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Property Rights and the Taking of Land: Expropriation in Historical Perspective

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Yonit Percival

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Abstract

Law provides an important prism through which both the discursive surfaces and material expression of agro-extractivism may be examined. It is emblematic of systemic rationality, unmasking it with starkness rarely found elsewhere. As a discourse, law represents a body of language, concepts and meanings. As an institution it provides the rules that translate the discourse into practice, locks in norms, and legitimises the power structures that formulated the discourse in the first place. These attributes render law an invaluable site of resistance in and of itself, as well as a base from which institutional and ideational reclamations may be launched.

With this in mind, this paper seeks to interrogate the concept of 'taking' in the international law regime governing the cross-border movement of capital, as it evolved from permissible taking of land in the context of colonial expansion ('appropriation') to prohibited taking by the post colonial state ('expropriation'). The paper argues that theorisation of property rights as born out of and sanctified by acts of 'improvement' explained and justified the former. With the grant of statehood to formerly colonised lands, same logic was employed, this time, however, to de-legitimise the latter. The post-colonial state is thus disciplined and penalised using a notion of 'expropriation' that is enforceable under international law. By contrast, 'appropriation' and intertwined violence by foreign private capital remain embedded primarily in soft law, or in what Santos conceptualises as the social territory on the other side of the dividing line, to which the lawful/unlawful dichotomy does not apply.

This, *prime facie*, contradictory if coalescing double movement of legitimisation of taking and counter-movement of its de-legitimisation is accorded theoretical integrity by the capitalist rationality that underpins private property rights. Possession of and customary rights over land deemed 'wasted' is marginalised, rendering it available for improvement, and ripe for the taking. Once improved, however, it may not be taken back except in prescribed circumstances and manner, including compensation that is commensurate with its enhanced value.

Ideologies and strategies of possession and dispossession thus form part of a single continuum, casting doubt over the break between colonialism and its purported dismantling. The paper will also consider the resistance put up by post-colonial states in their struggle for permanent sovereignty over natural resources, and capital's response to such resistance in the form of a network of bilateral investment treaties (BITs). In relation to the latter, the paper will focus on the ways in which 'expropriation' is treated in the model treaties proposed by the formerly colonised/semi colonised BRICS countries of China, India and Brazil.

1 Introduction

Why is the law a suitable lens through which extractivism may be examined?

Law expresses systemic rationality with starkness rarely found elsewhere. In a way that leaves little room for concealment, legal rules unmask the realities of where power lies, whose benefit is being served and how this is achieved.

I propose two lenses through which law may be observed, and which go some way to explaining this statement of fact.

First, we can theorise law as a discourse. Adopting Foucault's definition of discourse, by this I mean that law represents a system of meanings. It is a system that entails rules, practices and strategies, and which describes as well as constructs the object it talks about. In the context of this paper, we may want to ask what is the meaning of property rights, what are the practices that both created and describe them, and the means by which they were institutionalised. In particular, we may want to enquire how it is that the same meaning was applied so as to legitimise and enable a practice - in this case the taking of land - and, later on, applied in turn to de-legitimise it. The hope is that such enquiry may shed at least some light on the role modern property rights play within extractivism both in its narrower sense of what has come to be known as 'land grabbing', and its wider sense of the global movement of capital in search of opportunities for value extraction.

Here we get an inkling of the intimacy that exists between discourse and power. It is power, as it circulates throughout society, its actors and its institutions, that creates meanings. By delineating the boundaries within which our regime of knowledge is negotiated it manufactures consent (Foucault 2002). It follows that discourse and therefore law are not necessarily purely about language, but extend also to the power structures out of which they emerged, the questions raised by power's pursuance of self-preservation and expansion, as well as the answers given in response.

Second, law is also an institution. As such, it provides rules that guide us as to how internalised norms are to be practiced, and then locks in such norms and rules so that they are not easily deviated from. In so doing, law legitimises the power structures that formulated the discourse in the first place.

With this in mind, for the rest of this paper, I will examine the historical context in which the concept of property rights was formulated, and the double movement of privatisation and resistance to privatisation that brought us to where we are now. I will conclude by looking at ideas coming from the camp of the BRICS countries.

2 Property Rights

Introduction

There is nothing new about the concept of property rights over land. The development of local propertied elites was central to the structure of the Roman Empire. In China, some form of property in land was often a prerequisite of office at an early stage. Feudalism unified authority over private property with political authority, and the former was made conditional on the lord's role as a fragment of the state. But it was in the context of the emergence of agrarian capitalism in England, and European overseas expansion that property rights were innovated and 'modernised' in a way that imbued them with a whole new logic. Legal engagement was central to this innovation. For law – emblematic of European rationalism - provided a mechanism for ordering and institutionalising the answers constructed in response to the troubling questions raised by the project of 'taking possession' - taking possession by the landed aristocracy of common land in England and, by colonial settlers of the 'discovered' 'New World' overseas. That the transformation of property rights first took place in

relation to land is hardly surprising, given that land is associated with the most fundamental access to reproduction. That is food, and in the context of industrialised societies, natural resources.

Enclosures and Colonialism: Taking Legitimised

Thus, what triggered the innovation of property rights was the act of taking. The question arose as to how such taking may be legitimised and given permanence notwithstanding its unlawfulness at the time in England under the Magna Carta and the Charter of the Forest; how it may be transformed into a lawful right of ownership – the right to possess the land, deal with it, and perhaps most importantly, exclude others from it. The need to find answers capable of transforming the act of taking into a right was particularly pressing against a landscape of resistance by those it dispossessed – impoverished and aggrieved peasants in England, now exiled to urban slums or reduced to a life of vagabonding, and indigenous populations in the 'New World', all of whom threatened the desired order. For 'taking possession' and losing possession reside on a single continuum - the act of taking contains within it the act of exclusion, so that one produces the other. And so, at the dawn of the 17th century, the tinker, John Reynolds and his dispossessed fellow rebels, known as the Diggers and the Levellers dug out and levelled the hedges planted to mark the boundaries of private ownership. They also petitioned the King to enforce his own laws, which the enclosing landed aristocracy was breaking. This peaceful resistance was met with deadly violence inflicted on them not only by landowners' backed militias, but also, using the charge of treason, by the King whose laws the diggers and levellers sought to maintain. In the context of European expansion, the urgency of finding answers was also associated with imperial competition. By what mechanism, for example, other imperial powers could be excluded from land in the Americas taken by the settlers despatched from Spain. New practices had to be met with new meanings.

Here we may want to distinguish between the colonial encounter and enclosures in England. Eventually, they were to converge, at least in the context of English and French colonialism, in a justification that linked the act of taking to the ethics of 'improvement' and commerce as it emerged, most famously, in John Locke's theory of property. Earlier, though, in the context of Spanish expansion, this was preceded with notions such as the 'spirit of conquest, and the divine right to prior occupation that flowed from a 'right of discovery'. For the Spaniards, in the 15th century, conquest was originally vested with divine sanction. Since property rights derived from God's grace, it followed that non-Christian could not possess these rights. By the 16th century, however, the Spanish theologian and jurist, Francisco de Vitoria responded differently to the need to theorise the relationship between the Spaniards and the Indians, and the novel legal problems they threw up. He did so in two lectures generally viewed as founding texts of international law. The issue was how to account for the Spanish claim for title over the Indies. Vitoria rejected the primary role allocated by scholars of the preceding century to divine law and its administrator, the Pope, and replaced it with natural law administered by a secular sovereign. The first question he posed was: could the Indians, being unbelievers, own property? As we saw above, as a matter of divine law, the answer was no. Vitoria's answer in contrast was yes. Ownership, he argued, was based on natural law as translated by human reason into human law. Such law could not be displaced by the absence of true faith. Rejecting the argument that the Pope' authority was universal and capable of legitimising conquest, Vitoria stripped it of temporal authority, and confined it instead to the spiritual dimension of the Christian world. Out of this legal reasoning, the Indians emerged as equally possessing of reason and therefore with access not only to rights over their land, but also to the universal realm of commerce. In other words, in Vitoria's jurisprudence, the Indians were equal participators in reciprocal commercial transactions. However, the reality was that it was the Spaniards who were present in the Indies. The Indians were not present in Spain, nor did they want or able to go there. The reality was also that the Spaniards had much greater power and greater capacity for violent coercion. Seen through this lens of reality, the discourse of equality and reciprocity in fact justified Spanish incursions into Indian society. The norms of free travel and residence it created were inevitably violated by the Indians resisting foreign penetration of their lands. Such resistance was conceptualised as an act of war, which in turn invoked Spanish right to defend themselves against aggression. Second, for Vitoria, Indian capacity for reason was not aligned with their culture and customs. This gap between the ontologically equal

Indian and the culturally inferior Indian called for the imposition of universal norms as practiced by the Spaniards. Such imposition applied not only to Spanish-Indian interactions, but also to intra-Indian relationships, and whether they desired it or not (Anghie 2004:17-23). It seems therefore that, albeit using different routes, the secularisation of the law also ended up producing a two-tier system with, nevertheless, a claim to universality. There were two hierarchically-structured groupings – one who could do the taking, and the other who was prohibited from objecting. The utilisation of legally framed language of reciprocity and equality to mask this reality survives till today. It may be found in the language and format of bilateral investment treaties (BITs), to which we shall return later.

Starting in early 17th century, a different argument was used by the English, and to a lesser extent, the French, to enable the transformation of taking into ownership of land. This argument was a variant of the Roman law of *res nullius*, demonstrating a line of continuity in political and legal thought between the Roman and modern European empires. *Res nullius* referred to 'empty things', including unoccupied lands. It provided that such unoccupied lands remained the common property of humankind, until such time as they were put to use. The first to put them to use became the owner. Armed with this reasoning, and settling in Indian hunting grounds deemed vacant, the British and the French were thus able not only to take, but also to assert ownership over Indian land. The legitimacy of possession was enhanced by the application of a different though related principle of Roman law: that of 'prescription' whereby rights are created by the passage of time and continuous occupation.

It was this idea of use as giving rise to a property right that John Locke innovated by combining it with the notion of 'improvement'. The innovation was of considerable significance because it articulated the logic of agrarian capitalism as it was taking hold of and redefining social relation in England. In the process, property rights were transformed. Thus, the act of taking and the need to justify and enable it were not confined to the colonised peripheries. They also took place on home ground.

The act most associated with the emergence of English agrarian capitalism was that of enclosure. Enclosure is often understood as simply referring to the fencing of common land. In reality, it went beyond a physical act of taking to include a normative content. That is, the the extinction of common and customary rights, such that dispossessed a vast section of the population of its access to the means of survival (Wood 2002:108-9). The major wave of enclosures took place in the 16th century, when commoners were driven off lands by large landowners, so that the lands may be put to profitable use as pasture for increasingly lucrative sheep farming or as arable land. By that time, preoccupation with the enhancement of land's productivity for profit was growing. The word that most expressed this preoccupation was 'improvement'. For, in its origin, the word 'to improve' did not mean to make something better generally, but rather to do something for monetary profit. In this way, it articulated the ideology of England's rising agrarian capitalism (Wood 2002:105-8).

Enclosure produced a growing problem of dispossessed vagabonds who roamed the countryside threatening the social order. The need to theorise the transformation in the nature of property rights was pressing. Partly this was done via legal practice. In court cases judges legitimised improvement by holding that it was capable of displacing centuries old customary rights. But it was John Locke, the son of a country attorney who was to offer the systematic analysis emblematic of English agrarian capitalism and overseas English and French expansion. The direction towards which Locke was to veer the meaning of property rights is aligned with his private life. A protégée of an encloser, Lord Shaftesbury, he started as an Oxford don to become the holder of various colonies, plantations and trade related government posts, as well as shares in the slaves trading East Africa Royal Charter company.

Essentially, what Locke did was to introduce the idea of labour in order fill in the gap in the reasoning that tied improvement to private ownership rights. Locke's first proposition was that in the beginning God 'hath given the world to men in common'. By what mechanism was it then nevertheless privatised? Here, Locke inserts his second proposition. Namely, that men own their own person. The labour they do using their bodies is therefore their property too. Ergo: a natural property right is

created when a person mixes their labour with something, 'when, that is, by means of his labour he removes it from its natural state or changes its natural condition' (cited in Wood 2002: 110). So here we have it: land that purportedly lies waste, but which, through the application of labour was improved. Improvement, understood as the increase in the exchange value of the land, as increase in its market value in the context of profitable commerce, thus creates a private property right, such that trumps common ownership. The equation between improvement and market exchange value is crucial. Because, much like the subsistence farmers of today, both the English peasants and the Amerindians of earlier days may have worked their lands too. Nevertheless, their labour did not increase its exchange value, thereby leaving it vulnerable to enclosure and colonial taking then, and land grabbing by agribusiness and mining multinationals with state support in the 20th and 21st centuries.

The idea of labour as the creator of value is attractive. However, the labour Locke talks about is not necessarily one's own labour. Like land, labour too may be appropriated. The labour may be that of someone else who was either employed or enslaved, or as Locke terms it, the Servant. We may recall in this context that Locke was professionally and personally involved in the projects of colonial settlement and slave trade. This understanding of labour as the conduit of improvement rather than its creator shapes also contemporary language. When we talk about producers and production we normally refer to capital rather than to the worker. The actual labour may be that of the workers, but it is the capitalist who is accredited with using it it in such a manner as to achieve improvement and its hallmark, profitability. Therefore, it is she, not the worker, who is the producer and the one entitled to property rights over that which was produced including the profit. Similarly, in the context of bilateral investment treaties (BITs), it is foreign capital, not the working population that is accredited with the ability to bring progress, to improve.

Locke's redefinition of property rights soon spread to the peripheries. The Native Americans, declared Thomas Pownall, Governor of Massachusetts from 1757-1760 were 'not landowners, but hunters, not settlers but wanderers, with no idea of property in land, of that property which arises from a man's mixing his labour with it' (cited in Pagden 1995;77). In the 19th century, a similar process of enclosure involving the transformation of common land into private property took place across most of Europe and North America, where legislation enabled speedy and cheap privatisation of the West. The rate of 'land grabbing' is said to have declined recently, but it continued till today, mostly in the Global South – East Asia and Africa.

Locke's success was hardly surprising given that, as pointed out by the American author Jim Tully, it provided a contemporary route by which to bypass the basic principle of Western law, that of consent. As we saw above, the Spaniards attempted to exclude the requirement of consent, first by attributing to the Pope the power to force it, and then by conferring on the Indians the potential for knowing their own interest, such that produced consent, even if actual knowledge came in retrospect and produced a different response. Locke's innovation though created a reasoning that was in line with emerging capitalist logic and its worldwide expansion. In the process, it separated between possession and occupation. The land may be occupied by indigenous people, and may have been so occupied for centuries. Nevertheless, a right to possess this land did not necessarily follow.

Such theorisation of property rights also legitimised and made acceptable the poverty of those dispossessed, such that, in many ways, persist till today. For Lock's theory of property rights gave expression to an understanding of property that goes beyond rights to possession, dealing and exclusion. As with Roman jurists, property acquired a broad sense as both the essence of what makes a man a man and the foundation of civil society. In the words of James Madison, political theorist and 4th president of the US, property is a 'broad and majestic terms', one that 'embraces everything which may have a value to which man may attach a right' (cited in Pagden 1995;78). For Emerich de Vattel, the 18th century Swiss philosopher and jurist accredited with the development of some of modern international law foundational principles, the cultivation of land, the actualisation of nature's potential is an obligation imposed on man by nature. It constitutes a fundamental part of what it means to be human. It follows that – be it the Native Americans in the context of the colonial encounter, or the contemporary dispossessed - those who failed in this duty to themselves as men, those who proved

incapable of, or unwilling to create and secure for themselves such right in nature, are not men at all. Or put differently, those who are unable or unwilling to exclude others from the realm of humanity are in turn excluded themselves.

The above is but a brief and general summary of what were in effect endless debates among European jurists and theorists of empire. Further, the outcomes produced by these debates were not necessarily consistent or linear, so that narrating them inevitably calls for a degree of simplification. Hopefully, the above suffices to demonstrate how the narratives constructed around the notion of property were animated by the compulsion to legitimise and enable powerful interests in their pursuance of expansion and associated riches, and to create norms that could be then institutionalised and employed to quell resistance.

Perhaps the legal device that most powerfully locked in the idea of the act of taking as initiator of property rights were treaties. It was a device that had its own theoretical difficulties. For, if, as follows from Locke's theory, mere occupancy of land does not create property rights, the Indians could hardly concede the land they occupied, whether through a treaty or otherwise. If the land was waste by reason of their failure to cultivate and improve it, then evidently it was not within their power to give it away. Yet, in places where European theorisation of property rights did not echo with the Native Americans, where the indigenous population proved difficult to displace, both the English and the French relied on treaties (and purchase) to legitimise and stabilise their act of taking. These agreements were often fraudulent, and, must have been incomprehensible to most Amerindian people and to African chieftains who had no analogous concept of land ownership. In many pre-colonial societies, property relations were underpinned by cultural and spiritual beliefs, which dictated that land could be possessed and used, but not exclusively owned. Nevertheless, in European eyes these treaties represented due process of law. Any other claims to legitimacy, it was argued in relation to them, were fictitious. Numerous treaties were entered into from the 15th century onwards on the basis that both Europeans and non-Europeans understood themselves to be entering into legal relationships. This was notwithstanding that, non-European societies were considered non-societies, and by the 19th century were officially excluded from the special reserve of civilised societies, that is international law.

The Post Colonial Contest: Taking Delegitimised

Such absurdity was resolved once the process of de-colonialisation transformed formerly colonised lands into bordered territories that enclosed the populations and were to be governed by a sovereign. Modelled on the European nation-state, and underpinned by the European legal constructs of territory and sovereignty, the post-colonial state was born. Gifted membership of the international community, and, at least formally, equal in international law to Western nation-states, the treaties it was to enter into would be free of the theoretical difficulties that plagued colonial ones.

Yet, novel difficulties arose. Armed with the newly acquired weapon of sovereignty, the New States as they were referred to at the time, sought to regain control over their own political and economic affairs. It was a multi-faceted attempt that was to give rise to a wide-ranging contest, such that went as far as to question the universality of international law. Much of it took place within the confines of the UN General Assembly. Of particular interest for the purpose of this discussion is the 1962 resolution known as the Permanent Sovereignty Over Natural Resources (PSNR), which, for the New States, was to form one of the pillars of a New International Economic Order (NIEO). What flowed from the PSNR was the right to re-open colonial concessions/treaties as well as the right to nationalise property. In other words, the act of taking was invoked once again, now theorised as an absolute sovereign right capable of challenging private property rights created within the framework of colonial expansion, and to be exercised on behalf of and for the population at large. Two BRICS countries - Brazil and India with China as an observer, and at times acting as a spokesman – were among the founding members of the Group of 77 States behind the NIEO and the PSNR.

This time, however, it was the former colonisers who put up resistance. Nationalisation, they argued, could be legitimate, but only insofar as it met certain conditions, the most significant of which was

payment of compensation. These conditions, including the obligation to pay compensation, it was said, represented principles of international customary law. Since the New States entered the realm of international law when they accepted statehood, they too were bound by them. And so, taking, or perhaps we should say 're-taking' was no longer freely available. The act of taking was inversed so as to represent infringement. Conceptualised as 'expropriation' to denote that the act was one of taking from an owner, it turned into 'confiscation' in the absence of or delay in the payment of compensation. The significance attributed to compensation is telling, since it is in line with the link made by Locke between the creation of property rights and improvement. Since property rights emerged out of the profitable use of land, re-taking it subsequent to such profitable use entails loss of profit and deprivation for capital, such that must be compensated for. In contrast, the lands taken by colonial settlers had no exchange value. And so, it appears, no compensation is due.

This contest between the two perspectives is beautifully illustrated in the diplomatic exchanges that took place between the Mexican government and Cordell Hull, the US secretary of State in the wake of the 1917 Mexican nationalisation of land, which included land owned by American citizens. In the course of these exchanges, the measure of compensation known as the Hull Formula came into being. Underlying them are two opposing perspectives of property rights: collective rights possessing of a social content v individual rights representative of private entitlement. Hull asserted that compensation was due not only as a matter of international law, but also as a matter of reason, equity and justice. Justice dictated that the Mexican government's desire to better the life of its people could not be undertaken at the expense of American citizens. Compensation thus had to be adequate, prompt and effective. The Mexican government in contrast denied the existence of a universal obligation to pay compensation either as a matter of international law, or as a matter of justice. Referring to the Mexican people's right to the land secured through the 'sacrifice of the very lives of their sons', and the importance of land being in the hands of those who work it, it argued that the future of the nation 'could not be halted by he impossibility of paying immediately the value of the properties belonging to a small number of foreigners who seek only lucrative end'. To the extent that compensations were payable, the only requirement was that it be 'appropriate', a flexible measure that permitted consideration of the surrounding circumstances. E.g. the price at which the land was acquired, profits already made, the state's ability to pay, and the substance of the act of taking being one that was '…inspired by legitimate causes and the aspirations of social justice…' (Lowenfeld 2002: 399).

BITS: Expansion and Resistance

Imperialist enclosures of common land continue to the present days. Jungles are surveyed, mapped and transformed into private property through acts of improvement involving concessions for activities such as gas and oil explorations and palm oil plantations. Improvement dictates that land be taken from indigenous populations or subsistence farmers so that it may be put to profitable use in the form of private large landholdings dedicated to mono-culturist agribusiness or resources extraction.
Simultaneously, the scope of property rights has been expanded beyond ownership of physical assets to include intangible assets such as, inter alia, intellectual property rights. In other words, knowledge no longer resides in the public domain, but has been privatised and reconstituted as rights of private ownership. Also simultaneously, the de-legitimisation of the act of (re)-taking not only persists, but is becoming increasingly broad. Expropriation now extends to property rights in their expansive meaning. That is to say, it refers not only to the taking of physical assets, but to any measures that reduce the benefits associated with property rights, notably profit. Thus, in a manner reminiscent of the way enclosures went beyond the physical act of fencing to include the extinction of customary rights, expropriation now goes beyond the physical act of taking to include policy measures that infringe capital's entitlement to extract value – the so-called 'indirect' or 'regulatory' expropriation.
As in colonial times, but inverted, the legal instrument of treaties in the form of international investment agreements (IIAs), primarily BITs that criss-cross the globe, provide a route through which the notion of property rights as absolute and inviolable, as well as related expropriation, direct and indirect, and the Hull formula are being legitimised, locked in and institutionalised. The device of a treaty is necessary because there is little evidence that as matter of constitutional systems, even those of capital exporting countries, property rights are either absolute, inviolable, or fundamental.

Similarly, at the international and regional levels, human rights documents on the whole do not accept an unqualified right to property, such that excludes justifiable interference in the public interest. In this context, it is telling that the right to property is absent from the main text of the European Convention of Human Rights, and is instead relegated to its First Protocol. Indeed, the drafting committee of the Protocol was divided by a debate as to whether there was a duty to pay compensation when property was being expropriated in the public interest. As argued by counsel for the European Commission in the case of *Lithgrow v United Kingdom*[1] : 'I am not aware of one single case where, for nationalisation of whole industries, full compensation was paid by the nationalising state to the foreign owners, without special investment treaties being applicable' (Sornarajah 2010; 422). The 1937 edition of Lauterpacht similarly qualified a state's obligation to respect the property of aliens by reference to fundamental changes in the political system and economic structure of the state, in which case 'neither the principle of absolute respect for alien private property nor rigid equality with the dispossessed nationals offers a satisfactory solution to the difficulty' (Oppenheim 1992: 407).

It seems then that in its debate with Hull, the Mexican government was right after all. And so, treaties are enlisted once again to the task of creating an absolute right where none existed before. This time, though, the aim is to delegitimise the act of taking, and supplement national laws with additional protection, such that is grounded in external standards of international law. Once again, we see the language of reciprocity and equality in treaties that are essentially power instruments. Ostensibly, the obligations of protections are the same for both states. However, the reality is that, in most cases, there is one party who is primarily a home state, and whose foreign investors and investments, and indeed the state itself, will benefit from the treaty's protection and absence of obligations. The other state is primarily a host state, for whom there are only obligations, and no protection. Thus, once again we see the creation of a two tier groupings: those whose act of taking is legitimised and protected, and those whose act of re-taking is prohibited.

Given the proliferation of BITs, there is intense debate as to whether expropriation in both its narrower and broader senses, as well as the Hull formula have now become principles of customary international law. The resistance that persists at both grassroots and state level testifies otherwise. At the state level, members of the Group of 77 such as India, Brazil and China have integrated into the global economy and the legal formations by which it is ordered. Yet, within these boundaries, they still attempt to introduce change. India's 2016 Model BIT equates expropriation, direct and indirect, with nationalisation and make the lawfulness of both conditional. However, it also imposes limitations on what policy measures may be deemed expropriation and keeps the determination of whether or not a measure may amount to expropriation within the jurisdiction of national courts. Further, while equating 'adequate' with fair market value, it also introduces 'mitigating factors' that are very much in the spirit of 'appropriate' compensations. E.g. current and past use of the investment, including the history of its acquisition and its purpose; the duration of the investment and previous profits made; compensation or insurance payouts received by the investor from other sources; reasonable efforts to mitigate the loss; conduct of the investor that contributed to the loss; environmental damage and damage to the local community. The Brazilian Agreement for Cooperation and Investment Facilitation with Mozambique introduces an altogether new approach to BITs, one that allocates the primary role in the management of the treaty, investors and their investments to the contracting states, rather than the investor/capital.

3 Conclusion

These innovations are a far cry from the heydays of the NIEO, a time when formerly colonised people, believing that their struggle and blood spilled made them masters of their own home, declared the re-taking of property an absolute sovereign act, such that entitled them to reject past colonial taking. Nevertheless, they do operate to undermine attempts to confer on BITs the force of international customary law. They also, to an extent, challenge the dominance of Western absolutist approach to

[1] *Lithgrow v United Kingdom (*1986) 8 EHRR 329

property rights, and open up the possibility of the formerly colonised, Global South forging among themselves at least a new discourse and new model of cooperation and mutual support.

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