International Interplay

International Interplay: The Future of Expropriation Across International Dispute Settlement

By

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Foreword by Martin Hunter

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For
My Beloved Grandmother

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FOREWORD

Many academic supervisors instruct, or persuade, their doctoral students to define their thesis topics much more narrowly than they propose initially. I have to admit that I do also. The reason is that a doctoral thesis should be innovative and 'add to the science'. Wide topics tend to lead to comprehensively researched compilations of the science that has been developed previously, with an associated commentary. Whilst such work can be useful, only exceptionally can it add to the science.

Similarly, many post-graduate doctoral students – having eliminated much of their formative initial research – understandably do not have the stamina to revisit their doctoral theses and rewrite or expand large chunks of their work for the purposes of preparing a book for separate publication.

Mr (now 'Dr', I am pleased to report) Dasgupta first discussed his plans with me about two years ago. He told me that, after he had defended his thesis, he was thinking of spending approximately another year revisiting his earlier, wider, research and converting his 'examined text' into a book with a wider scope for possible publication. I expressed admiration for his stamina, and was very pleased when he achieved this goal.

The result is impressive, and provides his readers with a well-constructed and organised analysis of the ways in which modern international arbitration tribunals have 'moved with the times', in tackling the expropriation-related issues placed before them for decision.

The introductory chapter demonstrates the importance of expropriation in international law, with facts and figures. The author reflects on the co-extensive evolution of international tribunals with respect to expropriation and property rights and establishes that *'each has been the others' access point to growth'*. Also, when defining the term *'expropriation'* he explains that its scope is treated in its broadest sense in that it covers both direct and indirect expropriations.

The author examines the current expropriation-related standards, new trends and future challenges. This book thus fills an obvious need for a systematic account on this topic because the ever-broadening scope of the meaning and effect of expropriation has shown to be an elastic concept.

In Chapter 3, Dr Dasgupta deals with 'attribution' and 'causation'. This chapter is mainly concerned with the ethos and predispositions of international tribunals. He explains that:

> *. . . . it is about really entering the minds of the international tribunals empowered to decide if an expropriation has taken place and, if so, what compensation is to be paid.*

There have been many conceptual changes since the time of the famous *ex parte* Libyan oil concession arbitrations of the 1970s and, later, the more liberal approach of the *Aminoil v Kuwait* tribunal in the early 1980s. This Chapter discusses how modern tribunals think, what criteria they apply when they decide whether a respondent state is responsible ('attribution'), and what degree of *nexus* amounts to proximate causation. He notes that:

> *. . . . there is a constant tug of war between investors and property owners, who typically want to make it easier to show attribution and state responsibility, and governments, who usually do not.*

Chapter 4 addresses, first, the exhaustion of local remedies and, secondly, continuous nationality standards in international law. Chapter 5 deals with concepts such as non-discrimination, national treatment, and the application of most favoured nation principles. Chapter 6 explores other substantive issues: fair and equitable treatment, due process, minimum standard of treatment, and compensation, explaining that the 'Chapter 6 standards' are absolute, unlike those described in Chapter 5, such as non-discrimination, legitimate expectations and *force majeure.*

In the context of future developments Dr Dasgupta also discusses a number of thus far intractable problems such as the appellate mechanism that exists in the ICSID system, as to which he makes a proposal that deserves consideration by the appropriate authorities.

The work finishes with some helpful and provocative conclusions which pull together many of the strands that run through the work. The concluding chapter is of particular interest as it contains Riddhi Dasgupta's well thought-out predictions for future developments, and the dialogues and debates that will lead to them. I am happy to recommend the book most warmly to readers interested in the study of international law of expropriation and property rights.

—Professor J. Martin Hunter
London, United Kingdom
December 2012

PREFACE AND ACKNOWLEDGEMENTS

I was counselled to retain rather a *res ipsa* approach to the task of writing prefatory remarks. The well-intentioned suggestion was, "The monograph should speak for itself, so keep the preface Spartan." Moreover, I cannot be so presumptuous as to add very much to the comments and analyses of Professor Martin Hunter, the esteemed writer of the *Foreword*, and academic-practitioner-arbitrator-innovator *par excellence*. I will just reinforce three simple notions undergirding this monograph. In this, I beg your patience.

First, I should say that in international law, which by nature needs to reach a wide and diverse audience, there is a preferred form of delivery and it matters. It is encapsulated by one word: Simplicity. After all, the point is to have an impact, meaning that the message must reach people who do not ordinarily live in this orbit. Second, while there are risks in comparative analysis, it would be tantamount to throwing the baby out with the bathwater if we did not consider the analytical possibilities which only a comparative and multi-linear process can give us. If you do not know what is out there, you do not know what your comparators or your potential sources of inspiration are. Not only might the premises and assumptions resulting from a one-dimensional process be cramped and narrow but so might our deductions. Third and lastly, the intellectual process is not offended — rather it is vindicated — when we directly engage with the notion that ideas come from people who have lives which are composed of both biology and experiences. The legal profession is rendered stimulating as well as valuable because of diversity. Life experiences empower lawyers with a diverse set of perspectives to dissect important questions of rules and justice.

Along those lines, it is crucially important to focus not only on the people upon whose ideas this book is built but also those people who have been instrumental in making this book see the light of day — in short, the people important to me. I must thank my grandmother, my parents, my aunt Ranu Basu, the rest of our family, and friends and well-wishers who have been there for me. I do not wish to leave anyone out but some other people just *had* to be named for their constant support, help and inspiration: Rahul Mediratta, Amrita Basu Somani, Chris Thompson, Kingdar Prussien, Jacob Marty and Marissa Cope, Darleny Cepin, Anaïs Menard, Lourdes

Madagisekera, Laura Ertmer, Gustavo Barros de Carvalho, Mark O'Flynn, Thierry Maldonado, Apurba Khatiwada, Shira Goldstein, Daniel Brusser, Daniel Barton, Madjdy Fawzy, Laura Bolton, Caroline Hull, Sebastian Robins, Rebecca Hadgett, Xiaolu Zhang-Coenen and Peter Coenen, Albert Monroe, Norma Weir, Rosemary Luff, Asif Khan, Daniel Baker, Alice Dub, Adam Samarillo, Paul Syers, Joshua Parker, Christian Perrone, Ryan Rogers, Pascal Knoll, Christoph Trautrims, Sean Bhattacharya, Mark Stadnyk, Ruvi Ziegler, Jan-Fabian Meis, Claudia Buitkamp, David Chait, Fotis Vergis, Tom Hamilton, Matthew Morton, Sam and Anna Littlejohns, Samuel Dahan, Kenneth Burns and the Burns family, Yu Zhang, Christian Brink, Nicholas Crawford, Michael Walker, Vess Popov, Michael Campbell, Besim Hatinoglu, Christina Brittain, Benjamin Watts, Joshua Poritz, Aashika Damodar, Alex Cocavessis, Bethan Saunders, Ola Janusz, Ana Lise Feliciano Hansen, Shalina Daved, Siddarth Mitroo, Simon Gray, Rohan Shekhar, Esther Widmann, Jeremy Richardson, Paula Koelemeijer, Sayan Chaki, Christian Capasso, Jay Orenduff, Daniele Mercadente, Alex Mills, Maximilian Bulinski, Mariano Beguerisse, Luka Krsljanin, Shane Kelly, Brad Hiller, Kevin Morgan, Ramona Meyricke, Isabella Wanderley Vitali, Aditi Chokshi, Dwayne Menezes, David Adelsberg and Jocelyn London, David Gordon, Joana Borlido, Roberta Wells, Sir Martin and Lady Barbara Harris, Irene Hills, Karolis Stašinskas, Tadas Jucikas, Kristina Jucikaitė, Marianna Zaslavsky, Sebastian Pender, Graham Wheeler, Adam Nagorski, Andrew Simpson, Laura Mckoy, Nitish Upadhyaya, John Niland, Govert Coppens, David Hostert, Laurence Groot Bruinderink, Michael Chalk, Michael Waibel, Alexander Rodney, Charles Justin Henck, Jonathan Kamler, Ben Taylor, Nabil Wilf, Eric Koskinen, Damian Eads, Artūras Ratkus, Sid Misra, Rebecca Hiner, Mariela Aguirre Sanchez, Maribel Butler, Alexander Kaus, Roland Saam, Christian Winzer, Justin Kempley, Sabena Panesar, Christian Capasso, Elan Gada, David Goldin, Terence Zaleski, Brian Kauffman, Scott Keller, David Greenhouse, Emily Jordan, Gwen McDougal, Jason Parsont, Brandon Walsh, Charmaine Jelbert, Cedric Vanleenhove, George Bangham, Daniel Ham, Kunaal Sharma, Daniel Silovitz, Alex Grow, Trisha Garbe, Simon and Sophie Leimbacher, Rahim Moloo, Todd Weiler, Evianne Van Gijn, Bill Asquith and Mario, Erin and André Faure.

My Ph.D. supervisor Professor Martin Dixon was superbly patient with me throughout this process, and whatever this book is it is so because of him. I am grateful to Professor Sara Seck and the University of Western Ontario's Faculty of Law for sponsoring my research during the summer of 2010. I am beholden to Dr. Markus Gehring and Dr. Kate Miles for being incredibly conscientious about assessing my Ph.D. thesis and for making

helpful suggestions. These suggestions I have done my best to incorporate into this publication. I am grateful to Professor James Crawford, Dr. Tom Grant, Professor Roger O'Keefe, Dr. Michael Waibel and the entire Lauterpacht Centre family at Cambridge University for their doctrinal entrepreneurship in general and help to me in particular. I also thank from the very bottom of my heart Judge David Faber and Mrs. Debbie Faber for their unceasing friendship, understanding, and courage. They have demonstrated to the world that new frontiers are a lifelong aspiration, and attainable too. They have shown me kindnesses that one day I wish to pass on to "youth, whose feet must pass this way." May we all learn from their valour and enterprise. I am grateful to Professor Tom Ginsburg at the University of Chicago Law School for his personal help and theoretical contributions alike. Judge Charles Brower and Chief of the Investment Arbitration at the United States Department of State, Mr. Jeremy Sharpe, assisted me immensely in clarifying issues, lending their assistance and backing me up. Their enchanting, courtly and modest manners made me feel instantly at ease when interacting with these giants of the law. I am also grateful to my editor for her vigilance and care. I can say nothing that will do justice to what my parents have done for me.

In giving of themselves to my growth, each person has demonstrated the value of looking beyond formal datasets and credentials which tell only a narrow (and frequently misleading) part of the story. By taking up qualitative assessment, the process is made slightly more difficult, to be sure, but it is also made better. I have benefited significantly, especially in difficult times, from their courage. Lastly, some judicial personages and legal advisors gave me extensive help but did not want to be identified publicly (frequently because of a lengthy clearance process required in order to give on-the-record interviews). They know who they are, and they have my warm and heartfelt gratitude.

There is an awe-inspiring amount of talent around me reposed in gifted lawyers and other innovators. Their curse is their imagination which some sterile checklists cannot capture and with which the latter simply cannot cope. This tragedy has cost these innovators, and the rest of us, the prospect of coveted roles through which they might have made great strides for all of us. By subconsciously or perhaps consciously choosing some paths of least resistance we might have done ourselves a grave disservice. May we all become a little wiser, and may we all appreciate those who did give us their time as well as chances when things looked bleak for us.

I have been blessed with excellent, supportive people in my life. Each of these top-drawer dignitaries imparted to me the message that what counts in life is the wholesome composite of resilience, generosity,

solidarity, diligence, courage, imagination, perseverance and kindness. During the most challenging days of churning this product out as well as responding to several other wildfires, I was at first stunned and impressed, and eventually deeply moved, by the iconic performances of the differently-abled athletes in the 2012 London Paralympics. Their countless disappointments earlier in life are said to have paved the way to these remarkable moments in the summer of 2012. Each of the aforementioned traits — imperatives, really — was embodied in their performances. They must have been told a million times, as we all have, that our gifts are no gifts at all. They combined their aptitudes with perseverance and imagination to redefine the very notion of "talent."

Being on the losing side of an advantage, even if it is something that others in your environment take for granted, need not be a disqualifying feature. In my own small way, then, I drew tremendous inspiration to soldier on and complete the book. Thus the process and the craft have been ever so meaningful, for in *its* own way this book beseeches the international law community to think imaginatively about the weighty and sensitive questions facing us in the coming years. The well-trodden path is a time-tested path and merits reverence. But we should not be above paying ourselves the greatest reverence of all, which is constant introspection and active efforts to adapt and improve. No more fulsome a tribute is even possible.

The errors are mine alone. I request the reader to pardon my Dickensian, Greek tragedies, and other cultural (both popular and esoteric) fascinations. This book imparts legal strategy and observations to putative and current practitioners, judges and academics. But there is no reason that strategic observations may not also be entertaining or relatable. My prose-style happens to be a hybrid of practitioner manuals, cultural anthologies and theoretical texts. Above all, this book attempts to be useful, clear and memorable. These articles of faith simply help the writing and, I can only hope, reading processes — and they make the subject come to life.

Cambridge, United Kingdom
December 2012

CHAPTER ONE

INTRODUCTION: EXPROPRIATION IN INTERNATIONAL LAW

Aim of the Enterprise

Enthusiastically, this book sets out to determine how to maximise the advantages and minimise the disadvantages in the international law of expropriation. Some of this book is prescriptive, some descriptive, all riveting. We consider past as well as potential transfers of knowledge among international tribunals[1] that have been duly constituted and those which strive to protect the rights of the parties to have their claims properly heard, with due deliberation, to have a process free of fraud and corruption, and to have a prompt and "reasoned judgment in accordance with the applicable law."[2]

In that venture, this book adopts a comparative approach and assumes a healthful, impartial dose of scepticism. This endeavour has been aided by the fact that, to the extent I am aware, I have no axe to grind.[3] This book is no ideological jeremiad, unless of course "ideology" encompasses legal pragmatism and wholesome, constructive and usually-unifying

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[1] There is some controversy as to what an "international tribunal" is or does and what the "ideal-type" attributes of an international tribunal are. International tribunals might be described as judicial or at least judicial-like institutions "created by inter-governmental agreement (including agreements made within, or by, inter-governmental organizations), or by agreement between a national government and a foreign private entity, where the court is legally situated either fully or partly outside the national juridical and governmental system of any state." B. Kingsbury, "International Courts: Uneven Judicialization in Global Order," *in* CAMBRIDGE COMPANION TO INTERNATIONAL LAW 38 (James Crawford and Martti Koskenniemi, eds., Cambridge University Press, 2012).

[2] V.S Mani, INTERNATIONAL ADJUDICATION, PROCEDURAL ASPECTS 23 (Martinus Nijhoff, 1980).

[3] Of course, a good commentator, like a good judge, must be open-minded enough to question her or his unobvious prejudices at every point. Ignoring a problem cannot be the answer.

common sense. There are strong arguments on both sides, and one is tempted to ask the critical follow-up question: What do the *details* indicate? The proverbial Devil often dwells in the details. This book strives to spell out imaginative strategies of advocacy, including counterarguments, for the next generation of investment and property disputes in international law. Contained herein are innovative theories which rest on the shoulders of giants.

International lawyers might appreciate that with respect to expropriation and property rights, international tribunals themselves have been changed, sometimes absentmindedly, and of course the tribunals have altered the field of property rights. Each has been the others' access point to growth. This coextensive evolution is the book's narrative.

§ 1.1—Undertaking this Monograph

Public international law is often seen as a mammoth *gestalt*. When we do somehow dissect its anatomy, its distinct compartments (to mean tribunal types and legal standards) begin to reveal themselves to us. This book deduces the interactive lessons on international expropriation law to be learned from the different compartments for their mutual benefit and for the benefit of emerging international law systems. Unifying or even adequately comprehending the international legal order in its totality, including specific jurisdictional and merits doctrines, entails a nuanced understanding of international human rights.

We trace where the various expropriation-related standards currently are and where the trends of these force-fields are headed. Such a book has not ever been shared with the world. It is high time that this is done because expropriation law's ever-broadening scope has shown itself to be highly elastic. It is not that there are no relentless efforts to slow the tide but the overall trend decidedly and definitely is in the expansive direction. When Indonesia tries to ban open-pit mining in its forests, Canada tries to introduce public auto insurance options—had the "public option" component of the recent Patient Protection and Affordable Care Act (PPACA) in the United States been enacted, might we have witnessed a similar NAFTA or other IIA request for arbitration challenging the provision? Quite likely[4]—or Costa Rica nullifies erstwhile-active concessions to an investor now seeking off-shore oil exploration, another

[4] This angle was not given much coverage during the pre-PPACA enactment debates in Congress, on-line or over the airwaves.

creative (though not necessarily illegitimate) expropriation claim is docketed.

Right now there is a genuine hunger within the international law community to brainstorm about the way forward by merging the different subject-matter and tribunal-type compartments. This is unsurprising because the flow of foreign direct investment (FDI)[5] into developing and transitional economies has been steadily growing,[6] and in 2011 reached the peak of $776.562 billion.[7] The global FDI in-flow reached $1524.422 billion, thus deriving by subtraction the amount of FDI in-flow for developed countries: $747.86 billion.[8]

Some might say this has been the inevitable consequence of the "unbundling of global production"[9] since the fall of the Berlin Wall (and the end of the Cold War it signalled), the intensity of globalisation, and the mushrooming international character of investment projects that even half a generation ago might have been unthinkable. With the steady progressions have come higher stakes and more complex contentions. Complexity has become a genuine concern due to the tangible FDI-related differences

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[5] See N. Bajpai & N. Dasgupta, "Multinational Companies and Foreign Direct Investment in India and China," Columbia India Program, Columbia University, January 2004, at 3, n. 1, available at <www.earth.columbia.edu/cgsdOLD/documents/bajpai_mncs_china_india_001.pdf> ("FDI can be defined as a financial stake a foreign company acquires in a domestic company. FDI is the category of international investment that reflects the objective of a resident entity in one economy ('direct investor' or parent enterprise) obtaining a 'lasting interest' and control in an enterprise resident in another economy ('direct investment enterprise') (International Monetary Fund (IMF) Balance of Payments Manual, Fifth Edition, 1993)").

[6] It must be remembered that FDI out-flow is not necessarily the same as an "expansion of productive capacity, as it . . . [might be] due in large part to cross-border acquisitions and increased amounts of cash reserves kept in foreign affiliates rather than the much-needed direct investment in new productive assets through . . . [various] investment projects or capital expenditures in existing foreign affiliates." See UNCTAD: "Global FDI Outflows Continued to Rise in 2011 Despite Economic Uncertainties; However Prospects Remain Guarded," Global Investment Trends Monitor, April 2012, available at <http://unctad.org/en/PublicationsLibrary/webdiaeia2012d19_en.pdf>.

[7] See "Inward and Outward Foreign Direct Investment Flows, Annual, 1970-2011," United Nations Conference on Trade and Development (UNCTAD), available at <http://unctadstat.unctad.org/TableViewer/tableView.aspx>.

[8] *Id*.

[9] Baldwin R. (2006), *Globalization: The Great Unbundling(s)*, Prime Minister's Office, Economic Council of Finland.

among developing nations,[10] and also because the erstwhile order of the day—FDI out-flow *from* developed *to* developing nations—has been turned on its head in several cases.[11] The economics of BITs, particularly a nation's marginal benefit of entering one, is also telling: it has been argued that "[a]s more countries sign BITs, the benefit of BITs to any one country falls, but because the benefit of staying out also falls, more and more countries sign up. . . ."[12] Furthermore, "although the marginal value to a

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[10] See, *e.g.*, N. Bajpai & N. Dasgupta, "Multinational Companies and Foreign Direct Investment in India and China," Columbia India Program, Columbia University, January 2004, at 1, *available at* <www.earth.columbia.edu/cgsdOLD/documents/bajpai_mncs_china_india_001.pdf>. (articulating that "the yawning gap between China and India in attracting the non-debt creating FDI flows raises some important fundamental questions about its actual FDI potentials. What could be the possible reasons behind China's success in attracting FDI inflows? Has the Chinese FDI been said to take place at least partially, at India's expense? Can India possibly become an FDI destination as attractive as China? Who are the target groups of foreign investors for India? What lessons can India possibly derive from China to attract these investors?"); N. Bajpai & N. Dasgupta, "FDI to China and India: The Definitional Differences" prepared jointly with Dr. Nirupam Bajpai, Senior Development Advisor and Director of the South Asia Program at the Center for Globalization and Sustainable Development (CGSD), Columbia University, Business Line, May 15, 2004. The issue is especially central for emerging markets (and Brazil-Russia-India-China, the BRIC countries), and the differences therein.

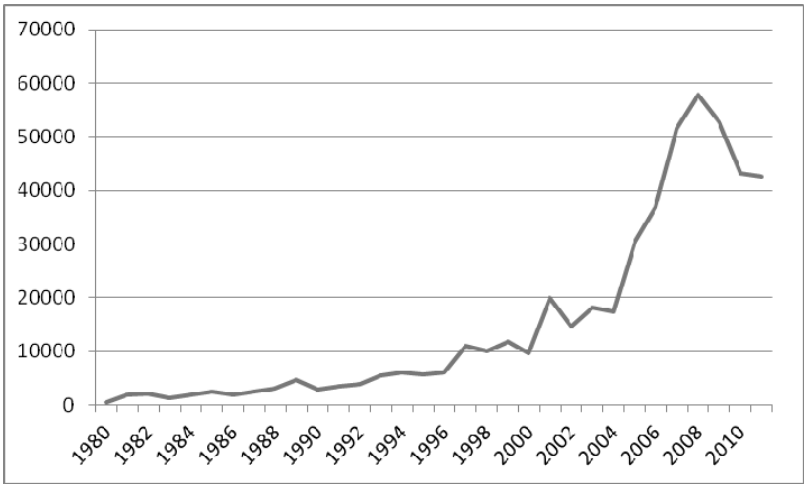
[11] See generally N. Dasgupta, "Examining the Long Run Effects of Export, Import and FDI Inflows on the FDI Outflows from India: A Causality Analysis," Journal of International Business and Economy (JIBE) (2009); N. Dasgupta, "Indian Companies Investing in USA: An Enquiry into the Recent Pattern and Trends to the US-Bound Indian FDI", in Sauvant, K. P. and J.P. Pradhan, with A. Chatterjee and B. Harley (2010), (eds.), THE RISE OF INDIAN MULTINATIONALS: PERSPECTIVES ON INDIAN OUTWARD FOREIGN DIRECT INVESTMENT, New York: Palgrave Macmillan (2010); UNCTAD: "Global FDI Outflows Continued to Rise in 2011 Despite Economic Uncertainties; However Prospects Remain Guarded," Global Investment Trends Monitor, April 2012, *available at* <http://unctad.org/en/PublicationsLibrary/webdiaeia2012d19_en.pdf> ("FDI outflows from developing countries fell by 7 per cent mainly due to significant declines in outward FDI from Latin American and the Caribbean and a slow down in growth of investments from developing Asia.").

[12] J. Tobin & S. Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, Yale Law School Working Paper (2006), pp. 11-12 [J. Tobin & S. Rose-Ackerman, *When BITs Have Some Bite*].

country of signing an extra BIT will be positive, the size of that marginal effect falls as the global coverage of BITs increases."[13]

The graphs to illustrate these data are provided below. The first three graphs concern the FDI in-flow of developing economies; the fourth concerns transitional economies; the fifth concerns developed economies; the sixth concerns the global economy; and finally the seventh graph concerns emerging economies. Each graph's *x*-axis denotes years and *y*-axis denotes the FDI in-flow in millions of U.S. Dollars ($).

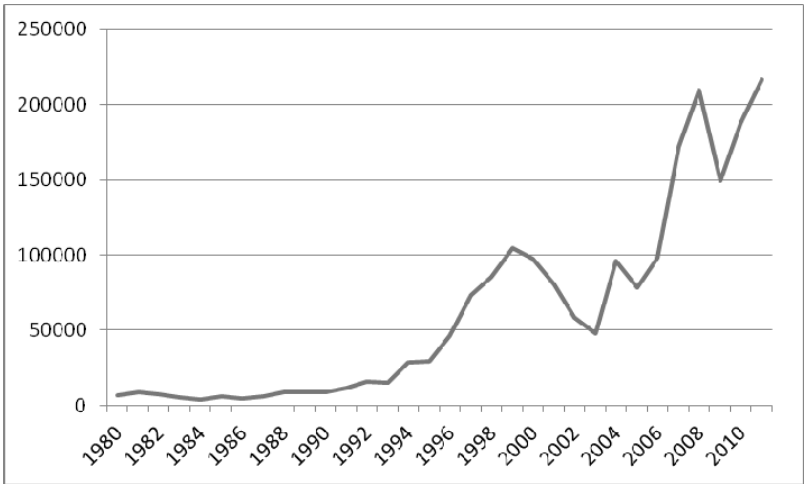
Graph I
African Developing Economies' FDI In-Flow (1980-2011)



UNCTAD Stat: 2011.

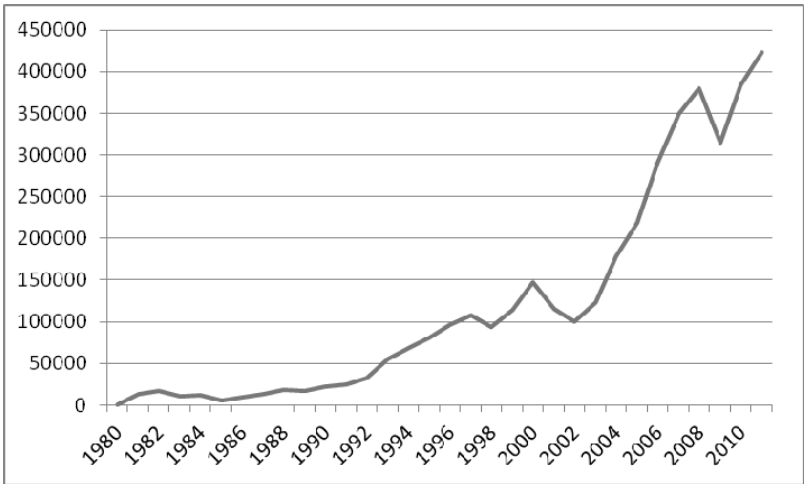
[13] *Id*.

Graph II
North and South American Developing Economies' FDI In-Flow (1980-2011)



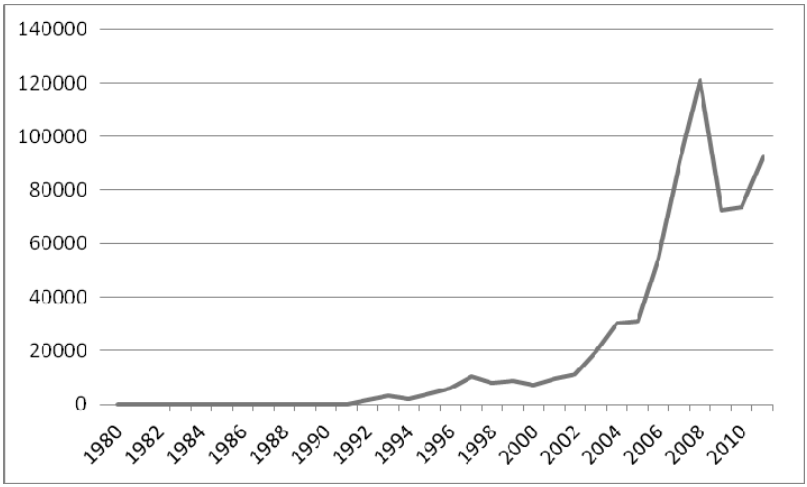
UNCTAD Stat: 2011.

Graph III
Asian Developing Economies' FDI In-Flow (1980-2011)



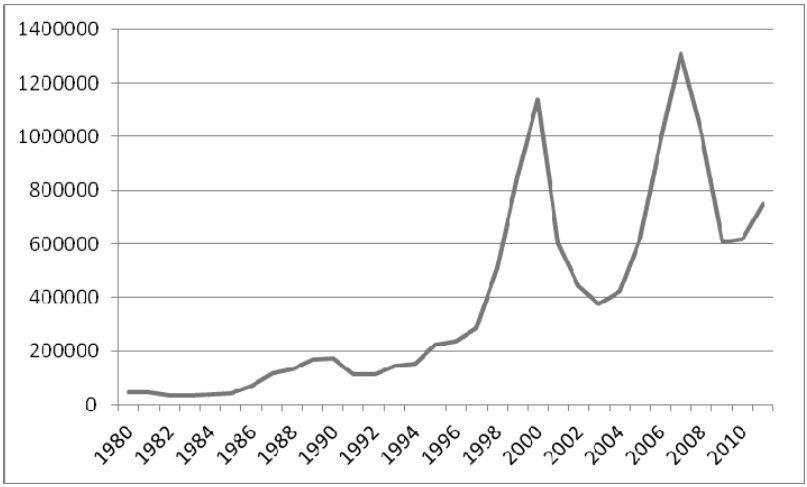
UNCTAD Stat: 2011.

Graph IV
Transitional Economies' FDI In-Flow (1980-2011)



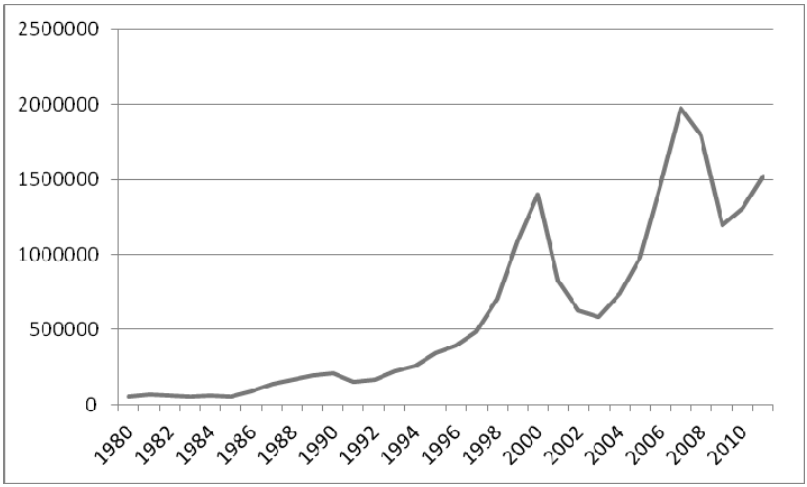
UNCTAD Stat: 2011.

Graph V
Developed Economies' FDI In-Flow (1980-2011)



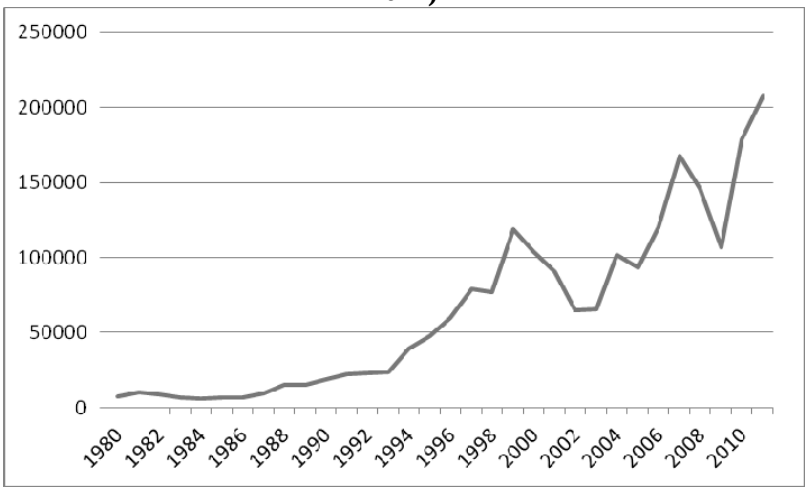
UNCTAD Stat: 2011.

Graph VI
Global Economy FDI In-Flow (1980-2011)



UNCTAD Stat: 2011.

Graph VII
Emerging Economies' FDI In-Flow (1980-2011)



UNCTAD Stat: 2011.

Presently expropriation law is receptive to creative idea-generation and ingenious lawyering. Did this come from an insightful *eureka* experience? Perhaps. Talking over with some involved lawyers the possibility that maybe the Republic of Uruguay would, in a particular case, be best served in claiming cogently the "national security" secondary defence, I began to experiment with the idea of a book about how to think most effectively like a public international lawyer in practice or academia.

Consider the unenviable position in which the Republic of Uruguay finds itself. Uruguay has its task cut out: To salvage[14] its 2009 cigarette packaging law—the new law mandates that 80 percent of each side of cigarette boxes be covered by graphic images of the possible pernicious health effects of smoking—which has been challenged by the tobacco giant Philip Morris International. The State's defence: national security. Surely, at least the law blogs would have something interesting to churn out and discuss in droves. Its starting proposition might be that all throughout history, and especially recent history, the magic words "national security" have been claimed by States as a sort of malleable shibboleth to achieve almost anything they wanted. Danger lurked.

The reasoning went this way: Since smoking can and does cause cancer to persons not suspicious or aware of the risks is such a grave problem, the State is entitled to protect its national security interests by requiring such packaging. After all, for whom and by whom will the Nation's borders be defended if a significant population of the country and, if true, its military forces are cancer-prone or -stricken? Uruguay may yet advance this argument in its Memorial sometime in the near future. Imaginative still was Uruguay's *expressio unius est exclusio alterius* argument in its Memorial on Jurisdiction, stating that an express and rare "public security and order, public health or morality, as well as activities which by law are reserved to their own investors" exception,[15] though not clearly vindicating the government position, is by reason of its very

[14] Of course, the statute cannot be invalidated or its enforcement proscribed by an international investment tribunal. But the tribunal *may* find a violation of an international obligation and issue an award of damages which has the *de facto* effect of leading to the statute's repeal or non-enforcement. Moreover, in future treaty negotiations the losing sovereign is likely to have less leverage than if the tribunal had not found a violation.

[15] Art. 2(1), Switzerland-Uruguay BIT ("The Contracting Parties recognize each other's right not to allow economic activities for reasons of public security and order, public health or morality, as well as activities which by law are reserved to their own investors.").

presence a significant help to Uruguay.[16] Potentially effective, with a surface plausibility.

Most importantly perhaps, this book lays out the challenges and benefits over the arc of the future: the next one to two decades (perhaps even longer). I did not start out by articulating the differences between the international and domestic orders. But it became increasingly clear to me that shaping the book's thesis will have proved to be a fool's errand had I glossed over this important set of differences. It constitutes the centrepiece of the book's unifying argument in several respects, especially as it justifies the consent function (coming up in the ensuing chapters).[17]

There is also another reason for embarking on this project *now*. We live on the cusp of great changes in the fundamental idea and mechanics of property rights internationally. For instance, there is an emerging recognition that investment protection rather than developmental objectives is the main purpose behind modern IIA's.[18] Bilateral investment treaties,

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[16] *Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Republic of Uruguay*, ICSID Case No. ARB/10/7 (2011), Memorial on Jurisdiction, at ¶ 7 ("This language is unique among BITs and is significantly stronger than the more typical "non-precluded measures" clauses litigated in prior cases. . . . [B]y mutually underscoring, at the very outset of the BIT, their mutual sovereign rights to prohibit economic activities for reasons of public health, Switzerland and Uruguay manifested their clear intent to exclude public health measures from the protections otherwise afforded to investors in the subsequent provisions of the Treaty, including the dispute resolution clause. Any other reading of Article 2 would render it meaningless, in violation of basic precepts of treaty interpretation. The conclusion is strengthened further by the structure of the BIT as a whole considered in light of its object and purpose.").

[17] Whoever undertakes this sort of book, I realised, must be both the proverbial poet as well as the historian — speaking as the descriptor explaining how the state of the law is and will develop to be (the historian's role) and how it should, if that path is a different one (the poet). The erudite Sampson states: "It is one thing to write like a poet, another like a historian. A poet can say or sing things not as they were, but as they should have been. The historian should write them down not as they should have been, but as they were, without adding or omitting anything." ("Pero uno es escribir como poeta, y otro como historiador: el poeta puede contar o cantar las cosas, no como fueron, sino como debı´an ser; y el historiador las ha de escribir, no como debı´an ser, sino como fueron, sin an˜ adir ni quitar a la verdad cosa alguna."). Miguel de Cervantes, *Don Quijote de la Mancha, Segunda Parte Del Ingenioso Caballero*, Capı´tulo III (1605 and 1615), Edicio´n del IV Centenario (2004).

[18] See, *e.g.*, L. Petersen, BILATERAL INVESTMENT TREATIES AND DEVELOPMENT POLICYMAKING 8 (International Institute of Sustainable Development, 2004) ("While BITs can, in theory, be written with an eye towards flexibility for

or BIT's ("foundational elements of international investment law"), have been characterised succinctly as "agreements between two states designed to provide investors with recourse when the foreign state in which they invest harms or discriminates against their investment."[19]

On the other hand, developing countries and sustainable development advocates are calling for a more level playing field, as the expression goes, along with "special and differentiated treatment" for their goals.[20] The nascent but growing sustainable development movement in the law is calling for "the need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments, taking into account the special needs of developing countries."[21]

The debate before international tribunals, sometimes subliminally, inquires whether and to what extent this reconfiguration in *specific* cases might displace default principles of international law. Tribunals must also ask if, more generally speaking, older default principles of international law should yield to newer ones. When the older rule is quite simply obsolete and dysfunctional and/or might even contain the serious and probable risk of being counterproductive, its reevaluation is warranted.

Is there such a notion as too many fissures in international law? Can we capitalize on this state of affairs? An age fraught with tense scenarios such as the Arab Spring, Latin American and Eurozone financial crises is also an age of opportunity for international law to show its value, notably to disabuse laypeople and lawyers alike of the too-fragmented-to-be-effective (an inverse of too-big-to-fail perhaps) myths surrounding modern international law. Several strands and various degrees of precedent applicable to international law are said to cause fragmentation.

However, fragmentation can also generate diversity in the marketplace of effective ideas and thereby result in tremendous solidarity and might help mediate this conflict. In my view, it is preferable that the stakeholders, namely the international tribunals, practitioners, academics, and of course laypeople, should know the facts rather than speculate about

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development purposes, it appears uncommon for them to have been crafted in such a manner. Rather, BITs tend to be *highly* reciprocal, narrowly focused on investment protection (rather than development or other policy goals), and garnished with few exceptions.").

[19] K. Claussen, *Comment: The Casualty of Investor Protection in Times of Economic Crisis*, 118 YALE L. J. 1545, 1545, n. 3 (2009).

[20] Agenda 21, 1992 Report of the UNCED, I (1992) UN Doc. A/CONF.151/26/Rev.1, (1992) 31 I.L.M. 874 Chapter 38.

[21] *Id*.

the correctness of some allegations directed at this area of international law.[22] That is part of the reason this monograph must be delivered at this time.

Through the prism of property rights and to better analyse property rights, various international fora can learn from each other. This can be achieved through an important sequence: functionalism, expressivism, assemblage, and paragon-building. In the international law process of "law-perfection," this metamorphosis cannot guarantee durability of the legal instrument, though it makes that prospect likelier, but it can guarantee solidarity both within a country and among countries.

Even though international law is classed as a species different from comparative law, comparative law is inextricably connected to international law. Indeed, the two are internecine to one another. To inform or improve the effectiveness of a given mechanism in international law, comparative law and other sources of international law are necessary. A chief technique of law-building in the aftermath of chaos is to seek a wholesale substitute elsewhere that could serve as a model, the rationale being that piecemeal assemblage is too experimentally delicate. Debates attending the adoption of the African Charter on Human and Peoples' Rights, for example, found no *one* document that "fit Africa's needs." After more than a decade of human rights dominance by the quasi-judicial body African Commission on Human and Peoples' Rights (AComHPR), modeled on the United Nations Human Rights Committee and lacking binding authority, in 1998 full powers were invested in the African Court on Human and Peoples' Rights (ACtHPR).

The next stage is *expressivism*—to identify certain consistent instrumental and revelatory public purposes that are faithful to the history and goals of the regime in question. International investment agreements concerned with the energy sector trying to follow the multilateral North American Free Trade Agreement (NAFTA) and Energy Charter Treaty (ECT) models faced these limitations early.[23] The deficiencies of functionalism

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[22] There is something of an "image problem," particularly concerning international arbitration, that has become too vociferous not to go unaddressed any longer. See, *e.g.*, P. Eberhardt & C. Olivet, "Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom" (Corporate Europe Observatory and the Transnational Institute, 2012), *available at* <www.tni.org/sites/www.tni.org/files/download/profitingfrominjustice_0.pdf>.

[23] J. M. Marlles, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law*, 16 J. OF TRANSNAT'L L. & POL'Y 275, 277 (2006) ("NAFTA, the [Energy Charter Treaty (ECT)], and almost all BITs are united in requiring governments to pay compensation to

thus reveal themselves, and necessitate clearer thinking about principles as well as behaviourally-based rules.

Assemblage (or what Professor Mark Tushnet has called *bricolage*)[24] from various effective sources now comes into play, demonstrating that both a system of values and a system of black-letter rules are essential. I would modify Tushnet's axiom slightly and call it *ordered bricolage* because this stage need not necessarily be haphazard, disorganized, and succeeded by buyer's remorse. Legitimacy is prime among the values that the rules attempt to create and sustain; otherwise even some *exclusively* retrospective international tribunals not have clearly demarcated *lex specialis* and *lex generalis*. The prerequisites to legitimacy are following others as well as giving others a roadmap to follow you. The importance of this template creation cannot be overstated. Other values that the book will explore are democracy, rights of the vulnerable, separation of powers, and federalism. Despite this gradual metamorphosis towards law-perfection, both international law instruments and domestic constitutions may prove to be ineffective or unsustainable.

Nonetheless, the *paragon-building* that has been achieved might lead to solidarity and cohesion among the populations. Therefore, if this legal instrument or even this regime disintegrates (and they might for infinite reasons), the solidarity generated within a population or among populations of various nations will push them to keep trying. The scent of success will have proved to be too alluring. Moreover, the disintegration may or may not be attributable to the frailties in the instrument. The elephant in the room, the real reason at work on some level, is the civic spirit (or lack thereof). Measured and cautious solidarity, then, might be the end achieved by various means interstitial to (and inter-locking with) the law-building metamorphosis.

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foreign investors when direct governmental expropriation occurs which resembles a physical taking. Article 1110 of NAFTA, Article 13 of the ECT, and Article 6 of the U.S. Model BIT all use similar language in requiring compensation for actions constituting expropriation or measures equivalent to expropriation.").

[24] M. Tushnet, *The Possibilities of Comparative Constitutional Law,* 108 YALE L.J. 1225, 1286 (1999); M. Tushnet, *The Bricoleur at the Center*, Book Review of THE PARTIAL CONSTITUTION by Cass R. Sunstein (1993) 60 U. CHICAGO L. REV. 1071; Claude Lévi-Strauss, THE SAVAGE MIND (University of Chicago Press, 1966) at 17-36 (coining the term "bricolage" to generally mean borrowing whatever is readily at hand). One of the great exports through the "third wave" of constitutionalism is judicial review. See T. Ginsburg, JUDICIAL REVIEW IN NEW DEMOCRACIES 6-9 (Cambridge University Press, 2003) (containing a list of countries and designating them as having created legislation and policy review by a special body, by courts, and scope of review or level of access).

This complex and multi-layered interrelationship among domestic, international and comparative law may lead to a respectful conversation among nations and their people, a conversation whose centerpieces are comity as well as respect for autonomy and rights of all recognised entities. Private and public parties are a consequential part of this dialogue. Ultimately this might be *the* Holy Grail, of which expropriation is an important component.

Adding Value through this Endeavour

Various international courts tend to differ with regard to the extent to which they depend "on consent of (or delegation from) the affected states or legal persons," with regard to the "independence (*vel non*) of judicial appointments and judicial decisions from those actors," with regard to "their levels of independent agency as actors over time," with regard to the degree of these courts' effect on tangible results, including policy changes, "or on political actors or on legal norms or on values such as individual or collective freedom or responsibility or self-determination," with regard to the reasons they courts themselves were created and the purposive functions they are expected to discharge, and with regard to "their sustained activity or inactivity" over a period of time.[25] But to limit the differences between international tribunals to this laundry list is to ignore the point of origination for any analysis: the text and relevant proviso called into examination in any case or arbitration.

Diplomacy was never taken off the table but since the late nineteenth century nations have shown themselves to be more open to international adjudication and arbitration. The arbitrations of claims where public law remedies were sought for losses suffered by private individuals in relation to the Britain-United States Treaty of 1794 (Jay Treaty), and of inter-state claims of the *United States v. Britain (Alabama Arbitration)* (1872),[26] were by this time thought to be representative of the growing possibilities, even if not yet realities, of bilateral as well as multilateral arbitration. At the time, "[i]nternational law was . . . concerned principally with the protection of . . . [foreign-owned tangible] property . . . [and financial interests in investments] against seizure and the right of creditors to collect

[25] B. Kingsbury, "International Courts: Uneven Judicialization in Global Order," in CAMBRIDGE COMPANION TO INTERNATIONAL LAW 37 (James Crawford and Martti Koskenniemi, ed., Cambridge University Press, 2012) [B. Kingsbury, "International Courts"]; see also M. J. Dixon, INTERNATIONAL LAW 54 (Oxford University Press, 2005).
[26] Moore, 1 Int. Arb. 495.

debts."[27] Several treaties were therefore negotiated to "protec[t] foreign property, such as merchandise and vessels, against expropriation"[28] and these treaties gave rise to awards.[29]

The 1899 Hague Peace Conference, for its part, established the Permanent Court of Arbitration (the PCA), which as a structure continues to facilitate arbitration by *ad hoc* panels. After many cases in its first few decades, the PCA suddenly was lacking in business from 1935 until a powerful surge starting around the mid-1990s. When the twentieth century came around, three fundamental kinds of international arbitration were in existence and they have remained so: Inter-Governmental Claims Commissions, such as the Iran-United States Claims Tribunal and the Eritrea-Ethiopia Claims Commission; *Ad hoc* Inter-State Arbitration; and Inter-State Arbitration Embedded in Pre-Existing Legal Institutional Structures.

In 1929, the first proposal to protect investors was created by the International Chamber of Commerce (ICC) and the League of Nations: Draft Convention on the Treatment of Foreigners.[30] "Not only" did it apply "to the exercise of all economic activity," but also "to civil and legal rights, to the acquisition, preservation and transmission of property by foreigners and to fiscal charges both exceptional and normal"—in short, the Full Protection and Security (FPS) standard.[31] The proposal froze the investors out by focusing on the relationship among the States, thereby

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[27] *Scope and Definition*, UNCTAD Series on Issues in International Investment Agreements II, 2011, p. 8 [*Scope and Definition*, UNCTAD Series 2011].

[28] See, *e.g.*, Article 10, General Convention of Peace, Amity, Navigation and Commerce, United States-Colombia, 3 October 1824 in United States Treaty Series, No. 52.

[29] *Scope and Definition*, UNCTAD Series 2011, *supra*, at 8 (citing *Petroleum Development Limited v. Sheikh of Abu Dhabi*, Judgement (International Law Reports, 1951, Vol. 18, pp. 144-164); *Sapphire International Petroleum Limited v. National Iranian Oil Company*, Judgement (International Law Reports, 1967, Vol. 27, pp. 117-233); *Ruler of Qatar v. International Marine Oil Company Limited*, Judgement (International Law Reports, 1953, Vol. 20, pp. 534-547); *Saudi Arabia v. Arabian American Oil Company (ARAMCO)*, Judgement (International Law Reports, 1963, Vol. 27, pp. 117-233)).

[30] League of Nations, "Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners," Conference for the Codification of International Law, Bases of Discussion, vol III, LN Doc C.75.M.69.1929.V (1929).

[31] A.K. Kuhn, *The International Conference on the Treatment of Foreigners*, 24 A.J.I.L. 570 (1930).

creating a diplomatic protection regime, but its sweeping NT protections for investor rights led to the proposal's rejection by States.

It is not that international amity is not a significant tribunal motive; it is, as was evinced by the United Nations' International Tribunal for the Law of the Sea's (ITLOS) December 2012 decision in the *ARA Libertad (Ghana v. Argentina) Case*.[32] A brief recitation of the case is in order. The American hedge-funder Paul Singer owns the Cayman Islands-based hedge fund NML Capital, also known pejoratively as a "vulture fund," had purchased Argentine bonds at fire sale rates and was now seeking full repayment of principal plus interest in the amount approximately of U.S. $1.6 billion. Argentina's 2001-02 had forced a rapid and escalating devaluation of its currency and had led Argentina effectively to default on Singer's bonds.

In the wake of the default a decade ago, Argentina signed agreements with most creditors to pay back a fixed sum over a period of several years. The creditors who rejected this deal, such as NML Capital, are called "holdouts," who are not receiving debt repayments from Argentina. Singer used Ghanaian authorities to detain the Argentine ship for recovery of Argentina's obligations. Holding that the frigate ARA Libertad's detention might serve as "a source of conflict that may endanger friendly relations among states,"[33] especially since the Libertad was "a warship belonging to the Argentine Navy"[34] (a strong national security defence supersedes a commercial argument perhaps), the ITLOS panel ordered the Libertad's "release" in a manner that was both "forthwith and unconditiona[l]."[35]

Surely, the Ghanaian seizure seemed to the tribunal to be disproportionately excessive since the ship's detention also meant the detention of the Commander and the crew who must be "able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana."[36] Even though the ITLOS left it unspoken, present were the seeds of a competing FPS claim (based in customary law) from innocent third-parties. The ITLOS recognised, of course, that international arbitration avenues were open but maintained that the frigate's detention was simply

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[32] Order, ITLOS Case No. 20, December 15, 2012, *available at* <www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15_12_2012.pdf>.
[33] *Id*., at ¶ 97.
[34] *Id*., at ¶ 98 (stating that the warship had the right to "discharge[e] its mission and duties [, which] affect the immunity enjoyed by this warship under general international law.").
[35] *Id*., at ¶ 108.
[36] *Id*.