

INTERNATIONAL INVESTMENT LAW
AND ARBITRATION:

Leading Cases from the ICSID, NAFTA,
Bilateral Treaties and Customary
International Law

*Edited by
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CAMERON
MAY
INTERNATIONAL LAW & POLICY

21. Ghosts of Chorzów
Maha Nuñez-Schultz v. Republic of the Americas

Jan Paulsson

In the Supreme Court of the Americas,

Decision Rendered: 18 February 2254

(Chung, CJ; Buenavista, Patel, Handy, and Al-Rumaihi, JJ).

This action is brought under a certain international treaty known as the *America-Europe Protocol on Investment* of 2231. The claimant seeks compensation for the alleged expropriation of her property under Article 7 of that Protocol, which provides:

“The investments of the nationals of one State in the territory of the other State may not be expropriated, or otherwise treated by the latter State in a manner the effects of which are tantamount to those of an expropriation, unless it is carried out for a public purpose, without discrimination, and with the payment of prompt, adequate and effective compensation in accordance with the standards of customary international law.”

The facts appear sufficiently in the opinion of the Chief Justice.

Chung, Chief Justice. The facts of this case are simple, but their legal consequences give rise to distressingly awkward divergences. Maha Nuñez-Schultz, a national of the Republic of Europe and a member of the illustrious banking family whose name she bears, purchased a vast tract of land in the Province of Belize 18 years ago for the sum of A\$300 million. It must be said that the tract comprised no less than 8 hectares of land, with nearly 120 m of beachfront. Since then she has sought to realise a project involving the construction of 2,500 exclusive luxury residences in low-rise buildings designed to respect a self-imposed limit of 63 floors.

No building has yet been erected on the site, but Nuñez-Schultz has put forward evidence that she has spent A\$5 million – in addition to the original purchase price – on engineering, architectural studies, and pre-procurement. This proof is not challenged, as such, by the Republic.

From the beginning Nuñez-Schultz encountered vigorous opposition from environmental groups. It appears that the tract abuts the habitat (known archaically as a "ranch") of a singular troop of bovines which includes a number of exotic cows – the last in the Western hemisphere – known as "bulls." These outlandish animals are much larger than other cows, but are perfectly useless as they are wholly incapable of lactating. It appears that they were once important in the reproductive cycle of cows, although how this could be true, given their exceptionally primitive cerebral functions, is lost in the mysteries of time. With the introduction of the Anti-Carnivore Laws more than one century ago, needless to say, the replication of such an energy-inefficient curiosity became pointless. Yet there remain aficionados of this beast, and the effort to save the three remaining "Bulls of Belize" has generated significant popular support. The proposition advanced to oppose the Nuñez-Schultz project was that it would make it impossible for this heterogeneous and primitive herd of cows to survive, since their ever-shrinking "ranch" now comprises only 2 hectares and their minders have since time immemorial allowed them to graze on the tract which is now the property of Nuñez-Schultz.

Four years ago, pursuant to a Provincial Decree duly enacted by the Caucus of Belize, the Nuñez-Schultz property was rezoned as non-constructible land. The preamble of the Decree explicitly stated that its purpose was the preservation of an endangered life form. Nuñez-Schultz immediately brought action before the Court of Claims of the Americas to obtain compensation for the devaluation of her property rights. She alleges that she has lost net revenues of some A\$800 million. She offers as evidence a series of signed contracts with would-be lot purchasers. The Court of Claims, applying American law, held that since her title to the property remained undisturbed and no new easement was being imposed on it, there was no compensable event. She then seized this Court, which in accordance with the arrangements of the America-Europe Protocol has the final authority to determine disputes arising under the Protocol and involving investments in this Republic, just as our colleagues in Strasbourg are empowered to decide disputes under the Protocol arising out of investments in the Republic of Europe.

Such is the case we are now called upon to decide.

Nothing is new under the sun, whether on the beaches of the Caribbean or in the field of investment protection generally. This case recalls a claim against the Republic of Costa Rica (as it then was) decided in the year 2000, when an international arbitral tribunal granted compensation for

the fair market value of a project to develop a tourist resort. The project was aborted when the Government expropriated the site in order to incorporate it into a nature-conservation park. At the core of that tribunal's reasoning were the following paragraphs:

Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.

As mentioned above, there is no dispute between the parties as to the applicability of the principle of full compensation for the fair market value of the Property, i.e., what a willing buyer would pay to a willing seller.¹

The arbitrators' position that the motive of expropriation was irrelevant to the duty to affect reparations encountered strident objections from environmentalists and social reformers of various stripes. That controversy – which was not new then and has continued unabated since – foments fundamental issues of law, policy, and distributive justice. Not without the sense of triumph understandable in a person of my advancing years who confronts a challenge of overcoming new technology, I was able somehow to coax my LifeLog Data System® into the cobwebbed recesses of its ultra-memory to retrieve the following exam question from my ancient but not-entirely-forgotten student days:

Course in International Economic Law

Final Exam

Optional Question 3

States A and B have signed a treaty for the protection of investments. By this treaty, each State promised to treat investors from the other State in accordance with international law.

¹ *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica*, 5 ICSID Reports 153, paras. 72-73.

InvestCo from country A spent \$100 million developing an industrial venture in country B. The venture has been a great economic success. Its revenues are so high that it is now objectively worth \$10 billion. The government of country B decrees the expropriation of the venture. The government is heavily indebted on the international markets. What claims may InvestCo validly make under the following alternative hypotheses?

- A. *InvestCo purchased the land used for the project from a local private party. InvestCo has no contract with the Government; nor does it hold a license. The reason given for the expropriation is the development of a natural reserve to preserve endangered species, and the industrial plant will be abandoned. The Government observes that if it were required to pay \$10 billion, it could not afford to develop the reserve because it cannot sacrifice other compelling expenditures on public welfare.*
- B. *InvestCo operates under a permit which has a 15-year validity. (The operation is still worth \$10 billion.)*
- C. *InvestCo operates under a joint venture agreement with the Government which has a 15-year validity. (InvestCo's share is still worth \$10 billion.)*
- D. *Instead of the abandonment of the industrial venture in order to develop the natural reserve, the Government announces its intention to take over and pursue the venture. The Government points out that it lacks funding for vital public services.*
- E. *The venture is abandoned and the natural reserve is developed, but thereafter a new Government comes into power and decides to resume the industrial venture on its own, pointing out that it lacks funding for vital public services.*
- F. *The Government points out that it is democratically elected, and that the previous Government was a corrupt dictatorship which enabled InvestCo to operate under outrageously favourable conditions. It declares the expropriation as a way to recoup part of the prejudice suffered as a result of InvestCo's anti-competitive practices and its illegitimate tax avoidance.*

Questions in each hypothesis:

- Does InvestCo recover \$10 billion?
- Some other significant sum?
- Nothing?

Did we have pat answers then? If we did, how naïve we were! Today, I find that I understand rather too little of the motives behind governmental measures, and that I have seen rather too much of their effects. I am now disinclined to promote judgments that depend on an assessment of such factors. All governmental action – we put aside cases of *ultra vires* – by definition seeks the public benefit, as the old law exam so clearly shows.

The question is rather: is the governmental action subject to constraints under relevant law, national or international?

Various ratiocinations have been sponsored by scholars and jurists for generations. Each of them, one may readily ascertain, has been quite convenient in terms of disposing of particular cases in intuitively satisfactory ways. So for example, a traditionally legalistic approach looks to matters of form, and contents itself with the outcome each time it is able to conclude that the case fits into some abstract rubric like *dispossession* or *nuisance*. Legal realists quickly noted how ineluctably this would lead to instances of arbitrariness, and so it did. A plaintiff whose land is encroached at its outermost fringe, producing negligible devaluation, is compensated because the state has taken a portion of his *title of ownership*; but the loss of an entire enterprise as a consequence of restrictive rezoning is an exercise of *police power* and yields no compensation. And how can the concept of “nuisance” accommodate respect of acquired rights? The owners of a foundry may have operated their remote and perfectly lawful plant for generations, only to find that their noisy activity has suddenly become *a nuisance* to be shut down – because civilisation *has come to them* in the form of expanding urban development.

Having exposed the unsatisfactory vagaries of the nominalistic model, legal realists tended to propose economic analyses which also served well in some cases to provide ostensible rationales for an intuitively satisfactory outcome, but which capsized in their turn when faced with

new fact patterns. Thus it was with the notion that the difference between compensation and rejection depended on the degree of social good pursued by the state and the proportionality of the prejudice to be borne by the plaintiff. People who want to make these kinds of determinations should not seek judicial office, but enter the political fray and seek election to parliament.

And while we fret and fiddle, the cases keep rolling in, demanding that we answer them *now*, before we have seen any light of consensus at the end of our tunnel of doubt. To decide is our judicial duty. I am prepared to decide. But I am also bound to concede, as I reach out to invoke maxims and precepts which strike me as persuasive – and which others might well say are merely expedient to justify my inclinations – that I am not convinced that these rationalisations deserve to be called rules.

I revert to Nuñez-Schultz. Her property remains hers. The state has not dispossessed her, has not taken her title, has not usurped any economic advantage she may prove to be part of her reasonable expectancy. Her enterprise may have been thwarted, but it has not been taken over by the Province; there is no unjust enrichment. Indeed it was not a going concern at all. I am not inclined to go into the matter of a nuisance analysis. The Decree of the Caucus does not say that the construction of more buildings on this Caribbean beach was a nuisance, although I suppose one could put it negatively and say that they considered land use which did not sustain the habitat of the Bulls of Belize was nuisance. True, it had not been a nuisance before, but so slavery was a lawful business before Emancipation, alcohol distillery was a lawful activity before Prohibition, the operation of *abattoirs* an honourable trade at a time when we were still flesh-eaters.

When Nuñez-Schultz established herself in our country (and I do not mean her physical person, but her patrimonial interest) she should have expected that her perspectives would be that of other members of our polity. We are subject to the vagaries of legislation. Societies continually evolve. Transformation is disruptive. Our officials may or may not see fit to provide for compensatory arrangements for the discontinuities that arise. Such arrangements may or not be satisfactory. Cynics will say that some schemes are overgenerous and correspond to the occult machinations of political influence. Other schemes will demonstrably fail to offset undoubted losses. There will be winners and losers. Indeed each of us is likely to find ourselves *both* winners and losers, even when we do not know it; we are happy about the new convenient transport

centre, but do not realise that some neighbours can neither sleep at night nor retrieve the original capital invested in their depreciated property; and we are disappointed that the shares in our favourite company have lost value on the stock exchange because of new regulatory restrictions that frustrate a part of its business.

This is the stuff of politics, not jurisprudence.

Chorzów Factory, as we all know, tells us to restore the status quo ante, either physically or by monetary equivalence. But when all is said and done, Nuñez-Schultz is still precisely where she was: a property owner in our Republic, facing the burdens and benefits of participating in our society. Her undeveloped site will remain an undeveloped site. She is free to engage in agricultural industry. She can enjoy the personal luxury of space and nature. The loss of a lucrative business opportunity is undoubtedly a disappointment to her, but every citizen of a progressive civilised society must contemplate such contingencies. We take the good with the bad. If we are fortunate that our activities remain consistent with the regulatory framework, and that we happen to be in line with the vagaries of consumer preferences, our businesses may flourish – and we can be grateful for the opportunity of access to the multiplying levers of a prosperous economy. For that access we must pay a price. It may be taxes – more for some than for others. It may be exposure to the risk of regulation – and there will always be those who do not agree that we should save the Bulls of Belize.

I vote to dismiss the claim.

Buenavista, J. What has happened to my sister Chung? For 30 years I sat next to her, the two junior members of this body, and enjoyed the exhilaration of proximity to a brilliant mind. How I rejoiced when I saw her eyes narrow, and anticipated the implacable shearing which was about to befall a woolly-headed advocate! But now a different person seems to have moved to this middle of the dais. Becoming Chief, I fear, is a calamity; suddenly every argument is respectable, there are many sides to every question, and all litigants should apparently come away with the impression that they have been taken seriously. I shudder to think what kind of nonsense we will be asked to listen to, ever so politely, in the interest – it appears – of creating confidence in our institution.

The price of all of this cosy tolerance, I fear, will be to plunge our jurisprudence into a lukewarm *velouté* of amiable confusion. The proof is in the Chief Justice's own opinion. She confuses private and public

law. (Since when is unjust enrichment part of the law of eminent domain?) She treats a case arising *under a treaty* as though she has never heard of international law. Worst of all, she gives no sign of recognising the basic text we are supposed to be applying, namely the article of the Protocol invoked by the claimant.

It is not for us to say whether the provisions of the Protocol are wise or not. Our task is only to establish what happens as a consequence. If those consequences are unwanted, then let someone change the rule. The members of this Court are judges, not negotiators of treaties, not members of Parliament.

The rule which my sister Chung has so studiously ignored is the one agreed by both of our great Republics when they stipulated that investments may not be treated “in a manner the effects of which are tantamount to those of an expropriation.” All her musings of political philosophy and the social compact dissolve into gossamer irrelevancies when one considers that Nuñez-Schultz is not one of our fellow citizens; she is a foreigner; her state has struck a bargain with ours; it gives the same rights to our nationals in their relations with the other state.

If my memory serves me right, it must have been in my second year of law school, some 80 years ago, in the crysto-silicone Crawford Module on international law which even then was nearly two centuries old, that I learned that a State committing a wrongful act – *quintessentially by violating a treaty* – is liable to make restitution or to pay its monetary equivalent.² We were taught that this follows from the hoary authority of *Chorzów Factory*. Having been so instructed, we repeated it like a mantra – I as often as others. Many of us have done so on many occasions over the ensuing years. And so we find the Chief Justice once more reiterating this conventional wisdom.

But does it convey anything meaningful? Honesty compels me to admit, as I now approach the later stages of my career, that hearing the words *Chorzów Factory* mentioned once more as our Court began its deliberations, I could not remember if I had actually ever read the case. So I requisitioned it, and upon accessing the antiquated text file I immediately realised how utterly unlikely it was that I ever had. (I can speak for no one else, but frankly my suspicion that I am not alone is compelling.)

² See James Crawford, *The International Law Commission's Articles on State Responsibility* at pp. 213 and following (2002).

The *Case concerning Certain German Interests in Polish Upper Silesia* concerned two distinct categories of grievance. The matter of surpassing interest related to a nitrate factory at Chorzów; hence we speak of the *Chorzów Factory* case, and pay little heed to the second set of interests, namely those of owners of large agricultural estates which the Polish Government had declared would form part of a programme of expropriation. When most lawyers refer to *Chorzów Factory*, they in all likelihood do not realise that the judgment they have in mind – the one referred to by the Chief Justice – is Judgment No. 13 of the PCIJ,³ which had in fact been preceded by four other judgments (Nos. 6, 7, 8 and 9) in the same case.

Pursuant to a Polish law enacted in 1920, the name of the German corporate owner of the Factory site was deleted from the land registers and replaced by the Polish Treasury. Moreover, a Polish official took over control of operations. Germany sued, invoking what was known as its right of diplomatic protection.

One of the treaties that accompanied the end of World War II (the *Geneva Convention*) recognised a limited right for Poland to expropriate the property of German nationals. Only certain assets could be expropriated, and only if certain procedures were followed. Under Article 256 of the *Treaty of Versailles of 1919* (the treaty above all others in this context) States to which German territory was ceded would acquire all German state property therein. Poland considered that its Law of 1920 had properly declared that post-Armistice transfers from the German State to private parties should not be recognised. But Poland had not been at war with Germany, and its attempt to rely on the Versailles Treaty was fraught with difficulty. There is no need here to go into the thicket of arguments regarding jurisdiction, admissibility, overlapping treaty stipulations, and requests for interpretation, all of which generated various prolix episodes within this complex case. Suffice it to say that the PCIJ concluded that “no title of international law has been cited by Poland”⁴ that would enable the 1920 law to overcome the limitations of its expropriatory authority under the Geneva Convention, and that the 1920 law did exceed those limitations and therefore violated international law. It is important to note that the relevant standards were those of customary international law, which applied to expropriatory acts to the extent that the Geneva Convention had not created exceptional rights to expropriate. The Court

³ *Germany v. Poland*, 13 September 1928, 1928 PCIJ, Series A. No. 17, at p. 29.

⁴ Judgment No. 7, 25 May 1925, 1925 PCIJ, Series A. No. 7, at p. 31.

also established, after detailed analysis, that Germany had not acted in *fraudem creditorium*.

Having laboured through the many pages of this series of judgments, I felt like Livingstone encountering Stanley when, on page 47 of Judgment No. 13, I finally reached the familiar passage etched in so many a lawyer's brain. I will reproduce it, but not just yet, for it looks very different if one considers a fundamental element of context. It is this: on the preceding page, the Court notes that *Poland's act was not an expropriation*, because to make an expropriation internationally licit requires "only the payment of fair compensation." Rather, it was a "seizure of property" which *could not be expropriated even against compensation*. Given this distinction, obviously intended as fundamental, it is foolhardy to read only the paragraph which has echoed in a thousand lecture-halls; there are *two paragraphs* on page 47, and they must be read together if one wishes to explore what the PCIJ thought it was thinking. The passage is long but merits very careful reading:

It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated; in the present case, such a limitation might result in placing Germany and the interests protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland had respected the said Convention. Such a consequence would not only be unjust, but also and above all incompatible with the aim of Article 6 and following articles of the Convention – that is to say, the prohibition, in principle, of the liquidation of the property, rights and interests of German nationals and of companies controlled by German nationals in Upper Silesia – since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”

What does this tell us?

The PCIJ begins by positing that expropriation is lawful if there is compensation of “the value of the undertaking” plus interest. It then immediately makes clear that this is something inferior to that which the victim of an “unlawful dispossession” should obtain. It follows, as night follows day, that the famous *equivalence of restitution* – which is the reason for the fame of the second paragraph – was conceived as something more than “the value of the undertaking at the day of dispossession.” But what could that possibly be? How can the equivalence of restitution be more than the “value” of the thing restored?

Let us consider the difficulty of computing the remedy in the case of an expropriation which was *unlawful* because no compensation was given by the national authorities – and for that reason alone. Assume that the expropriation would have been lawful if the investor had been paid 100. Questions come down like rain:

1. Will international law mandate compensation of 100? If so, where is the distinction between lawful and unlawful expropriation?
2. What if the state had paid less than the amount which would make the dispossession unlawful – say 30? Would international law require something more than 70? If not, what is the meaning of *Chorzów Factory*?

3. What if the state and the foreigner had agreed by special compromise that the issue of compensation would be determined by international adjudication? In that scenario, there is no issue of unlawfulness; the parties have agreed the procedure. So will the compensation not be less than 100? Otherwise what is the incentive for a state ever to make a voluntary payment of the amount that makes its act lawful?

At this point in one's reflection, one may be forgiven for wondering what these 12 men thought they were doing, and try to imagine their individual positions. With a bit of searching, one can determine that, in point of fact, no less than five of them dissented in various ways, and – subversive literature though it may be – these dissenting opinions become an irresistible temptation. One need go no further than to Lord Finlay's dissent to discover something quite important. Finlay records that Germany – apparently for practical reasons – had renounced the remedy of physical restitution. He then writes:⁵

“There is no trace of anything from which it could be implied that on giving up the right to *restitutio in integrum*, Germany should be entitled in lieu thereof to get damages on a higher scale than that on which the *damages for a wrongful taking* would by law be assessed.”
(Emphasis added.)

Damages assessed “in the usual way,” he argued, mean “the value of the undertaking at the time of the seizure,” plus interest, plus “any other damage directly consequent upon the seizure.”

We now see the spectre of four conceptions of recovery:

- 1) restitution;
- 2) equivalence of restitution (PCIJ);
- 3) value of the undertaking in case of unlawful taking (Finlay);
- 4) value of the undertaking to complete a lawful expropriation (PCIJ).

The logic of the judgment and the Finlay dissent ought to be that the monetary alternatives – that is to say 2, 3, and 4 – appear in a descending order of magnitude. I doubt that many of us will be convinced of these distinctions. They are unexplained. Allow me to doubt that this ancient

⁵ At page 71.

rhetoric was founded on a proper understanding of the economic valuation of business ventures.

Having applied my mind to these hieroglyphics, the best I can do is to venture that Finlay's bone of contention must have been an implicit disagreement with the judgment's *dispositif*, which called for a financial inquiry by a neutral expert, to be conducted with segmented damages computations – one to evaluate the factory at the date of the taking, the other to evaluate the evolution of its business in its competitive environment over the several years to the final judgment. The majority considered that restitution would include appreciation in value since the taking. Finlay was clearly opposed. But I am not aware of a single other case where such a segmentation was effected. It may well be doubted that businesses are more successfully operated post-taking.

Let me put it in a nutshell: hundreds of subsequent awards and judgments have (i) paid lip-service to the majority, (ii) followed Finlay's concept, and then (iii) given a meaning to "the value of the undertaking" which – if I may be forgiven for saying so of the long-since departed – the judges of the PCIJ, whether in majority or in dissent, showed no sign of being equipped to understand as a matter of fundamental economic theory. If they had, they would have seen that the monetary results of an illegal dispossession and of a licit expropriation – which they intended to be fundamentally different in principle – were identical. The State has a choice: to do the right thing under international law, or have it imposed by international adjudicators – with the sole but not insignificant other consequence of being seen to have acted unlawfully. But the words immediately preceding the famous paragraph, *i.e. its very premise*, are nonsense. The Emperor has no clothes.

The Chief Justice, in her nebulous lecture about the "contingencies" which "every citizen of a progressive civilised society must contemplate," neglects to notice that Nuñez-Schultz is not a citizen of this country; that she is able to invoke an international treaty; that, whether or not the Chief is right to postulate that as a matter of national law an American in Nuñez-Schultz's position would have no remedy, the plain fact is that as a European invoking the Protocol Nuñez-Schultz is entitled to the protection of international law; and that we must give weight to the treaty's injunction against uncompensated measures having effects *tantamount to expropriation*.

Chorzów Factory deals with the problem at such a comfortable level of generality that the non sequitur at its core disturbs no one. We are thus left with the open-textured words of the Protocol. They could not be applied by automatons; nor were they intended to be. They were intended to be applied by this all-too-human Court, and decide we must. *Non liquet* is a denial of justice, aberrant to national and international law alike.

Nuñez-Schultz made her investment in 2236, and was entitled to rely on the Protocol which had come into effect five years earlier. I am particularly well placed to testify to the acuity of the Chief Justice's mind. Her failure to give weight to a proposition so evident suggests an unwillingness to do so. I can only record my disappointment, and proceed to decide in accordance with my plain perception of our legal duty as a judicial institution. Reflections about the risks of living in civilised societies which advance by regulation may be interesting as moral philosophy, but the representatives of our Republic have made certain promises on which the plaintiff in this case is entitled to rely.

Chorzów Factory, for all its ineptness, does tell us to give back to the victim of a breach of international law what she had before that breach. Nuñez-Schultz had a viable and lawful venture. It was not a going concern, but she has demonstrated, by contracts with solvent third parties, that it was destined for success. I am not sure, for reasons alluded to above, that the judges of the PCIJ had a clear understanding of the word "value" as applied to an "undertaking," but we have come a long way since 1928. Let me give three examples of valuations – noting immediately that the present case belongs with the second – which I believe cause no difficulty as a matter of international law.

- (A) Six ships are expropriated. Their replacement value is 100.
- (B) A transportation company owning six ships is wrongfully deprived of its license. It is established that a bona fide third party purchaser was prepared to purchase the company, which benefited from a portfolio of advantageous contracts, for 200.
- (C) Same as B, but instead of proof of a third-party offer, there is an economically irreproachable demonstration that the going-concern value to the expropriated owners was 200.

A is not difficult. But how is B less acceptable than A? And if B is accepted, why not C? The demonstrable market value of a disposed asset has been

endorsed by international tribunals.⁶ But that may imply the recovery of anticipated lost profits; i.e. the purchasers are willing to go beyond the replacement value of the six ships (which are not for sale) to pay an *enhanced* value based on their expectations that the transportation company has demonstrable prospects of profitable operations.

The respondent has made not a dent in the plaintiff's demonstration of the present value of her prejudice at the date of the measures of which she complains.

Others may take a different view. That is presumably why we – like most courts everywhere throughout history – sit in an uneven number. The result I would promote may meet with unanimous assent or with a majority in its favour; or it may be overcome by a majority of opponents. Whichever way we decide, there is likely to be controversy. This is especially true with respect to abstractions with respect to which it is so easy for laymen to have opinions, and for politicians to pander to the sentiments of the electorate.

Some will view this as a contest between the “sovereign” right of Americans to legislate in their own land without being taken to task by outsiders. They will invoke dark forebodings of open floodgates of evil, as our Republic becomes incapacitated to act in the most compelling areas of public health and welfare. Others will insist on the reciprocal nature of the legal security necessary to profitable international economic exchanges, and maintain that the pillars of a global liberal economy are being assailed. The most simple-minded will doubtless see this in narrow terms as a popularity contest between vastly rich foreigners and our own brave Bulls of Belize. All I can do is look at the law as I understand it.

I vote unhesitatingly to uphold the claim.

Patel, J. My sister Buenavista's erudite exposition has opened my eyes, but once opened they behold a very different road than the one she has decided to follow.

⁶ As in the old cases of *de Sabla* (VI RIAA 358) (proof of purchase offers for lots in Panama) and *SPP v. Egypt* ((1995) 3 ICSID Reports 131) (proof of willing purchasers of lots in the Pyramids Oasis project). The *SPP v. Egypt* case was chaired by a former President of the International Court of Justice, who asserted that the purchase and sale between arms' length buyers and sellers are the best indication of the value of the assets. See Crawford, Articles at p. 226: “The value of goodwill and other indicators of profitability may be uncertain, *unless derived from information derived from a recent sale or acceptable arms-length offer.*” (Emphasis added.)

Chorzów Factory, I now accept, does not adequately explain the distinction between the remedies for illicit measures and those that merely serve, if I have understood the matter properly and if I may put it in my own words, to supply the missing element to complete a licit expropriation. Nor does it give the slimmest explanation of how to value a business venture.

We are left, it seems, with the words of the Protocol. Buenavista has in my view observed a serious defect in Chung's reasoning when she points out the Chief Justice's elision of the issue of measures tantamount to expropriation. But of course the Protocol does not tell us what such a measure is.

So, as I see it, we are left with two questions – was the rezoning to accommodate the Bulls of Belize a measure tantamount to expropriation? if so, how is the loss measured? – but no normative tools with which to accomplish our task of deciding them.

Although I would not be able to give a scholarly account worthy of a Buenavista, I know perfectly well that there are hundreds of international arbitral awards which determine whether various types of governmental measures were tantamount to expropriation, and hundreds more which determine their effect on the value of business ventures. But how consistent are they? How many of them are based on instruments identical in their wording to the expressions found in the America-Europe Protocol? What qualifying features are to be found in the texts that were relevant in each case? What is one to make of brilliant dissenting opinions which find no answer in the award? To look at the case before us, how are we to decide whether the undoubted diminution of Nuñez-Schultz's expectancies required compensation when her title is undisturbed, when no business venture has been taken over, when she remains free to pursue an agricultural industry, and when the import of "non-constructible" rezoning does not prevent her from continuing to have the private enjoyment of her magnificent *existing* estate and its unique bovine wildlife? I agree with Buenavista that Nuñez-Schultz is entitled to rely on the Protocol, *but what does that mean?*

My sister Buenavista is willing to answer these questions with little hesitation. To the contrary, the lack of a proper roadmap seems to endow her with a heady sentiment of freedom to go where she wants. Part of me would wish to join her, but such is neither my dominant temperament nor – more importantly – my perception of our judicial tasks.

I will not pretend to be the driver of an automobile with no engine. I will not pretend to be a cook in a kitchen with no heat. And I will not pretend to be a judge when I find myself in a normative void. It seems that for many generations our lawmakers and our international negotiators have shirked their responsibilities whenever faced with difficult policy choices that relate to distributive justice. They make popular promises and enact attractive programmes. Any when the inevitable complaints arise, they not only leave it to the courts, but take advantage of every opportunity to complain about us. What they do *not* do is to fulfil their duty to define the norms that we are to apply. We are blamed for “making our own law.” We are accused of inconsistency because we are at the mercy of the facts that come before us and the more or less astute forensic choices of the litigants. And so, ultimately, the prestige of the judiciary is at risk.

I have long wrestled with this difficult problem, and can think of only one way to resolve the intolerable situation. Like anyone else assigned a task but given no tools to perform it, I refuse to take responsibility, and hereby withdraw from this case.

Handy, J. My colleagues’ talent for legalistic obfuscation never disappoints me. Once again, they have taken a simple matter and turned it into a mysterious broth which will cause the public to wonder if we are re-enacting the opening scene of *Macbeth*. What use is this torrent of ratiocinations, abstractions, and learned historical disquisitions? What we need is some simple practical wisdom to deal with a matter of human reality which is understandable to the average Scotty (or “teleport operator” if we, alone in the world, are to use the proper term). Glancing to my left, I note with alarm the pile of books at the elbow of my sister Al-Rumaihi, who under our conventions of seniority speaks last, and apprehend that we will shortly be in for more of the same. I therefore make it my duty to speak plainly of some fundamental truths.

Judges are not extraterrestrials. We are a part of society. The Supreme Court in particular should be careful not to drive a wedge between itself and the populace. This is not a matter of currying favour with an unruly mob, but one of maintaining the legitimacy of the judiciary in the eyes of our populace. True, we are sworn to uphold the law, and that we should. But *the law* is comprised of many *laws*, and not all are consistent, or of equal authority. In private we readily admit that we have all too many laws. Yet many eager reformers want to make ever more laws. We sorely need a Department of Dismantling Laws as texts become obsolete or at odds with newer legislation.

All I am saying is that we are the ultimate professionals of the law, and we need to handle the law with art and discernment. Like the good administrator, we should accommodate procedures and principles to the problems that arise and to the changes in the environment around us. We should know when to minimise the effect of a clumsily conceived regulation. We should select, among competing and contradictory norms, those that are conducive to the preservation of a reasonable and decent accord between the courts and public opinion.

I have listened carefully to my sister Buenavista, and beyond all the esoteria I believe I can reduce her position to a very simple proposition: the plaintiff must prevail because she made an investment at a time when she was entitled to rely on a treaty which promised her regulatory stability. Buenavista has a point, but I have a stronger point. And while hers is ever weakening, mine is getting stronger. This is because her perception is backward-looking; mine is the opposite.

We must uphold Nuñez-Schultz's expectations, we were told – repeatedly – by her lawyers, because that is the only way we can attract investment. But allow me to observe that we are not considering whether foreign investors are given legal protection. *Everyone* is so entitled. What is at stake is whether they are entitled to *greater* protection than our own citizens. This, I am quite convinced, is not too complicated for the average citizen, who is entitled to demand justification for any alleged inferiority. True, we want investment, but *the right kind*. Perhaps back in 2032 we wanted investors to build luxury residences on the beach. Perhaps, but I am not so sure; there was no process of evaluation or approval. If that is what we wanted then, the fact is that Nuñez-Schultz has built not one such residence. She may have *spent* A\$300 million in purchasing the tract, but we all know that money was paid to the previous owner, Admiral Parker, and those funds are presumably still with him where he lives in Reykjavik. How much good has all this done for the people of Belize?

And whatever the putative advantages of Nuñez-Schultz's investment 18 years ago, who can believe they are still extant? She has waited all these years to do something which today involves very little risk – and very little benefit to Belize. After the invention of the fluid hyper-conductor 20 years ago and the discovery of hainanium that drives it, a new group has taken over as the wealthiest people on earth: the Hainanese. They are very rich, they are very numerous, and – do not ask me how it started – multitudes of them seem to wish to live in luxury with other Hainanese

on the beaches of Belize. I know that my sisters find that my interest in such things is unbecoming to the judicial function, but why should they be the only people not to notice the names and addresses, readily visible in the record of the case, of the purchasers of Nuñez-Schultz's lots: all Hainanese! Belize's construction industry is booming; workers are migrating to Belize; the last thing needed on that beach seems to be another luxury development. The population now discovers another side to life, and they perceive a hitherto unimagined value in the Bulls of Belize.

All of this in preparation for my rhetorical question: are we to be blind to the fact that social priorities change over time, in fundamental ways, and that "entitlements" and "expectations" too must change?

I could cite great legal authorities from the convulsive 20th Century to the effect that *partial compensation* may be sufficient to comply with international standards "in cases where fundamental political forces affecting the social fabric of the host state are involved." But I will not refer to these authorities by name for the simple and important reason that the proposition is inherently compelling. To try to justify it suggests that it is debatable. I do not see how it could be, unless the spirit of law is suicidal. It is inconceivable to ask the citizens of a country who have suffered the deprivations of a radical transformation of their social order to make the further sacrifice of indemnifying foreigners on the footing that they should be insulated against the effects of the movement of history. No surer way could be found to drive a wedge between the legal order and its indispensable constituency.

In the present case, it might be apposite to invoke a figure from European history; as General de Gaulle might have said, the policy choice to save the Bulls of Belize is perhaps more akin to a *courant d'air de la mode* than to the *vent de l'histoire*. Yet the guiding notion is the same. And somewhere on the scale of dislocation between the aftermaths of revolution, on the one hand, and measures to protect these valiant beasts, on the other, lies an infinite host of other candidates for compelling social legislation: the discovery that a particular fuel is more dangerous to health than others, the decimation of an emblematic species, the encroachment on the livelihood of a unique community. Our citizens have the legitimate right to insist that our government not sacrifice its right to use its police powers, acting for the common good, on the mysterious altar built to protect foreign investors.

In conclusion, I would note that Nuñez-Schultz has not asked to recover the A\$5 million of specific costs wasted on her residential project. In her very professional presentation, this amount was properly subsumed in the revenue/cost streams that led to her calculation of the net present value of her loss. She did not present an alternative plea; perhaps she found it *de minimis*, or made the tactical choice not to give us a way out which had so limited an attraction from her point of view. I am neither unreasonable or xenophobic, and wish to record that the plaintiff's possible recovery of these wasted costs has not been considered – by the plaintiff's own choice.

I vote to dismiss the claim.

Al-Rumaihi, J. One cannot fail to observe that the arrangements under the Protocol are somewhat odd. The highest court of America decides whether the American Republic has incurred international responsibility for the treatment of European investments in the territory of the Americas, and the highest court of Europe decides whether the European Republic has incurred international responsibility for the treatment of American investments in the territory of Europe. In the BIT that preceded the Protocol, all such disputes were submitted to an international tribunal presided by an arbitrator having neutral nationality.

It occurred to me to inquire whether this impetus to dismantle the international tribunals which once adjudicated investment disputes had antecedents. Going back 350 years – to the time before *Chorzów Factory* – I found that the infamous colonial powers of the era before World War I, far from desiring international arbitration, *actively rejected it* on the grounds that political controversies were unsuitable for arbitral determination. The implicit conclusion was that they were left to be resolved by armed force. I had harboured a suspicion that this must have been the case – for when did the strong love the law? – and found two illuminating instances involving two famous colonial powers: France and Great Britain.

In 1837 France raised a series of demands against Mexico on the grounds that French nationals had been unjustly treated there. Mexico offered to submit the claims to arbitration. France rejected this offer as ridiculous; the dignity of France did not allow it to contemplate a third party adjudication of matters with respect to which there “could be no possible difference of opinion between civilized States.”⁷ France therefore

⁷ Lapradelle and Politis, *Recueil des Arbitrages Internationaux*, vol. 1 (1905) p. 546.

presented an ultimatum with which Mexico did not comply, whereupon France invoked the right of "reprisal," and engaged hostilities. (France similarly rejected Siamese offers of arbitration in the 1890s.⁸)

The vicious Boer War between Great Britain and the South African Republic was precipitated by the British rejection of South Africa's repeated offers of international arbitration.⁹ Great Britain also rejected Venezuela's offer of international arbitration 1902 in the following terms:

"Some of the claims are of a kind which no government could agree to refer to arbitration. The claims for injuries to the person and property of British subjects owing to the confiscation of British vessels, the plundering of their contents, and the maltreatment of their crews, as well as some claims for the ill-usage and false imprisonments of British subjects, are of this description. The amount of these claims is comparatively insignificant, but the principle at stake is of the first importance, and His Majesty's Government could not admit that there was any doubt as to liability of the Venezuelan Government in respect of them."¹⁰

The British position had been the same vis-à-vis Greece half a century earlier in the famous *Don Pacifico* case.¹¹

One reason why these colonial powers did not eagerly embrace arbitration was that their claims were exaggerated in the first place. The US-Venezuela Commission of 1903 upheld only 3% of the US claims (\$436,450 of \$15,550,000). Jackson H. Ralston's study of INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO (published in 1929) describes the demands of the Italian and German governments for full payment of demands *before* they were adjudicated; that venerable author concludes, by reference to the 27% success rate of claims before the subsequent German-Venezuelan Commission, that Venezuela had been made to pay amounts "not due from her in order to buy her peace."¹²

⁸ H. Lauterpacht, *The Function of Law in the International Community* 160, n. 2 (1933).

⁹ *Ibid.* n. 3.

¹⁰ Memorandum of 23 December 1902 communicated by the Marquess of Lansdowne, *ibid.* at 161-2.

¹¹ Described at somewhat tedious length in Chapter 3 of Jan Paulsson, *Denial of Justice in International Law* (2005).

¹² At p. 223.

This glance of history is intended to give some perspective to our task. How unfortunate it would be if the consequence of the reference of issues of international law under the Protocol to our two national Supreme Courts were to be the reemergence of chauvinism and partiality! If the effect of removing issues of international law from neutral international adjudicators is to reassert national control, we would be returning to the 19th Century. One can only hope that our governments had no such thought when signing the Protocol. The stated purpose appears to have centred on the putative quest for certainty. One should make no pronouncements about the realism of that purpose without considering how this case is analysed in the five opinions we are voicing today. Replace a single judge – and where is predictability?

It is hardly necessary to point out that my sister Handy and I have irreducibly divergent views of the judicial function. I suspect that if her vision were correct, the Supreme Court of the Americas would be better served by judges trained in journalism than in the law. She seems to believe that the fact of change is a revelation. The implication for the rest of us is, to be blunt, rather rude. We who believe in the value of reliable promises certainly do not disregard the effect of change on performance. To the contrary, it is a fundamental part of the equation. The longer the period of commitment, the greater its value. Persons or corporations or states who can make credible promises with long-term reliability reap immediate and quantifiable benefits. Those whose contracts or treaties are writ in water are limited to static variations of cash-and-carry.

The challenge to negotiators is not to find accommodating judges such as my sister Handy; that will disserve them in the long run. Rather, it is to circumscribe their commitments to what they really can deliver. It is no good to say that “perhaps Nuñez-Schultz’s investment was not desirable” in 2236; the Protocol could have called for a system of *approved investments*, but it did not. It is no good to say that “Nuñez-Schultz sat on her property for 18 years;” the Protocol could have called for a system of monitoring, but it did not. And Handy makes a fundamental mistake in concluding that it is enough to say the words “police powers” to insulate all conceivable governmental measures from accountability at international law.

If one wishes to find a Euro-American precedent involving “police powers” in the literal sense, one can go back to the case of *The Phare* between France and Nicaragua, decided in 1880 by the French Court of Cassation acting as the international arbitrator (at the proposal of

Nicaragua) of a claim brought on behalf of the owner of cargo on a French ship. The goods were cases of muskets. They were seized in Corinto, then the principal port of Nicaragua. The cargo was found to be in lawful transport, not contraband. The French court accepted Nicaragua's plea that it was acting for the "political end ... of social conservation," namely to prevent the arms from falling into the hands of insurrectionists, and moreover accepted that "measures of that nature constituted acts of legitimate defense," but held that even on such a premise:

"they could be carried out only on the responsibility of the government which thought it right to adopt them and under the obligation to make reparation to those who were the victims of the damage thus caused."¹³

An indemnity was accordingly granted in the amount of the value of the muskets.

I have found much to edify my own thought in my sister Buenavista's exegesis of *Chorzów Factory*. I have obeyed an impulse to seek to understand the fundamental premises that underlay the thinking of the Court that decided that case, and this has caused me to reflect on the great work of its President, Max Huber, on "the fundamental sociological rules of the law of nations."¹⁴ Notwithstanding the cynical pursuit by States of their own interests, international law emerged as an effect of their economic strategies and the influence of consumption patterns of their populations. The Finnish scholar Martti Koskenniemi, nearly a century later, encapsulated Huber's concept – based on a perception of "the increasing predominance of economic considerations over purely political ones" – as follows:

"International law had started out as an instrument for national economies to collect resources first by individual exchange contracts between isolated States and then by law-making treaties regulating long-term relations between large numbers of States. National economies could no longer extricate themselves from the network of complex dependence."¹⁵

¹³ John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a party* Vol V. p. 4875 (1898).

¹⁴ *Die Soziologischen Grundlagen des Völkerrechts* (1910). (By the time the case had come to an end, Huber had been succeeded by another great name: Anzilotti.)

¹⁵ In *The Gentle Civilizer of Nations* at 227-8 (2001).

As a polity, we may make such legal arrangements as we see fit. That is an expression of popular sovereignty, properly understood. We may use the complex balances articulated by the best thinkers from Bentham¹⁶ to Michelman¹⁷ and make our policy choices, whether we adopt the model of *socialising* the costs of governmental programs, or put our faith in the phenomenon of *logrolling* (in the long run, those disadvantaged by some programs will be broadly satisfied by advantages derived from others), or muddle through with some combination of these or other more or less consciously articulated concepts.

The same holds true for our international bargains. Treaty by treaty, we may agree to multilateral or bilateral arrangements reflecting a variety of models. But when we have made them, we must keep them. We have no grant to impose our national models once we have given international promises upon which foreign states and private persons or entities rely.

I do not really understand my sister Patel's refusal to search for a meaning in the concept of effects tantamount to those of an expropriation. Her failure to do so causes an obvious injustice to Nuñez-Schultz. Legal texts often leave interstices for judicial interpretation. We may sometimes feel that we are balancing on a high wire without a safety net, but we must have the courage to do so; no one forced any of us to take a seat on this Court

My agreement with Buenavista, J., is tempered only by my caution with respect to quantum. I would like a full study of *mitigation*, i.e. an evaluation of what Nuñez-Schultz could earn in the alternative business activities which remain open to her, which I expect would be agricultural.

Subject to this reservation as to quantum, I vote to uphold the claim.

Patak, J. The Chief Justice has asked me whether, having had the advantage of considering the opinions of my colleagues Handy and Al-Rumaihi, I am now prepared to reconsider my position and join one side or the other to create a majority.

To the contrary. When I stated my views previously, I was most apprehensive about taking my unprecedented position. The irreconcilable opinions of the judges who have spoken after me comfort me in my determination to withdraw from consideration of this case. To join Handy would, in my view,

¹⁶ Jeremy Bentham, *Theory of Legislation*.

¹⁷ Frank I. Michelman, "Property, Utility, and Fairness: On the Ethical Foundations of 'Just Compensation' Law," 80 *Harvard Law Review* 1165 (1967).

be an abdication of the judicial role as I understand it. To act as a sociologist or an opinion-poll taker – let alone an office-seeker currying the favour of ephemeral political majorities – would violate my most profound convictions. I have always believed that to be a good judge may require the courage to take deeply unpopular decisions, to hew to the law in the tempest of current events, and to resist the debasement of the law by refusing to bend it to the will of a mob shouting puerile slogans – because we know that very mob would lament the weakening of the law if we became just another convenient target for pressure groups and lobbyists.

Yet this reflection does not push me into the camp of my sister Al-Rumaihi. I am a judge, she says; what I do is judge, and judge I will, in a normative vacuum if that is what is required. For my part, I do not judge because I have been given the task of judging; I do so because I perceive the law, and seek to ensure that it is respected. Our officials have not, in this matter, performed their duty as lawmakers. I will not be the applier of what is not there. My sister Al-Rumaihi may rest assured that I have the courage to cross any chasm on a high wire, with or without a safety net. But first I must be shown the wire.

I am not ignorant of the classics; I know what the great Judge Kirby of Australia wrote: “It is beyond contest that some of the accretions of power to the judiciary over the last century have come about as a result of failures and inadequacies in lawmaking by the other branches and departments of governments. Constitutional power hates a vacuum.”¹⁸ But just as I acknowledged the acuity of a Buenavistan insight only to draw a conclusion opposite to that of its author, I bow to Kirby’s perception but decline to follow him over the ramparts. The legislature has not done its job, and we should not indulge its sloth by doing its work. I repeat that the legislature has unlimited sources of information and advice; we have only what two litigants happen to have put before us. I decline to dilute our authority by exercising it in this case.

* * *

*The Supreme Court being evenly divided, the claim cannot prosper. The Chief Justice refuses, in the circumstances, to certify that its rejection is res judicata. In the name of the people, so judged.**

¹⁸ Michael Kirby, *Judicial Activism* 65 (2004).

Readers reminded of Lon Fuller’s “The Case of the Speluncean Explorers,” 62 *Harvard Law Review* 616 (1949), are asked to reflect that imitation is the sincerest form of flattery.