitions, however, work within two specific theoretical frameworks relevant to this work: the strategic choice approach and the heuristic biases framework. The point here is not to review the literature on each framework. Rather, I will examine the core principles of varying approaches in order to ascertain their differences and commonalities. Both approaches specifically deal with decision-making process but differ in their treatment of choice and strategy. I begin with the first approach.

Strategic Choice Approach

The strategic approach for analyzing politics and economics has gained currency in political science and beyond. The framework was particularly embraced by scholars of international relations for its ability to bring intellectual order in the sub-discipline and for its explanative power. Lake and Powell (1999)⁸⁹ summarize the tenets and principles of the strategic approach as follows.

Strategic Choice Approach	(Lake & Powell 1999)
General focus	Choices or decisions of actors (p.3) - <i>Choice is frequently strategic***</i>
Components (Explanative power)	-Strategic problem and interaction (unit of analysis) p.4. -Distinguishes between actors and environment (p.4) -Actors defined by preference and beliefs -Environment defined by sets of actions and information available

⁸⁸ Rihoux, Benoît, and Charles Ragin. (2009). *Configuration Comparative Methods: Qualitative Analysis (QCA) and Related Techniques*. Thousand Oaks : Sage.

⁸⁹ Lake & Powell. 1999. Op. cit.

Methodology	Methodological bets (p.4) -Essential pragmatism (theory appropriate to the question) -Agnostic toward the appropriate level of analysis - <i>Partial equilibrium</i> ***
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Strategic choice is a great tool for analysis for the reasons I address below. For now, I explain why, the framework, as it is, is not adequate to analyzing cases under study in this project. I offer one major critique, and one minor comment.

The very juxtaposition of “strategy” and “choice” in strategic choice approach is telling about the pivotal roles that these two concepts play in the decision-making process. An actor (individual and corporate) acts strategically, meaning, the “ability to further its ends depends on how other actors behave, and therefore each actor must take the actions of others into account.”⁹⁰ This definition of strategy, however, is open to criticism on two counts. First, action, or choice is confounded with strategy. Second, the mere co-dependence of outcome on others’ behavior does not sufficiently tell us about strategy. In fact, all relational interactions could be said to obey the same co-dependence principle.

Jeffrey Frieden offers a better definition of strategy when he writes, “an actor prefers some outcomes to others and pursues a strategy to achieve its most preferred possible outcome... The actor’s strategy is its attempt to come as close as possible to the outcome it most prefers.”⁹¹ Now we can separate preference from strategy, but still when is strategy being acted upon? Is it at the moment choice is rendered visible? Is strategy discovered ex-ante when we know the outcome and through backward deduction derive what it was? It seems to me that knowing exactly where strategy is situated, or positioned, in the course of action, or decision-making is the challenge to strategic choice approach. Yet, scholars have not answered this question. Although strategic choice has, unlike pure rational choice models, given us actors we can easily identify with because they can bargain, the power of

⁹⁰ Lake & Powell. 1999. Op. cit., p. 3.

⁹¹ Frieden, Jeffrey. (1999). “Actors and Preferences in International Relations.” In *Strategic Choice and International Relations*. David Lake and Robert Powell. Editors. Op. cit., p. 41.

normative game theoretic assumptions still sets some limitations when analyzing complex real life cases.

The problem with strategic choice approaches to political analysis is that the qualifier, “strategic,” is assumed to describe choice, and the choice of strategy. Hence, frequency of strategy is assumed, not demonstrated. In a footnote to the influential book *The Strategy of Conflict*, Thomas Schelling, one of the fathers of strategic analysis, notes that “the term ‘strategy’ is taken, here, from the theory of games, which distinguishes games of skill, games of chance, and games of strategy, the latter being those in which the best course of action for each player depends on what the other players do. The term is intended to focus on the interdependence of the adversaries’ decision and on their expectations about each other’s behavior.”⁹² That is, strategic choice assumes rational behavior of actors acting with knowledge of the “best course of action.” Hence, by following the part of choice that is seen in the decision making process, one would expect the strategy of actors to follow the utility curve of moves since choice cannot be winning and strategy losing at the same time. Strategy, in strategic choice is therefore a tool for the betterment of judgment with a caveat; it must predict, then, defeat its adversaries’ obstruction to overcome its existential crisis.

Here, I am questioning the existential location of choice and strategy within the strategic choice framework. Failure to wonder about the location of choice and strategy may explain why a strategic choice framework for political analysis has not been fully endorsed in the vast scholarship on developing countries. Strategic choice approach has mainly contributed to understanding the behavior of the powerful and the winners in strategic games. We rarely assess strategic choice to account for failure or underdevelopment. This is not to say that the framework cannot be applied in analyzing the behavior of peripheral or weak actors. I am just pointing to the fact that the underlying assumption about choice and strategy excludes countless paradoxical cases that could otherwise help us understand how decision-making works in an environment full of uncertainty and power disequilibrium.

⁹² Footnote 1, Schelling, Thomas.(1980). *Op. cit.*, 3 .

The other problem with strategic choice approach, though not a critique *per se*, is that methodologically, it adopts a partial equilibrium perspective. Unlike equilibrium, which is supposed to include all economic activities (in this case decisional activities), partial equilibrium is a condition of economic equilibrium when only certain aspects of the market are considered to attain equilibrium, all other things remaining equal. As a formal tool for analysis, partial equilibrium allows one to formalize and understand the working of a particular case but cannot account for all possible interactions in an environment. This limitation is not necessarily a handicap except when it comes to deriving inferences that are attributed, not to the case under study, but generalized to all possible cases. Notwithstanding its formal appeal, partial equilibrium does not problematize, nor does it address the concerns of the losers in strategic interactions. Partial-equilibrium is allergic to noise, yet the world is crowded⁹³ and noisy and the bulk of people who need to make the kind of choice that could be termed 'strategic' today are those whose life is out of balance, in disequilibrium.

A note of caution is in order here. I am not suggesting that the formality of equilibrium and partial equilibrium analyses do not apply to developing countries, or peripheral states because they are not key players in international politics. So far, I am only saying that in order to address the challenges our world faces today, we need to cast our analytical nets into the sea, not on islands of strategic interactions, to include paradoxical cases. I am further arguing that this inclusion of paradoxical cases is not going to happen if *a priori*, knowledge and formalization remain paradigmatic and doctrinal. That is, if instead of harnessing and analyzing paradoxical instances within our cases, our analytical frameworks assign them to dusty edges.⁹⁴ When this happens, decisional relevance to real life situations is treated as residual and the positive or negative behavior of 'convenient' cases and actors - western and non-western alike—becomes paradigmatic simply because it fits a chosen frame.

Heuristics and Biases (H&B) Tradition

⁹³ See Friedman, Thomas. (2009). *Hot, Flat, and Crowded: Why We Need a Green Revolution*. New York: Farrar, Straus and Giroux.

⁹⁴ Brams, Steven. (2007). *Paradoxes in Politics: An Introduction to the Nonobvious in Political Science*. New York: Free Press.

With the exception of my query about the exact location of power and choice within strategic choice framework, criticism of rational choice models is not new. Again, I am not going to review the entire literature but point to major contributions of the Heuristics tradition and show how it complements the strategic choice framework.

The Heuristics and biases tradition could be traced to the Nobel Prize winner, Hebert Simon,⁹⁵ whose contribution to our understanding of the effect of uncertainty in decision-making has influenced research in many disciplines such as public administration, cognitive psychology, management, sociology, and political science, to name a few. The Heuristic biases, however, starts with Kahneman, Slovic, and Trevisky⁹⁶ and Gilovich, Griffin, and Kahneman⁹⁷. The core tenets of this tradition are summarized below.

The	Heuristic and Biases Approach	Kahneman, Slovic, and Trevisky (1982) KST Gilovich, Griffin, and Kahneman (2002), GGK
	General focus	Choices or judgment of actors -Judgment under uncertainty often rests on a limited number of simplifying heuristics rather than extensive algorithmic processing -Heuristics typically yield accurate judgments but can give rise to systematic error
	Components (Explanative power)	-Biased judgment without invoking irrationality - Decision-making categorically different -Judgment under uncertainty: availability, representativeness, anchoring, adjustment (1982). Extensions: Forecasting, overconfidence, optimism (2002) -Heuristics are not exceptional responses to excessive complexity but normal intuitive responses -Naturalistic settings, judgment by experts and by the average person
	Methodology	-Process tracing, text analysis, process coding, psychological analysis

heuristic tradition offers a cognitive alternative to analyzing human judgment without any assumption about irrationality. Empirical contribution in this tradition shows that people often make more

⁹⁵ See Herbert, Simon. (1997). *Administrative Behavior: A Study of Decision-Making Process in Administrative Organizations*. Fourth Edition. New York: Free Press.

⁹⁶ Kahneman, Daniel, Paul Slovic, and Amos Tversky. Editors. (1982). Op. cit.

⁹⁷ Gilovich, Thomas, Dale Griffin, and Daniel Kahneman. Editors. (2002). Op. cit.

systematic mistakes than they assume and do not follow the normative standard of rational choice models. Consequently, causes of substandard performance and strategies became interesting to scholars. Because human rationality is bounded, the process of judgment making is not just simpler; it is categorically different. In principle, heuristics are associated with sets of biases that show “highly efficient mental shortcuts that provide subjectively compelling and often quite serviceable solutions to judgment problems.”⁹⁸

Critics of the heuristics and biases framework have wondered whether heuristics are automatic or deliberate, meaning strategic. This question is particularly important if one considers that incentives given to the decision-maker could help reduce some of the biases identified within this tradition. The tendency in the H&B tradition is however to focus on automated heuristics independent from any strategic goal. Often cited to justify this position is Camerer and Hogarth⁹⁹ whose review of more than seventy studies concludes, “incentives can reduce self-presentation effects, increase attention and effort, and reduce thoughtless responding, but ‘not replicated study has made rationality violation disappear purely by raising incentives.’¹⁰⁰” In its first formulation, H&B tradition restricted heuristics to “natural assessment” of the task at hand without deliberative intent.¹⁰¹ It is assumed that when presented with a choice, people quickly and intuitively choose based on the similarity or dissimilarity, they see between categories and prototypes under consideration. Decision could also be based on “affective evaluation” or default choosing governed by rapid and intuitive processed relatively immune from introspection.¹⁰²

Although it contributes to understanding the cognitive realms of decision-making not dealt with in strategic choice framework, the H&B tradition has not found a way to addressing the strategic question in decision-making. Even if decisions are often made by intuitive comparison of categories and prototypes, it does not follow that the environment in which the decision occurs always makes

⁹⁸ Gilovich, Thomas, Dale Griffin, and Daniel Kahneman. Editors. (2002). *Heuristic and Biases: Psychology of Intuitive Judgment*. Cambridge: Cambridge University Press, Loc. 158-68 (Kindle).

⁹⁹ Camerer, Colin and Robin Hogarth. (1999). “The Effects of Financial Incentives in Experiments: A Review and Capital-Labor-Production Framework.” *Journal of Risk and Uncertainty* Vol. 19, No. 1-3, 7-42.

¹⁰⁰ Gilovich, Thomas, Dale Griffin, and Daniel Kahneman. Editors. Ibid. Loc. 168-78 (Kindle).

¹⁰¹ Gilovich, Thomas, Dale Griffin, and Daniel Kahneman. Editors. (2002). Ibid. Loc 168-78 (Kindle).

¹⁰² Frederick, Shane. (2002). “Automated Choice Heuristics.” In Gilovich, Griffin & Kahneman. Editors. Op. cit. Loc. 8465-8470-13109

comparison possible or desirable. By way of illustration, in the course of penning these thoughts, I used three formats to access resources. The first two formats are traditional, print copies of books (hardback and paperback) and articles (print or electronic format). The third category, however, is the electronic format for books, which given the state of technology, allows portability of reading materials but does not necessarily make page numbers readily available.¹⁰³

It may be intuitive judgment may point to 'location' or possible reference points more or less related to elements of choice at hand. These locations, however, may in reality only be shadows of categories and prototypes. Put philosophically, in a Platonic Cave it is not just the presence of shadows that keeps the onlookers captive, but also the absence of an exit strategy from the cave, a deliberative project that engages imagination, not just intuition.¹⁰⁴ Dwelling in the Cave of intuitive shadows may as well mean that judgment itself is biased; an outcome that renders the distinction between "judgment" and "bias" in the H&B tradition objectionable. Thus, in failing to make provision for deliberative intuitive judgment, the H&R tradition has little to say to a decision-maker who faces uncertainty in a new or changing environment.

Scholarly contributions from artificial intelligence literature and entrepreneurship have attempted to address some of the limitations of the pure H&B tradition. It is not surprising that this literature primarily deals with the corporate decision-maker (firm, public administration etc.), which cannot afford not to harness intuitive judgment for strategic or deliberative purposes. For instance, Sasaki¹⁰⁵ models bilateral decision-making under time uncertainty. Time constraint, Sasaki contends, is particularly interesting in accounting for decisional shift from heuristics to strategy because it introduces actors to *transitional games*. The transition in Sasaki's model occurs with the computation of opportunity cost, or the value of the next best alternative use of time. By so doing, Sasaki finds that

¹⁰³ If one were to ask me to choose between a print and an electronic copy of a book based on default reasoning, affective evaluation, or comparative prototype, I won't have much to compare the electronic book with. The technology is not just new to me (hence the challenge to my judgment), but I don't know yet whether using 'location' rather than page numbers to cite for electronic books is going to be fashionable in the future. I may as well opt to go with tradition and find the page numbers on a print version of the book to accomplish the task at hand and please my reader. Regardless of what I do, it is always going to be fallacious to think that comparison (regardless of its basis) is always cognitively possible when key factors affecting a decision are tied to the newness of the situation, be it personal, domestic, or international.

¹⁰⁴ Plato. (1992). *The Republic*. G.A. Grube and C.D. Reeve. Editors. New York: Hackett.

¹⁰⁵ Sasaki, H. (2010). "Decision Making Under Time Constraint: From Heuristics to Strategy." *Systems Man and Cybernetics (SMC), IEEE International Conference* in Istanbul, October 10-13, 2010. DOI [10.1109/ICSMC.2010.5641958](https://doi.org/10.1109/ICSMC.2010.5641958) accessed January 2012.

in evaluating the opportunity cost of time under time constraint, the strategic shift “occurs one-third of the entire or remaining duration for decision making procedures instead of a heuristic point of it half time.”¹⁰⁶ In layman’s language, Sasaki is saying that once the exogenous environment becomes a pressing issue, such as in time constraint setting, and when the decision-makers is aware of the clock ticking (meaning s/he is aware of the value of time remaining to make a decision), actors become strategic faster than they would if confined to using heuristics to assess the situation. So what has changed? Definitely not the actors but the environment in which decision-making occurs. The environment is now “transitioning” and creating new sets of uncertainties while limiting the amount of time one could subjectively use to think before taking up the challenge. Thus, without opportunity of evaluate changes in one’s environment, the transition from heuristics to strategy is unlikely to occur.

With the notion of opportunity cost, we are introduced to the logic of discovery, which guides the decision maker in several ways. First, by showing him/her (a) how to act given constraint in existing environment, (b) and how to act given the transitioning nature of the environment itself. In strategic management literature, such tools are given to entrepreneurs to allow them “effective capture of opportunities”¹⁰⁷ present and future. Where organizational heuristics contribute to developing high performing processes within firms, strategy vitalizes opportunity for firms in competitive markets.¹⁰⁸ This view of strategy within the heuristic tradition is in agreement with Herbert Simon’s understanding of bounded rationality. While Herbert Simon recognized cognitive and situational limitations to choice, he never applied these to strategy per se. Rather, he believed that the deliberate control of the environment of decision permits, not only to integrate choice, but its socialization was well.¹⁰⁹ Though social and political institutions could be viewed as integral to a collective strategy to subject individual choice to a socially sanctioned gaze.

¹⁰⁶ Sasaki, H. Ibid. 2935.

¹⁰⁷ Bingham, Christopher, Kathleen Eisenhardt, and Nathan Furr. (2007) “What Makes a Process a Capability? Heuristics, Strategy, and Effective Capture of Opportunities.” *Strategic Entrepreneurship Journal* Vol.1, 27-47.

¹⁰⁸ Bingham et. al. Ibid., 27.

¹⁰⁹ Simon, Herbert. (1997). Op. cit., 117.

From what precedes, we have two transitional options from heuristics to strategy. First, transition can occur as a result of a search for answers to challenging questions of a given time, and discovery of what the future holds given change in circumstances. Second, transition can also occur not as a free search for responses, but as an organizational project. Where responses to decisional challenges are assumed and efforts put into organizing, managing, and regulating behavior. While the first transition tends encourage the free and deliberative choices of individual and society, the second prioritizes order and control over spontaneity, awe, creativity, and freedom. As we shall see later, strategies that encouraged spontaneity and creativity collided with those that privileged control in major historical transitional crises in Africa: the fight against maritime piracy in Northern Africa (18th century) and over slavery and international trade (early 19th century).

Framework Used and Concepts

Because this project fundamentally deals with freedom as development, and more specifically with freedom of contract, it draws insight from the strength of the heuristic tradition and from the strategic choice approach. This blend of the two frameworks is what I have termed *strategic heuristics* in this project.

Strategic heuristic retains the pragmatic methodological logic of the strategic choice approach. That is, strategic heuristic allows me to answer the question about the role of freedom of contracting in development history. In analyzing historical data on public contractual agreements in Africa, I focus on the choice and decision of actors, who are distinct from their environment. In this study, actors are political entrepreneurs involved in strategic bargaining with power to influence policy. The environment is that of uncertainty due to inequality, or disequilibrium¹¹⁰ (of might, means, and knowledge) and hierarchy (might, status, and knowledge), and interdependence.

The strategic logic of interactions is my unit of analysis and I ignore the domestic/international binary. The strategic logic is derived from textual analysis of contractual historical documents. Unlike strategic choice, however, I contend that for choice and strategy to illuminate the actions of peripheral or weak

¹¹⁰ I use both inequality and disequilibrium interchangeably in this work.

actors (since I take power into consideration), (a) choice and strategy must be disaggregated; (b) uncertainty should be accounted for as not always stemming from factor endowment and prior history. Uncertainty is a product of individual and collective aspirations; it is the condition of inequality, disequilibrium, or asymmetric alignment of wants with means of satisfying them. (c) Thus, the search for balance, a strategy out of disequilibrium, is necessarily and heuristically guided.

Having presented the key tenets of the framework and methodology, I now define pivotal terms that will appear as a lightning rod to guide the reader throughout this project.

Economic freedom

In this work, the idea of economic freedom refers to the ordering of society in a way that affirms the liberty and dignity of individuals to enter voluntary economic exchanges, to produce, trade and consume goods and services, to make binding promises and suffer gains or losses as a result of market exchanges; the protection of property. Because economic freedom is embedded in normative concerns about individuals and market exchanges --some legal, other economic, and still other political-- it is an idea subject to conceptual and empirical debate.

Based upon the seminal conferences of Milton Friedman¹¹¹ between 1986 and 1994 and a series of indexes developed by the Fraser Institute¹¹² and the Heritage Foundation¹¹³ with the *Wall Street Journal*, measurements of economic freedom have been developed to help us understand the extent to which a nation's institutions and policies are consistent with the notion of economic freedom. Kapás and Czeglédi note that the existing "conceptualization [of economic freedom] has largely been driven by empirical (measurement) considerations...[referring] to the fact that the concept must be quantified, i.e. it is based on statistics."¹¹⁴ Kapás and Czeglédi further point to the limit of a concept of economic freedom driven by operational and empirical considerations only. Thus, reversing the direction of the Fraser Institute and the Heritage Foundation, Kapás and Czeglédi argue that a

¹¹¹ See < <http://www.cbe.csueastbay.edu/~sbesc/frlect.html> > accessed January 2012.

¹¹² <http://www.fraserinstitute.org/programs-initiatives/economic-freedom.aspx> accessed January 2012.

¹¹³ < <http://www.heritage.org/index/> > accessed January 2012.

¹¹⁴ Kapás Judith and Pál Czeglédi. (2007). "Economic Freedom: A Hayekian conceptualization." *New Perspectives on Political Economy* Vol. 2, No. 2: 206-7.

theoretical framework of economic freedom must come first, and measurement after if possible. Central to Kapás' and Czeglédi's understanding of what economic freedom means is the Hayekian notion of freedom which distinguishes government actions that hurt and those that foster economic freedom. The advantage of a Hayekian approach is that "it can be operationalized and it can point to a mechanism through which economic freedom may affect income in a way that is not explained in the empirical literature on economic freedom"¹¹⁵ Kapás and Czeglédi contend.

Hayek, existing economic freedom indexes, and my preliminary definition of economic freedom all relate to individuals' actions. However, Hayek's understanding of 'freedom' in 'economic freedom' puts the concept in conversation with the role and function of the state. That is, based upon historical monopoly and coercive powers of the state, freedom, according to Hayek, should accomplish at least two things: first, free the state from excess monopoly, and second, free individuals from monotony broadly defined. Conceptual and empirical definitions of economic freedom in this sense are intimately related to our understanding of the place of state monopoly over coercion and the proper size of government. For Hayek under economic freedom, what the state is permitted to do is normatively limited. Hence, freedom is the rule of law where such a rule is predicated on the belief that "rights are neither abstract, nor do they exist prior to the organization of society around political ideals and government."¹¹⁶ Hayek arrives at this conclusion based upon his analysis of the historical transformation of state economic and political monopoly, and the rule of law protecting property and in keeping both public and private coercion in check. In this perspective, what matters in terms of economic freedom is not the size of government as some scholars suggest, but its character, by which Hayek means, "the rule of law [not to be confused with a rule of law], a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal."¹¹⁷ Thus, before economic freedom becomes quantifiable, it is first and foremost defined by economic values that free the state from excess monopoly and the individual from estranged monotony.

¹¹⁵ Kapás Judith and Pál Czeglédi. Ibid. 208.

¹¹⁶ Hamowy, Ronad. (Ed.). 2011. "Introduction." In *The Constitution of Liberty*. The definitive edition. Chicago: Chicago University Press, 13

¹¹⁷ Hayek, F. A. Op. cit., 206

It follows that to write about economic freedom is to tell the story of the great transformations of collective monopoly and individual economic monotonicity; the story of ties that isolate and bind at the same time,¹¹⁸ the story of spontaneous and organized mechanisms that create collective and individual powers and attitudes necessary to bring about profitable economic exchanges. This work takes a procedural view of economic freedom. I argue that the work of transforming collective monopoly and individual monotony in a way that affirms individual dignity and liberty is fundamental to development because it creates character and ideas that when sufficiently acted upon alters the nature of social exchanges.

Thus conceptually, I am not interested in the economic sphere of measurable causes and effects. Rather, I seek to account for how collective monopoly and individual monotony can be transformed in light of individuals' economic choices whose effects are not just seen immediately, but must also be foreseen. As Frédéric Bastiat once put it, "in the economic sphere an act, a habit, and institution, a law produces not only one effect, but a series of effects. Of these effects; the first alone is immediate; it appears simultaneously with its cause, it is seen. The other effects emerge only subsequently; they are not seen, we are fortunate if we foresee them."¹¹⁹ It is interesting that Bastiat did not make a distinction between economic activity that is seen and unseen. That is, we can foresee that something unpredictable is going to happen, but we cannot predict that something unforeseeable is going to happen. Foreseeability unlike predictability is a pro-active way of seeing and making full use of particular circumstantial and broad contextual knowledge to guide analysis.

Commenting on the work of Bastiat, Hayek notes, "freedom is important in order that all the different individuals can make full use of the particular circumstances of which they only know."¹²⁰ Thus, in addition to individuals, context matters in understanding immediate and subsequent effects, direction,

¹¹⁸ Bloch, Marc. (1989). *Feudal Society: The Growth and Ties of Dependence*. Second edition. New York: Routledge.

¹¹⁹ Bastiat, Frédéric. (2011). *The Economics of Freedom: What your Professors Won't Tell You. The Selected Works of Frederic Bastiat*. Clark Super and Tom Palmer, editors. Students for Liberty and the Atlas Economic Research Foundation, xv.

¹²⁰ Hayek, F.A. (2011). "Introduction" *The Economics of Freedom: What your Professors Won't Tell You. The Selected Works of Frederic Bastiat*. Op. cit.

and character of freedom in economic exchanges.¹²¹ Amartya Sen also notes that “if freedom is what development advances¹²²” through free exchange of information and ideas, the role of active agents and freedom of agency in society is key to understanding development and underdevelopment.

I am not interested in establishing causality but foreseeability between freedom of contract and development. I am interested (1) in giving a politically and historically grounded conceptual edge to the legal notion of freedom of contract in Africa; (2) in analyzing the origin and evolution of the concept of freedom of contract in the domain of government contracting, or public procurement. Far from being a theoretical import, the notion of freedom as development, as it will be showed in this project, has a long Africanist tradition, which rediscovery this work intends to facilitate.

From what precedes, the idea of economic freedom and freedom as development is tied to key normative concerns, which are:

Freedom matters: agents involved in economic transactions that bring about development are *free* from arbitrary coercion that applies to them individually.

Context matters: cultures, conventions, spontaneous creative energies matter because they provide feedback mechanisms and learning opportunities to free acting individuals.

Institutions matter: as long as they can channel the spontaneous and creative energies of free individuals. Thus, when referring to the institutional environment, I will define it based upon the political arrangement and function assigned to individuals. One way to know the type of individual that makes up the institution is to look at the decision-making process and information management.

Inequality and Disequilibrium

Since the sixteen century until today, the question of inequality between contracting parties has been fiercely debate. The following chapter will highlight some of the key themes emerging from this debate and how they were echoed in Africa. For now, it suffices to say that in the twenty first century, the road to political freedom is, relatively speaking, known to nations. The French and American

¹²¹ These need not be restricted to ‘economic exchanges’ per se. The power of freedom and human rights, or socio-political values as in Chauffour Jean-Pierre. (2009). *The power of Freedom: Uniting Development and Human Rights*. Washington D.C.: Cato Institute.

¹²² Sen, Amartya.(1999). *Development as Freedom*. New York: Random House, 3.

Revolutions, the Civil Rights Movement in the U.S., the Third World's fights against colonialism through guerilla warfare and civil disobedience, the recent "independence" of South Sudan after a civil war and starvation, the Arab Spring that brought down old dictatorships in Northern Africa are parts of a continuum; a quest for political dignity and freedom. These historical events give substance to the idea that, sometimes, it only requires the will of a determined people to overthrow political oppression. While collective action to obtain political freedom may have changed over time, and while some tactics have proven more successful than others, the basic assumption that massive rebellion is a powerful weapon against tyranny can be documented in both very poor and wealthy countries.

Political freedom is, however, distinct from economic freedom in the sense that while the former is often influenced by the subjective perception of the freedom fighters, the latter generally rests on objective and foreseeable indicators. Thus, while political freedom may attract sympathizers, economic freedom principally attracts investors and competitors. This relational dimension of economic freedom, however, comes with some strategic requirements and cost. Before a nation can attract investors or competitors, it must have an accurate understanding of its real needs and capabilities, and prioritize action accordingly. Attempts to attract investors or competitors prior to this assessment is more likely to have harmful effects on the nation because subsequent partnerships for 'development' would be based on falsified needs that may further lead to wasteful investment.

To answer the question how do political communities attain economic freedom implies understanding the kind of actions they undertake to become attractive to themselves and to others. Communism imagined and tested the idea of massive rebellion against the modern bourgeoisie to abolish economic inequality but this model failed and left nations shackled in debt, corruption, and misplaced pride. What then, besides rebellion against a given international economic order is affordable for developing nations, particularly those in Africa, in search for economic freedom?

I answer this question by arguing that, what economically unfree agents need is to take a new look at the possibility for economic cooperation without equality. Previous concerns about "equality" have successfully identified economic gaps between and within states, but solutions proposed remain

utopian because they confuse the ends of economic freedom with its means. It might be objected that countries are already unequal, yet they cooperate. The rebuttal is that although they cooperate, states do so today as “equal sovereigns” not as unequal. Yes, inequality between states is observed empirically; but it is not yet fully integrated and understood positively in theory and practices of international economic cooperation. Where inequality has been touched upon in either development or international studies, it has mainly been treated in negative terms.¹²³ It is my contention that mistakes made in designing and implementing development strategies for economically unfree nations in the post-colonial and post-Cold War eras are partly attributable to misunderstanding of potential positive gains from economic inequality.

To claim that a positive understanding of economic inequality is a good thing for development strategy is not to make a moral apology of inequality, nor is it to suggest that inequality always works positively toward economic improvement. Rather, it is to contend that a positive approach to understanding inequality as a harbinger of economic opportunities for developing countries is a necessary condition to imagining a way out of poverty. A positive treatment of inequality is imperative because it takes seriously the real --not the imagined-- conditions of nations that aspire to economic freedom. The implication is that by remaining conversant with the lived experience of aspiring nations to economic freedom, a positive understanding of inequality leads to a search for “affordable” not “idealized” solutions for development. Following this logic, the cost of freedom is calibrated to the real capabilities of developing countries.

A positive treatment of inequality is important in political and economic analysis because inequality helps explain why people and states may desire things they don’t have in the first place. In economic terms, there is utility in inequality because inequality produces desire and longing for goods and services. Politically speaking, inequality is problematical and even embarrassing. It creates attraction without necessarily magnetizing the things desired; it creates tangible and intangible

¹²³ There are a few exceptions such as David Krasner. (2009). In *Power, the State, and Sovereignty: Essays on International Relations*. New York: Routledge. Where the discrepancy between internal and external strength is construction as a paradox Krasner’s depiction of life on the Pareto frontier in chapter 7.

expectations without guidelines or forecasting. How then do poor nations, especially those in Africa attain economic freedom given disequilibrium between the ways and means for development?

The idea that inequality should be celebrated is tantamount to saying as a metaphor its semantic conjectures could be likened to Halloween's. That is, inequality can trick or treat society into adopting the right or wrong attitude toward it.

IV. Is inequality a Trick or Treat for Developing Countries?

To say that not all countries are equal may not be a "politically correct" statement. Yet, the statement is undeniable with regard to economic development. If nothing else, we know that countries that can attract investment set themselves on a path that is likely to lead to economic transformation. Because no country is self-sufficient, states often expropriate, buy, rent, and borrow the investment they need to meet their public mission.

Although not limited to developing countries, the discrepancy between state's capacity and the means at its disposal is more pronounced in these countries. Difference in capability of states puts a premium on the development of poor countries. That is, unlike advanced nations, developing countries must go the extra step to attract foreign and domestic investments, monetary and nonmonetary investment, human and technological capital etc. The problem, however, is that under international legal and Westphalian sovereignty, states behave as if they were equal with full empirical knowledge of the contrary. Authority, legitimacy and recognition that come from these two types of sovereignty do not guarantee state effective control of either international decision-making processes, or domestic legitimacy.¹²⁴ Arguably the attributes of sovereignty as we have come to understand them are not true statements of the political and legal experience of most of the world. What then explains the fact that developing countries often choose to assert the abstract attributes of *de jure* sovereignty rather than capitalize on the attributes of *de facto* inequality to design better strategies for economic freedom?

¹²⁴ Steven Krasner. (1999) *Sovereignty: Organized Hypocrisy*. Princeton University Press: Princeton.

I argue that part of the answer rests on the negative connotation that the term “inequality” has acquired over time. Yet, development requires an integrated and balanced strategy that makes the most out of the interplay between factors that strengthen and those that weaken developing states conceptually and empirically. While Sovereignty could be said to “enhance” the international standing of developing countries, they now need to understand the strategic and economic implications of their “capability handicap” especially in this era of highly mobile capital. Put differently, we need a new approach to development based on a positive theory of inequality. Such an endeavor necessitates a big change in common opinion about inequality within states, between states, and between states and private actors in the international system. I now identify cognitive blocks to making a positive analysis of inequality in the developing world, especially in Africa.

Although this work treats inequality as *given* and is not concerned with its origin per se, it is important to provide the background of ideas that shape our understanding of inequality among nations. At the core of inequality is the debate over the impact of social organization upon the character of humankind. In his influential *Discourse upon the Origin and Foundation of the Inequality Among Mankind*, Rousseau (1712-1778) put forward the distinction between inequality established by nature or physical inequality, “which consists in the difference of age, health, bodily strength, and the quality of the mind, of the soul,” and moral or political inequality, which “depends on a kind of convention, and is established, or at least authorized, by the consent of mankind.”¹²⁵ Political inequality, he moves on to say, “consists in the different privileges which some men enjoy, to the prejudice of others, such as that of being richer, more honored, more powerful, and even that of exacting obedience from them.”¹²⁶ According to Rousseau, the transition from natural inequality, which still preserve equality, liberty, and solidarity among humankind to moral equality has to do with “progress of things, that moment, when right taking place of violence, nature became subject to law.”¹²⁷ This transition from the rule of natural

¹²⁵ Rousseau, Jean-Jacques. (2008). *Discourse upon the Origin and Foundation of the Inequality Among Mankind*. New York: Cosimo Classics, 35.

¹²⁶ Rousseau, Jean-Jacques. Ibid. 6.

¹²⁷ Rousseau, Jean-Jacques. Ibid. 6.

violence to the conventional, authorized consent for the rule of law happened, according to Rousseau, first in the realm of ideas and in two ways.

First, in assigning coercive regulatory powers to society, law, and to the state over humankind, philosophers have not “scrupled to attribute to man in that state [of nature] the ideas, or even that such ideas were useful to him,” Rousseau argues. Rather, *ideas about the state of nature hypothesized as belonging to the state of nature* were picked upon at the “bosom of society” and transferred to the state of nature.¹²⁸ It follows that in order to reverse inequality one must rediscover the state of nature as it is and not as it has been hypothesized by thinkers. Thinking of Africa today, Rousseau would probably identify the source of inequality at several historical conjectures giving rise to an artificial state and coercive public institutions and law. Although not directly related to Rousseau, the literature on the colonial origin of development and underdevelopment is an exemplar of this line of thinking.¹²⁹

Second, the language that helped establish, consent, convention, authorization of society and the civil state as substitutes to the state of nature were formal in essence and celebrated the rights individuals and property. The language of differentiation between “nature” and “civil society” was unnatural because abstract; painful in operation because property rights and individual solitude replaced natural solidarity. Again, reflecting on Africa today, Rousseau might say the power of abstraction in development economics and programs “tricks” Africa into poverty. Although not necessarily inspired by Rousseau, this line of reasoning is found in the vast literature on the role of international institutions on development. Inequality in this body of work is a “trick” because it works

¹²⁸ Rousseau, Jean-Jacques. (2008). Ibid 6.

¹²⁹ The literature could be placed into three categories. First, authors who blame colonialism for the ills of Africa in early sixties and seventies (Rodney, Walter. (1973). *How Europe Underdeveloped Africa*. Tanzania Publishing House. Samir, Amin (ed.). (1974). *Modern Migrations in Western Africa*. Oxford : Oxford University Press, 1974. Second, Authors whose who feel compelled to trace economic development back to colonial time without telling us what they mean by ‘colonialism’ (Acemoglu, Daron, Johnson, Simon H. and Robinson, James A. The Colonial Origins of Comparative Development: An Empirical Investigation (June 2000). NBER Working Paper No. W7771. Available at SSRN: <http://ssrn.com/abstract=235727>). This group often emphasizes the positive contributions of Europeans and then to shift the blame of underdevelopment to mismanagement of colonial legacies. Lastly there is the experimental school less concerned with prior legacies and which emphasis testing the theory is conditions that approximate laboratory experiments to derives policy recommendation (Nunn, Nathan. “*The Legacy of Colonialism: A Model of Africa’s Underdevelopment*.” *The Journal of Development Economics* (2003):1-37; “Relationship-Specificity, Incomplete Contracts, and the Pattern of Trade.” *The Quarterly Journal of Economics* (May 2007): 569-600; “The Long Term Effects of Africa’s Slave Trades.” *The Quarterly Journal of Economics* (Feb. 2008):139-176).

against the interest of developing countries often taken advantage of because of their weak bargaining power.¹³⁰

But, in defending the noble savages in state of nature against the individualizing abstractions of a coercive civil society, Rousseau also commits a noble and bourgeois sin. That is, he simultaneously denies his happy savage civility, the ability to think and to think abstractly. By so doing, Rousseau deprives his protégé of one of the most important assets needed to survive in an economy driven by ideas. But, Rousseau is not alone. Developing countries in general and African countries in particular continue to primarily function as “theory takers,” the testing laboratories of development ideas and this attitude is often perpetrated by well-meaning pundits.

Whether Rousseau is right in his analysis of the origin of inequality is not my concern here. Yet, his contribution to understanding the role of ideas, especially formal ideas in providing the foundation of civil society, or modern state institutions is important to my discussion. To the extent that civil society triumphed over the ideal “state of nature” with its noble savages, and noting the role of ideas in bringing about such a development, inequality certainly takes the form of an ideological challenge no longer limited to its material or moral attributes. Back to the question I asked earlier, how then can developing countries contribute to their economic freedom when the development challenge is ideological? What kind of strategic calculation could they apply to themselves so the formality of our economic and political environment works for them when it can? How can they make a case for positive understanding of their “capability handicap” without betraying their history?

The initial step is to render intelligible developing political communities’ weaknesses through formalization. But what is formalization and how does it work? Formalization, Stinchcombe writes,

means creating an abstraction in such a way that it can be taken as a “fact,” *so that most people, most of the time, don’t have to go behind it...* Formalization is unpopular because *it has been misconceived as consisting mainly of its pathologies*, while its virtues have been thought to be obtained only in those rare cases where substance does not matter...*a clearer understanding of how formality works to accurately and*

¹³⁰ Others might say that the African actors were being moved by what they perceived to be preferable incentives not because they were tricked.

usefully reflect substance will allow us to see... that at its best, [formality] does better than would do informality.¹³¹

One of the reasons inequality has not been positively engaged with in developing countries has to do with surviving memories of colonialism – which is still, relatively speaking, part of a recent past-- and the sloppy work of formalization of the concept of “colonialism” itself. Formality with references to colonialism has mainly emphasized and politicized the pathologies of colonial encounters making it harder to see the potential positive value of inequality between states in both historical and contemporary perspectives. While existing conceptualizations of colonialism may continue to sustain deep-seated mistrust of capitalism, they unsatisfactorily show developing countries the way to economic freedom and here is how.

Conventional wisdom with regard to political and economic development in Africa gives weight to the colonial origin of the modern state and institutions.¹³² Although there is no agreed upon definition of what colonialism is in the social sciences, domination and hierarchy are assumed in colonial relationships. While the existing colonial framework captures *some* aspects of Afro-European encounters in the immediate post-Atlantic slave trade period, it is neither perfect, nor costless for the following reasons. Firstly, pre-analytic inferences that take colonial ideology as a sufficient condition and a robust measure of colonial policies and outcomes often lead to conceptual stretching,¹³³ the phenomenon by which an abstract idea is presented in a way that explains all reality abstractly and nothing or very little of the same reality empirically. As Clasen & Nico put it, conceptual stretching is “absence of reflection on how to conceptualize, operationalize and measure change¹³⁴” especially change that occurs as a result of the transition from preindustrial development in the Third World. Thus,

¹³¹ Stinchcombe, Arthur. (2001) *When Formality Works: Authority and Abstraction in Law and Organizations*. Chicago: University of Chicago Press, 2. My emphasis.

¹³² Acemoglu, Daron, et al. (2001). Op. cit. 1369-1401.

¹³³ Sartori, Giovanni. (1970). “Concept Misconception in Comparative Politics.” *American Political Science Review* Vol. 64, No. 4 (1970): 1033-1053; Gerring, John. (1997). “A Definitional Analysis.” *Political Research Quarterly* Vol. 50, No. 4, (Dec.):957-994. Collier, David & James Mahon. (1993). “Conceptual ‘Stretching’ Revisited: Adapting Categories in Comparative Analysis.” *American Political Science Review* Vol 87, N. 4, (December):845-855.

¹³⁴ Clasen, Jochen, Nico A. Siegel. (2007). *Investigating the Welfare State Change: The Dependent Variable Problem in Comparative Welfare State Analysis*. New York: Edward Elgar, 4.

colonial assumptions in development studies rarely take into account the nature of change and its scope but assume rather than specify the colonial conditions that explain underdevelopment.¹³⁵

Thirdly, the overarching “colonial label” often conceals *negotiated* gains and losses of all agents involved in the transition from slavery to legitimate trade and formalized politics. Fourthly, the emphasis on the ‘destructive’ effects of Africans contracting with private entrepreneurs is not balanced with the assessment models of contracting for development in absence of duress. Public-private contracting cannot operate in a vacuum. It is sometimes couched in ideological discourse that makes the private actors potential catalysts of negative political changes or as providers of new economic opportunities and incentives.

One way to solve the insufficient cross-cultural perspective on colonialism as well as the lack of a consensual theoretical perspective¹³⁶ has been to emphasize either the motivations and interests of colonial and imperial powers,¹³⁷ the objects and subjects of colonizers’ desires, or the character of the conqueror. For instance, J.S. Furnivall argues that the distinctive national character of colonial powers

¹³⁵ Despite impressive literature on colonialism and imperialism, there is no consensus on what these words really mean. Take for example Hans Kohn’s assertion that “not every ‘imperial’ relationship is ‘colonial’ and that colonialism cannot affect non-existing territories. Kohn, Hans. (1958). “*Reflections on Colonialism*.” In *The Idea of Colonialism*. Eds. Strasz-Hupé and Harry Hazard. New York, p. 4-5. If Kohn is right, his claim raises a number of questions that beg answers: whether or not one could become colonized by decree such as the colonial acts of the Berlin Congo Conference when the entity “Congo” is still in the making? Whether to refer to modern, yet inexistent African states during the so-called colonization period as ex-colonies is a misnomer? The question here is not a question of sovereignty but of simple existence to begin with. Whether studies of colonialism in this latter case should refocus on ethnic geographies and nations as opposed to states? As Albert Szymanski (1981) notes, the use of “exploitation” as the measure of colonialism and imperialism often fails to differentiate between “fair accumulation of wealth and unjust appropriation” in *The Logic of Imperialism*. New York: Praeger, 6. Recalling Kohn’s assertion, it becomes important to ask whether the “colonial exploitation” affects previously non-existing wealth, or wealth that only acquired this nominal status as a result of price manipulations from trade and colonial traders?

In normative political theory, imperialism is associated with the extension of a political power beyond its assigned border for reasons that may vary, but always involve some forms of coercion and control of the powerless by the powerful. Both Machiavelli and Edmund Burke saw colonies as mainly places where colonizers settle to control indigenous populations and resources through formal administrative apparatuses. Contemporary scholars have argued that imperialism is “a vague and imprecise catchword...multifaceted as crystal, but lacks the crystal’s transparency and clearly defined lines” (Baumgart 1982:1). This vagueness has led other to suggest that words such as colonialism and imperialism only convey “a war of words” (Williamson 1959:335; Strausz-Hupé & Hasard 1958; Horvath 1972), a “verbal trap” emotionally charged with partisanship attributed to “anti-colonial” intellectuals (Williamson 1959: 336). Still, other scholars have argued in defense of colonies, colonization, and good colonialism (see Burns 1957; Tshibangu-Wa-Mulumba, Albert (1987). *Hommage à la Colonisation*. Paris: OKEM.

The semantic argument tries to win back anti-colonial intellectuals and nationalists who suddenly became in the post WWI, a “formidable bloc in international life” (Williamson 1959: 335). Conversely, new typologies -good versus bad- introduced in the debate reduce colonial relations to technical management and strategies, that even if adopted, still won’t reveal much about what colonialism or imperialism is. Noble and evil colonialisms do not equip us with tools that identify and measure their core attributions and characteristics. Moreover, knowing how both colonizers and colonized (imperialized) feel (good or bad) does not tell us anything about colonialism either. Finally, those who are less impressed by the fuzziness of the term nevertheless see it as an “inherent part of the capitalist world system” (Szymanski 1981:555) that can only be deterred by a radical change.

¹³⁶ Winch, Donald. (1965). *Classical Political Economy and Colonies*. London: Bell and Sons.

¹³⁷ Schumpeter, Joseph. (1951). *Imperialism and Social Classes*. New York: Augustus M. Kelley.

is one of the most salient and “an invisible export on every ship from Europe¹³⁸” in nineteenth-century. Other colonial classifications such as settler colonialism, informal (free-trade) imperialism,¹³⁹ administrative and material, domestic, cultural, racial,¹⁴⁰ internal,¹⁴¹ and psychological imperialisms etc., add to the fuzziness of the concept. Where capital, instead of men settles, capital is supposed to create “dependencies of *interest* and *affection* instead of colonies.¹⁴²”

Dorothy Jones’ analysis of early treaty system in America defines colonialism as a “distinctive blend of uplift and exploitation that was one result (and only one) of Europe’s long invasion of the world¹⁴³” where traditional diplomacy was slowly replaced by a treaty system of land grabbing. Notwithstanding Jones’ acknowledgement of the abuse of the word “colonialism” her study of the transformation of diplomatic relations in early America juxtaposes international factors and domestic hegemonic preferences of the Iroquois League in a context where settlement is important. Keeping in mind the difference between patterns of settlement in early America and Africa,¹⁴⁴ I part ways with from Jones’ conclusion that great disparity of power between treaty makers is destiny. Because great disparity of power is not exclusive to ‘colonial’ relationships attention should be paid to enduring features of the international system such as, *hierarchy* and *status* in thinking about ways to make cooperation work for the weak in spite of inequality of means.

¹³⁸Furnivall, J.S. (1956). *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India*. New York: New York University Press, 3.

¹³⁹Nkrumah, Kwame. (1965). *Neo-Colonialism: The Last Stage of Imperialism*. New York: International Publishers.

¹⁴⁰Valls, Andrew.(ed.) 2005. *Race and Racism in Modern Philosophy*. Ithaca: Cornell University Press.

¹⁴¹Hechter, Michael. (1977). *Internal Colonialism: The Celtic fringe in British National Development 1536-1966*. Los Angeles, University of California Press.

¹⁴² Furnivall, J.S. (1956). Op. cit.1, my emphasis.

¹⁴³ Jones, Dorothy. (1982). Op. cit. xi.

¹⁴⁴ On settler colonialism, scholars often differentiate settlement by choice, necessity and by force. They often recognize ambiguous relationships between settler communities and metropolitan imperial centers (see Coombes, Annie. (2006) “*Memory and History in Settler Colonialism.*” *Rethinking Settler Colonialism: History and Memory in Australia, Canada, Aotearoa New Zealand and South Africa*. Ed. Annie Coombes. Manchester: Manchester University, 2006). However, this literature fails to determine the weight of such ambiguity, contradictions (see Penvenne, Jeanne M. (2005). “*Settling Against the Tide: The Layered Contradictions of Twentieth-Century Portuguese Settlement in Mozambique.*” *Settler Colonialism in the Twentieth Century*. Eds. Caroline Elkins and Susan Pedersen. New York: Routledge) and motivational determinants in the definitional frontiers of the concept of colonialism and imperialism. Caroline Elkins and Susan Pedersen argue that prior to the twentieth century, the logic of settler colonialism was not exploitation but elimination, a view that excludes colonial expansion with military advantage or trade (2005:2). Interestingly, Elkins and Pedersen also add that settler colonies often find it advantageous to weaken the metropolitan control rather than maintain an ambiguous relationship with the mother country. The two fundamental characteristics of settler colonialism, namely, independence from the metropolis and the logic of extermination raises two important questions about the sources of domination, colonial liability, comparative and absolute advantage. To what extent *de facto* or *de jure* independence of a settler community forces us to narrow our definitional analysis to the actions of few lost Europeans adventurers, refugees, and migrants? Presumably, it is from the twentieth century that settler colonialism starts reversing this “dual defeat of indigenous populations and of the imperial metropolises [because it is] marked by ongoing negotiation and struggle” (Elkins, Caroline, Susan Pedersen (eds.). (2005). *Settler Colonialism in the Twentieth Century*. New York: Routledge, p. 3-4) due to highly sensitive public opinions in both the metropolises and in the colonies.

The concept of colonialism is subject to interpretation and misinterpretation. Ranajit situates the misrepresentation of power relations within historical discourse, in nationalist and colonialist writings. This misrepresentation, he argues, is in part due to the failure of historiographers to situate themselves “outside ideological domains of the objects criticized” or praised.¹⁴⁵ While I find Ranajit’s critique of colonial historiography illuminating because his argument captures very well paradigmatic fluxes, fusions, and displacements in the concept, I am not convinced that genuine critique of hegemony, by which he means “a condition of dominance such that, in the organic composition of domination, persuasion outweighs coercion¹⁴⁶” is solely a prerogative of nationalist epistemologies of contestation and resistance.¹⁴⁷ The absence or the decline of hegemony in world political economy certainly allows “international regimes” to keep options for critique, cooperation, and contestation open.¹⁴⁸ With regard to the proposal put forward here, a sound critique of hegemony is, and should be, the prerogative of realistic and pragmatic understanding of hegemony and hierarchy work abstractly in the first place. Failure to do this can only perpetuate the fallacy that regime change alone from colonial to post-colonial, from communist to socialism, from democrat to republican suffices to bring about economic freedom.¹⁴⁹

Thus, definitional frames of colonialism and imperialism are not value free regardless of who makes them. Existing classical and modern definitions of colonialism are studied from the colonizer’s vantage point. From what precedes, one should exclude strategic interactions such as bargaining and contracting, from the so-called colonial vocabulary. Existing definitions of colonialism prohibit choice. Presumably, nobody chooses to be colonized. Colonization is *always something that is done* to a

¹⁴⁵Ranjit, Guha. (1997). *Dominance without Hegemony: History and Power in Colonial India*. Cambridge: Harvard University Press, 13.

¹⁴⁶Ranjit, Guha. Ibid. 23-24.

¹⁴⁷Crowder, Michael. (1988). “ ‘Many Questions – Some Answers’: African Resistance in West Africa – A General View.” In *Bismarck, Europe, and Africa: The Berlin African Conference 1884-1885 and the Onset of Partition*. Stig Förster and Wolfgang Mommsen. Eds. Oxford: Oxford University Press; Ansprenger, Franz. (1988). “African Perception of the New European Policies in Africa during the 1880s.” In *Bismarck, Europe, and Africa: The Berlin African Conference 1884-1885 and the Onset of Partition*. Stig Förster and Wolfgang Mommsen. Eds. Oxford: Oxford University Press, 1988.

¹⁴⁸Keohane, Robert. (1984). *After Hegemony: Cooperation and Discord in the World Economy*.

Princeton: Princeton University Press; Tomz, Michael. (2007). *Reputation and International Cooperation: Sovereign Debt across Three Centuries*. Princeton: Princeton University Press.

¹⁴⁹See Vincent Ostrom. (2000). *The Meaning of Democracy and the Vulnerability of Democracies: A Response to Tocqueville’s Challenge*. Ann Arbor: University of Michigan Press.

people. Where strategic behavior is recognized, it is mostly seen as the colonizer's prerogative with tremendous effects on institutional development.¹⁵⁰

The State and Inequality

To leverage a critique against existing definitional frames of colonialism is not to deny the historical organization of power relations that approximate certain features of the concept. Rather it is to highlight the usefulness of evidence-based investigation in historical settings relevant to current debates. Most of the data to be presented in subsequent chapters are historical not because I wish to reconstruct history, but because I recognize the tremendous power of priors in shaping the way we view the world, possibility and impossibility therein. For example, states, like human beings are not just made of priors; they are uniquely and continuously endowed with sets of aspirations which intelligibility and scope are embedded in history and yet transcend any prior experience.

The use of historical data seeks to establish the similarity of challenges between past and present situations and to explain why understanding critical turning points¹⁵¹ in African contractual development could help "endogenize" debate over public procurement reform among policy-makers today. Today, state leaders should pay more attention to debate over public procurement reform not because the World Trade Organization, the U.N., OECD countries, and tied-aid dictate so, but because as data presented below show, procurement outcomes have been and still are central to the continent's political and economic development. Prior to the emerge of current legal discourse over public procurement reform in 1990s, contractual historical practices in Africa provide us with a wealth of information that gives an African content to the debate, which so far has been portrayed as originating from Anglo-American common law historical practices only.

¹⁵⁰ See Acemoglu, Daron and James Robinson. (2006). "Economic Backwardness in Political Perspective." *American Political Science Review* Vol. 100, No. 1 (February):115-131.

_____. (2001). ; Nunn, David. "Relationship-Specificity, Incomplete Contracts, and the Pattern of Trade." Working Paper (June 2003). < <http://www.uoguelph.ca/~cneh/pdfs/nunn.pdf>.> accessed? I thank Miriam Goldman for this reference. Discontent with development economics does not stem from its ignorance of economics but from the failure to establish similarity between dynamic processes at different stages of development in the West and those unfolding in the Rest today. See Deepak Lal. (2002). *The Poverty of 'Development Economics.'* London: The Institute for Economic Affairs.

¹⁵¹ Larson, Deborah. (2001). "Sources and Methods in Cold War History: The Need for a New Theory-Based Archival Approach." In *Bridges and Boundaries: Historians, Political Scientists and the Study of International Relations*. Colin Elman and Miriam Elman Eds. The MIT Press: Cambridge.

The inequality among political communities that arises as a result of discrepancies between nations' goals and means of attaining economic freedom has the potential to better our understanding of economic cooperation in a world structured around hierarchy and status. This work is concerned with ways of undoing this kind of inequality, the inequality of abilities resulting from new aspirations while working at the same time with enduring features of the international system such as hierarchy and status. Thus, "inequality of means" is a treat to our theoretical conceptualization of development and to developing countries' strategic quest for ways of realizing economic freedom. This work is aimed at spelling out possibilities for broader and pragmatic economic cooperation toward economic freedom for developing countries, especially those in Africa. Of the possible suggestions offered here, a Marxist type of revolution is not one of them.

I wish the saying "to whom much is given much is expected" could be easily applicable to political and economic development. To undo the type of inequality conceptualized here, much is expected from those to whom not much or nothing has been given except the ability to choose and act strategically. Now, this may sound simplistic as it might be argued that sometimes "choice" is a bourgeois prerogative not always available to all. My counter-argument is the choice that brings the means of development closer to the need for economic freedom is not just a matter of considering the options available in a finite universe of opportunities. To be consequential, choice for the procurement of means of economic freedom requires a change in the common ideas about the political and economic functions of inequality of means, the role of market and governance in developing countries. In some sense the choice of ways of attaining economic freedom for developing countries may necessitate that they take a new look at not just the material accomplishment of the West, but more importantly, at the ideas that fostered its economic transformation.

The choice of ways and means for economic freedom may entail gleaning the same ground over and over again and harvesting each time new ideas that have gone previously unnoticed. For developing countries in particular, the task of farming ideas for economic freedom could be painful because it involves setting aside misplaced nationalistic pride, and revising ideas and practices

previously ignored starting with those pertaining to our various colonial narratives in the past and globalizing injunctions in the present time. Gleaning the past this way and sorting through perspectives on global public procurement 'revolution' is the step in the right direction that, hopefully, could encourage African leaders to take the market, governance, and freedom seriously.

Chapter 4. The Fiscal-Military Origin of Procurement Contracts

But let concealment, like a worm i' the bud,
Feed on her damask cheek...
Twelfth Night, Act 2 scene 4, Shakespeare

In the previous chapters, I laid down the theoretical premises that guide my empirical investigation of historical contractual cases from the seventeenth to early twentieth century in Africa. I highlighted the pragmatic and critical essence of the strategic heuristics framework used in this work. The framework is pragmatic because it attends to actual cases of human interaction in natural settings, and critical because it primarily seeks to understand the explanatory limitations of existing concepts of decision-making. The natural setting, I said, is that of uncertainty, inequality, and disequilibrium, which I conceived as products of expectations, not just of mere factor endowment and prior history. In this chapter, I start my descent into empirical analysis by briefly presenting the historical context in which contract theory arose in Great Britain.¹⁵² I demonstrate that the rise of government contracting coincided with the emergence of the expansionist modern state. The main argument of this chapter is that the legal underpinning of contract theory, mostly taking place in America in the nineteenth-century and informing debates over public procurement reform today, were unique to the United States. Outside the U.S., and more specifically in Africa, experience with government contract was political in nature and tied to the expansion of Great Britain and other European powers on the continent. Although I mainly focus on the evolution of contract theory and practices as related to the colonies within the Anglo-American tradition, France,¹⁵³ Prussia,¹⁵⁴ Italy¹⁵⁵ and Spain¹⁵⁶ had similar recourse to contracting their expansionist policy that I will not address here.

I. Politics of Transition in Seventeenth Century Great Britain

¹⁵² Throughout this work I use the term 'Great Britain' for the sake of conformity but one should keep in mind that the political entity named as such underwent dramatic transformations under different names during the period under consideration (17th to early 20th century). When quoting from secondary sources or citing specific terms of a contract, I use the name that appeared in the original document or reference.

¹⁵³ Lewis, Gwynne. (2004). *France 1715-1804: Power and the People*. New York: Longman.

¹⁵⁴ The "Great Elector" of Brandenburg, Frederick William (1640-88) open trade with West Africa in 1681 with a treaty with three caboceers of Cape Three Points (Ghana) and later helped launch the Brandenburg African Company in 1682, which was given trade monopolistic rights over unoccupied areas of the coast of Guinea. The company successfully brought a few indigenous groups under its protection in 1685 and managed to build a trading post in an area that gave it a strategic advantage over the gold trade. For details see (documents 1, 2, 7, 13, 16-19) in Jones, Adam. (1985). *Brandenburg Sources for West African History 1680-1700*. Stuttgart: Franz Steiner Verlag Wiesbaden.

¹⁵⁵ Livy, Titus. (1965). *The War With Hannibal: The History of Rome from Its Foundation*. Trans. Audrey de Selincourt. Penguin Classics.

¹⁵⁶ See Calabria, Antonio. (1991). *The Cost of Empire: The Finances of the Kingdom of Naples at the Time of Spanish Rule*. New York: Cambridge University Press.

Before the legal refinement of contract theory in the nineteenth-century, public procurement contracts were already in use as public policy tools to support the Crown confronted with political opposition at home and costly expansionist wars abroad in early seventeenth century Great Britain. As a public policy instrument of the modern state, public procurement was first used to maintain royal control over the bureaucracy (the Parliament), public spending, and foreign policy.

Data collected begin in the year 1627 with a commercial agreement between the Kingdom of Morocco and Great Britain.¹⁵⁷ The year is highly symbolic because shifting international discourse over the meaning of contract in early seventeenth century created political anxiety as well as commercial and legal opportunities that later transformed the ordering of power internationally and domestically, in the *metropoles* as well as in the colonies. Victoria Kahn¹⁵⁸ traces the cultural beginning of conversations over contracts in early seventeenth-century Great Britain as emerging from a crisis of political obligation. By shifting discourse, from “the medieval pact of subjection, in which a corporate body of the people subjects itself to the sovereign” to a new discourse of obligation based on the freedom of individuals to enter social and political contracts, early modern contract theory was, according to Kahn, “a radically new poetics of the subject and the state.”¹⁵⁹ Thus, at a very early stage, conversations over contract were ‘powerful’ in essence because the discourse attacked political and social entitlement based on long-held corporatist views about the individual. Anxiety over the proper dimension of contract and contractual obligation in Great Britain was at the core of disagreement between royalists and parliamentarians ending with the beheading of a king, the triumph of the Parliament, and the displacement of the monopoly of the Church of England on Christian worship. But debates over contract were not just confined to politics. Contract theory emerged as a “central theme

¹⁵⁷ Morocco's diplomatic relations with England go back to the thirteenth century between King John and Sultan Muhammad an-Nasir when the Crown wanted support against France. “With the defeat of Portugal at the Battle of the Three Kings in 1578, the way was clear for Queen Elizabeth I (1558-1603) and the Sa’adi Sultan Ahmed al-Mansur (1578-1603) to strengthen the economic and political links between their two countries. Political relations were strengthened as a result of reciprocal diplomatic missions and commercial relations were strengthened through the creation of the “Barbary Company” in 1585 by which Britain obtained a monopoly on trade with Morocco for twelve years. Following the deaths of Al-Mansur and Elizabeth I in 1603, many missions were exchanged during the seventeenth century to hold talks on the release of English captives incarcerated in Morocco.” Source Embassy of the Kingdom of Morocco in London < <http://www.moroccanembassyinlondon.org.uk/en/MoroBri.html>> Accessed March 2012.

¹⁵⁸ Kahn, Victoria. (2004). Op. cit.

¹⁵⁹ Kahn, Victoria. Ibid. 1.

in the struggle over political legitimation and obligation in the 1640s precisely because it could be inflected in a variety of ways,¹⁶⁰ Kahn adds.

The inflection of contract happened in the late eighteenth century not just in theory but in practice also. Despite the triumph of the Parliament in the seventeenth-century, the Crown retained a few prerogatives such as having Parliament adopt his Civil List (total expenditures for his service) without review. The prerogative to submit public spending to the Crown's discretionary inventory eventually became a major source of influence and control over Parliament in the eighteenth-century. Holding the purse of public spending, the Crown was able to recklessly spend money in the colonies and tales of corruption quickly raised an investigation of public finances. According to Reitan, a select committee of the House of Commons in a 10 pages report dealing with the ordnance of contracts "described in detail irregularities that presumably applied to contracting for the army and navy as well in 1763."¹⁶¹ So far, the King had used the colonies to strengthen his own power. The origin of corruption is worth mentioning here because it shows that it wasn't just legal theory or economics that inflected the language and practices of contract. Politics played a pivotal role in giving a global edge to contract as public policy instruments with tremendous effects on the administration of colonies situated in the Americas and beyond.

It was not just the British Crown who used contracts to coopt the Parliament. Due to the absence of an adequate bureaucracy, early Parliament was more an adjudicatory than a legislative body " 'making marginal adjustments to the reigning state of affairs' without any significant alteration of the social system."¹⁶² One of the consequences of the discrepancy between claims of independence from the Crown and the lack of effective means to proactively influence policy was that Parliament quickly became an institution of consultants for private interest seeking to extract concessions from the Crown. As Ayitah writes, "the Parliamentary process itself sometimes represented a statutory bargain. Petitioners would want a Bill passed in order to enable them to do this or that --- and Parliament might,

¹⁶⁰ Kahn, Victoria. Ibid. 22.

¹⁶¹ Reitan, A. Earl. (2007). *Politics, Finance, and the People: Economical Reform in England in the Age of the American Revolution, 1770-92*. New York: Palgrave Macmillan, 7.

¹⁶² Ayitah, P.S. (1979). *Rise and Fall of Freedom of Contract*. Oxford: Oxford University Press, 93.

in effect, require a *quid pro quo* from the petitioners in return for the powers they sought.¹⁶³ Baker estimates that between 1775 and 1783, “eighteen of the forty four contractors were Members of Parliament during the time they held contracts.”¹⁶⁴ It is in this context that most of the Royal charters were granted to companies operating overseas such as the East India Company operating in Africa, and the South Sea Company trading in South America.

The economy of war with the American colony further led to a rise in government contracting. Thomas Harley and Henry Drummond Banks received a contract for the “making of remittances of specie to the troops in North America, for which they received a commission of 1 ½ percent.”¹⁶⁵ Brewer notes that the “most lucrative contracts were for the supply and remittance of money either to garrisons such as Gibraltar or to pay troops in Europe or American services that the big merchant and banking houses which underwrote government loans were best equipped to provide.”¹⁶⁶ Financial speculators benefitting from the strength of the fiscal-military English state were not just lending to or contracting with the Crown. They operated “monopolies granted by royal fiat, or the tenure of offices in the fiscal apparatus.”¹⁶⁷ Before the economic reforms introduced in Great Britain in 1780s, political connections dispensed government contractors and public debt managers from competitive bidding. Although criticism of corruption shifted from moral to social arguments in the eighteenth-century, corruption remained rampant in corporate¹⁶⁸ and public bodies,¹⁶⁹ including those involved in international trade and in the management of colonies¹⁷⁰ in Africa and beyond.

The process of institutionalizing contract as an emerging discourse and practice of the state was stochastic and remained so for a long time. Atiyah notes that as early as the sixteenth-century, Englishmen were already seeking greater freedom to deal with landownership in new ways. Central to

¹⁶³ Ayitah, P.S. Ibid. 94.

¹⁶⁴ Baker, Norman. (1971). *Government and Contractors: The British Treasury and War Supplies 1775-1783*. The Athlone Press, 216.

¹⁶⁵ Reitan, A. Earl. (2007). Op. cit. 23.

¹⁶⁶ Brewer, John. (1989). *The Sinews of Power: War, Money and the English State, 1688-1783*. Boston: Unwin Hyman, 208.

¹⁶⁷ Brewer, John. Ibid. 207.

¹⁶⁸ Sweet, Rosemary. “Corrupt and Corporate Bodies: Attitudes to Corruption in Eighteenth-Century and Early Nineteenth-Century Towns.” In *Corruption in Urban Politics and Society, Britain 1780-1950*. James Moore and John Smith, eds. Burlington: Ashgate

¹⁶⁹ Moore, James. (2007). “Municipal Corruption and Political Partisanship in Manchester 1885-95.” In *Corruption in Urban Politics and Society, Britain 1780-1950*. James Moore and John Smith, eds. Burlington: Ashgate.

¹⁷⁰ Sunderland, David. (2004). *Managing the British Empire: The Crown Agent, 1883-1914*. Suffolk: The Royal Historical Society.

the Englishmen concerns were what A.W.B. Simpson calls the “calculus of future interests¹⁷¹” that is, how to go about maximizing possible use and ownership of land. The establishment of trust and the doctrine of estates to some extent afforded transferability of ownership for future enjoyment. Blackstone’s *Commentaries on the Laws of England* (1765-69) did provide some answers to the concerns of property owners. But, it wasn’t until Maine published his *Ancient Law* in 1861 that the changes in law governing property were conceptualized as a progressive transition from status to contract, by which the author meant the pervasiveness of legal relationships. As James Gordley writes, a fierce debate over fairness erupted between legal theorists and proponents of state intervention. While the theorists favored the will of the contracting parties, critics argued that without taking into account substantive fairness, “the terms of contract must necessarily reflect, not justice but power.”¹⁷²

The American revolution of 1776 was a revolt against unfair treatment by Great Britain and the denunciation of the Crown’s monopolistic power, the incompetence and corruption of Parliament, and reckless public spending based on a heavy tax burden. Unlike Great Britain, however, the court in the United States was later constitutionally empowered through the notion of judicial review¹⁷³ to shield individuals from the discretionary powers of both the executive and the legislature. It is therefore not surprising that the concept of freedom of contract later emerged in the United States with a strong legal emphasis on the meaning of contract in the nineteenth century, a critique of corporatism, and the valuing of entrepreneurship. But even in the United States, legal formalizations of contract were constantly challenged and inspired by case law showing more stochastic behavior among contracting parties than theory captured. Although law and politics later took parallel routes in theory, case law in the nineteenth century United States remained “a chaotic mass of materials...[whereby] the cases

¹⁷¹ Simpson, A.W.B. “Land Ownership and Economic Freedom.” In *The State and Freedom of Contract*. Harry Schreiber. Ed. Stanford: Stanford University Press, 14.

¹⁷² Gordley, James. (1998). “Contract Property and the Will.” In *The State and Freedom of Contract*. Harry Schreiber. Ed. Stanford: Stanford University Press, p. 85.

¹⁷³ By allowing the court to adjudicate the constitutionality of statutes in *Marbury v. Madison* in 1803, the United States was not just innovating within the Common Law tradition, it was introducing a legal device that was not available to civil law judges in continental Europe such as France, Germany, and Italy, that were equally invested in Africa. Sir Edward Coke introduced the idea in Great Britain. Although aware of this work the court in the U.S. did not use Coke’s doctrine to establish a precedent for judicial review.

[could not] be explained in accordance with the simplicity offered by new contract theory¹⁷⁴ only. What is interesting from my perspective is the fact that nineteenth-century contractual cases in the United States surprisingly yield data very similar to contractual undertakings in Africa at roughly the same time.¹⁷⁵ I will return to this development later.

The newness of the challenges nations faced due to significant changes in world trade and ideas about freedom led to different uses of contract mechanisms for problem solving. While some nations adopted contract mechanisms to negotiate sovereignty with imperial powers (Japan,¹⁷⁶ Kuwait,¹⁷⁷ African territories, etc.), other emphasized the use of contract as a metaphor of freedom¹⁷⁸ to assert individual and commercial rights (United States). Still others used contracting to reinvent and resize public bureaucracy in a modern world (Great Britain).

II. Public Procurement and Corruption

Public procurement in particular was entrenched with the rise of the fiscal-military power of the expansionist Crown, whose authority had only been partly challenged by Parliament in the aftermath of English Civil War. As Brewer notes, “before mid-seventeenth century the chief beneficiaries of the growth of standing armies were not rulers but private entrepreneurs... But by the mid-seventeenth century rulers were gaining control of the forces that marched in their name, and self-sustaining warfare.”¹⁷⁹ The fiscal-military origin of public contracting in Great Britain is particularly relevant to the political development of the non-western world, which is the focus of this thesis. It allows one to investigate the missing link between law and politics historically and evaluate the strategic implication for non-Western nations over time. By tracing the connection between on the one hand, shifting focus in debates over monopoly, corruption, freedom of contract and fairness in Great Britain and the United

¹⁷⁴ Kreitner, Roy. (2007). Op. cit.3.

¹⁷⁵ Spelling, Thomas. (1893). *A Treatise on Trusts and Monopolies Containing an Exposition of the Rule of Public Policy against Contracts and Combinations in Restraint of Trade, and a Review of Cases, Ancient and Modern*. MOML Legal Treaties, 1800-1926. Print edition.

¹⁷⁶ Auslin, Michael. (2004). *Negotiating with Imperialism: The Unequal Treaties and the Culture of Japanese Diplomacy*. Cambridge: Harvard University Press.

¹⁷⁷ Rush, Alan. (1987). *Al-Sabah: History and Genealogy of Kuwait's Ruling Family 1752-1987*. Ithaca: Garnet & Ithaca press. Slot, B.J. (2005). *Mubarak Al-Sabah: Founder of Modern Kuwait, 1896- 1915*. London: Arabian Publishing.

¹⁷⁸ Stanley Dru, Amy. (1998). Op. cit.

¹⁷⁹ Brewer, John. (1989). Op. cit.11.

States, and on the other hand historical contractual cases that took place in Africa, I establish similarity of strategic contexts.

The crisis-like political context in which debate over contract theory grew in Great Britain has further theoretical implication for the analysis of 'colonial' expansion abroad. As a leaven of the expansionist state, contracting added to the strength and weakness of Great Britain. If on the one hand non-state actors were called upon to supply goods and services to the expansionist state, on the other hand, contractors simultaneously limited imperial expansion strength by potentially increasing institutional moral hazard. As Sunderland puts it, in addition to a more active presence in the colonies, there was a danger that suppliers' self-interest "would weaken the legitimacy of British rule in the eyes of both ruled and rulers."¹⁸⁰ This real fear forces us to rethink dominant assumptions about power, when analyzing Great Britain's foreign expansion.

It is my contention that hesitation about the wisdom of government contracts to manage foreign expansion was symptomatic of a struggle over the power devolved between the Crown and the Parliament. Government contracting did not just shift public responsibility to private actors, it also fostered new regimes of freedom through the creation of the Crown Agents, a "non-representative form of administration that comprised a governor and a nominated council"¹⁸¹ to run the business of government in the colonies. The Agents were appointed by the Crown and enjoyed administrative and financial independence from the Parliament.

That is, Great Britain's foreign expansion taking place at this time was the artifacts of a waning royal power desperately trying to maintain the illusion of effective control through the hiring of contractors. By contracting at home and expanding abroad, the use of contractors worked as a concealment strategy that sought to hide the bureaucratic corruption, which, like a worm in the bud, fed on Great Britain's damask cheek! Exemplifying corruption, or at least conflict of interest from government contracting was the frenetic debate over the role of contractors in Africa. Among other

¹⁸⁰ Sunderland, David. (2004). *Op. cit.*, 17.

¹⁸¹ Sunderland, David. *Ibid.* 2.

accusations, the Unionist government's image was tarnished by Parliamentary allegations; reports of corruption, and conflict of interest because most MPs were also board members of companies granted government contracts in Africa. In 1892 "three Conservative Members who had voted for a Motion in favor of a grant-in-aid to finance a preliminary survey for a railway to link the East African coast to Lake Victoria-Nyanza" saw their vote disallowed after a motion citing "infraction of the privileges of the House," was introduced.¹⁸² In the same period a number of colonial contract deals came under public scrutiny among which were Joseph Chamberlain's ties to the Royal Niger Company in Nigeria, war contracts awarded to his brother during the Boer War in 1899, and speculative financial companies owned by Cecil Rhodes.



***News for the enemy**

Mrs. Brown. "HAVE YOU HEARD AS HOW OUR JIM HAS GOT HIS STRIPE?"
Mr. Smith. "HUSH, WOMAN! DON'T YOU SEE THAT NOTICE?"
(Punch, Vol. 150, June 21 1916)¹⁸³

The cartoon above satirized the position of the government on public debates over contracting. Despite critics¹⁸⁴ calls for an investigation of the Boer War contracts "government took the line that

¹⁸² Searle, G.R. (1987). *Corruption in British Politics 1895-1930*. Oxford: Clarendon Press, 43

¹⁸³ Gutenberg Project <http://www.gutenberg.org/files/38899/38899-h/38899-h.htm> accessed March 2012

holding an inquiry while the war was in progress would simply clog the wheels of the administrative machine.¹⁸⁵ At stake here was not just the question of regulating government contracts, but also concerns about the power of Trust, the monopolistic prerogatives of contractors, and their influence on government. According to Searle, the affair of the South African war contracts contributed, albeit in a minor way, to the disintegration of the Unionist government.¹⁸⁶ Thus, government contracting led to the consolidation of built-in monopolies and threatened the freedom of both the central colonial administration and of the people within soon-to-be administered territories in Africa.

Although European government intervention in Africa in late nineteenth century after the conference of Berlin progressively sought to harness corporate monopoly for the sake of empire, the displacement of private monopolies through politics had, comparatively speaking, a worse effect on the managed territories. That is, while the restriction on political freedom might have been similar under private and public monopoly, only with the latter came financial dependency. Late nineteenth-century 'hesitant' expansionist Great Britain used the language and institution of the market to invent national debt, a concept that was almost inexistent under private monopoly in Africa. This outcome was in part due to a shortage of capital to sustain Great Britain's dependencies (Crown colonies, Protectorates etc.), and more importantly, to a conflict of authority between various colonial agencies competing for the management of development programs: the Secretary of State, the Colonial Office, the Treasury, and the Crown Agents.

The speculative bond between creditor and debtor was only one of the many bonds the expansionist modern state. As the historian Niall Ferguson rightly points out, "in many ways the bond market was interesting precisely because it concerned itself with other bonds as well: above all, the usually implicit contractual bonds between the ruler and the ruled, the elected and the electors, but also the bonds –more often (though not always) contractual –between states."¹⁸⁷ The Colonial Loan

¹⁸⁴ Important to this debate over government contracting during the Victorian era were arguments put forward by Henry Labouchere, a member of the parliament later accused of share-rigging.

¹⁸⁵ Searle, G.R. (1987). Op. cit., 72.

¹⁸⁶ Searle, G.R. Ibid. 79.

¹⁸⁷ Ferguson, Niall. (2001). *The Cash Nexus: Money Power in the Modern World, 1700-2000*. New York: Penguin, 21.

Act (1899) approved loans to the colonies from the Local Loans Fund at an artificially high rate with the condition that “each borrowing colony was to pass legislation stating that any loan under the act constituted a ‘first stage’ on the revenues and assets of the colony...The effect of [this] lien clause made it more, not less, difficult for a colony to borrow money in the open market once it had borrowed money under the act.¹⁸⁸” Most affected by this Act were the Cape of Good Hope, Mauritius and Natal. Although the Colonial Stock Act (1900) later made available loans at lower interest rate from the open market to finance public works and increased the number of borrowers in Africa, outstanding debt increased also a decade after in the Gold Coast (Ghana), Mauritius, Sierra Leone, and Southern Nigeria. In contrast to Africa, and with the exception of Trinidad, Colonial Stock Act loans did not increase the outstanding debt of West Indian colonies.¹⁸⁹

Bankers and contractors underwrote government loans. Between 1777 and 1783, Baker finds “thirteenth contractors who were not bankers subscribed to a total of £348,000” and concludes, “considerable sums were circulating between contractors and government, by way of contracting profits and subscriptions to government loans.¹⁹⁰” Thus, by tying aid to East Africa to preferential contracting with British companies and labor (Crowned Agents), the British government promoted monopoly, not free trade in public procurement. Monopoly, however, became part of the supply chain for public works for development of the colonies as a result of institutional breakdown and bureaucratic capture. Sunderland, for instance, distinguishes monopoly in the purchase and supply of goods from Britain as a result of the underdeveloped state of crown colonies. Crown Agents in this case helped reduced transaction cost associated with the possibility of obtaining supply in world markets plagued with suspicion and rivalries at this time.

¹⁸⁸ Kesner, Richard. (1981). *Economic Control and Colonial Development: Crown Colony Financial Management in the Age of Chamberlain*. Westport: Greenwood Press, p. 80, 81, my emphasis. For a complementary list of loans raised by British colonial government on London market under the colonial Stock Act and the Guaranteed Loan Act from 1919 to 1939, see Constantine, Stephen. (1984). *The Making of British Colonial Development Policy 1914-1940*. London: Frank Cass, 296-7.

¹⁸⁹ Kesner, Richard. Ibid. 87-8 table 11. Sunderland (2004. Op. cit.) for instance, shows that the conversion of unsecured loan issued by investors into crown colony stock had positive effect on the purchasing power of the Crown Agents, 218. Nevertheless, Sunderland also notes that the terms of conversion often ignores the general ordinance which stipulated that conversion was to be done only when the debenture had a higher rate than the stock. The Gold Coast (Ghana) loan of 1909 and Sierra Leone 1904 loan did not follow the ordinance.

¹⁹⁰ Baker, Norman. (1971). Op. cit., 226-7.

Another type of monopoly, however, was introduced in the procurement supply chain as a policy of adjustment to the fall of the Crown Agency's income and the growth in its workload in 1890s. This asymmetric alignment between responsibilities and revenue to sustain the agency in its management of colonies shifted its agenda from the maximization of the 'quality' of public goods to fund raising activities. As Sunderland writes, "it was in the [Agency's] own interests to turn a blind eye to colonial violations of the monopoly regulation and to purchase high quality goods" with the complicity of the colonial governors who continued to monitor "quality effectively through use" and not through price.¹⁹¹ The implication for the colonies was the rise in 'territorial' debt from the supply of public works at a very high price as colonies were forced to buy not from the market, but from the Crown Agency directly. The difference between market price and the Agency's price helped pay Crown Agents salaries and provide them with good retirement plans.

In 1922 the president of the Board of Trade declared that under the Trade Facilities Act, guarantees were made for orders for concrete, iron, steel and electric goods, all to be placed in Scotland, North of England, and the Midlands while labor required were to be supplied from Enfield, Tottenham, Lee Valley, and at London Docks.¹⁹² The same Board of trade introduced a quota system in West Africa to please Manchester cotton manufacturers worried about Japanese goods flooding the market causing dissent within its own administration in East Africa, Sierra Leone, Seychelles, and Mauritius.¹⁹³ Similar statutes and financial instruments were later adopted in East Africa with further implication on British government purchasing for development projects. Under the Trade Facilities Acts (1921), "projects financed in whole or part by the CDF¹⁹⁴ should use British materials and British manufactured goods (made where applicable out of British materials) and should be shipped in British vessels and be insured by British companies."¹⁹⁵ The use of local shipping companies on the West Coast of Africa such as the German Woermann Company and Elder Dempster --with a contract to

¹⁹¹ Sunderland, David. (2004). Op. cit., 42.

¹⁹² Hansard DC Deb February 13, 1922 Vol. 150 cc606-7 < http://hansard.millbanksystems.com/commons/1922/feb/13/trade-facilities-act#S5CV0150P0_19220213_HOC_267> accessed March 2012.

¹⁹³ Kesner, Richard. (1981). Op. cit., 189.

¹⁹⁴ Colonial Development Fund

¹⁹⁵ Constantine, Stephen. (1984). Op. cit., 213.

supply coal from America-- unfortunately did not help bring price down because these companies refused to grant Crown Agents special rates.¹⁹⁶ Southern and Northern Nigeria, the Gold Coast (Ghana), Natal (South Africa), Mauritius, to name a few, all spent excessive fees in goods mostly purchased through shady subcontracts to British companies and secret dealers. Thus, competition fell with increase demand for public goods but this development was not specific to Africa; it rather confirmed historical trends that linked to rise of public debts to public monopoly in Venetian State, the Spanish Crown, and other European monarchies in the sixteenth, seventeenth, and eighteenth centuries.¹⁹⁷

Notwithstanding eighteenth century bureaucratic weakness and corruption, Great Britain was able to remain the 'lord and owner of her face' through the revamping of the 'fiscal military state'.¹⁹⁸ The combination of Great Britain's domestic weakness and international strength up to the nineteenth century has puzzled many. Brewer, for instance, argues that the combination of strength and weakness "add to a consideration of the question of authority...[where] a large state apparatus is no necessary indication of a government's ability to perform such tasks as the collection of revenue and maintenance of public order."¹⁹⁹ This line of reasoning implies that government contracting initially played a key role in "faking" both strength and authority especially in Great Britain's foreign ventures and allowed the bureaucracy to adjust to political pressure through a series of administrative reforms²⁰⁰ leading to the Contractors Act of 1782²⁰¹, which barred government contractors from becoming members of Parliament and asked for competitive bidding, and to the Victorian Corrupt and Illegal Practices Act of 1883, the growing precision of contract specifications, and the growth of equity law.²⁰²

¹⁹⁶ Sunderland, David. (2004). Op. cit., 46,47. For data on local purchase (p. 45) and comparative cost between the war office and the Crown Agents (p.51).

¹⁹⁷ see Ferguson, Niall. (2001). Op. cit.,111-116.

¹⁹⁸ Brewer, John. (1989). *The Sinews of Power: War, money and the English State 1688-1783*. London: Unwin Hyman, xvii

¹⁹⁹ Brewer, John. (1989). Ibid. xix-xx.

²⁰⁰ Harling, Philip. (1996). *The Waning of 'Old Corruption': The Politics of Economic Reform in Britain 1779-1846*. Oxford: Clarendon.

²⁰¹ Also known as Clerk's Act. For types of contracts awarded and their specification see Binney, J.E.D. (1958). *British Public Finance and Administration 1774-92*. Oxford: Clarendon Press,176-179. Reitan, Earl A. (2007). Op. cit., adds that "after the Contractors Bill (22Geo.III, c. -45) passed with slight opposition, 12 members of the Parliament who held contracts with the treasury gave up their contracts rather than lose their seats in Parliament," 103.

²⁰² Morris, Roger. (2011). *The Foundation of British Maritime Ascendancy: Resources, Logistics and the State, 1775-1815*. Cambridge: Cambridge University Press, 399.

III. Public Procurement: An Ambivalent Undertaking

Eighteenth century bureaucratic weakness therefore did not just allow Britain's power to fester; it created bargaining opportunities for foreign nations interacting with her. For instance, during the military campaign that rooted out Napoleon in Egypt in early nineteenth century, contractors played a pivotal role in supplying food to the soldiers through Gibraltar. Great Britain reaped the fruit of sustained economic diplomacy in Northern Africa by finding in Morocco, Tunis, and Algiers local suppliers when the Victualing Board could not be counted on for transportation or replenishment.²⁰³ After successful liberation from Napoleon, however, Egypt, quickly fell prey to speculative bonds made available by her liberators prompting a takeover of her public finances by her main creditors (France, Italy, Britain and Austria). Ferguson shows that "between 1862, the date of the first Egyptian foreign loan, and 1876, the total public debt rose from 3.3 million Egyptian pounds to 76 million, roughly ten times total tax revenue²⁰⁴" excluding Khedive Ismail personal debt. While the rise of Egyptian public debt in this period was attributable to irresponsible borrowing by Egyptian leaders Muhammad `Ali, Sa`id and Isma`il²⁰⁵ for rapid political, economic, and social transformation and monopoly privilege, Labouchère (1831-1912), a liberal politician and critic of empire in Egypt, blamed the financial contractors, or bondholders in the parliament for undermining "self-development" of the people of Egypt.²⁰⁶ British intervention in Egypt was 'for the sake of the bondholders and for that reason only,' Labouchère vehemently argued. Indeed a default from Egypt would have had tremendous financial consequences in Britain as data show that "countries under British control – Australia, Canada and Egypt- offered overseas investors markedly higher real returns than independent states like Japan, Russia, and Turkey."²⁰⁷

²⁰³ Morris, Roger. (2011). Op. cit., 378-381.

²⁰⁴ Ferguson, Niall. (2001). Op. cit., 300.

²⁰⁵ Safran, Nadav. (1961). *Egypt in Search of Political Community*. Cambridge: Harvard University Press, chapter 2.

²⁰⁶ Hind, R.J. (1972). *Henry Labouchère and Empire 1880-1905*. London: The Athlone Press, chapter V. Labouchère himself invested in Egyptian securities but sold his shares later. He opposed liberal hardliners in the parliament who wanted to take political control over Egypt and the Sudan. He further attempted to push policy centered on the economics of the Suez Canal rather than on the political control of the region by Great Britain.

²⁰⁷ Ferguson, Niall. (2001). Op. cit., 302. The author further adds that the problem with " 'informal imperialism' – investment in the absence of direct political control—was that financial control was harder to impose so that the risk of default remained high," 301.

From what precedes, public procurement as a state policy in what is called a 'colonial' setting, is very much relevant to understanding the history of and politics surrounding this practice. In Great Britain early public procurement reform worked a double-edged sword. While it is certainly true that government contracting became royal instrument for patronage contributing to the projection of power abroad, internal criticism of the use of contractors led to bureaucratic transformation as well as legal regulation. Thus, in a context of political uncertainty and transition, Great Britain's contracting policy and practices simultaneously complicated its foreign expansion. The formation of agencies to supervise the business of government in the colonies also created bureaucratic loopholes that technocrats were able to use to pursue their own self-interest. Equality acting according to self-interest given uncertainty about the nature of political transition in seventeenth and nineteenth centuries were African leaders contracting economic and political goods with various European nations.

While colonies in Africa did not stage early revolts in an American-like fashion, by contracting, they in some cases strategically engaged with the most ambivalent, 'pliable' because transitional aspect of public bureaucracy in Great Britain. By contracting 'colonies' or certain agents within them were able to get concessions that would have been hard to acquire by other means. How contracting restated the principle of freedom within society and how strategy guided this process are what the next chapter is about.

Chapter 5. Contracting Security: The Case of Early Movers

Pliny proveth out of Homer that Traffic was found for the maintenance of the life of man. But after that immovable things began to be divided unto lords and owners, community being on all parts *taken away* made trading necessary, not only between men divided by distance of places but also between neighbors, which that it might more easily proceed money was afterward invented, so called...because it was a civil institution
Hugo Grotius²⁰⁸

It's not what you think you are doing or how you rationalize your choice of that action. It's whether the action has survival value
Armen Alchian²⁰⁹

I. General Context

The crisis of political obligation spinning around contract theory after the civil war in England was very much felt in Africa especially in the Northern region. With the exception of Morocco, all Northern African city-states from Egypt to Algeria had been conquered by the Ottoman Empire in the sixteenth century and came under the rulership of governors, Pashas, and Deys appointed by and paying tribute to the Sultan of Istanbul. The capture of Northern Africa, later known as the Barbary by the Ottoman happened at the time when this region was at war against Spain. Constant war and feuds among rival groups (Arabs and Berbers) created a climate of instability of a strategic interest since passage through the Mediterranean Sea was the shortest route to India and China for European merchants. Piracy,²¹⁰ corsairing, white slavery,²¹¹ extortion, and blackmail became the many ways in which Northern Africans sought to resist foreign empire and defend their monopoly over the sea where early international trade was concentrated. Although the language used to describe the fight over monopolistic rights was religious (Christian versus Muslims), politics and economics transcended religion through bargaining and contractual agreements.

Hugo Grotius, a great humanist and defender of free trade, had already planted the seed for contestation against monopoly in his challenge of the Portuguese monopolistic claims in the East

²⁰⁸ Grotius, Hugo. (2004). *The Free Sea*. David Armitage. (ed.). Indianapolis: Liberty Fund, p.50. My emphasis.

²⁰⁹ Alchian, Armen. (2006). *The Collected Works of Armen A. Alchian. Vol: 1 Choice and Cost Under Uncertainty*. Indianapolis: Liberty Fund, p. xxiii.

²¹⁰ Pirates were existed before dates back to the reign of Queen Elizabeth I (1533-1603), before the civil war in England. The long war with Spain may have contributed to the rise of piracy by legitimizing attacks on Spanish ships. Later, the disenchanted English sailors 'converted' into piracy by joining organized groups on the Barbary Coast and by pleading allegiance to local Sultans. See Tinniswood, Adrian. (2010). *Pirates of Barbary: Corsairs, Conquests, and Captivity in the 17th-Century Mediterranean*. New York: Penguin; and Ronald, Susan. (2008). *The Pirate Queen: Queen Elizabeth I, Her Pirate Adventurers, and the Dawn of Empire*. New York: Harper.

²¹¹ Davis, Robert. (2003). *Christian Slaves, Muslim Masters: White Slavery in the Mediterranean, the Barbary Coast, and Italy, 1500-1800*. New York: Palgrave.

Indies by saying that “the sea [was] fluid and ever changing, it [could not] be possessed.”²¹² Grotius, however, recognized that freedom of trade as a principle could not undo monopoly except when bargaining is declared, that is, when it passes into the proper right to allow the permutation of things movable and immovable. An undeclared necessity is, according to Grotius, that which rests on “the honesty and conscience of the changers.”²¹³ Although nations can trade under a variety of conditions, they trade freely only when monopoly is displaced; that is, when immovable things can be divided and exchanged because trust transcends the conscience of the parties. In North Africa, bargaining beyond conscience necessitated the adoption of written contractual instruments to mitigate sea-borne monopolistic tensions and solve security dilemmas. As I already mentioned, early movers are nations with the longest experience of contracting. In my database, these early movers were all Northern African nations (Morocco, Tunisia, Libya, Algeria, Egypt).

The use of contractual agreements to secure trade deals among merchants,²¹⁴ and between political leaders and merchants²¹⁵ predated the modern era. Intensive immigration in the Maghreb facilitated the formation of commercial ventures and shared capital reinforced transactional linkages that mostly relied on reputation to safeguard the private enforcement of contracts. However, “reputation mechanism modeled as an exchange of protection in return for tax payment by each merchant and his close associates”²¹⁶ gave the Maghreb ruler more power to discriminate between merchants and sometimes abuse them. In order to curtail power exerted by the ruler in the absence of a parliament as in England, information about the ruler-merchant transactions needed codification and formalization. According to Greif, the rise of guild organization in the Middle Age enabled merchants to collectively retaliate against the ruler in Europe. From this perspective, the formalization of economic and political transactions allowed private organizations to curtail domestic powers in order to secure

²¹² Grotius, Hugo. (2004). Op. cit., p.49.

²¹³ Grotius, Hugo. (2004). Op. cit., p.49.

²¹⁴ Greif, Avner. (2006). *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade*. Cambridge: University of Cambridge Press.

²¹⁵ Brancato, Ekatarina. (2009). *Markets versus Hierarchies: A Political Economy of Russia from the 10th Century to 2008*. Northampton: Edward Elgar. Cooley, Alexander and Hendrik Spruyt. *Contracting States: Sovereign Transfers in International Relations*. Princeton: Princeton University Press, 2009.

²¹⁶ Greif, Avner. (2006). Op. cit., p. 92.

property rights. Notwithstanding the ability of impersonal rules to exogenously curtail political power, success in this sense depended on the state of the world, domestic social hierarchies, and the ordering of state apparatuses. When the contracting environment is chaotic as it was in seventeenth century Barbary, strategy, not rules, determines institutional choice and outcomes in cooperative bargaining.

Despite its strategic proximity to Europe, weak political structures provided the background for city-states' sponsorship of corsairs and piracy, which introduced arbitrary justice and insecurity in major trading cities. Until 1856, privateering and corsairing were legal as military means through which governments empowered their citizens to raid enemy shipping. Pirates on the other hand were individuals or organized groups that indiscriminately preyed upon their local rivals as well as foreigners. For the statesmen of the Maghreb and Westerners, "piracy or privateering against the Christian powers was both a patriotic-religious obligation and an important, if highly variable source of revenue."²¹⁷ Kidnapping, enslavement of merchants, frequent ambushing of fishermen and attacks on coastal communities threatened trade and created a permanent security dilemma. While corsairing brought revenue to local treasury, "perpetual struggle for power was worsened by increasing the difficulty that the corsairs had in making a living and they severely limited the actions of the Dey in his relations with Europeans powers."²¹⁸ In other words, although they benefitted from this activity, the authority of the Dey and Bey could be jeopardized with too many independent corsair entrepreneurs unwilling to respect their alliances with European merchants and powers. Corsairing therefore was always a political gamble for Northern African statesmen.

With the opening of the new route to East Indies through the Cape of Good Hope in the fifteenth century and with the rise of insecurity in the Maghreb, the Mediterranean route lost its prestige and became peripheral, at least until the opening of the Suez Canal in 1869. In order to maintain their competitiveness in trade despite internal political divisions, the Maghreb city-states' leaders needed to engage in a two-level strategic game of international cooperation and domestic coordination. Native

²¹⁷ Parker, Richard. (2004). *Uncle Sam in Barbary: A Diplomatic History*. Miami: University Press of Florida, 5.

²¹⁸ Pennell, C.R. Ed. (1989). *Piracy and Diplomacy in the Seventeenth-Century North Africa: The Journal of Thomas Baker, English Consul in Tripoli, 1677-1685*. Toronto: Associated University Presses, 50.

populations, Arabs, Jews, urban merchants and peasants in the hinterland, the Sultan, religious appointees, organized corsairs and pirates represented different domestic constituencies that unequally benefitted from the state of insecurity. Hence the domestic nested games in the seventeenth century were embedded in a political structure that was both centralized and commercial. Given the central role of the Sultan, Deys and Beys in organizing politics and economic activity in this period, their actions linked domestic coordination to international cooperation with rival powers. Anarchy in this context was not the absence of a central authority *per se* but the lack of an appropriate coordination mechanism over trade transactions.

In order to contract the cost of insecurity and bring about peace, international cooperation in this period took both military and diplomatic forms. The activity of corsairs was subject to “general duplicity (flying false flags and feigning friendship toward a prey), mistreatment of captives, and the lack of consideration for the victims²¹⁹” and the activities of the pirates solely defined by opportunistic behaviors. The military solution had European navy and contracted forces accompany merchant ships in order to deter attacks. Except in cases of outright occupation, gunboat diplomacy alone proved inefficient to maintaining peace in the periphery, partly because commercial rivalries between European powers facilitated coalition building among, European renegades, sea rovers, and African pirates. Before France’s occupation of Algiers in 1830, Parker reports that in 1683 and 1688 “French consuls were subject to being put in chains and sent off to join the slaves...executed by being blown from the mouths of the cannons, while the British consul was cut in pieces in front of the ruler’s palace in 1634 or 1674.²²⁰” The diplomatic solution established special partnerships with North African city-states to ensure the continuation of trade under anarchy. Recourse to diplomacy, however, was in keeping with the nature of the challenge in a context where international law and navigations rights were imperfectly defined.

²¹⁹ Pennell, C.R. ed. (1989). Op. cit., 6.

²²⁰ Parker, Richard. 2004. Op. cit., 2.

Thus the commercial and political shifts taking place in Northern Africa at this time brought with them transitional puzzles. New commodities, new trade rationale, new actors and competitors, all these naturally limited the ability of key players to rely on comparison of existing categories or intuitive valuation of prototypes only to negotiate transition. Similarly, the opening of East Indies route via the Cape of Good Hope put a premium on the ability of parties to figure out the best course of action unilaterally. Put in the language of theory, both strategic choice and the heuristic bias approaches are incapable of explaining why parties sometimes made sub-optimal decisions and why they seemed to do so with spontaneous yet, deliberative intent. If in the first case the model predicts that the state of the world will always yield the best course of action, in the second case, not only such assumption is denied, the world itself and its categories and prototypes do change. Strategic heuristics, in contrast validates (a) the environment assumed to be transitioning, (b) the agents under constraint (that may or may not be transitioning), and (c) the process of *adjustment*, or the equilibration of individual constraints with the challenges of the transitioning environment to solve problems of the future. It is this connection with the future through ‘captured opportunities’ that defines strategy as a discovery process conceived from and referencing personal and contextual constraints.

Peace and commercial contracts at the beginning of the seventeenth century were incomplete in the sense that for the most part, they only laid out the initial rules of cooperation. This incompleteness reflected the transitioning nature of the era, the constraints on negotiators, and the process of adjustment to change through the capture of bargaining opportunities. Cooley defines incomplete contracts as the ones that “delineate the *initial terms of the exchange* but will *neglect* several contingencies.”²²¹ If incomplete contracts evidenced initial will to cooperate, the parties still had to come to terms with the problem of opportunistic behavior. By distinguishing “formal ownership from de facto control or ‘use’ value,” Cooley adds, “the right to use the asset in any manner beyond what is specified in the initial contract [or the right to residual] delineates the potential relational power over an

²²¹ Cooley, Alexander. (2009). Op. cit., 26 my emphasis.

asset.²²² Thus, the incompleteness of early contractual agreements gives a heuristic edge to the decisional process aimed at solving security dilemmas at sea, and at giving a theoretical frame to contracting from the Northern African periphery.

As Kreitner argues, the very marginal position that incompleteness holds within contract theory, when submitted to historical review, “allows us to examine the conception of contract as a structure of thought, without taking a position as to the content of the structure. The focus on marginality, in this sense, is a focus on the framework that creates a debate, rather than on the positions within the debate.”²²³ Obviously, contractual happenings in the periphery were not integrated in the process of building the structural content of contract theory in the West. Nevertheless, data suggest that contractual practices in North Africa at this time were framing the debate over promises with or without consideration,²²⁴ and expanding the horizon of tactical and strategic considerations. Kreitner’s perspective therefore allows us to better understand not only non-territorial transfers, but also extend case selection to mixed political bargaining where one party may assumed *de facto* independence and the other not.

Kacowicz,²²⁵ for instance, analyzes such historical “peaceful territorial transfers” where bargaining mechanisms --sometimes contingent on the use of threats but not limited to them—lead to compromise in the presence of power. When dealing with colonial issues, however, Kacowicz excludes cases from territorial transfers from a colonial power to a non-independent country. Here, I show that independence *per se* is not a prerequisite to strategic bargaining, which by definition, takes advantage of such power and resources disequilibrium embedded in but not limited to the so-called colonial relationships. That is, the process of alteration of the *status quo* needs not to be underestimated when it takes place between “unequal powers,” nor should it be overrated only when it determines contractual relationships among seemingly ‘equal.’ Colonial settings are perfect cases that legitimize the idea that uncertainty is a market force in contractual relationships which equilibrates and equalizes

²²² Cooley, Alexander. Ibid 28-29.

²²³ Kreitner, Roy. (2007). Op. cit., 8.

²²⁴ I am using ‘consideration’ in its legal sense, which is the value promised to a party when making a contract.

²²⁵ Kacowicz, A.M. (1994). *Peaceful Territorial Change*. University of South Carolina Press, 7.

not the status of parties but their ability to discover “by thought or luck what are the new best conditions²²⁶” that give their actions a surviving value.

Data show that the initial terms of contracts sought to formalize customs procedures, the transfer of wealth to descendants, the issuance of patent letters and passports to privateers, ransom practices, capture and treatment of enslaved crew members, and the extension of military bases. If the Maghreb periphery found international cooperation helpful and domestic coordination essential in order to solve security dilemma, how is one to understand the function of incomplete contracting? If incomplete contracts arose as a result of failure in the market of reputation-based cooperation, did incompleteness lead to hierarchy²²⁷ or hybrid form of governance? Provided the incompleteness is ‘marginally’ defined in the Kreitnerian sense, to what extent contractual regimes could be said to have established a post-hegemonic²²⁸ and post-independent framework for cooperation between parties? It is indeed the moment when incompleteness is no longer a matter of position, but of reference and locus.

According to Levy, France was the hegemon from roughly 1665 to 1705 in a unipolar world. In a multipolar world that followed the short decline of France, England, Austria-Hungary, Spain, Prussia, Russia and Sweden were expected to behave as key strategic players in world politics from 1715 to 1835. The pattern of contracts in the Maghreb corroborates Levy’s classification based on politico-military and economic might because most powers are represented. However, contractual patterns remained bilateral (0) not multilateral (1) throughout this period. Although Levi classifies France as a Great Power, her uneven relations with different city-states cannot fully be understood without taking into account the ways in which the periphery acted strategically. Although Algiers and Tunis were both under the Ottomans, and of different Beys, France is a smaller partner to Algiers in comparison to her

²²⁶ Alchian, Armen. (2006). Op. cit., xxiii.

²²⁷ Lieshout, Robert. (1995). *Between Anarchy and Hierarchy: A Theory of International Politics and Foreign Policy*. Aldershot: Edward Elgar.

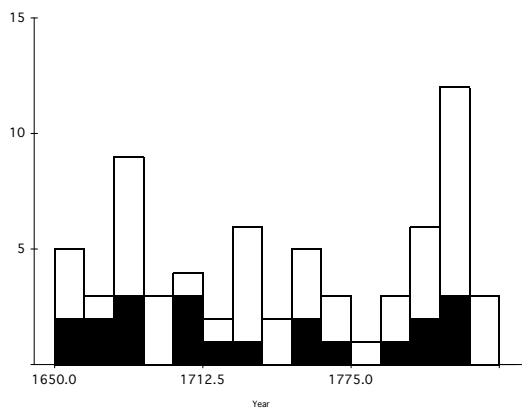
²²⁸ Keohane, Robert. (1984). Op. cit.

involvement in Tunis. Levy leaves out the United States and Portugal in this period but those states seemed to have been important players respectively in Tunis and Tripoli.²²⁹

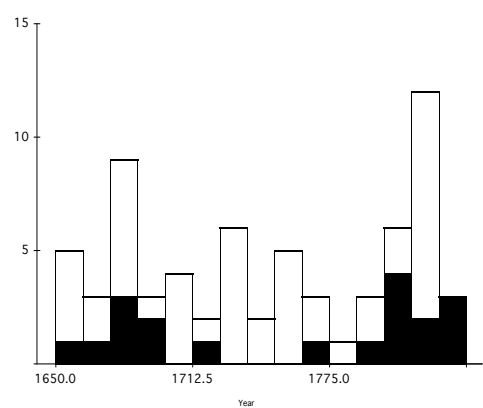
Algiers (Algeria)

Algiers' main partners were England, France, and the Netherlands [Figure 5.1 and 5.2 below]. The first contract signed between Algiers and France on February 9, 1661 was military in nature. The contract specified the amount of rent to be paid over time to the "kingdom of Algiers" for the military base. Returns to the Dey of Algiers were twofold. With the help of French military, Algiers regulated its trade more efficiently, fought piracy and added more revenue to its treasury. In return, French citizens employed at the base could not be kidnapped or enslaved.

[Figure 5.1] Contracting patterns with Great Britain 1661-1837²³⁰



[Figure 5.2] Contracting patterns with France 1661-1837²³¹



The contract was incomplete in the sense that there were no time limits, nor procedural provisions for renegotiation. Still contracting parties relied on trust and the cooperation of local African authorities to issue and honor safe conduct bills and patents to French employees and merchants. The fix-rent tenancy deal in this case initiated commitment to finding peaceful ways to negotiate trade and security. However, the rise of uncertainty due to kidnapping at sea and local dealers unwillingness to pay custom duties at home made France a strategic partner to Algiers. While the military base signaled military power, foreign raw power alone could not predict the outcomes of the contract. The

²²⁹ Kitzen, Michael. (1962). *Tripoli and the United States at War: A History of American Relations with the Barbary States 1785-1805*. London: MacFarlane and Parker, Richard. (2004). Op. cit.

²³⁰ Y= number of contractual agreements X= Year. See coding of African and foreign contractors in the appendix.

²³¹ Y= number of contractual agreements X= Year. See coding of African and foreign contractors in the appendix.

authors of insecurity in this case were local people. Renting a base to France was strategic in the sense that the very absence of a procedural clause on renegotiation endowed Algiers with residual rights after contracting insecurity. Put differently, with or without breach in contract, incomplete contracting over a military base in this period was not necessarily loss of power for the host nation. On the contrary, with no procedural terms for renegotiation, the host African statesmen could regain the upper hand by realigning with the pirates when a contract with foreigners became inconvenient especially if there had been ere no transfer of sovereignty.

After 1662, Algiers' commercial relations with France seemed to have improved. A fishing and mine concession was given to French merchants in 1690²³² and renegotiated in 1694.²³³ Here we see further specification on annual taxes to be levied on French merchants as well as a slight reorganization of the tax administration of Algiers. What is important here however, is the framework of peace against government intervention echoed in this agreement. Free trade was beginning to appear in North Africa's contractual dealings as *raison d'être* for commerce, peace, and predictability in government action. Article IX stresses the point that the commercial contract shall over last any political conflict between Algiers and France because 'Les affaires des négociants sont différentes des celles du Gouvernement / the business of merchants is different from the business of government' (Article IX). This evolving search for codification, accuracy, and predictability in contractual dealings though not directly inspired by Great Britain or even France, paralleled similar efforts in these countries to limit mischiefs and misconception in the sixteenth and seventeenth-centuries.²³⁴ Thus before her invasion in 1830, Algeria had, through different forms of contractual devices, contributed to an Africanist perspective on strategic negotiation.

Another example of an incomplete peace agreement is the contract signed on November 22, 1662 between Algiers and the Netherlands. This contract only mentioned the general terms of peace pertaining to the free circulation of merchants and ships. An authenticated merchant passport was

²³² see Consolidated treaties, 1690, 43-49.

²³³ see Consolidated treaties, 1694, 353-363.

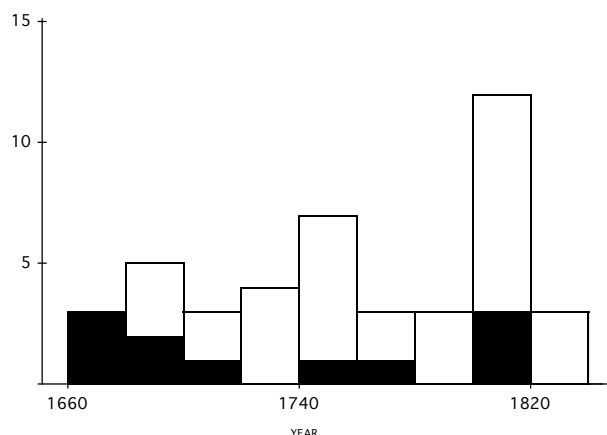
²³⁴ For a discussion on the history and policy of statutes of fraud in Great Britain and France in this period, see chapter 7 in Fursmton, Michael. (2001). *Cheshire, Fifoot & Fursmton's Law of Contract*. Fourteenth edition. London: Butterworths LexisNexis.

established as the only document for mutual recognition. Unlike France's military base acquisition, the contract with the Netherland was purely commercial. However, both the military and non-military white slave redemption²³⁵ contracts still relied on trust for enforcement. Unlike France however, Algiers and the Netherlands recognized their mutual the right to punish any citizens who broke the contract. However, the contract was not informative about whether or not punishment should be prorated to the offense. The apparently equal right to punishment in this sense could lead to more conflicts.²³⁶

Tripoli (Libya)

Great Britain in Tripoli had a different approach to contracting peace and security. For instance, the peace contract signed on March 5, 1676 between the King of Great Britain, France and Ireland and the "most illustrious Lords Bey and Divan of Tripoli" the general terms of peace related to trade at market price and kidnapping are reiterated. What was new was that England and Tripoli seemed to correct previous mistakes made by France and the Netherlands by specifying conduct in peace *and* wartime, and by calibrating punishment in the case of a breach of contract. This contract tended toward completeness because it preemptively made binding provisions for both peacetime *and* wartime, thereby maximizing the durability of the agreement. The contract was binding for the signatories *and* for their successors.

[Figure 5.3] Contracting patterns with Great Britain 1662-1830²³⁷



²³⁵ see Consolidated treaties, 1677, 163-166.

²³⁶ Harkavy (2007: see appendix) mentioned Netherlands' acquisitions of two military bases in Cape Town (South Africa) in 1652 and in Gold Coast (Ghana) Loango (Angola) in 1663. Similar to Algiers, the basis of acquisition was conquest.

²³⁷ Y= number of contractual agreements X= Year. See coding of African and foreign contractors in the appendix.

In peacetime, legitimate citizens determined the contours of honest conduct. In Article XIX, England and Tripoli committed not to rely on the actions of pirates, banished citizens and runaways from justice in England to infer a breach of peace. Both parties committed to raising the cost of a breach by death and calibrate punishment when mistakes were made. In controversial matters the subjects of his Majesty residing in Tripoli were liable to no other jurisdiction but that of the Bey or Divan (Article XIV). Punishment proper, when carried by the other party, must be applied in the same manner in which the punisher would deal with his own subject. That is, the severity of the punishment remained constant regardless of the identity of the enforcer (Article XV). The scope of uncertainty was further reduced with provisions that regulated rescue procedures in the case of natural disasters such as shipwrecks in order to avoid misrepresentation of unfortunate events. In wartime, officials residing in the enemy's territory on both sides were granted immunity. Finally, moving from general terms to specific ones, both parties agreed to protect themselves against strategic hazard by fundamentally transforming residual threats, which in this case were the corsairs.

Previous classification between legitimate and illegitimate citizens provided an initial demarcation of the subjects of the contract. However, as long as corsairs and sea rovers from the host countries could threaten the agreement, the peace and commerce contract remained incomplete if it failed to make provisions for these exogenous forces specialized in manufacturing insecurity. In Article VII Tripoli agreed not to use corsairs and sea rovers for clandestine or unholy alliances against Great Britain. By agreeing to this clause, Tripoli strategically reduced the spatial actions of its corsairs through vertical integration. As Williamson once noted, a special purpose contract has organizational ramifications when it deals with a unique or imperfectly standardized good. When an asset is specialized, Williamson notes, it cannot be redeployed without loss of productive value. When the statesmen of Tripoli agreed to displace the pirates as a potential threat to Great Britain, they strategically positioned themselves as replacement of the loss value thereby reshaping their image as strong and credible leaders. What could be seen as a loss for the corsairs was a gain for the

statesmen involved in the two-level game of bargaining. Whether or not the statesmen were capable in practice of subduing domestic groups such as the corsairs in this case is not relevant to my analysis. What is important is to understand how the statesmen strategically used incomplete contracting to reorganize political structures domestically and influence the ordering of Great Powers' preferences internationally.

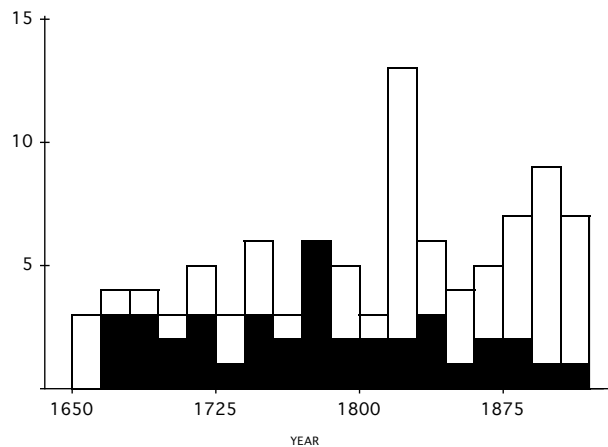
Tunis (Tunisia)

If not for security reasons, then the leaders of the Maghreb had a stake in the continuation of trade because their agricultural domestic products were highly demanded in Europe. Similar to other Maghreb city-states, corsairing was intense in Tunis save that there, the activity received investment from a diversified pool of stakeholders. While most corsairing activities received maritime investments, in Tunis, non-maritime funds came from the Beys and other powerful agro-pastoralists in the hinterland.²³⁸ However, corsairing activities were declining in Tunis partly because of the diversification of capital among stakeholders with interest in agricultural trade. Between 1793-1798, Panzac records 97 corsairing campaigns in Tunis and only 22 between 1820-21.²³⁹ Tunis was also distinguished by its diversified pool of merchants many of whom came with the hope to rebuild their wealth after declaring bankruptcy in Europe, other came as refugees from religious persecutions and still others came as simple adventurers hoping to become rich by speculating. As Sadok (1987) notes, merchants in Tunis were not wealthy but average traders and hard workers who wanted to take advantage of the many opportunities that the city-state offered in its special economic zones such as Porto-Farina, Bizerte, Sfax, Soussa, la Goulette, and Cape Nègre.

²³⁸ Sadok, Boubaker. (1987). *Régence de Tunis au XVIIe Siècle: ses Relations Commerciales avec les Ports de l'Europe Méditerranéennes, Marseille et Livourne*. Andalous : Centre d'Etudes et de Recherches Ottomanes et Moriso-Andalouses.

²³⁹ Panzac (2004,65).

[Figure 5.4] Contracting patterns with France 1662-1914²⁴⁰



In Tunis, early diplomatic relations were first established with France, who through her consul in residence, sought to curb the activities of the corsairs with peace treaties, but this efforts failed. With the entry of the Netherlands in 1622, England through the *Levant and Barbary companies* in 1645. Successful peace and commercial accords between these two latecomers in the market of raw materials and the political leaders in Tunis, was a wake-up call to France who became more proactive and concluded her first treaties in 1665.

Timing played a key role in shaping the competitive strength of rival Great Powers entering the emerging Tunisian market at this point. During civil unrest in 1685, Tunisian corsairs attacked French interests. Taking advantage of civil war in Tunis, France claimed the attack as a breach of the peace contract previously signed with Tunis and imposed heavy compensation demands on Mehemet-Bey and Ali-Bey September 4, 1685. The political situation was so unstable that Mehemet-Bey and Ali-Bey in the city-state had to send representatives to sign the agreement. On August 28, 1685, France demanded and obtained a “capitulation” treaty with monopolistic concessions for the Gauthier Company over trade in Cape Nègre. Prior to this concession, Tunis had complete ownership of the

²⁴⁰ Y= number of contractual agreements X= Year. See coding of African and foreign contractors in the appendix.

Cape Nègre and used fix-rent tenancy contracts to manage this strategic trading post. However contracting in the midst of a civil war dispossessed Tunis of all privileges to extracting rent on Cape Nègre. Custom duties went from 10% on the value of merchandises to 1%.²⁴¹ By strategically introducing a monopolistic claim during civil unrest when the authority of Tunis' political leaders was being sapped, France revealed her ultimate goal to become the leader in trade and strategically made her demand defensible based on initial breach of a peace contract. If England's interests were spared during the civil unrest, it was because England was the foreign power that Tunisians corsairs respected the most at the time. What was new though, was not so much the monopolistic claims but the nature of the entity that was to benefit from claim: the Gauthier Company.

So far, diplomacy and politics came first in core-periphery relations. By endowing a private company with monopolistic rights over a city-state, France subjected the policy tool of the periphery to the whims of a non-state entity. According to Article VII of the contract, the company's monopoly extended to fisheries in all parts of Tunis and it was not supposed to pay rent to the Bey for six renewable years. Were frictions to arise between local populations and the French company, the Bey was supposed to protect the interest of the private company first because it represented private investment, not the French state, Article XIV stipulated. The capitulations treaty therefore reflected the declining power of the political leadership in the periphery.

The persistence of corsairing activities culminating with internal wars and an outburst of the plague weakened political structure in Tunis as well as the bargaining power of its statesmen. With the sophistication of the foreign fleet, the security dilemma of the statesmen takes a different meaning. As in the case of the Gauthier Company, incomplete contracting led to vertical integration in the sense that the periphery lost its residual rights over Cape Nègre. As Panzac shows, the decline of corsairing activities saw the consolidation of European monopoly in the Maghreb. Of all 184 merchant ships registered in Tunis in 1788, 148 were French, meaning that more foreigners were getting a foothold in

²⁴¹ Sadok, Boubaker. (1987). Op. cit.

domestic commerce and displacing Muslims.²⁴² The network of European consulates in the Maghreb and their proximity to the periphery gave foreigners informational advantage over local traders who did not benefit from similar concessions in Europeans ports. Unable to rely on complete reciprocity or on alternative mechanisms of coercion and blackmail such as the corsairs, cooperation in the periphery necessitated a strategy of decline and recovery. Between 1801 and 1816, Malta was the only port-city with the higher number of Maghrebi fleet and ships compared to Marseille, Livourne and Barcelona.²⁴³

By granting monopoly over trade to a foreign great power, Tunis was adversely integrated politically and economically as a weak periphery in world economy. Concessions made to private corporations and foreign nations had a direct impact on rural life and local entrepreneurship. Although Tunis was rising as an important trading center, its bargaining leverage was constrained by domestic political unrest. In other words, Tunis' rise and the entry of great partners in trade coincided with its potential decline.

Territorial political endowment shaped contractual outcomes even in the case of "unequal treaties." As theory suggests, a declining firm could maintain its competitiveness and raise the cost of exit by designing a strategy of decline that focuses on durable assets or book value that may exceed the value of tangible assets. It follows that by solely focusing on fixed and tangible assets (agricultural products, fishing rights), the capitulation contract incompletely stated the liquidation value of the city-state. In other terms, even when they contract in monopolistic terms, neither France nor the Gauthier Company could determine with accuracy the book value, which is the real political weight and legacy of the city-state. The initial terms of the capitulation contract still recognize the government of Tunis as the protector of the Gauthier Company in its "repression clause" thereby attributing residual rights over repression to the very entity that France wanted to undermine.

Tunis was able to regain the upper hand in negotiations with France by harvesting support from merchants-resident equally opposed to the monopoly of great trading companies. Next, Tunis used

²⁴²Panzac, Daniel. (1999). *Les Corsaire Barbaresques: La Fin D'une Épopée 1800-1820*. Paris, CNRS, 1999,124.

²⁴³Panzac, Daniel. Ibid, 141-2.

England as a cover to regain an upper hand in negotiations with France by reviving corsairing activities and secured a few concessions in another peace and commerce treaty signed on December 16, 1691. Attempts to regain the upper hand in negotiations by manipulating international rivals and by renewing strategic partnerships with the corsairs remained inconclusive because they maintained the rural bias in Tunisian economic policy.

The strategy of decline in this sense was not sufficiently nested in the key rural sectors in which the monopoly of foreign intervention was strongly felt: the agricultural zones where trading companies established themselves. This urban bias meant that the leadership chose to rely on the benefit of past favors awarded to an urban-based elite to recover their authority. The political consequence of this option is that success will not alter domestic political institutions. Despite their important roles in economic output the interests of the peasant societies in Tunis at this time seemed misaligned with the interest of the center. Nevertheless, it was through their independent organizing using trade stoppage, blackmail and extortion, that peasant societies at Cape Nègre were able to obtain a few concessions from big trading companies such as Gauthier.²⁴⁴ However, Tunis as a whole remained internally weak through this entire period

In designing a strategy of decline, the leaders of Tunis failed to raise the value of their territorial authority through strategic partnerships with the rural segments of their polity. It therefore follows that domestic political structures determine and constrain institutional choice. When international cooperation became too costly, the ability of the periphery to rebound as a key strategic player in international politics was conditioned on its use of the policy tool to redistribute residual rights from incomplete international agreements to the productive segments of society most affected by change in the world of ordered preferences.

Morocco

²⁴⁴ Sadok, Boubaker. (1987). *Régence de Tunis au XVII^e siècle: Ses Relations Commerciales avec les Ports de l'Europe Méditerranéennes, Marseille et Livourne*. Andalous: Centre d'Etudes et de Recherches Ottomanes et Moriso-Andalouses.

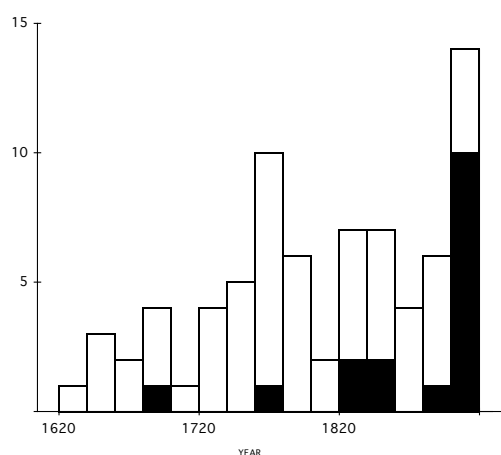
Morocco is an interesting case not just because the country successfully resisted the Ottoman incursions but because of its successful economic diplomacy, which in part explains its ability to secure independence amidst coveting powers during this time. The first recorded contract here is signed between Great Britain and Morocco in the year 1627 after the death of Moulay Zidan before the Sa'adi dynasty was replaced by the Alaouite dynasty in 1669. Until the signature of this agreement, the Netherlands had privileged relations with Morocco. Eight years later France had a similar agreement with the Sultan of Marrakesh. Despite internal rivalries, leaders of the Morocco managed to force European powers into signing peace agreements and deter the use of direct force to curb piracy.²⁴⁵

Sultan Mulay Ismael started Morocco's first diplomatic contractual relations with France. In the treaty of January 29th 1662, the Sultan challenged the hegemonic pretenses of France in a way that he could not have done otherwise. According to Abitol this treaty established a reciprocal 'buy back' (*rachat*) of prisoners fixed at 300 pounds per person. This agreement however was never signed because the Sultan disagreed on price. A second attempt at renegotiation also failed in 1698 because Sultan Ismael wanted to be recognized as *equal to the Sultan of the Ottoman Empire*. Morocco and France broke all diplomatic relations in 1718, leaving the question of the prisoners to missionaries unsolved.²⁴⁶ Contracting therefore became a strategic means for contestation of power and status in the ordering of the international system. What is interesting for my analysis is that contracting uniquely allowed peripheral states to deploy strategy that would not be obvious had they engaged in conventional or confrontational wars.

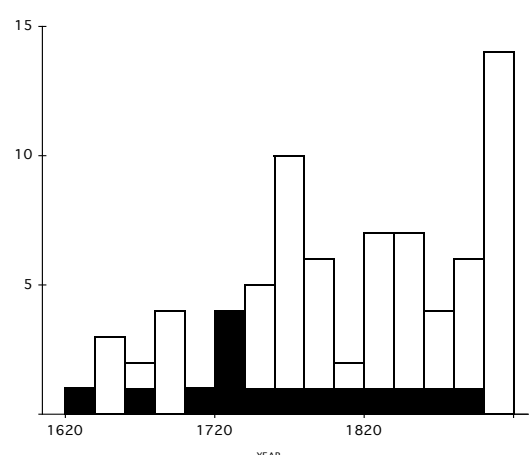
²⁴⁵ Abitol, Michel. (2009). *Histoire du Maroc*. Paris: Perrin, 227.

²⁴⁶ Abitol, Michel. Ibid. 251.

[Figure 5.5] Contracting patterns with France 1627-1912²⁴⁷



[Figure 5.6] Contracting patterns with Great Britain 1627-1912²⁴⁸



Of all Moroccan leaders, Sidi Mohammed expanded the contracting possibilities of Morocco by granting monopoly rights to Denmark in the region of Safi (1757), monitoring Great Britain's transit rights to Gibraltar through Tetouan and Tanger (1760), granting residency to Swedish citizens in the littoral of Morocco (1763). In a peace and friendship agreement with Spain, Sidi Mohammed conceded to navigation, and fishing rights to Spain in 1799 and fixed the misinterpretation of the treaty of 1767.²⁴⁹ This treaty would later allow the Sultan to strategically distance himself from the persistent attacks of Spanish fleet by corsairs and patriot of the Rif region by calling them "thieves."²⁵⁰ Morocco was the first country to recognize U.S. independence in to grant protégé status to U.S. consular employees in 1786. The articles of the Treaty with the United States show that unlike other nations in Northern Africa, Morocco saw itself as an equal and strategic the partner in commercial dealings influencing politics beyond its territorial location.

Despite its successful economic diplomacy, the Moroccan monarchy, however became weakened by the lack of internal reform that would have allowed the broader distribution of opportunities resulting from the politics of contracting of various Sultans. In the nineteenth century, Moroccan cities such as Fez, Tetouan, Sale, and Tangier were the centers of politics, trade, and

²⁴⁷ Y= number of contractual agreements X= Year. See coding of African and foreign contractors in the appendix.

²⁴⁸ Y= number of contractual agreements X= Year. See coding of African and foreign contractors in the appendix.

²⁴⁹ Zaki, M'barek and Mimoun Charqi. (2008). *Maroc: Colonisations & Résistances 1830-1930*. Salé: Fondation du Rif, 22.

²⁵⁰ Benjeloun, Abdelmajid. (1995). Op. cit.,165.

literacy. The countryside life was mainly composed of different tribal groups producers of raw materials such as leather, cloth, and other metal goods for the industry of the cities. Though urban merchants provided most of the capital for trade between the cities and the countryside, the tribesmen also influenced the economy of the city by purchasing among other goods, arms, ammunitions and luxury items imported from Europe. The relations between the main cities and the hinterland were sometimes hostile or peaceful depending on the personal strength of the Sultan, the quality of trade, and religious interactions between urban-based and country-based elites. According to Burke III, despite their prosperity, the fear of a tribal revolt always haunted the cities. Because of geographical and cultural differences, the relations between the cities and the hinterland of Morocco in the nineteenth century were mostly based on trade but also on political and religious power to influence the behavior of potential hostile tribes. Cooptation as a political strategy therefore dominated the political life of Morocco prior to the French protectorate.

Two major wars forced Morocco to implement political reforms that came too late and too slowly. First, the French invasion of Algeria in 1830 followed by the subsequent victory of the French army at Isly in 1844 allowed the occupation of the Moroccan territory. This victory changed the terms of trade between Moroccans and Europeans. Deals and concessions were quickly replaced by claims of monopolistic rights by French merchants. In 1845 the Sultan consented to an imprecise definition of Algero-Moroccan frontier. This imprecision became a tactical French weapon against Morocco.²⁵¹ Second, after the defeat of Moroccan forces during the Tetouan war (1859-60), the Spanish government forced the sultan Mawlay Al-Hasan to pay an indemnity in *douro* rather than in *dirham*, a decision that destroyed the stability of Moroccan economy. Wholesale dumping, currency devaluation, the efforts of European speculators to increased their rights, and high inflation emptied the sultan's treasury.

Finally, the opening of the Suez Canal made Moroccan goods such as wheat, dates, and wool, compete with similar products from Russia and Australia. It is in this period of economic depression

²⁵¹ Zaki, M'barek and Mimoun Charqi. (2008). Op. cit.

coupled with trade concessions to foreign firms without preliminary negotiations that the 1856 Anglo-Moroccan commercial treaty opened Moroccan market to British manufactured goods. The economic crises in the years following the treaty lead to political revolt across Morocco hit by famine and diseases.

Subsequent attempts at reforms to bring back political order and modernize the army by creating 330 new units headed by the *qaid*s failed under Moulay Hasan (1873-94). As Burke III points out, the main reason why these military reforms failed was due to their repressive nature and dependence on foreign expertise hated by the population. Through diplomatic leverage and military agreements, Hasan used “European renegades as instructors, then resorted to sending a few Moroccans to Gibraltar or to military schools in Europe. [However,] large government expenditures on canons, rifles, ammunition, uniforms, and the financing of costly *makhzan* military expeditions against recalcitrant tribes, further helped deplete the already weakened Moroccan treasury.”²⁵² Another consequence of the militarization of the state accompanied with trade was that many tribes in the interior acquired the same modern arms smuggled²⁵³ into the countryside by corrupt officials. This availability of modern weaponry in the countryside signified not so much the end of *Sultan*’s monopoly over force but rather that opportunity for retaliation or insurrection of the “Lords of the Atlas” could potentially cause more destruction.

Following Moulay Hasan, the reign of Moulay Abdul-Aziz (1894-1908)²⁵⁴ was equally met with a refusal to pay taxes, corruption and brigandage. Thus far, no foreigner was allowed to acquire land or control the finances of the sultan. However, with Abdul-Aziz, real estate concessions were not only given to foreigners causing the rise of interest with home mortgage loans and speculation. The

²⁵² Eckmann, Jules. (1885). *Le Maroc Moderne*, Paris, 252-67. Louis, Arnaud. (1952). *Au Temps des Mellahas ou le Maroc de 1860-1912*, Casablanca, 9-13.

²⁵³ See Guillen, Pierre. (1967). *L’Allemagne et le Maroc, 1870-1905*. Paris, Press Universitaires; the book gives a good account of the illegal arm trade between European merchants and semi-autonomous tribes in the interior of Morocco under Abdel-Aziz.

²⁵⁴ Abdul Aziz was the son of a favorite Circassian slave brought up among the women of the harem and was not specifically prepared for the role of a political and religious leader until he was made one. Questions have been raised about what caused the decay of Morocco under Aziz’s reign. Answers point to either his feeble character or the evils of the system of monarchic rule.

popularity of the sultan decreased after he agreed to the Act of the Algeciras conference (1906)²⁵⁵ and also negotiated a separate treaty enabling France to override the spirit of the Act.²⁵⁶ Totally bankrupt, Abdul-Aziz started to raise money for his treasury by selling government land in coastal countries and by taking loans from Germany, England, and France as the largest lender. Rivet estimates about 50,000 hectares of land owned by French citizens in Morocco before the protectorate.²⁵⁷ The multiple rebellions across Morocco made the sultan's treasury totally dependent on foreign aid. In 1901 the first international loan was given to Morocco, the second in 1902 and by 1912, thirteen French companies were installed in Morocco.²⁵⁸

French pre-protectorate policies in Morocco revolved around two diplomatic axes. There was this idea of a military penetration through Algeria with the aim to mobilize the countryside against the Sultan, and the alternative soft, but top-down reforms focused on the Sultan capability to grant important economic concessions to his *protégés*, foreign firms and banks. The protégé status derived from the accords of Tangier (1867) and Madrid (1880) and was modeled after patron-clients relationships of the sultanate. The main purposes of these conferences were to protect European property from the attacks of increasingly angry populations; to regulate the activities of investors so that none of them be given monopolistic rights and privileges over trade; and to guarantee Moroccan independence by which the delegates meant, the continuing rule of the *markhzen*, or *Sultan*.

Thus far, it could be said that the divide between the central authority of the *Makhzen* and *as-siba* was not a natural divide due to irreconcilable cultural difference. The relationship between the Sultan and independent tribes evolved in one direction or another depending on the character of the *Makhzen*, the nature of inter-tribe conflicts, and more importantly in the nineteenth century, the nature of concessions given to foreign firms in Moroccan economy. Arguably, trade at times reinforced ties

²⁵⁵ On Morocco's role in the French-Algeria war see this compilation of letters between Abderrahmane Ben Hicham (1778-1859) and Moroccan political leaders on the frontier with Algeria in Hamet, Ismael (1925). *Le Gouvernement Marocain et la Conquête d'Alger*. Thala & Chihab.

²⁵⁶ Asmead-Bartlett, E. (1970). *The Passing of the Shereefian Empire*. Westport: Negro University Press, p.17.

²⁵⁷ Rivet, Daniel. (1988). Daniel Duvet, *Lyautey et l'Institution du Protectorat Français au Maroc 1912-1925*, Paris, Harmattan, p. 45. "In early nineteenth century, Great Britain was the leader in the Moroccan market with 40,9% of exchange with external commerce in 1902, 45,4% in 1903, 43,2% in 1904. France became the leader in 1905 (46,9%), and acquired more than 50% in 1906 before the losing its leadership to Great Britain again in 1909 when its external exchanges fell under 40%" (47).

²⁵⁸ Report from Caix, de R. (1912). *Comité du Maroc*, R.C. no. 7, 1912., 260.

between the central authority and the hinterland. However, with increased taxes and the modernization of the Sultan's army, the first revolution in Morocco had the allures of a revolution against taxation that forced many tribes to buy modern weapons from European merchants they all hated. The militarization of the central authority and of the hinterland of Morocco therefore helps explain why in Morocco, the army could not as an independent body, intervene and negotiate transition from a sultanic regime to a semi-democratic one.

Another puzzling aspect of political revolution in the nineteenth century was the role of civilian protégé in shaping the destiny of Morocco. These were mainly Jews, Arabs, and Berbers traders living in coastal cities such as Fez, Tangier, and Casablanca. Some of them owned business, and other worked as courtiers and middlemen facilitating trade with the hinterland. These merchant protégés of the Sultan and of European firms that enjoyed the same preferential treatments as European merchants were also exempt of taxes and immune from Moroccan legal jurisdiction. However, unlike Moroccan native protégé, foreign merchants could always appeal to their consuls and tried to introduce unilaterally reforms in Morocco. The status of the protégé in Moroccan therefore made it hard to attribute all commercial and political decisions in this period to the concerted rational policy of great powers. More often than one imagines, the great powers became the symbolic umbrella for purely individualistic interests that changed the fate of Morocco.

Burke III recalls two instances of forceful sponsorship of reforms and internal improvement initiated by French and British ministers at Tangier using Moroccan protégés. In the first case, the French minister Ordega attempted to use sharif Wazzan to force reforms under French sponsorship. In the second case, Sir Charles Euan Smith, a British minister at Tangier and former colonial employee in Zanzibar, forcefully introduced diplomatic reforms in Fez.²⁵⁹ In both cases, the Sultan resisted their coveted attempts to influence domestic politics through native *protégés*. Also, it was proven that these foreign ministers acted on their own initiative and were recalled home. Through the status of protégé

²⁵⁹ Burke III, Edmund. (1976). *Preclude to Protectorate in Morocco: Precolonial Resistance 1860-1912*. Chicago: University of Chicago Press, 27-8.

and its implication for politics and commerce, one could trace both the ambivalent nature of European expansions most of the time lacking a cohesive strategy and means to carry their mission successfully.

From the Moroccan perspective however, the willingness of native protégé to bypass the Sultan indicates that contrary to what theory predicts, the “client” status within a patron-client rent seeking polity is not always a fixed status. As the above-cited examples show, political allegiance in Morocco was an inverse function of rents. From the perspective of bargaining, the native *protégé* in Morocco is an ambiguous kind of revolutionary negotiating uncertainty and contracting security²⁶⁰ through the exploitation of legal apparatuses and immunities that old tribal and religious solidarities did not offer.

One notes at least two effects of the protégé economy on the state of political affairs in Morocco. Firstly, in addition to not paying taxes, and as a result of their frequent interactions with their rural homeland, the new bourgeoisie of Morocco was able to diversify the sources of revenue in these remote areas by “combining agricultural products with commercial ventures and, by offering credit for the European products they sold, with land and crops accepted for security.”²⁶¹ Land thus acquired needed care, and the new bourgeoisie progressively incorporated family members and their retainers into their personal domain. This arrangement allowed the protégé status to trickle down to these tribal regions and people otherwise not eligible to a tax exempted status. As Rivet notes, by 1909 all great *qajids* with the exception of “Abd Al-Malek; el-Mtougî and Saïd el-Guelloulî turned to France for protection rents.”²⁶² The protégé status therefore became attractive all for wealthy elite across classes.

According to Abitbol, the treaty of 1856 between Morocco and Great Britain abolished the Sultan's monopoly over trade. It accorded fiscal concessions to English merchants, inserted an extraterritorial clause, which made litigation fall under the jurisdiction of the plaintiff (and not solely on the Sultan's as customary); custom duties were reduced to 10 % which lead to an influx of cheap European goods in Morocco. The losers were rural farmers whose products couldn't compete with low prices. More importantly, English merchants as well as their *protégés* were granted immunity. This,

²⁶⁰ Martin, L. “Le Regime de la Protection au Maroc,” *Archives Marocaines* no. 15, 1-32.

²⁶¹ Burke III, Edmund. (1976). *Op. cit.*, 26.

²⁶² Rivet, Daniel. (1988). *Op. cit.*, p. 87, my translation.

according to Abitbol, allowed many Moroccans to shield themselves against Moroccan laws.²⁶³ Thus, the *protégé* system contributed to weakening the Sultan's political influence and to fueling the dissatisfaction of the rural populations. In 1860, Morocco lost the territories of Sebta and Melilla to Spain (Article 2 and 7) and Ifni (Article 8). However, it wasn't until June 1862 that the Sultan made implementation official after a long resistance of the affected tribes.

This chapter surveyed the contracting environment and security dilemma of early movers, which were mostly Northern African city-states with the exception of Morocco, a kingdom. Data show that contracting security and peace was adopted as a device to curb piracy and promote trade. In these early days of contractual dealings, a close reading of contract agreements allows one to discern at least two important changes. First, the act of writing contracts was not devoid of meaning. Instead, it was accompanied with reasoning about what constituted liability as parties sought to create durable relationships not solely guaranteed by conscience. In keeping with my second hypothesis, which conjectures that beyond actual goods and services traded in public procurement, contracting brings together regimes of freedom in society, I have demonstrated that contracting security dilemma did not abolish power between parties or equalized parties based on power only. Rather, the uncertain nature of the contracting environment itself worked as an equilibrating and equalizing force in the market of contracts and put a premium on parties' ability to make strategic decisions with a surviving value. That is, it wasn't inequality (of power and resources) alone that determined gains and losses. As trade moved from sea to the land and to the hinterland, highly centralized yet fragmented political structures created coordination problems that could not be solved with old tactics used in maritime piracy.

As Kreitner argues, the every marginal position that incompleteness holds within contract theory, when submitted to historical review, "allows us to examine the conception of contract as a structure of thought, without taking a position as to the content of the structure. The focus on marginality, in this sense, is a focus on the *framework* that creates a debate, rather than on the

²⁶³ Abitbol, Michel. (2009). Op. cit., 313.

positions within the debate.²⁶⁴ Obviously, contractual happenings in the periphery were not integrated in the process of building the structural content of contract theory in the West. Nevertheless, data suggest that contractual practices in North Africa at this time were framing the debate over promises with or without consideration,²⁶⁵ and expanding the horizon of tactical and strategic considerations. Kreitner's perspective therefore allows one to better understand not only non-territorial transfers, but also extend case selection to mixed political bargaining where one party may assumed *de facto* independence and the other not.

Kacowicz,²⁶⁶ for instance, analyzes such historical "peaceful territorial transfers" where bargaining mechanisms --sometimes contingent on the use of threats but not limited to them--lead to compromise in the presence of power. When dealing with colonial issues, however, Kacowicz excludes cases of territorial transfers from a colonial power to a non-independent country. Here, I show that independence *per se* was not a prerequisite to strategic bargaining, which by definition, takes advantage of such *power* and *resources* disequilibrium embedded in but not limited to the so-called colonial relationships. That is, the process of alteration of status quo needs not to be underestimated when it takes place between "unequal powers," nor should it be overrated only when it determines contractual relationships among seemingly 'equals'. Colonial settings are perfect cases that legitimize the idea that uncertainty is a market force in contractual relationships which equilibrates and equalizes not the status of parties but their ability to discover "by thought or luck what are the new best conditions²⁶⁷" that give their actions a surviving value.

Thus the commercial and political shifts taking place in Northern Africa at this time brought with them transitional puzzles. New commodities, new trade rationale, new actors and competitors, all these naturally limited the ability of key players to rely on comparison of existing categories or intuitive valuation of prototypes only to negotiate transition. Similarly, the opening of East Indies route via the Cape of Good Hope put a premium on the ability of parties to figure out the best course of action

²⁶⁴ Kreitner, Roy. (2007). Op. cit., 8.

²⁶⁵ I am using 'consideration' in its legal sense, which is the value promised to a party when making a contract.

²⁶⁶ Kacowicz, A.M. (1994). *Peaceful Territorial Change*. University of South Carolina Press, 7.

²⁶⁷ Alchian, Armen. (2006). Op. cit., xxiii.

unilaterally. Put in the language of theory, both strategic choice and the heuristic bias approaches are incapable of explaining why parties sometimes make sub-optimal decisions and why they seem to do so with spontaneous yet deliberative intent. If in the first case the model predicts that the state of the world will always yield the best course of action, in the second case, not only such assumption is denied, the world itself and its categories and prototypes do change. Strategic heuristics, in contrast validates (a) the environment assumed to be transitioning, (b) the *agents* under constraint (that may or may not be transitioning), and (c) the process of adjustment, or the equilibration of individual constraints with the challenges of the transitioning environment to solve problems of the future. It is this connection with the future through 'captured opportunities' that defines strategy as a discovery process conceived from and referencing personal and contextual constraints.

Chapter 6. Contracting Intangibles: Reverse Auctioning, Independence, and Sovereignty in East Africa

“The Ethiopian emperors who contributed to the establishment of the bureaucratic empire were all well aware of the critical need to expand their reservoir of flexible resources in order to increase their autonomy and to strengthen their authority in relation to other groups in society. Flexible resources were simply diplomatic, manpower, monetary, and secularly based institutional resources that could be exclusively manipulated by an emperor.”
Edmond Keller²⁶⁸

“Economic life in colonial Africa was stereotypically divided into three spheres. At the top were Western firms, modern, efficient, Weberian, highly capitalized, and organized on the joint-stock principle. In the middle were the ‘Asiatic’ intermediaries, often compared to Jews. Their funds came from ‘usury’, and their modest property was attributed to close knit community bonds, based on family, religion, caste and similar ‘pre-modern’ social structures. At the bottom of the social heap were ‘natives’, ignorant, simple-minded, living for the moment, and incapable of rational economic behavior.”
William Gervase Clarence-Smith²⁶⁹

I. Introduction

In the previous chapter, I focused on the Maghreb region, early mover in African contractual development. In addition to forming a geographical cluster, the Maghreb also distinguished itself from the rest of the continent through the use of Arabic as a written language for commercial and political transactions. Based on this latter characteristic alone, Zanzibar and Ethiopia could also be considered as early movers with their respective use of Arabic and Amharic as official languages. The region of East Africa under consideration here could roughly be said to cover the territories ranging from modern Sudan to Mozambique. It is useful to remember that specific cases to be discussed in detail in the following paragraphs should not be taken for a history of the modern states as defined by the territorial boundaries in existence today. Instead, keeping in mind shifting territorial boundaries over centuries, cases under consideration are coded as “configurations” of strategic challenges at historical junctures. To the extent that I abstract from the “national history,” I do so with the sole purpose of identifying dominant strategic factors and themes such as political independence and sovereignty that shaped competition for the procurement of tangible and intangible goods. In this endeavor focus remains on the decisional process, the *choice* of trade and political partners, and the strategies of acquisition of good and services through contracting given asymmetric distribution of power among rival groups.

²⁶⁸ Keller, Edmond. (1988). *Revolutionary Ethiopia: From Empire to People's Republic*. Bloomington: Indiana University Press, 16.

²⁶⁹ Clarence-Smith. (2001). “Indian and Arab entrepreneurs in Eastern Africa (1800-1914)” in *Négoce Blanc en Afrique Noire: L'Evolution du Commerce à Longue Distance en Afrique Noire du 18ème au 20ème Siècle*. Publication de la Société Française d'Histoire d'Outre-Mer. Paris: Alterna, 334.

To better capture changing economic and political dynamics in East Africa and the ways in which contracting tangible and intangible goods restated power and freedom within societies, I have divided the coast into two sub-regions: the upper-northern region with Ethiopia (also known as Abyssinia in the pre-modern era) as the most influential player, and the southern coast with Zanzibar as the leading power and economic broker. The name Abyssinia and Ethiopia are used interchangeably in historical documents. However, because data analyzed here mostly reflect transactions that took place in early nineteenth-century and beyond, I use the name Ethiopia throughout my analysis. Thus, data summarily capture the contractual transactions under emperor Tewodoros II (1855-1868) as well as the briefly self-proclaimed Emperor Tekle Giyorgis II (1868-1872) on the death of Tewodros, Yohannes IV (1872-1889), and Menelik II (1889-1913). First, I present the general strategic context in each sub-region and follow up with the analysis of disaggregated data to compare the contractual contexts and patterns of specific players.

This chapter presents important empirical findings that challenge the exclusive “economic-focus” of current procurement models as ahistorical and suggests new directions for further research. Here I argue that intangibles such as “independence” have historically been the return to politics contracting services and goods from private suppliers. Political intangibles are indeed the unseen wealth of the political economy of government procurement.²⁷⁰ If procurement has been one of the ways in which nations invented “independence” data leave theorists with the task of reimagining the concept of state, democracy, and sovereignty especially today as the ‘core’ functions of government, such as monopoly over the use of violence,²⁷¹ are being contracted out to private suppliers. Indeed, we live in an age

²⁷⁰ The idea of intangibles as ‘unseen wealth’ is borrowed from Blair, Margaret and Steven Wallman. (2001). *Unseen Wealth: Report of the Brookings Task Force on Intangibles*. Washington D.C: The Brookings Institution Press. My concern, however, is not about the management, measurement, and reporting of intangibles. I understand the intellectual, political, and social premise of intangibles in the procurement process as inseparable from the economic and profit motive of agents.

²⁷¹ Particularly concerns about the outsourcing state violence to private contractors in a context of peace and war in the twentieth century revolve around prison management (see Tabarrok, Alexander. Editor. (2003). *Changing the Guard: Private Prisons and the Control of Crime*. California: The Independent Institute; Blakely, Curtis R. (2005). *America’s Prisons: The Movement Toward Profit and Privatization*. Florida: Brown Walker Press; Selman, Donna and Paul Leighton. (2010). *Punishment for Sale: Private Prisons, Big Business, and the Incarceration Binge*. New York: Rowman & Littlefield.), the use of torture and indiscriminate killings in the war on terror (see Singer, P.W. (2003). *Corporate Warriors: The Rise of the Privatized Military Industry*. Ithaca: Cornell University Press; Avant, Deborah D. (2005). *The Market for Force: The Consequence of Privatizing Security*. Cambridge: Cambridge University Press; Pelton, Robert Young. (2006). *Licensed to Kill: Hired Guns in the War on Terror*. New York: Three Rivers Press; Scahill, Jeremy. (2007). *Blackwater: The Rise of the World’s Most Powerful Mercenary Army*. New York: Nation Books; Rasor, Dina and Robert Bauman. (2008). *Betraying our Troops: The Destructive Results of Privatizing War*.

where public procurement is transforming the relations between citizens and government but those who worry about the future of democracy given the outsourcing of many of the government's functions to private contractors treat the idea of independence as deriving from other sources than the historical contractual practices of nations and states. Thus, by focusing on the interpretation of the idea of "independence" on the East African coast, and by showing how procurement enhanced rather than diminished such a concept, data provide a critique of existing notions of the state based on ahistorical, abstract ideas from Hobbes and consorts.

In keeping with my commitment to establishing similarities between Africa and the rest of the world, I end this chapter with a comparison of similarities of the strategic context of early America's procurement practices and East Africa's.

II. The Upper Region

The Abyssinian Empire (which roughly encompassed what is present day Ethiopia) appeared as the most internationally connected player in the northeastern region. Ethiopia's contractual practices rivaled those of North Africa's city-states and old European kingdoms. For they were not just written in a local language (Amharic and Ge'ez), they also bore a particular aesthetic intended to showcase political power at its highest level of sophistication. Signatures, customized ornamental seals, the use of witnesses, a sophisticated diplomatic language, and a variety of styles leave no doubt to the reader about the standing of Ethiopia as a great player among the greatest in this period. Ethiopia stood as the oldest known place in Africa to foreigners; its ancient Christianity amidst 'pagans' and later Muslim neighbors was a highly symbolic currency that incentivized the Christian kingdoms of Europe and Asia to seek friendship for commerce and military reasons.

Despite the empire's uniqueness, Ethiopia's contracting patterns followed similar trends with other African regions. Ethiopia's contractual activities mostly took a bilateral form [Table 6.a] with Italy,

New York: Palgrave Macmillan; Uesseler, Rolf. (2008). *Servants of War: Private Military Corporations and the Profit Conflict*. Translated by Jefferson Chase. New York: Soft Skull Press; Hartung, William D. (2011). *Prophets of War: Lockheed Martin and the Making of the Military-Industrial Complex*. New York: Nation Books).

Great Britain, France, and the United States [Table 6.b] from roughly 1840 to 1914 [Figure 6.1]. Despite a rich history of official negotiations with Europe, Ethiopia's history of public procurement of tangible and intangible goods and services was very similar to the rest of the continent. Here as elsewhere, private (commercial and religious) entrepreneurs had a central role in the political economy of Ethiopia as brokers of trade contracts and land concessions. In all figures the vertical axis represents the number of contracts and the horizontal axis the year of the deal.

Table 6.a. *Bilateral and multilateral contractual patterns of Ethiopia*

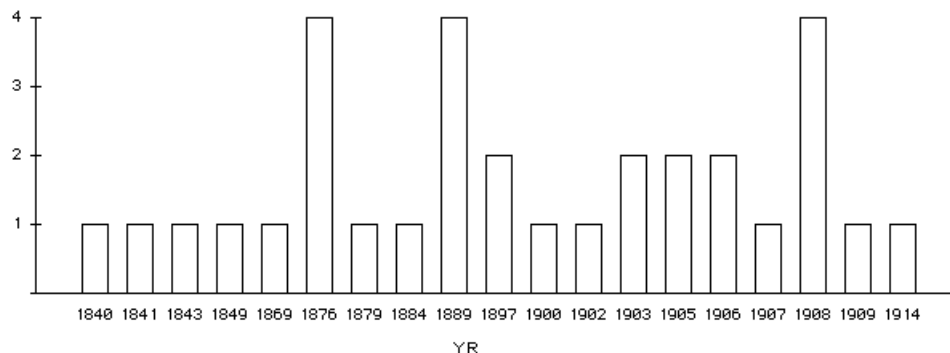
Rows are levels of ET
Columns are levels of POL

	0	1	Total
ET	30	2	32
Total	30	2	32

Table 6.b. *Contingency table: Ethiopia's foreign partners. The main contracting parties were Italy, Great Britain, France, and the US*

	AUH	BL	FR	GB	GR	IT	US	Total
ET	1	1	9	8	1	10	2	32
Total	1	1	9	8	1	10	2	32

[Figure 6.1] *Contracting activities of Ethiopia by year (1840-1914)*²⁷²



Data reveal three peak years in economic and political diplomacy: First, 1876 after the British punitive expeditions of 1868 when Ethiopia was under Emperor Theodore II. Second, 1889 period marking the Mahdist invasion of Ethiopia (1887-9), the battle of Adwa (1896) where Ethiopians inflicted a monumental defeat to Italian troops, and the treaty of Addis Ababa securing Ethiopian independence under emperors Yohannes IV and Menelik II. Third and last, 1908 year of the last agreement defining the frontier of the Italian colony of Eritrea and Ethiopia under emperor Menelik II. The correlation

²⁷²Y= number of contractual agreements X= Year. See coding of African and foreign contractors in the appendix.

between a high volume of contracting activities and Ethiopia's most important historical crises suggests the procurement of goods and services from suppliers took place in a politically stressful environment. Strategy and decisional processes in this context were not necessarily designed to foster economic self-sufficiency, but to preserve political independence; a pre-requisite to creating a lasting union as the country became more centralized. For the enemies of a united Ethiopia were not just foreign, they were domestic also.

Before its consolidation in the mid-nineteenth century, Ethiopia was ruled by independent princes (~ late 1700s to 1855). It was united and centralized as a state under Emperor Tewodros around 1855. The consolidation of monarchical power was constantly contested by internal rebellion and external aggressions mainly from Egypt. At times Christianity helped promote peace; at other times, it worked against it. Thus, the project of national unity, the centralization of power, and the ambition to be taken seriously at the world stage made international cooperation and domestic coordination paramount to Ethiopia's survival. Starting in 1840, data capture the decisional motivation, the change in political values, and paradoxes of contractual choice in the context of state building when regional princes still had tremendous discretionary power over foreign exchanges.

Whereas we are used to understanding historical contractual practices in Africa as mere replicas of economic practices originating in Western Europe, the case of Ethiopia challenges such overbearing unidirectional assumptions. A close reading of the language and substantive content of contract documents reveals a highly skilled people that used what could be called reverse auctioning as a strategy for the procurement of the goods and services they needed in the process of state-building.

To see Ethiopia's contractual history as a configuration of auction-like strategies has implication for theory building. An auction is a process through which the procurement of goods and services is open up for bid and items are sold to the highest bidder. In contrast, a reverse auction is a process through which goods and services are purchased rather than sold to the auctioneer thus reversing the role of buyer and seller. It is typically assumed that price decreases in reverse auctioning through

competition between sellers. While reverse auctioning is applied today in government procurement, the strategy worked for Ethiopia well before theory made sense of it. Ethiopia successfully combined auction and reverse auction by *buying* legitimacy in the global market of reputation at a cheap price and by *selling* to the highest bidder trade privileges in its territory. It was through the manipulation of the buyer and seller positions in the process of empire building that Ethiopia maintained its independence despite foreign encroachment in late nineteenth-century. Hence, Ethiopia did not just contract; princes and emperors changed the agents, direction, and discourse over public contracting.

Ethiopia and France

The Ethiopian case is useful to investigating the ways in which contracting historically restated power and freedom principles in the clash between collective monopolistic forces and individuals. This struggle for decentralization and centralization is seen in the contractual activities and framing of transactions during the era of princes (1769-1855) “when the regional rulers held the real power in the country and the King of Kings in Gondar became but a puppet in the hands of his regents.”²⁷³ Ethiopia used Christianity to finesse reputation among the Christian kingdoms of Europe especially with France. On September 12th, 1840, a contract between “Sovereign Mahmud Hasan and Badri, judge and religious head, and Edmond Combes charged by the French government, Frederic Broquant, Legion of Honor,”²⁷⁴ for the sale of the island of Kordumyat situated in modern day Eritrea, was signed. In ceding to France a piece of land, the Ethiopian sovereign and judge made it clear that they were acting out of their “own free will.”²⁷⁵ Three years later, a treaty of friendship was concluded between “Sahle Sillase, king of Shewa & the Great Louis Philippe, king of France” for the peace of Jerusalem promising more preferential concessions.²⁷⁶ The Ethiopian kings in this case were regional princes.

²⁷³ Abir, Mardochai. (1970). *Ethiopia: The Era of the Princes*. Washington: Praeger, xxiii.

²⁷⁴ Rubenson, Sven. Ed.. (1987). *Correspondence and Treaties 1800-1854*. Acta Aethiopica. Vol. I, Addis Abeba: Addis Abeba University Press, 46.

²⁷⁵ Rubenson, Sven. Ibid., 46 document no. 36.

²⁷⁶ Rubenson, Sven. Ibid. document no. 66.

On June 15th, 1876, “Menelik II, -by the Grace of God king of Shewa” granted a coal mine concession to Pierre Arnoux representing the French-Ethiopian society.²⁷⁷ If the first contract recorded in my sample took place between a regional prince and a French representative, this one occurred at a time when the centralization of Ethiopia was in full swing. Thus, even as political rule changed hands in Ethiopia the tendency to give perks to public and private French citizens remained part of a strategy of self-aggrandizement that paid off. Wielding natural resources concessions with cultural heritage, international reputation was cheaply bought through contracting and lobbying. Introduce the following source:

By this document we authorize Mr. Pierre Arnoux to cede in our name, without payment and with full ownership, to the French-Ethiopian society to be established in France, the coal mine which is found near Chenno...besides the mine, also the territory necessary for the accommodation of the workers and the exploitation of the coal mine. The company undertakes to construct at its expense a road as far as the river Awash for the transportation of its coal.²⁷⁸

This is both a coal mine and a land grant offered to a company that was going to be incorporated in France. Keller notes that although Ethiopia historically had different types of land tenure, “the emperor’s fictional control over all land [was] an extremely valued [instrument] of political patronage” that safeguarded his own absolutist position.²⁷⁹ It is not clear whether King Menelik had stock in the French-Ethiopia Society but the only immediate economic benefit was a ‘road’ to be constructed in Ethiopia. Otherwise, the French-Ethiopian society was a powerful lobbying strategy that consolidated Ethiopia’s standing as a great power among the greatest at this time. Through concessions and grants, Menelik appeared to be the buyer of international reputation. The following year (June 16, 1876)²⁸⁰, Arnoux was given a political mandate as *envoyé extraordinaire* (extraordinary envoy) to friendly powers in Europe. If the free concession of a coal mine and land did not make sense in the beginning, we now understand why Menelik made the move. He wanted a non-state private ally and basically employed Arnoux with the hope of building a diplomatic front for the defense of Abyssinian interests.

²⁷⁷ Rubenson, Sven. (Ed.). (2000). *Internal Rivalries and Foreign Threats 1869-1879*. Acta Aethiopica. Vol. III. Addis Abeba: Addis Abeba University Press, 241, document 168.

²⁷⁸ Rubenson, Sven. Ibid. 241, document 168.

²⁷⁹ Keller, Edmond. (1988). Op. cit., 51.

²⁸⁰ Rubenson, Sven. Ed. (2000). Op. cit., 241, document 169.

As Menelik's extraordinary envoy, Arnoux was granted the power to defend and protect the territorial integrity and independence of Abyssinia, sign a treaty with Egypt guaranteed by European powers, establish diplomatic and friendly relations with Christian nations of Europe, raise questions about Egyptian aggression and explain the official position of Abyssinia to European powers.

This strategy evidences the interdependence of trade and politics. More interestingly, it must be noted that the bundling of trade and politics was an African diplomatic initiative. From an Africanist perspective, Menelik could be seen as a visionary theorist and statesman who stretched the concept of freedom and independence far beyond the imaginative frontiers of western classical theorists. It should perhaps be noted that with the exception of Machiavelli, none of the western theorists of state still taught in introductory classes to political theory nowadays captured the complex dimensions of independence as Menelik did. Machiavelli understood the risk that comes with a system of government by contract in *Prince*, but nevertheless held it in higher regard than government by fortune in part because he was first and foremost a statesman not an armchair philosopher.²⁸¹

It might come as a surprise that it was Menelik, not Yohannes IV, the great unifier of Ethiopia who made the best use of private contractors. Yohannes mainly relied on direct and “patient diplomacy²⁸²” to reach out to great powers. His administration produced a significant amount of correspondences between Yohannes IV and France, Great Britain, Russia, Egypt. The letters²⁸³ show that Yohannes clearly wanted to be perceived as equal to other great leaders of powerful nations and this might explained his reliance on formal and direct diplomacy rather than on private brokers. The state of unrest and external aggressions under his reign might have made foreign private contractors suspicious to Yohannes IV's. In contrast, private contractors helped Menelik undercut the power of Yohannes IV and secure his rise to power.

Following the appointment of Arnoux as Abyssinia's Ambassador to various governments in Europe, he was sent off with the power of attorney

²⁸¹For a good review of Machiavelli's public life as courtier and war procurement diplomat for the Republic of Florence see King, Ross. (2007). *Machiavelli: Philosopher of Power*. New York: HarperCollins.

²⁸² Keller, Edmond. (1988). Op. cit., 28.

²⁸³Rubenson, Sven. Ed. (2000). Op. cit., for Yohannes IV's correspondences with different foreign powers during his reign.

*to sell on the best possible terms the merchandise which [Abyssinia] entrusted to him as samples...proceed to the French government... to conclude political and commercial treaties between France and Ethiopia; to found a large Franco-Ethiopian company...to assist in the development of industry and commerce in Ethiopia...to make purchases on the behalf of the Ethiopian government of arms, ammunitions, various tools, various merchandise, everything according to what has been agreed before his departure, and in accordance with the instructions handed over.*²⁸⁴

A note from Rubenson, the editor of this historical contract, reads as follows: "that is document was initiated and drafted by Arnoux is quite obvious. Whether they were fully understood or even known to Minelik (*sic*) and his advisers remains an open question."²⁸⁵ For my analysis, it suffices that "authenticity" not be questioned. Rubenson, however, raises an important question related to the choice of angles of analysis of the decisional processes in contractual relations. Again, one can clearly see the pitfalls of confounding choice and strategy. It might be tempting to view the initial concession as "land grab," to denounce the appointment of a Frenchman as foreign diplomat as "colonial usurpation" only. I can see the appeal of the argument that economic transactions that are not homegrown could be harmful to domestic interests. But, such paternalist analytic attitudes are costly because they infantilize non-western agency by disqualifying its tenets. Omniscience is neither a measure of sound public policy, nor evidence of the absence of strategic thinking. Indeed accompanying the devolution of power resulting from the decision to hire a private foreign contractor was a carefully designed strategy that sought to consolidate Ethiopia's reputation internationally and to affirm a unitary rule domestically.

An account of the evolution of the relationship between France and Abyssinia, Arnoux and Menelik shows that contracting served both the foreign and domestic interests of Ethiopia. Indeed in long-term relational contracts convention is not all that matters. In many cases, competition in long-term relational contracts remains within reach of the expectant and is rarely limited by the transaction cost of the exchanges. The "reverse auction-like" strategy of Ethiopia becomes clearer as one distinguishes and juxtaposes concessions made to Arnoux as payment for his services²⁸⁶, and

²⁸⁴Rubenson, Sven. Ibid. 242, Document 170. My emphasis

²⁸⁵Rubenson, Sven. Ibid. 242, *sic*.

²⁸⁶In return for his good services, Menelik granted Pierre Arnoux a piece of land (about 20x50 kilometers). The new contractual elements were the following: the land grant was made according to French Law; Menelik promised to eject the farmers who are settled on the land -

privileges given to him as a diplomatic means to attract either more foreign investment in Ethiopia, or win foreign military cooperation against Ethiopia's enemies.

Ethiopia and Italy

Unlike France, Ethiopia's relations with Italy were hostile. As previously mentioned, the second and third peak in the data took place when Ethiopia was under external aggression with the Mahdists and Italy leading the charge. Before the outbreak of the battle of Adwa (1896), however, peaceful commercial deals consolidated Italo-Ethiopian relations. On November 15, 1869, a contract sale of a territory was signed between two brothers Hasan bin Ahmad and Ibrahim bin Ahmad and Giuseppe Sapeto, an Italian Catholic missionary. The two brothers sold the land for six thousand thalers. Giuseppe handed over 250 thalers²⁸⁷ to the sellers with the understanding that the remaining five thousand seven hundred and fifty thalers should be paid within one hundred days from the sale date.

A note from Rubenson reads as follows:

The signatures are followed by the following note: 'The rights deriving from this convention were transferred by the Rubattino society [company] to the Royal Government by the convention of 10 May 1882.' All attempts to locate the original or archival copy have failed. The private purchase of a piece of land by the former Catholic missionary Giuseppe (see ACTA I, no. 30) with no mention of the Rubattino Company, for which he was acting, much less the Italian government, nevertheless became the foundation of the first Italian claims to the colony of Eritrea.²⁸⁸

Whereas Christianity helped further the interests of Ethiopia through contracting with France, it became the bearer of bad news with Italy another Catholic country. The difference in outcome, however, was attributable less to differences in the nature of Christianity than to the transient nature of private ownership and the changing nature of political power in Italy and this period. What started as a private sale to one missionary entrepreneur later gave ownership rights to a company and imperial

nothing is said about relocation or compensation of the farmers-; Arnoux was entitled to cede or give away the land as well as the stream on the condition that it will all be "utilized for cultivation, irrigation, or establishment of factories"; Arnoux is referred to as "the French merchant". Given at Liche on June 10th, 1876. Rubenson, Sven. Ed. (2000). Op. cit., 243, document 171.

²⁸⁷The Maria Theresa thalers were minted throughout the Austrian Empire in limited numbers and circulated in different parts of Africa during the scramble period (1880-1900). Great Britain and Italy later manipulated the currency and acquired a monopolistic edge on trade and politics on the East African coast. For details see Gervais, Raymond. (1982). "Pre-colonial Currencies: A Note on the Maria Theresa Thaler." *African Economic History*, p.147-152.

²⁸⁸Rubenson, Sven. (Ed.). (2000). Op. cit., p. 27, document 22.

claims to Italy. On December 30th, 1879 a land sale contract was signed between Burhan Dini, Sultan of Rahita and Ribattino & Co.²⁸⁹ With this concession, one traces the evolution of trade deals between Rubattino & Co. and the political leaders of Abyssinia. The land ceded had been leased for the past ten years to Mr. Guiseppe Sapeto. Now the Sultan was selling the land for two thousand rupees for definitive acquisition. In addition to ownership the Sultan gave rights to the company to "raise the Italian flag there." This was the first time that the "flag" became explicitly part of trade deals in the collection of treaties by Rubenson.

Procurement deals are never entirely commercial or political; they are both. Of the many causes of the first war between Ethiopia and Italy (1896) nothing illuminates the past as clearly as the trade contract of 1879 with its patriotic zeal coded as flag privileges. The years that followed the 1879 contract involved land disputes²⁹⁰ preceding the battle of Adwa in 1896. Ethiopia experienced major setbacks not primarily because of the military superiority of Italy, but also because of internal weaknesses due to the unfinished business of state centralization. Menelik, then a vassal prince from the south first allied (1883-1887) himself with Italy for the procurement of weapons against the Yohannes, the central authority.²⁹¹ In 1889, the limits of the Sultanate of Oppiah were included in another treaty were later contested by Osmand Mahmond, the Sultan of all the Mijjertayns and Yusuf Ali Jusif, Sultan of Oppia. New boundaries were drawn in May 1889.²⁹² Unlike trade contracts with France, Ethiopia seemed to have lost its ability to define independence and sovereignty in its own terms with Italy. The ceding of a part of its territory in 1889 was not just loss of sovereignty, but also the encroachment of foreign ideas depicting national freedom as emanating from Italian 'protection.' A concession of Eritrea was given to Italy in the same year but the terms of this contract or the treaty of Wuchale later became contested by both parties²⁹³ and eventually led to war. As Menelik consolidated

²⁸⁹ Rubenson, Sven. (Ed.). (2000). Op. cit., p. 339, document 235.

²⁹⁰ Millette, A.J. (1973). Op. cit., no. 1, and 3.

²⁹¹ Keller, Edmond. (1989). Op. cit., 31. Bulatovich, Alexander. (2000). *Ethiopia through Russian Eyes: Country in Transition 1896-1898*. Translated by Richard Seltzer. New Jersey: Red Sea Press, 98.

²⁹² Rubenson, Sven. (Ed.). (2000). Op. cit., 339, document 235, no. 161

²⁹³ Misunderstandings such as the one that arose from the interpretation of the treaty of Wuchale were quite rare and point the overbearing of aggression and war context on traditional diplomacy. Nevertheless, what is important from my perspective is to note that contestation ex-post of the intent of the treaty was never presented as an outright denial of its existence. A deeper understanding of the context and agents

his power, he later defeated the Italian army in 1896 in the epic Battle of Adwa and secured the territorial integrity of Ethiopia without reclaiming Eritrea.²⁹⁴

From the perspective of strategic posturing, the battle of Adwa was also a policy success for Ethiopia showing the effective use of foreign non-state actors as military advisers domestically and extraordinary envoys internationally. Menelik II developed a strategic friendship with Russia through Nicolai Leontyev and the St. Petersburg Geographical Society for military support without raising the suspicion of Great Britain. The House of Commons sitting on February 28, 1895 worried about the Russian mission to Abyssinia and Her Majesty was reassured that the expedition was 'not official but sent by the St. Petersburg Geographical Society for scientific purposes...and...very possibly...charged with some religious mission from the Russian Ecclesiastical authorities.'²⁹⁵ Thus under the cover of scientific missions, humanitarian (Russian Red Cross²⁹⁶), and Orthodox Christian expeditions, Ethiopia once again recruited foreign agents as partners in the art of war making and intelligence gathering to secure a victory at Adwa.²⁹⁷ Nicolai Leontyev later became Count Abai and the governor general of one of the provinces of Ethiopia. Accompanying Russia's first official diplomatic mission to emperor Menelik II in 1897 was Armatov, Colonel of the General Staff and Arnoldi, a Lieutenant of the Izmailovskiy Guard Regiment and both men were "on business from the War Ministry."²⁹⁸ By outsourcing some of the functions of this empire, such as diplomacy, to foreign consultants, "Menelik strengthened his defensive capability by purchasing modern arms and military equipment."²⁹⁹ Thus the procurement of tangible (arms deals) and intangible (lobby, reputation) goods from foreign private suppliers sustained the Ethiopian empire at different stages of its consolidation.

involved in the signing of the treaty helps clarify the origin of the misunderstanding. For this purpose, see Caulk, Ricard. (2002). *"Between the Jaws of Hyenas" A Diplomatic History of Ethiopia (1876-1896)*. Edited by Bahru Zewde. Wiesbaden: Harrassowitz Verlag. Erlich, Haggai. (1982). *Ethiopia and Eritrea During the Scramble for Africa: A Political Biography of Rās Alulā, 1875-1897*. Edited by Harold G. Marcus. East Lansing: Michigan State University African Center. For a critical analysis of Menelik II relations with Italy as well how the financial demise of the army of occupation complicated the mobilization of white battalions and native troops on the ground see chapter VII in Berkeley, G, F-H. (1902). *The Campaign of Adowa and the Rise of Menelik*. Westminster: Archibald Constable.

²⁹⁵ Hansard, February 28, 1895 vol. 31 c31 "Mission to Russia" <http://hansard.millbanksystems.com/commons/1895/feb/28/russian-mission-to-abyssinia>

²⁹⁶ Bulatovich, Alexander. (2000). Op. cit., Book II, 173.

²⁹⁷ Although this work is not concerned with the procurement practices of European powers in Africa per se, it might be useful to highlight the fact that the defeat of Italy could be attributable to a dysfunctional war procurement systems and parliamentarian bickering over budget. See Fitz-Hardinge, George. (1902). *The Campaign of Adowa and the Rise of Menelik*. Westminster: Archibald Constable. Chapter 7.

²⁹⁸ Bulatovich, Alexander. (2000). Op. cit., Book II, 173-174.

²⁹⁹ Keller, Edmond. (1988). Op. cit., 33.

What is remarkable is that public procurement historically transformed the strategic ways and means through which nations invented and consolidated independence and sovereignty. Ethiopia sold and bought goods and services but actively participated in the transformation of meaning and value attributed to historical public-private partnerships. The gain to Ethiopia, in this sense has not been material only, but also symbolic, political and epistemological. The asymmetric power context in which Ethiopia evolved was not entirely defined by exogenous attempts to colonize its territory. Power discrepancies were a result of domestic structures highlighting the struggle between centripetal and centrifugal forces at work in the process of empire building.

Additionally, public procurement restated the power of individuals within society especially within the military. The organization of military hierarchy was divided along four categories: the regular regiments of troop mainly protecting the emperor, the private regular troops under individual leaders, the auxiliary and territorial troops supplied by landowners in times of war, and the irregular troops comprised of any inhabitant who decided to join combat.³⁰⁰ Although central authority remained with the emperor, mobilization for war required both general (public) and private troops. The supply of private troops served other purposes than military hierarchical decorum; it was a tactical necessity because a rare commodity. Private troops were a tactical bargain of individual military leaders who recruited and paid them and “the number of troops of individual leaders [was] not determined by law for each separately, but rather depend[ed] on the wealth, the popularity of the leader, and the size of the region that provides the means for maintaining the troops.”³⁰¹ In contrast, the recruitment of the irregular corps was voluntary at the onset of a war. Hence, for individual leaders, war contracting presented them with the opportunity to enhance the military performance of their units and to compete for the favors of the emperor. Individual firms, lone Catholic entrepreneurs as well as regional princes such as Menelik prior to his assuming the throne of the King of Kings, became power brokers by manipulating contractual opportunities to their advantage.

³⁰⁰ Bulatovich, Alexander. (2000). *Op. cit.*, p.101-2.

³⁰¹ Bulatovich, Alexander. *Ibid.*, 102.

III. The Southeast Region

Two important events brought profound change in the southern region: first the creation of the Sultanate at Zanzibar, and second the abolition of the Indian Ocean slave trade. Early contacts between Europeans and the southern East African Coast date back to the Middle Age with Vasco da Gama's voyages around the Cape of Good Hope. Constant wars between the Portuguese and Muslims in North Africa also led the Knights Templars to this region in search for Christian converts and potential allies against the Arabs. The Portuguese search for potential partners from the East Coast region put the Africans in a strategic position that shaped trade and politics for many centuries. There is a vast literature on the Europeans and Arab strategic games on the East African Coast. However, in keeping with the goal of this study, I am interested in understanding how contracts became key instruments for trade and politics from the perspective of the Africans.

Because of the eclectic cultural nature of this African region, when I use the term "African" in this chapter it is meant to include political groupings in the hinterlands (mostly blacks) and Arabs settlers (mostly along the coast). Thus the term "African" denotes a people belonging to the coast (Swahili) and to the interior. The European is treated as the sole foreigner³⁰² given the fact that Islam already made inroads into this region well before the arrival of Portuguese missionaries.³⁰³

Although Islam had unified a number of ethnic groups under its umbrella in the northern part of the southern coast, tensions and rivalries remained between local politically autonomous communities, and between the North and the South coast. These internal conflicts took a different turn with the arrival of the Portuguese whom the Africans sometimes used to settle their own disputes. The North-South divide became more accentuated as the competitive pendulum kept swinging between parties

³⁰² China's sea power reached the East African Coast in the fifteenth century before the arrival of the Europeans. Historians have traced early gifts from the king of Mombasa (modern Kenya) to the Chinese emperor at this time but contacts with China were bound to be superseded by East African trade with the European because of China's isolationist policies that followed after initial contacts. See Lodewijk Duyvendak, JJ. (1949). *China's Discovery of Africa: Lectures Given at the University of London on January 22 and 23 1947*. A. Probsthain's Oriental Series; and Levathes, Louise. (1997). *When China Rules the Seas: The Treasure Fleet of the Dragon Throne, 1404-1433*. Oxford: Oxford University Press.

³⁰³ Coptic Christianity in Ethiopia has a longer history in this region. In fact some of the early missionaries were interested to the East Coast in part because they were in search for Prester John, a legendary "Christian King of Ethiopia, of whom the peoples of Europe had heard so much, and from whom they expected so much aid in their struggle against the Moors" in Gray, John. (1958). *Early Portuguese Missionaries in East Africa*. St. Martin: Macmillan, 2. Nevertheless, when I refer to Christianity in this chapter, I am mainly referring to Christianity brought to the coast by Europeans.

that did not hesitate to use self-interested rationale or religious-sanctioned tactics to gain an advantage over rivals. For the purpose of this study, I confine myself to internal and external factors that shaped contractual arrangements from roughly the sixteenth century until 1919. Religion is mentioned only in relation to its underlying political and economic roles in constructing or deconstructing strategic alliances between parties.

Here I retain two important factors that contributed to making bargaining on the East Coast of Africa unequal yet strategic, namely, the nature of *overland* (hinterland-coast) *political economy* and *climate fluctuation*. How agents evaluated the benefit and cost of a cooperative approach to overland and seaborne opportunities for trade diversification against those of unilateral trade monopolies is what the study of their contractual decisions seeks to reveal.

History has it that when Vasco da Gama reached the African East Coast, he received “a friendly reception at Malindi [because] the ruler of that place was usually at war with his more powerful neighbor at Mombasa and accordingly welcomed the Portuguese as a possible ally.”³⁰⁴ Through their strategic partner, the King of Malindi, the Portuguese later obtained a lease of the island of Mombasa, - which the African ruler had previously captured-- and turned it into a center for proselytization.³⁰⁵ Mombasa therefore passed to the Portuguese and became their administrative capital.

As we have seen with the early movers, the Coast-hinterland relations were a determining factor in designing the strategic contour in the procurement of goods and services. The autonomy of towns in East Africa resembles the autonomy of cities visited in chapter x with the difference that “coastal settlements had no territorial backing...since all places offered much the same commodities for sale, each would compete with its neighbours in trying to entice interior peoples and maritime traders to its own markets.”³⁰⁶ Thus the hinterland and its people became strategic players with potential symbolic and economic power especially with the entry of Portuguese in the race for trade monopoly.

³⁰⁴ Gray, John. Ibid., 3.

³⁰⁵ Gray, John. Ibid., chapter 4.

³⁰⁶ Nicholls, C.S. (1971). *The Swahili Coast: Politics, Diplomacy and Trade on the East African Littoral, 1798-1856*. New York: Africana Publishing Corporation, 23.

On the one hand, the Portuguese were in search for Prester John, a mythical Christian King of Abyssinia (Ethiopia), with whom they hoped to defeat Arabs in Africa. Thus the search for an overland route to Ethiopia became a spiritual and national obsession for the Portuguese equally relying on the collaboration of hinterland political groups. Beyond the realm of spiritual imaginary, the hinterland had significant economic power as a supply of raw materials such as gold, ivory, and slaves. It is therefore not surprising that when Vasco da Gama learned that “gold mines existed in the interior, he also discovered that the trade in gold was more or less a monopoly of the inhabitants of Kilwa.”³⁰⁷

The discovery of a gold monopoly in the interior prompted Portugal to change the initial strategy of peaceful contacts into a forceful capture of the southern gold producer town of Sofala (located in modern Zimbabwe) leading to the construction of a fort to assert monopoly over the Southern African gold trade and the control of trade with the independent Queens of Zanzibar off the Coast. As it will be shown later, although Portuguese activities were short-lived, Portugal’s contractual activities were mainly concentrated in the South Africa-Mozambique-Zanzibar-Madagascar belt.

In response to this attempt to capture and replace indigenous natural monopoly with a foreign ‘managed’ monopoly in gold trade, Africans allied themselves with pirates in northern Africa to thwart Portuguese plans on the East Coast. Thus the vertical (North-South) configuration of the strategic context revealed a struggle between competing monopolistic claims between the Cross and the Crescent. The initial gains secured by early Portuguese traders and missionaries were subsequently challenged as many towns rebelled against foreign monopoly over trade. The Swahili sometimes invoked “Jihad” against infidels and eventually turned to Oman for support. In 1698 Mombasa fell to the Omanis who later established an independent Sultanate in Zanzibar in 1729³⁰⁸ (adding to the list of groups considered Africans in this study).

³⁰⁷ Gray, John. (1958). Op. cit., 5.

³⁰⁸ Middleton, John. (2004). *African Merchants of the Indian Ocean: Swahili of the East African Coast*. Long Grove: Waveland, 35-6. The date varies from different sources. The Sultanate, however, became consolidated only after the defeat of the Portuguese in Mombasa in 1832. The actual transfer of the independent Omani Sultanate from Muscat to Zanzibar took place around 1861 see Seaton, EE and S.T. Maliti. (1973). *Tanzania Treaty Practice*. London: Oxford University Press, 5.

With the entry of the Omanis in the picture, the politics and economics of contracting became interplay between three types of players separated by land and by sea yet needing the produce from both sources: the landlocked, the coastal, and the Indian Ocean merchants in the race toward monopoly over trade. The Omani Sultanate at Zanzibar retained control over maritime trade and secured the cooperation of Sultans of the mainland by contracting trade revenues. In the fragmented South at Kilwa, the Omanis “had made an agreement with the Sultan that he should retain his title and one-fifth of the customs dues.”³⁰⁹ In the North, they asserted monopoly over trade from and to Mombasa, but they did so without disturbing trade relations with the hinterland and without alienating the middlemen upon whom commerce with the coastal towns depended. Hence the Sultanate at Zanzibar successfully established a network of exchanges cooperation with the mainland (North and South) and the hinterland that added to the advantage of its strategic location as the guardian of maritime trade. Subsequent arrivals and departures of different Europeans powers restructured the balance of power between the hinterland, the coastal towns and Zanzibar but did not totally control the dynamic of change. Thus, the contractual activities in this regions were two types: (a) the contracts of Zanzibar in the process of establishing itself was the major player in the southern region; (b) contracts concluded between Africans and other regional players in their attempts to unseat Zanzibar’s authority [Table 6.d]. Peripheral but equally important were the contractual transactions of Madagascar and Mauritius as rivals and partners with Zanzibar in the slave trade and plantation economy.

[Table 6.d] *Bilateral and multilateral contractual patters in East Africa (excluding Ethiopia)*. Data reveal that Zanzibar had the highest number of bilateral c and multilateral contracts.

Rows are levels of East Africa

Columns are levels of POL

	0	1	Total
MA	0	1	1
MD	3	2	5
UG	2	1	3
ZR	31	9	40
Total	36	13	49

³⁰⁹ Nicholls, C.S. (1971). Op. cit., 33.

[Table 6.e] *Contingency table: East African and foreign partners (excluding Ethiopia)*. The main contracting parties with Zanzibar were Great Britain, Germany, and the US.

Rows are levels of East Africa
Columns are levels of FP

	AUH	BL	FR	GB	GBF	GBG	GR	IT	M	PO	US	Total
MA	0	0	0	0	1	0	0	0	0	0	0	1
MD	0	0	3	2	0	0	0	0	0	0	0	5
UG	0	0	0	3	0	0	0	0	0	0	0	3
ZR	1	2	0	23	0	3	5	3	1	1	1	40
Total	1	2	3	28	1	3	5	3	1	1	1	49

One unifying factor besides actual goods and services justifying iterated bargaining in the region was the climate cycle of the monsoon winds. One could imagine the monsoon winds as regulators of overall trade³¹⁰ constraining choice and the durability of choice in this context. The wind that may have carried out trade rivals from April to August from the East African Coast to the Persian Gulf and to Asia was the same wind that brought back new competitors to the same coast from November to March. To illustrate,

Mombasa's defensive position was strengthened by the difficulties of mounting a blockage. Blockade tactics, assisted, it is true, by the narrowness of the harbour's entrance, were greatly hindered by the monsoon winds. Vessels could only maintain a blockade for the duration of one monsoon or forfeit their freedom to return to their home port.³¹¹

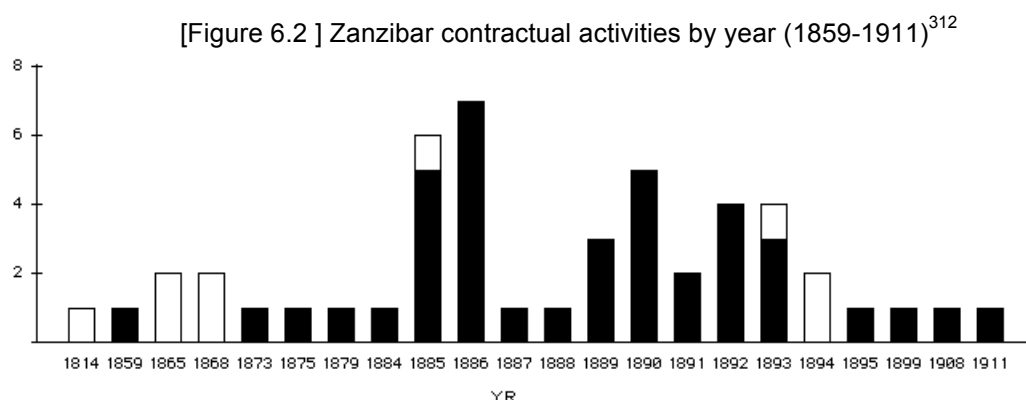
Because the monsoon cycles determined the trade cycles, climate had a strategic implication for all players. That is, unilateral solutions and one-way exit or entry strategies were not as useful as some parties might have wished. Because the monsoon winds simultaneously empowered and disempowered different trading agents with its cycles, "contracting the winds" must have been an intangible yet *equilibrating* factor in the decision-making process leading to the procurement of tangible goods and services. The only exception to the whims of the wind was Zanzibar itself because the

³¹⁰ See a very interesting analysis of the effects of the monsoon on the economies and local strategies of the Gulf of Persia port cities in Floor, Willem M. (2006). *The Persian Gulf: A Political and Economic History of Five Port Cities 1500-1730*. Washington DC: Mage.

³¹¹ Nicholls, C.S. (1971). *Op. cit.*, 46.

monsoon did not affect its trade with the mainland, a strategic advantage that facilitated the transformation of the island into an export-import monopolistic port.

I now turn to the analysis of the contractual patterns of specific players over time. Again, modern names used here are approximations of historical places where events under study took place.



Based upon the volume of contracts and the durability of contracting activities, Zanzibar appears as a major player in trade relations. The concentration of Zanzibar's contractual activities peaked around the years 1884 and 1885 followed by a steadily decline only after 1895. This pattern suggests: (a) the influential role of the Indian Ocean slave trade in the making Zanzibar, (b) the position of the island as a full-fledged negotiator that colonial powers had to grapple with during the territorial scramble for Africa in late nineteenth century. Data above confirm Zanzibar's strength and further reveal that it was the only African party to engage in multilateral economic diplomacy.

Intangibles: the rise of anti-slavery discourse and policy

Data collected show Zanzibar contractual transaction starting in the mid-nineteenth century when abolitionist discourse and policy were in full swing. Before the emergence of abolitionist discourse and policy, the most strategic concerns of different Arab families on the East African coast

³¹² Y= number of contractual agreements X= Year. See coding of African and foreign contractors in the appendix.

were the consolidation and preservation of their independence from Oman. Politics before early nineteenth century was therefore dominated by internal feuds between the houses of Mazrui, the pro-independence faction, and the Busaidi, in favor for continuing allegiance to Oman.

After establishing themselves at Zanzibar in late eighteenth century, the authority of the Mazrui in Zanzibar continued to be challenged from Oman and from the mainland. The loss of Pemba, Zanzibar's main food supply led to a search for strategic alliances to prevent the island from falling back under the authority of Oman. With the demise of the Portuguese in the region, a strategy was devised to *contract out independence* with Great Britain stationed at Bombay in India. A letter by Abdulla bin Ahmed sent to Bombay explained that "he was the ruler of an independent state which Said bin Sultan of Oman wished to annex³¹³" and declared that he would rather give the said independent state to England. This request was rejected given the close ties that bound Great Britain and Oman. Notwithstanding this complication, the Mazrui amended their offer by giving "half of [their] revenues³¹⁴" to Great Britain in exchange of an officer stationed on the coast. The British never formally accepted the offer but changes in discourse over trade practice and policy made British presence in the region necessary. Instead of working with his critics stationed at Mombasa, Bombay made the choice to cooperate with Sultan Seyyid Said in Oman who regained control of the East African coast in early nineteenth century after turning local protests against Mazrui family to his advantage.

In 1807 the British adopted the Slave Trade Act, which outlawed slave trade in all British territories and dominions. Previous attempts to curb the slave trade yielded imperfect results in East Africa the reason being that the Sultan of Oman derived substantial revenues from taxes levied on slave ships from Zanzibar. French merchants at Mauritius and Bourbon islands had independently secured slave trade concessions with Zanzibar and Kilwa in 1776, 1785, and 1819³¹⁵ and were competing with Portuguese and Spanish merchants on the coast. To win the collaboration of Oman,

³¹³ Gray, John. (1957). *The British in Mombasa 1824-1826 Being the History of Captain Owen's Protectorate*. London: Macmillan, 21.

³¹⁴ Gray, John. *Ibid.*, 21.

³¹⁵ Nicholls, C.S. (1971). *Op. cit.*, 198, 131-6.

the British strategically likened the slave trade to piracy, which they previously fought alongside Seyyid. The reinvention of an anti-piracy discourse in the forms of a fight against slavery offered the discursive incentive to the Sultan of Oman to agree to a treaty with Moresby in 1822. Given the economic return of the slave trade from Zanzibar to the Omani treasury, this political discourse proved strategically significant because the treaty had effect in Zanzibar where the Omani had previously migrated. Thus,

1840s is a climacteric in the history of the East African coastline, since it saw the setting up in Zanzibar of a court whose ruler had foreign diplomatic connections –the first in tropical Africa—with France, with Britain, and with the United States. From the United States, he accepted a consul in Zanzibar in 1836, and from Britain a consul, Atkins Hamerton, in 1840. This so far as the British were concerned, was mainly to confirm and support the Moresby Treaty of 1822, by which Said had agreed to make illegal throughout his dominions the sale of slaves to the subjects of Christian powers, and to confirm trading conditions already existing. For the Americans it was a similar confirmation. These changes brought Europe and the United States into permanent formal contact with Zanzibar.³¹⁶

The Omani edict of 1850, when the contractual history of Zanzibar starts in my dataset, forbade slave trading to Indians merchants on the East African coast leading to, on the one hand, the consolidation of Zanzibar authority in the sub-region, and on the other hand, increase in slave capture for local plantation industry.³¹⁷ But Sultan Seyyid Said's double-dealings with the slave trade and pirates quickly led some colonial administrators to reconsider the Mazrui offer as well as new partnerships with other groups in the hinterland.

Beside Great Britain and France, Germany played a key role in expanding the contractual affairs of the East Coast. The first date of contract recorded in my dataset is 1859, year of the treaty on Trade, friendship and navigation between the Hanseatic League and Zanzibar. In it, "the Hanseatic cities [Hamburg, Bremen and Lubeck] of Germany asked the Sultan to provide a legal framework for the ever increasing trade...Modelled after the respective treaties which Zanzibar had concluded with the United States, England and France...In 1860 Johann Witt, representative of the firm of William

³¹⁶ Her Majesty's Stationary Office. *Zanzibar: Exchange of letters between His Highness the Sultan of Zanzibar and the British Resident terminating the 1890 Agreement as respects the Dominions of the Sultan not Comprised in in the Kenya Protectorate*. Presented to Parliament by the Secretary of State for the Colonies by Command of Her Majesty. December 1963. Although a minor player with Zanzibar, Italy added his name to the cohort of consular representation in 1885, secured a concession contract of the Benadir Ports on August 12, 1892, which the duration was set to three years after additional negotiations in 1893 see Herslet, Edward. (1894). *Map of Africa by Treaty*. Vol. II, Charleston: Bibliobazaar, nos. 201,203 & 204.

³¹⁷ Nicholls, C.S. (1971). *Op. cit.*, 211-5.

O'Swald, was nominated the first German Consul in Zanzibar.³¹⁸ Henrich Ruete, a German merchant, even won the heart of Sayyida Salme,³¹⁹ the Sultan's sister and gave Germany a prominent role on the East African Coast.

Like their predecessors, Germans merchants traded with the island of Zanzibar and bought territorial concessions from disgruntled vassals from the mainland. By 1885, a mixture of trade contracts, gunboat diplomacy and strategic alliances with Great Britain put Zanzibar under the control of Germany. German companies' ascendancy, however, cannot be dissociated from the economic gains and territorial footholds they received from dissatisfied mainland Sultans. Similarly, on the British side, the proclamation of a British Protectorate over Mombasa, Malindi, and Pangani (1824-6) is a tale of Captain Owen's attempt to suppress the slave trade as well as a result of the local chiefs and Mazrui bid for power and ascendancy against Oman.

It is true that the contractual language and subsequent interpretations of the historical documents often focused on the citizenship of the parties, but it is important to remember that prior to 1885, "diplomacy" was conducted by private European companies in Africa with non-state actors on the continent. Thus the language of "treaties" is somewhat misleading because it seems to overemphasize the role of the "public agent," or the state, while simultaneously ignoring the "private" dimensions of early trade deals in Africa.

The distinction and intertwining of the public/private forces is important to note especially when analyzing the decisional motivations of African agents on the eve of the modern era. Here strategy and choice may appear to be confounded but they remain distinct. Africans bargaining opportunities and *choice* of contracting partners became more restricted in late nineteenth-century, thanks to the outright scramble of the continent. Nevertheless, the use of contracts as instruments of cooperation and non-cooperation points to something else: a progressive attempt to harness the winds of discontent. To use fashion imagery, the external-internal agential aspect of Africa's contractual history allows one to

³¹⁸ Schneppen, Heinz. (1998). *Zanzibar and the Germans: A Special Relationship 1844-1966*. National Museums of Tanzania. Occasional Paper, no. 10, 1.

³¹⁹ For a brief history of Germany, Islam, and Christianity in Zanzibar see Schneppen, Heinz. (1999). *Sayyida Salme/Emilie Ruete: Between Zanzibar and Germany, Between Islam and Christianity*. National Museums of Tanzania. Occasional Paper, no. 12.

identify the local threads of objection, rebellion, anger, dissatisfaction in the quilt of “colonial possessions;” a search for new modes of freedom, and a fight against monopolistic forces in societies. These are the politically significant intangibles worth noticing as they narrow the interval between the “colonial” history and contemporary challenges to public procurement practices reform in Africa.

To illustrate, political contracts between coastal dwellers and the hinterland with Great Britain and Germany pulled in and pushed away power from Zanzibar simultaneously. In the year leading to the conference of Berlin in 1885, British negotiators secured treaties with the chiefs Chagga and Taveta in the presence of Sir J.W. Matthews, in which they recognized their loyalty to the Sultan of Zanzibar.” Conversely, German treaties signed with many chiefs from the mainland and hinterland tended to disavow Zanzibar’s supremacy.

On November 26 1884, a declaration and agreement was signed at Msevero by the ‘Governor,’ Salim bin Hamed, and Dr. Peters. The agreement stated that the Governor, who for four years had been First Plenipotentiary of the Sultan of Zanzibar in Nguru, had declared that the Sultan did not possess suzerainty or protectorate on the mainland East Africa, and specifically not in Nguru or Usagara... On 2 December 1884, the Sultana Mbumi, Lady of the Province of Mukondokwa (or Mkondogwa) in Usagara, who declared that she was not and never had been dependent in any way on the Sultan of Zanzibar, signed a treaty with Dr. Peters, in which she declared that she, with the consent of the people, made over to him as the representative of the Society for German Colonization, her whole territory, with all civil and public rights, for all time and without any condition.³²⁰

Analyzed from the perspective of European possessions, these historical dealings have mainly been seen as “colonial.” Nevertheless, when one examines the motivational processes and tactical choices from an Africanist perspective it becomes probable that theory, not the action of the parties, that might be at fault here. Scholars have not seen the pedagogical, value-laden relevance of the seemingly ‘subpar’ African choice in ‘colonial’ encounters because rational choice theory confounds strategy with choice and sovereignty with independence.

It made sense to African to bargain *sovereignty* as *independence* seemed to have mattered more in a pre-modern state context. Should we be concern about sovereign in ‘public’ contracting?

³²⁰ Seaton, EE and S.T. Maliti. (1973). Op. cit.,7-8. The authors provide a thorough list of treaties on page 9.

What is does the meaning of independence with sovereignty in decline? Put differently, what is the meaning of freedom in the age of public contracting for both economically advanced and developing countries? Given the contingencies of the modern state, what sorts of “independences” become toxic and what are those worth keeping when government contract out goods and/or services? If one thinks the behavior of Africans were “irrational” or not worth a political attention at least for theory building, one might want to consider that we still haven’t figured out the answers yet as the most recent contributions on government contracting suggest.³²¹ While some caution against the new corporate imperialism,³²² other see opportunities for new forms of partnership between central and local governments for the provision of public goods,³²³ and none is satisfied with either purely public or private law regulatory mechanisms³²⁴, or an exclusive economic approach to reform.³²⁵

Thus, the reward of revisiting the past from an Africanist perspective is humbling in the sense that it reveals how contemporary governance problems remain unanswered questions of the past. More importantly, the theoretical overture here suggests that such a mode of inquiry into global governance should not be bound to a particular genealogy.

Intangibles matter in contractual relationships because they create equilibrating dynamics imperfectly captured in rational strategic choice models. Economics or law alone does not explain why political entities contract out services; rational choice would not make sense of the historical actions of the contracting dynamics on the East coast of Africa. As we have seen, the climate conditioned the trade environment as a *repeated game of interactions* thereby restricting simple and unilateral moves. Although predictable, the repeated cycles of the monsoon winds made strategy unstable. That is,

³²¹ Government contract makes scholars and policy-makers worry about the future of foreign policy (Stanger, Allison. (2009). *One Nation under Contract: The Outsourcing of American Power and the Future of Foreign Policy*. New Haven: Yale University Press), democracy (Freeman, Jody and Martha Minow. eds. (2009). *Government by Contract: Outsourcing and American Democracy*. Cambridge: Harvard University Press), civil liberties (Blakely, Curtis. (2005). *America's Prisons: The Movement Toward Profit and Privatization*. Florida: BrownWalker Press) domestic security and public spending (Cedilot, Andre and Andre Noel.(2010). *Mafia Inc. Grandeur et Misere du Clan Sicilien au Quebec*. Quebec: Les Editions de L'Homme), international peace and cooperation.

³²² Scheidernman, David. (2008). *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Premise*. Cambridge: Cambridge University Press. Gourevitch, Peter and James Shinn. (2005). *Political Power & Corporate Control: The New Global Politic of Corporate Governance*.

³²³ Minow, Martha. (2002). *Partners, Not Rivals: Privatization and the Public Good*. Boston: Beacon Press. Mary-Scott N, Mary. (2012). *Collaboration Nation. How Public-Private Ventures are Revolutionizing the Business of Government*. Pennsylvania: Platform Press.

³²⁴ Goldstein, Judith et al. eds. (2001). *Legalization and World Politics*. Cambridge: the MIT press.

³²⁵ McCrudden, Christopher. (2007) *Buying Social Justice: Equality, Government Procurement & Legal Change*. Oxford: Oxford University.

strategic behavior was a combination of party's ability to spot particular favorable trade/political configurations, not a unique optimal solution.

Intangibles matter because they increase the scope of what matters. Put differently, they *are* the things bargained for as well as the pre-requisites for bargaining. Intangibles in this sense historically might explain why given political discontent and fragmentation, some societies do not collapse. Hence sovereignty and independence appear at times as *choice* that at other times as *strategy* with delayed choice. We are accustomed to thinking of sovereignty as a choice, thanks to Hobbes. Data, however, suggest another possibility: sovereignty as a strategy. Nothing else but the business of nations/states gives theoretical breath to the idea of *sovereignty as a strategy* and deserves more empirical explorations today than in the past. Indeed there remain unsolved but surprising paradoxes within existing 'governance' paradigms.

Findings about concepts and practices of sovereignty in the northern part of East Africa could be interpreted as countering and critiquing emerging visions of an international order organized around the notion of sovereignty "as an outcome of ongoing interactions between states"³²⁶ only. When non-Western people bargained with Western non-state actors prior to 1885 in Africa, they incorporated and transformed angles and possibilities for critical engagements with the emerging state-centered monopoly over political coercion and the provision of public goods. As Thomson argues, the transition from a heterogeneous management of violence to state monopolization of (domestic and extraterritorial) order did not displace old strategic bargaining practices. Confronted with social resistance of powerful groups against monopolization of political and coercive power, rulers often "struck bargains with various societal groups...These *bargains constitute[d] subplots in the central drama* which the state achieved ultimate authority, especially on the use of coercion, within its territory."³²⁷ Charles Tilly's empirical study of the evolution of the European states equally shows that "everywhere...the nation's creation of military might involved its agents in bargaining with

³²⁶ Thomson, Janice E. (1994). *Mercenaries, Pirates, and Sovereigns*. Princeton: Princeton University Press, 5.

³²⁷ Thomson, Janice E. *Ibid.*, 4. My emphasis.

powerholders and with groups of ordinary people³²⁸.” To the extent that Ethiopia’s strategic procurement and political discourse differentiated *independence* from *sovereignty* the case is a departure from widely spread amalgamations persistent in international relations theory³²⁹ today. Furthermore, by combining formal diplomacy and the bargaining with private contractors, the country’s strategic procurement could be seen as stretching the territorial dimensions and political location of “subplots” against the international normative sovereign order of the time.

IV. Comparison with Early American History

I began this chapter by arguing that intangibles are as important as tangible benefits that may accrue to polities as a result of public contracting. The historical precedent in East Africa suggests that the current focus on economic and legal rationales alone miss important aspects and function of public procurement. To criticize economic and legal models of public procurement is not to suggest that they are irrelevant to fostering good procurement practices in the developing world today. Rather, it is to show the perversion of such models when they attempt to simulate in developing countries, a postulate that runs counter to the very history of public contracting of once developing countries in the West. Early American history is particularly interesting in this regard because of the similarity of themes it provides.³³⁰

The profit versus patriotic/strategic motif

I situated the origin of public procurement in the fiscal-military policy of imperial Great Britain. In northern America, the history of government contracting started with the French and Indian and revolutionary wars mainly involving military contracting. During the French and Indian wars, “American

³²⁸ Tilly, Charles. (1992). *Coercion, Capital, and European States AD 990-1992*. Cambridge: Blackwell, 100.

³²⁹ A number of scholars have raised concerns about the fitness of international relations theory and social science models in the developing world. Newman, Stephanie G. (1998). Editor. *International Relations and the Third World*. New York: St. Martin’s Press. Connell, Raewyn. (2007). *Southern Theory: Social Science and the Global Dynamics of Knowledge*. London: Polity. Comaroff, Jean and John Comaroff. (2011). *Theory from the South: Or How Euro-America is Evolving Toward Africa*. Boulder: Paradigm Publishers. Cornelissen, Scarlett, Fantu Cheru, and Timothy M. Shaw. (2011). Editors. *African and International Relations in the 21st Century*. New York: Palgrave Macmillan. Dunn, C. Kevin and Timothy Shaw. (2001). Editors. *Africa’s Challenge to International Relations Theory*. New York: Palgrave Macmillan.

³³⁰ Such a similarity is possible when one extends the comparative strength of pattern identification in American Political Development (APD) literature to historical sites in Africa. See Orren, Karen and Stephen Skworonek. (2004). *The Search for American Political Development*. Cambridge: Cambridge University Press, chapter one.

businessmen participated in supplying the troops [and] although merchants in Britain often received the contracts for feeding the British troops, they relied on their colonial agents for the actual purchases and deliveries.³³¹ With a limited authority given to the Continental Congress to tax, American independence could have hardly been won without government contracting to private agents, merchants (including pirates), and other privateers.³³² In order to the secure overseas procurement of arms and ammunitions, the continental congress had to reconcile the profit motivation of merchants and the public interest for liberty. As Huston notes, “a large part of the ammunition brought into the United States from abroad, and a large share of the profits of many of the most prosperous merchants were not the result of extraordinary commercial transaction. They came from successful raids by American privateers on the high seas.”³³³ Thus, faced with the urgency of independence, contracting with available private expertise of all sorts became paramount. To sabotage English trade at sea, George Washington created a secret navy based on contracting with pirates and merchants and he financed their expeditions with commodities rather than hard currencies. Tobacco, indigo, grain, and timber were used as barter for foreign ammunitions.³³⁴ Ethiopia’s payments to contractors through commodities such as land concessions as opposed to barter privileges did not make its leaders’ decisions less strategic than Washington’s. Hence, one needs not to extrapolate the profit motive in historical contractual deals in Africa to make sense of their strategic and analytic usefulness in retrospect. Unraveling the role of private enterprise in the political economy of Africa might therefore help retrieve Africa’s agency too often neglected in colonial narratives.

State-building: Unity versus Union Motif

Early American history of government contracting helps put Africa’s historical practices in perspective. America’s contracting history is similar to Ethiopia’s in the sense that both territories were involved in a struggle for independence against exogenous threats and in the process of building a

³³¹ Nagle, James F. (1992). Op. cit., 12.

³³² Magra, Christopher. (2009). *The Fishermen’s Cause: Atlantic Commerce and the Maritime Dimensions of the American Revolution*. Cambridge: Cambridge University Press. For the role of private enterprise in the American Revolution.

³³³ Huston, James A. (2004). *The Sinews of War: Army Logistics, 1775-1953*. Hawaii: University Press of the Pacific, 20.

³³⁴ Patton, Robert H. (2008). *Patriot Pirates: The Privateer War for Freedom and Fortune in the American Revolution*. New York: Vintage, 17. For an extensive read on George Washington’s role in the creation of a contracted navy during the American Revolution, see Nelson, James L. (2008). *George Washington’s Secret Navy: How The American Revolution Went to Sea*. New York: McGrawHill.

territorial union. While most government contracting practices remained 'in house' after the American Revolution, foreigners continued to be used as contractors as the territorial frontiers expanded West and South³³⁵ of the United States. During the war against Mexico, Ulysses Grant writes,

The army was indifferently supplied with transportation. Wagons and harness could easily be supplied from the north; but mules and horses could not so readily be bought. The American traders and Mexican smugglers came to the relief. Contracts were made for mules from eight to eleven dollars each. The smugglers furnished the animals, and took their pay in goods of the description before mentioned...the principal business consisted in securing mules and getting them broken to harness. The process was slow but amusing. The animals sold to the government were all young and unbroken, even to the saddle, and were quite as wild as the wild horses of the prairie. Usually a number would be brought in by a company of Mexicans, partners in the delivery ... The soldiers were principally foreigners who had enlisted in our large cities, and, with the exception of a chance drayman among them, it is not probable that any of the men who reported themselves as competent teamsters had ever driven a mule-team in their lives, or indeed that many had any previous experience in driving any animal.³³⁶

What is interesting here is that the United States Army had to use the expertise of the locals, and therefore contract out certain functions to Mexicans with skills adapted to the geographical and climatic requirements of their territory. These were smugglers, entrepreneurs shifting allegiance, and rebelling against government monopoly over consumer products. Similar patterns are seen on the southern coast of East African coast where traders constantly shifted their allegiance based upon the weather and available contracting opportunities.

During the American Civil War, "two-thirds of all war spending went to pay for goods and services needed to outfit and sustain its forces in the field³³⁷" and a good portion of it wasted in corruption and kickbacks. At the same time, public opinion became more divided in its values about profiteering through public contracts and this debate remains polarizing today. Generally speaking though, in times of crisis, public opinion seems more concerned with work done than 'cost'. Though, while some of the concessions given to private entrepreneurs on the East Coast of Africa might seem too

³³⁵ Smith, Thomas. (1999). *The U.S. Army & the Texas Frontier Economy 1845-1900*. Texas: Texas A & M University Press. See appendices 1-4 for a list of military contractors and items supplied.

³³⁶ Grant, S. Ulysses. (1990). *Grant: Personal Memoirs of U.S. Grant Selected Letters 1839-1865*. New York: The Library of America, 51, 58.

³³⁷ Wilson, Mark R. (2006). *The Business of Civil War: Military Mobilization and the State 1861-1865*. Baltimore: The John Hopkins University Press, 1.

profitable today, the decision-makers at the times had other pragmatic concerns such as maintaining territorial independence or trade monopoly as in the case of Zanzibar.

Beyond similarity, there are also differences in conceptual posturing between early American contracting history and East Africa's. While in practice, American leaders primarily sought to attain political and social goals through government contracting, they concomitantly recognized the need to affirm and protect the private profit. When corruption and fraud became obscene, America's public opinion and legislators responded with the creation of price courts –so did Zanzibar- and other regulatory mechanisms. Denunciation of profiteers became more accentuated during the American Civil War and further legal remedies were sought to curb corruption and make government more accountable. Military procurement, however, remains an obscure subject in the United States and most citizens learn about it through scandals that make headline news. Despite public ignorance and frustration, there is hardly any aspect of government that is not contracted out in the United States today. Missing, however, in the approach to understanding the changing role of government is a debate about what is at stake. Historical understanding of notions of “independence” and “sovereignty” by procurement practitioners in East Africa could provide seeds for thought today. Is outsourced sovereignty always threatening?³³⁸ Can we outsource sovereignty and remain independent? These are perhaps the most important conceptual queries that make East Africa's historical contractual experience pertinent to the world today.

³³⁸ See Verkuil, Paul R. (2007). *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What we Can do About it*. Cambridge: Cambridge University Press. The author suggests that outsourcing always threatens democracy because there is a fundamental link between sovereignty and democracy.

Chapter 7. From the Mundane to the Sublime: A Political Analysis of ‘Legal Fictions’ and its Application in non-Western Settings

“We find that in the judicial process a highly significant role is played by ideals with reference to which the starting points for legal reasoning are chosen, by ideals which determine what is ‘reasonable,’ by ideals by which the ‘intrinsic merit’ of competing interpretations is determined, and by ideals which lead tribunals to extend one precept by analogy, while restricting another to the narrow bounds of its four corners.”
Roscoe Pound³³⁹

“English law is the most verbally conscious of legal systems, as our style of statutory interpretation and our approach to judicial precedent demonstrate...”
A.N. Allott³⁴⁰

“I am not saying that Tiv do not ‘have’ contract; I am merely saying that they have it like M. Jourdain spoke prose”
Paul Bohannan³⁴¹

The discovery and acknowledgement of paradox at the heart of networks provides the key to the construction of an appropriate legal concept and normative framework
Hugh Collins³⁴²

I. Introduction

The existence of a local written language for business certainly gave an archival momentum to a few African contractors. Thus, where data exist about lettered African societies, it is possible to compare different versions of the same contract as a starting point of inquiry into the political history of contractual relationships in Africa. Without a formalized language for business, however, researchers are confined to studying contractual archives produced by lettered Europeans, mostly merchants, entrepreneurs, and government officials. At first sight, this discrepancy may suggest an inherent bias weighing on the side of the writers of historical documents. The temptation here is to assume a methodological posture that goes against the archival grain to retrieve the trace of unwritten African voices. Although such an undertaking is tempting, it is virtually impossible without distortion given the localized nature of knowledge in Africa in this period.

With the exception of the above-mentioned countries, data from the rest of Africa in this study suffer from the limitation of written materials in African languages. This historical contingency raises

³³⁹ Pound, Roscoe. (2002). *The Ideal Element in Law*. Indianapolis: Liberty Fund, 7.

³⁴⁰ Allott, A.N. (1965). *Law and Language*. London: University of London, 6.

³⁴¹ Bohannan, Paul. (1968). *Justice and Judgement among the Tiv*. London: The Oxford University Press, 104. Accessed through HRAF online June 2012. Document id: ff57-031-06071.

³⁴² Collins, Hugh. Editor. (2011). Teubner, Gunther. *Networks as Connected Contracts*. Translated by Michelle Everson. Oxford: Hart Publishing, 25.

theoretical questions and methodological challenges that have confined comparative inquiries of Africa's legal development to either the study of traditional customary practices, or to the uncritical embrace of the 'colonial origin' of law as the starting point for political and legal reasoning. Where the first approach treats African 'customs' as a separate body of cultural practices different from their European counterparts,³⁴³ the second rests on a formulaic understanding of law that sublimates Western contribution to Africa's legal development. In turning to culture or colonialism to locate origins of Africa's legal development, none of these approaches sufficiently accounts for politics in the making of law.

First, the oral-written dichotomy rightfully raises concerns about agency, accuracy, and representation of intent in contract. Traditionally, scholars have treated the colonial context as over determining contractual outcomes. That is, existing assumptions about 'colonialism,' or the apparent discrepancy of power between parties is seen as a delegitimizing factor impeding serious comparative analysis beyond the traditional oppressed/oppressors binary. With this posture, the verdict seems unanimous: Africans could not possibly have engaged in signing contracts had they had full knowledge of their *legal* implications. Consequently, they were tricked into conceding rights and might through an elaborated colonial scheme of spoliation. It logically follows that African parties engaged in contractual agreements without command of a written language were comparatively speaking, more likely to be take advantage of than their counterparts with a written language. Consequently, the actions of African parties engaged in contractual agreements without command of a written language and/ or formal institutions are comparatively speaking, fallible.

Unfortunately, debate over the legitimacy of 'colonial' arrangements is biased towards highly publicized cases of contract failure, which certainly capture 'friction' between signatory parties, but do not in any case, establish a reliable pattern of misconduct of either party. That is, with the exception of a few cases, European versions of the contracts do not significantly differ from the African versions where they exist. Where the political society did not have a formal language for communication,

³⁴³ One exception to this is the work of Max Gluckman reviewed in this chapter.

disputes sometimes emerged, but these remained an exception rather than the norm. Diversity in the *form* of contracts suggests, there were more than European conspiracy that influenced contractual political development in Africa. I will come back to this aspect later. The other objection is that the oral-written divide, while appealing for its theoretical simplicity, was not so sharp in Africa. Writing and written documents seemed to have been mostly used by elites involved in high politics or merchants in long-distance trade. Thus even in societies characterized as lettered, a significant portion of the population still relied on oral contracts for political and commercial transactions.

While it is important to keep in mind possible errors in documents, I choose *not* to go against the archival grain; that is not to assume intentional inaccuracy *a priori* but instead rely on multidisciplinary secondary sources to establish context and to interpret data. How contracts came about as negotiating instruments for trade, slave trade, and later legitimate trade is the process that I seek to uncover. By paying attention to “motivational processes not directly observable [as] critical turning points”³⁴⁴ when analyzing archival data, context is brought to bear a resemblance to big contemporary procurement questions in Africa.³⁴⁵ In keeping with my objective to fill the gap between law and politics and to put Africa’s contractual experience in dialogue with legal innovation in the West I proceed as follows in three steps.

First, I review the exceptional contribution of linguistic anthropology in establishing similarity in judicial reasoning and process between African and common law customary systems.³⁴⁶ Second, building on these findings, I address the abnormality of ‘oral’ conveyance in data under study by

³⁴⁴ Larson, Deborah. (2001). “Sources and Methods in Cold War History: The Need for a New Theory-Based Archival Approach.” In *Bridges and Boundaries: Historians, Political Scientists and the Study of International Relations*. Colin Elman and Miriam Elman, editors. Cambridge: The MIT Press, 327, 350.

³⁴⁵ In the twenty first century, the rhetoric of ‘land grab’ in Africa relies on the same logic.

³⁴⁶ Literary criticisms on the subject of (oral and written) speech are also worth mentioning here because they have changed our ways of thinking about text in a transactional economy. Gelb, I.J. (1952). *A Study of Writing: A Discussion of the General Principles Governing the Use and Evolution of Writing*. Revised edition. Chicago: The University of Chicago Press; Michel, Foucault. (1973). *The Order of Things: An Archeology of the Human Sciences*. New York: Vintage Books; Derrida, Jacques. (1974). *Of Grammatology*. Translated by Gayatri Chakravorty Spivak. Baltimore: The John Hopkins University Press; Havelock, Eric. (1986). *The Muse Learns to Write: Reflection on Orality and Literacy from Antiquity to the Present*. New Haven: Yale University Press; Ong, Walter. (2000). *Orality and Literacy*. New York: Routledge. To the extent that these contributions provide us with a framework for expanding our understanding of social and economic exchanges taken place between literary and nonliterary societies, they are complementary to this project. One has, however, to bear in mind that while literary criticism tends to bury all meaning inside text for deconstructive purpose, to use Derrida’s framework, my reading of contractual data somewhat differs from this approach by situating intentionality and strategy not just in the text (actual contract), or in the ‘rational behavior’ of parties (which the deconstructivist school challenges), but also in the general political context in which historical transactions occurred.

reviewing once again, common law development in Great Britain. This time, attention is given to the discursive and rhetorical devices used to bridge oral and written traditions in the interpretation of sources of contractual action, obligation, and enforceability in early seventeenth century. This discussion identifies 'legal fiction' as a critical turning point in Britain's legal discourse about contracts that although not intended to work as such initially, provides a theoretical platform from which 'colonial contracts' could be reassessed and non-western agents' orality demystified and conceptualized. Third, I argue that at a substantive level, the use of 'legal fictions' in the historical development of common law was politically charged. That is, without a theory of the political action in 'legal fictions', it is impossible to comprehend how codification transformed routinized customs into sublime laws in Great Britain.

Thus, beyond the form, the oral-written contractual divide ought to be understood not just as a measurement of technological progress and differentiation between early societies, but also as political undertaking reinventing power and regimes of freedom within societies rhetorically. Thus, one might find within the oral-written divide similarity, convergence, and divergence of the two poles based upon not so much the aesthetic form of contracts, but on the *political configurations of progressive and regressive forces within societies*. While codification might suggest perfect symmetry in a perfect legal system, I seek to understand the *equilibrating process* whereby abstract rules and facts, the written and oral sources of action, were historically brought into harmony under legal fictions. I conclude this chapter by showing how the process of equilibration of routinized facts and oral sources of action -- with sublime abstract law codified in written documents-- adds to our understanding of African contractual customs and helps politicize historical contracts on the continent.

II. From Legal Translation to Political Transition

The relatively recent development of modern statehood in Africa and the continent's 'oral tradition' pose conceptual and methodological challenges to mobilizing contract theory as a framework to analyze the 'colonial' context. How would anyone go about writing a contractual political history in

'stateless' societies and in a context of asymmetric means of communication; a situation where one party is lettered and not the other? At stake here is the problem of establishing sources of authority and normativity with respect to the *form* of contract and of determining the 'governmental activity',³⁴⁷ or the administrative process of adjudication. Sources of authority help determine whether an agreement between parties justifies exogenous intervention – be it through law, a state, or international instruments of adjudication – to enforce a contract. Sources of normativity refer to contractual analogies and paradigms for classification that (mostly Western) classical theorists have brought to bear on historical agreements between Western and non-Western nations. Lastly, the administrative process of adjudication denotes the boundaries of remedies in case of a breach of contract.

The 'command' paradigm

In the analysis of non-Western contractual history, questions of authority and normativity have received wider attention from scholars. For instance, the anthropological and seminal work of Gluckman among the Barotse³⁴⁸ in Zambia was a direct response and challenge to classical theorists who had showed little interest in primitive law. Gluckman was particularly unimpressed by the work of leading jurists, namely, Maine and Roscoe Pound³⁴⁹ whom he criticized for their lack of "first-hand knowledge on which to base [their] generalizations"³⁵⁰ and for being too dismissive of primitive law as essentially religious in nature. Gluckman clearly failed to understand the contours of both Maine's and Pound work beyond the assumption often attributed to both as proponents of the idea of legal evolution, the view that "legal institutions had a natural history of their own [whereby] evolution and the historical method became synonymous."³⁵¹ The idea of evolution in this view analogizes the state with stability of law. Where Bentham and Austin thought of law as the expression of a sovereign command (thereby making stateless society lawless), Gluckman saw Maine and Pound as proponents of literacy as a form of 'soft command' rendering non-literary society devoid of legal logic.

³⁴⁷ Pound, Roscoe. (2002). Op. cit., 3.

³⁴⁸ Gluckman, Max. (1973). *The Judicial Process among the Barotse of Northern Rhodesia (Zambia)*. Manchester: Manchester University Press.

³⁴⁹ Pound, Roscoe. (1922). *Interpretation of Legal History*. New York: Macmillan.

³⁵⁰ Gluckman, Max. (1973). Op. cit., xiii.

³⁵¹ Stein, Peter. (1980). *Legal Evolution: The Story of an Idea*. New York: Cambridge University Press, x.

It goes without saying that Gluckman had a simplified view of classical jurists. Nevertheless, his attempt to spell out similarity in jurisprudence logic and reasoning of an African tribe with that of the most advanced nations earth was and remains, to say the least, revolutionary. Where many were accustomed to writing about differences, western progress versus primitive regressions, Gluckman saw “fundamental similarity between the administration of justice in Loziland and in Great Britain or in the United States.”³⁵² Lozi precedents may have not been written, but they have been reasoned; they have not been recorded in writing, but the “‘reasonable man’ plays an important role in the Lozi legal system as he does in common law.”³⁵³ He cleverly juxtaposed and contrasted the theory of power between classical jurists and the Barotse. Where Bentham, Austin, and Montesquieu relied on the Sovereign command as the ultimate source of law at different stages of their writings, the Barotse had a theory of power that many today would find authoritative. “They were “terrified of giving away power, even power to protect, for once a man is elevated, it is feared he will stand against those he ought to care for. They [thought] always of the dual pressures of the ambivalence of power on an individual,”³⁵⁴ Gluckman writes. Thus, one finds further similarities –that even Gluckman missed –the Barotse’s idea of freedom similar to Pound’s resentment of appeals to “a political god in the form of State or People”³⁵⁵ as authoritative sources of law and order.

With respect to their theory of contractual obligations, the Barotse made few labor contracts. As Maine suggested, status played an important role in early legal systems including the Barotse’s. Where Gluckman treats conveyance as “reciprocal rather than contracts creating obligations...rather than rights,”³⁵⁶ Maine regards the contractual obligation as “incomplete conveyance.” Reciprocity in Barotse’s view established obligation because the ‘bargaining’ and ‘transfer’ of property, not the mere promise, was what created legal obligation. Thus, in analyzing and interpreting historical contracts in Sub-Saharan Africa, a specific emphasis is given to political contingency that made bargaining and

³⁵² Gluckman, Max. (1973). Op. cit., xiv.

³⁵³ Gluckman, Max. Ibid., xiv.

³⁵⁴ Gluckman, Max. (1965). *The Ideas in Barotse Jurisprudence*. New Haven: Yale University Press, 40.

³⁵⁵ Pound, Roscoe. (1922). Op. cit., 3.

³⁵⁶ Gluckman, Max. (1965). Op. cit., 183-4.

transfer of tangible and intangible goods between strangers necessary in the first place. In the absence of formal states in Sub-Saharan Africa in this period (1600s-1920s), I will consider the material and political rendering of bargaining opportunities within and beyond actual text (contracts) as sources of power, knowledge, and choice to derive contextual, but generalizable inferences.

The 'Normative' and 'Relational' Paradigms

A numbers of scholars of international relations have grappled with normative and relational paradigms and remain divided. *The Inadequacy of the Contractual Analogy in the Law of Treaties*³⁵⁷ exposes the different associative ideologies that rationalize treaty-making in a context where writing and literary are extoled and traces the ways in which the “use of the treaty instrument for the acquisition of a title, and, in particular, its use as a basis for legitimating a freehand extraterritorial sovereign power³⁵⁸” has historically worked in Africa. Rather than foreclosing the possibility of a differently type of relational paradigm as I suggest in this work, Raftopoulos is not resisting the contractual analogy *per se*, but “the paradigmatic use of a treaty or contract as a ‘center-piece of the relation and the only and principal source of normativity.’³⁵⁹” By contextualizing and broadening the sources of legitimacy in historical economic and political relationships, it will become obvious to the reader that although norms are not always embodied in particular forms, it is difficult to speak of a form (including forms of agency) without a norm.³⁶⁰ Hence, I have normalized –though not idealized – all contracting parties³⁶¹ in the data as strategic agents, and assumed that choice is not confounded with strategy as others have proposed.

It has been suggested that “most African Chiefs signed the treaties without actually understanding their future economic implication, whether they solemnly swore to their binding effect for

³⁵⁷ Raftopoulos, Evangelos. (1990). *The Inadequacy of the Contractual Analogy in the Law of Treaties*. Athens: Hellenic Institute of International and Foreign Law.

³⁵⁸ Raftopoulos, Evangelos. *Ibid.*, 137.

³⁵⁹ Raftopoulos, Evangelos. (1990). *Op. cit.*, 136.

³⁶⁰ See for instance the substantive and formulaic repertoires disputes among the Tswana (Botswana) in Camaroff, John and Simon Roberts. (1986). *Rules and Processes: The Cultural Logic of Dispute in an African Context*. Chicago: The University of Chicago. Chapter 3.

³⁶¹ Of course my use of the terms ‘treaties, bargaining, and contracting’ is loose and seeks to capture the political dynamic buried under legal considerations in the analysis of Africa’s historical foreign relations (see chapter 2 sections III and IV). For a legal perspective of the history of African by treaties see Alexandrowicz, C.H. (1973). *The European-African Confrontation: A Study in Treaty Making*. Leiden: A.W. Sijthoff. The book, however, treats diplomatic evidence as “titles” where are subject to “legal principles” of reasoning especially after the conference of Berlin in 1884-5. It does not interrogate sources of ‘entitlement’, nor does it establish a comparative analysis of the bargaining dynamics *before* and *after* 1885. I deal with these issues in the next chapter.

not. The few who understood the argued implications were, of course traitors.³⁶² This view of early contractual diplomacy seems to reify other arguments about treaty making as a technique of colonial acquisition of backward territory especially those “inhabited by natives as in the scale of civilization as those of Central Africa.”³⁶³ The problem with this view is that it makes fools out of a category of African chiefs through oversimplification. For instance, in 1860, the independent republic of Liberia used historical treaties with African chiefs to challenge the encroachment of British traders who refused to pay custom duties. In this dispute between returned slaves from the Americas, England, and British merchants, local African chiefs were the winners as their testimonies was bought with high currency in order to settle the dispute and delineate the contours of the Liberia-Sierra Leone border in 1883.³⁶⁴ In this case, self-interest probably motivated the indigenous African chiefs to ally themselves with the highest bidder in exchange for contractual authentication *ex-post*. In another dispute opposing African Liberians to France they used historical treaties to *decolonize* the territory “by presenting Liberian treaties and agreements signed with the Kru chiefs, which antedated those signed with the French.”³⁶⁵

Thus, diplomacy prior to the latter part of nineteenth century shows not one single narrative but a range of possible usages of contracts that suggests *strategy*, not ignorance and treason, was reasonably and *heuristically* guiding the Africans in a changing world economy and politics. From a political perspective, it is important to pay attention to negotiation and strategy as the “authorizing vocabulary”³⁶⁶ that allows one to outwit the traps often associated with the ‘oral tradition treadmill’ and to see African contractual diplomacy as also partaking in a larger project of social and political transformation.

³⁶² Nguluma, A.T. (1980). “Unequal Treaties (with special Reference to the African Experience in Unequal Exchange and Cession of Land).” *Utafiti* Vol. 5, No. 2, 222-3.

³⁶³ Lindley, M.F. (1969). *The Acquisition and Government of Backward Territory in International Law: Being a Treatise of the Law and Practice Relating to Colonial Expansion*. New York: Negro University Press, v.

³⁶⁴ Gershoni, Yekutieli. (1987). “The Drawing of Liberian Boundaries in the Nineteenth Century: Treaties with African Chiefs versus Effective Occupation.” *The International Journal of African Historical Studies* Vol. 20, No. 2, 294-6.

³⁶⁵ Gershoni, Yekutieli. (1987). *Op. cit.*, 296

³⁶⁶ See Rafael, Vincent L. (1993). *Contracting Colonialism: Translation and Christian Conversion in Tagalog Society under Early Spanish Rule*. Durham: Duke University Press, p. xiv. The author does a great work in bridging the oral and the vernacular, text and content, speech and writing in a ‘nexus of asymmetric exchanges’ that many would identify as speaking to Africa’s political development experience also.

Even in African societies with written language for trade, oral contracts historically survived alongside formal ones. For instance, despite the formal use of Arabic in Moroccan diplomatic relations with foreign nations, and the use of notarized written sale contracts in places such as Western High Atlas,³⁶⁷ other types of contracts existed based on occupational categories. In construction work, “labor relations were sometimes done through compulsory personal service (*twiza*) —often translated as ‘corvée.’³⁶⁸ In Riffian, the word is *dhiwiza*, pl. *dhiwizawin* -- Any ditches which need special work done on them, such as bridges or retaining dams, [were] previously agreed upon to be done by contract with master-masons, with the cost of the materials included.”³⁶⁹ In the educational section, nonfulfillment of contractual obligation was not tolerated so that “regarding the contract with the schoolmaster, if anyone should be opposed (to contributing his share to the schoolmaster's annual ration of barley), he shall be fined 10 *uqiyyas*.³⁷⁰” In the Rif region, Hart mentions that among farmers, “herding and agricultural contracts of a verbal nature are made between the wealthier and the poorer men of the community, those who have little hiring themselves out to those who have more.”³⁷¹ The Touareg of Northern Africa had at least three systems of contract regulating agricultural labor: the *Khamast*, the *tilt agreement*, and *sharecropping*.³⁷²

Adding to this ethnographic work on diverse contractual practices within Morocco is Lydon's findings that although writing paper was in circulation in West Africa in the sixteenth century, it wasn't until “the course of nineteenth century [that] paper [became] more readily available and Arabic literacy widespread” to induce trans-Saharan traders to record their contractual transactions.³⁷³ According to

³⁶⁷ Hatt, D. Gordon. (1974). *Skullcaps and Turbans: Domestic Authority and Public Leadership among the Idaw Tanan of the Western High Atlas, Morocco*. Ann Arbor: University Microfilms [1993 copy], 390. Accessed through HRAF online, June 2012. Document id: mw11-005-10479.

³⁶⁸ The French word for compulsory labor.

³⁶⁹ Blanco Izaga, Emilio & David Hart. (1975). *Emilio Blanco Izaga: Colonel in the Rif*. New Haven: Human Relation Area Files, 119. Accessed in May 2012 through HRAF online. Document ID: mx03-005-011223.

³⁷⁰ Blanco Izaga, Emilio & David Hart. (1975). Op. cit., 298.

³⁷¹ Hart, David. (1954). *An Ethnographic Survey of the Riffian Tribe of Aith Wuryaghil*. Tetuan High Commission of Spain in Morocco Delegation of Education and Culture.p. 75-77. Accessed in May 2012 through HRAF online. Document id: mx03-003-00141

³⁷² Nicolaisen, Johannes. (1963). *Ecology and Culture of the Pastoral Touareg: with Particular Reference to the Touareg of Ahaggar and Ayr*. Copenhagen: The National Museum of Copenhagen, 198. Accessed through HRAF online, June 2012. Document id: ms25-007-06980.

³⁷³ Lydon, Ghislaine. (2010). *On Trans-Saharan Trails: Islamic Law, Trade Networks, and Cross-Cultural Exchange in Nineteenth-Century Western Africa*. Cambridge: Cambridge University Press, 103.

Lydon, of all business transactions, contracts were the most numerous³⁷⁴ in trans-Saharan trade covering all kinds of commercial partnerships, agencies, labor relations in nineteenth century. Thus, the use of contract agreements (oral and written contracts in the context of asymmetric literacy) to facilitate trade in Africa was not limited to trade with Europeans only, but endogenously underwent significant refinement through trans-Saharan trade and elsewhere.³⁷⁵

Among the Zulu (South Africa), pastoral activities were historically facilitated by contracts requiring witnesses and recording of transactions.³⁷⁶ In trial procedure and dispute such as in *Dingizwe v. Nkosentya*, verbal contracts were enforced depending on whether they were witnessed or unwitnessed.³⁷⁷ In *Sengane v. Gondele*, (1880) *Memani v. Memani*, (1930) and *Sitole v. Sitole*, (1936) the British court upheld deathbed verbal declarations as to property as binding.³⁷⁸ Witnessing a contract had a functional purpose, which was to establish ideal social norms and legal principles³⁷⁹. On contractual breach and remedy, the Yoruba (Nigeria) jurisprudence is interesting in the sense that it recognized consent as a key element of contract strengthened with the presence of eyewitnesses.³⁸⁰ Yoruba (Nigeria) jurisprudence, however, differentiated between breach of contract due to negligence and *force majeure* (illness etc.) and upheld the bond of contractual agreement beyond death. Society played the roles of guardian, mediator, witness, and judge but it was always up to the individual to decide the course of action when there was a breach of trust or mischief. Among the Wolof (Senegal), group contract was known³⁸¹ and a sale contract could be written or verbal.³⁸² In case of non-execution of a contract, damages could still be demanded.³⁸³ At all times, borrowing and lending were equally

³⁷⁴ Lydon, Ghislaine. *Ibid.*, 319.

³⁷⁵ The same oral-written configuration is also noted among the Somali where property was traded using written contracts in the coastal zones but not in the hinterland. See Cerulli, Enrico. (1957). *The Consuetudinary Law of Northern Somali* (Mijirtein). Fiduciaria Italiana della Somalia Istituto Poligrafico dello Stato, 113, 115. Accessed in June 2012 through HRAF online. Document ids: mo04-021-03755; mo04-021-03818.

³⁷⁶ Reader, D.H. (1966). *Zulu Tribe in Transition*. Manchester University Press, 40. Accessed in June 2012 through HRAF online. Document id: fx20-006-01205.

³⁷⁷ Reader, D.H. (1966). *Op. cit.*, 311. Document id: fx20-006-10356.

³⁷⁸ See details of the cases in Kerr, A.J. (1961). *The Native Law of Succession in South Africa*. London: Butterworths, 24-9.

³⁷⁹ Reader, D.H. *Ibid.*, 313. Document id: fx20-006-10419.

³⁸⁰ Similar logic is found among the Nyakyusa and Ngonde (Tanzania). Wilson, Monica H. (1951). *Good Company: A Study of Nyakyusa Age-Villages*. London: Oxford University Press, 149. Accessed in June 2012 through HRAF online. Document id: fn17-001-04223.

³⁸¹ Campistron, M and Cone Michèle. (1939). *Ouolof Customs in Cayor (Circle of Thiès)*. Paris: [s.n.], 21. Accessed through HRAF online July 2012. Document id: ms30-005-00701.

³⁸² Campistron, M and Cone Michèle. *Ibid.*, 23. Accessed through HRAF online July 2012. Document id: ms30-005-00650.

³⁸³ Campistron, M and Cone Michèle. *Ibid.*, 117-146. Accessed through HRAF online July 2012. Document id: ms30-005-00659.

subject to reciprocal consent.³⁸⁴ Customary law for specific performance contracts among the Haya in Tanganyika (Tanzania) covered construction work or healthcare.³⁸⁵

The relevant point in showing the wide range of contractible social, economic, and political actions in traditional African societies is to highlight their dynamic nature.³⁸⁶ Examples of customary contractual knowledge and practices allow one to understand the intermingling dynamics of law and politics with or without the codification or standardization of legal instruments in African traditional societies. The anthropologist, Sally Falk Moore emphasizes this point in her study of contractual relations when she writes that the Chagga of Kilimanjaro in Tanzania had culturally standardized form of contracts, but “fixity in rule statement [was] frequently found coupled with flexibility of practice.”³⁸⁷ Fixity in customs and flexibility in practice point to the importance of “adjustable relationships of standardized rules;” the valuing of “negotiability consistent with what is known of ... politics on the interpretation and manipulation of rule system in general,”³⁸⁸ Falk Moore insists.

This process of adjusting, reinventing, manipulating, and of assigning new meanings (and perhaps ‘techniques’ to retrieve new insights) from asymmetric contractual agreements to reduce the scope of ‘anomaly’ is what I have called strategic heuristics. It is this political dynamic that historically empowered Western legal theorists and jurists to manipulate standardized systems of rules -- without seeming to do so—to accommodate ‘anomalies,’ asymmetric interests and abilities in early modern contractual relations. The next section recounts the use of legal fiction in early England to solve the oral-written dichotomy. The implications for data under study is that by tracing the role of ‘fiction’ in the making of common law, one partly overcomes the oral-written dichotomy by exploring theoretical possibilities of reconciliation of both terms.

³⁸⁴ Fayet, M.J.C. and Michèle Cone. (1939). *Customs of the Modern Ouolof (Circle of Baol)*. Paris:[s.n.], 147-193. Accessed in July 2012 through HRAF online. Document id: ms30-004-00929. On the dynamic of individualism, dynamism, and egalitarian ideology of all before the law among the Igbo in Nigeria see Eboh O., Simeon. (2003). *An African concept of Law and Order: A Case Study of Igbo Traditional Society*. London: IKO. See chapter 7.

³⁸⁵ Cory, Hans and M.M. Hartnoll. (1945). *Customary Law of the Haya Tribe Tanganyika Territory*. London: Percy Lund Humphries, 208-212.

³⁸⁶ It should come as no surprise that the founder of the relational theory of contract was particularly influenced by his observation of the use of contracts in East Africa as instruments for social cooperation. Macneil, Ian. (1968). *Contracts: Instruments for Social Cooperation in East Africa*. New Jersey: Fred B. Rothman.

³⁸⁷ Falk Moore, Sally. (1986). *Social Facts and Fabrications: ‘Customary’ Law on Kilimanjaro 1880-1980*. Cambridge: Cambridge University Press, 40.

³⁸⁸ Falk Moore, Sally. *Ibid.*, 40.

What is interesting from political and strategic perspectives are the ways in which parties constructed events and framed their choice of contracts. By examining the ‘critical nodes’ emerging from Britain’s development from oral to written contracts, I derive theoretical implications for inspecting data from West Africa. This approach is important because it shifts the focus from ‘progressive narratives,’ which view the transition from oral to written contracts as ‘revolutionary’ to emphasize the pragmatic and networking imperatives of such a change. I consider important ‘political windows’ in the discourse over enforceability taking place in early Britain and retrieve bargaining as a location of ‘actionable justification’ in oral contracts.

As the history of legal development of Great Britain shows, one cannot understand the historical incorporation of oral contracts into the realm of ‘legitimacy’ without grasping the philosophical and rhetorical transformation of contract in early seventeenth century. The passage from oral to written contracts represented not a linear ‘transition’ from lesser to better transactional instruments; it established nodes of communication leading to networks of appropriation and invention in Common Law. It is this networking feature of the transition from oral to written contracts that will serve as the basis for analysis of contractual agreements in oral societies in the following chapter.

III. Conceptualizing Informal and Oral Contracts

An anomaly is something that deviates from what is standard, normal, or expected. In legal as well as political discourse, the ‘standard, the norm, the expected’ is encompassed in the idea of form, or formal. Formal institutions are those with a clearly defined structure operating under specified and predictable rules, and capable of safeguarding their institutional memory, without making them a-temporal. Thus, formal institutions are therefore institutions with a trail.

Common law of contracts had its origin in “informal contracts” reached by oral agreement in early Britain. Contract by ‘*parol*’ in Early Britain was in keeping with the social diversity of society before the emergence of a central royal power and later a modern state. With the rise of personal leadership came the shift from communal courts to countless lordship courts eventually leading to the

creation of the King's Court. Initially, the King's Court dealt with criminal cases but later started hearing cases that failed to establish justice over civil causes. As Baker writes, with the shift from communal authority to a feudal and royal authorities came the most significant innovation of the Anglo-Saxon period: "the employment of writing in the business of government as an outward manifestation of [Anglo-Saxon] royal authority³⁸⁹" in the absence of King's law. By the Fourteenth century, the Common Pleas and the King's Bench with jurisdiction over criminal matters were functional. By the Sixteenth century, however, the King's Bench acquired "jurisdiction over most common pleas by a combination of procedural devices" that aggravated Common Pleas suspicious over the King's Bench.³⁹⁰

Thus, the use of written documents and the successive adoption of procedural devices in the history of the laws of England sought to accomplish two things. First, written documents and language codified the practice of justice through strict adherence to form. Procedure and form from the sixteenth to the nineteenth centuries helped differentiate the kinds of action that could 'legally' be undertaken. Notwithstanding this formulaic development, "the principal vehicle of change was virtually formless, and provided the law with a temporary escape from the formulary system."³⁹¹ Among these principal vehicles of change was the use of 'legal fiction'³⁹² in litigation to redefine and expand the network of contractual liability and remedies.

Medieval law already recognized formal contracts or written contracts, contracts under seal, and informal contracts or oral contracts between private parties. With a formal contract action could be taken for damages (actions of debt or penal bonds). In the absence of formal evidence, enforcement became a challenge. Common law courts could only receive claims no more than forty shillings dealing with debt (claims to specific sums or money) or detinue (claims to goods, chattel etc). Despite these attempts to bring oral contracts into common law, Furmston notes persisting gaps in law with action pertaining to a "breach of an informal agreement to *do* something, for example build a house."³⁹³ From

³⁸⁹ Baker, J.H. (2002). *An Introduction to English Legal History*. Fourth Edition. London: Butterworths LexisNexis, 9.

³⁹⁰ Baker, J.H. *Op. Cit.*, 40

³⁹¹ Baker, J.H. (2003). *The Oxford History of the Laws of England*. Vol. VI 1483-1558. Oxford: Oxford University Press, 325.

³⁹² A legal fiction is a fact created or assumed by the courts used to apply a legal rule.

³⁹³ Furmston, Michael. (2001). *Cheshire, Fifoot & Furmston's Law of Contract*. London: Butterworths LexisNexis, 3.

the sixteenth century, medieval recourse to oath swearing to settle debt informally contracted were proven farcical and the fact that 'debt died with the debtor' in common law eventually increased demands for a royalist justice in finding remedies to breach in informal contracts.

The King, as alternative to common law, was made possible through the creation of legal fiction. Plaintiffs could initiate legal action in Common Pleas or in the King's Bench, and did so only after purchasing a writ, or a "pass to a kind of justice for which they had paid for...[Thus,] the procedures and methods of trial available in an action commenced by one kind of writ were not necessarily available in another."³⁹⁴ Consequently, different treatments of courts actions depended on whether the plaintiff introduced demand a right or an appeal to correct a wrong. In the former case,

the Sheriff was told to command (*praecipe*) the defendant to do what was demanded by the plaintiff or demandant, or else come before the king's justices to explain why (*ostensurus quare*) he would not. The king's court acquired jurisdiction in default of acknowledgement of the supposed right by the defendant. Presumably, at some point the option of performance had been real; but it became fictional. The disappearance of the *reality of option*³⁹⁵ made the *praecipe* writs truly original, in that they were conceived of as originating an action from the time of their issue rather than from the moment of non-compliance; there was no need to prove a refusal before process could issue.³⁹⁶

Thus, with the rise of centralized political power in twelfth century Great Britain, legal conservatism favored form over analysis by displacing the 'reality of option' for the defendant. Whoever was able to buy 'high-justice' was viewed as the demandant of rights whose claim originated not from the moment of non-compliance, but from the political action of mobilizing the central government as the legitimating and paramount authority for remedies. The King, in this circumstance, offered a 'fictional' option to the plaintiff to command the defendant into compliance.

Because common law did not remedy for grievance (specially debt) arising from informal contracts, the intervention of royal justice seemed to satisfy the litigant, but the conservatism of the King's Bench eventually led for a search within common law historical processes, remedies for breach in informal contracts. Following this search was the adoption of *assumpsit* (from Latin *assumere*) as a

³⁹⁴ Baker, J.H. (2002). Op. cit., 54.

³⁹⁵ My emphasis.

³⁹⁶ Baker, J.H. Ibid., 57-58.

form of action in common law for the recovery of damages based on implied and express promises until mid-nineteenth century when the Common Law Procedure Act (1852) abolished this form of action.

Often cited as a landmark case in the process of incorporation of informal contracts into the real of enforceability and remedy in common law is the *Slade's Case* (1596-1602). "A creditor brought an action of *assumpsit*, and declared that the defendant was indebted to him in a certain sum, and, being so indebted, made a subsequent promise to pay the same sum; for breach of this subsequent promise the plaintiff brought his action³⁹⁷" to the King's Bench which ruled the case under *assumpsit* valid.

The validation of informal contract did not change the nature of the contracts themselves but the philosophical views of the court. If traditional views on informal contracts hold remedy could not lie against the executors, the *Slade's Case* revolutionize contract theory by suggesting, "purely executor bilateral contracts were enforceable – that a promise against a promise created an enforceable agreement."³⁹⁸

A Political Basis for Actionable Justification

Bargaining is the node that brings closer legal and political discourse over contract and obligation. As a point of entry in establishing 'actionable justification,' bargaining does justice to non-Western experience without reneging the practical benefits of 'paper obligations' in standard contract theory. It does so by establishing similarities of historical situations and contingencies between Africa and Great Britain to derive sound comparative puzzles that could be solved through new theory building.

The next and last chapter revisits historical contractual agreements without the written account by Sub-Saharan Africans. I treat existing documents as 'sufficient' because they help test both Great Britain's official narratives and post-colonial assumptions about foreign expansions. Sufficiency is not 'accuracy.' As already mentioned, my study of Africa's contractual development brackets concerns

³⁹⁷ Simpson, A.W.B. (2004). "The Place of *Slade's Case* in the Historical Contract." In Boyer, Allen. Editor. (2004). *Law Liberty, and Parliament: Selected Essays on the Writings of Sir Edward Coke*. Indianapolis: Liberty Fund, 70.

³⁹⁸ Simpson, A.W.B. Ibid., 70.

about 'enforceability' to focus on sources of political action, which as I argue, mainly revolve around bargaining in the making of contracts, be they oral or written.

Chapter 8. Projecting Power: Hierarchy, Horizontal and Vertical Integrations in West Africa

“Material relations generate their own internal elements of great complexity, ranging from unspoken custom to detailed elements of bureaucratic planning and conduct, which define and redefine the relations...By contract I mean no more and no less than the relations among parties to the process of *projecting exchanges into the future*...A sense of choice and an awareness of the future regularly cause people to do things and to make plans for the future...That is, some of the elements of exchange, *instead of occurring immediately, will occur in the future.*”
Ian Macneil³⁹⁹

“Imperialism is seen here as a process of interaction, and ultimately, conflict between the industrialized nations and the underdeveloped world. To analyze this process parallel analyses are required, the first dealing with *intra-group relations*, that is among African producers, traders and politicians on the one hand, and among *inter-group strategy*.”
A.G. Hopkins⁴⁰⁰

“The expanded definition of ‘foreign state’ prevents its being confined to a government that is recognized by HM Government as the *de jure* sovereign government over a particular area. It is, and was no doubt intended by the draftsman to be, broad enough to make it a criminal offence to enlist in armed forces raised by rival governments in a civil war...But the questions whether and, if so, when the Act becomes applicable to particular cases of internal struggles for power between rival factions within a state in the varied circumstances in which struggles may arise today, are capable of raising so many doubts as to make this part of the Act unsuitable, in our opinion, to continue to be used as a penal statute.”
*The Diplock Report*⁴⁰¹

I. Introduction

In the previous chapters, I presented and analyzed instances of contractual negotiations of various goods and services between African polities and foreign suppliers. So far, I have treated contractual agreements as one of the many ways in which, African political leaders sought to solve domestic challenges given shifting priorities in international politics and trade. Although incomplete in a technical sense of the terms, contracting with various types of private suppliers was historically embedded in the political structures and strategy of semi-lettered societies in the North and East Africa. Thus, one of the contributions of this study is that empirical findings broaden our understanding of agency to include categories that were previously neglected in colonial studies. Contracting, I demonstrated, was an equilibrating mechanism that made inequality and asymmetric power almost irrelevant to bargaining, as strategy and choice became disaggregated to meet strategic goals.

By now, it should be obvious to the reader that underlying this attempt to let data speak is the work of deconstruction, reconceptualization, and rehydration of concepts and typologies in legal theory

³⁹⁹ Macneil, Ian. (2001). Op. cit., 126 and 129; my emphasis.

⁴⁰⁰ Hopkins, A.G.(1973) *An Economic History of West Africa*. New York: Columbia University Press, 135, my emphasis.

⁴⁰¹ Quoted in Burchett Wilfred and Derek Roebuck. (1977). *The Whores of War Mercenaries Today*. New York: Penguin Book, 197.

of contract, strategic bargaining in asymmetric settings and choice under uncertainty. In this last chapter, I continue the endeavor slightly shifting the focus of my analysis to address the problem that *ex post* costs of contracts, or the outright colonization of the African continent in late nineteenth century, poses to my interpretation of historical agreements. A legitimate criticism of this work could be that while data certainly reveal Africa's agency in ways that have not previously been acknowledged, history holds it that by and large, domination of the continent by foreign powers was effective—though not always totalizing—in late nineteenth-century. Thus, this contribution would rightly be considered incomplete if it fails to engage with the period of the grand scramble for Africa.

To address the problem of hyper-hierarchical forms of exchanges in late nineteenth century, I have divided my analysis into two periods representing different contractual dynamics and logics. First, the pre-1801-1884 identified as a period of *horizontal integration* with a focus on intra-group relations among African parties and their effect on inter-group strategies. Second, the post 1886 period with its logic of *vertical integration* characterized by the emergence of consensus over international regimes of power and the invention of the modern state in Africa. Hence, 1884-5 is a good cutoff because the conference of Berlin radically changed the spectrum of future contractual relations in Africa. In both periods Africa's articulations of freedom and freedom of trade, in particular, will be investigated. My use of the terms *vertical and horizontal integration*, signals a continuing reference to contract theory within the framework of organizational/new institutional economics drawing mainly from the work of Coase and Williamson. The remainder of the chapter is organized as follows. First, I present a general overview of the region under study followed by differing perspectives on the contract-hierarchy nexus. Second, I analyze vertical and instances of horizontal and vertical integration on the West Coast of Africa.

II. Organizational Perspectives on Contracting

The previous chapter ended with forward-looking questions about the complexity and possible futures of the material relations between polities and private suppliers. Macneil recognizes “the internal

elements of great complexity which define and redefine material relations⁴⁰² in any exchange. When scholars worry about sovereignty, democracy, human rights, government waste and even the possibility of economic development in government contracting today, they implicitly recognize at least three things:

1. A political analysis of government contracting takes seriously the “public” dimension and implications of the transactions. This “public” dimension needs not be stated in any public contract. Rather, it must be assumed to be real. Sovereignty, democracy, human rights, government waste, environmental protection...etc., are indeed the “internal elements” that introduce complexity beyond the discreteness –specific terms-- of a public contract.
2. A political interpretation of historical and contemporary procurement practices and ideologies is a forward-looking enterprise because it explains decisional processes based upon the parties’ ability to project exchanges into the future. Thus, beyond explaining choice processes and mechanisms, a political interpretation grapples with motivational expectations to address the normative construction of the future in public contracts.
3. A political analysis should make palpable the linkages and contradictions resulting from responses and conceptualizations of internal-external/sovereign-nonsovereign normative futures of contractual agreements.

There is certainly more to gain from the analysis of historical and complex contractual material exchanges projected into the future of Africa’s political development. This chapter retraces the origin of the modern state in Africa to contractual outcomes and the organizing principles of horizontal and vertical integration of people and economies of West Africa into a globalized and corporatized discourse over free and legitimate trade. If historical contractual exchanges in West Africa generated their own internal discourse about a spectrum of futures that the relationships between contracting parties could have taken, what then explains the scramble of the continent in late nineteenth century? To frame the question this way is tantamount to mobilizing organizational theory and its treatment of

⁴⁰²Macneil, Ian. (2001). *Op. Cit.*, 129.

“ex-post institutions of contract with a special emphasis on private ordering (as opposed to court ordering)⁴⁰³ and hierarchy.⁴⁰⁴

I already proposed that a procurement contract is a statement about future exchanges and the parties’ freedom to manage and govern strategic information. Given the scramble of Africa in late nineteenth century, what future role, if any, would contractual agreements play in the process of domestication and domination of the continent by external forces? Framing the question this way conceptually assumes the future is exogenous to historical contractual transactions themselves. Nevertheless, the future here is treated as *endogenous* to contractual relations and all other familiar exogenous factors (the identity and foreign nationality of contractors) are provisionally bracketed. This change in emphasis better illuminates the strategic problems and functional attributes of colonial contractual transactions.

In the study of empires, it is tempting to assume *ex-post* that whoever holds the future might have been a good strategist in contractual exchanges *ex-ante*. I do not make this assumption because it does not tell us much about Africans’ perspectives, the focus of this work. For instance, in their analysis of the effect of property rights institutions (PRI), “which protect the citizens against expropriation by the government and powerful elites,” and contracting institutions (CI), “which enable private contracts between citizens,” against the exogenous backdrop of European colonial history, Acemoglu and Johnson conclude that the former determined colonization strategy and the latter “appear[ed] only to matter for financial intermediation.⁴⁰⁵” The future or consequences of both property rights and contracting institutions, the authors suggest, lie in the fact that individuals “often [found] ways of altering the terms of their formal and information contracts to avoid the adverse effects of weak contracting institutions but [found] it harder to mitigate the risk of expropriation in this way.⁴⁰⁶”

These findings –despite their reference of the colonial history—are clearly meant to inform us about which type of institution, within the European expansionist scheme, worked best in foreign lands

⁴⁰³Williamson, Oliver E. (1985). *The Economic Institutions of Capitalism*. New York: Free Press, 18.

⁴⁰⁴Stinchcombe, Arthur. (1983). “Contracts as Hierarchical Documents.” *The Institute of Industrial Development*. No. 65. Bergen.

⁴⁰⁵Acemoglu, Daron and Simon Johnson (2005). “Unbundling Institutions.” *Journal of Political Economy* Vol. 113, no.5, 949.

⁴⁰⁶Acemoglu, Daron and Simon Johnson (2005). *Op. cit.*, 949.

and why. Otherwise, there is no value added to the understanding of the colony and its interactions with “native” populations. Furthermore, the “exogenous colonial history” mobilized in analyzing both types of institutions does not account for the spectrum of contracting institutions in the colony as data show. In fact, the definition of contracting institutions as those enabling “private transactions between citizens” is misleading in the context of my study as the notions of “private [recognized by fellows] and citizen [recognized by the state]” converged in historical/colonial public procurement practices in Africa. By equating and restricting contractual transactions to those between “citizens,” the analytic trope also makes unavoidable, the need for an external enforcer, mainly the state.⁴⁰⁷ This requirement *de facto* discriminates against the contractual choices of stateless societies and groups under study where modern citizenship was a late invention. Thus, normative and definitional axes of what a contract is would therefore yield different interpretations of Africa’s (colonial) history. What matters here is that historical contractual choices of stateless societies in West Africa appear to contradict the prediction of popularized strategic models. That is, without a modern sense of citizenship and a formal state as an enforcer, societies used contractual mechanisms to procure goods and services from foreign suppliers and by and large abided by the terms of the agreements.⁴⁰⁸

Thus one of the major flaws of legal centralism and economic modeling of contract transactions referencing colonial settings is that it rarely accounts for the complexity and organization of internal and external factors that defined and transformed these long-term relations. Cooley, for instance, addresses this problem when he likened the hierarchical organization of firms to that of empires as defined in international relations. Key to Cooley’s contribution is the differentiation between “hierarchical organization” and “hierarchical governance” to explain “types of control losses and authority slippages,” often confounded in studies of empires and hierarchy [that] place excessive

⁴⁰⁷ Stringham, Edward. Editor. (2007). *Anarchy and the Law: The Political Economy of Choice*. New Brunswick: Transaction Publishers. The book has several chapters (34 to 40) on historical trends of enforcement that complicate our understanding of the inevitability and need for an external legal enforcer of private contracts from an anarchist-libertarian perspective.

⁴⁰⁸ Ostrom, Elinor. (1990). *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge: Cambridge University Press, chapter 1. See Ostrom’s warning about the use of metaphors and other abstract language that artificially establish similarity of behavior between behavior of people in natural settings and those in popularized models.

emphasis on the ideology of identity of a particular polity and ignore the common organizational issues and dilemmas that confront all hierarchical polities.⁴⁰⁹”

The contribution of economic theory of firms and transaction costs makes the likening of an empire to an “organization” of political relations under various forms of hierarchies intellectually rewarding. Coase was probably the first to suggest that multiple incomplete contracts would be required under price mechanism to make the market work. That is, if one assumes that all consumers have the same access to information about price. Transaction costs associated with the task of finding this information would give the rise of a firm in lieu of a pure market; under certain conditions, consumers would agree to be under the hierarchical authority of the firm. Consequently, the hierarchical organization of the firm reduces transaction costs related to the many incomplete contracts required in a pure market without entirely displacing the market itself. Thus the phenomenon by which pure market transactions are eliminated within the firm “and in place of the complicated market structure of exchange transactions is substituted the entrepreneur coordinator who directs production⁴¹⁰” is known as *vertical integration*.

As theory holds, the scale of vertical integration depends on the type of industry and the success of the entrepreneur in directing labor, on whether or not the relationship with his/her subordinates is profitable and desirable for its own sake. The character of the contract entered between a factor employed within the firm is one whereby “the factor, for a certain remuneration (which may be fixed or fluctuating), agrees to obey the directions of an entrepreneur within certain limits. The essence of the contract is that it should only state the limits of the powers of the entrepreneur.⁴¹¹” As a prerequisite to establishing firm-like relations, resources must become dependent on the buyer. Hence factors needed in establishing firm-like relations, or a hierarchical organization of contracts, create three types of dependencies based upon: mutual profit and desirability replacing the inconvenience of

⁴⁰⁹ Cooley, Alexander. (2005). Op. cit., xi, chapter2.

⁴¹⁰ Coase, R.H. (1988). *The Firm, the Market, and the Law*. Chicago: University of Chicago Press, 35.

⁴¹¹ Coase, R.H. Ibid., 39.

market transaction cost, contractual consent limiting the hierarchical exercise of power, and resource dependency on the buyer's needs and demands.

Although he personally did not extend analysis to power-laden relations, Coase gestured in the direction of a political extension of this theory of the firm to 'firm-like' relations such as those normally called "‘master and servant’ or ‘employer and employee.’"⁴¹² He thought that although "the legal concept of ‘employer and employee’ and the economic concept of a firm [were] not identical, in that the firm may imply control over another person's property as well as over their labour...the identities of the two concepts are sufficiently close for an examination of the legal concept to be of value in appraising the work of the economic concept."⁴¹³ Notwithstanding these similarities between law and economics, I suggest that the "master and servant" and "employer employee" should also be seen as politically determined especially with regard to the explicit or implicit norms and objectification of contractual processes that may free, coerce, or enslave labor.⁴¹⁴ The implication for these "firm-like" relations from a Coasian perspective is that his theory allows one to begin seeing a 'servant' as an 'agent' and owner of his/her freedom; someone whose agency is predicated upon his/her freedom to carry out [or not to carry out] his employment. Thus, by recognizing the role of personal freedom, the overt and covert choice of the servant even in a situation of power disequilibrium,⁴¹⁵ Coase was not just outlining the coordination and inner workings within a firm. He was also acknowledging the servant/agent as an

⁴¹²Coase, R.H. Ibid., 53.

⁴¹³Coase, R.H. Ibid., 53-4.

⁴¹⁴Galeson, David. (1990). *White Servitude in Colonial American: An Economic Analysis*. Cambridge: Cambridge University Press. Orren, Karen. (1991). *Belated Feudalism: Labor, the Law, and Liberal development in the United States*. Cambridge: Cambridge University Press. Watts, Michael J. and Peter D. Little. Editors. (1994). *Contract Farming and Agrarian Transformation in Sub-Saharan Africa*. Madison: The University of Wisconsin Press. Steinfeld, Robert J. (2001). *Coerce Contract and Free Labor in the Nineteenth Century*. Cambridge: Cambridge University. Beusekom, Monica M. (2002). *Negotiating Development: African Farmers and Colonial Experts at the Office du Niger, 1920-1960*. New Hampshire: Heinemann. Witt, John F. (2006). *The Accidental Republic: Crippled Workingmen, Destitute Widows and the Remaking of American Law*. Cambridge: Harvard University Press.

⁴¹⁵Stinchcombe, Arthur L. (1995). *Sugar Island Slavery in the Age of Enlightenment: The Political Economy of the Caribbean World*. Princeton: Princeton University Press. The author shows that master-slave contractual relationships though hierarchical in the Caribbean had many features of agency similar to "the agency of contract of modern civil law in the lives of some, but not all, slaves. Contracts with agents nowadays often are strategic principal monitoring of agent performance rather than close supervision, much agent discretion, agent reward proportional to results, and delayed agent reward until the overall results are in. The features are thought in modern agency theory to achieve the principal's purposes when the agent has more information and more control over effort and intelligence than the principal...Treating slaves as almost free, and eventually as legally free, in the 18th century Caribbean was in general like an agency contract. Such contracts solve the problem of trust between slaves and master better than coercion does" (p.138). Thus, the "discretion" afforded to the slave to perform *without direct close supervision* gave him/her agency not affordable under pure coercion. Also see "seamen occupied a pivotal position in the movement from paternalistic form of labor control to the contested negotiation of waged work.

“island of conscious power⁴¹⁶” within “firm-like” relations; a human entrepreneur that moved the presumably static equilibrium of agentless market models he criticized. Finally, he was stressing the logic of venture given transaction costs as fundamental to understanding human choice in both political and economic settings. Thus, I see Coase pushing the margins of economic analysis to include ‘firm-like’ political structures similar to those that governed the period under study in Africa. Indeed, similar to patterns identified on the East coast, the contractual categories of ‘master/servant,’ ‘employer/employee’ were context-bound and remained subject to strategic manipulation as a result of change in circumstances on the West Coast of Africa.

Although the concept of vertical integration often assumes a small number of bargaining parties⁴¹⁷ in long-term mutual commitment,⁴¹⁸ its illustrative and explanatory powers could be extended to contractual agreements involving large populations in West Africa. The shift from the slave to legitimate trade progressively changed the nature and structure of contractual relations. While the Atlantic slave trade was a seller’s market, change to legitimate trade restructured the direction of transactions in favor of the buyers. One therefore witnessed the transformation of the market structures into combination and integration. That is, combination when “transactions which were previously organized by two or more entrepreneurs [became] organized by one...integration when it involve[d] the organization of transactions which were previously carried out between the entrepreneurs on the market.”⁴¹⁹ As data show, the hierarchical structuring of contractual agreements in the immediate post-Atlantic slave trade era expanded in these two ways. In this chapter, vertical integration is operationalized as the formalization of incomplete contracts between a small number of foreign entrepreneurs and African coastal leaders during the Atlantic slave trade. Furthermore, vertical integration refers to the progressive extension of contractual gains and losses into *ex post* long-term

⁴¹⁶Coase, R.H. (1988). Op. cit., 35.

⁴¹⁷Williamson, Oliver. E. (1975). *Markets and Hierarchies: Analysis and Antitrust Implications*. New York: The Free Press, 104.

⁴¹⁸Miller, Gary. (1992). *Managerial Dilemmas: The Political Economy of Hierarchy*. Cambridge: Cambridge University press, 9.

⁴¹⁹Coase, R.H. (1937). “The Nature of the Firm.” In *The Nature of the Firm: Origins, Evolution, and Development*. Williamson, Oliver and Sidney G. Winter. Editors. 1933. Oxford: Oxford University Press, 24.

corporate (state and trans-ethnic) liabilities and/or renegotiation structures in the post-Atlantic slave trade and post conference of Berlin years.

The hierarchical restructuring of market relations in a Coasian model has political implications. To the extent that Coase subordinates the directional imperatives of contractual relationships to the buyer's needs, it could be assumed that the buyer-seller relationship is permeated with static political authority. As Miller notes, "hierarchy, by its very nature, gives each superior monopsony powers as "buyer" of team effort."⁴²⁰ Nevertheless, "if narrow self-interest behavior under formal contractual systems cannot realize all potential efficiency gains there must be a competitive advantage for hierarchies that can induce non self-interest intrafirm cooperation,"⁴²¹ Miller adds. Put differently, the ability to induce long-term cooperation beyond initial terms of vertical integration is fundamentally a managerial dilemma of a political nature. Thus analysis of contractual agreements on the West Coast of Africa would take into account the transactional and economic nature of hierarchical governance and explain why it failed in the post-Atlantic slave trade and post-1886 years. As data would soon show, the lack of a sustained political cooperation within complex vertical contractual agreements explains the structure and nature of governance known as 'colonialism' --redefined here as a configuration of interdependent *ex post* costs of contracting in late nineteenth-century Africa--.

These *ex post* costs have previously been identified in the literature as associated with: (a) *Fundamental transformation*,⁴²² where "initial bidding merely sets the contracting process in motion...whether *ex post* competition is fully efficacious or not depends on the good and service in question is supported by durable investments in transaction-specific human or physical assets."⁴²³ Where the problem of future competition and monopoly becomes a matter of durability and adaptability of contractual investments as opposed to the number of bidders. (b) *Maladaptation costs*: "when

⁴²⁰ Miller, Gary. (1992). *Managerial Dilemmas: The Political Economy of Hierarchy*. Op. cit, 159.

⁴²¹ Miller, Gary. Ibid. 12.

⁴²² Polanyi, Karl. (1957). *The Great Transformation: The Political and Economic Origins of our Time*. Boston: Beacon Press.

⁴²³ Williamson, Oliver E. (1985). Op. cit., 61.

transactions drift out of alignment in relation to the “shifting contract curve.”⁴²⁴ When unknown factors about the future, potential conflict, and when institutional support of contract makes renegotiation necessary, bargaining must be assumed to be pervasive.⁴²⁵

As the remainder of the chapter will show, one of the problems with the rise of the modern state in Africa is that it obsolesced pervasive bargaining of the previous era. Analysis would capture of the extent to which historical contracts on the West Coast deviated from or follow a “relational response to the breakdown of cooperation...in terms of what [was] necessary or desirable to restore present and future cooperation.”⁴²⁶ (c) Key to the workings of points (a) and (b), is the decisive role of communication and information in hierarchical organization.⁴²⁷ Failure of hierarchy in historical contracting contexts would, however, be presented as attributable to rising international political norms about governance as opposed to managerial dilemmas⁴²⁸ in late nineteenth century.

III. General Overview & Data Patterns

The region under study approximately expands from Senegal to Angola. The West Coast significantly differed from other regions I analyzed in the previous chapters. While North and East Africa had mixed literacy economies, West and Central Africa were oral societies.⁴²⁹ The other difference was that not all-powerful political groups were settled on the coast. In Ghana for example, the powerful Ashanti were landlocked and so were the Sokoto Caliphate in Nigeria, the Sultanate of Sokoto in Nigeria, the Bamun kingdoms in Cameroon. Further south, the Kongo and Luango were closer to the coast and the Teke landlocked. Thus, while most of the trade remained on the coast (Benin, Fernando Po, St. Louis, Dakar etc.,) for the period under study, internal struggle for monopoly was more pronounced thereby making intra-group dynamics an important factor in contractual patterns and decisional processes.

⁴²⁴ Aoki, Masahiko. (1983). “Managerialism revisited in the light of bargaining-game theory,” *International Journal of Industrial Organization* Vol. 1, 1-21, cited in Williamson, Oliver E. (1985). Op cit., 21.

⁴²⁵ Williamson, Oliver E. (1985). Op cit., p. 29.

⁴²⁶ Macneil, Ian R. (1973-74). “The Many Futures of Contracts.” *Southern California Law Review* Vol. 47, 741.

⁴²⁷ Barnard, Chester. (1938). *The Functions of the Executive*. Cambridge: Cambridge University Press.

⁴²⁸ Miller, Gary. (1992). Op. cit.

⁴²⁹ I dealt with some of the conceptual challenges that oral literacy raised in the mobilization of contract theory in historical settings in the previous chapters.

The relative spread of highly centralized and powerful kingdoms along the coast and in the interior had tremendous consequences on intra-group relations and inter-group strategy. One of the effects of this configuration of power was what Hopkins calls a “revolution of expectations”⁴³⁰ among small groups of entrepreneurs who, taking advantage of the fall of coastal monopolies, --due to the proscription of the Atlantic slave trade-- steered trade and politics in new directions. The Gold Coast (Ghana) stands out as the territory with a higher volume of contracts followed by the Free Congo, Liberia, Nigeria, and Cameroon.

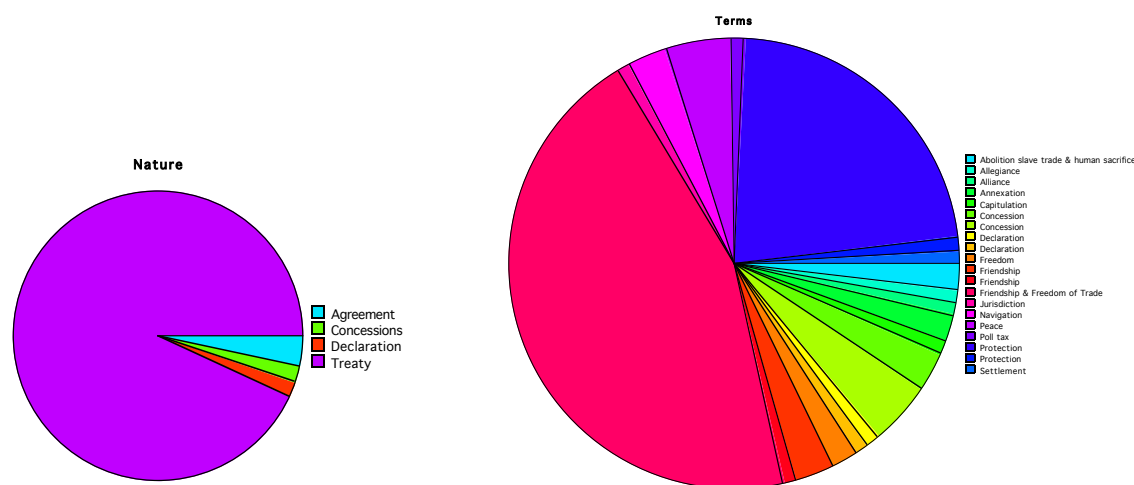
Ghana’s main contracting partners were Great Britain, Germany, and the Netherlands. Ghana contracting history shows that the territory used various negotiation instruments such as treaties, agreements, concessions, and declarations. A classification of negotiation themes reveals two sets of languages: one friendly, from early seventeenth century until about early nineteenth century, and the other adversarial for the remainder of the period under consideration.

Politics of Horizontal Integration in the Pre-1884-5 Years

Early contractual history of Ghana roughly started with a treaty of friendship between king Asebu and the Dutch Republic in 1612 and the relationship with the Netherlands last until about 1656. Most transactions in this period were trade deals with coastal chiefs and kings interacting with the Dutch East Indian Company. Amity, alliance, Freedom of trade, is a recurring language that suggests equal horizontal dealings between contractors. Where the Dutch entity was mentioned with political attributes, the language of the agreements suggested the contract was between the signatories only and did not extent to their subordinates. As part of their accomplishment, the Dutch built the first fort along the Ghanaian coast.

⁴³⁰ Hopkins, A.G.(1973). Op. cit., 125-6.

[Figure 8.1. Nature of contractual agreement with Ghana]



Treaties with Germany (Prussia) cover the period from 1681 until 1698. The first of the treaties signed with Caboceer Pregatte, Caboceer Sophomije, Caboceer Apanij shows very distinct African signatures similar to the Amharic script...Unlike other oral societies in this region, the people of Ghana did use the Christian cross). According to Jones, “local groups may have welcomed the entry of Prussia with the hope to become middlemen and divert trade from the Dutch fortification and from their neighbors.”⁴³¹ Thus, the rise of local middlemen entrepreneurs in the immediate post-Atlantic slave trade era inflected discourse and practices toward more competition. Nevertheless, it was the aggregation of political and ethnic leadership in the process of contracting goods and services provided the foundation for horizontal integration. For instance, one notices for the formidable increase in the number of contracting parties. Contracting was no longer between a foreign firm or merchant, with a local African chief but involved trans-ethnic African communities. The treaty of February 12th, 1684 another trade treaty was signed with twenty-one African coastal kings.⁴³² Despite the aggregation of the African contractor, relationship remained friendly and mostly non-hierarchical. “Friendship and Freedom of Trade” was the dominant language of negotiations in the seventeenth century. I have not been able to locate data that speak to the contractual activities in the eighteenth century.

⁴³¹ Jones, Adam. (1985). *Brandenburg Sources for West African History 1680-1700*. Stuttgart: Franz Steiner Verlag Wiesbaden. Document no. 2.

⁴³² Jones, Adam. (1985). Op. cit., document no. 13

Data only record Great Britain's involvement with Ghana from roughly 1817 until 1899 and although contractual agreements were still in used, the language was more confrontational than peaceful. The fundamental disruption brought about with the passage of the Slave Trade Act in 1807, created a different structure for bargaining. "Protection, Settlement, allegiance, abolition of slave trade and human sacrifice, concessions...etc" are dominant themes of this era. What fundamentally changed in the last part of nineteenth century was the prominent role given to the state to regulate trade through gunboat diplomacy. Thus if the moral ground for ending the slave trade cannot be contested, it was politics that provided a rational for a hierarchical restructuring of trade contracts. In 1874, the Capitulation treaty effectively ended Ashanti's pretension to supremacy over Elmina.⁴³³ While Ghana had many trading partners in the previous years, the last half of nineteenth-century limited the number of those partners. The annexation treaty of July 27th, 1886 between Great Britain and Akwanu had no other purpose than to counter Germany's advance.⁴³⁴

That conflict arising from contractual agreements was pervasive throughout West Africa suggests increase ex-post costs, which unfortunately did not lead to renegotiation. In 1841 a treaty to end the slave trade was signed between Great Britain and the king of Bonny (Nigeria). In this agreement, the King of Bonny managed to change the clauses of articles 3, 6, and 8th. "The 'Man of War' was replaced by 'King Pepple' indicating his willingness to renegotiate his status in the new era of legitimate trade under certain conditions. When asked to allow merchants to submit 'proof' of the end of slavery, the king of Bonny argued that they will be biased as no provision was given to him to challenge their reports. As per the reward for cooperating, he insisted on being paid in dollars, easier for redistribution among his vassal and for the promotion of trade in other goods. He also reserved the right to resume slave trade if England changed her policy or the terms of this engagement. Although the final agreement was not approved,⁴³⁵ outcomes of the negotiation process highlight misalignment

⁴³³ Metcalfe, G.E. (1964). *Great Britain and Ghana. Documents of Ghana History 1807-1957*. London: Thomas Nelson & Sons, no. 299

⁴³⁴ Metcalfe, G.E. *Ibid.*, no. 354.

⁴³⁵ Newbury, C.W. (1965). *British Policy Towards West Africa. Select Documents 1786-1874*. Oxford: The Clarendon Press, 380-1.

between on the one hand Great Britain and later the international community pushing for change in trade and end of old monopoly.

While Great Britain focused on demoting natural monopoly, she concomitantly betrayed freedom of trade by supporting corporate monopoly through the National African Company. Individual entrepreneurs such as Jaja⁴³⁶ who rejected such dual policy were tortured, jailed, or killed. Still some communities chose to reinvent or reassert hegemonic pretense through contracting. For instance, the cease-fire of 1886 between 24 Yoruba chiefs and the governor of Lagos transformed intra-groups politics. To end internal conflicts, the leaders of the Yoruba appealed to the Governor of Lagos as a mediator of peace talks. Envoys of the confederate assented themselves both verbally and in writing. A few kings and chiefs gained independence while some became vassal as a result of successful multilateral negotiations (Article 2).⁴³⁷ Individuals and communities were allowed to relocate based on their self-interest and assessment of the outcomes of peace negotiation (Article 4, 5). In this case, contracting as a community allowed weak members to break free from social coercion while contributing to long-lasting peace for the group. Hence, the peaceful outcome of renegotiation of political prerogatives, inequality of individuals, and expected collective gains helped speed the process of horizontal integration.

Politics of Vertical Integration in the Post-1884-5 Years

Most analysts agree that the General Act of the Conference of Berlin or the Congo Conference of 1884-1885 was a turning point in Afro-European relations.⁴³⁸ As indicated in Articles 11 and 12 of the General Act,⁴³⁹ the conference was not a fact-finding meeting. Previous contractual agreements

⁴³⁶ Anene, J.C. (1966). *Southern Nigeria in Transition 1885-1906: Theory and Practice in a Colonial Protectorate*. Cambridge: Cambridge University Press. Appendix C. o. 333-336.

⁴³⁷ Atanda, J.A. (1973). *The New Oyo Empire: Indirect Rule and Change in Western Nigeria 1894-1934*. New Jersey: Humanities Press.

⁴³⁸ For a broader view of European stakes and political background of the conference see Crowe, S. E. (1942). *The Berlin West Africa Conference 1884-1885*. New York: Longman, and Elikia M'Bokolo. (2004). *Afrique Noire: Histoire et Civilisations du XIXe Siècle à nos Jours*. Paris: Hatier-AUF, for the African perspective.

⁴³⁹ Article 11

In case a Power exercising rights of sovereignty or Protectorate in the countries mentioned in Article 1, and placed under the free trade system, shall be involved in a war, then the High Signatory Parties to the present Act, and those who shall hereafter adopt it, bind themselves to lend their good offices in order that the territories belonging to this Power and comprised in the Conventional free trade zone shall, by the common consent of this Power and of the other belligerent or belligerents, be placed during the war under the rule of neutrality, and

between European governments and Africans, and between African nations and foreign entrepreneurs were left untouched. However, the conference superimposed onto these existing contracts discretionary rights exclusive to European stakeholders and shareholders of small concessions on African coasts. The General Act stipulated that any “High Signatory Power” could transfer a territory deemed belligerent to the Congo commission with power to declare it neutral.

The “neutralization” of pre-Berlin conference contracts had tremendous political and intellectual effects ex-post; it took away the question of incentives within these contracts and obliterated the dynamic work of African coastal leaders as entrepreneurs, risk-takers under uncertainty, decision-makers, innovators, owners of factors of production, pivotal employers and strategists in the post-Atlantic slave trade period. Once entrepreneurship and incentives were taken out of the picture, the coastal leaders were reduced to mere fools who selfishly “sold” their land and sovereignty to European colonizers.

The expected payoffs for pre-Berlin African contractors and their European counterparts were initially different, but not necessarily opposed. However, informational disadvantage created different kinds of incentives and approaches to the “new” but not formalized “legitimate trade” that explain the discrepancy in the accounts of colonial possession and dispossession. Germany, the host of the Conference of Berlin between 1884 and 1885, also signed the General Act and behaved as *if* it owned colonies in Africa. There had indeed been, few months prior to the conference, a contract signed between the German Woermann firm and the coastal kings of Kamerun (now Cameroon). But, to what extent did German colonial claims reflected the firm’s *real* possessions in this nation at the time of the conference?⁴⁴⁰ If there were discrepancies in Germany’s reporting at the conference that potentially

considered as belonging to a non-belligerent State, the belligerents thenceforth abstaining from extending hostilities to the territories thus neutralized, and from using them as a base for warlike operations.

Article 12

In case a serious disagreement originating on the subject of, or in the limits of, the territories mentioned in Article 1, and placed under the free trade system, shall arise between any Signatory Powers of the present Act, or the Powers which may become parties to it, these Powers bind themselves, before appealing to arms, to have recourse to the mediation of one or more of the friendly Powers.

< <http://web.jjay.cuny.edu/~jobrien/reference/ob45.html> > accessed July 17, 2008.

⁴⁴⁰ Some treaties presented at the conference were concluded a few weeks and days before the meeting. “Many of these treaties were only of a temporary and provisional nature, although Hewett declared himself confident of being able to turn them, and did fact succeed in turning them, into permanent ones later” Crowe, S. E. (1942). Op. cit, 126.

endowed it with discretionary rights to alter the terms of its contracts with Kamerun, what can we learn from this case and from an analytic historical perspective about the bargaining power of German entrepreneurs and African middlemen?

In early nineteenth-century, Europeans barely knew the interior of Africa⁴⁴¹ and most Africans were equally agnostic to life in Europe. In 1807, the British, “the almost exclusive slave trading partner of the Duala,⁴⁴²” outlawed the slave trade in the Gulf of Guinea and obtained permission from the Spanish to occupy the Island of Fernando Po (now Bioko in the Republic of Equatorial Guinea) in order to control the slave trade from the Bight of Biafra. What was originally a military settlement to end human trafficking became a trading and missionary post along the River Wouri in Duala-Kamerun. The first treaty between the British and the native chiefs encouraged legitimate trade, and not before long, German and Dutch traders joined the British in these humanitarian and commercial enterprises. It wasn’t just the end of the trans-Atlantic slave trade that challenged the local economies but also *the actual presence* of European entrepreneurs and official envoys to enforce the abolition of the old trade. European presence provided incentives and opportunities for local economies to maximize the production of alternative resources that could raise the level of their competitiveness in the world market. This European *dissuasive* entrepreneurial pressure to move trade away from slavery --after having profited from it-- highlights the critical function of the European entrepreneur as an ambivalent economic agent and political reformer with great policy influence in this period.

⁴⁴¹ The first documented contact between Kamerun and the world dates back to the fifth and sixth centuries when Hannon, a Carthaginian, sailing south through the pillars of Herakles reached the Bight of Biafra where he saw a huge volcano that he named “The Chariot of Gods,” which was later identified as the Mount Kamerun. The region identified by Hannon later entered Western records with the Portuguese at the end of the fifteenth century. As Levine reminds us, the Portuguese sailing into the Bight of Biafra, “into the estuary of what is now the Wouri River, were struck by the presence of innumerable prawns, easily taken and delicious to eat. The Portuguese named the river *Rio dos Camaroes*, or River of Prawns, and it was by that name that it appeared on the first Portuguese maps of the region” (1964:16). The Carthaginians, however, did not establish long-lasting relations with Africans and the hinterland of Kamerun remained unknown to them and to other Europeans during the Atlantic slave trade. As Levine points out, “on the Spanish maps the name became *Cameroñes*, on British, *Kameruns*, on German, *Kamerun*, and on the French *Cameroon*” (1964:260). At this point, the *idea* of Kamerun is still in gestation in European minds and unknown to the people of the land. An appeal to political linguistics helps decode the semantic value, the political images identifying and defining identities and institutions associated with “Kamerun” in the minds of western sailors. “The Chariot of Gods,” the river of shrimps, and Kamerun or the kingdom of Kamerun, are all relational and interpretative frames that remained floating over the shores of Duala until the Germans officially settled in. One consequence of the existence of *unknown variables* primarily associated with geography at the beginning of Kameruno-European encounters is the transformation of this *idea* of the unknown into a grammar of political invention, sociological imagination (Mills 1959), and economic growth whereby opportunities and interests were articulated (Hirschman 1977) in contracting modes. The mere fact that Europeans or Africans moved first to invent a political vocabulary did not add or subtract to the symbolic and relational meaning of the encounter.

⁴⁴² Austen, Ralph & Jonathan Derrick. (1999). *Middlemen of Cameroons Rivers: The Duala and their Hinterland c. 1600-c. 1960*. Cambridge: Cambridge University Press, 49.

With “legitimate” trade, Kamerun became an attractive economic and strategic trading post and competition grew faster among European traders and missionaries than among various Duala family groups. Local concerns with the changing social culture and trade were well expressed by Chief Akwa, later institutionalized as “King” Akwa, when he wrote to her Majesty, Queen Victoria, in 1879:

Dearest Madam—We your servants have joined together and thoughts (*sic*) its better to write you a nice loving letter, which will tell you about all our wishes. We wish to have your laws in our towns. We want to have every fashioned altered, also we will do according to your Consul’s word. Plenty wars here in our country. Plenty murder and idol worshippers. Perhaps these lines of our writing will look to you as an idle tale...We never have answer from you. When we heard about Calabar River [Nigeria], how they have all English laws in their towns, and how they have put away all their superstitions, oh, we shall be very glad to be like Calabar now.⁴⁴³

The silence of Her Majesty Queen Victoria, cautions against the overrating of the post-Atlantic slave trade era as “colonial” only. Such silences are not footnotes in historical archives, but rather reference points that shed light on the logic of choice and alternative choice of African entrepreneurs. The plea to her Majesty Queen Victoria, establishing political “bargain” and negotiation as one of the founding political practices of the people of the land. But, her Majesty ignored these invitations to establish a protectorate in Duala. Though England had a higher stake in the Atlantic slave trade, the colonization of former suppliers of human free labor did not always follow as an indelible blueprint. This evidence validates Schelling’s call for cultivating “strategy” for theoretical development because of the limit of the premises of “rational behavior” in our analysis of international trade and political relations.

King Akwa’s missive *signaled* the utility of a protectorate contract but did not capture the demands of all potential foreign and native consumers of the “idea of Kamerun,” those at the periphery (Bimbia, Victoria) and those far away in the hinterland. In fact, the Duala people were divided into two major autonomous sub-groups: the Akwa and the Bell on each side of the banks of *rio dos cameroes* (Wouri, the river of shrimps). Compared to Germany, England, and France, this Kamerun of the Duala

⁴⁴³ Levine, Victor T. (1964). *The Cameroons from Mandate to Independence*. Berkeley: University of California Press, 20, *sic*.

had no overarching sovereign. Their role as middlemen indeed assumed “hegemony without control”⁴⁴⁴ of various sub-groups or the hinterland.

Although the authorship of the above-cited letter is often attributed to chief Akwa, other local and foreign princes in the region signed the letter to Queen Victoria and they were: “Prince Black, Prince Joe Garner and Prince Bell.”⁴⁴⁵ King Bell sent another letter in 1881 urging the British government to take Kamerun under its shelter. But the British government concerned with the reaction of the English taxpayer, and aware of the daunting task of ending internal slavery, politely declined the invitation. From the content of the letters written by local chiefs, it becomes clear that the challenges they faced as middlemen and political leaders required more than local strength to be dealt with. They were not alienating their independence as one could easily infer. Instead, they understood the interdependence of the world and provided by the choices they made, a new model of sovereignty and a new approach to independence. As Ardener puts it, “it was as if a time and situation had been reached when all those on the spot felt that change was inevitable, and wanted –indeed were impelled forward – to meet it halfway.”⁴⁴⁶ These African leaders were not just bargaining under economic and social uncertainty, they were crossing time. Meeting change halfway for these African entrepreneurs meant constructing and contracting sovereignty⁴⁴⁷ and negotiating purchasing power over insecurity.

In dealing with the world from their local situation, the chiefs of the Duala were crossing time, making mistakes, yet inventing knowledge and practices that add to our understanding of the effects of imperfect and incomplete information on contracts and market transaction costs. The problem of information and bargain in the political economy has already been dealt with extensively in game theory and contract theory.⁴⁴⁸ In all human transactions, there is a degree of uncertainty that is always

⁴⁴⁴ Austen, Ralph & Jonathan Derrick. (1999). Op. cit., 48.

⁴⁴⁵ Ardener E. and S. Ardener. (1968). *Plantation and Village in the Kameruns*. Oxford: Oxford University Press, 20.

⁴⁴⁶ Ardener E. and S. Ardener. (1968). Op. cit., 21; my emphasis.

⁴⁴⁷ The Westphalian sovereignty was never intended to be a fetish of nations but opportunity for peace, institutional growth, trade and compromise. While we are sometimes eager to criticize nineteenth-century African leaders for “selling” their sovereignty –something they never did – it is ironic that the “fetishization” of sovereignty under the defunct OAU took better-informed Pan-Africanists by surprise. Also see Stephen Krasner (ed.). *Problematic Sovereignty*. New York: Columbia University Press, 2001; Stephen Krasner. (1999). *Sovereignty Organized Hypocrisy*. Princeton: Princeton University Press.

⁴⁴⁸ A game with *incomplete information* involves players who are “uncertain about some important aspects of the game situation” (Harsanyi 1997: 216) or the rules of the game. A game with *imperfect information* involves players who are uncertain about “the actual behavior of the

present. However, the institutionalization of the idea of “legitimate trade” brought about new opportunities and challenges that met another kind of uncertainty: the Knightian *unknown*. This unknown, not colonialism, positioned African kings as players with *incomplete information vis-à-vis* European firms and governments and with *imperfect information vis-à-vis* their homologues, constituencies and hinterland. In any case, signaling and contracting in an uncertain environment always involves risk that can be harmful to one entrepreneur or to all parties. However, that the Duala were able to make such an appeal in the first place, indicated the absence of the perceptual bias which can be explained by pre-existing history of deal-making during the Atlantic slave trade.

By asking for vertical integration, Duala entrepreneurs forwent their purchasing power over residual uncertainty as a “distinguishing mark of an economic action [which] governing purpose is not the creation of utility, but the creation of command over utilities.”⁴⁴⁹ In trying to convince the British to incorporate their territory into their government, Duala leaders’ signal lacked incentives beyond mere competition with Calabar, a region that seemed to flourish with the help of European missionaries and local trade networks. As Ardener contends, the idea of protection was “taken by the Duala to include modern administrative and educational services.”⁴⁵⁰ But as Michael Porter once wrote, “selective disadvantages best contribute to competitive advantage when they send the proper signal in dealing with problem that are widespread.”⁴⁵¹ A proper signal is a signal that is a statement, a stimulus about upgraded competitive advantage that leads to innovation.⁴⁵² The Duala signals unfortunately lacked innovation and took the form of the statement of bankruptcy; an attempt to outsource the insecurity they thought would not confront them once they vertically integrated the English nation. Radical innovation was too costly to the monopoly of Duala entrepreneurs, and their attempt to merge into the

players or, more generally, when the play [evolves] until the point in time when a new decision to be made is not known” Philips, Louis. (1988). *The Economics of Imperfect Information*. Cambridge: University of Cambridge Press, 9.

⁴⁴⁹ Hawley, Frederick. (1902). “A Positive Theory of Economics.” *The Quarterly Journal of Economics* Vol. 16, No. 2 (Feb.) 238-9.

⁴⁵⁰ Ardener E. and S. Ardener. (1968). *Op. cit.*, 24.

⁴⁵¹ Porter, Michael. (1990). *The Competitive Advantage of Nations*. New York: The Free Press, 83.

⁴⁵² Jervis, Robert. (2002). “Signaling and Perception” in Kristen Monroe (ed.). *Political Psychology* Earlbaum, 32.

British government system failed. When the negative answer finally came in 1882, the Duala chiefs had spent too much time waiting passively while the pressure to innovate or merge increased.⁴⁵³

A set of *unknowns* in the forms of incomplete and imperfect information caused the defeat of the Duala's first proposal. Nevertheless, this defeat could have had a different effect on the next application had the Duala considered all possible explanations to Great Britain's rejection. But, they wanted to move forward too fast and did not know whether risk increased or decreased with their next application to merge with another local or foreign power. The utility of prior information gathered from the experience with England could have at least given the Duala, an idea of the distribution of the "space of [the] states of nature"⁴⁵⁴ in the political economy of contracts in transitioning polities.

The initial search for an overarching political entity to merge with brought the Duala chiefs, British and German traders, British military officials, and the native populations together. English and "pidgin" were spoken and written by many Kamerunians. As Ardener writes "the German and British merchants alarmed by the progress of the French "joined the Duala in further approaches to the British Government"⁴⁵⁵ without success. These German merchants arrived in Duala around 1864 and established factories of the German Woermann Company around 1875⁴⁵⁶ that soon wrestled with the native monopoly of Duala over trade with the hinterland.

In order to solve the problem of Duala monopoly, the company unilaterally started negotiations with Bismarck to get him involved in this region. Though the Woermann Company did not have the capacity of a state, the structural endowment of its home country allowed it to exploit, whenever possible, political coalitions in Germany and to propose a framework for expansion to protect its acquisitions abroad. According to Townsend, Woermann Company welcomed "Joseph Thornählen, the [German] administration on April 22, 1874 for a consul to be stationed at Fernando Po, to protect its

⁴⁵³ The Duala found alternative ways to compete with German Merchants after 1895 when it became obvious that German companies were determined to bypass their coastal monopoly. See Franz Asprenger. (1988). "African Perception of the New European Policies in Africa during the 1880s. In *Bismarck, Europe, and Africa: The Berlin African Conference 1884-1885 and the Onset of Partition*. Stig Förster and Wolfgang Mommsen. Eds. Oxford: Oxford University Press.

⁴⁵⁴ Laffont, Jean-Jacques. (2000). *Incentives and Political Economy*. Oxford: University of Oxford Press.

⁴⁵⁵ Ardener E. and S. Ardener. (1968). Op. cit., 20.

⁴⁵⁶ Austen, Ralph & Jonathan Derrick. Op. cit., 63. Also see Townsend, Mary E. (1943). "Commercial and Colonial Policies" *The Journal of Economic History* Vol. 3, supplement: The Task of Economic History (Dec.):1 24-134.

commercial interests in Kamerun.⁴⁵⁷ However, unlike the Woermann Company, the Duala had no similar political reference to appeal to as collateral in their backyard.

Despite its political activism, the Woermann firm remained a firm not a government and its secret partnership with Bismarck also meant that it was putting itself under the pressure of a political institution with a distinct administrative culture. Note that the appeal to the German government as a collateral entrepreneur reduced the purchasing power of the company over residual uncertainty because the company was now bound to share risk with the state. However as Hicks argues, “newcomers [in the city states and colonies] need not do the same business as was being done by established merchants...their best opportunities will be to fill the gap in the already existing structure.”⁴⁵⁸ The German firm figured that the end of native monopoly could extend their trade in the hinterland, and the acquisition of land could help start the plantation economy. From the perspective of a trading firm, these ideas seemed the most rational given the context of high demand for integration from local leaders into world economy and politics. Unlike the British government, the Woermann firm was already established in Duala and German entrepreneurs understood that proximity reduces transaction costs and risk if only they could secure a long-term deal with local populations. As Say and Mangoldt would put it, the company created new utility out of old demands (for *vertical integration*) by discovering proximity as an undetected opportunity and by *partitioning* command over residual uncertainty among foreign and local entrepreneurs.

We’ve already seen that it costs something to supply the demands for security, legal and administrative institutions that the local chiefs needed. However, after the sour outcome with the British and despite political cleavages, the Duala amended their proposal with “independent private values.”⁴⁵⁹ In reintroducing their application to merge with the Woermann Company, the local chiefs of Kamerun made reservations on land property, marriages, taxes, but more importantly, they reaffirmed their intention to maintain exclusive rights over trade with the hinterland. Europeans are often credited with

⁴⁵⁷ Townsend, Mary E. Op. cit., 49

⁴⁵⁸ Hicks, John. (1969). *A Theory of Economic History*. Oxford: Clarendon, 48.

⁴⁵⁹ Philips, Louis. (1988). *The Economics of Imperfect Information*. Cambridge: University of Cambridge Press, 90.

the invention of modern nations in Africa. I propose to see this explicit extension of one native ethnic monopoly into its hinterland as one of the founding acts of national identity in this period. While Woermann Company was fighting to secure the endorsement of the German government by making the signature of the contract *coincide with the transfer of authority to German political institutions*, this strategy was *equally* met with the Duala's assertive monopoly over trade in the hinterland. In practice however, fast technology (cable and sea) increased the capability of the firm to communicate with Germany whereas the Duala only had empty claims with no real power over their backyard.

What is important to my analysis is the native integration of the territorial unknown in a contractual agreement by extension of monopoly. This extension of monopoly has all the characteristics of what Bernstein terms "full line forcing," the phenomenon by which "firms with monopoly power with respect to one good frequently attempt to condition the right to purchase that good by requiring that the buyer also purchase stated quantities or "requirements" of other goods from the monopolist."⁴⁶⁰ The Duala successfully inserted a "latent extortionate threat" that by definition is "threat that can be exploited only if it can be attached to some more ordinary, legitimate, bargaining situation"⁴⁶¹ complicating our reading of the sophisticated strategy of the German firm. The Germans did not detect the imagined nation abstracted from the ethnic group of the Duala and inserted in the contract as a "latent threat" until they clashed with real nationalist forces later. Without the science of strategy, it is hard to see nothing but "colonialism" and impossible to highlight the cleverness of the Duala in creating, strategizing, and formalizing entrepreneurial mechanisms of checks and balances in the absence of a formal state. The Duala here applied an implicit theory similar to that employed in an analysis of the behavior of firms to nations by brilliantly transforming in theory, a natural (ethnic) monopoly⁴⁶² into a national monopoly with prerogatives over regulating among other things, domestic rights, taxes, foreign trade, and risk. The geographic advantage of the Duala therefore established

⁴⁶⁰ Bernstein, M. (1960). "A theory of Full-Line Forcing." *Northwestern University Law Review* Vol. 55 (March-April): 62-95.

⁴⁶¹ Schelling, Thomas. (1956). "An Essay on Bargaining." *The American Review* Vol. 46, No. 3 (June): 289.

⁴⁶² Posner, Richard. (1999) *Natural Monopoly and its Regulation*. Washington D.C.: Cato Institute.

grounds for tying arrangements with any potential government and firms willing to contract with their local leaders.⁴⁶³

Note how the amended provisions of the chiefs also made the formalization of their native ethnic monopoly and the national monopoly (which has nothing in common with democracy) coincide with the formalization of contractual agreements with a European power. Nevertheless, the difference between the German firm and the Duala is that in the first case, the effect of pressure from the private firm over its hinterland or government yielded effective outcomes and asserted an existing power. In the second case, the effects of the pressure of the Duala over their hinterland were mainly theoretical while the pressure from the hinterland created effective social unrest and insecurities as noted in the letters addressed to Queen Victoria of Great Britain. The irony of monopoly however, is that while a few firms and or states may have the capability to become real monopolies, no one has the monopoly over monopoly. This extension of an indigenous ethnic monopoly into territories that were not under its control handicapped both the Duala and their backyard. Ironically, it is the very display of monopolistic feathers in a peacock-like fashion⁴⁶⁴ that opened the hinterland of the Duala to the highest bidder and to the best strategist.

While Bismarck was still undecided on the issue of colonies, the Woermann Company already initiated negotiations to do what Great Britain had failed to do: become the vector of the political institutionalization and trade in consultation with the natives. The Woermann Company had over the German government, the advantage of reducing transaction cost and according to Coase, “the fact that it cost something to enter into transactions means that firms will emerge to organize what would otherwise be market transactions whenever their costs were less than the costs of carrying out the transactions through the market.”⁴⁶⁵ If African encounters with European governments and firms were only to be seen from the colonizer/colonized perspective, European pride would have been rewarded

⁴⁶³ Ansprenger, Franz. (1988). Op. cit.

⁴⁶⁴ See Amotz and Avishag Zahavi’s “Handicap Principle” derived from the observation of animal signaling behaviors. According to the authors, signaling that underscores the truthfulness of the signal serves the interests of both the predator and the prey. However, the peacock incurs significant cost with its weighty tail-feathers that interferes with the movement of flight. Amotz and Avishag Zahavi. (1997). *The Handicap Principle: A Missing Piece of Darwin Puzzle*. Oxford: Oxford University Press.

⁴⁶⁵ Coase, R.H. (1988). Op. cit., 7.

every time there was a supply of territories such as the Kamerun, or every time the cost of acquiring such possession decreased.⁴⁶⁶ As we have seen with the leaders of the Duala and the British government, *price mechanism alone in the market economy of 'colonies' could not regulate the direction of colonial acquisition and resources dispossession*. According to Coase, firms emerge to supersede price mechanism "if the relationship which replaced it was desired for its own sake."⁴⁶⁷ If Coase is right, it becomes important to analyze the role of Woermann Company on its own terms before we move onto the German government's retrieval of contracts signed between this company and the Duala for its own pride.

After the debacle with Great Britain, and with mounting pressure to find a reliable trading partner capable of enforcing security, the coalitions of the Duala became divided between those who still believed negotiations with the British should continue and the proponents of a new search. During secret negotiations between chiefs and Woermann firm, "there were stormy [native] meetings with rival cries of 'we want English' and 'we want Hamburg'... The kings were prepared to sign, but their powerful subjects were not and strongly opposed signing a contract with the German Reich'.⁴⁶⁸" During these negotiations, rumors circulated about Germans' secret intentions to use the Duala as military conscripts. Note that the opposition to the German firm seems ideological but it was in fact based on the conviction that because of their late entry in the new "legitimate" market, it was preferable to pursue deals with the British, the old partner who successfully overcame "the liability of foreignness"⁴⁶⁹ over time with the coastal trading ethnic groups of Kamerun. The opposition came up short with alternatives besides "waiting for the English" but it had its own logic.

Before consensus was reached among the relevant indigenous actors Bismarck dispatched Gustav Nachtigal to enquire about the progress of the Woermann Company and he appeared in Duala on July 12, 1884. Ardener reports, "the appearance in Duala of the impressive warship (bigger than the

⁴⁶⁶ See for instance Cameron's offer of the Congo to Great Britain and the opposition of both Manchester and Liverpool commercial circles on the ground that the establishment of any political control menaced the freedom of trade in the Congo (Vol. 19 Appendix IV) in Crowe S.E. (1942) *The Berlin West Africa Conference 1884-1885*. New York: Longman.

⁴⁶⁷ Coase, R.H. (1988). *Op. cit.*, 39.

⁴⁶⁸ Ardener E. and S. Ardener. (1968). *Op. cit.*, 23.

⁴⁶⁹ Eden, Lorraine. (1991). "Bringing the Firm Back In: Multinationals in International Political Economy." *Millennium Journal of International Studies* Vol. 20, No. 2, 197-224.

familiar English gunboats) no doubt heightened the pressure that was building upon the chiefs.⁴⁷⁰ On July 12, 1884 a contract between the Woermann Company and the Duala kings was signed; an agreement that the British government recognized in 1885. Until the signature of the Kamerun-Woermann treaty, the spirit of the negotiations and amendments made to the first proposal never changed. However, in the final document it was suggested that the Duala kings “sold” their sovereignty to the Woermann Company, which in turn, retailed it to its home government. Assuming this version of the German treaty is true, it does not explain why the amendments to the contract were not respected by the German administration when it initiated incursions in the hinterland years after the Berlin Conference.

The sudden change in the position of the nation of the Duala political entrepreneur as full-fledged negotiator with foreign firms is explained by the expectations of the conference of Berlin. The idea of colonialism implied in the attitudes of the signatories of the General Act of the conference, each one speaking in terms of its possession in Africa, obliterated the historical circumstances and economic imperatives of negotiated contractual agreements between private foreign firms and African leaders. Having dismissed the bargaining agency of African contractors the Conference of Berlin rendered obsolete previously existing commercial contracts and treaties.

After tracing the political processes and key determinants in the Duala-Woermann relations, it appears that in many ways, the firm and the nation were early movers in a market of entrenched positions consolidated in the process of drafting a contract agreement. With respect to the uncertain informational and technological environment, the Woermann firm was able to use its knowledge of the host country's demands to effectively and to strategically position itself in the direction of political change⁴⁷¹ in European foreign policy. However, the company's sophisticated knowledge could not predict nor fully assess the consequences of symbolic but powerful strategic entrenchments of the host nation (Duala-Kamerun) with its hinterland. The aspiring nation of Duala-Kamerun did not have the

⁴⁷⁰ Ardener, A. (1968). Op. cit., 23.

⁴⁷¹ See similar strategies with the oil industry in Canada in Jenkins, Barbara. “Reexamining the “Obsolescing Bargain”: A Study of Canada's National Energy Program.” *International Organization* Vol. 40, No. 1(Winter 1986): 139-165.

same competitive technological skills but remained powerful enough to inspire the first cultural nationalist movement under the German administration.

The Bismarck-Woermann firm entente changed simple trade contracts between the company and the politics of Kamerun into “trade-mark--*Made in Germany* business proposal⁴⁷²” of the German government and the consequence was the establishment of a political system in that created more inequality between Germans and the natives under the regime of colonization. However, the company’s and Bismarck’s political motivations alone do not tell the whole story. Entrenchment of competing technology, and the ability to predict changes in the home country helped the Woermann Company to strategically position itself in Germany by appealing to a favorable home-based opinion for extension abroad. Despite its late entry in the market of “legitimate” trade in Africa, the Woermann firm did not follow the politics and strategy of English leading traders in this region. On the Kamerunian side, the ability to amend contractual agreements was not exogenous but integral to the process of contracting based upon the cumulative history of success and failure of previous contracts; a history that is independent of the perceived losses and gains associated with available resources in future contracts. The tendency to make promises that one could not deliver is noticeable in the attitudes of the nation when it tries to “sell” sovereignty that it did not possess and ascertain monopoly over enclaves it clearly did not control. A similar behavior is noted in the attitude of the Woermann firm when it overstated its assets in order to influence public policy in Germany. Thus, from the perspective of the history of bargaining to procure goods and services on the West African coast, political intervention had mixed result. On the one hand, it sought to curb the inhumane Atlantic slave trade, but in doing so, it usurped power, obsolesced pervasive bargaining, and imposed a bureaucratic states run by colonial procurement agencies with the prerogative to create national debt by extension of contractual liability to residents of the colonies.

⁴⁷² Townsend, Mary E. (1943). Op. cit., 127, 129.

Looking Forward

Historical procurement cases presented in this study trace the origin of the modern African state to outcomes of contractual agreements from the seventeenth century until early twentieth century. Empirical data used here helped theorize the importance of implicit dimensions in procurement contracts and establish the role of intangibles in African political and institutional development.

Attention to history does give us a foundational ground to debate over procurement practices in Africa. It also allows one to understand the role of strategic choice, the international and domestic constraints that give rise to specific discourse over procurement practices. How do these contractual practices compare to state entrepreneurship, procurement practices, interest formation and institutional change in post-independent Africa? Do sovereign contractual prerogatives of the African state contribute to the poverty of governance and command over national assets? Could state natural monopoly over procurement add to our understanding of a source of power and survival of non-democratic regimes? These questions point to the need for more research on public procurement reform and its relations to tangible and intangible development in contemporary Africa.

The strategic challenges that African leaders faced as a result of international fights against maritime piracy, the Atlantic and Indian Ocean Slave trades, the rise of free trade ideology and its concessionary regimes in, are similar to those post-colonial states face today. The war on terrorism, the fight against piracy on the East and West African coasts, the provision of antiretroviral drugs, and unconventional wars are the many challenges that are reshaping the ways in which African states solve problems. Public-private partnerships are increasingly hailed as the new model of economic development. Mines, Oil and gas and land, infrastructures concessions to private companies have been one of the ways in which modern African states negotiate development. Private contractors are, increasingly managing other new areas such as, intelligence gathering, elections, and electoral campaigns. While this trend is not specific to African states, it is interesting to ask what factors might prevent them from harnessing the potential benefits of contracting out services. Whether domestic

needs for public goods and services remain constant or evolve over time, they always create demands that public sector entrepreneurs must meet through innovation after bargaining strategically with domestic and international potential suppliers. As this study shows, conservative and progressive forces interact in the creation of a demand for and in the making of public procurement.

One of the characteristics of the nineteenth century was the absence of a harmonizing public procurement discourse and theory. Scholars of western political development have written about procurement dynamics between political leaders and private entrepreneurs, merchant guilds and multinational companies. With the rise of international trade in late eighteenth and nineteenth centuries, procurement practices took the forms of political instruments given to private companies such as royal charters, monopoly rights over foreign and domestic trade. Nevertheless, the rise of free-trade ideology in the eighteenth and nineteenth centuries failed to foster the harmonization of procurement practices across nations, but instead, empowered an entrepreneurial class of profit-driven traders and adventurers working as middlemen between countries and contracting external services and goods needed domestically. With the collapse of the British Empire in the twentieth-century, many ex-colonies became independent by contracting security and/or strategic resources with either former colonial powers or with foreign private companies. The traditional individual entrepreneurs as middlemen in public procurements practices was temporarily displaced and replaced by sovereign states and international legal instruments.

The linkages between domestic needs and foreign investment may foster development in developing countries in many ways. Empirical studies on international technology diffusion show that new technologies transmitted internationally “may be embodied in *goods* and transferred through imports of new varieties of differentiated products or capital goods and equipment, they may be obtained through exposure to foreign buyers or foreign investors, or they may be acquired through direct trade in ‘disembodied knowledge’- through contracts supported by policies that protect

intellectual property.⁴⁷³ Thus, when purchasing from external suppliers, success rests on both trade openness and the capacity of procuring states to innovate and to absorb embodied and disembodied spillovers from goods and services acquired exogenously. It follows that improving investment opportunities without equal improvement of domestic incentives to source locally may lead to economic distortions especially in economies with a large public sector and a semi-developed private sector.

Procurement for development is therefore an entrepreneurial challenge that depends on the transformation of governance apparatus, especially the administrative power embedded within bureaucracy. How states use procurement to foster or hinder trade, economic and political developments is of particular interest to political scientists because of the critical administrative and organizational transformations embedded and required in the process. I argue that the political metamorphosis of state governance from simple command and control to incentives making is *sine qua non* in procurement policies. By seeking to extend the reach of free trade to public procurement today, the WTO's momentum is supposed to transform the ways in which state monopolistic bureaucracy does business. Though necessary, a momentum for the legal and structural transformation of the procuring environment is not sufficient to bring about change in resource management. To be comprehensive, any debate over government contract reform today in Africa should take into consideration political and governance systems as these variables seem to weigh heavily on procurement outcomes in Africa today as in the past

⁴⁷³ Hoekman, Bernard and Beata Javorcik. (2006). "Lessons from Empirical Research on International Technology Diffusion and Foreign Direct Investment." In *Global Integration & Technology Transfer*. Hoekman, Bernard and Beata Javorcik. Eds. Washington D.C.: The World Bank.

Appendix

CODING OF CONTRACTING PARTIES (1612-1919)

ALGERIA	AL
AUSTRIA	AU
AUSTRIA-HUNGARY	AUH
AUSTRALIA	AS
BELGIUM	BL
BENIN	BE
BULGARIA	BU
CAMEROON	CM
CANADA	CA
CONGO	CO
DENMARK	DN
DENMARKNORWAY	DNN
EGYPT	EG
ETHIOPIA	ET
FRANCE	FR
FRANCE PORTUGAL	FRP
FRANCE SPAIN	FRS
FRANCE USA	FRU
GAMBIA	GA
GERMANY	GR
GHANA	GH
GREAT BRITAIN	GB
GREAT BRITAIN FRANCE	GBF
GREAT BRITAIN NETHERLANDS	GBN
GREAT BRITAIN USA	GBU
GREAT BRITAIN GERMANY	GBG
GREAT BRITAIN LIBERIA	GBL
GREAT BRITAIN PARAGUAY	GBY
GREAT BRITAIN PORTUGAL	GBP
GREAT BRITAIN BELGIUM	GBB
GREAT BRITAIN SWEDEN	GBS
GREAT BRITAIN COLOMBIA	GBC
GREECE	GC
HONG KONG	HK
INDIA	IN
ITALY	IT
KENYA	KN
LIBERIA	LI
LIBYA	LY
NETHERLANDS	NT
NIGERIA	NI

NORWAY	NO
MADAGASCAR	MD
MAURITIUS	MA
MONTENEGRO	MT
MOROCCO	MO
MULTIPLE (= OR > 4)	M
MUSCAT	ZR
OTTOMAN	OT
PERSIA	IR
PORTUGAL	PO
RUSSIA	RU
SARDINA	IT
SENEGAL	SE
SENEGAMBIA	SE
SIERRA LEONE	SL
SOUTH AFRICA	ZA
SPAIN	SP
SUDAN	SU
SWEDEN	SW
SWEDEN NORWAY	SWN
SWITZERLAND	SZ
TANZANIA	ZR
TOGO	TO
TUNISIA	TU
TURKEY	TK
UGANDA	UG
UGANDA KENYA	UGK
USA	US
ZANZIBAR	ZR

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