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ALTERNATIVE VISIONS OF THE
INTERNATIONAL LAW ON FOREIGN
INVESTMENT

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Muthucumaraswamy Sornarajah
(Photograph: David Tan, 2015)

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LAW ON FOREIGN
INVESTMENT

Essays in Honour of Muthucumaraswamy Sornarajah

Edited by

C. L. LIM

University of Hong Kong and Keating Chambers, London



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PREFACE

International economic law is a branch of public international law. Its subfields, however, have taken on the appearance of disconnected specialist subjects over the years, not least in the world of international legal practice with its Gattologists, Bitologists and sovereign debt workout specialists. In recent decades, the international law on foreign investment especially risked becoming unmoored from sovereign legal relations. Sornarajah, however, always took the classical view of a subject rooted in the sources and systems of public international law. Without being sovereign-centric he views the law as being as much a product of sovereign will as it is the result of economic change. His conclusions sometimes appeared incongruous with economic globalisation, transnational legal innovation, the explosion since the 1990s of private claims before investment tribunals and even the practice of these tribunals. But as Gus van Harten says here, Sornarajah “has pursued independent critical scholarship in international investment law for a longer time than any other living specialist in the field and has done so with patience and grace”, and the current backlash against investor-state arbitration is a tribute to the viewpoint which he has long held.

Whichever side one takes in the current debates, it is the right time for a book which explores Sornarajah’s views. This book attempts to do so in light of recent withdrawals from the Washington Convention, and a growing epidemic of ongoing national “reforms” of investment treaties and the institution of investor-state dispute settlement as it is currently understood. The backlash against investor-state arbitration, appearing in different shades in different places, is now no longer confined to a number of Latin American nations. Large economies – Indonesia, India and the European Union among them – are taking a broadly similar turn. From Kuala Lumpur to K Street, from Potsdamer Platz to the Palais d’Egmont, protests have taken place around the globe against ongoing mega-regional investment treaty negotiations.

A critical introduction to these complex, contemporary developments is also required, and it is hoped that this book will be of interest and use to students and scholars, government international law counsel and policy-makers, private legal counsel and arbitrators alike. The contributors come from varied backgrounds in the making, implementation, evaluation and contestation of treaty policies and from the worlds of treaty-making, professional law teaching, public interest lawyering, international law litigation and arbitration practice. Many, though not all, have been Sornarajah's fellow-travellers. Nonetheless, we have put these writings together to honour a friend and colleague whose life's work foreshadowed, and was in any case devoted to explaining, the philosophy cementing the latest turn of events.

While scholars as eminent as Yale's Michael Reisman counsel continuing global economic integration, and reject a return to the old days of the New International Economic Order or outright reversion to protectionism and mercantilism, Sornarajah rejects depictions of the law as a part of the unbreakable march of economic globalisation. Here is the kind of modern contest between alternative visions of the law which this book also tries to explain.

Muthucumaraswamy Sornarajah might sometimes have seemed out of place, dancing to the beat of a different drummer. Yet he was always taken seriously, and his time has come. This book is an attempt to recreate the drumbeats he heard, reveal the subject he sees and show the paths to which his drums lead.

C.L. Lim
Typhoon Season, 2015
HKSAR, China

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My principal debt is to the authors of this volume who selflessly and so enthusiastically set other urgent matters aside to meet a harsh writing schedule. The chapters arrived quickly and fell equally swiftly into place. They have inspired me with their professionalism, camaraderie and good cheer.

Joel Lee, sometime Vice-Dean of the law school at the National University of Singapore, first alerted me to Professor Sornarajah's coming statutory retirement. The idea for the book was conceived in one evening. It would have remained no more than an evening's conversation without the enthusiasm and support of Simon Chesterman, Dean of the NUS law school. Professor Sornarajah made his papers available to me, and the University of Hong Kong's Human Research Ethics Committee granted timely approval to work on them. I thank Simon Young, Associate Dean at HKU, for his advice on the ethical issues, and Michael Hor, our Dean in Hong Kong, for his constant encouragement.

Still, we would not have come this far without Finola O'Sullivan, whose capacity to digest lengthy correspondence while travelling and whose decisiveness in setting an immediate course of action meant that while our project came together with great intensity of purpose, the proposal itself received the early attention of Cambridge University Press. There followed thoughtful and helpful comments and suggestions from two perceptive and careful anonymous referees. They improved upon the original scheme. Joe Ng at the Press steered our project on its onward journey with consummate navigational skill and thoughtfulness.

I have been a fortunate law teacher. Zachary Korman, a native Texan and Lord President Cooper Memorial Prize Scholar at Edinburgh, devoted long hours over many months as my assistant. He kept a weather eye open in respect of every detail from six thousand miles, joined me in reading through the manuscript and making corrections. Zack prepared the table of treaties, legislation and cases. Justine So, now in practice, perhaps suspecting that ideas quickly dreamt up are liable to evaporate,

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ensured that I could commence the whole project armed only with a phone.

There were other well wishers. Sornarajah's portrait which appears in this book was taken by David Tan, Vice-Dean at NUS, following arrangements made by Jean Ho.

My wife, Lyn, bore a lost holiday with her usual aplomb. Work for this book was completed while I was Lionel A. Sheridan Visiting Professor at NUS, for which I am indebted to the Class of '61.