INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

RAILROAD DEVELOPMENT CORPORATION

Claimant,

v.

THE REPUBLIC OF GUATEMALA

Respondent

ICSID Case No. ARB/07/23

OPINION OF W. MICHAEL REISMAN

JUNE 11, 2009

W. Michael Reisman
Myres S. McDougal Professor
of International Law
Yale Law School
127 Wall Street
New Haven, CT 06511

TABLE OF CONTENTS

I. INTRODUCTION

1. I am the Myres S. McDougal Professor of International Law at Yale Law School, where I have been on the faculty since 1965. I have published twenty books in my field, five of which focus specifically on international arbitration and adjudication; a sixth, which I edited, focuses on jurisdiction in international law. In addition to my teaching and scholarship, I serve as President of the Arbitral Tribunal of the Bank for International Settlements. I have been a co-Editor-in-Chief of the *American Journal of International Law* and served as Vice-President of the American Society of International Law. I have also been elected to the *Institut de Droit International*. I have served as an arbitrator in numerous international commercial, international investment, and public international arbitrations and as counsel in other arbitrations, as well as in cases before the International Court of Justice ("ICJ"). A *curriculum vitae* setting forth a complete list of my professional activities and publications is appended to this opinion.

2. Greenberg Traurig, LLP, counsel for Railroad Development Corporation ("Claimant" or "RDC"), in the above referenced arbitration, has asked that I express an opinion on the merits of the substantive legal claims presented to the ICSID Tribunal which has been empanelled in the case. For this purpose, I have studied the pleadings, letters, and accompanying exhibits submitted by the parties to date. I assume, for the reasons set forth in the first section of this opinion, the truth of the factual allegations in the Claimant' Request for Arbitration ("Request") "insofar as they are not incredible, frivolous

or vexatious,"[1] and none of them, in my judgment, can plausibly be so characterized. I also assume the Tribunal's familiarity with those factual allegations and will reiterate them only briefly here, in order to provide a basis for the discussion of the substantive issues of international law which I have been asked to address.

II. SUMMARY OF CONCLUSIONS

3. For the reasons set out below, it is my opinion that the Government of Guatemala violated the rights of RDC and FVG to which they are entitled under Chapter Ten of the DR-CAFTA and customary international law. Specifically, Guatemala has:

(1) effected an indirect expropriation of FVG in violation of CAFTA Article 10.7 and customary international law;

(2) subjected FVG to unfair and inequitable treatment and denied it due process in violation of CAFTA Article 10.5 and customary international law;

(3) denied FVG the full protection and security owed under customary international law and CAFTA Article 10.5; and

(4) treated RDC discriminatorily in violation of the national treatment standard of CAFTA Article 10.3.

III. STATEMENT OF FACTS

4. The Claimant, RDC, is a privately owned railway investment and

[1] United Parcel Serv. of Am., Inc. v. Canada, Award on Jurisdiction, Nov. 22, 2002 (UNCITRAL), ¶ 112.

management company incorporated in the U.S. Commonwealth of Pennsylvania, which focuses on "emerging corridors in emerging markets," meaning railways plus other complementary businesses primarily in developing countries. It currently operates in the U.S., Argentina, Peru and, until 2007, Guatemala. It also previously operated railways in Estonia, Malawi and Mozambique.

5. Ferrocariles de Guatemala ("FEGUA") is a "state-owned, decentralized, autonomous company that has legal capacity, its own proprietorship and is fully entitled to rights and obligations."[2] For purposes of CAFTA, FEGUA is a "state enterprise", an enterprise that is owned, or controlled through ownership interests, by a Party (Guatemala), as defined in CAFTA Chapter 2 (General Definitions). It was created in 1969 to manage and exploit the railway system of the respondent, the Republic of Guatemala. Until 1996, FEGUA performed commercial railway transportation services and managed the railway's real and personal property that comprised its assets.

6. Due to extensive physical deterioration of the equipment and facilities, insufficient investment in the reconstruction or modernization of the railroad system, operating losses and declining passenger and cargo carriage, the Respondent closed the entire national railway system then operated by FEGUA in March, 1996.

7. Subsequently, the Respondent initiated an international bidding

[2] Article 1 of its Organizational Law, Decree No. 60-72 of the Congress of the Republic of Guatemala.

process on February 17, 1997, in which it invited the private sector to rebuild and operate its railway system; in order to induce a private enterprise to conduct private railway services to the country, Respondent authorized FEGUA to enter into an agreement with a private investor which would contractually authorize the use of the infrastructure, real estate and other specified rail assets. The Bidding Rules for the granting of the Onerous Usufruct of Railroad Transportation in Guatemala, according to Article 21 of the State Contract Law, Decree Number 57-92 of the Congress of the Republic, were published for an international public bidding contest in February, 1997.

8. On May 5, 1997, RDC formed Compañía Desarrolladora Ferroviaria, Sociedad Anónima, under the laws of the Republic of Guatemala with its principal place of business in Guatemala City. It does business under the name "Ferrovias Guatemala" ("FVG"), and its specific purpose was to be the vehicle for RDC's bidding for, and entering into the usufructuary contracts with the Respondent which were needed to carry out the intended investment. FVG is owned and controlled by RDC.

9. Two bids were submitted; of the two, FVG's was the only bid considered responsive by the Government. The bid consisted of a plan to rebuild the country's rail system in stages and committed to an investment program estimated at approximately ten million U.S. Dollars ($10,000,000.00). Part of that bid was FVG's business plan as reflected in "Envelope A: Technical Offer" and "Envelope B: Economic Offer" - in full response to and compliance with the

FEGUA's substantive and procedural bidding rules.

10. On the basis of its bid, FVG was awarded, on June 23, 1997, a 50-year usufructuary right to rebuild and operate the Guatemalan rail system -- which consists of a 497-mile (narrow gauge) railroad connecting Guatemala City with Mexico, El Salvador and ports on the Atlantic and Pacific Coast. This Usufruct Contract of Right of Way (Deed No. 402) was signed on November 25, 1997 by then-FEGUA Administrator Andrés Porras and FVG. Clause 15 of Deed 402 incorporated FVG's original offer, and thus FVG's business plan and investment expectations, including the sources of future profit from railway operations, into this contract. Both the usufruct and the right of way usufruct contract were ratified by the Congress of Guatemala via Decree 27-98 and published in the Official Gazette on April 23, 1998. The railroad privatization entered into effect on May 23, 1998.

11. According to Deed No. 402, the Government's stated objective was to re-establish the functions of the railroad system to support the country's economy, while relinquishing its role of rail operator and all other functions pertaining to the activities of rail transport companies. Besides the right to use the railroad tracks for transportation purposes, the right of way also included the right to develop alternative uses such as pipelines, electric transmission, fiber optics and commercial and institutional development on FEGUA lands bordering the tracks. For its part, FVG agreed to pay, and has paid, FEGUA 5% of its gross income on rail operations and 10% of other income during the first

five years of the usufruct, and, starting in year six, 10% of gross income derived from both rail transportation and other activities.

12. Because of legal technicalities that evolved in the usufruct documentation process, it was necessary to complement the right of way usufruct regarding the use of the real estate of the railroad tracks with a separate bidding process for use of the rail equipment. The bidding was won by FVG and led to the award of the respective usufruct to FVG on December 16, 1997. FEGUA and FVG entered into a Usufruct Contract of Rail Equipment, Property of FEGUA in Favor of FVG via Deed No. 41, dated March 23, 1999.

13. Because this deed was never formally approved by Government resolution, it was, at the Government's request, subsequently replaced by Deed No. 143, dated August 28, 2003 and further amended by Deed No. 158, dated October 7, 2003. In return for the right to use the railroad rolling stock and other equipment, FVG agreed as an additional concession to pay 1.25% of the gross freight traffic revenue (renegotiated upward from the original 1.0%, at the Government's insistence) during the duration of the contract, which was stipulated to end the same day as the usufruct contract of right of way, i.e. May 22, 2048.

14. FEGUA and FVG signed another contract, Deed No. 820 dated December 30, 1999, which established a Trust Fund for the Rehabilitation and Modernization of the railroad system in Guatemala, which included obligations by FEGUA to make annual payments into the Trust Fund.

15. Overcoming many obstacles, including the restoration of severely deteriorated tracks and equipment and extensive invasion by squatters, FVG was able to resume commercial service between El Chile and Guatemala City on April 15, 1999. In December, 1999, commercial service was restored between Guatemala City and two Atlantic ports. Traffic tonnage gradually increased until 2005, but declined drastically in 2006, in particular, after the Declaration of Lesivo.

16. On June 13, 2005, FVG filed a domestic arbitration case against FEGUA for breach of contract for FEGUA's failure to pay monies to the Trust Fund pursuant to Deeds 402 and 820. On July 25, 2005, FVG filed a second domestic arbitration case for FEGUA's failure to remove squatters from the railroad right of way in violation of Deed No. 402.

17. Claimant alleges that, in response to and in anticipation of these filings, on June 22, 2005, FEGUA requested the Solicitor General of Guatemala to investigate the circumstances surrounding the award of the Usufruct and to issue an opinion on the legal validity of Deeds No. 143 and 158 regarding the railroad equipment. In his Opinion No. 205-2005 issued on August 1, 2005, the Solicitor General recommended that the President of Guatemala declare these deeds injurious ("*lesivo*") to the interests of the State. He explained:

> The contract executed by the two entities, [No. 41], dated March 23, 1999, did not enter into force for not being approved by the Executive Branch. ... As a result, ...

1. The bidding process and the contract arising thereof produced no effect whatsoever, and

2. The second contract currently effective could not be based on the previous bidding process, but on Civil Law, as supported by the Government Contracting Law, article 103, among other provisions which refer to the ordinary jurisdiction.

Although the Twelfth clause incorporates the bidding terms and the original offer to the contract, such provision is not deemed to be valid and cannot be part of the contract. The parties were well aware of that situation, since the wording of the contract includes that: in the event of inconsistency, the terms of the contract will apply.

The contract was subject to a term of almost forty-five years, which is too long a term considering the useful life of the property under usufruct. By the time the term expires, the property would have probably disappeared. The railway equipment referred to in the contract includes valuable historical property deemed to be cultural patrimony under protection by the IDAEH (Anthropology and History Institute) and are not identified as such in the inventory incorporated to the contract; it is uncertain whether goods are protected property or not. The IDAEH was not even consulted. There is no evidence that the contract was registered under the terms of the Twentieth clause.

A) It is also worth mentioning that the loss or damage of cultural property, whether by action or omission, is a crime under article 47, Decree 25-97 of the Congress of the Republic, Law on National Cultural Patrimony Protection. ...

B) The payment of 1.25% of net freight invoicing should be annually made by the beneficial owner to FEGUA, once the payment is due, within a sixty-day term following the end of the tax year. This is unfavorable to the State for implying a loss of income, whereas the beneficial owner could receive a higher return by monthly reinvesting the income from freight.

C) According to the information provided by FEGUA, repairs are not being made as agreed, FEGUA is not allowed to supervise the physical existence of the property, and it is yet unknown whether IDAEH controls or supervises protected property or any other

> goods that could now qualify as cultural patrimony, or if this institute is somehow involved, as stated in the Tenth clause of the contract. It is possible to apply the case of termination included in the same contract, which supports rescission on the beneficial owner's failure to comply with the obligations arising thereof.
>
> It should be noticed that, in addition to the preceding considerations, the beneficial owner's exceeding its rights on property is one of the causes to terminate usufruct (article 739 of the Civil Code), by deteriorating the property or letting the property become extinct due to the beneficial owner's failure to make regular repairs. The termination should be judicially declared.
>
> LEGAL BASIS: Political Constitution of the Republic of Guatemala, Article 252; Decree 512 of the Congress of the Republic, as amended by Decree 40-94 of the Congress, Articles 1, 34; and laws quoted above.

18. On January 13, 2006, FEGUA issued its own Opinion No. 05-2006, in which it agreed with the Solicitor General's opinion, also arguing that the usufruct contracts in question were not awarded as a result of a public bid.

19. After numerous attempts to reach a resolution of the issues with FEGUA, the Chairman of RDC and the President of FVG met with then-President of the Republic of Guatemala, Mr. Oscar Berger, on March 7, 2006. At that meeting, according to the Claimant, President Berger "purported to instruct FEGUA's director to dissolve FEGUA and to comply with the Usufruct Contracts." Also, he "instructed that a high-level railroad commission be established, purportedly to work with RDC and FVG on Governmental support of FVG railroad operations and to address the issues public, private and commercial squatters, as well as theft and vandalism, all of which were plaguing

railroad operations."

20. This commission was established and a number of meetings took place, but after a few months, the Government suspended the meetings without ever having submitted a proposal to comply with the usufruct contracts. The Claimant contends that, in parallel, and without its knowledge, the Government prepared a resolution declaring the usufruct of railroad equipment injurious to the interests of the State. It alleges the Government to have been motivated by a desire to accommodate Mr. Ramon Campollo, a local sugar oligarch who had been unsuccessful in private attempts to intimidate FVG into ceding to him all, or substantially all, of FVG's rights and interests under the usufruct. Claimant further alleges that Mr. Campollo had been assisted in this effort by Juan Esteban Berger, a lawyer and the son of the President.

21. On August 11, 2006, the President of the Republic, in joint counsel with certain of his cabinet ministers, signed Government Resolution 433-2006, which declared the usufruct of the rolling stock as contained in Deeds No. 143 and 508 injurious to the interest of the State. This "Lesivo Resolution" was published in the Official Gazette on August 25, 2006.

22. This resolution is based on allegations that the usufruct contract on railroad equipment (i) violated Article 19 of the Government Contracting Law by allowing FVG to discuss the terms of the contract; (ii) violated Article 90 of the same law by allowing property other than that listed in the inventory to be

included in the contract to be covered by the usufruct; (iii) avoided a new bidding process; and (iv) that the FEGUA Administrator exceeded his powers in violation of the Government Contracting Law and its Regulations.[3] Interestingly, the arguments of the Solicitor General's opinion regarding the railway equipment as cultural property of the Nation, the overly long duration of the usufruct contract, and the terms of the payment of 1.25% of net freight invoicing as unfavorable to the Republic of Guatemala, were not listed in the President's Explanatory Statement appended to his Resolution.

23. The Resolution asserts that under Article 17(b) of the Executive

---

[3] The explanatory statement to the Resolution reads:

a) The text of section III, first clause, states that the Board awarded the bid to Compañía Desarrolladora Ferroviaria, Sociedad Anónima, [granting the company] the right to discuss the terms of the Onerous Usufruct Contract Involving Railway Equipment Owned by Ferrocarriles de Guatemala, which is not consistent with the terms of article 19 of the Government Contracting Law;
b) The fourth clause, regarding the property granted in usufruct, states that other property, different from that listed in the inventory (prepared by the parties and notarized through the same public instrument) may be incorporated [to the usufruct] in the future, which is a violation to the terms of article 90 of the Government Contracting Law;
c) The sixth clause is not consistent with section V, first clause thereof, as it is in conflict with subsection 6.4 of the bidding conditions that preceded and endorsed the execution of public instrument number 41;
d) The parties applied the conditions of a contract that they mutually agreed to terminate, although they should have prepared new bidding conditions and call for a new process, allowing other bidders to take part;
e) FEGUA's Overseer did not comply with the Government Contracting Law and its Regulations, since such position gives him no authority to act disregarding the applicable laws.
Therefore, it is lawful to declare that said contract causes lesion to the interests of the State.

Branch Law, Decree No. 144-96 of the Congress of the Republic, "the Cabinet Council and the President shall concur to declare whether administrative acts or contracts cause lesion, for the purposes of filing an administrative litigation." Such declarations "must be issued within a three-year term following the date of the act or resolution at issue" (Article 20 of the Law on Administrative Litigations, Decree No. 119-98 of the Congress of the Republic). Thus, as to Deed No. 143, dated August 28, 2003, *lesividad* was declared on almost the last possible day before the expiration of the three-year period during which it could have been declared.

24. In exercise of his duty under Article 2 of the Lesivo Resolution to "execute all legal measures required in order to cease the binding force of the contract," the Solicitor General of the Nation, on November 14, 2006, filed a claim against FVG in the administrative court of Guatemala (*Sala Primera de lo Contencioso Administrativo*, Claim No. 389-2006) seeking (i) the court's confirmation of the Lesivo Resolution;(ii) an order seizing the rolling stock transferred by FEGUA to FVG; (iii) an order denying FVG's general manager the right to travel outside the country; and (iv) the seizure of FVG accounts. But it was only on May 15, 2007 that the Government served its claim on FVG. FVG filed its initial objections to the claim on May 21, 2007. As of this date [6/10/09], the administrative court has yet to confirm the Lesivo Resolution.

25. The Lesivo Resolution itself had devastating effects on RDC's

investment. It caused a critical number of FVG's customers and suppliers to refuse to continue to do business with a private entity engaged in a legal battle with the Republic of Guatemala. Customers refused to contract exclusively with FVG or for any term longer than meeting immediate needs. Many customers switched their business to truck transportation providers.

26. FVG's principal suppliers significantly reduced credit terms to FVG. FVG cannot secure new credit lines with financial institutions in country which appear to expect FVG's imminent demise as a result of the *lesivo* action. Nor can FVG secure new suppliers of essential goods and services. Similarly, potential customers for the lease of real estate within the right of way, a critical element of RDC's business plan, have withdrawn from negotiation fearing FVG will be forced into bankruptcy.

27. Without giving FVG an opportunity to be heard, Guatemalan judges have issued preliminary injunctions against FVG embargoing FVG bank accounts based on suits by squatters and others.

28. Incidents of vandalism of the tracks and thefts of railroad materials as well as squatting on the railroad tracks have substantially increased since the issuance of the Lesivo Resolution, as basic services of the local police to protect FVG's property have all but evaporated. The declaration was "the equivalent of the Government giving an all clear signal to poorer Guatemalan citizens to seize land and personal property from FVG with impunity as the Government would

not provide protection." FVG's efforts to secure evictions of and compensation from these trespassing entities and persons were, Claimant alleges, met with delaying tactics by squatters in the local court system, and these tactics were further emboldened and enabled by Government officials after the issuance of the Lesivo Resolution.

29. On June 26, 2007, because the Lesivo Resolution had effectively destroyed any prospect for FVG to pursue its business plan, the Board of Directors of RDC terminated its financial support of FVG. Railway operations were discontinued in September 2007.

30. The Claimant contends that the Lesivo Resolution and subsequent actions by the Respondent manifestly violated the investment protection provisions under Chapter 10 of CAFTA, to which the Respondent is a state party: it constituted an indirect expropriation under Article 10.7; it violated the minimum standard of treatment obligations under Article 10.5; and it violated the national treatment obligations under Article 10.3.

IV. THE LAW

31. This opinion will address the claims of violation of the investment protection provisions of CAFTA *seriatim*. As no treaty can exist in isolation from general international law,[4] I will begin by putting the Lesivo Resolution into its

[4] Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench,*

proper domestic and international legal context.

1. The Status of Guatemala's Version of *Lesivo* in National and International Law

32. The idea of *lesión* as grounds for invalidating a contract goes back to the French Civil Code's conception of *lésion énorme* which provided that a seller of real property "may rescind if the agreed purchase price is less than five-twelfths the fair value of the property."[5] Due to the "multitude of sources" available to the drafters of civil and commercial codes in the newly independent states of Latin America, the acceptance *vel non* of concepts such as *lésion énorme* varied greatly in the region.[6] Vélez Sársfield, the father of the Argentine Civil Code, rejected the concept of *lesión*, emphasizing, instead, the "responsibility and free autonomy of the contracting parties."[7] Andrés Bello, the drafter of the Chilean Code, allowed for rescission when either the seller or the buyer suffered

---

55 INT'L & COMP. L.Q. 791 (2006); *see also* CAMPBELL MCLACHLAN QC et al., INTERNATIONAL INVESTMENT ARBITRATION: Substantive Principles 15 (2007) ("investment treaties are not self-contained regimes," meaning "*negatively* that, in entering into treaty negotiations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third states; and *positively*, that the parties are taken 'to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms and in a different way'," referring to, inter alia, ILC, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, U.N. Doc. A/CN.4/L.682, 4 April 2006; U.N. Doc. A/CN.4/L.702, 18 July 2006. CAFTA itself attempts to minimize any such differences by firmly grounding CAFTA Articles 10.5 and 10.7 and Annexes 10-B and 10-C in customary international law.

[5] M. C. Mirow, Latin American Law 162 (2004).

[6] *Id.*

[7] *Id.*

a "*lesión enorme*" - when the "seller received less than half the just price or the buyer received property whose just price is less than half the buyer's payment at the time of the contract."[8] The Mexican Civil Codes placed limits on "complete contractual freedom based on ideas of fair value, such as *lesión*."[9] Thus the core notion of *lesión* in civil law is not an assertion of arbitrary state power, which would be offensive to the civil law, but an exercise of power which was made subject to explicit objective limits.

33. The *lesión* referred to in the present case has, *a priori*, nothing to do with gross imbalances of obligations under a contract between two equal partners. It does not set a contract law limit of an unconscionably unjust or unfair value of some asset to be purchased or sold. It is not the Civil Code, but Article 20 of the Guatemalan Administrative Procedure Law, Decree 119-96 which purports to allow the Government to declare an administrative contract to be "in detriment to the interests of the State" and to seek its annulment. No defined standards exist to define the "interests of the State," and, insofar as there is a standard, it is certainly not, for example, the exacting standard of necessity delimited as a condition precluding wrongfulness under the United Nations' International Law Commission's Articles on State Responsibility; moreover, even those provisions, which undertake to codify customary international law, do not

---

[8] *Id.*, referencing Kenneth L. Karst & Keith S. Rosenn, Law and Development in Latin America 477 (1975).

[9] *Id.* at 163, referencing George M. Armstrong, Jr., Law and Market Society in Mexico 34-35, 50-51 (1989).

preclude an obligation to compensate. I will consider the question of the legality of *lesión* under customary international law and conventional international law below but confine myself, for the moment, to the idiosyncratic practice of Guatemala.

34. In this idiosyncratic Guatemalan *lesivo* regime, the President of the Republic in Cabinet Council can freely decide what such interests of the State are, and, due to the lack of standards for review, the administrative court which is then asked to confirm his decision will have a hard time articulating any reasons to counteract the President's judgment. In particular, the interests of the State which are adduced may not even amount to illegalities of contract formation and content. The private party to whom the resolution is directed has no opportunity to be heard - to be informed of and respond to the charges prior to the issuance of the decree. Under Article 584 of the Procedural Code, the Government is even prohibited from desisting from a *lesivo* claim once it has been filed.

35. The potential for uncontrolled abuse by such virtually unrestricted Executive power is great.[10] And, indeed, it is my understanding that the practice

---

[10] The most recent example of such a declaration illustrates the ease with which contracts the Government has entered into with private entities regarding major investments can be vitiated using the concept of *lesivo*:

Government declares harmful two contracts with CDAG

The Government of Guatemala has annulled two contracts concluded

of *lesivo* declarations in Guatemala has been one in which the Government abuses this power to get out of, or force renegotiation of, valid administrative contracts on any imaginable grounds—without having to compensate the investor. The President's references in this case to bidding process violations on

---

with the Autonomous Sports Confederation (CDAG) in 2006 on the ground that it deemed them harmful to its interests.

The executive resolution, Governmental Agreement 136-2009, published today in the official newspaper, will be effective starting tomorrow. Although the resolution does not indicate to which contracts it refers, it may relate to the lands that were part of a negotiation to improve Aurora International Airport which President Oscar Berger concluded with CDAG during his tenure as President. The resolution considers the first contract harmful in that its division and consolidation of real estate is too costly for the interests of the State, and the second contract because it divides and creates a usufruct of real estate containing military installations that must be protected for reasons of national security.

Author's translation of:

El Gobierno de Guatemala ha dejado sin efecto dos contratos suscritos con la Confederación Deportiva Autónoma (CDAG) en 2006 por considerar que son lesivos a sus intereses.

La resolución ejecutiva ha sido publicada hoy en el diario oficial por medio del acuerdo gubernativo 136-2009, con vigor a partir de mañana. Si bien el acuerdo gubernativo no precisa a qué contratos se refiere, podría tratarse de los terrenos que fueron parte de una negociación para llevar a cabo la ampliación del aeropuerto Internacional La Aurora, durante el gobierno del ex presidente Óscar Berger suscribió con la CDAG. El acuerdo considera que el primer contrato es lesivo, por desmembración y constitución de bien inmueble porque es demasiado costoso para los intereses del Estado, y el segundo contrato por desmembraciones y constitución de usufructo a título gratuito de bienes inmuebles, porque tiene instaladas torres de instalaciones militares que deben ser protegidas por seguridad nacional.

Gobierno declara lesivos dos contratos con la CDAG, 19 May 2009, *available at* http://www.deguate.com/artman/publish/noticias-guatemala/gobierno-declara-lesivos-dos-contratos-con-la-cdag.shtml (last accessed May 29, 2009).

a re-executed deed, whose original was properly bid for, and whose re-execution was only necessary because of the President's failure to approve it, combined with other technicalities, such as the insufficient description of other related assets covered by the usufruct, are a case in point: these violations, if they even occurred, can hardly be said to rise to the level of an actual harm to the Republic of Guatemala.

36. Waiting for the administrative court to say so, however, can take years; it typically never occurs. The alternatives are then, most probably, "waiting for Godot," or receiving a confirmation of the President's resolution. In any event, the economic damage has already been done, as demonstrated in this case, with the Executive's declaration of injury to the State.

37. There is room to question whether the Guatemalan version of *lesivo*, whether applied to Guatemalan nationals or foreign investors, is even valid under Guatemala's domestic law. The Constitution of Guatemala, in its Article 39, declares the right to private property to be one inherent in human beings;[11]

---

[11] Political Constitution of Guatemala, adopted 31 May 1985, effective 14 January 1986, as amended November 17, 1993, *available in English at* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed.): Guatemala, Booklet 3, release 97-1 (January 1997):

> **Article 39.- Private Property.**
>
> Private property is guaranteed as a right inherent in the human person. Any person can freely dispose of his property according to the law.

and expropriation shall not occur without compensation. In this respect, Article 40 establishes a regime of very strong protection of private property, both procedurally and substantively.[12] Article 41 prohibits categorically both expropriations for political reasons and confiscations.[13]

38. As to the relevance of this constitutionally guaranteed right in Guatemala's domestic legal system, Article 44(3) could not be clearer as it

---

The State guarantees the exercise of this right and will have to create those conditions that enable the owner to use and enjoy his property in such a way as to achieve individual progress and national development in the interest of all Guatemalans.

[12] **Article 40.- Expropriation.**

In specific cases, private property can be expropriated for reasons of duly proven collective utility, social benefit, or public interest. Expropriation will have to be subject to the proceedings indicated by the law, and the affected property will be appraised by experts taking its actual value into account.

Compensation will have to made in anticipation and in legal tender, unless another form of compensation is agreed upon with the interested party.

Only in cases of war, public disaster, or serious disruption of peace can there be occupation or interference with property or expropriation without prior compensation, but the latter will have to be done immediately following the end of the emergency. The law will establish the norms to be followed with enemy property.

The form of payment of compensation for the expropriation of idle land will be determined by law. In no case will the deadline to make such payment effective exceed 10 years.

[13] **Article 41.- Protection of the Rights of Ownership.**

The right of ownership in any form cannot be restricted on account of political activity or crime. The confiscation of property and the imposition of confiscatory fines is prohibited. In no case can the fines exceed the value of the unpaid tax.

declares any laws or other governmental decisions which violate or diminish the rights guaranteed under this constitution *ipso iure* void.[14]

39. I am not an expert on Guatemalan law and this opinion does not address details of Guatemalan constitutional or sub-constitutional law. Suffice it to say that it appears that the Lesivo Declaration here worked to destroy a usufruct, which is defined, under the Guatemalan Civil Code, as a property right (not a mere contractual right), limited in time and purpose to the enjoyment of the fruits of another person's property.[15] This *de facto* expropriation was meted out directly to the usufructuary in the railroad equipment, and indirectly, but just as effectively, to the formally still valid usufruct in the right of way - as if it were of any use under the contract without the rolling stock. This government declaration of an "administrative contract" (as this investment contract is termed) as harmful to the interests of the state, subject to administrative court confirmation, is not foreseen or even mentioned in the country's constitution. It is only referred to, not established, in two jurisdictional provisions of the

---

[14] **Article 44.- Rights Inherent in the Human Person.**

(3) Laws and administrative directives or any other decree that reduces, restricts, or distorts the rights guaranteed by the Constitution are void *ipso jure.*

[15] The usufruct finds itself listed in Book Two of the Guatemalan Civil Code, under the heading: "De los bienes, de la propriedad y demás derechos reales." For details, see Articles 703 *et seq.* of the Guatemalan Civil Code, Decreto Ley No. 106, 14 September 1963.

Administrative Procedure Code,[16] which delimit the authority of administrative courts to deal with controversies "derived from administrative contracts and concessions"[17] if the Government, by declaration of the President in Cabinet Council, has declared one of its own acts or resolutions "harmful [*lesivo*] to the interests of the State."[18] Usually, the substance of a governmental power to expropriate or to terminate contracts, in a civil law country governed by the rule of law, is spelled out in a different document - either the constitution itself or a special law granting these powers and their limitations. As the Guatemalan Constitution assumes no unlimited power of the Executive Branch, and the Executive itself assumes a formal final authority of the Judicial Branch to legally effectuate a termination of this "administrative contract," while the Judicial Branch is given no criteria to determine whether the Governmental termination

---

[16] Ley de lo Contencioso Administrativo, Decreto No. 119-96, 21 November 1996.

[17] *Id.* art. 19:

> Procederá el proceso contencioso administrativo: ...
>
> 1. En caso de contienda por actos y resoluciones de la administración y de las entitades descentralizadas y autónomas del Estado;
>
> 2. En los casos de controversias derivadas de contratos y concesiones administrativas. ...

[18] *Id.* art 20:

> Si el proceso es planteado por la administración por sus actos o resoluciones, no será necesario que concurran los requisitos indicados siempre que el acto o resolución haya sido declarado lesivo para los intereses del Estado, en Acuerdo Gubernativo emitido por el Presidnete de la Républica en Consejo de Ministros. Esta declaración solo podrá hacerse dentro de los tres años siguientes a la fecha de la resolución o acto que la origina.

is lawful or not, one can only assume that any substantive legal basis for the Lesivo Declaration by the President and his Cabinet is missing. And even if there were a statutory basis, it would fail the requirements of expropriation spelled out in Article 40 of the Constitution, which overrules any conflicting lower law. In effect, a property right has been taken, without a hearing, and without compensation.

40. In addition, with respect to human rights, the Constitution, in Article 46, subordinates itself, and all domestic law, to the regime of any international treaty the Republic of Guatemala has ratified[19] -- a quite unusual implementation of the monist view of the relationship between international law and domestic law in this subject matter of growing importance and great sensitivity.

41. Guatemala is party to the American Convention on Human Rights or "Pact of San José" of November 22, 1969; it ratified this treaty on April 27, 1978.[20] Article 8(1) of that important instrument provides:

---

[19] Article 46.- Preeminence of International Law.

The general principle is established that in the field of human rights, treaties and agreements approved and ratified by Guatemala have precedence over municipal law.

Translation in Constitutions of the Countries of the World: Guatemala, *supra* note 11.

[20] Department of International Law, Organization of American States, B-

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

42. The Guatemalan practice of *lesión*, as it has been described to me, raises serious questions with respect to compliance with Article 8(1), in that it invalidates a contract establishing a property right, a usufruct, without any prior hearing.

43. Also, the practice appears to violate the right to property under Article 21 of the Convention:[21]

32: American Convention on Human Rights, General Information of the Treaty: B-32, available at http://www.oas.org/juridico/english/Sigs/b-32.html. The Republic of Guatemala is now bound to all the provisions of this convention as an initial reservation regarding the death penalty was withdrawn effective August 12, 1986. *Id.*

[21] Article 1(1), which bears the chapeau "Obligation to Respect Rights of the Convention," provides:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Note that Guatemala is obliged to undertake to respect the conventional rights of all persons subject to their jurisdiction, i.e., Guatemalans as well as foreign nationals who may be subject to their jurisdiction.

Article 2, which bears the chapeau "Domestic Legal Effects," obliges each state-party to bring its law into conformity with the Convention:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties

> 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
>
> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

44. Beyond that provision, the Inter-American Commission on Human Rights has held that the international instruments establishing the right to property "have become rules of customary international law, and as such are considered obligatory in the doctrine and practice of international law."[22]

45. In actual cases, the Commission has held the confiscation of an individual's mine without compensation in Nicaragua to be a breach of Article 21.[23] Also, it held "creeping expropriation"[24] to violate the right to property under the companion provision of Article XXIII of the 1948 American Declaration

---

> undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

Moreover, in addition to Guatemala's own subordination of its internal law to international human rights treaties, Article 27 of the Vienna Convention on the Law of Treaties, to which Guatemala is also a party, also precludes a state party from using its domestic law to evade compliance with treaty obligations. Article 27 provides:

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

[22] Case No. 10.770 (Nicaragua), IACHR Annual Report 1993, 293 at 299, ¶ 13. *See also* Report on Nicaragua, *id.* at 442, 465.

[23] IACHR Annual Report 1986-7, 89 at ¶ 10.

[24] Scott Davidson, *The Civil and Political Rights Protected in the Inter-American Human Rights System*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 215, 277 (David J. Harris & Stephen Livingstone eds., 1998).

of the Rights of Man[25] in the case of the Paraguayan Government shutting down a private radio station through intimidation of the radio manager and his family, the denial of police protection, and by interference with broadcasts and power cuts caused by agents of the State.[26] The Inter-American Court of Human Rights also recognized such an indirect violation of the right to property in the case of *Ivcher Bronstein v. Peru* where the applicant was deprived of Peruvian nationality in order to clear the way to removing him from the editorial control over the radio station which he owned.[27] The jurisprudence under the Inter-American Human Rights system, however, only extends its protections to individual human beings, not to legal persons - which includes shareholders of corporations (if their rights as shareholders are affected), but not the corporations themselves.[28] In contrast, both customary international law and international investment law, in particular, CAFTA, recognize the right to property of foreign

---

[25] Article XXIII reads:

> Every person has the right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

[26] The Inter-American Commission declared that "in the present case the Government of Paraguay has, by commission or omission, violated particularly Articles IV and XXIII of the American Declaration of the Rights and Duties of Man concerning freedom of the expression and dissemination of ideas and the right to property." Resolution N° 14/87, Case 9642, Paraguay, March 28, 1987, IACHR Annual Report 1986-7, ¶ 10, *available at* http://www.cidh.oas.org/annualrep/86.87eng/Paraguay 9642.htm.

[27] *Ivcher Bronstein v. Peru (Judgment)*, Inter-American Court of Human Rights Series C No 74 ¶¶ 122, 123 (6 February 2001).

[28] Report No. 10/91, Case 10.169, Peru, 22 February 1991, *available at* http://www.cidh.oas.org/annualrep/90.91eng/Peru10.169.htm.

legal persons as well.[29]

46. In any event, there appear to be serious questions about the essential lawfulness of the Guatemalan version of *lesión* as it is practiced within that country, whether with respect to aliens such as the foreign investor in the instant case or with respect to Guatemalan nationals.

47. As the present opinion focuses, however, on the lawfulness under conventional (CAFTA) and the customary international law of the application of *lesión* to the foreign investor in the case under review, I turn to that now.

2. RDC's Shares in FVG and its Rights under the Usufruct Constitute an Investment under Chapter 10 of CAFTA

48. In order for these provisions to be applicable, there must be an investment as defined by the treaty. Investments covered by CAFTA are defined in Article 10.28 as

> every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise;

---

[29] Ursula Kriebaum & Christoph Schreuer, *The Concept of Property in Human Rights Law and International Investment Law* (undated manuscript), *available at* http://www.univie.ac.at/intlaw/concept_property.pdf (last accessed May 29, 2009).

(c) bonds, debentures, other debt instruments, and loans;

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;

49. There is no doubt that RDC's substantial financial and long-term commitment to the Respondent's economy and infrastructure, which is described above, constitutes an investment under CAFTA. RDC's creation of FVG as its vehicle of operations in the railroad business of Guatemala qualifies as an investment under subparagraph (a). Alternatively its 82% of shares in this enterprise qualify as an investment under paragraph (b) of this definition. The advances extended to FVG are "loans" in the sense of subparagraph (c). The management rights to the railway system in the usufruct contract qualify as an investment under subparagraph (e). The usufruct right itself is a property right under subparagraph (h).

3. The Lesivo Declaration Constitutes an Indirect Expropriation in Violation of CAFTA Article 10.7.

50. At issue is whether the Lesivo Declaration in itself constitutes a prohibited direct or indirect expropriation. Article 10.7 spells out states parties'

obligations regarding expropriations by specifying four *cumulative* tests:

> 1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
> (a) for a public purpose;
> (b) in a non-discriminatory manner;
> (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and
> (d) in accordance with due process of law and Article 10.5.

51. As the *Third Restatement of Foreign Relations Law*, often considered a reliable synthesis of customary international law, states that the requirement that an expropriation be "for a public purpose" (CAFTA Article 10.7.1.(a)) "has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and not subject to effective reexamination by other states. Presumably, a seizure by a dictator or oligarchy for private use could be challenged under this rule."[30]

52. The facts of this case, as alleged by the Claimant, may just constitute such an exceptional case: Mr. Ramon Campollo, the sugar oligarch of Guatemala, is the private person to benefit from the demise of the Claimant's investment - part of the oligarchy dominating the country at the time of President Oscar Berger,[31] whose son was Mr. Campollo's advisor on this issue. In addition, none of the alleged grounds of lesion demonstrate any injury or

---

[30] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 712 Comment e.

[31] For an overview of the power structure of Guatemala at work in the context of this case, *see infra*, note 79.

harm to the State, or articulate any genuine interest of the State in this measure.[32]

53. Under the facts as alleged, the taking has also been violative of CAFTA Article 10.7.1.(b), the prohibition of discrimination in carrying out a taking. Under the *Restatement*, this means that a taking that "singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law."[33] The tribunal in *Eureko BV v. Poland*, for its finding of an expropriatory action, emphasized the discriminatory intent of the government's actions aimed at excluding foreign control from the host state market.[34]

54. In the case at hand, the motivation appears to be to exclude the American investor from the Guatemalan market - a clear case of facial discrimination against a particular alien.

55. CAFTA Article 10.7.1.(c) has been violated as well, in that there has

---

[32] According to the recent holding of the Tribunal in *ADC v. Hungary* regarding the closely related requirement of "public interest" in expropriation,

> a treaty requirement for "*public interest*" requires some genuine interest of the public. If mere reference to "*public interest*" can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.

ADC v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 432.

[33] RESTATEMENT (THIRD), *supra* note 30, Comment f.

[34] *Eureko BV v. Republic of Poland*, Partial Award, 19 August 2005, ¶242; August Reinisch, *Expropriation*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 407, 451 (Peter Muchlinski et al. eds., 2008).

been no payment of any compensation pursuant to paragraphs 2 through 4 of this article. Such payments are also not likely to occur in this context for a simple reason: although settlements of *lesivo* cases can be made according to Article 2161 of the Guatemalan Civil Code, none of the settlements known have included the payment of any compensation to the defendant investor.[35]

56. The same is true for CAFTA Article 10.7.1.(d), as the Claimants' due process rights and rights under Article 10.5 have been violated as well, as will be shown *infra*.[36]

57. Annex 10-C to CAFTA further expounds upon the concepts that undergird Article 10.7.1:

> The Parties confirm their shared understanding that:
> 1. Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
> 2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
> 3. Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
> 4. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
> (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

---

[35] *See infra*, note 76.

[36] *See infra*, at Part IV.4.

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
(iii) the character of the government action.

58. The Lesivo Declaration is not a "nondiscriminatory regulatory action", so paragraph 4(b) of Annex 10-C is not at issue.

59. Whether a direct or indirect expropriation in violation of Article 10.7.1 and customary international law (of which the provision is a reflection) has occurred, depends therefore on the legal nature and economic effect of the governmental act at issue, i.e., the Lesivo Resolution by the President and Cabinet of Guatemala. With respect to an indirect expropriation "through measures equivalent to expropriation," the essential test is consequential, i.e., whether the government has taken or allowed measures to be taken which are factually expropriatory.[37]

60. Examining the requirements of expropriation under Article 10.7, it is clear that the measures which the Claimant has suffered, as I described them earlier, do not constitute a direct expropriation, as this would require a "formal transfer of title or outright seizure." The formal "transfer" or taking of the usufruct, a limited property right, would only be completed with the

[37] W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115, 121 (2004).

confirmation of the President's declaration by the competent administrative court, which has not yet occurred.

61. This does not end the inquiry, however, as Article 10.7 establishes that expropriation, for purposes of CAFTA, also includes indirect expropriation, i.e., a consequence achieved "through measures equivalent to expropriation or nationalization." In this respect, CAFTA is consistent with current international developments, for the legal concept of indirect expropriation is now part of customary international law.

62. Indirect expropriation of intangible rights, as an equivalent form of expropriation, has long been recognized. Referring to two decisions, one of the Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia (the Chorzów Factory Case)*[38] and the other of the Permanent Court of Arbitration in *Norwegian Shipowners Claims (Norway v. United States),*[39] Professor Christie concluded that a State may expropriate property "where it [the State] interferes with it, even though the State expressly disclaims any such intention," and that "even though the State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be

[38] Certain German Interests in Polish Upper Silesia (Chorzów Factory Case) (F.R.G. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 4 (Sept. 13).

[39] Norwegian Shipowners' Claims (Norway v. United States), 1 U.N. Rep. Int'l Arb. Awards 307 (1922).

deemed to have expropriated them."[40]

63. The concept of expropriation, as *Metalclad v. United Mexican States* teaches, thus "includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of the property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[41]

64. The *CME v. Czech Republic* panel was of the same view: "De facto expropriations or indirect expropriations, i.e., measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims. This is undisputed under international law."[42]

65. As for the concept of "what is taken," international law has come to appreciate that it is essentially functional. As one leading authority on international investment law put it, in modern times, "the key function of property is less the tangibility of 'things,' but rather the capability of a

---

[40] G.C. Christie, *What Constitutes a Taking Under International Law?*, 38 BRIT. Y.B. INT'L L. 307, 310-11 (1962).

[41] Metalclad v. United Mexican States, ICSID Case No. ARB/96/3, Award of Aug. 30, 2000, (2001) 40 ILM 36, at 51, ¶103.

[42] CME Czech Republic BV v. Czech Republic, UNCITRAL Arbitral Tribunal, Partial Award of 13 September 2001, *reprinted in* 14(3) WORLD TRADE AND ARBITRATION MATERIALS 109 (2002), ¶604.

combination of rights in a commercial and corporate setting and under a regulatory regime to earn a commercial rate of return."[43] The critical element in determining whether an indirect expropriation has occurred is the impact of the actions on the investor's rights and whether there has been a "substantial loss of control or economic value of a foreign investment without a physical taking," (or, in this case, a "serious economic harm").[44]

66. Thus, in each case, the governmental measures and their impact on the investment have to be closely examined:

> [I]nternational tribunals, jurists, and scholars have consistently appreciated that states may accomplish expropriation in ways other than by formal decree; indeed, often in ways that may seek to cloak expropriatory conduct with a veneer of legitimacy. For this reason, tribunals have increasingly accepted that expropriation must be analyzed in consequential rather than formal terms. What matters is the effect of governmental conduct - whether malfeasance, misfeasance or nonfeasance, or some combination of the three - on foreign property rights or control over an investment, not whether the state promulgates a formal decree of otherwise expressly proclaims its intent to expropriate. For the purposes of state responsibility and the obligation to make adequate reparation, international law does not distinguish indirect from direct expropriations.[45]

---

[43] Thomas Waelde & Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 INT'L & COMP. L.Q. 811, 835 (2001).

[44] Christoph Schreuer, *The Concept of Expropriation under the ETC and other Investment Protection Treaties*, 2 TRANSNATIONAL DISPUTE MANAGEMENT, Nov. 2005, ¶12.

[45] Reisman & Sloane, *supra* note 37, at 121.

67. In particular, it is now "well-established under international law that the taking of a foreign investor's contractual rights constitutes expropriation or a measure having an equivalent effect."[46]

68. In *Liberian Eastern Timber Corp. (LETCO) v. Liberia*, the breach of a concession contract constituted expropriation[47]and in *Metalclad v. United Mexican States*, the lack of an orderly process and timely disposition in issuing permits, breach of reasonable expectations of the investor, failure to honor representations of the Government, and denial of a construction permit necessary for the operation, taken together, constituted expropriation.[48]

69. Similarly, in *Goetz v. Burundi*,[49] the host State revoked the investor's tax free zone status without any formal expropriation. The Tribunal held that the measure was tantamount to expropriation because the revocation forced the company to halt all activities, which "deprived their investments of all utility and

---

[46] Stanimir A. Alexandrov, *Breaches of Contract and Breaches of Treaty: The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines*, 5 J. WORLD INV. & TRADE 555, 559 (2004). *See also Phillips Petroleum Co. v Iran*, 21 Iran-US CTR 79 (1989), ¶76 ("there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefor").

[47] Liberian Eastern Timber Corp. (LETCO) v. the Government of the Republic of Liberia, ICSID Case No. ARB/83/2, Award, March 31, 1986, 26 I.L.M. 647 (1987), *rectified* May 14, 1986.

[48] Metalclad v. United Mexican States, *supra* note 41, ¶ 107.

[49] Goetz and Others v. Republic of Burundi, Award, 2 September 1998, 6 ICSID REP. 5.

deprived the claimant investors of the benefit which they could have expected from their investments. . . ."[50]

70. In *Middle East Cement v. Egypt*,[51] a free zone license was revoked through the prohibition of the importation of cement. According to the Tribunal, the investor had been deprived of the use and benefit of its investment even though it retained the nominal ownership of its rights - a measure tantamount to expropriation[52]:

> When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a "creeping" or "indirect" expropriation, or ... as measures "the effect of which is tantamount to expropriation." As a matter of fact, the investor is deprived by such measures of parts of the value of his investment. This is the case here, and therefore, it is the Tribunal's view that such a taking amounted to an expropriation within the meaning of Art. 4 of the BIT.[53]

71. Similarly, in *Tecmed v. Mexico*, the revocation of a license for the operation of a landfill was considered a measure tantamount to expropriation. Although such measures "do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do

---

[50] *Id.* ¶ 124.

[51] Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, Award, 12 April 2002, 7 ICSID Rep. 178.

[52] In my view, "a measure tantamount to expropriation" in the following cases has the same substantive meaning as "an effect equivalent to direct expropriation" in CAFTA Annex 10-C.

[53] *Id.* ¶ 107.

not explicitly express the purpose of depriving one of rights or assets, but actually have that effect."[54]

72. In cases of interference with investment contracts, the distinction between the Government acting as a sovereign and acting as a participant in the market is essential. In the *Jalapa Railroad* case, a legislative decree that declared a critical clause in a contract to be invalid was held to amount to an expropriation which, through the use of "superior government power," gave rise to international liability.[55]

73. The Tribunal in *Impregilo SpA v. Pakistan*[56] reiterated that a breach of contract may be a breach of treaty if the host State acts as a governmental or sovereign authority rather than as a participant in commerce:

> In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority ("*puissance publique*"), and not as a contracting party, may breach the obligations assumed under the BIT.[57]

74. The *Siemens v. Argentina* Tribunal also held that to incur international responsibility for expropriation, the State needed to use its public

---

[54] Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, Award, 29 May 2003, 43 ILM 133 (2004), ¶ 114.

[55] *See* 8 WHITEMAN DIGEST OF INT'L LAW 908-09 (1976) *citing Jalapa Railroad and Power Co.*, Am. Mex. Cl. Comm'n. (1948).

[56] Impregilo SpA v. Islamic Republic of Pakistan, Decision on Jurisdiction, Case No. ARB/03/3 (2005).

[57] *Id.* at ¶ 260.

authority and to act based on its "superior governmental power," rather than merely as a commercial party to a contract.[58]

75. The foundational case in this respect, however, is the *Shufeldt Claim*, a decision by Arbitrator Sir Herbert Sisnett, Chief Justice of British Honduras (the later Belize), in the case of P.W. Shufeldt, a U.S. citizen whose claim was espoused by his home government.[59] The facts eerily resemble those in the case at hand and the *Shufeldt* tribunal's holding is especially applicable.

76. On February 4, 1922, Mr. Víctor Morales and Mr. Francisco Nájera Andrade entered into a ten-year contract with the Government of Guatemala, which was represented by the Secretary of Agriculture, for the extraction and exportation of a minimum of 75,000 quintales (46 kilos net) of chicle, a natural gum to be found in tropical trees indigenous to Central America, against payment of 5 U.S. gold dollars for every quintal of chicle exported. The contract was approved by the President of the Republic the same day and published in the official newspaper, *El Guatemalteco*. On February 11, 1922, the concessionaires assigned their rights under the contract to Mr. P. W. Shufeldt. The contract continued in force, with Mr. Shufeldt carrying out his obligations, expending large sums of money to facilitate the extraction and exportation of chicle, and dutifully paying what he owed the government -- up to May 22, 1928, the day the

---

[58] Siemens A.G. v. Argentine Republic, ICSID Case. No. ARB/02/8 (Award of February 6, 2007), ¶253.

[59] Shufeldt Claim (U.S. v. Guatemala), July 24, 1930, 2 U.N. REP. INT'L ARB. AWARDS 1079.

Legislative Assembly of Guatemala passed Decree No. 1544. In this decree, the legislature, asserting its power to approve or disapprove such an agreement, disapproved the contract of February 4, 1922, simply asserting that it was "harmful to the national interests" and in violation of "various dispositions and prohibitions defined by the laws of the Republic." Thus, the agreement was summarily terminated.

77. The United States espoused Shufeldt's claim against Guatemala. The Arbitrator concluded that the original contract had in fact been approved by the legislature and had generated property rights for Mr. Shufeldt and that Mr. Shufeldt had not breached it. As to the Guatemalan Government's further contention that "the decree of the 22nd May 1928 was the constitutional act of a sovereign State exercised by the National Assembly in due form according to the Constitution of the Republic and that such decree has the form and power of law and is not subject to review by any judicial authority," the arbitrator held:

> This may be quite true from a national point of view but not from an international point of view, for "it is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject."[60]

78. Some 80 years later, RDC seems to have fallen victim to the same *modus operandi* of the same country's government at whose hands Mr. Shufeldt had suffered. The Lesivo Resolution of the Executive Branch of Guatemala with

---

[60] *Id.* at 1098.

its pernicious effect on RDC's railroad investment is, just as the legislative decree of yesteryear, an exercise of municipal public power which international law does not allow to defeat the vested rights of foreigners. RDC, as a U.S. company, has been forced into enormous losses culminating in abandonment of an investment because of an arbitrary "sovereign" decision that worked to rob it of its contractually established property rights. All of this was in violation of the customary international law rule against expropriation without compensation laid down in Article 10.7 of CAFTA.

79. Confirming this result is the official interpretation of the concept of indirect expropriation laid down in Article 4(a) of Annex 10-C to CAFTA. It relies on a "case-by-case, fact-based inquiry" that considers, *inter alia*, (i) the economic impact of the government action; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.

80. As the NAFTA Tribunal in *Pope & Talbot* stated, measures affecting property interests have to be of a certain "magnitude or severity" in order to qualify as indirect expropriation.[61] Such a "substantial deprivation"[62] of the Claimant's property rights is obvious, as it has led to the demise of the Claimant's investment.

---

[61] Pope & Talbot, Inc. v. Government of Canada, Interim Award of 26 June 2000, ¶ 96.

[62] *Id.* ¶ 102. *Accord* Occidental Expropriation and Production Co. v. Ecuador, LCIA No. UN 3467, Award, 1 July 2004, ¶ 89.

81. The Government's Lesivo Declaration has clearly interfered with RDC's distinct and reasonable investment-backed expectations, expectations which were, moreover, understood and endorsed by the Government. International arbitral practice has recognized investors' legitimate expectations as an important part of property protection.[63]

82. In *Metalclad*, the NAFTA Tribunal expressly relied for its finding of an indirect expropriation on the test of a "reasonably-to-be-expected economic benefit."[64] In that case, the investor's reliance in good faith was disappointed by the host state authorities, as the claimant had relied on the representations by the Mexican federal government that it had exclusive authority to issue permits for hazardous waste disposal facilities.

83. In international arbitral practice since then, the *Metalclad* test has become "one of the touchstones of for an assessment of the validity of an expropriation claim."[65]

84. As stated above,[66] RDC's envisioned sources of profit, the bases for its investment, were reflected in FVG's Business Plan. This business plan was fully known and approved by Guatemala, not only via the acceptance of RDC's bid; it was also considered and expressly incorporated, via Clause 15, into Deed

---

[63] Reinisch, *supra* note 34, at 448, with further references.

[64] Metalclad, *supra* note 41, ¶ 103.

[65] CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION 302 (2007).

[66] *See supra*, ¶¶ 7-10.

No. 402, the right of way usufruct contract. As FEGUA was a legitimate agent for the Government of Guatemala, this reference constitutes a specific commitment of the Respondent on which the Claimant more than reasonably should have been able to rely.

85. The other RDC investment-backed expectations frustrated by the Lesivo Resolution include: (1) that FVG would have use of the rolling stock during the entire 50-year term; (2) that Deed 143 was awarded, executed and approved in accordance with Guatemalan law; (3) that the terms of Deed 143 were not harmful to the interests of Guatemala; (4) that, if there were any legal or technical flaws with Deed 143, they would have been resolved through renegotiation and less extreme measures (such as when Deed 143 replaced Deed 41); and (5) that the Government would compensate FVG for any expropriation.

86. Lastly, the character of the government action, as exercise of sovereign authority, also demonstrates its expropriatory nature. Thus, the requirements of an indirect expropriation under Annex 10-C are all present in the case at hand.

4. The Lesion Resolution and the Subsequent Conduct by the Respondent Violate CAFTA's Minimum Standard of Treatment under Article 10.5

87. Article 10.5 spells out two essential components of an investor's right to minimum standards of treatment:

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

88. According to Annex 10-B of CAFTA, the customary international law minimum standard of the treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

89. One early pertinent decision was the *Lena Goldfields Ltd.* arbitration;[67] it concerned a 1925 concession agreement on the mining of gold

---

[67] Schiedsgerichtssache zwischen Lena Goldfields Co. Ltd. und der Regierung der U.S.S.R., Award, 2 September 1930, *available, with English translation, at* http://tldb.uni-koeln.de/php/pub_show_content.php?page=pub_show_document.php&pubdocid=261300&pubwithtoc=ja&pubwithmeta=ja&pubmarkid=959000. *See also* Arthur Nussbaum, *The Arbitration Between the Lena Goldfields, Ltd. and the Soviet Government*, 36 CORNELL L.Q. 31 (1950/51), and V.V. Veeder, *The* Lena Goldfields *Arbitration: The*

between a British company and the Government of the USSR. The relationship between the two parties to the contract soured with the decline of the country's "New Economic Policy" that had allowed the opening for the concession in the first place. The USSR Government, in violation of the agreement, denied the exploitation by Lena of promising new gold areas; incited a class war against the employees of Lena, as a "capitalist enterprise"; allowed large thefts of gold to be carried out without affording protection by the police and local government; delayed the delivery of needed and promised coal shipments; coordinated criminal raids, searches, seizures (including the taking of proprietary documents describing difficult metallurgical processes and ore processing) and arrests of high-level staff of Lena, and generally terrorized its entire labor force. The result of these actions of the Government was to "deprive the company of available cash resources, to destroy its credit, and generally to paralyse its activities."[68]

90. The tribunal concluded that these actions by the Government made it a "total impossibility for Lena of either performing the Concession Agreement or enjoying its benefits."[69] They decided to relieve Lena from the burden of further obligations under the agreement and to award it compensation in money "for the value of the benefits of which it had been wrongfully deprived. On ordinary legal principles this constitutes a right of action for damages, but the

---

Historical Roots of Three Ideas, 47 INT'L & COMP. L.Q. 747 (1998).

[68] *Id.* ¶21.

[69] *Id.* ¶25.

Court prefers to base its award on the principle of 'unjust enrichment,' although in its opinion the money result is the same." [70]

91. In more recent times, the NAFTA Tribunal in *Waste Management v. Mexico ("Waste Management II")*[71] has summarized the jurisprudence on fair and equitable treatment claims:

> Taken together, the *S.D. Myers, Mondev, ADF* and *Loewen* cases suggest that the minimum standard of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety - as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.
>
> Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.[72]

92. In *Tecmed,*[73] the Tribunal described the standard of fair and equitable treatment as requiring, *inter alia*:

> The foreign investor ... expects the host State to act consistently, i.e., without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the

---

[70] *Id.*

[71] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/00/3 Award (30 April 2004).

[72] *Id.* ¶¶98-99.

[73] Tecmed, *supra* note 54.

> investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[74]

93. *Azurix v. Argentina* made it clear that the standard of fair and equitable treatment is objective, and thus unrelated to any requirement of bad faith or malicious intent in adopting the measures in question.[75]

94. Here, the unfettered power of the Guatemalan President and his Cabinet to declare any administrative contract "harmful" to the interests of the state, without any clarification as to what the relevant interests of the state are and what the harm should consist of makes it a model example of arbitrariness in decision making. Any purported reason to terminate a contract under this doctrine of lesion would suffice. The absence of rational criteria and the consequent lack of foreseeability are incompatible with the essential trust which a long-term relationship of an investment from abroad requires and which international investment law's legal instruments are designed to achieve.

95. Moreover, the ultimate authority of the administrative court to confirm the President's decision is illusory: for one, the court has no criteria for performing any meaningful judicial review of the President's determination of the "interest of the State," and, since 1991, I am informed that only one such confirmation has been rendered; all the other cases are still pending or the claims

---

[74] *Id.* ¶ 154.

[75] Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 372.

have been settled out of court on terms favorable to the State.[76]

96. In addition, the Star Chamber procedure of not informing the investor of an impending declaration of *lesion*, not giving it notice of the charges and allowing it to defend itself violates the essence of due process. Indeed, the absence of these features in the process of finding and issuing a Lesivo Declaration flies in the face of "the principle of due process embodied in the principal legal systems of the world."[77]

97. The obligation of Article 10.5 is also violated by the lack of police protection that has been afforded to the Claimant's assets. After the Lesivo Resolution was issued, there was an increase in looting and vandalizing the railroad right of way and in thefts of railroad materials and equipment. As in the *Lena Goldfields* case, law enforcement ignored these criminal actions. This conduct clearly violates the CAFTA duty under customary international law to provide full protection and security for the Claimant's investment.

5. The Lesivo Declaration Violates the National Treatment Standard of CAFTA Article 10.3.

98. According to CAFTA Article 10.3.1,

> Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion,

---

[76] Such settlements of *lesivo* cases can be made according to Article 2161 of the Guatemalan Civil Code. None of the settlements known have included the payment of any compensation to the defendant.

[77] CAFTA Article 10.5.2(a).

management, conduct, operation, and sale or other disposition of investments in its territory.

99. This provision, according to NAFTA Tribunal's decision in *Archer Daniels*, prohibits "discrimination based on nationality, including both *de facto* and *de jure* discrimination."[78] According to the facts as stated by the Claimant, Mr. Ramon Campollo, a Guatemalan oligarch strongly interested in the railway system operated by RDC, a foreign investor, was favored by the Government to take over the railroad, in particular the South Coast corridor. This intent was furthered by Mr. Campollo's legal representation by then-President Oscar Berger's son and the behind-the-scenes manipulations leading to the Lesivo Resolution.[79] Such favoritism toward competing local investors, if true, would

---

[78] Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/04/5 (NAFTA), Award, 21 November 2007, ¶193.

[79] At least one news story put the railroad investment's demise in the context of an intra-Guatemalan power struggle:

> Guatemala's one and only railroad has shut down operations in what appears to be an attempt by powerful local sectors to take back the system from a US company. ...
>
> Carrasco's client, the company, remains entitled to do business in the country even though it has lost its right to the machinery with which to do it. This odd fact adds up to a conspiracy, says the lawyer. "To want to declare the contract for the use of the machinery, railcars, etc., is only an excuse to expel Ferrovias from the country. The company is not going to want to continue operating the line if it is not going to be able to use the equipment." So something else is going on, he contends, and the something else is that a single family, with the help of the government, is behind the company's problems. He would not reveal the name of the family, but it was enough that he identified it as a sugar family.
>
> The sugar sector would be one that could benefit immensely from a railroad expansion, and there is nothing at all unusual about a lawyer or

anyone else in Guatemala being reluctant to accuse a member of the oligarchy. As the weekly publication Inforpress Centroamericana looked into the suggestion, it found several experts and analysts in agreement with the basics, that this is a confrontation between different families of the oligarchy for control of one of the country's strategic service industries.

One analyst who declined to give his name confirmed that sugar-industry heavyweights have obstructed the Ferrovias project from the beginning with the help of President Oscar Berger. Berger is related to the Widmann family, one of the principal names in sugar. The source told Inforpress, "They are interested in having their own line in the south, between Escuintla and Puerto Quetzal, to export sugar without the Ferrovias monopoly imposing their tariffs."

The train would be an enormously valuable acquisition for the sugar industry. According to the Asociacion de Azucareros de Guatemala (AZASGUA), 99% of the harvest is exported through Puerto Quetzal. The cost of transporting it by train, at about US$1 per km/t, would be far less than by road, as is presently the case.

"Everybody wants the railroad because it is the most efficient form of land transport," said Mariano Diaz of the Agencia de Exportacion de Guatemala (AGEXPORT). Sugar is the country's second-most-important source of foreign exchange and represents almost 25% of the total agricultural export.

Economist Fernando Solis is another observer who agrees that what is happening here is another round in the ongoing battles for power among the great families. He recalled that it was the Paiz Andrade family that first attracted RDC in 1997 and that this enraged the sugar sector, which was in the process of modernizing and wanted the system for its own. Given the proximity of the president to the sector, Solis said it is no coincidence that the government has moved against the beneficiary of the privatization of FEGUA as his time in office runs out. "The great families of the country are resetting their position against the prospect of a change of government," said Solis. The economist also noted that the Widmanns and another sugar family, the Vilas, are the principal financiers of the Gran Alianza Nacional (GANA), the ruling party of Berger.

The railroad dispute, and the way it pans out in future months, provides a rare glimpse into the relationships between the oligarchy and individuals and structures of government. As Solis sees it, the railroad will be a bargaining chip as the Widmanns and Vilas on one side and the Paiz Andrades on another divide up power in the new legislature and executive after the November elections. "The thing is to have elements

constitute a clear violation of the national treatment standard under CAFTA Article 10.3.

V. CONCLUSIONS

100. For the reasons set out above, it is my opinion that the Government of Guatemala violated the rights of RDC and FVG to which they are entitled under Chapter Ten of the DR-CAFTA and customary international law. Specifically, Guatemala has:

1. effected an indirect expropriation of FVG in violation of CAFTA Article 10.7 and customary international law;

(2) subjected FVG to unfair and inequitable treatment and denied it due process in violation of CAFTA Article 10.5 and customary international law;

(3) denied FVG the full protection and security owed under customary international law and CAFTA Article 10.5; and

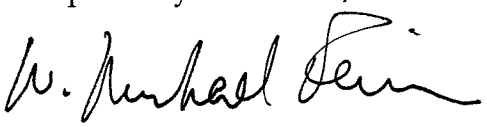
---

> that locate each family relative to the new government to get access to the pieces of the state privatization pie. The lawsuit before the ICSID [the Paiz Andrade leverage in the dispute] is not important, given that it will be the taxpayers who pay," he said.
>
> That is the real payoff to the foreign investors, courtesy of CAFTA, the US$65 million. Timing the suit to the start of CAFTA, Posner and company walk away with what one anonymous analyst calls "a juicy profit at the expense of the taxpayers, while the local investors, the sugar people, get their railroad and millions in free appurtenances, courtesy of the state, and those same taxpayers."

Guatemala's Only Railroad Shuts Down Amidst Hints of a Conspiracy under Cover of CAFTA, NOTI-CEN: CENTRAL AMERICAN & CARIBBEAN AFFAIRS, Sep. 20, 2007, available at http://www.thefreelibrary.com/GUATEMALA'S+ONLY+RAILROAD+SHUTS+DOWN+AMID+HINTS+OF+A+CONSPIRACY+UNDER...-a0168918068 (last accessed on May 29, 2009).

(4) treated RDC discriminatorily in violation of the national treatment standard of CAFTA Article 10.3.

Respectfully submitted,



W. Michael Reisman

Appendix: Curriculum Vitae of W. Michael Reisman

W. Michael Reisman

P.O. Box 208215
New Haven, CT 06520-8215
Tel.: (203) 432-4962
Fax.: (203) 432-7247

Summary Resume

W. Michael Reisman is Myres S. McDougal Professor of International Law at the Yale Law School where he has been on the Faculty since 1965. He has been a visiting professor in Tokyo, Hong Kong, Berlin, Basel, Paris and Geneva. He is a Fellow of the World Academy of Art and Science and a former member of its Executive Council. He is a member of the Sudan Boundary Tribunal, President of the Arbitration Tribunal of the Bank for International Settlements, a member of the Advisory Committee on International Law of the Department of State, Vice-Chairman of the Policy Sciences Center, Inc., a member of the Board of the Foreign Policy Association, and has been elected to the *Institut de Droit International*. He was a member of the Eritrea-Ethiopia Boundary Commission (2001-2007); served as arbitrator and counsel in many international cases and was President of the Inter-American Commission on Human Rights of the Organization of American States, Vice-President and Honorary Vice-President of the American Society of International Law and Editor-in-Chief of the American Journal of International Law.

Curriculum Vitae

Born April 23, 1939, Philadelphia, PA; educated, Philadelphia public schools; Central High School, 1956; B.A. Johns Hopkins University, 1960; LL.B. summa cum laude, Faculty of Law, Hebrew University, Jerusalem, Israel, 1963; Diplôme en Droit Comparé (Premier Cycle), Faculté Internationale pour l'enseignement de droit comparé (Strasbourg), 1963; LL.M. Yale Law School, 1964; Admitted, Connecticut Bar, 1964; J.S.D. Yale Law School, 1965; Research Associate, Yale Law School, 1965; Fulbright Scholar, The Hague, The Netherlands, 1966-67; Associate Professor, Yale Law School, 1969; Professor, Yale Law School, 1972-82; Wesley Newcomb Hohfeld Professor of Jurisprudence, Yale Law School, 1982-98; Myres S. McDougal Professor of International Law, 1998-; Board of Editors, American Journal of International Law, 1971-1983; Board of Editors, American Journal of Comparative Law, 1971-1977; Vice-President, American Society of International Law, 1984-86; Honorary Vice-President, American Society of International Law, 1996; Board of Editors, Journal of Conflict Resolution, 1972-1987; Board of Editors, Policy Sciences, 1984-88; Board of Review and Development, American Society of International Law (ASIL), 1972-1975; Executive Council, ASIL, 1972-1974, 1983-1984, 1996-; Committee for Student and Professional Development, ASIL, 1971-1974; Panel of Humanitarian Law, ASIL, 1971-1974; Advisory Board, Aviation Consumer Action Project, 1971-1974; Member, Consortium for Inter-University World Order Studies, Fund for Peace, 1970-1975; Board of Directors, Policy Sciences, Inc., 1979-; Board of Directors, U.S. Committee for Somali Refugee Relief, 1980-86; Advisory Board, Urban Morgan Institute for Human Rights, 1984-; Council on Foreign Relations, 1975-; International Law Association, 1975-; Executive Committee, American Branch, International Law Association, 1981-1995; Fellow, World Academy of Art and Science, 1981-; Executive Council, World Academy of Art and Science, 1983-93; Advisory Committee on International Law, U.S. Department of State 1987-; Fellow, Institute for Advanced Studies, Berlin, 1990; Member, Inter-American Commission of Human Rights, Organization of American States, 1990-95; Second Vice-President, Inter-American Commission on Human Rights, Organization of American States, 1992-93; First Vice-President, Inter-American Commission on Human Rights, Organization of American States 1993-94; President, Inter-American Commission on Human Rights, Organization of American States 1994-95; Honorary Vice-President, American Society of International Law, 1997; Member of the Board, Foreign Policy Association, 1997- ; member of the Institute of World Business Law of the International Chamber of Commerce, 1998-2001; *associé* of the *Institut de Droit International*, 1999; Academic Advisory Board for Transnational Books; Chairman, International Advisory Panel, National University of Singapore, 2002; member of panel of overseas referees of *Singapore Academy of Law Journal*, 2002-; member of the Advisory Board of *Journal of International Criminal Justice*, 2002-; member, International Bar Association Task Force on Legal Responses to International Terrorism, 2002-2004; Editor-in-Chief, American Journal of International Law, 1998-2003; member of the Advisory Board of *African Human Rights Law Journal*, 2003-; Board of Editors, Encyclopedia of Public International Law (Heidelberg), 2003-; member of the Panel of International Consultants for the Gujarat National University, Ahmedabad, Gujarat State, India, 2004-2006; member of the Editorial Board of *Indian Journal of International Law*, 2004-; member of the European Society

of International Law, 2004-; Honorary Editor, *American Journal of International Law*, 2004-; member of the Advisory Editorial Board of the *University of Botswana Law Journal*, 2004-; member of the Editorial Board of the *Stockholm International Arbitration Review*, 2005-; member of the ASIL Advisory Committee for ICJ Nominations and Other International Appointments, 2005-; ICSID Arbitrators List (for Colombia) for the period effective February 15, 2006-2012; member of the Advisory Board of the Columbia Program on International Investment, 2006-; member of the International Editorial Board of the *Cambridge Review of International Affairs*, 2006-; Honorary Professor, Gujarat National Law University, 2007-; member of the International Advisory Board of the School of Law of City University of Hong Kong, 2007-; member, World Bank Administrative Tribunal Nominating Committee, 2007-2008; Honorary Professor in City University of Hong Kong, May 1, 2008 to April 30, 2011; member of the Advisory Board of the Latin American Society of International Law (LASIL), 2007-; member of the Advisory Board of *Journal of International Dispute Settlement*, 2009-; member of the Advisory Board of *Yearbook on International Investment Law and Policy*, 2009-.

Prizes and Awards: Gherini Prize, Yale Law School, 1964; International Organization Prize (Ginn Foundation), 1965; Fulbright Scholar, 1966-1967; O'Connell Chairholder, University of Florida, Law Center, Spring, 1980; World Academy of Art and Science, Harold Dwight Lasswell Award for Communication in a Divided World, April, 1981; Certificate of Merit, American Society of International Law, 1994; Order of Bahrain, First Class, 2001; Manley O. Hudson Medal, American Society of International Law, 2004; Human Rights Award, International Human Rights Law Review, St. Thomas University School of Law, 2008.

Endowed Lectureships

Myres S. McDougal Distinguished Lecture in International Law and Policy, University of Denver, 1982.

Distinguished Visiting Lecture, Cumberland Law School of Samford University, 1986.

Beam Distinguished Lecture, University of Iowa, College of Law, 1986.

Dunbar Lecture, University of Mississippi, College of Law, 1988.

Brainerd Currie Lecture, Duke University, School of Law, 1989.

Freiwillige Akademische Gesellschaft Lecture, University of Basel, 1991.

Sloan Lecture, Pace University Law School, 1992.

Siebenthaler Lecture, Salmon P. Chase College of Law, Northern Kentucky University, 1995.

Hague Academy of International Law, 1996.

Lauterpacht Lecture, Cambridge University, 1996.

Eberhardt Deutsch Lecture, Tulane University, 1997.

Order of the Coif Lecture, 1999.

Hugo L. Black Lecture, University of Alabama School of Law, Spring 2001.

The Johnson Lecture, Vanderbilt Law School, January 2002.

Adda B. Bozeman Lecture, Sarah Lawrence College, April 2002.

The Manley O. Hudson Lecture, American Society of International Law, April 2004.

The Klatsky Lecture in Human Rights, Case Western Reserve University School of Law, January 2008.

The Goff Arbitration Lecture, Freshfields Bruckhaus Deringer/City University of Hong Kong, Hong Kong, December 2008.

Human Rights Missions

1. Member, Independent Counsel on International Human Rights, Peshawar, Pakistan, 1987.
2. Member, OAS Observation Team for the Elections in Suriname, November, 1987.
3. Member, International Commission of Jurists Group, Budapest, Hungary, February, 1990.
4. Observer, Taiwan elections, International League for Human Rights, December, 1991.
5. On-site visit to Haiti, Inter-American Commission on Human Rights, 1990, 1994.
6. On-site visit to Peru, Inter-American Commission on Human Rights, 1990, 1992, 1994.
7. On-site visit to Colombia, Inter-American Commission on Human Rights, 1991, 1993.

8. On-site visit to Guatemala, Inter-American Commission on Human Rights, 1994.

9. On-site visit to Bahamas, Inter-American Commission on Human Rights, 1994.

10. On-site visit to Ecuador, Inter-American Commission on Human Rights, 1994.

11. On-site visit to Jamaica, Inter-American Commission on Human Rights, 1995.

12. Report to the Constitutional Review Commission, Fiji, 1997.

13. Report to the Greenland Commission on Self-Government (with Chimène Keitner), December, 2001.

Publications

Books

1. Nullity and Revision: The Review and Enforcement of International Judgments and Awards (Yale University Press, 1971).

2. The Art of the Possible: Diplomatic Alternatives in the Middle East (Princeton University Press, 1970).

3. Puerto Rico and the International Process: New Roles in Association (American Society of International Law, West Publishing Company, 1973). Reprinted in 11 Revista Juridica de la Universidad Interamericana de Puerto Rico (1977).

4. Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal (co-edited with Burns Weston, Free Press, 1976).

5. Folded Lies: Bribery, Crusades, and Reforms (Free Press, 1979).

   A. Spanish Translation, Remedios Contra la Corrupcion? (Cohecho, cruzadas y reformas), Fondo de Cultura Economica", Mexico, 1981; republished in its Series "Biblioteca Joven", 1984.

   B. Japanese Translation, Iwanami Shoten, Tokyo, 1983.

   C. Russian Translation, Moscow, 1988.

6. International Law in Contemporary Perspective: The Public Order of the World Community (co-edited with Myres S. McDougal, Foundation Press, 1981).

7. International Law Essays (co-edited with Myres S. McDougal, Foundation Press, 1981).

8. Power and Policy in Quest of Law: Essays in Honor of Eugene Victor Rostow (with Myres S. McDougal, Martinus Nijhoff, 1985).

9. Jurisprudence: Understanding and Shaping Law (with Aaron M. Schreiber, New Haven Press, 1987).

10. International Incidents: The Law that Counts in World Politics (co-edited with Andrew R. Willard, Princeton University Press, 1988).

11. Regulating Covert Action: Practices, Contexts and Policies of Covert Coercion Abroad in International and American Law (with James E. Baker, Yale University Press, 1992) (Japanese Translation, 2000).

12. Systems of Control in International Adjudication and Arbitration: Breakdown and Repair (Duke University Press, 1992).

13. Straight Baselines in International Maritime Boundary Delimitation (with Gayl Westerman, St. Martin's Press, 1992).

14. The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict (with Chris T. Antoniou, Vintage Press, 1994).

15. International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes (with W. Laurence Craig, William Park and Jan Paulsson, Foundation Press, 1997).

16. The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication (Hague Academy, 1997).

17. Law in Brief Encounters (Yale University Press, 1999). Chinese Translation, Shenghuozhongde Weiguan Falu [Microscopic Laws in Life] (Shangzhou Chubanshe, Taipei, 2001).

18. Jurisdiction in International Law (Ashgate, 1999).

19. International Law in Contemporary Perspective (2d ed.) (with Mahnoush H. Arsanjani, Siegfried Wiessner and Gayl S. Westerman) (Foundation Press, 2004).

20. Foreign Investment Disputes: Cases Materials and Commentary (with Doak Bishop and James Crawford) (Kluwer Law International) (2005).

21. Understanding and Shaping International Law: Essays of W. Michael Reisman (Guojifa: Lingwu Yu Goujian) (Law Press - China, 2007).

22. The Reasons Requirement in International Investment Arbitration: Critical Case Studies (with Guillermo Aguilar Alvarez, eds.) (Martinus Nijhoff Publishers, 2008).

In Progress

1. Fraudulent Evidence in International Litigation (Lauterpacht Lecture) (Cambridge University Press, 2009).

2. International Commercial Arbitration (with Laurence Craig, William Park and Jan Paulsson, Foundation Press, 2009).

3. The World Constitutive Process: Structures of Decision in International Law and Politics (with Andrew R. Willard). Date of completion not projected.

4. International Law in the 21st Century: The Quest for World Order and Human Dignity. General Course in July 2007 at The Hague Academy of International Law.

Articles

1. "The Changing Structure of International Law: Unchanging Structure for Inquiry," 65 Columbia Law Review 810 (with Myres S. McDougal, 1965).

2. "The Role of the Economic Agencies in the Enforcement of International Judgments and Awards: A Functional Approach," 19 International Organization 929 (1965).

3. Address in De Zaak Zuid-West Afrika: Het Vonnis Van Het Internationaal Gerechtshof Critisch Bezein (1966) pp. 52-59, 61.

4. "Revision of the South West Africa Cases," 7 Virginia Journal of International Law 1 (1966).

5. "The World Constitutive Process of Authoritative Decision," 19:3 Journal of Legal Education 253 (with Myres S. McDougal and Harold D. Lasswell, 1967); reprinted in 1 Black & Falk, The Future of the International Legal Order (1968); reprinted in McDougal & Reisman, International Law Essays (1981).

6. "Rhodesia and the United Nations: The Lawfulness of International Concern", 62 American Journal of International Law 1 (with Myres S. McDougal, 1968); reprinted in 2 International Lawyer 721 (1968).

7. "Theories about International Law: Prologue to a Configurative Jurisprudence," 8 Virginia Journal of International Law 188 (with Myres S. McDougal and Harold D. Lasswell, 1968); reprinted in McDougal & Reisman, International Law Essays (1981).

8. "Judgment Enforcement," Proceedings of the American Society of International Law 13 (1968).

9. "The Enforcement of International Judgments and Awards," 63 American Journal of International Law 1 (1969).

10. "The Collection and Distribution of Current Materials for Teaching International Law," 21 Journal of Legal Education 80 (1968).

11. "Facets of International Arbitration," 20 Syracuse Law Review 166 (1968); reprinted as "The Multifaceted Phenomenon of International Arbitration" 24 Arbitration Journal 69 (1969).

12. Memorandum upon Humanitarian Intervention (with Myres S. McDougal, 1968) circulated privately and as a United Nations Petition Document; republished in Lillich, Humanitarian Intervention (1973).

13. "The Continuing Validity of Humanitarian Intervention," 3 International Lawyer 435 (with Myres S. McDougal, 1969).

14. "Ratification of the Genocide Convention," Proceedings of the Association of American Law Schools (1969).

15. "Sanctions and Enforcement," Volume 3, Black & Falk, The Future of the International Legal Order (1970); reprinted in McDougal & Reisman, International Law Essays (1981).

16. "International Non-Liquet: Recrudescence and Transformation," 3 International Lawyer 770 (1969).

17. "Procedures for Controlling Unilateral Treaty Termination," 63 American Journal of International Law 544 (1969).

18. "Responses to Genocide and Discrimination," East African Journal of Law and Development 1971; republished in 1 Denver Journal of International Law 29 (1971).

19. Rapporteur's Report, Working Group on Scientific Knowledge, Education and Communication, Environment and Society, International Joint Conference of the American Geographical Society and the American Division of the World Academy of Art and Science, 1970, published in 184 Annals of the New York Academy of Sciences 595 (1971).

20. "Polaroid Power: Taxing Business for Human Rights," Foreign Policy, Summer, 1971.

21. "Diplomatic Alternatives in the Middle East: From Obsolescent Goals to a New

Program," Testimony in Hearings Before the Subcommittee on the Near East of the Committee on Foreign Affairs, House of Representatives, 92nd Cong., 2nd Session, February 22, 1972, p. 8.

22. "Who Owns Taiwan," 166 New Republic 21 (April 2, 1972).

23. "Who Owns Taiwan: A Search for International Title," 81 Yale Law Journal 599 (with Lung-chu Chen, 1972); reprinted in Yung-Hwah Jo, Taiwan's Future (1974).

24. "Theory of Federal Preemption -- Legal Grounding and Application," Anti-Boycott Bulletin (July, 1977).

25. "The Status of Taiwan: International Law and International Implications," Testimony in Hearings Before the Subcommittee on Asian and Pacific Affairs of the Sub-committee on Foreign Affairs, House of Representatives, 92nd Congress, 2nd Session, May 3, 1972 on "The New China Policy: Its Impact on the United States and Asia."

26. "The Intelligence Function and World Public Order," 46 Temple Law Quarterly 365 (with Myres S. McDougal and Harold D. Lasswell, 1973); reprinted in McDougal & Reisman, International Law Essays (1981).

27. "Private Armies in a Global War System: Prologue for Decision," 14 Virginia Journal of International Law 1 (1973); reprinted in J.N. Moore, International Law and Civil War (Johns Hopkins Press, 1973); reprinted in McDougal & Reisman, International Law Essays (1981).

28. "Making International Humanitarian Law Effective: The Case for Civic Initiatives," (Paxman & Boggs, eds.) The United Nations: A Reassessment, p. 31 (University of Virginia Press, 1973).

29. "Miselection: Responses to an Insider Coup," The Nation, August 13, 1973.

30. "Middle East Disengagement: More Substitutes for Peace," The Nation, March 9, 1974.

31. "Compacts: A Study of Interstate Agreements in the American Federal System," 27 Rutgers Law Review 70 (with Gary Simson, 1973); reprinted in Hazard & Wagner, Law in the United States of America in Social and Technological Revolution 459 (1974).

32. "Accelerating Advisory Opinions: Critique and Proposal," 68 American Journal of International Law 648 (1974).

33. "Living with the Majority," The Nation, February 1, 1975.

34. "Trade Helps the Traders," The Nation, June 12, 1976.

35. "A Theory about Law from the Policy Perspective," in Weisstub (ed.), Law and Policy (1976).

36. "Recognition and Social Change" in Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal (with Eisuke Suzuki, co-edited with Burns Weston, 1976).

37. "Big Sticks and Big Mouths," The Nation, June 19, 1976, p. 472.

38. "The Danger of Abandoning Taiwan," New York Times, August 28, 1976.

39. "Why We Can't Cry Foul," The Nation, January 8, 1977.

40. "African Imperialism," Editorial, 70 American Journal of International Law 801 (1976).

41. "Myth System and Operational Code," 3 Yale Studies in World Public Order 230 (1977).

42. "Foreign Affairs and the Several States," Speech delivered at the Annual Meeting of the American Society of International Law, April 22, 1977. Published in the Proceedings of the 71st Annual Meeting, p. 182.

43. "The Pragmatism of Human Rights," The Nation, May 7, 1977, p. 554, reprinted in Yale Law Reports (Fall, 1977).

44. "Theory of Federal Preemption--Legal Grounding and Application," Anti-Boycott Bulletin, July, 1977, p. 121.

45. "On Playing Chinacard," Wall Street Journal, August 25, 1978.

46. "The Case of Western Somaliland," 1 Horn of Africa 13 (1978).

47. "Playing Chinacard," 13 Yale Law Report (Winter, 1978-79).

48. "Campaigns Against Bribery," Yale Alumni Magazine, p. 17 (February, 1979).

49. "Views on Recognizing the Peoples Republic of China," Yale Alumni Magazine and Journal, p. 16 (March, 1979).

50. "Treaty Termination in American Constitutional Law," Testimony to the Senate Committee on Foreign Relations, in Treaty Termination, Hearings Before the Committee on Foreign Relations, United States Senate, 96th Congress, 1st Session, April 11, 1979, p. 387.

51. "Who Can Terminate Mutual Defense Treaties" (with Myres S. McDougal), Part I, National Law Journal, Vol. I, No. 36, May 21, 1979; Part II, idem., Vol. I, No. 37, May 28, 1979.

52. In Memoriam: "Harold D. Lasswell" 4 Yale Studies in World Public Order 154 (1978).

53. "Harold D. Lasswell," 73 American Journal of International Law 55 (with Myres S. McDougal, 1979).

54. Motion and Brief Amici Curiae in support of petition for certiorari in Goldwater v. Carter, December 6, 1979 (with Myres S. McDougal).

55. "The Regime of Straits and National Security," 74 American Journal of International Law 48 (1980).

56. "Termination of the U.S.S.R.'s Treaty Right of Intervention in Iran," 74 American Journal of International Law 144 (1980).

57. "Myres S. McDougal," Biographical Essay in 18 International Encyclopedia of the Social Sciences 479 (1980).

58. "The Legal Effect of Vetoed Resolutions," 74 American Journal of International Law 904 (1980).

59. "The Case of the Non-Permanent Vacancy, 74 American Journal of International Law 907 (1980).

60. "Humanitarian Intervention," The Nation, May 24, 1980, p. 612.

61. "National Development as International Development," Forward to Lateef, Crisis in the Sahel: A Case Study in Development Cooperation (1980).

62. "The Prescribing Function in World Constitutive Process: How International Law is Made," (with Myres S. McDougal), 6 Yale Studies in World Public Order 249 (1981).

63. "International Law-making: A Process of Communication," Lasswell Memorial Lecture, American Society of International Law, April 24, 1981. 75 American Society of International Law Proceedings 101 (1981).

64. "Inadequacies of the Straits' Passage Regime in the LOS Draft," Marine Policy, p. 276 (July, 1981).

65. "Key International Legal Issues with Regard to Ocean Thermal Energy Conversion Systems," 11 California Western International Law Journal 425 (1981).

66. "West Bank: Belligerent Occupation or Incremental Annexation," The Nation, December, 1981.

67. General Report, International Law and Organization for a New World Order: The Uppsala Model, Grahl-Madsen & Toman, The Spirit of Uppsala (1984).

68. "The Golan Gambit," The Miami Herald, December 20, 1981.

69. "Critical Defense Zones and International Law: The Reagan Codicil," 76 American Journal of International Law 589 (1982).

70. "The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication" (with Eric Freedman), 76 American Journal of International Law 739 (1982).

71. "The First Casualty," The Nation, May 15, 1982.

72. "Somali Self-Determination in the Horn: Legal Perspectives and Implications for Social and Political Engineering," in (I.M. Lewis, ed.) Nationalism and Self-Determination on the Horn of Africa 151 (1983).

73. "Jeffrey Edwin Rockwell," 9 Brooklyn Journal of International Law 1 (1983).

74. "The Individual Under African Law in Comprehensive Context" in The Individual Under African Law 9 (Takirambudde, ed. 1983).

75. "Toward a General Theory About African Law, Social Change and Development" in The Individual Under African Law, 83 (Takirambudde, ed. 1983).

76. "Looking, Staring and Glaring: Microlegal Systems and World Public Order" (The McDougal Lecture, University of Denver, 1982), 12 Denver Journal of International Law and Policy 165 (1983).

77. "The Tormented Conscience: Applying and Appraising Unauthorized Coercion," 32 Emory Law Journal 499 (1983).

78. "The Struggle for The Falklands," 93 Yale Law Journal 287 (1983).

79. "Intervention Treaties in International Law" in Adeniran & Alexander, International Violence (1983).

80. "The World Power Process of Effective Power: The Global War System" (with Myres S. McDougal and Andrew R. Willard), (McDougal & Reisman, eds.) Power and Policy in Quest of Law (Martinus Nijhoff, 1985).

81. "International Law in Policy-Oriented Perspective" (with Myres S. McDougal) in Macdonald & Johnston, The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory 103 (Martinus Nijhoff, 1983).

82. "Coercion and Self-Determination: Construing Article 2(4)," 78 American Journal of International Law 642 (1984).

83. "Reporting the Facts As They Are Not Known: Media Responsibility in Concealed Human Rights Violations," 78 American Journal of International Law 650 (1984).

84. "The United Nations Charter and The Use of Force: Is Article 2(4) Still Workable?" Proceedings of the American Society of International Law 68 (1984).

85. "Nuclear Weapons in International Law," 4 New York Law School Journal of International and Comparative Law 339 (1973); reprinted, in slightly amended form, under title of "Deterrence and International Law" in Nuclear Weapons and Law 129 (Miller & Feinrider, eds. 1984).

86. "Bad Politics Makes Bad Law: Reflections on the Politicization of the International Court," forthcoming in John Bassett Moore Society, The Nicaraguan Case (1985).

87. "Teaching International Law in The '80s," 31 Yale Law Report 29 (Spring, 1985); reprinted in 20 International Lawyer 987-95 (Summer, 1986).

88. "International Incidents: Introduction to a New Genre in the Study of International Law," 10 Yale Journal of International Law 1 (1984).

89. "Criteria for the Lawful Use of Force in International Law," 10 Yale Journal of International Law 279 (1985).

90. "Jurisdiction in Human Rights Cases: Is the Tel-Oren Case a Step Backward?" Proceedings of the American Society of International Law 361 (1985).

91. "The Utility of McDougal's Jurisprudence," Proceedings of the American Society of International Law 273 (1985).

92. Comments on "Problems of the Law of Armed Conflict in Lebanon," Proceedings of the American Society of International Law, Panel on Humanitarian Law 236-39 (1983).

93. "Has the International Court Exceeded Its Jurisdiction?" 80 American Journal of International Law 128 (1986).

94. "Termination of the United States Declaration Under Article 36(2) of the Statute of the International Court," published by the University of Virginia Press in a collection entitled The United States and the Compulsory Jurisdiction of the International Court of Justice 71-106 (ed. A.C. Arend, 1986).

95. "Lining Up: The Microlegal System of Queues," 54 University of Cincinnati Law Review 417 (1985).

96. "Should We Just Write Off Hostages?," New York Times, December 3, 1986, p. 31, op. ed.

97. "The Other Shoe Falls: The Future of Article 36(1) Jurisdiction in the Light of Nicaragua." 81 American Journal of International Law 168 (1987).

98. "U.S. Gain From an Iranian Victory," Wall Street Journal, February 19, 1987, p. 26, op. ed.

99. "Jurisdiction in Human Rights Cases," 79 Proceedings of the American Society of International Law 368 (1985).

100. Foreword to Khosla: "Myth and Reality of the Protection of Civil Rights Law: A Case Study of Untouchability in Rural India" (with Myres S. McDougal, 1987).

101. "Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs," 72 Iowa Law Review 391 (1987).

102. "The Cult of Custom in the Late 20th Century," 17 California Western International Law Journal 133 (1987).

103. "Designing Curricula: Making Legal Education Continuously Effective and Relevant for the 21st Century," 17Cumberland Law Review 831 (1986-1987); Reprinted as "El Diseño del Plan de Estudios: Para que la Enseñanza del Derecho Continúe Siendo Efectiva y Relevante en el Siglo XXI" in La Enseñanza del Derecho y el Ejercicio de la Abogacia (Martin F. Böhmer, Ed.) Biblioteca Yale de Estudios Jurídicos, pp. 105-128 (1999).

104. "America Sails Into Difficult Gulf Straits While Losing Track of Its Own Interests," Los

Angeles Times, August 2, 1987, op. ed.

105. "Kuwait Takes Advantage of U.S. Paranoia About Soviet Expansion," Hartford Courant, August 4, 1987. op. ed.

106. Editorial Comment: "The Resistance in Afghanistan is Engaged in a War of National Liberation," 81 American Journal of International Law 906 (1987).

107. "The Formulation of General International Law: How is it Generated? How is the Existence of its Norms Ascertained?" 2 American University Journal of International Law and Policy 448-54, 455, 457-58, 460 (1987).

108. "Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice," 13 Yale Journal of International Law 171 (1988).

109. "Closing P.L.O. Office Strikes at Free Speech," New York Times, March 16, 1988, op. ed.

110. "Even Though Defeated, Soviets Emerged Victor of Afghanistan War," Hartford Courant, April 24, 1988, op. ed.

111. "Genocide and the Soviet Occupation of Afghanistan," 1 The ISG Newsletter (with Charles H. Norchi, (Spring, 1988).

112. "Flashy, Shoddy Journalism Undermines Democracy," Hartford Courant, June 8, 1988, op. ed.

113. "Preliminary Notes for Discussion on the Establishment of a World-Museum," World Academy of Art and Sciences News June, 1988.

114. "Silent World Fuels Growth of Chemical Arsenals," Los Angeles Times, August 24, 1988, op. ed.

115. "The World Community: A Planetary Social Process," 21 University of California at Davis Law Review 807 (with Myres S. McDougal and Andrew R. Willard, Spring, 1988).

116. "Accord on Embassy Espionage Would Ease U.S.-Soviet Tensions," New Haven Register, September 11, 1988, op. ed.

117. "Which Law Applies to the Afghan Conflict?" 82 American Journal of International Law 459 (with James Silk, 1988).

118. "American Human Rights Diplomacy: The Next Phase," 28 Virginia Journal of International Law (Summer, 1988).

119. "Preliminary Notes for Discussion on the Establishment of a World-Museum," Part II World Academy of Art and Sciences News November, 1988.

120. "Rapping and Talking to the Boss: The Microlegal System of Two People Talking," Conflict and Integration: Comparative Law in the World Today Chuo University, 1988.

121. "A Hard Look at Soft Law," Proceedings of the 82nd Annual Meeting of the American Society of International Law 373 (1988).

122. "Straight Baselines in International Law: A Call for Reconsideration," Proceedings of the 82nd Annual Meeting of the American Society of International Law 260 (1988).

123. "Harnessing International Law to Restrain and Recapture Indigenous Spoliations, 83:1 American Journal of International Law 56 (January, 1989).

124. "Respecting One's Own Jurisprudence: A Plea to the International Court of Justice," 83:2 American Journal of International Law 312 (April, 1989).

125. "Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations," 10:1 Michigan Journal of International Law 231 (Winter, 1989).

126. "Holy Alliance Would Censor Civilization's Symbols -- and its Dynamism," The Hartford Courant, Sunday, April 23, 1989.

127. "No Man's Land: International Legal Regulation of Coercive Responses to Protracted and Low Level Conflict," 11:2 Houston Journal of International Law 317 (Spring, 1989).

128. "The Arafat Visa Affair: Exceeding the Bounds of Host-State Discretion," 83:5 American Journal of International Law 519 (July, 1989).

129. "An International Farce: The Sad Case of the PLO Mission," 14:2 Yale Journal of International Law 412 (1989).

130. "Apartheid's Death: Reports are Greatly Exaggerated," The Los Angeles Times, Wednesday, September 6, 1989.

131. "War Powers: The Operational Code of Competence," 83:4 American Journal of International Law 777 (October, 1989);
reprinted in Foreign Affairs and the U.S. Constitution (L. Henkin, M. Glennon & W. Rogers, eds.) 68 (1990).

132. "The New International Holy Alliance and the Struggle to Appropriate and Censor General Cultural Symbols," Proceedings of the 83rd Annual Meeting of the American Society of International Law, 260 (1989); reprinted as "Who Controls Our Symbols?" in Yale Law Report (Spring, 1990).

133. Panel on "Chemical Warfare," Proceedings of the 83rd Annual Meeting of the American Society of International Law, 455 (1989).

134. "The Breakdown of the Control Mechanism in ICSID Arbitration," 1989:4 Duke Law Journal 739 (1990).

135. "International Law after the Cold War," 84:4 American Journal of International Law 859 (1990).

136. "Sovereignty and Human Rights in Contemporary International Law," 84:4 American Journal of International Law 866 (1990).

137. "Necessary and Proper: Executive Competence to Interpret Treaties," 15:2 Yale Journal of International Law 317 (1990).

138. "Governments-in-Exile: Notes Toward a Theory of Formation and Operation," in Governments-in-Exile in Contemporary World Politics (Shain ed.) (1990).

139. "Some Lessons From Iraq: International Law and Democratic Politics," 16:1 Yale Journal of International Law 203 (1991).

140. "Theory About Law: The New Haven School of Jurisprudence," Institute for Advanced Study, Berlin, Yearbook 1989/90 (1991).

141. "Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects," in Law and Force in the New International Order (Damrosch & Scheffer eds.) (1991).

142. Panel on Application of Humanitarian Law in Non-International Armed Conflicts, 85 ASIL Proceedings 83, 85 (1991).

143. "Double Standards 'Guide' the Vote," Los Angeles Times (Jan. 17, 1992); reprinted as "Human Rights in Taiwan," in The 1991 National Assembly Election in Taiwan: Reports by Observers from the United States of America (1992).

144. "National Reports: United States of America," (with William Araiza) in International Law of Export Control, Jurisdictional Issues (Karl M. Meessen, ed.) 163 (1992).

145. "Systemic Costs of Non-Compliance with International Law -- Effects on the System and on Interstate Relations," ASIL/NVIR Proceedings, 1991 (The Hague).

146. "Repairing ICSID's Control System: Some Comments on Aron Broches' 'Observations on the Finality of ICSID Awards,'" 7:1 ICSID Review, Foreign Investment Law Journal 196 (Spring, 1992).

147. "Some Reflections on International Law and Assassination Under the Schmitt Formula," 17:2 Yale Journal of Int'l Law 687 (Summer, 1992).

148. "My Self-Determination, Your Extinction," Los Angeles Times (Aug. 12, 1992); also appeared as "Too Bad If My Self-Determination Destroys You," International Herald Tribune (Aug. 14, 1992); also appeared as "Wenn aus Freiheit Vertreibung folgt" in Die Zeit (Nov. 6, 1992).

149. "With Help, U.S. Can Avoid New Quagmires," The Atlanta Journal, The Atlanta Constitution (Dec. 27, 1992).

150. "International Election Observation," 4 Pace University Yearbook of International Law 1 (1992).

151. "The Concept and Functions of Soft Law in International Politics," in Essays in honour of Judge Taslim Olawale Elias (Volume I Contemporary International Law and Human Rights), edited by Professor Emmanuel G. Bello and Prince Bola A. Ajibola, SAN, 135 (1992).

152. "New Scenarios of Threats to International Peace and Security: Developing Legal Capacities for Adequate Responses," Proceedings of an International Symposium of the Kiel Institute of International Law 13 (1993).

153. "The View from the New Haven School of International Law," 86 American Society of International Law Proceedings 118-125 (1992).

154. Sovereignty Panel, Remarks on Symposium on Low-Intensity Conflict, Naval War College (forthcoming).

155. "Humanitarian Intervention and the Protection of New Democracies," American Bar Association Standing Committee on Law and National Security and the Center for National Security Law at the University of Virginia (Oct. 1992, forthcoming).

156. "Hachlata Mishpatit Ki-hachra-ah Chevratit" ("Legal Decision as Social Choice,") University of Tel-Aviv, 18:3 Eyunei Ha-Mishpat 611 (1994).

157. "Obviating Affirmative Action," 39:2 Yale Law Report (Spring 1993) reprinted in 1 Discrimination and The Law in South Africa, 256 (C. Heyns ed., 1994).

158. "The Constitutional Crisis in the United Nations," 87:1 AJIL 83 (1993), reprinted in "The Development of the Role of the Security Council, Workshop 1992" Hague Academy of International Law (Nijhoff, 1993).

159. "The Constitutional Court and the Independence of the Judiciary," in Hungarian Constitutional Reform and the Rule of Law (D.T. Fox & A. Bonime-Blanc, eds. 1993).

160. "Peacemaking," 18:1 Yale Journal of International Law 415 (Winter 1993).

161. "Preparing to Wage Peace: Toward the Creation of an International Peacemaking Command and Staff College," 88:1 American Journal of International Law 76 (January, 1994).

162. "Autonomy, Interdependence and Responsibility," Comments on Weyrauch & Bell, "Autonomous Lawmaking: The Case of the "Gypsies," 103:2 Yale Law Journal 401 (1993).

163. "Control Mechanisms in International Dispute Resolution," 2 United States-Mexico Law Journal 129 (1994).

164. "Moving International Law From Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict (with W. Lietzau) vol. 64 International Law Studies 1991, The Law of Naval Operations (H.B. Robertson, Jr. ed.).

165. "Critical Choices," paper prepared for "The Push of Science and Technology, The Pull of Cultural Diversity and Human Values," conference co-sponsored by The World Academy of Art and Science, Georgetown University, April 4, 1993.

166. "The Raid on Baghdad: Some Reflections on its Lawfulness and Implications," 5:1 European Journal of International Law 120 (1994).

167. "Fact-Finding Initiatives for the Inter-American Court of Human Rights," Commemorative Edition of the 15th Anniversary of the Inter-American Court of Human Rights, San José, Costa Rica (Nov. 1994).

168. Introductory Remarks, Symposium: Constitutionalism in the Post-Cold War World, 19 Yale J. Int'l L. 189, 191 (1994).

169. "A Place For 'All the Rest of Us': Reinventing the General Assembly," Proceedings XXIII Annual Conference, Canadian Council on Int'l Law, 33 (October, 1994).

170. "The Structural Imperatives of DRMs: Some Hypotheses and Their Applications," ABA Committee on Int'l Trade Law and Canadian Law "Int'l Dispute Resolution After NAFTA," April, 1994, reprinted as "Contextual Imperatives of Dispute Resolution Mechanisms — Some Hypotheses and Their Applications in the Uruguay Round and NAFTA," 29:3 Journal of World Trade 5 (June, 1995) (with Mark Wiedman).

171. "The Inter-American Commission on Human Rights," Conference on the Inter-American Human Rights System: Defending Human Rights, 1959-1994, Regional Meeting of the Am. Soc'y of Int'l Law, Am. Univ. (April, 1994).

172. "Amending the Charter: The Art of the Feasible," Annual Meeting of the Am. Soc'y of Int'l Law

173. "Reflections on the Problem of Individual Responsibility for Violations of Human Rights,"

174. "Protecting Indigenous Rights in International Adjudication," 89:2 American Journal of Int'l Law 350 (1995).

175. "Haiti and the Validity of International Action," 89:1 AJIL 82 (1995).

176. "Humanitarian Intervention and Fledgling Democracies," 18:3 Fordham International Law Jnl. 794 (1995).

177. "Covert Action," 20:2 Yale Journal of International Law 419 (Summer, 1995) (remarks at the International Studies Association Annual Meeting, Intelligence Section, Washington, D.C. March 29, 1994).

178. "A Jurisprudence from the Perspective of the "Political Superior", Harold J. Siebenthaler Lecture, 23:3 Northern Kentucky Law Review 605 (1996).

179. "Creating, Adapting and Designing Dispute Resolution Mechanisms for the International Protection of Human Rights," Conference on the Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution, Proceedings of a Forum Co-Sponsored by the American Soc'y of Int'l Law and the Graduate Institute of Int'l Studies, Geneva, Switzerland, May 13, 1995, ASIL Bulletin No. 9.

180. "Practical Matters for Consideration in the Establishment of a Regional Human Rights Mechanism: Lessons from the Inter-American Experience," 1 Saint Louis-Warsaw Transatlantic Law Journal 89 (1995).

181. "Institutions and Practices for Restoring and Maintaining Public Order," 6:1 Duke J. of

Comparative & Int'l Law 175 (1995).

182. "Designing Law Curricula for a Transnational Industrial and Science Based Civilization," ABA Section on Legal Education, Aug. 5, 1995, 46:3 Journal of Legal Education 1 (1996).

183. "Assessing the Lawfulness of Non-military Enforcement: The Case of Economic Sanctions," Proceedings of the 89th Annual Mtg. of ASIL 350 (1996).

184. "Tilting at Reality," 74:6 Texas Law Review 1261 (May 1996).

185. "Human Rights Workers as Internationally Protected Persons," in The Living Law of Nations: Essays on Refugees, Minorities, Indigenous Peoples and the Human Rights of Other Vulnerable Groups in Memory of Atle-Grahl Madsen (Alfredsson & MacAlister-Smith, eds.) 391 (1996).

186. "On Africa, No Attractive Options for the World," The International Herald Tribune, Nov. 23-24, 1996, p. 8.

187. "International Law and the Inner Worlds of Others," 9:1 St. Thomas Law Review 25 (1996).

188. "When Are Economic Sanctions Effective? Selected Theorems and Corollaries," 2:3 ILSA Journal of International & Comparative Law 587 (Summer 1996).

189. "El Control y Vigilancia de Guardianes Corruptos: ¿Reformas Eficaces o Simples 'Cruzadas' de Distracción?," Universidad de Los Andes Facultad de Derecho, 7 Revista de Derecho Público (Febrero de 1997).

190. "Redesigning the United Nations," 1 Singapore Jnl. of Int'l & Comp. Law 1 (1997).

191. "The Political Consequences of the *Nuclear Weapons* Opinion," Symposium on Changing Structure of International Law Revisited (Paris), forthcoming in European Journal of International Law.

192. "Toward a Normative Theory of Differential Responsibility for International Security Functions: Responsibilities of Major Powers," in Japan and International Law Past, Present and Future: International Symposium to Mark the Centenary of the Japanese Association of International Law (Nisuke Ando, ed.,), Kluwer Law International, page 43 (1999).

193. "Legal Responses to Genocide and Other Massive Violations of Human Rights," prepared for delivery at the Meeting of Experts on "Reining in Impunity for International Crimes and Serious Violations of Human Rights," U.S. Holocaust Memorial Museum, April 13,

1997.

194. "Myres S. McDougal: Architect of a Jurisprudence for a Free Society," 66 Mississippi Law Journal 15 (1997).

195. "The Lessons of Qana," 22:2 Yale Jnl of Int'l Law 381 (Summer 1997).

196. "Legal Responses to Genocide and Other Massive Violations of Human Rights," 59:4 Law and Contemporary Problems, Duke University 75 (Autumn, 1996).

197. "The Sea Change from Caution to Openness," in The Enduring Importance for a Free Press of Article 19, Universal Declaration of Human Rights 35 (w/ Ralph Wilde, 1998).

198. "Designing and Managing the Future of the State," 8:3 European Journal of International Law 409 (1997).

199. "International Human Rights Law Bearing on Individual and Group Rights," Fiji Constitution Review Commission Research Papers, vol. 2 181 (1997).

200. "Hollow Victory: Humanitarian Intervention and Protection of Minorities," Proceedings of the American Soc'y of Int'l Law 431 (April, 1997).

201. "The Quest for an International Liability Regime for the Protection of the Global Commons," in International Law: Theory and Practice: Essays in Honour of Eric Suy (with M.H. Arsanjani) 469 (1998).

202. "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes," (with Douglas Stevick) 9 European Journal of Int'l Law 86-141 (1998).

203. "Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics," 6 Tulane J. of Int'l & Comp. Law 5 (1998).

204. "Freedom of Speech as a Matter Fundamental to All Human Rights. Why and What For?," Friedrich-Naumann-Stiftung 79 (Aug. 1998).

205. "A Policy Science Approach for Designing the Future of Taiwan," 1 New Century Think Tank Forum, 80-85 (1998) (in Taiwanese).

206. "Myres Smith McDougal (1906-1998)," 92:4 American Journal of International Law 729 (1998) (with R. Falk, R. Higgins and B. Weston).

207. "The Facts," (*Breard* case) 92:4 American Journal of International Law 666 (1998) (with J.

Charney).

208. "A World Contest for Teaching Phonetic Universality," in Toward Comparative Law in the 21st Century, Institute of Comparative Law in Japan, Chuo University (1998).

209. "Private International Declaration Initiatives," in La Déclaration Universelle des droits de l'homme 1948-98 Avenir d'un idéal commun Actes du colloque des 14, 15 et 16 septembre 1998 à la Sorbonne, 79 La Documentation Française, Paris (1999)

210. "Developments in International Criminal Law," (Forward) 93:1 American Journal of International Law 1 (1999) (with J. Charney).

211. "Tributes: Myres S. McDougal, Theory About Law: Jurisprudence for a Free Society," 108:5 The Yale Law Journal 935 (1999).

212. "Compensation for Human Rights Violations: The Practice of the Past Decade in the Americas," State Responsibility and the Individual - Reparation in Instances of Grave Violations of Human Rights, 63 Kluwer Law International (1999).

213. "The Political Consequences of the General Assembly Advisory Opinion," International Law, the International Court of Justice and Nuclear Weapons, 473 Cambridge University Press (1999).

214. "The Government of the State of Eritrea and the Government of the Republic of Yemen Award of the Arbitral Tribunal in the First Stage of the Proceedings," 93:3 American Journal of International Law, p. 668 (July 1999).

215. "Towards a Normative Theory of Differential Responsibility for International Security Functions: Responsibilities of Major Powers," Japan and International Law Past, Present and Future, (International Symposium to Mark the Centennial of the Japanese Association of International Law) 43 Kluwer Law International (1999).

216. "The United States and International Institutions," 41:4 Survival, The IISS Quarterly, 62 (November 1999).

217. "Kosovo's Antinomies" 93:4 American Journal of International Law 860 (1999).

218. "International Legal Responses to Terrorism" 22:1 Houston Journal of International Law 3 (1999).

219. "Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention" in 11:1 European Journal of International Law 3 (March 2000).

220. "Sovereignty and Human Rights in Contemporary International Law" in Democratic Governance and International Law 239, Cambridge University Press (2000).

221. "The Incident at Cavalese and Strategic Compensation" with Robert D. Sloane in 94:3 American Journal of International Law 505 (July 2000).

222. "Procedures for Resolving the Kosovo Problem" with Monica Hakimi and Robert Sloane, in <http://www.unausa.org/issues/kosovo/rome/reisman.htm>.

223. "Designing Curricula: Making Legal Education Effective in the 21st Century", in The Singapore Conference: Leading the Law and Lawyers into the New Millennium @ 2020, 271 Butterworths (2000).

224. "The Vision and Mission of *The Yale Journal of International Law*", in 25:2 Yale J. Int'l L. 263 (Summer 2000).

225. "How to Make Pirates into Law-abiding Citizens: Free and Fair Radio and Free and Fair Elections in Taiwan", in Freedom of the Press and The Mass Media, 87 (2000).

226. "Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)" in 94:4 American Journal of International Law 721 (October 2000).

227. "The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of Its Threshold" in Essays in Honor of Ibrahim F.I. Shihata,15:2 ICSID Review Foreign Investment Law Journal 362 (Fall 2000); also printed in Liber Amicorum Ibrahim F.I.Shihata, Kluwer Law International (2001).

228. "Scenarios of Implementation of the Statute of the International Criminal Court" in "The Rome Statute of the International Criminal Court: A Challenge to Impunity," edited by Mauro Politi and Giuseppe Nesi 281 (2001).

229. "A New Haven School Look at Sanctions" in "Does Method Matter?" ASIL Proceedings (2001).

230. "In Defense of World Public Order" in 95:4 American Journal of International Law 833 (2001).

231. "Congratulation Letter" in Volume 1: Peking University International and Comparative Law Review, January 8, 2002.

232. "Judge Shigeru Oda: Reflections on the Formation of a Judge" in a Festschrift in Honor of Judge Shigeru Oda, Liber Amicorum Judge Shigeru Oda, 57-73, N. Ando et al (eds.)

(2002).

233. "Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions," 35 Vanderbilt Journal of Transnational Law 729 (2002).

234. "International Arbitration and Sovereignty," 18:3 Arbitration International 231 (2002).

235. "Introduction to Proceedings" in "The Definition of Aggression and the ICC" ASIL Proceedings 181 (2002).

236. "2001 Hugo Black Lecture: Illusion and Reality in the Compensation of Victims of International Terrorism," (with Monica Hakimi) 54:2 Alabama Law Review (2003).

237. "Jonathan I. Charney: An Appreciation," 36:1 Vanderbilt Journal of Transnational Law (January 2003).

238. "Assessing Claims to Revise the Laws of War," 97:1 American Journal of International Law, 82 (January 2003).

239. "Preemptive Force: When Can It Be Used? Implications for Iraq and North Korea," Volumes XI and XII, Foreign Policy Forum, 195 (2002).

240. "Aftershocks: Reflections on the Implications of September 11," Vol. 6 Yale Human Rights & Development Law Journal 81 (2003).

241. "The Use of Friendly Settlements in the Inter-American Human Rights System"(with Susan Benesch) in a Festschrift in Honor of Antonio Cassese, "Man's Inhumanity to Man," L.C. Vohrah et al (eds.), 741-770 (2003).

242. "Judge Shigeru Oda: A Tribute to an International Treasure," Leiden Journal of International Law, 16 (2003), pp.57-65.

243. "Self Defense in an Age of Terrorism," ASIL Proceedings, 142 (2003).

244. "Free Association: The United States Experience" (with Chimène I. Keitner), 39:1 Texas International Law Journal 1 (Fall 2003).

245. "Learning to Deal with Rejection: The International Criminal Court and the United States," 2 Journal of International Criminal Justice, 17-18 (2004).

246. "Comments on the Presentations by Nico Krisch and Carsten Stahn" in "Terrorism as a Challenge for National and International Law: Security Versus Liberty?" Walter, Vöneky, Röben, Schorkopf (eds.) P.909 (2004) Max Planck Institute.

247. The Manley O. Hudson Lecture "Why Regime Change is (Almost Always) a Bad Idea," 98 American Journal of International Law 516 (2004) and also in ASIL Proceedings 290 (2004).

248. Memorial Remarks in "Eugene V. Rostow 1913-2002" in Memorial Volume published at Yale Law School at page 34 (2004).

249. "Indirect Expropriation and its Valuation in the BIT Generation," (with Robert D. Sloane), 74 The British Year Book of International Law 2003 115 (2004).

250. "Rasul v. Bush: A Failure to Apply International Law," 2 Journal of International Criminal Justice 973 (2004).

251. "The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application," in Developments of International Law in Treaty Making (R. Wolfrum & V. Röben (eds.) Max-Planck-Institut für ausländisches öffentliches Recht and Vöolkerrecht, page 15 (2005); reprinted in 2:3 Transnational Dispute Management ( ) (June 2005).

252. "Unilateral Action in an Imperfect World Order," in 8 Austrian Review of International and European Law 163 (2003) and in Multilateralism v. Unilateralism: Policy Choices in a Global Society (J.B. Attanasio and J.J. Norton eds., 2004).

253. "The Law-in-Action of the International Criminal Court," in 99:2 American Journal of International Law 385 (April, 2005) (with Mahnoush H. Arsanjani).

254. "On Paying the Piper: Financial Responsibility for Security Council Referrals to the International Criminal Court," in 99:3 American Journal of International Law 615 (July, 2005).

255. "The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes," in 19:2 ICSID Review 328 (Fall 2004) (with Mahnoush H. Arsanjani).

256. "Expanding the Security Council: Much Ado," in JURIST on (August 7, 2005) http://jurist.law.pitt.edu/forumy/2005/08/expanding-un-security-council-much-ado.php (last checked October 7, 2005) and in 36:3 Security Dialogue 373-374 (September 2005).

257. "A Judge's Judge: Justice Florentino P. Feliciano's Philosophy of the Judicial Function," in Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano (Charnovitz, Steger and Van den Bossche, editors) at page 3 (2005).

258. "The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes," (with Mahnoush H. Arsanjani) in Common Values in International Law: Essays in Honour of Christian Tomuschat (Pierre-Marie Dupuy, Bardo Fassbender,

Malcolm N. Shaw, Karl-Peter Sommermann, editors) at page 409 (2006).

259. Foreword in Tai-Heng Cheng's "State Succession and Commercial Obligations," page ix (2006).

260. Foreword in Elli Louka's "International Environmental Law: Fairness, Effectiveness, and World Order," page xi (2006).

261. "The Past and Future of the Claim of Preemptive Self-Defense," (with Andrea Armstrong) in 100:3 American Journal of International Law 525 (July 2006); also in ASIL A Century of International Law: American Journal of International Law Centennial Essays 1906-2006, p. 189 (2007).

262. "Holding the Center of the Law of Armed Conflict," in 100:4 American Journal of International Law 852 (October 2006).

263. "The Shadows Looming over International Law," in 6 Baltic Yearbook of International Law 7-25 (2006).

264. "No Exit? A Preliminary Examination of the Legal Consequences of United States' Notification of Withdrawal From the Optional Protocol to the Vienna Convention on Consular Relations," (with Mahnoush H. Arsanjani) in Promoting Justice, Human Rights and Conflict Resolution Through International Law / La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international (Liber Amicorum Lucius Caflisch), Marcelo G. Kohen (ed.), 897-926 (2007).

265. "What is the Current Value of Signing a Treaty?" (with Mahnoush H. Arsanjani) in Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber, (S. Breitenmoser, B. Ehrenzeller, M. Sassòli, W. Stoffel, and B. Wagner Pfeifer (eds.)), 1491 (2007).

266. "The New Haven School: A Brief Introduction" (with Siegfried Wiessner and Andrew R. Willard) in 32:2 Yale Journal of International Law 575 (2007).

267. "Reflections on Economic Development, National Sovereignty and International Arbitration,"in xvii Arbitraje Internacional: Tensiones Actuales (Fernando Mantilla-Serrano, Coordinator for Comité Colombiano de Arbitraje) (2007).

268. "Claims to Pre-emptive Uses of Force: Some Trends and Projections and Their Implications for World Order," (with Andrea Armstrong) in International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein (M.N. Schmitt and J. Pejic (eds.)), 79 (2007).

269. "Some Reflections on the Effect of Artisanal Fishing on Maritime Boundary

Delimitation," (with Mahnoush H. Arsanjani) in Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah (Ndiaye and Wolfrum (eds.)), 629-665 (2007).

270. "Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration," in International Arbitration 2006: Back to Basics?" (ICCA Congress Series No. 13), (van den Berg (gen. ed.)), p. 849 (2007).

271. "The Evolving International Standard and Sovereignty" in 101 ASIL Proceedings, p. 462-465 (2007).

272. Preface in "The Historical Foundations of World Order: The Tower and The Arena" by Douglas M. Johnston, page vii (2008).

273. "The International Criminal Court and the Congo: From Theory to Reality," in The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni (with Mahnoush H. Arsanjani) (Sadat and Scharf (eds.)), page 325 (2008).

274. "On the Causes of Uncertainty and Volatility in International Law" in The Shifting Allocation of Authority in International Law: Considering, Sovereignty, Supremacy and Subsidiarity: Essays in Honour of Professor Ruth Lapidoth, (Broude and Shany (eds.)), page 33 (2008).

275. "Development and Nation-Building: A Framework for Policy-Oriented Inquiry" 60:2 Maine Law Review 309 (2008).

276. "Acting *Before* Victims Become Victims: Preventing and Arresting Mass Murder" 40:1&2 Case Western Reserve Journal of International Law 57 (2008).

277. "Nullity in International Law," (with Dirk Pulkowski) in Max Planck Encyclopedia of Public International Law (www.mpepil.com) (2009).

278. "The Provisional Application of the Energy Charter Treaty," in Investment Protection and the Energy Charter Treaty, (Coop and Ribeiro (eds.)), page 47 (2008).

Forthcoming Articles

1. "The Future of Peace-keeping: Some Thoughts on the Prospects for the Lawful Use of the Military Instrument in Defense of World Order," to appear in German and to be published in Sicherheit und Stabilität (Security and Stability).

2. Contribution on Myres S. McDougal to the Yale Biographical Dictionary of American Law.

3. Preface in a forthcoming book edited by Emmanuel Gaillard and Domenico Di Pietro entitled "Enforcement of Arbitration Agreements and International Arbitral Awards - The New York Convention 1958 I n Practice."

Book Reviews

1. Review of Schelling, Arms and Influence, 61 American Journal of International Law 625 (1967).

2. Book Review: Fact-finding in the Maintenance of International Peace, by William I. Shore (Dobbs Ferry, New York, 1970). 65 American Political Science Review 1256-57 December 7, 1971.

3. Book Review: East Pakistan--A Post-Mortem, 64 American Journal of International Law (1974).

4. Book Review: Hungdah Chu (ed.), China and the Question of Taiwan, (1973), 69 American Journal of International Law 207-209, 1975.

5. Book Review: Pierre-Marie Martin, Le Conflit Israelo-Arabe. Recherches sur l'Emploi de la Force en Droit International Public Positif" (1973), 70 American Journal of International Law 197 (1976).

6. Book Review: Smith (ed.), From War to Peace: Essays in Peacemaking and War Termination (1974), 70 American Journal of International Law 196 (1976).

7. Book Review: Hull, The Irish Triangle: Conflict in Northern Ireland (1976) and Rose, Northern Ireland: Time of Choice (1976), 71 American Journal of International Law 375 (1977).

8. Review of Yearbook of World Problems and Human Potential (1976) in 71 American

Journal of International Law 832 (1977).

9. Book Review: Preservacion del Medio Ambiente Marino, edited by Francisco Orrego-Vicuña, 72 American Journal of International Law 447 (1978).

10. Book Review: P.J. Kuyper, The Implementation of International Sanctions: The Netherlands and Rhodesia (1978), 73 American Journal of International Law 720 (1979).

11. "Bosses and the Law: Caudillism and Formalism," Review of Rogelio Perez Perdomo, El formalismo juridico y sus funciones sociales en el siglo XIX Venezolano (1978) in 29 American Journal of Comparative Law 727 (1981).

12. Review of Cabranes, Citizenship and The American Empire (1979), 28 American Journal of Comparative Law 358 (1980).

13. Book Review: Young, Compliance and Public Authority, 76 American Journal of International Law 868 (1982).

14. Book Review: Morrison. The Dynamics of Development on the European Human Rights Convention, 77 American Journal of International Law 345 (1983).

15. Book Review: Steinberg. Satellite Reconnaisance. 78 American Journal of International Law 516 (1984).

16. Book Review: (Bernhardt, ed.) Encyclopedia of Public International Law. 78 American Journal of International Law 503 (1984).

17. Book Review: Willis, Prologue to Nuremberg, 79 American Journal of International Law 200 (1985).

18. Book Review: Zoller, Peacetime Unilateral Remedies, 79 American Journal of International Law 1083 (1985).

19. Book Review: Craig, Park & Paulsson, International Chamber of Commerce Arbitration, 80 American Journal of International Law 268 (1986).

20. Book Review: Kratochwil, Rohrlich and Mahajan, Peace and Disputed Sovereignty: Reflections of Conflict Over Territory, 81 American Journal of International Law, 306 (1987).

21. Book Review: Encyclopedia of Public International Law, Instalment 7. 81 American Journal of International Law, 263 (1987).

22. Book Review: Encyclopedia of Public International Law, Instalment 9, International Relations and Legal Cooperation in General: Diplomacy and Consular Relations, 85:1 American Journal of International Law 205 (1991).

23. Book Review: Encyclopedia of Public International Law, Instalment 10, International Relations and Legal Cooperation in General: Diplomacy and Consular Relations, 85:1 American Journal of International Law 207 (1991).

24. Book Review: Lassa Oppenheim's Nine Lives: Oppenheim's International Law (edited by Sir Robert Jennings and Sir Arthur Watts) Volume I, PEACE, Introduction and Parts 1-4, Ninth Edition, 1992, 19:1 Yale Journal of International Law 255 (1994).

25. Book Review: Metamorphoses: Judge Shigeru Oda and the International Court of Justice in Canadian Yearbook of International Law, 185 (1995).

26. Book Review: The Inter-American Human Rights System in 92 American Journal of Int'l Law 784 (1998).