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Introduction

1. In (international) legal scholarship, theoretical and doctrinal arguments are inextricably linked and mutually dependent. Doing one without the other inevitably distorts our view of the law, so much so that it might not be entirely unreasonable to paraphrase Kant's famous aphorism: legal theory without legal doctrine is empty, legal doctrine without legal theory is blind.[1] This is what this book seeks to prove or, rather, seeks to demonstrate by way of a case-study. Purely theoretical speculation about the nature and value of theory is not only as empty as first-order theory which proceeds in this manner but there is greater didactic value in showing how theory 'works' with respect to specific legal rules and arguments on the law – and how theoretical and doctrinal arguments intermesh. Proceeding from substantive questions to structural analysis and from there to methodology and epistemology may engender a greater acceptance among those not normally inclined to spend their energy on theoretical deliberations. In other words, showing the theoretical dimension of 'ordinary' legal questions may be more convincing than scholastic exercises on the theoretical level. Accordingly, the theoretical approach adopted here is used in every chapter, rather than remaining confined to an introductory section.

There is hardly a topic better suited to serve as case-study than expropriation in international investment law, for it is hotly debated yet undertheorised. The arguments developed to support one or another position are suffused with theoretical significance, particularly regarding the structure of the expropriation norm. Yet at the same time, hardly anywhere in international law is theory treated with greater disregard – and

[1] See Immanuel Kant, *Kritik der reinen Vernunft* (Riga: Hartknoch 1781/1787) A 48, B 75: 'Ohne Sinnlichkeit würde uns kein Gegenstand gegeben, und ohne Verstand keiner gedacht werden. Gedanken ohne Inhalt sind leer, Anschauungen ohne Begriffe sind blind.' 'Without sensibility no object would be given to us, without understanding no object would be thought. Thoughts without content are empty, intuitions without concepts are blind.' (Translation Norman Kemp Smith 1929.)

sometimes open disdain – than here. Contributors to debates in investment law in general and expropriation law in particular find it particularly hard to separate their ideological inclinations from the analysis of the law, yet seem to believe strongly that their arguments relate to the law.

However, the proposed *modus operandi* – demonstration, rather than abstract argument – is itself fraught with problems. The book could be taken for an 'ordinary' monograph on expropriation law whose theoretical chapters are at best a superfluous growth and at worst contain a malignancy whose metastases threaten to destroy what is left of 'healthy' doctrinal arguments. If that were the case, a book of this type and scope at this moment in the development of international investment law would seem untimely, superfluous and both too narrow and too broad. One could say with some justification that the time for writing a monograph on expropriation in international investment law has passed. Both investment law as a whole and the protection of foreign investors specifically against indirect expropriation have passed their zenith. All judges, counsel, academics, state officials and other 'stakeholders' must now be active participants in a complete rethinking of the law governing foreign direct investment, rather than worry about the foundations for the 'old' view of expropriation law under the network of outdated International Investment Agreements (IIAs). At best, we should be looking for pragmatic ways to incorporate legitimate concerns from a variety of legal, political and ethical considerations into 'legacy' IIAs. We cannot be concerned with deconstruction and legal reconstruction in the manner proposed when we have, to use the colloquial phrase, bigger fish to fry.

From another perspective, this type of book on expropriation would go too far: we already have a number of excellent works portraying the law in the time-honoured tradition of international legal scholarship. We do not need another, particularly one which expends so much effort on sowing doubt about the foundations for our arguments while not providing comprehensive coverage of the topic. Therefore, if this book were simply aiming to describe 'expropriation', the execution would be problematic: it is not a critique of the law itself, but it is critical of the methods that lawyers use. It does not attempt to find an 'acceptable' view of the law – one commensurate with the politics of the moment which allows a 'balanced' view of investor and state interests. It is not a reference work for practitioners, yet it seeks to show what the 'positive law' on expropriation is, warts and all.

This weak-spot would be real enough if this were yet another monograph on expropriation law – but it is not. The book aims to demonstrate that our arguments about the (content of the) law are dependent on theoretical foundations, such as how norms are created and interact or how legal scholarship should work. It also argues that the reverse is true: theory must respond to the law and the way we talk about the law. Expropriation in international investment law is the example chosen and this book will approach the demonstration of inter-linkage in a twofold manner. The theoretical chapters show how theoretical questions find their expression in doctrine; the doctrinal chapters show how doctrine raises theoretical questions. The law (respectively, our construction of it) is portrayed to show theoretical relevance; theory is portrayed to show its relevance for doctrine. Such an enterprise, however, cannot be apologetic and must include a critique and a deconstruction of the aims and methods of both jurisprudence and academic writings on expropriation.

2. Expropriation in international investment law has been a pressing and hotly debated issue for some time. A large number of authors and arbitral awards have attempted to grapple with the problem of what it is and how to apply the unspecific prescriptions in the network of thousands of IIAs. Foundational critiques of protection against so-called 'regulatory' expropriation – general legislative and administrative measures which may negatively affect foreign investors and their investments – have flourished as has the attempt to reconstruct the law to account for this critique. A large body of thought has developed to overcome the fundamental fragmentation of the 'base layer' of the law. After all, there is no universal investment treaty and it largely consists of a collection of bilateral or plurilateral treaties with no systematic interconnectedness. While largely similar in content, they are separate entities in law. Also, while there is case-law, there is no standing court, only ad hoc arbitral tribunals, which are deliberately designed to deliver decisions valid only *inter partes*. Despite this, in recent decades it has become commonplace to argue both that similarity of text means cross-treaty equality of legal content and that 'de facto' precedential value accrues to investment awards.

Take a typical example: the phrase 'measures having effect equivalent to nationalisation or expropriation' in Article 5(1) of the Pakistan–Denmark Bilateral Investment Treaty (BIT) 1996 cannot be made more specific by a tribunal deciding on the basis of the France–Venezuela BIT 2001 that the taking-over, by a national oil company, of a fracking

proppants plant, amounts to indirect expropriation.[2] In other words, even if Pakistan State Oil were to take over a Danish investor's fracking proppants plant in similar circumstances, 'the law' does not mandate a similar decision. On the evidence available, it can even be argued that the *factual likelihood* of a similar decision by a future tribunal is not particularly high.

3. While the past decade has seen a burgeoning of theoretical writings[3] on international investment law, most writings[4] tend to follow the 'orthodox' pattern of doctrinal international legal scholarship (*Rechtsdogmatik*). Orthodox international legal writings operate on the basis of 'default' legal positivism,[5] wanting to discover the law 'as it is', as opposed to a law based on perceived moral or political imperatives. However, it also tends to be non-theoretical and quasi-positivist, believing in received authorities, foremost international tribunals, without a sustained critique of their authority or correctness of their pronouncements. In investment law, this means trying to find specific rules in unspecific treaty provisions – and primarily using prior reasoning by arbitral tribunals. However, IIAs do not contain specific prescriptions: 'the law' applied by arbitral tribunals is 'coarse' and arbitral case-law does not change that fact. While IIAs typically prohibit uncompensated 'indirect expropriation', neither they themselves nor arbitral awards rendered on their basis determine (beyond the specific case) whether a tax of 99 per cent on oil production is an indirect expropriation – yet the orthodox approach (implicitly) argues that they do.

Both scholarship and practice employ a range of methods to unify and specify the law on expropriation. There is a great mass of literature and a large number of precedents. Yet as soon as we stop taking mainstream contentions at face-value, once we take a closer look at the foundation for their arguments, many of the methods employed to get to these

[2] *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, ICSID, ARB/12/13, Award of 30 December 2016 para 477.

[3] Leading investment law theorists include Zachary Douglas, Stephan Schill, Kate Miles and Andreas Kulick.

[4] Leading general publications on international investment law adopting this pattern include: Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford: Oxford University Press 2012); August Reinisch (ed.), *Standards of Investment Protection* (Oxford: Oxford University Press 2008); Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press 2007).

[5] Jörg Kammerhofer, 'International Legal Positivist Research Methods' in Rossana Deplano, Nicholas Tsagourias (eds.), *Research Methods in International Law: A Handbook* (Cheltenham: Edward Elgar in press), available at: ssrn.com/abstract=3503295, section 2.

contentions can be shown to be deeply problematic; some are unsustainable. That is, they are not sustainable if we take seriously the idea of wishing to discover the positive law in force *only*, rather than our conscious or subconscious ideological, ethical or pragmatic wishes or positions.

Mainstream scholarship on expropriation suffers from a range of problems. For example, it is based on a narrow band of arguments to sustain its construction of the law. Almost exclusively, orthodox views on case-law are encyclopaedic-apologetic, rather than critical. In elucidating the concept of 'expropriation', these voices privilege a balancing approach – balancing investment protection against the right to regulate – which, although its reliance on a highly technical and complex proportionality analysis suggests legality, is really an exercise in diplomacy. Where writings are pragmatic, untheoretical (or outright anti-theoretical), they are in danger of misrepresenting the law, as the lack of reflection on the theoretical foundations will result in an obfuscation of the limits of the law. Lack of critical reflection of the legal method leads to a falsification of results. Many are beholden to the *horror vacui* – they cannot abide the possibility of the law not being specific, not being unified, not providing a solution. Legal scholarship's subconscious drive to provide 'solutions' also hinders its task of accurately portraying the law in force.

Why is this tendency so strong in those writing about international law? Among other causes, there is a lack of awareness for the interlinkage and mutual dependency of theory and doctrine. A partial answer to this lack of awareness is that international legal scholarship does not have a group of people common to public legal scholarship in national contexts: scholars of constitutional law. In the municipal realm, these are primarily concerned with the arrangements for organising the highest organs of the state; administrative scholars are charged with describing the content of administrative rules. However, the former also take particular parts of and changes to administrative law as opportunity to expound on the foundations of administrative-legal doctrine, to explain the structural-hierarchical relationships and to critique arguments made by doctrinal scholars. They discuss topics such as the sources of public law, interpretation, norm-conflict and derogation. Constitutional lawyers serve as intermediary, talking about administrative doctrine, constitutional doctrine as well as legal theory proper,[6] raising awareness of

[6] A very good example for this type of scholarship is Ewald Wiederin, *Bundesrecht und Landesrecht: Zugleich ein Beitrag zu Strukturproblemen der bundesstaatlichen Kompetenzverteilung in Österreich und Deutschland* (Vienna: Springer 1995).

theory among doctrinal scholars as well as spelling out how their theoretical arguments can be applied with respect to substantive law. Perhaps we are missing the constitutional lawyers of international law.[7]

In order to *apply* legal theory, a specific theoretical approach needs to be chosen. We will proceed on the basis of the normativist positivism of the Pure Theory of Law and of its founder, Hans Kelsen. The following is based on the premise that its basic tenets can be gainfully applied to the study of international law. The Pure Theory contains a theory of legal scholarship (*Rechtswissenschaftstheorie*), a theory of how cognition of law as norms is possible without admixing it with norms belonging to other normative orders (or even 'absolute' values) or reducing law to socio-psycho-linguistic facts. It avoids reducing legal scholarship to a form of sociology, political science, psychology or linguistics. Yet it is not, cannot and does not want to be an explanation of the totality of 'the law'.[8]

This approach recognises, for example, that written norms, couched in natural languages, are not determinate and that legal scholarship cannot give an 'interpretation' that gains in specificity. It realises that, as a matter of *social fact*, concrete (tribunal) decisions are an important factor influencing future behaviour. Stakeholders such as states, investors and professional jurists such as counsel and arbitrators are influenced by the great amount of investment arbitral awards or, rather, by the reasoning therein. Yet, the Pure Theory is adamant that this highly important set of facts cannot be called 'the law'. Decisions *as facts* neither replace general norms nor make decisions (i.e. individual norms) generally binding. Even their factual influence is contingent on a wide variety of factors.

4. This book's focus on the interlinkage of theory and doctrine engenders a number of limitations. First, we will focus only on the 'modern' investment law based on the large network of IIAs, not on traditional norms, including customary international law (except as relevant to IIAs) or on the law and jurisprudence of the Iran–US Claims Tribunal. Second, there will be no attempt to collect and cite *all* writings and jurisprudence on the topic; while this book attempts to be reasonably comprehensive with respect to its sources, only writings (and case-law) in English and German were systematically canvassed; texts and awards in other languages were used only sporadically. Third, only literature published and

[7] See Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Abingdon: Routledge 2010) 196–7.
[8] See Jörg Kammerhofer, 'Positivistische Normbegründung' in Eric Hilgendorf, Jan C Joerden (eds.), *Handbuch Rechtsphilosophie* (Stuttgart: Metzler 2017) 200–8 at 205.

awards rendered before 1 January 2019 were canvassed. The linguistic and temporal limits are owing to pragmatic factors, such as the necessity to cut a significant part of the original manuscript before publication and my limited knowledge of other languages. A more encyclopaedic approach to sources was not necessary because this book focuses on theory: it is simply not necessary to provide all sources for a typical doctrinal argument – the theoretical critique attaches to the form of the argument, not to a specific number of treatments. Moreover, as far as I can ascertain, neither in scholarship published nor in awards rendered since 2019 have there been any arguments made which are so significantly different as to warrant a change in the points made in the following chapters.

5. How will the argument sketched out above be made in the remainder of this book? The first approach will be from a legal-theoretical vantage-point. The three 'theoretical' chapters will each discuss a significant type of doctrinal argument – customary international law, the authority of jurisprudence and the epistemic authority of interpretation – by which the universalisation, specification and greater certainty of expropriation are to be achieved. On the legal-theoretical framework adopted here, all three types of argument must face significant hurdles; none yields the benefit which modern investment doctrine expects.

Chapter 2 asks whether IIAs have generated or changed customary law. Investment scholarship's optimistic approach to the status of customary international law after the 'BIT movement'[9] must face four theoretical issues. First, there is a consistent failure to distinguish the elements of custom-creation (*usus* and *opinio iuris*) from their proofs; if we do so, however, IIAs help us rather less than expected to prove a modern customary expropriation norm. Second, IIAs counted as state practice are problematic because verbal acts as such are problematic. If customary norms get their content from a repetition of the behaviour to be prescribed, then verbal acts are no more than practice of *making* a verbal act, not of the content of that verbal act: an IIA prescribing that states ought to do 'x' is not the same as states actually doing 'x'. Third, IIAs counted as *opinio iuris* cannot supply the content of the resulting norm: customary norms are given their content by the repetition of behaviour, not of beliefs. Fourth, the idea that treaties are an *inter partes* opt-out from general international law means that IIAs are likely

[9] Andreas F Lowenfeld, 'Investment Agreements and International Law' 42 *Columbia Journal of Transnational Law* (2003) 123–30 at 129.

concluded to counter perceptions of custom and a fortiori not custom-building. Therefore, a customary international law on expropriation is unlikely to be shaped significantly by IIAs: IIAs are not instances of expropriation or non-expropriation, hence they cannot serve as state practice *sensu stricto*. Also, the treaty norm-formulation for expropriation without more does not tell us whether this is the *opinio iuris*. However, some evidence for *opinio iuris* can probably be gleamed from treaty-related texts or events. Further, even if IIAs did shape customary international law or if IIA expropriation clauses did incorporate a customary expropriation norm, the likely specificity of such a norm would be extraordinarily low.

Chapter 3 evaluates jurisprudence's precedential force. Orthodox approaches are marked by an agreement on a narrow set of arguments, namely that international law is not a common law and arbitral awards do not have *stare decisis* power, that jurisprudence is hugely important and tribunals rely on it and that there must therefore be a sort of de facto system of precedents in operation. In effect, 'factual importance' is fashioned into a source of legal authority. However, few arguments are given as to why this transfer from fact to law would occur and they do not provide a foundation for a general *legal* value for precedents. Yet the weight of arbitral jurisprudence is both too great to ignore and too helpful in discovering what 'expropriation' means in a pragmatic sense. Precedents are statements about general norms; outside the common law, judge-made law is merely an interpretation of a general norm in a judgment. Not even a constant tradition of decisions can turn such a statement into a norm.

Chapter 4 focuses on the claim that (tribunal) interpretation of IIAs is an epistemic 'authority' and that it is the integrative factor. Interpretation is, at once, the most promising, the most complex and the most problematic avenue, for there are two fundamentally different and to some extent irreconcilable meanings of interpretation: it can mean both the process of finding out what texts mean and guidance to the concretisation of abstract general norms in individual instances. In that second sense, interpretation is subconsciously used to narrow the freedom implicit in empowering an organ to decide and is therefore caught in the no-man's -land between decision and cognition. A range of interpretative tools is used to generate a quasi-formal unity of meaning across IIAs; systemic integration is the most used and most potent tool. It relies on two arguments: 'Reference' is based on the idea that systemic integration merely brings to the fore the intention of the treaty parties that wish their treaty to

be interpreted in the light of other parts of international law. Yet treaties are not reducible to party intentions. 'Coherence' assumes that international law is a rational system and that treaties must be (made) coherent with the system. However, international law is not a rationally coherent whole.

If customary law supplies the content in the process of systemic integration, then how does a treaty as contracting-out from customary law square with bringing its content back by means of interpretation? What difference would remain between such a potent interpretative tool and a straight-up modification of the treaty? Systemic integration enjoins us to assume that meanings are identical but that assumption is baseless: taking into account external rules could just as easily be the basis for a divergence. However, these problems are not as urgent as they may seem: customary law is less certain and precise than assumed; from the perspective of peer-accepted reasoning-before-decision-making, the interpreter takes *meanings*, not external rules into account. Arbitral tribunals interpret IIAs in light not of a customary norm but of other investment tribunals' understanding of the meaning of *pari materia* treaties' norms on expropriation. This is a paradigm change because it negates the distinctions among systemic integration, *pari materia* interpretation and other interpretative tools. Interpretation cannot provide a legal process of universalisation of international investment law because it *does not change the law*. It is, however, a powerful *factual* universaliser.

Chapter 5 discusses what doctrinal investment law scholarship can be and thus introduces the three doctrinal chapters. Can a doctrinal scholarship which is based on the normativist-positivist framework espoused in this book do any better? Starting from a critique of certain hyper-systematising approaches, it introduces Kelsen's idea of legal scholarship properly so called, one devoid of external influences, because these make it impossible to correctly cognise the law. Reconstructed in this manner, doctrinal scholarship can provide a structural analysis of the law, both on the macro-level of system-coherence and on the micro-level as frame-determination. It can also give practical information on how awards have exercised their freedom within the frame of possible meanings.

Chapter 6 deconstructs the main argument of orthodox doctrinal scholarship on regulatory expropriation. It argues that the strong impetus of orthodox scholarship to solve problems leads both camps – those favouring strong investor protection and those arguing for a wide state freedom to regulate – to see the problem in virtually the same terms

and to develop the same solution. The problem identified is that none of the two extremes is sustainable; the solution is that a balance has to be struck. Yet such a view is ideological, not legal, because it cannot contemplate and must deny a priori the possibility that IIA expropriation clauses are skewed in one direction or that the law does not provide for a balanced, proportional solution. Doctrinal scholarship, however, must analyse the law as it is, not as we may wish it to be.

Chapter 7 demonstrates the method of 'frame-determination' for IIA expropriation clauses and identifies three limits of the *actus reus* condition (the *Tatbestand*) of typical IIA expropriation clauses: First, on the macro-structural level – concerning the interaction of IIA clauses with the rest of international law – facile references to customary international law are shown to be problematic: 'expropriation' in IIAs does not refer to a customary norm of certain validity and great specificity. Second, on the micro-structural level, the necessity of treating direct and indirect expropriation as fully equivalent is structurally inherent in typical IIAs. Third, the other micro-structural argument is that all legality conditions are equal and cannot be doubled in the *Tatbestand* of indirect expropriation. The structure of typical IIA clauses does not support the majority of arguments based on 'police powers' or on a 'right to regulate'.

Chapter 8 turns to the frame of possible meanings, for there is ample room for tribunals to decide cases within that frame. It discusses tribunal arguments and holdings and by analysing and structuring extant jurisprudence for three topics: the 'substantial deprivation' standard, the preeminent measure of the intensity of measures in modern case-law; the controversy over the possibility of partial expropriation; and the distinction between compensation under IIAs and reparation under the law of state responsibility.