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The worm's view of history and the twailing machine

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Introduction

Muthucumaraswamy Sornarajah devoted his career to the study of the international law on foreign investment. In the later part of that career, he turned his attention to a critique of economic neo-liberalism. Using the language of film and photography, he called it "the worm's view of history".[1] He is, for this and other reasons, often regarded as a member of the radical Third World Approaches to International Law (TWAIL) movement.[2] This chapter introduces the reader to Sornarajah's work.[3] I aim to describe his writings over the years in the hope of conveying a flavour of the issues, themes and concerns which so preoccupied him. Subsequent chapters go on to develop upon a broad range of his concerns. These collected writings are offered to him on the occasion of his formal and statutory, albeit not his substantive, retirement from the National University of Singapore.[4] It is also the right time for a book on, and for, Sornarajah. Many of the ensuing chapters seek to capture the

[1] M. Sornarajah, "Power and Justice: Third World Resistance in International Law", (2006) 10 *SYBIL* 19, 26.

[2] Although Sornarajah is a sympathist, this is something which he rejects together with any association with the New Haven School of International Law. I make this plain at the outset since in this book, in this chapter and the concluding chapter, I shall be making frequent references to both TWAIL and Yale. TWAIL is a scholarly movement which is said to have grown out of the graduate research community at the Harvard Law School, but for a longer historical view, see D.P. Fidler, "Revolt Against or from Within the West? TWAIL, the Developing World and the Future Direction of International Law" (2003) 2 *Chinese JIL* 29, 32. See also C.L. Lim, "Neither Peacocks Nor Sheep: T.O. Elias and Postcolonial International Law" (2008) 21 *Leiden JIL* 295.

[3] His friends simply call him "Sorna".

[4] Formerly the University of Singapore, and before that the University of Malaya in Singapore.

current moment in the field as a global backlash against investor-state arbitration continues to unfold.

Viewed in time and against its background events, Sornarajah's body of work may be distinguished from that of a previous generation. His writings cannot be reduced to that historical attempt, following the wave of post-war, post-colonial nationalisations of the 1960s and 1970s, to shape a New International Economic Order (the "NIEO"). He had started writing only after these events, by which time many in the West had considered the efforts of the 1960s and 1970s to have failed. Third World scholars were no longer on the offensive, but they were easily characterised as ideological radicals which time and events had passed. Sorna's writings during this period were marked by subsequent global events instead, and this "post-NIEO" work evolved accordingly. Our story begins in the 1980s when the Cold War was drawing to a close and the economic globalisation era was about to begin. Borrowing a few lessons from biographical history and historical biography, I will also attempt to describe the subsequent backlash against globalisation which had begun in earnest in the late 1990s,[5] culminating in the 2008 Global Financial Crisis.

Turning to the larger field of international law, more specifically the use of its sources, international investment law had shifted from having an uncertain basis in the changing state of customary international rules – grown from the contending practices of industrialised and developing states – to the emergence of a worldwide network of bilateral investment treaties (BITs).[6] In between, there had been various experiments. For a moment, the whole field threatened to shift away from a strict basis in the public international law rules of state responsibility towards a new hybrid form.[7] This had been the result of an attempt to marry public international law rules to contractual commitments. It included the attempt to turn ordinary contractual promises into a new form of public international law promise, and to adapt the principles and

[5] See J. Stiglitz, *Globalisation and Its Discontents* (London: Penguin, 2002), generally.

[6] The book which marked that change was Rudolf Dolzer's and Margerete Stevens' *Bilateral Investment Treaties* (Hague: Kluwer, 1995). See further, C.L. Lim, "The Strange Vitality of Custom in the International Protection of Property, Contracts, and Commerce", in Curtis A. Bradley (ed.), *Custom's Future: International Law in a Changing World* (Cambridge: CUP, in press).

[7] S.W. Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law" (2011) 22 *European Journal of International Law* 875–908, available on Global Law Books at www.globallawbooks.org/reviews/detail.asp?id=712 to which page references are here made, 12, 16.

techniques of private commercial arbitration to the settlement of public, non-contractual disputes. Some saw promise in contract and private law because of the uncertainties surrounding international custom. However, by the 1980s a new, worldwide regime of thousands of international investment treaties had become firmly established, even in the Third World. As treaty law gained ascendance, contractual innovations were no longer so sorely required by international capital to assure its protection when abroad. In time, the process of settling investment disputes also became treaty-based, by which I mean that a claim could be brought before arbitration even in the absence of a breach by the host state of any existing investment contract. The most important work which private law did, however, in the attempt to create a modern international investment system was to extend the teachings of commercial arbitration to a new form of treaty-based claim. Eventually, contract, its role for now largely spent, ceased to be as important in supplying either the cause of action or in binding the parties to arbitration.[8]

Sornarajah's work began on the arbitration of disputes involving state contracts with foreign investors.[9] But his training as an international lawyer meant that he also had an acute appreciation of the hierarchy of legal norms. This led him to remain true to his subject, in the face of the rapid developments just described, and to favour the controlling role of public international law precepts and doctrines over the private law precepts of the commercial arbitration lawyer.[10] He considered commercial arbitration's doctrines especially unsuitable for their adaptation *holus*

[8] Commercial arbitration had earlier been used in disputes over foreign investment contracts; see M. Sornarajah, *International Commercial Arbitration* (Singapore: Longman, 1990). Subsequently, the growing popularity of investment treaty arbitration under the North American Free Trade Agreement (NAFTA) marked the emergence of arbitrations which proceeded without an arbitration clause in a contract, or "arbitration without privity"; J. Paulsson, "Arbitration without Privity" (1995) 10 *ICSID Rev-FILJ* 232. This development had begun earlier in *SPP* v. *Republic of Egypt* (the "Pyramid Oasis" Case) (1991) 16 YB Comm Arb. 28, which had concerned a unilateral promise of arbitration under a national investment promotion law. This insight was applied to BIT undertakings to arbitrate in *AAPL* v. *Sri Lanka*, ICSID Case No. ARB/87/3 (1990); 4 *ICSID Rep*. 245 (1991); 6 *ICSID Rev-FILJ* 526 (1991), 30 *ILM* 577, the first BIT arbitration; Paulsson, "Arbitration without Privity", 234–236. Sornarajah calls this insight the "original sin", M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: CUP, 2015), 139.

[9] See Sornarajah's *International Commercial Arbitration*, generally.

[10] Indeed, even the new arbitral jurisprudence which subsequently emerged with the explosion of BIT-based arbitration has at best only an uncertain effect on public international law doctrine; see, however, A. Bjorklund, "Investment Treaty Arbitral Decisions as *Jurisprudence Constante*", in C.B. Picker *et al.* (eds.), *International Economic Law: The*

bolus (in their entirety) to the settlement of what essentially were disputes over the application of public international law rules on foreign investment. Rather, his view reflected a traditional conception of international economic law as that body of law dealing with the economic relations of states.[11]

This is the Sornarajah whom most readers know.

Muthucumaraswamy Sornarajah

Muthucumaraswamy Sornarajah was born on 24 April 1942 in Manipay, located in the Northern district of Jaffna.[12] Jaffna was the principal city of the Tamil people of Ceylon (now, Sri Lanka). Only weeks before, Japan, fresh from its conquest of Singapore, had carried out the terrifying Easter Sunday Raid on Ceylon, which in 1948 went on to gain independence as a dominion. As a schoolboy, he attended the Royal College in Colombo, the "Eton of Ceylon", and was among the last to be taught Latin and Greek, subjects then entrusted by the Royal College to Mr E.F.C. Pereira. It was not an easy time, for tension had commenced between the majority Sinhalese and the minority Tamil races. Sorna recalls being tutored with equal devotion by both Sinhalese and Tamil masters, and to have been shaped almost exclusively by Sinhalese teachers. He had been a rebellious child who when made to stand outside the classroom as punishment would do so on his head in order to better torment his schoolmaster.[13] Sorna was to be as quick subsequently in his understanding of the exploitation of normative ambiguity and to develop a habit of turning things on their head, but I shall not rush the story.

In 1948, the Immigration Act was passed, denying citizenship to Indian Tamils who had worked on Ceylon's tea estates. By 1956, Sinhalese had also been made the sole national language. It had the effect

State and Future of the Discipline (Oxford: Hart, 2008), 265; *contra* Sornarajah, *Resistance and Change*, 50, 53.

[11] Professor McRae has attributed this classic view to Georg Schwarzenberger, Ignaz Seidl-Hohenveldern and the 1971 Colloque d'Orlèans; D.M. McRae, "The Contribution of International Trade Law to the Development of International Law" (1998) 275 *RdC* 99, 120–122.

[12] The account in this section has relied on access to Professor Sornarajah's private papers at the author's request. The use of these papers is governed by Hong Kong University's rules on research ethics in the conduct of non-clinical research on human subjects. I am grateful to Professor Sornarajah, and to the relevant university committee for granting me their permission.

[13] There is no mention in his private papers of the name of this kindly school teacher.

of depriving young Tamils of access to careers in the public service which, traditionally, had presented an alternative to working in the tea estates. Sorna's own maternal grandfather had joined the Malayan Civil Service where by 1896 there had emerged a common system of recruitment through the Far Eastern Cadetships for the Ceylonese, Malayan and Hong Kong services.

In 1958, the first anti-Tamil riots began.[14]

Sorna's home was not spared the violence although in a fit of athleticism rarely to be seen later in life, he managed to save it from being burned to the ground by swinging onto the roof to kick away the petrol bombs. The boy of 16 years and his old grandmother fled. Together with his family, he went from one and thereafter to another refugee camp.[15] Fortunately, he was soon to win entry to the University of Ceylon, eventually graduating LLB with a rare First Class Honours. The university became a sanctuary. The *Mahaveli Ganga* ran through it with – if you could just imagine the place through Sorna's own description – waterfalls from the hills which surrounded the campus forming rivulets which fed that great river. The head of school was Professor Nadarajah who taught from R.W. Lee's book on Roman Dutch Law and presented a virtual annotation of it.[16] For all three years there, Sorna was taught by Mr Rajah Goonesekere, "an Oxford-trained lawyer" Sorna remarks in his private papers, and subsequently the principal of the Law College. It was he who left a lasting impression upon his student, and it is Mr Goonesekere to whom Sorna attributes his own method of teaching ex tempore with few notes. As for style, Sorna saw cause for emulation there too – mastery of the law is a pre-requisite but opinions are to be freely ventured. He became, in due course, Mr Goonesekere's successor at the University of Ceylon, teaching the subjects the latter had taught.

His first teacher in international law, however, was that titan, Dr Chittharanjan Felix ("C.F.") Amerasinghe, who at the time was completing his own work on state responsibility for injuries to aliens. A privileged

[14] T. Vitachi, *Emergency '58: The Story of the Ceylon Race Riots* (London: André Deutsch, 1959).

[15] I have mentioned all of this as it seems extreme adversity deriving from ethnicity, and national circumstances is not unusual in the making of international lawyers, and the point could have some value for future research. As Sornarajah has observed in his private papers, the pattern of events described here is of course also familiar to those elsewhere in the Commonwealth.

[16] R.W. Lee, *The Elements of Roman Law*, 4th ed. (London: Sweet & Maxwell, 1956).

young Sorna was granted access to Dr Amerasinghe's unfinished chapters,[17] sparking an early love for our subject.

He eventually attended the Yale Law School (LLM) and was to be much influenced by the policy science method developed there, notwithstanding his lifelong ambivalence towards that approach which I shall mention later. He also attended the federal University of London, graduating both LLM and PhD, where his courses – which were mainly in international law with a smattering of criminal law – were split between those offered at King's College on the Strand, and the London School of Economics nearby on Houghton Street. It was common at the time, although less so now, that international lawyers were given a place to teach in a law school on condition that they could also make themselves useful by teaching a bread-and-butter legal subject. Sorna had obtained an assistant lectureship at the University of Ceylon beforehand. His agreement with the university was that he would be responsible for the teaching of criminal law. The fact that permission to read for a PhD degree had been granted meant also that it had to be done in a hurry, in time for him to return to his duties in November of 1970 at the University of Ceylon. Again, this was not uncommon for those who had nascent teaching careers. In any case, it justified a decision to write on what he already, largely, knew of the criminal law. He had not, in his view, the luxury to properly pursue research in international law. What England did, however, was to confirm in his mind that it was international law that he wanted to do, that and a lifelong membership of the British Labour Party.

In later life, Sorna was awarded a higher doctorate (LLD) by London University. As required by the statutes for the degree, it was awarded on the basis of his collected works in international law.

His teaching career, as I mentioned, had already begun earlier in 1966, as an assistant lecturer at the University of Ceylon, and he was subsequently promoted to the position of Lecturer in Law. These were eventful years, tumultuous politically, but which resulted nonetheless in three articles on criminal law-related matters in the *International and Comparative Law Quarterly* (*ICLQ*) and an agreement to constitute what became a long and happy marriage for the past 40-odd years. He did eventually get to teach international law when his former teacher, C.F. Amerasinghe, left to pursue a subsequently distinguished career at the World Bank. But Ceylon was then

[17] C.F. Ameransinghe, *State Responsibility for Injuries to Aliens* (Oxford: Clarendon, 1967).

already in the grip of violence resulting from the *Jathika Vimukthi Peramuna*'s ("The Race's Salvation Front's") racial politics. Sorna recalls that in response, the Government "callously eliminated . . . many thousands of youth, both innocent and guilty . . . Among them were many university students."[18] In any event, eventually, communalist politics took over. Government facilities were reserved for the Sinhalese, the sons of the soil, and Buddhism became the state religion. It was cause for discomfort that the sixth-century Buddhist text, the *Mahavamsa*, which preached that the killing of Tamils is not a sin, had by then become a schoolchild's textbook.[19] It influenced the sort of history taught in the schools and played a role in entrenching majoritarian communalism.[20]

Sorna served on the Senate of the University of Ceylon, and as Proctor of the University of Colombo in which capacity he had been responsible for student discipline during that very difficult time. It was as I had mentioned the time of the uprising of the Jathika Vimukthi Peramuna, which attracted many Sinhalese university students. As Proctor, Sorna came into contact with these students. He recalls that:[21]

> After the ruthless crushing of the uprising by the military, many of the students, some of them innocent of any participation in the movement, did not turn up for lectures. This was a sad and haunting event. The brutality of the army that was unleashed on the Tamils later had started much earlier with communal politics seeping into the universities in Sri Lanka.

Sorna eventually made the decision in 1974 to continue his career at the University of Tasmania, joining the Department of Law there as a lecturer following an interview with Professor Derek Roebuck. Life for Tamil academics had become too difficult in his native land and here was a kindly man offering the chance of escape.[22]

The early foundations of his reputation as an international lawyer were laid during those happy Tasmanian years. He continued to write for the

[18] Correspondence with Professor Sornarajah, 23 June 2015.
[19] B.R. Rubin, *Cycles of Violence: Human Rights in Sri Lanka since the Indo-Sri Lanka Agreement* (Washington, DC: Asia Watch, 1987), 128.
[20] As described to the author, correspondence with Professor Sornarajah, 23 June 2015.
[21] *Id.*
[22] In light of his experiences, Sornarajah has, throughout his career, maintained a deep interest in the issues of self-determination, secession and minority rights in international law, and has played a pivotal role in relation to these matters. That, however, is not the subject of this collection.

ICLQ, and had begun work on the international law on foreign investment which eventually became *The Pursuit of Nationalised Property*.[23] The Tasmania faculty at the time was destined to become an illustrious lot. At the time, it included Frank Bates, Norman Palmer and Don Chalmers. By 1985, Sorna had served for four years as the head of the department but in 1986, by which time there was one book, a further edited work and eleven articles in the *ICLQ*, he decided to join the National University of Singapore as an associate professor.

In Singapore, he was eventually promoted to full professor in 1995, having produced the *International Law on Foreign Investment* in 1994, which the very distinguished reviewer in the *British Yearbook of International Law* considered worthy of becoming a classic.[24] Classic or not, it immediately became a new subject in the law school curriculum. Sorna subsequently assumed the present title of C.J. Koh Professor of Law. He kept up with his international links; with the United States as a visiting professor at the American University at Washington, and with visiting appointments at the Lauterpacht Centre in Cambridge, the world-leading Centre for Petroleum and Mineral Law at the University of Dundee and a period spent at the Max Planck Institute. He engaged in policy work as a consultant to the United Nations Conference on Trade and Development, serving in several well-known roles. He also occupied himself in capacity-building work in Vietnam and Sri Lanka under the auspices of the United Nations Development Programme and the World Bank.

While his academic reputation is known widely, Sorna's prestigious practice as an arbitrator and counsel also deserves mention. He had qualified to practise law in Sri Lanka, in England and Wales, and before the Supreme Court of Singapore. Today, his name crops up regularly in the usual discreet soundings taken over long-distance telephone calls. But he does not speak about these professional roles.[25] He was co-arbitrator (with Messrs Schwebel and Cardenas) in *Perusahaan Umum Listrik*

[23] M. Sornarajah, *The Pursuit of Nationalised Property* (Dordrecht: Nijhoff, 1986). See also M. Sornarajah (ed.), *The South West Dam Case: The Legal and Political Issues* (Hobart: University of Tasmania, 1983).

[24] M. Sornarajah, *The International Law on Foreign Investment*, 1st ed. (Cambridge: CUP, 1994). This book is, hereinafter, referred to as "Foreign Investment". Subsequent editions are referred to with an indication of the particular edition. For the review, see E. Denza, "Book Review" (1994) 65 *BYIL* 483, 484.

[25] Perhaps that is fitting for a scholar-practitioner, whose sensibilities and needs are rather different from those of practitioner-scholars in the field of arbitration practice.

Negara (Electricity Board of Indonesia) and the Republic of Indonesia v. *PT Paiton Energy Company* (1999) (the "PT Paiton" arbitration),[26] and had served as sole arbitrator in other arbitrations. He enjoyed sitting in arbitrations with Lord Hoffman and Lord Phillips. Sorna was also lead counsel for the claimants in *Yaung Chi Oo Ltd* v. *The Government of the Union of Myanmar* (2002), heard before three distinguished arbitrators (Messrs Sucharitkul, Crawford and Delon).[27] That dispute had involved the naked seizure of an investment by the Burmese army, and Sorna hoped to convert the case into one which would expose military atrocities in Myanmar. He served as counsel in *Merbok Hilir Ltd* v. *Board of Investment (Sri Lanka)* (ICC Arbitration) and he also served as an expert largely on the side of states, producing an extensive opinion in *El Paso* v. *Argentina*,[28] an experience he particularly enjoyed, and also in *Council of Canadians and Ors.* v. *Canada* in which the Council of Canadians and the Canadian Union of Postal Workers had challenged the constitutionality of the North Atlantic Free Trade Agreement's (NAFTA's) investment rules.[29]

He is, however, a full-time law teacher whose love – to paraphrase Lord Bramwell – is not of fees,[30] and whose title of professor is not a mere enticement for them.[31] A professor involved in the private dispensation

[26] See M. Sornarajah and R. Arumugam, "An Overview of the Foreign Direct Investment Jurisprudence", in Denis Hew (ed.), *Brick by Brick: The Building of an ASEAN Economic Community* (Singapore: ISEAS, 2007), 144, 160.

[27] *Yaung Chi Oo Trading Pte. Ltd.* v. *Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, 31 March 2003 (2003); 8 ICSID Reports 463 (2003); 42 ILM 430. This arbitration is well known for it stands for the effectiveness of having an "admissions model" BIT requiring approval of an investment for the investment to qualify as such. On this point, see also *Rafat Ali Rizvi* v. *Indonesia*, ICSID Case No. ARB/11/13, 16 July 2013 (Griffith President, Donoghue, Sornarajah), para. 61. *Yaung Chi Oo* is discussed in some detail in Sornarajah and Arumugam, "An Overview of the Foreign Direct Investment Jurisprudence", 163 *et seq*.

[28] Legal Opinion of M. Sornarajah, *El Paso* v. *Argentina*, ICSID Case No. ARB/03/15, 5 March 2007. The dispute, as is well known, arose from the Argentinian economic crisis, the consequent devaluation of the currency and the subsequent "pesification" policy. Although Sornarajah's argument regarding the absence of standing in minority shareholders was eventually rejected, his argument on the necessity defence was upheld and this had an effect on other Argentinian cases.

[29] Affidavit of M. Sornarajah, Ontario Superior Court of Justice, Court File 01-CV-208141.

[30] *Salt* v. *Marquess of Northampton* [1892] AC 1, 18–19 ("But the piety or love of fees of those who administered equity have thought otherwise").

[31] In the practising community, use of the title is now widespread, even among those who one might suppose would have considered academic life wearisome and the idea of having substantive writing commitments to be professionally hazardous. This is not to say that the field as a whole is not fortunate to have many eminent academic experts.

of commercial justice is nothing new under the sun, but Sorna is noticeably mindful of the value of a reputation acquired for scholarly and professional impartiality.[32]

Overview of Sornarajah's works

State investment contracts

Aside from *The Pursuit of Nationalised Property*, Sornarajah's early major works were on state contracts, in the contexts of international joint ventures and the settlement of investment contract disputes through commercial arbitration. These other early books are perhaps less well known, especially when compared to his *International Law on Foreign Investment*. However, the thrust of his later works cannot be properly understood without some appreciation of his earlier writings.

Sorna's concerns had been disciplinary at the outset, having much to do with the evolution of specific doctrines in the field. He wrote at a time when investment disputes were typically contractual. If he has been less than enthusiastic about our current attempts to expand treaty protection, it is because of his view that absent solid customary rules, contractual commitments are often still required to pin down the obligations states might owe to investors and that here lie doctrinal limits to what contract can do which cannot always be cured by treaty law.[33]

It was only when Sorna's views became more fully developed that he proceeded to mount his current theoretical attack on economic neo-liberalism.[34] We should therefore separate his earlier doctrinal writings from this latest theoretical effort.

As I have tried to suggest, Sorna's first concern had been to reveal and develop the international law on foreign investment, especially from the time when public international law precepts were only beginning to be

[32] It is sometimes uncritically accepted that a person whose writings reveal little might be more desirable than an ample scholar in the field. Perhaps one cannot be so naïve about competing professional concerns, for it is unlikely that the risk of challenges based upon issue conflicts will disappear. See further, *Urbaser* v. *Argentina*, decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, ICSID Case No. ARB/07/26, 12 August 2010. Yet it would be a shame for the most qualified writers to suppress their scholarship as a result. *Cf.* Sornarajah's views on scholarship and the practising profession in his *Resistance and Change*, 61.

[33] *Supra* note 7, and Chapters 13 and 14.

[34] His writings on economic neo-liberalism are now expanded in his latest book; Sornarajah, *Resistance and Change*.