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"Book Review: The Public International Law Regime Governing International Investment, by Jose E. Alvarez, The Hague: Hague Academy of International Law, 2011, Pp. 502"

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The Public International Law Regime Governing International Investment. By José E. Alvarez. The Hague: Hague Academy of International Law, 2011. Pp. 502. $25, €18.

A series of Hague lectures, published as *The Public International Law Regime Governing International* Investment, by José E. Alvarez, the Herbert and Rose Rubin Professor of International Law at the New York University School of Law, places international investment law firmly within the rubric of public international law. Historically, international investment law might have been classified as pure private international law given the private commercial actors and investment activities involved. The lectures, however, posit that a dichotomous public versus private law paradigm does not work in the context of international investment. Alvarez makes the implicit explicit by considering investment law's unique, arguably *sui generis*, hybrid essence that crosses the public and private international law divides. By articulating its legitimate and fundamental public international law elements, he uses his lectures to encourage the evolution of the international investment law regime. He explains that his resulting "monograph is an attempt to understand the evolving ideological, political and legal natures of the international investment regime—and what lessons it may hold for other treaty regimes and their dispute settlers,"[1]

While Alvarez focuses primarily on the public international elements that exist in investment law, he acknowledges that the relationship is not a one-way valve flowing only from investment law to public law. Rather, the relationship is reflexive. As a myriad of panels and concomitant debates at the 2012 Biennial Conference of the Society of International Economic

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[1] JOSE E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 94 (2011).

Law demonstrated recently, public law principles inevitably inform the universe of investment law and vice versa. Alvarez's core contribution in the lectures is to ground international investment in the crossroads of international public and private law and to do so chiefly by reference to investment disputes arising from the 2001 Argentine currency crisis, where Argentina's adoption of measures to stabilize its economy led to over forty arbitrations involving claims of more than US$8 billion.[2]

The lectures are, in many respects, a fundamental overview of the investment treaty system in general and required reading for anyone interested in the Argentine disputes. In his effort to situate investment law within the public law context, Alvarez identifies international public law elements but also recognizes internal tensions, particularly where adjudicators or other stakeholders may not fully appreciate the public law aspects of the regime. Indeed, he observes that some investor-state arbitrators "see themselves as engaged in the same task as commercial arbitrators, that is, merely resolving a particular dispute, and some [investor-state arbitrators] see investor-State arbitrations as a species of 'public law' adjudication."[3] His reflexive approach to the intersection of public and private law elements likewise means that the public law stakeholders should appreciate the nuance of the private law elements of the system. In this way, Alvarez creates a foundation for other scholars to acknowledge this fundamental tension within the investment regime and to offer new frameworks that recognize even deeper tensions and public international law elements.[4]

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[2] William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 308–11 (2008).
[3] *See supra* note 1, at 364.
[4] Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AJIL (forthcoming 2013).

In support of his key thesis, Alvarez succinctly identifies the core areas where investment law and public international law intersect. His "Top 10" list identifies fundamental synergies, including (1) treatification, (2) fragmentation, (3) impact on nonstate actors, (4) globalization and its discontents, (5) the international law professional, (6) the increasing judicialization of law, (7) hegemonic elements of international law, (8) global administrative law, (9) constitutionalization, and (10) humanity's law.[5]

Each book chapter represents one of Alvarez's five lectures. Chapter 1 provides the necessary overview of the history and context of international investment to permit an evaluation of the regime. In an effort to frame the legalization and judicialization of international investment, Alvarez places the treatification of investment law into a modern schema of globalization and its discontents. He then identifies with textbook clarity the fundamental rights—both substantive and procedural—of international investment treaties and plants two sets of seeds to support his theory about the inherent public international law elements of investment law.

Alvarez's first type of seeds involves functional comparisons with established public international law regimes, namely international trade[6] and human rights, and includes a useful nomenclature of the functions of adjudicators in human rights and investment law.[7] His second type of seeds relates to a four-category schema for understanding the current "backlash" against the international investment regime and for exploring traditional public international law themes. The schema frames the debate by identifying (1) vertical critiques, which relate to a top-down disconnect between international and national domestic regimes creating concerns for systemic legitimacy, democracy deficits, and other vertical affronts to state sovereignty; (2) horizontal

[5] *Id*. at 406-57.
[6] *Id.* at 35-41, 55-56.
[7] *Id.* at 49-75.

critiques, namely, a lack of sovereign equality in the investment regime that harks back to traditional debates about the divergences between the global North/South, imbalanced economic rights, and other power disparities; (3) "ideological" dissatisfaction related to structural concerns about the value of the international investment given different approaches to the value of privatization and free markets in public international law; and (4) other issues relating to the rule of law, including forum shopping by investors, transparency, and systemic consistency. The care that Alvarez displays in the construction of this schema is helpful both in its ordered classification of the core issues for debate and its balanced recognition of systemic critique.

Chapter 2 explores the objectives of investment treaties, the public international law instrument at the heart of the investment regime. Alvarez correctly posits that a monolithic narrative of the value of bilateral investment treaties (BITs) is improper[8] and instead suggests that BITs often perform multiple functions simultaneously, and differently, for various stakeholders.[9] He then drills down with a focus on the BIT program of the United States and, without identifying a sharp historical divide, notes a potential generational shift in terms of the sovereign objectives in promulgating investment treaties. In the first generation of U.S. BITs, given the emphasis on U.S. capital exports, the BITs focused on (1) creating a uniform standard for fair compensation of expropriation; (2) providing other substantive guarantees of treatment to incentivize and facilitate a stable, predictable, and secure regulatory framework for foreign investment; and (3) depoliticizing investment disputes by removing sovereigns from espousal decisions. Yet, after traditional capital exporters found themselves subjected to suit or when

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[8] *See* Jennifer L. Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, 6 REV. INT'L. ORG. 1 (2011) (questioning the value of creating monolithic narratives about the actual or intended benefits of investment treaties); *see also* Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 400 (2010); Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions*, 54 INT'L STUD. Q. 1 (2010).

[9] *See* Alvarez, *supra* note 1, at 135.

historically capital-importing states became capital exporters, the proverbial worm turned. Once the economic paradigm of investment shifted and the hitherto theoretical reciprocal nature of BITs became a reality, states shifted to reclaim sovereignty and retain domestic policy space in a manner consistent with international law.[10]

Despite the utility of Alvarez's careful state-specific analysis, the lectures focus on the U.S. experience to the exclusion of other key players in the international investment regime. There is certainly value in explaining the position of the United States as a major player in the regime, and the U.S. model has arguably influenced the practice of other states. Nevertheless, including additional narratives from other interested states, particularly emerging economies or economies in transition, would have been useful. While Alvarez does refer to China and other states—but not with the detail of his exploration of the United States—one wonders whether his characterization of the international investment regime would be the same if a "bottom up" approach were considered from the perspective of states, like Egypt or South Korea, that have a complicated and fragmented history of BITs. Given the lectures' use of Argentine examples to illustrate key elements related to investment disputes, a non-U.S.-focused case study on treaty creation could provide useful insights on key public international law themes of fragmentation and state sovereignty.

Having grounded the discussion, Alvarez uses chapters 3 and 4 to provide specific examples—typically related to Argentina—of demonstrable doctrinal links between the investment treaty system and public international law. Chapter 3 focuses on the evolution of fair and equitable treatment (FET) provisions, whereas chapter 4 explores the Argentine cases in detail. The strength of Alvarez's core thesis, namely that international investment law is inevitably intertwined with public international law, is demonstrated in these chapters. Having

[10] *Id. at* 153-60, 166-69.

crisply identified seven interpretive questions about FET, chapter 3 has two goals: to provide a roadmap for those interested in the evolution and treatment of FET and to demonstrate how FET applies. In keeping with his public international law focus, Alvarez queries how FET may be distinct from customary international law while simultaneously identifying how textual variance exacerbates concerns about fragmentation, even though "most tribunals charged with interpreting FET have not emphasized the textual differences among FET clauses."[11] Chapter 4 develops this theme and uses Argentina to explore challenges related to inconsistency in the relevant jurisprudence, the meaning of "necessity" under international law, and the interpretation and application of provisions relating to essential security and nonprecluded measures.

Chapter 5 moves beyond Alvarez's core thesis of identifying investment law's synergies with public international law. Rather, he seeks here to offer normative insights about the future of the investment regime. By highlighting its transitional nature and the existing backlash, Alvarez uses the Argentine cases to highlight the best and the worst of the investment regime. Argentina thus becomes the showcase for exploring inconsistent and disparate outcomes, challenges to sovereignty, implications for the human rights—particularly related to concerns for rule of law and procedural justice—before turning to the thorny question of claims of purported "pro-investor" bias. In reaping the harvest from the seeds planted in chapter 1, Alvarez uses his four-category schema to offer assessments of various normative solutions for improving the investment system. He then comes full circle to consider the points of intersection between the investment regime and public international law. He closes by encouraging stakeholders to grasp the deep complexity of the investment regime, which is not inherently capable of overly simplistic dichotomies. Instead, akin to dialogues for legal pluralism, he encourages an appreciation that the investment regime may relate to "harmonization *and* fragmentation, reflect

[11] *Id.* at 205.

the views of States *and* non-State actors, be both a tool of . . . globalization *and* of 'humanity,' [and] enforce *both* treaty and non-treaty sources of law."[12] Ultimately, Alvarez's encouragement of a "both/and" approach to the international investment law regime is appropriate. Following Alvarez's call will undoubtedly require deep and complex thinking that challenges traditional classifications and stark conceptions of international law. Yet, while the task is not easy, the effort will be worthwhile as it offers the opportunity promote a more nuanced approach to investment law that more closely mirrors reality and normative hopes for the future.

Overall, there is much to commend in Alvarez's book. Yet, as Socrates gently suggests in Plato's *Crito*, one's greatest strength can also be one's greatest weakness and vice versa.[13] Similarly, Alvarez's effort to bring the public international law elements of investment into sharper focus through the Argentine case study has value—but also a cost. The focus on the Argentine cases, while useful, perhaps detracts from a balanced assessment of the entirety of the international investment system. Contextualization is necessary to clarify what the Argentine cases mean for Argentina specifically, states generally, and, perhaps more interestingly, given the condition of the international economic order, states in the midst of fiscal crises.[14]

Yet Alvarez clearly appreciates the value of a holistic analysis of the investment regime. He identifies the utility of large-scale statistical analyses as well as their inherent limitations. These limitations necessitate the ongoing assessment of the investment treaty system over time. In his discussion of the possibility of bias within the investment regime, Alvarez observes that prior to 2007 "[g]overnments won in 58 per cent of the cases while investors won in 39 per cent;

[12] *Id.*, at 456 (emphasis in original).

[13] *See* PLATO, APOLOGY, CRITO AND PHAEDO OF SOCRATES, Henry Cary., M A. (trans) 105, ("Would, O Crito that the multitude could effect the greatest evils, that they might also effect the greatest good"); *see also id.* at 119 ("these multitudes, who rashly put one to death [] would restore one to life").

[14] *See, e.g.*, Noel Mauer, *Argentina Beats ICSID! Seriously, Argentina Beats ICSID. Regularly*, *in* THE POWER AND THE MONEY, *at* http://bit.ly/MSAxz8/ (providing commentary by a Harvard Business School professor that discusses general statistics about investment treaty disputes and then discusses Argentina's experience within the larger framework).

that despite the fact that investors claimed on average US$343 million in damages, tribunals awarded only US$10 million on average,"[15] He then observes that further research is required, presumably if one wishes to draw inferences from the totality of the system based upon the specific example of Argentina.

Recent research has taken this call seriously and replicated key aspects of data upon which Alvarez relies—concerning both outcome and discounts between amounts claimed and awarded—to address questions of systemic bias. A dataset of "Generation 2" public awards prior to 2010,[16] which nearly doubled the cases subject to earlier analysis, found that governments still won 55.6 percent (*n*=55)[17] of the cases, investors won 38.4 percent (*n*=38) of the cases, and the remaining cases (*n*=6) were settled. Other Generation 2 analyses that controlled for inflation[18] found the raw mean amount investors claimed was US$370,898,027 (*n*=79),[19] with a minimum claim of US$202,858 in *Maffezini v. Spain*[20] and a maximum claim of US$11,489,456,522 in *Generational Ukraine Inc. v. Ukraine*.[21] By contrast, the mean amount awarded for all final awards, adjusted for inflation, was US$21,161,794 (*n*=99),[22] with a maximum award in *CME Czech Republic B.V. v. Czech Republic*.[23] Even when focusing on the narrow subset of cases that

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[15] *Id.* at 389.The figures upon which Alvarez relies are based upon a data set that is publicly available and downloadable. *See* http://law.wlu.edu/faculty/page.asp?pageid=1185/.

[16] The Generation 2 dataset involved all publicly available awards as of June 1, 2009. *See id.* A third generation of research to assess awards rendered before January 1, 2012 is underway.

[17] The use of "*n*" indicates the number of cases.

[18] As in the Generation 1 data, damages were converted to a common U.S. dollar currency at the date of the award. All damage awards were then adjusted for inflation using the consumer price index (CPI) as of January 1, 2011.

[19] Even when accounting for statistical outliers, the trimmed claimed mean was US$147,352,001 (*n*=72), and the winzorized claimed mean was US$188,198,953 (*n*=79).

[20] *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/77, Award (NAFTA Ch. 11 Arb. Trib. Nov. 13, 2000), involved an amount claimed of ESP30,000,000, which amounted to the raw amount of US$155,314 at the date of the award.

[21] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003), involved a raw claim of US$9,400,000,000.

[22] The raw mean damage award, without adjusting for inflation, was US$18,889,128 (*n*=99). Even accounting for statistical outliers, the trimmed mean award was US$1,266,186 (*n*=82), and the winzorized mean damage was US$3,353,098 (*n*=99).

[23] The tribunal awarded US$269,814,000 on the date of award, which amounts to US$329,788,959.80 when adjusted for inflation.

only involved an award in favor of an investor, a substantial—but not as large—discrepancy existed between mean amounts claimed (US$198,233,505; *n*=33) and awarded (US$53,718,399; *n*=39).[24] Particularly with a doubling of the population of public awards, the stability of both the win-loss ratio (namely 1–3 percent shifts) and the steep discount between amounts claimed and awarded (a US$350 million difference rather than a US$330 million difference) is remarkable. It also suggests that Alvarez's data-driven responses to critics of the system will remain valuable.[25]

It is curious that, despite Alvarez's appreciation of holistic data and his specific and detailed exposition of Argentina, he does not take the next step and use large-scale quantitative analysis to contextualize the Argentine cases. Given the extensive nature of his undertaking and the need to focus on legal doctrine rather than quantitative analysis, such an omission is understandable. There is nevertheless value, and connecting the dots as reference to Argentina's experience—whether by Alvarez or others—raises a fundamental question, namely: is Argentina the tail wagging the dog of the investment regime?

As a preliminary matter, one may find it easy to recall and instructive to rely upon the Argentine cases. The sheer volume of cases and the amounts at stake warrant individualized attention. Nevertheless, exclusive reliance on Argentina—particularly given that those cases involve a focused set of government measures responding to a severe economic crisis—may nevertheless have limited inferential value for assertions about the totality of the international investment regime.

Data can help provide an answer and contextualize whether the cases are representative of the larger whole. It is noteworthy that for the top sixteen awards (the "Top 16" or "T16") in

[24] The raw mean amount claimed for this subset was US$178,607,593, and the raw mean amount awarded was US$47,949,326. The smallest amount awarded was in *Bogdanov v. Republic of Moldova*, Award (Stockholm Chamber of Commerce Arb. Inst. Sept. 22, 2005), with an original award in Moldovan lei of 310,000, which was a raw amount of US$24,603 on the date of the award and an inflation adjusted amount of US$28,336.23.
[25] Alvarez, *supra* note 1, at 391-92.

the Generation 2 dataset that were over US$20 million (adjusted for inflation), nine of the T16 cases were rendered against Argentina.[26] These statistics suggest that Alvarez is right to focus on Argentina, as it is a key fiscal subcomponent of state liability in the investment regime. Yet Argentina is arguably overrepresented in the most extreme (and most negative) outcomes for states in the entire population. As Argentina therefore constitutes a heavy thumb on the scale, one must be cautious in assessing whether Argentina is a representative example or an unrepresentative subpopulation before drawing broader conclusions about the investment regime.

At least three competing narratives exist. In one narrative, Argentina is an unrepresentative example and, given the unique nature of its experiences, cannot be used to draw valid inferences about the totality of the investment treaty system. The argument is that, given Argentina's unique experience with the system where it is responsible for more than 50 percent of the T16 awards—and indeed four of the five highest awards—its experience reflects neither the experiences of other states nor a normal distribution and is arguably a statistical outlier. Moreover, Argentina's disputes relate to catastrophic economic events, and the remaining disputes in the population do not share this critical commonality, particularly other T16 awards. Under this narrative, Argentina's experiences must be limited to its unique historical context and should not be used as a basis for generalization about the investment regime.

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[26] The nine cases out of the top sixteen awards (i.e. awards that were over US$20 million when adjusted for inflation to a common date) were: (1) *Siemens A.G. v. Argentina*, (2) B.*G. Group PLC v. Argentina*, (3) *Azurix Corp v. Argentina*, (4) *CMS Gas Transmission Company v. Argentina*, (5) *Sempra Energy International v. Argentina*; (6) *Enron Corporation and Ponderosa Assets, LP v. Argentina*; (7) *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, (8) *LG&E Energy Corp, LG&E Capital Corp. and LG&E Int'l Inc. v. Argentina*, and (9) *National Grid v. Argentina*. Interestingly out of the top six awards, five were against Argentina but the largest award was rendered against the Czech Republic (*CME v. Lauder*). The seven remaining awards were investors were awarded over US$20 million when adjusted for inflation were: (1) *CME v. Lauder*; (2) *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan*; (3) *Occidental Exploration and Production Co. v. Republic of Ecuador*; (4) *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*; (5) *Eastern Sugar B.V. v. Czech Republic*; (6) *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*; and (7) *Metalclad Corp. v. Mexico*. *See* Appendix I.

Under a second narrative, Argentina is a proper, representative, and necessary case study. This narrative recognizes that, based upon Generation 2 data, Argentina is responsible for 19 percent of the total investment treaty caseload,[27] and therefore making inferences about the population seems reasonable. This narrative suggests that Argentina shares critical and representative characteristics with other states. Specifically, Argentina's World Bank development status is similar to other states within the general population and also the specific subset of awards rendered against the states. Notably, with the exception of two cases—one case against the Czech Republic when it was a high-income respondent and another case against Ecuador when it was a lower-middle–income respondent—when the awards were made, all of the T16 awards were made against upper-middle–income countries. In other words, while Argentina may be unusual in its claims deriving from a financial crisis, it generally *does* share its development status with other states that have received the short end of the investment arbitration stick. Moreover, Argentina, like other upper-middle income states, has also won cases. These similarities form a basis for suggesting that Argentina's disputes can be used to make valid inferences about the overall population.

A third, hybrid narrative balances these two previous perspectives. Under this view, Argentina should be appreciated within its unique context, but inferences related to the remainder of the population must be made with caution and with recognition that inferences may not hold true in the future. This assessment requires simultaneous appreciation of the limitations of the macro-level inferences and respect for the unique micro-experience of Argentina. Put another way, it will be critical to address, or at least control for, a possible "Argentina effect." As the population of investment treaty awards continues to expand, time will tell whether the

[27] Generation 2 data, which relates to all disputes with at least one publicly available award, reveals that Argentina has the largest caseload of any State (*n*=26). Mexico is the next largest (*n*=12; 8.8%), and the United States has the third largest number of awards (*n*=9; 6.6%). The average number of disputes brought against a state is 2.85.

Argentine cases are a representative example of the system's functionality or a proverbial blip that is tied to unique and nonreplicable economic, political, and historic circumstances or some combination thereof.

In the interim, Alvarez's use of the Argentine cases to explore the unique reflexive insights—both that public law has for international investment law and that investment law has for public law—provides considerable, and compelling, food for thought. As the intersection of competing public law regimes continues to expand, including areas related to the environment, labor law, criminal law, and human rights, Alvarez's insights should form a baseline for future analysis of the investment treaty regime. As he reminds us in his closing comments, international investment law is not alone in finding new value by crossing scholarly divides when evaluating complex social, political, economic, and legal phenomena.

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Appendix I: T16 Cases

1. *CME Czech Republic B.V. v Czech Republic*: Original Award of Damages = 269,814,000.00; Inflation Adjusted = 329,788,959.80

2. *Siemens A.G. v. Argentine Republic*: Original Award of Damages = 217,838,439.00; Inflation Adjusted = 236,287,570.80

3. *BG Group Plc v. Republic of Argentina*: Original Award of Damages = 185,285,485.85; Inflation Adjusted = 200,977,649.30

4. *Azurix Corp. v. Argentine Republic*: Original Award of Damages = 165,240,753.00; Inflation Adjusted = 184,384,248.80

5. *CMS Gas Transmission Company v. Argentina*: Original Award of Damages = 133,200,000.00; Inflation Adjusted = 153,411,584.00

6. *Sempra Energy International v. Argentine Republic*: Original Award of Damages = 128,250,462.00; Inflation Adjusted = 139,112,225.80

7. *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Repubic of Kazakhstan*: Original Award Damages = 125,000,000.00; Inflation Adjusted = 130,573,618.20

8. *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*: Original Award of Damages = 106,200,000.00; Inflation Adjusted = 115,194,270.30

9. *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* [Vivdendi II - Arb/97/3]: Original Award of Damages = 105,000,000.00; Inflation Adjusted = 113,892,640.10

10. *Occidental Exploration and Production Co. v. Republic of Ecuador*: Original Award of Damages = 71,533,549.00; Inflation Adjusted = 85,161,691.65

11. *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*: Original Award of Damages = 76,200,000.00; Inflation Adjusted = 85,027,933.52

12. *LG&E Energy Corp, LG&E Capital Corp. and LG&E Int’l Inc. v. Argentina*: Original Award of Damages = 57,400,000.00; Inflation Adjusted = 62,261,309.93

13. *National Grid p.l.c. v. Argentine Republic*: Original Award of Damages = 38,800,000.00; Inflation Adjusted = 40,530,051.09

14. *Eastern Sugar B.V. v. Czech Republic*: Original Award of Damages = 33,746,200.00; Inflation Adjusted = 36,604,226.78

15. *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*: Original Award of Damages = 33,510,091.00; Inflation Adjusted = 36,348,121.28

16. *Metalclad Corp. v. Mexico*: Original Award of Damages: 16,685,000.00; Inflation Adjusted = US$21,792,534.41