Casey, Christopher A.: **Nationals Abroad: Globalization, Individual Rights, and the Making of Modern International Law.** Cambridge: Cambridge University Press, 2020. ISBN 978-1-108-48945-4 (Hardback). 316 pp. £ 29.99

On 17 December 2015, one part of Phillip Morris' legal battle against Australia came to an end with Australia scoring a decisive victory. The Permanent Court of Arbitration operating under United Nations Commission on International Trade Law (UNCITRAL) rules found that Philip Morris was abusing its rights under the Hong Kong-Australia Bilateral investment treaties (BIT). This abuse of rights involved Philip Morris Asia acquiring an Australian subsidiary for the sole purpose of initiating proceedings under the Hong Kong Agreement to challenge Australia's plain packaging laws.[1] It is, then, a testament to the importance of the book at hand that one of the most controversial international investment law cases of the recent decades was resolved on grounds of corporate nationality and, importantly, the potential abuses inherent in processes of strategic incorporation.

Casey is keenly aware of this contemporary significance. In the opening pages of the book he sets the frame for his historical exploration thusly: "Today, traders' and investors' utopian visions of global justice and international rights are much closer to reality than the visions of those seeking justice for the tortured, arrested, or censored. Commerce, today, is increasingly sovereign." (pp. 8-9). In setting out to understand how we got here, the author casts a wide net both temporarily and in regard to subject-matter. The six substantive chapters of this relatively short book deal with matters as diverse as diplomatic protection (Chapter 1), the laws governing nationality in an age of both nationalism and globalisation (Chapter 2), the protection of refugees prior to the 1951 Refugee Convention (Chapter 4), and even private international law and commercial arbitration (Chapter 5), two fields that are, as a rule, considered distinct from (public) international law. Undeniably, this is an ambitious and innovative book that pushes back against the fragmentation of international law and its histories. Instead of tracing the origins of a specific field or doctrine, Casey instead sets out to map the evolution of a complex and multi-layered problem, the legal treatment of foreign nationals in international law.

The author sets out to explore this question by focusing both on political/legal theory and on the evolution of "black letter" law (more on which shortly). For both theorists and statesmen had to deal with the tension between a growing conviction that jurisdiction is principally territorial and

1 UNCITRAL, *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, para. 585.

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"the centrifugal forces of the age" (p. 27) in the form of emigration and capital mobility. The growth and complication of the role of the consul abroad (pp. 35-36) emerges as emblematic of states' efforts to solve this riddle of territoriality in a world that was on the move. Initially concerned with the elementary welfare of stranded sailors, consuls – Casey tells us – started to understand their role as that of "the protector of his countrymen". This was a complicated job and not solely for practical reasons. The meaning of nationality was all but self-evident, especially in the context of Western colonial expansion. Casey documents how colonialism created a paradoxical legal situation in which Indians or Algerians were fully entitled to British or French protection abroad, while enjoying markedly lesser rights in England or in France (p. 65). Their complications were only exaggerated in the interwar period, when ever-increasing numbers of refugees found themselves unwilling or unable to turn to their state of nationality for protection abroad (pp. 109-112).

Casey abstains from articulating overarching arguments that bring together these diverse fields and stories. This makes the book at hand somewhat difficult to summarise. However, I believe that we can identify at least two underlying themes regarding the protection of nationals abroad that underlie his analysis. The first goes back to Casey's introductory remarks quoted above. Partly a book about the genesis of human rights (p. 6), the work at hand nonetheless suggests that the protection of humans as vulnerable, dignified or autonomous beings has only been secondary or incidental to their protection as traders, investors, accumulators of wealth (p. 192). Casey (rightly) suspects that even though humanitarianism was undeniably a factor, the driving force behind the evolution of legal protections for nationals abroad has been the need and desire to maintain continuous and stable commerce. The second thread that potentially brings this narrative together concerns legal technique. At a certain level, Casey's book deals with the failures, limitations, and demise of diplomatic protection (pp. 138-144) and of the legal fields, rules, and institutions that emerged in its place. As the author documents in detail, diplomatic protection during the 19th century was both widespread and the cause of constant frustration for individuals, territorial and home states alike. States that received foreign nationals and capital correctly argued that the theory and practice of diplomatic protection "allowed for intervention diplomatically and even militarily if the complaint went unanswered" (p. 25). Indisputably a "juridical instrument of informal empire" (p. 26) diplomatic protection nonetheless also caused headaches for the states of nationality, which were often pressured by their nationals to intervene, even if they had no desire to do so. It was, therefore, not a coincidence that states such as Britain emphasised the "entirely discretion-

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ary" character of diplomatic protection (p. 37). A century later, advocates of investors' individual rights (substantive as well as procedural) would invoke the "politicised" nature of state-based protection to advocate for their cause (p. 182). Indeed, as Doreen Lustig has argued recently, *Barcelona Traction* – the International Court of Justice case which determined that only the state of incorporation could bring claims on behalf of corporations – was the trigger for the development of modern international investment law, and especially investor-state dispute settlement mechanisms.[2]

I want to stay with this transition from diplomatic protection to international investment law for a moment, because it helps us to understand better the way Casey conceptualises his object of study, namely international law. For the news of the demise of diplomatic protection might be greatly exaggerated. Law, if understood as an argumentative practice of incredible intertextual complexity, is rarely definitely and irreversibly dead.[3] As Kathryn Greenman has shown in detail,[4] the mixed commissions set up in Latin America to adjudicate the claims of foreigners in the 19th century have had a long and significant afterlife since both the International Law Commission and investment tribunals have invoked their jurisprudence to justify their own conclusions. Casey mentions these commissions early in his account (p. 33) but does not show much interest in their complicated afterlives.

This omission is, I suspect, symptomatic of the author's own, unarticulated understanding of what international law is and where we can find it. Even though these assumptions remain largely implicit, we can find their fragments scattered throughout the reviewed book. Casey observes, for example, that "[l]aw, as a collection of texts, is at its heart about the establishment of predictability" (p. 83) and laments the fact that "the law, which was so good at further oppressing the already intimately oppressed, continued to do so" (p. 74).

Upon closer inspection though, the "collection of texts" that constitute international law is highly particular. Law appears to live and die in diplomatic conferences, high-level state meetings, and in the most "visible" workings of international organisations. Within this framework, international law

2 Doreen Lustig, *International Law and the Private Corporation 1886-1981* (Oxford: Oxford University Press, 2020).

3 I am grateful to Natasha Wheatley for helping me to think of law within time in terms of un-deadness: Natasha Wheatley, 'Legal Pluralism as Temporal Pluralism: Historical Rights, Legal Vitalism, and Non-Synchronous Sovereignty' in: Dan Edelstein, Stefanos Geroulanos and Natasha Wheatley, *Temporalities in Conflict and the Making of History* (Chicago: University of Chicago Press, 2020).

4 See Kathryn Greenman, 'The Secret History of Successful Rebellions in the Law of State Responsibility', ESIL Reflections 6 (2017); Kathryn Greenman, 'Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels', LJIL 31 (2018), 617.

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emerges as the clear and unambiguous product of its makers. Going through the pages devoted to minorities and refugees in the interwar period, the reader will be (hopefully) surprised when she will realise that information about Nansen – the person behind the "Nansen passport" for stateless individuals – being "a tall conspicuous figure", with an "athletic frame", and a "lean melancholy face", or that "[h]e walked, according to one admirer with a long swift step and the air of untrammelled freedom" (p.112) is found in the main text of the book. At the same time, the many cases concerning minority rights adjudicated in front of the Permanent Court of International Justice are almost entirely absent from the analysis, as is the *Barcelona Traction* case mentioned above and the endless pages on corporate and investor nationality international investment law students have to grapple with. This idea of law as the outcome of struggles between powerful men and their states is prioritised over the conception of law as a complex argumentative practice.[5] If we follow the book's unspoken assumptions, we have no way of distinguishing reliably between international law and diplomacy, and even between diplomacy and the deeds and thoughts of a handful of great men.

Much is lost if we adopt this approach. Law's indeterminacy, ambiguity, and plasticity become invisible as do the efforts (successful, disastrous, and anything in-between) of subaltern subjects to advocate their causes through law's openings, slippages, and ambiguities. Unintended consequences (welcome or not) become unthinkable as law is reduced to the will of its fathers. Interestingly, this view is in direct contrast with the way Casey himself conceptualises the historical background of his study. His account of 19th-century globalisation is a rich tapestry of capitalists, workers, missionaries, political dissidents and states in constant antagonism, conflict and collaboration (pp. 20-26). This split between layered economic history and simplistic legal history might be due to a problem Casey himself points out, only to then reproduce it himself. Early in his account, Casey laments the isolation between historians and lawyers working on histories of human rights (p. 7). A mere six pages later, Casey himself re-enacts this isolation when he argues that the "golden age" of international law (1870-1914) "has since been forgotten" (p. 13). This is a truly remarkable statement claim for anyone writing after 2000 to make.[6] One cannot be certain whether it is the lack of engage-

5 For an approach that attends to the capitalist functions of international law as an argumentative practice see Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge: Cambridge University Press, 2020).

6 International legal histories of that period are too extensive to cite comprehensively. For some representative examples see Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', Harv. Int'l L. J. 40 (1999), 1; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-*

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ment with this literature that resulted in such a narrow understanding of international law, or if the route of causation is the other way around. Be it as it may, Casey is right to point out that the tension between people (and, may I add, capital) who move and states who do not remains ever-present in international law and politics (p. 198). Elucidating the modalities of this tension and finding ways to resolve it in fair and sustainable ways demand a comprehensive understanding of international law's past and present. The book at hand has started an important conversation, but left a lot to be desired in that regard.

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1960 (Cambridge: Cambridge University Press, 2001); Matthew Craven, 'Between Law and History: the Berlin Conference of 1884-1885 and the Logic of Free Trade', London Review of International Law 3 (2015) 3, 31; Aoife O'Donoghue, 'The Admixture of Feminine Weakness and Susceptibility: Gendered Personifications of the State in International Law', Melbourne Journal of International Law 19 (2018), Law 227.

7 Many thanks are due to Anna Saunders for her comments and insights.