INVESTMENT LAW AND ITS OTHERS

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"Domination has always had need of justification."
Mohammad Bedjaoui[1]

Karen Knop introduced me to Anne Orford over a delightful dinner nine years ago in Toronto. She so admired Anne that she attended the online seminar at which the papers published in this symposium were presented. That day Karen was, as always, a wise and stimulating interlocuter. Karen passed away suddenly in September 2022. I will miss her dearly. This essay is dedicated to her memory.

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The rise of a muscular regime for the protection of foreign investment abroad surely is a remarkable achievement for international lawyers. Legal elites, after all, were at the forefront of the push for an international regime to resolve disputes between foreign investors and host states.[2] Investor-state arbitration, staffed by a transnational class of investment law elites, would emerge as the principal means by which capital exporting states could discipline states in the periphery for departing from acceptable norms of behaviour.[3] If a singular achievement, this adjudication process has emerged as a field fraught with conflict. It serves, for Anne Orford, as the "first field in which commentators began to express concerns about a backlash against liberal internationalism."[4]

Investment law plays a recurring role in Orford's new book.[5] International investment law, alongside international trade and human rights law, serves as an exemplar of how history serves contending sides in debates over the regime's legitimacy. Appeals to history, in other words, are assimilated into debates over the politics of international law, in which case, both international lawyers and historians, Orford maintains, are caught up in the politics of the present. I want to take the opportunity of commenting on Orford's absorbing and provocative contribution to

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1. MOHAMMED BEDAJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 177 (1979).

2. *See* NICOLÁS PERRONE, INVESTMENT TREATIES AND THE LEGAL IMAGINATION: HOW FOREIGN INVESTORS PLAY BY THEIR OWN RULES 36 (2021); *see also* TAYLOR ST. JOHN, THE RISE OF INVESTOR-STATE ARBITRATION: POLITICS, LAW, AND UNINTENDED CONSEQUENCES 4 (2018).

3. Still instructive in this regard is Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546 (1987).

4. ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY 45–50 (2021) [hereinafter ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY].

5. *Id.*

dive deeper into investment law's relationship to its others. I argue that the post-1989 torrent of international investment law scholarship and practice largely steers clear of history. For the most part, scholars do not seek out assistance from history in order to provide "a new foundation for formalism in international law."[6] They are, instead, content to rely on a more archaic formalism, stuck in a classical legal past, untainted by legal realism. By doing so, they elide connections to arguments, justifications, and discourses that are reminiscent of a more recent past—associated with colonialism and imperialism—that they would prefer to forget.

I first survey the field's perfunctory relationship to history in Part I and then in Part II suggest an approach, inspired by Michel Foucault's archeology, that bridges some of the distance between international law's practice and history's methods, rendering salient justifications associated with colonialism and imperialism.[7] Finally, in Part III, I interrogate the degree to which investment law's norm entrepreneurs can be said to be exhibiting a post-realist "hermeneutic of suspicion."[8] I explore whether investment lawyers and scholars are stuck in modes of argumentation that are pre-realist and uninhibited by the charge of behaving ideologically.

I.

If critical investment law scholars have contributed to our understanding of how investment law's past contributes to its present legitimacy crisis,[9] these contributions mostly are marginal to the mainstream and not very "numerous."[10] Not only are they small in number—if critically inclined—they are consigned to less prestigious journals and books. There are, in short, few professional rewards for critical investment law scholars. For this reason, the contributions of legal academic Muthucumaraswamy Sornarajah, reassuring for those of us working at the margins, cannot be overstated. An exemplary figure in the field, Sornarajah aims to reinscribe the past into investment law. He has made it a priority, in his scholarship and in his teaching, to make history relevant, particularly by restoring the relevance of U.N. General Assembly Resolutions associated with the New International Economic Order (NIEO).[11] He insists that they serve as "founding norms" for this branch of

6. *Id.* at 8.

7. Parts I and II of this article borrow liberally from the introduction to DAVID SCHNEIDERMAN, INVESTMENT LAW'S ALIBIS: COLONIALISM, IMPERIALISM, DEBT AND DEVELOPMENT (2022).

8. *See* ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 4, at 6.

9. *See* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE 128 (2015).

10. *See* ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 4, at 49. *See generally* Celine Yan Wang, *Mine-Golia: Integrated Perspectives on the History and Prospects of International Investment Law and the Investor-State Dispute Settlement Regime*, 53 N.Y.U. J. INT'L L. & POL'Y 631 (2021).

11. On the rise and fall of NIEO, see Vanessa Ogle, *State Rights Against Private Capital: The "New International Economic Order" and the Struggle Over Aid, Trade, and Foreign Investment, 1962–1981*, 5 HUMAN.: INT'L J. OF HUM. RTS., HUMANITARIANISM, & DEV. 211–12 (2014).

international law.[12] Declarations of newly decolonized states concerning "permanent sovereignty . . . over . . . natural resources"[13] comprise customary international law norms, he argues, that have not been displaced by international law on foreign investment.[14] With co-authors, he claims continuity between the imperial system and present-day protections for foreign investment, but "through more insidious means."[15] Sornarajah, therefore, claims continuity between the colonial past and the post-colonial present.[16] The "pre-existing system of dominance continues," he writes.[17]

Kate Miles also traces the origins of foreign investment law to the "history of colonialism."[18] For Miles, the past "is of fundamental importance to the shape and character" of present-day investment law.[19] It drives the cycles of "constraint" and "resistance," helping to explain the rise of the contemporary regime as a response to the threat posed by the NIEO.[20] The "calculated, often brutal, use of force, and the manipulation of legal doctrines to acquire commercial benefits" lie at the foundations of the contemporary regime, she explains.[21] These origins "drove" and "shaped" investment law, but these linkages appear more tenuous than Sornarajah's claim of continuity.[22]

The linkages between the investment law's past and its present are underscored by Perrone's excavation of the origins of the investment treaty regime. He argues that a legal imagination of states constrained by global legal rules in order to secure

12. *See* Muthucumaraswamy Sornarajah, *The Battle Continues: Rebuilding Empire Through State Contracts*, *in* THE BATTLE FOR INTERNATIONAL LAW: SOUTH-NORTH PERSPECTIVE ON THE DECOLONIZATION ERA 175, 193 (Jochen von Bernstorff and Philipp Dann eds., Oxford Univ. Press 2019) [hereinafter Sornarajah, *The Battle Continues*]; *see also* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 1–32 (Cambridge Univ. Press 3 ed. 2010) [hereinafter SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT] (presenting the restoration of history as an overriding concern); M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 31–54 (2015) [hereinafter SORNARAJAH, RESISTANCE AND CHANGE].

13. G.A. Res. 3281 (XXIX) Art. 2 ¶ 1 (Dec. 12, 1974).

14. *See* SORNARAJAH , INTERNATIONAL LAW ON FOREIGN INVESTMENT *supra* note 12, at 82–84.

15. JOHN LINARELLI ET AL., THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY 147 (2018).

16. *See* SORNARAJAH, RESISTANCE AND CHANGE, *supra* note 12, at 86 (discussing continuity in investment laws from the colonial era to post-colonial present).

17. Sornarajah, *The Battle Continues*, *supra* note 12, at 179.

18. KATE MILES, THE ORIGINS OF INTERNATIONAL LAW: EMPIRE, ENVIRONMENT, AND THE SAFEGUARDING OF CAPITAL 32 (James Crawford & John S. Bell eds., 2013) [hereinafter MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW].

19. *Id.; see also* Kate Miles, *History and International Law: Method and Mechanism – Empire and "Usual" Rupture*, *in* INTERNATIONAL INVESTMENT LAW AND HISTORY 136 (Stephan W. Schill, et al. eds., 2018) [hereinafter Miles, *History and International Law*].

20. *See* MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW, *supra* note 18, at 115.

21. *Id*. at 32.

22. *See id.* at 32, 387; *see also id.*at 161–62 (devoting the first third of her book, 121 pages out of a 389-page book, to this account of investment law's origins). For further discussion, see generally David Schneiderman, *Kate Miles, The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* 25 EUR. J. INT'L L. 942–45 (2014).

profits abroad, envisaged by business leaders, bankers, and lawyers in the mid-twentieth century, is now "enshrined" in the investment treaty regime.[23] Decolonization, coupled with the threat of communism, prompted norm entrepreneurs to "restore" international law's preoccupation with property and contract. The goal, according to U.S. Department of State legal advisor, Loftus Becker, was to bring "things back to normal."[24] Nicolás Perrone's account of events is underscored by Bedjaoui's observation that newly decolonized states, if now authorized to make their own laws, would find themselves again subject to capital-exporting states "mak[ing] and proclaim[ing] the law for all."[25]

It should be undeniable that the rise of investment law has affinities to "colonial occupation and its aftermath."[26] Despite history as a promising growth industry in investment law scholarship, much of the extant literature omits any serious treatment of the past.[27] Instead, most investment law scholarship chooses to ignore history. Institutional memories are of little consequence to contemporary international investment lawyers and scholars because, they say, the past has been overtaken by a new treaty-based regime premised on consent and reciprocity. States in both the global and southern hemispheres are said to have voluntarily signed onto these treaties, and they continue to undergo renewal and reform. Even if there is dissatisfaction expressed in some quarters, very few states have withdrawn from the regime. Moreover, treaties ensure reciprocity as between party states—both capital-exporting and capital-importing states are bound by investment treaty disciplines.

Scholars, therefore, choose to emphasize rupture over resemblance.[28] There are many examples to choose from, but one striking piece of evidence is provided by Rudolf Dolzer and Christoph Schreuer, joint authors of one of the leading texts in the field.[29] In the first edition of their book, they mention challenges to "traditional . . . international law" mounted by Carlos Calvo, post-revolutionary Mexico, and resolutions approved by the United Nations General Assembly associated with the NIEO.[30] However, "[w]ithin this new [contemporary] climate of international economic relations, the fight of previous decades against customary rules protecting foreign investment [have] abruptly become anachronistic and obsolete."[31] If the past is of no consequence, it offers no guidance to grasping the contemporary international regime, they argue.[32] They repeat the inconsequential

23. *See* Perrone, *supra* note 2, at 2.

24. *Id.* at 64 (quoting Becker).

25. BEDJAOUI, *supra* note 1, at 157.

26. GUS VAN HARTEN, THE TROUBLE WITH FOREIGN INVESTOR PROTECTION 17 (2020).

27. An exception is the edited collection of disparate and uneven contributions found in INTERNATIONAL INVESTMENT LAW AND HISTORY (Stephan W. Schill, et al., eds., 2018).

28. MILES, HISTORY AND INTERNATIONAL LAW, *supra* note 19, at 144 (claiming a "clean, bright, shiny new start.").

29. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 5 (2d ed. 2012).

30. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 13 (1st ed. 2008).

31. *See id.* at 5.

32. *See id.* at 5–6.

nature of the past in the next edition, emphasizing that opposition to customary international law (as defined by capital-exporting states) during the NIEO was prompted by "ideological positions."[33]

Despite Orford's efforts at placing history in proximity to debates over the future of investment law, the "historical turn"[34] in international law seems not to have exerted much of an influence. Where history has been salient, it has been in the service of *longue durée* accounts,[35] tracing the origins of investment arbitration to, for instance, the 1794 Jay Treaty between a newly independent United States and Great Britain.[36] The treaty exhibits "significant overlap"[37] with the investment law regime so that any claims about the regime's novelty is "overstated,"[38] claims legal counsel Barton Legum.[39] Or consider the lengthy study of U.S. Friendship, Commerce and Navigation (FCN) Treaties by Vandevelde, who argues that the principal object of FCN treaties was to secure basic "rule of law" principles analogous to the rights enjoyed by Americans under the U.S. Constitution, laying the foundation for the spread of the modern investment treaty regime.[40] These strategies, aimed primarily at U.S. audiences, aim to lend legitimacy to an enterprise that is desperately in need of better accounts than the ones that have been provided to date. In addition, the customary international law for the diplomatic protection of aliens may be invoked to assist in building regime legitimacy and even to fill in some treaty content; otherwise, norm entrepreneurs are discouraged from incorporating past practice into their interpretive strategies.[41] If periodization is an issue, it is a

33. For an example displaying a "hermeneutic of suspicion" discussed in Orford's book, see *id.* at 4–5. For futher discussion, see ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 4, at 6 and *infra* Part III.

34. ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 4, at 1.

35. *See, e.g.*, Alexis Keller, *Inter-State Arbitration in Historical Perspective*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 843 (Thomas Schultz & Federico Ortino eds., 2020). I would be remiss not to mention historical accounts in cognate fields. *Compare* CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES (1985), *with* NOEL MAURER, THE EMPIRE TRAP*: THE RISE AND FALL OF U.S. INTERVENTION TO PROTECT AMERICAN PROPERTY OVERSEAS, 1893-2013,* AT 23 (2013) (celebrating the "development of judicialized dispute resolution.").

36. On the faulty nature of this comparison, see David Schneiderman, *Constitution or Model Treaty? Struggling Over the Interpretive Authority of NAFTA*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 294 (Sujit Choudhry ed., 2006).

37. Barton Legum, *Federalism, NAFTA Chapter Eleven and the Jay Treaty of 1794*, 18 INT'L CTR. FOR SETTLEMENT INV. DISP. 11, 13 (2001) [hereinafter Legum, *Federalism*].

38. Barton Legum, *The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT'L L.J. 531, 531 (2002) [hereinafter Legum, *Innovation*].

39. *Id.* at 531–32; Legum, *Federalism*, *supra* note 37, at 13; Legum, *Innovation, supra* note 38, at 532.

40. KENNETH J. VANDEVELDE, THE FIRST BILATERAL INVESTMENT TREATIES: U.S. POSTWAR FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES 22 (2017).

41. Investment law's disdain with filling in gaps in treaty content by having recourse to customary international law was prevalent in the seemingly unanimous disapproval of Loewen Grp., Inc. and Loewen v. United States, Case No. ARB(AF)/98/3 (Int'l Ctr. for Settlement of Inv. Disp. 2003) (incorporating a continuous nationality rule depriving the tribunal of jurisdiction). *See, e.g.*, Noah Rubins, Loewen v. United States*: The Burial of an Investor-State Arbitration Claim*, 21 ARB. INT'L 1, 26 (2005) (opining that the decision conflates diplomatic espousal and investor-state

negligible one. Investment lawyers and scholars, if they are at all interested in history, instead mine the past for the purposes of making present legal argument. They adopt a range of strategies described by Orford in chapter five: finding facts, arguing about past precedents, interpreting treaty text, and identifying state practices that are candidates for customary international law. [42] In sum, investment lawyers appeal to the past, not for its own sake, but because, as Orford explains, it "is central to the legal process of adversarial interpretation, in which something is always at stake in the present."[43]

For critical international law scholars, too, the historical turn is in the service of conscripting history for present day normative ends. This is not historiography per se that contextualizes past controversies, but a style that resurrects history in the service of argumentative ends that connect international law, for instance, to imperialism. [44] The object, for Orford, as for others writing critical histories of international law, is to retrieve history so that present instances of injustice and domination can be connected to those of the past and, thereby, better understood and resisted.[45] They are, indeed, "doing something other than writing history."[46]

For the most part, the historical roots of investment law remain stationed outside the field's barricades. This estrangement from contemporary debates seems more than peculiar but, instead, looks strategic. As Bloch reminds us, it beggars belief to suppose that "within a generation or two, human affairs have undergone a change which is not merely rapid, but total . . . ."[47] History, after all, generates legitimate sources of authority and reinforces the value of former legal exploits. The past, Orford reminds us, is "constantly being retrieved [by lawyers] as a source or rationalization of present obligation."[48] Indeed, investment lawyers and scholars favour just this sort of "progressive teleology" in which the world is increasingly encompassed by the spread of "commerce, civilization and (especially) development."[49] If history provides resources that carry significant normative force, it is unusual that it is of little utility to investment law norm entrepreneurs. They

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arbitration).

42. ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 4, at 249. Also, for an author pursuing presentist aims, see Jason Yackee, *Investor-State Dispute Settlement at the Dawn of International Investment Law: France, Mauritania, and the Nationalization of the MIFERMA Iron Ore Operations* 59 AM. J. LEGAL HIST. 71, 72 (2019) (questioning whether politicized dispute settlement "can be successful.").

43. ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 4, at 249.

44. ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 241 (James Crawford & John S. Bell eds., 2004).

45. Anne Orford, *On International Legal Method*, 1 LONDON R. INT'L L. 166, 174 (2013) [hereinafter Orford, *On International Legal Method*].

46. Lauren Benton, *Beyond Anachronism: Histories of International Law and Global Legal Politics* 21 J. HIST. INT'L L. 7, 33 (2019).

47. MARC BLOCH, THE HISTORIAN'S CRAFT 32 (Peter Putnam Bloch trans., 1992).

48. Anne Orford, *The Past as Law or History?: The Relevance of Imperialism for Modern International Law* 9 (Melbourne Legal Stud., Working Paper No. 2012/2, 2012) [hereinafter Orford, *The Past as Law or History*].

49. Martti Koskenniemi, *Expanding Histories of International Law*, 56 AM. J. LEGAL HIST. 104, 106 (2016).

curiously reject the narrative of progress when it comes to explaining the normative foundations of investment law. In the next part, I attempt to explain this puzzle.

Why give up on history as a source of legitimacy? Any number of explanations for the field's disinterest in the past could be offered, but I focus here upon one, namely, its discredited past. It would be intolerable, in other words, for risible forms of domination to be invoked today as foundational.[50] In short, investment law norm entrepreneurs are embarrassed that this history would necessarily draw upon disgraced practices associated with colonialism and imperialism.

II.

Orford insists, in the final chapter of her book, that contextualist history and international law scholarship are not that far apart.[51] They both participate in the production of international law. They are both "politics all the way down."[52] Orford calls upon both contextual historians and international lawyers to be responsible for the worlds that they produce (or contribute to) by reason of their academic choices.[53] That common responsibility is underscored by their joint preoccupation with argumentative style. Contextualist historians, such as Quentin Skinner, admit that a focus on utterances is not a sufficient basis upon which to employ historical methods. Rather than pulling utterances out of their "argumentative context" he, instead, insists that they "must always be viewed at the same time as arguments."[54] Indeed, Skinner devotes a lengthy volume to the form of argument, shaped by classical rhetoric, that influenced the making of Hobbes' *Leviathan*.[55] If Skinner objects to those who engage in "abstracting particular arguments . . . in order to relocate them as 'contributions' to allegedly perennial debates,"[56] there is no denying that practices of argumentation, justification, and rationalization dominate this field as they do others in the social sciences.

It is not only that early modern arguments are the object of study but that historians are making *arguments about those arguments*, deploying context as a "sort of court of appeal" to evaluate claims about recovered intentions.[57] That

50. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION 86 (Robert Hurley trans., 1978) ("[P]ower is tolerable only on condition that it mask a substantial part of itself.").

51. *See* ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 4, at 285.

52. *Id.* at 315.

53. *Id.* at 315–16. It is reminiscent of Weber's ethic of responsibility *in* MAX WEBER, *Science as a Profession and Vocation in* COLLECTED METHODOLOGICAL WRITINGS 335, 350 (Hans Henrik Bruun & Sam Whimster eds., 2010).

54. Quentin Skinner, *Interpretation and the Understanding of Speech Acts*, *in* VISIONS OF POLITICS, VOLUME 1: REGARDING METHOD 115 (2002). Skinner's methods are discussed in ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 4, at 135–56.

55. QUENTIN SKINNER, REASON AND RHETORIC IN THE PHILOSOPHY OF HOBBES 8 (1996) [hereinafter SKINNER, REASON AND RHETORIC]. Historians, in short, cobble together 'lean-to sheds of inference" insists R.G. Collingwood. R.G. Collingwood, *The Limits of Historical Knowledge*, J. PHIL. KNOWLEDGE 213, 216 (1928).

56. Quentin Skinner, *Meaning and Understanding in the History of Ideas*, *in* VISIONS OF POLITICS, VOLUME 1: REGARDING METHOD 57, 86 (2002).

57. *Id.* at 87.

contextual historians engage in argument is underscored by Helen Sword's study of academic writing styles across ten disciplines. She reveals that historians are the least likely to use personal pronouns, fearing that to do so would undermine distance from their subjects of study. Historians, instead, are the most likely to use "subjectively weighted nouns . . . , adjectives . . . , and verbs . . . designed to sway readers to a particular point of view."[58] Sword accuses historians of being "manipulative, even" in their use of language.[59]

To sum up this point, contextual historians are engaged in "argument[s]" [that] "exemplify a particular approach to the study and interpretation of historical texts."[60] These arguments decisively serve presentist purposes. The "intellectual historian," Skinner acknowledges, "can help us to appreciate how far the values embodied in our present way of life, and our present ways of thinking about those values, reflect a series of choices made at different times between different possible worlds."[61] This knowledge equips us "with a broader sense of possibility . . . ."[62] We can now "stand back," he writes, "from the intellectual commitments we have inherited and ask ourselves in a new spirit of enquiry what we should think of them."[63] Put bluntly, not only are historical questions framed by the politics of the present, as Orford underscores in her concluding chapter, but their arguments are also in the service of ideological ends.[64] She encourages us to be not only responsible but also, as Max Weber suggested, "conscious of the fact that any action . . . will have consequences that imply taking sides . . . ."[65]

Foucault's methods similarly sought to understand what authors meant to say in their time but also to show that things made can be unmade.[66] In a lecture on January 11, 1978, Foucault announced that the imperative underlying his research was: "If you want to struggle, here are some key points, here are some lines of force, here are some constrictions and blockages" that serve as nothing more than "tactical

58. HELEN SWORD, STYLISH ACADEMIC WRITING 40 (2012).

59. *Id.* at 39. She describes writing in the personal voice as "more honest, making no attempt to camouflage opinion as historical truth." *Id.* at 40.

60. SKINNER, REASON AND RHETORIC, *supra* note 55, at 7. I should acknowledge that I have gained much from this body of work and have attempted histories of intellectual thought in, for example, David Schneiderman, *Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century*, 48 U. TORONTO L.J. 521 (1998).

61. QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 116–17 (1998) [hereinafter SKINNER, LIBERTY BEFORE LIBERALISM].

62. *Id.*

63. *Id.*; *see also* Quentin Skinner, *A Reply to My Critics*, *in* MEANING & CONTEXT: QUENTIN SKINNER AND HIS CRITICS 286–87 (James Tully ed., 1988) (explaining the need to assess multiple ways of thought).

64. *See* MICHEL DE CERTEAU, THE WRITING OF HISTORY 28–29 (Tom Conley trans., Columbia Univ. Press 1988) (1975).

65. On the "ethic of responsibility," see MAX WEBER, *The "Objectivity" of Knowledge in Social Science and Social Policy*, *in* MAX WEBER: COMPLETE METHODOLOGICAL WRITINGS 100, 102 (Hans Henrik Bruun & Sam Whimster eds., 2010) (emphasis in original removed).

66. *See* PAUL VEYNE, FOUCAULT: HIS THOUGHT, HIS CHARACTER 119 (Janet Lloyd, trans., Polity Press 2010) (2008).

pointers."[67] His object was to lay out a so-called strategic map according to which his listeners could choose whether to act or not: "I will never say: this is what you should do, this is good, that is not."[68]

Others have taken note of the similarities between Foucault's methods and those of the Cambridge school historians[69]—by the late 1990s, Skinner even acknowledged his debt to Foucault's archeology.[70] I want to offer here a third way (to borrow a phrase), driven by my own research agenda, merging their methods and which invites—*contra* the contextualists—the traveling across time and space of arguments, justifications, and means of resolving disagreement. I am speaking of a method that "enlarges" the possibility that there are undiscovered or buried tropes that remain to be uncovered.[71] It is akin to what Orford champions as one option, among a number of alternatives, to the contextualist account of history, namely, "creating connections or exploring constellations between present and past . . . ."[72]

Radically disrupting dominant methodological trendlines, the additive of what Foucault called "archaeology" enables interpreters to reinscribe past arguments into the present.[73] Like the Cambridge school, Foucault's archeology rejects a progressive narrative that transforms a "tangled mass of continuities" into a single, "uninterrupted" history.[74] Unlike the contextualists, however, Foucault breaks down elements of what he calls discursive formations so that they can be "constituted, modified, organized" at one period yet reappear in another.[75] These elements exhibit, in short, the "possibility of transformation."[76] Foucault writes, "in this sense," discourse serves as "an inexhaustible treasure from which one can always draw new, and always unpredictable riches . . . . It appears as an asset—finite, limited, desirable, useful . . . ."[77] These assets become the object of political struggle.[78]

The advantage of the archeological frame is that it underscores how past discursive formations can be recruited and reformed into current debates, mapping

67. MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977–1978, at 3 (Michel Senellart ed., Graham Burchell trans., Palgrave MacMillan 2007) (2004).

68. VEYNE, *supra* note 66, at 119 (quoting Foucault).

69. *See* Naja Vucina et al., *Histories and Freedom of the Present: Foucault and Skinner*, 24 HIST. HUM. SCIS. 124 (2011); Kate Purcell, *On the Uses and Advantages of Genealogy for International Law*, 33 LEIDEN J. INT'L L. 13 (2020).

70. *See* SKINNER, LIBERTY BEFORE LIBERALISM, supra note 61, at 112 n.19.

71. *See* MICHAEL OAKESHOTT, ON HISTORY AND OTHER ESSAYS 51 (1983).

72. ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 4, at 318.

73. *See generally* MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE (A.M. Sheridan Smith trans., Routledge 1989) (1969) [hereinafter FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE].

74. This school of thought is associated with the "whig interpretation" of history. See HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY 87 (1931), whose work is discussed in ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 4, at 119–27.

75. FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE, supra note 67, at 191.

76. *Id.* at 136.

77. *Id.*

78. *Id.*

dominant practices, unblocking occluded discourses,[79] and identifying "relations" that the past have with the present.[80] Discursive systems, then, are capable of "continuity, return and repetition."[81] They comprise not only statements that take place "once and for all" but "continue[] to function."[82] They are capable of being "transformed" over time, having the "possibility of appearing [again] in other discourses."[83] Elements of earlier discourses are, in this way, "reworked" for immediate political ends.[84]

Much has been written about the methodological flaws associated with discursive formations: it radically decontextualizes what has been said and omits the influence of non-discursive factors.[85] It helps to explain, for some, Foucault's turn to genealogy as his preferred method. The turn to genealogy, however, turns out not to have been a rejection of archeology but a new analytic layered over the old, linking truth statements to power and to the functions served by discursive formations.[86] Ian Hacking maintains that, having relied solely on what was said, Foucault was compelled to "return to the material conditions under which words were spoken."[87] Foucault agrees that "these two tasks [genealogy and discourse] are never completely separable."[88]

What emerges is an emphasis on not just discourse but also on practices and institutions, in addition to legal rules and forms. It approximates what Foucault labelled *dispositif*:[89] a "heterogenous ensemble"[90] exhibiting the characteristics of an "apparatus" in the service of manipulating the relation of forces, "either developing them in a particular direction, blocking them, stabilising them, utilising them, etc."[91] This interplay between the discursive and non-discursive, between the

79. *See* MICHEL FOUCAULT, *Politics and the Study of Discourse*, *in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 53, 62 (Graham Burchell et al. eds., 1991).

80. FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE, *supra* note 67, at 155–56.

81. *Id*. at 191.

82. Michel Foucault, *The Archaeology of Knowledge*, LA QUINZAINE LITTÉRAIRE, April–May 1969, *reprinted in* FOUCAULT LIVE: COLLECTED INTERVIEWS, 1961–1984 at 57, 57 (Sylvère Lotringer ed., Lysa Hochroth & John Johnston trans., 1996).

83. *Id.*

84. ANNE LAURA STOLER, RACE AND THE EDUCATION OF DESIRE: FOUCAULT'S *HISTORY OF SEXUALITY* AND THE COLONIAL ORDER OF THINGS 72 (1995).

85. *See* GARY GUTTING, MICHEL FOUCAULT'S ARCHAEOLOGY OF SCIENTIFIC REASON 259 (1989).

86. *See* HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 117 (2d ed. 1983).

87. Ian Hacking, *The Archaeology of Foucault*, *in* FOUCAULT: A CRITICAL READER 27, 33 (David Couzens Hoy ed., 1986).

88. Michel Foucault, *The Order of Discourse*, *in* UNTYING THE TEXT: A POST-STRUCTURALIST READER 48, 71 (Robert Young ed., 1981).

89. Translated variously as "apparatus," deployment," "set-up," and "economy of power." *See, e.g.*, VEYNE, FOUCAULT, *supra* note 66, at 9–10, 31 ("This set-up . . . consists of laws, actions, words, and practices that constitute a historical formation.").

90. MICHEL FOUCAULT, *The Confession of the Flesh*, *in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–77 194, 194 (Colin Gordon & Alain Grosrichard eds., Colin Gordon et. al. trans., 1980).

91. *Id*. at 195–96.

semantic and the material, is a "productive instance of discursive practice"[92] in so far as it exerts power, normalizes relations of domination and subordination, and even occasionally precipitates resistance.

What the additive of Foucault's methods allows is for interpreters to isolate the justifications, arguments, and practices that arose in the past and that continue to resonate today. Of interest to us is how powerful actors justified and managed discredited politico-legal orders associated with colonialism (governing in proximity) and imperialism (governing at a distance), that continue to serve similar functions today. It is striking how this matrix of past practices resemble arguments relied upon by investment law's norm entrepreneurs.

There is not sufficient space here to illustrate in detail how a focus upon present-day arguments, justifications, and legal forms is linked to failed *dispositifs* of the past. Consider only how a discourse of "improvement" (what is today associated with development) was dominant in justifying the British colonization of India. The promise of improvement was advanced by metropole authorities to persuade colonial subjects that "imperial dominance [was] acceptable, even desirable."[93] As Tharoor's book-length accounting reveals, the "benefits" accruing to British colonial India in economic, social, and political domains were unambiguously ruinous.[94] In terms of wealth creation alone, the British extracted £18 million per annum between 1765 and 1815.[95] The discourse of improvement endures: it is central to international investment law's premises and promises. Yet the promise remains unfulfilled: it is by now reasonably clear that the correlation between signing investment treaties and attracting new foreign investment is so negligible as to be close to zero.[96] One could multiply the salient practices of British colonialism that continue to resonate in the justifications for, and practices of, investment law.[97] In Part III below, I take up an example of how classical legal thought is being revived via investment law proceedings, providing another example of how legal arguments travel.[98]

Howls of outrage are likely to issue from the investment law *noblesse*. They dispense intemperate screeds, eagerly dishing out hyperbolic vilification of critics.[99] Leading arbitrator Jan Paulsson describes them as "shrill"' and "misdirected,"

92. MICHEL FOUCAULT, PSYCHIATRIC POWER: LECTURES AT THE COLLÈGE DE FRANCE, 1973–74, at 13 (Jacques Lagrange et al. eds., Graham Burchell trans., 2006).

93. RANAJIT GUHA, DOMINANCE WITHOUT HEGEMONY: HISTORY AND POWER IN COLONIAL INDIA 34 (1997).

94. SHASHI THAROOR, INGLORIOUS EMPIRE: WHAT THE BRITISH DID TO INDIA 3 (2016).

95. *Id.* at 9.

96. *See* Josef C. Brada et al., *Does Investor Protection Increase Foreign Direct Investment?: A Meta-Analysis*, 35 J. ECON. SURVS. 34, 58 (2021) (providing a recent survery of this now large literature).

97. For more, see DAVID SCHNEIDERMAN, *supra* note 7, c.1.

98. For other examples of viewpoints on investment law, see, e.g., Edward W. Said, *Traveling Theory*, 1 RARITAN 41, 65–67 (1982).

99. For further information, see David Schneiderman, *The Paranoid Style of Investment Lawyers and Arbitrators: Investment Law Norm Entrepreneurs and Their Critics*, *in* ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 131, 131 (C.L. Lim ed., 2016).

propagandists who "appeal[] to public prejudice."[100] Arbitrator Charles N. Brower, with co-author Sadie Blanchard, accuses critics of invoking "ideologically driven polemics," having "no discernable basis in reality," based on "nothing more than empty rhetoric"—at bottom "ignoran[t]."[101] According to arbitrator Stephen Schwebel, the "extraordinary backlash against investor-state arbitration" has been precipitated by "relatively obscure academics particularly in Canada" who have "misguided" views that will only be "attractive to the uninitiated."[102] Critics are accused not only of circulating "erroneous information [that] is subverting the debate" over the future of investor-state arbitration[103] but of "blatant ignorance"—they are guilty of spreading "nothing but myths and lies."[104] Are these norm entrepreneurs post-realist"—fully cognizant that their arguments are susceptible to the charge that they too are behaving politically? Is there reason to believe that the 'hermeneutic of suspicion' has widely taken hold in the field of international investment law?

III.

Orford frames the debate over the role of history in international law as one that accuses the other of hidden ideological motives. This "hermeneutic of suspicion," she argues, "structures encounters" between the disciplines of international law and history.[105] Duncan Kennedy describes the hermeneutic of suspicion as dominating contemporary legal debates in the United States: the other side has wrong answers to legal questions while my side, bereft of ideological influence, has the right ones.[106] Orford, in turn, dedicates her last chapter to this heuristic which underscores the stakes involved in the future of international adjudication: in order to maintain legitimacy, international law demands decision making bereft of politics.[107] This is an acute problem in investment law, where investment arbitration, staffed by lawyers and scholars with expertise in international economic law, has aggressively shrunk

100. JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 233, 263 (2005).

101. The Honorable Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 699, 710, 716, 720 (2014).

102. Alison Ross, *Schwebel on Arbitration's High Tide*, GLOB. ARB. REV. (Apr. 14, 2015), https://globalarbitrationreview.com/schwebel-arbitrations-high-tide.

103. *IBA Issues Fact-Correcting Statement on ISDS*, INT'L BAR ASS'N (Apr. 20, 2015), http://www.ibanet.org/Article/Detail.aspx?ArticleUid=1dff6284-e074-40ea-bf0c-f19949340b2f. Are these academics obscure because they are from Canada or just marginal to Schwebel's mainstream audience?

104. Christofer Fjellner, *Do You Dare to Challenge Me in the #ISDSchallenge?*, (May 5, 2015), http://www.fjellner.eu/the-isdschallenge-single-handedly-taking-on-the-anti-isdsers/.

105. ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 4, at 310.

106. *See* Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 L. & CRITIQUE 91, 91–92 (2014) [hereinafter Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*]; Duncan Kennedy, *A Political Economy of Contemporary Legality*, *in* THE LAW OF POLITICAL ECONOMY: TRANSFORMATION IN THE FUNCTION OF LAW 89, 93–95 (Poul F. Kjaer ed., 2020) [hereinafter Kennedy, *A Political Economy of Contemporary Legality*].

107. ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 4, at 314.

the policy space available to states and citizens. If the regime has not been very attentive at sniffing out corruption, it has, instead, exhibited a massive distrust of representative government.[108] The diminution of investment interests, protected by laconic standards of treatment, potentially give rise to international wrongs that require the payment of massive damage awards to investors.

Given the stakes involved, including their own place within the regime's legal order, it is no wonder that investment law elites view the opposition not only with suspicion but also with hostility. Critics, for their part, accuse the investment law establishment of institutionalizing a neoliberal project that exhibits connections (if not continuity) to colonialism and imperialism. Duncan Kennedy describes both sides as "neo-formalist"—a term that Orford embraces—for converting their "preferences into legal necessity" and by reviving methods associated with classical legal thought of the nineteenth and early twentieth centuries, associated with the Lochner era in the United States Supreme Court.[109] They are "postcritical" in so far as they are chastened by the peril of being accused of "Lochneris[m]," namely, of standing in the way of new forms of social regulation.[110]

Orford, like Kennedy, insists that both sides have been moulded by the American legal realist tradition and so are post-realist.[111] All have been infected by the knowledge that law 'might be politics all the way down.' It makes sense to Orford that international lawyers will want to seek out other methods, techniques and disciplines in cognate fields that might help to restore the objectivity with which to build (or maintain) regime legitimacy. Having recourse to history offers "new foundations for grounding our arguments."[112] Orford writes, "[r]ather than fully accepting . . . our responsibility for the politics of our legal arguments,we can use the work of historians to establish truths about international law."[113]

Investment law scholars and practitioners have had recourse to efficiency arguments (under the influence of law and economics) and to human rights regimes.[114] It also is true that investment arbitrators have displayed reflexivity in their decision making, aware that multiple audiences—investors, states, and NGOs—are watching their work.[115] The high stakes at work in the field were made

108. *See* GUS VAN HARTEN, SOVEREIGN CHOICES AND SOVEREIGN RESTRAINTS: JUDICIAL RESTRAINT IN INVESTMENT TREATY ARBITRATION 73 (2013).

109. Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, *supra* note 106, at 123. On classical legal thought and its penchant for categories and binaries, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992).

110. Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, *supra* note 106, at 102, 123; Kennedy, *A Political Economy of Contemporary Legality*, *supra* note 106, at 122.

111. *See* ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *supra* note 4, at 6.

112. *Id.* at 7.

113. *Id.*

114. On efficiency, see Anne van Aaken & Tomer Broude, *Arbitration From a Law & Economics Perspective, in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 874, 874–75 (Thomas Schultz & Federico Ortino, eds., 2020); on human rights, see MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 175 (2013).

115. *See* David Schneiderman, *Judicial Politics and International Investment Arbitration:*

apparent in *Philip Morris v. Uruguay*[116]— a dispute which was of interest not only to lawyers and state agents, but also to international organizations, like the World Health Organization, and to public health officials.[117] The tribunal absolved Uruguay of liability for indirect expropriation by having imposed strict controls on tobacco advertising. The measure, for one thing, did not amount to a "substantial deprivation" in the value of the investment.[118] For another, Uruguay was excused because it was exercising police powers jurisdiction, enacting measures having to do with health (or morals, order, or security).[119] Though this is an old distinction in U.S. constitutional law under the Fifth and Fourteenth Amendments,[120] the tribunal described a trajectory evolving in this direction in investment arbitration. If this doctrine "did not find immediate recognition in investment treaty decisions," the tribunal admitted, there has been "a consistent trend" since 2000 in which "a range of investment [tribunal] decisions have contributed to develop the scope, content and conditions of the State's police powers doctrine, anchoring it in international law."[121] This simply is revisionist. The only prior case in which a state was absolved of responsibility due to the police powers doctrine was *Chemtura v. Canada*, an award issued only six years earlier.[122]

Although instances of such strategic decision making can be found in investment arbitration, there is much evidence in the other direction as well. The prevailing approach, exhibited by the dominant role played by the legitimate expectations doctrine,[123] appeals to the need for certainty and predictability in property and contract relations. These are features associated with Weber's highest form of rational law that spread capitalism to the occidental world. This value-free

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Seeking an Explanation for Conflicting Outcomes, 30 NW. J. INT'L L. & BUS. 383, 403–13 (2010).

116. Phillip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Rectication (July 8, 2016).

117. Numerous international organizations filed amicus briefs in the dispute. *See* Nicole D. Foster, *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, 110 AM. J. INT'L L. 774, 780 (2016) ("Uruguay greatly enhanced its position in the dispute by providing a strong body of supporting scientific evidence, which was bolstered by WHO's, PAHO's, and the FCTC Secretariat's written briefs."); *see also* Borzu Sabahi and Kabir Duggal, *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, 108 AM. J. INT'L L. 67, 70 (2014) (explaining that the dispute "attracted attention because of the tension because it pits government regulation on matters of health against rights under investment treaties and thereby brings to the forefront important points relating to treaty interpretation that have been a magnet for debate in international law.").

118. *Philip Morris*, Award, ¶ 284.

119. *Id.* ¶ 287.

120. Evidence of U.S. legal power is the tribunal's reference to police powers doctrine in U.S. constitutional law. *Id.* at ¶ 293; *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (AM. L. INST. 1987) (explaining responsibility of states with respect to their police powers). I discuss this influence in DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE 79–80 (2008).

121. *Phillip Morris*, ICSID Case No. ARB/10/7, at ¶ 295.

122. Chemtura Corp. v. Can., Award (Perm. Ct. Arb. 2010), https://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf (concerning a ban on a dangerous pesticide for the growing of canola).

123. *See generally* Nicolás M. Perrone, *The Emerging Global Right to Investment: Understanding the Reasoning Behind Foreign Investor Rights*, 8 J. INT'L DISP. SETTLEMENT 673 (2017).

law, kept at a safe distance from substantive commitments (namely, ideology), facilitates capitalist relations of production by providing unambiguous, stable, and efficient administration of justice.[124] This is precisely how the *Suez* arbitration tribunal described the origins of legitimate expectations doctrine. It was grounded in Weber's legal sociology, which advanced the idea that "one of the main contributions of law to any social system is to make economic life more calculable . . . . An investor's expectations, created by law of a host country, are in effect calculations about the future."[125]

Could it be that the American realist tradition has not taken hold, but has mostly bypassed, the field of international investment law? Is it instead stuck in the nineteenth century, having recourse to a vested rights doctrine that disentitles states from taking measures for societal self-protection? Arguments employed by investment law entrepreneurs help to underscore this suspicion.[126] Consider the dispute, never resolved,[127] that was launched by the Detroit International Bridge Company (DIBC) against Canada for constructing a new bridge across the Detroit River, connecting Detroit, Michigan to Windsor, Ontario.[128] DIBC argued that, in return for its having constructed and operated its Ambassador Bridge, the company had been granted "a perpetual right to maintain the Bridge and collect tolls from vehicles using the bridge."[129] Canada, it was alleged, behaved arbitrarily and discriminatorily by constructing a competitor bridge that would steer traffic away from the Ambassador Bridge and destroy its profits.[130] The dispute was framed in the Marshall-era contract clause doctrine famously formulated in the *Dartmouth College v. Woodward* case.[131] Justice Story, concurring with Chief Justice Marshall's majority opinion, concluded that "rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." These were legal principles, enshrined in the U.S. Constitution, "so consonant with justice, [sound]

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124. *See* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 974 (Gunther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., U.C. Press 1978) (1956).

125. Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 203 (July 30, 2010), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/03/17.

126. For a study drawing out the "strikingly modern" character of an early nineteenth century arbitral claim, see Jason Webb Yackee, *The First Investor-State Arbitration:* The Suez Canal Company v Egypt *(1864)*, 17 J. WORLD INV. & TRADE 401, 403 (2016). This paper is revised and reproduced in INTERNATIONAL INVESTMENT LAW AND HISTORY, *supra* note 27, at 70–101.

127. A NAFTA tribunal concluded that it was deprived of jurisdiction to continue hearing the claim due to the investor improperly pursuing litigation in U.S. courts. Detroit Int'l Bridge Co. v. Can., PCA Case No. 2012-25, ¶ 336–38 (Perm. Ct. Arb. 2015), https://pca-cpa.org/en/cases/55/.

128. For further discussion, see David Schneiderman, *Global Constitutionalism and International Economic Law: The Case of International Investment Law*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 23, 35–39 (Marc Bungenberg et al. eds., Springer 2016) (ebook).

129. Detroit Int'l Bridge Co. v. Can., PCA Case No. 2012-25, Amended Notice of Arbitration, at ¶ 4 (Jan. 15, 2013), http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/detroit-04.pdf.

130. *Id.* at ¶ 11–13.

131. Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

policy, and legal reasoning, that it is difficult to resist the impression of their perfect correctness."[132]

Story refined this rationale in a dispute over the construction of a new Warren Bridge that would compete with the Charles River Bridge.[133] The claim looks virtually identical to the one initiated by the DIBC over 175 years later. Story, in dissent, declared that he could "conceive of no surer plan to arrest all public improvements, founded on private capital and enterprise, than to make the outlay of that capital uncertain, and questionable both as to security, and as to productiveness."[134] Though "[m]en may . . . differ" on the question, Story had not doubt that "[n]o man will hazard his capital in any enterprise, in which, if there be a loss, it must be borne exclusively by himself; and if there be success, he has not the slightest security of enjoying the rewards of that success."[135]

It is of little consequence that Chief Justice Taney rejected the particulars of Charles River Bridge's constitutional claim. Some argue that Taney's dismissal in that case signaled the rise of an open-ended police powers doctrine that would close shut again in the late nineteenth century.[136] Others explain the shift in terms of Taney's Jacksonian commitment to disrupting hierarchical privilege and encouraging private competition.[137] Rather, what is emphasized here is how durable are the arguments and justifications—rooted in nineteenth century vested rights doctrine—that are invoked today by investment law norm entrepreneurs. The doctrine, in short, has made a roaring comeback in the guise of investors' legitimate expectations. Investor expectations are considered paramount in any contest with public interest when states run afoul of investment treaty standards of protection. Deviations from these norms will not be tolerated but for exceptional circumstances, such as when the whole world is watching the challenge to a public health law intended to dampen tobacco consumption.[138]

There is a further motivation for investment law elites to resist the realist proposition that there may be more than one answer to investment law questions. Encouraging this confidence is the invitation that is provided to investment law

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132. *Id.* at 708.

133. Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837).

134. *Id.* at 608.

135. *Id.* at 607 (Story, J., dissenting).

136. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 107 (1996). On judicial encouragement of the creative use of property in this era, see JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956). Hurst associates the outcome in this case with the idea that vested rights would be respected so long as they "were felt to yield substantial present returns in social function." JAMES WILLARD HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY 236 (1960).

137. *See* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 206 (1997). On government enabling productive uses of private property in this period, see OSCAR HANDLIN & MARY FLUG HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY (1947).

138. *See* Phillip Morris v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶ 295 (July 8, 2016). For further discussion of this case, see *supra* notes 116–121 and accompanying text.

scholars by Article 38(1)(d) of the Statute of the Permanent Court of International Justice.[139] Serving as "the most highly qualified publicists," they are invited to generate, through their scholarship, subsidiary sources of international law.[140] This enticement serves as a springboard for investment law scholars to not only contribute to regime maintenance via academic writing but to act as counsel or arbitrator or both.[141] Are they "acutely aware"[142] that their legal answers are susceptible to the charge of being ideologically motivated? Though they will have recourse to forms of argument associated with classical legal thought—a common enough practice for neoliberals[143]—they do not appear to be "chastened" by the threat of being charged with being ideologically motivated. Moreover, they do not appear willing to accept any outcomes that do not align with their preferred ideological outcomes.[144] The fury directed at critics who argue otherwise is, I believe, evidence that investment law scholars are not willing even to give an inch.

Legal uncertainty will only minimally be tolerated. Investment law scholars' restorations of meaning will otherwise appear too tenuous. Exhibiting any uncertainty would be detrimental to the rise in their investment law fortunes. Investment law elites will never acknowledge, for instance, that self-interest has any role to play in their contributions. It is always everyone else—politicians, *campesinos*, NGOs, national courts, or investors—who are motivated by self-interest.[145] It can never be true of those responsible for defining and expanding the field of international investment law. To admit as much would undermine the very reason for their existence.

139. Statute of the Permanent Court of International Justice art. 38(1)(d), (Dec. 16, 1920), 6 L.N.T.S. 379.

140. *Id.*

141. *See* ORFORD, *supra* note 4, at 188–89. On "double hatting" (i.e., performing various roles in different disputes), see Malcolm Langford et al., *The Revolving Door in International Investment Arbitration*, 20 J. INT'L ECON. L. 301, 301–02 (2017).

142. Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, *supra* note 106, at 106.

143. *See id.* at 111.

144. Kennedy describes chastened legal elites as "hoping that this will not happen in too many or too horrible cases." Kennedy, *A Political Economy of Contemporary Legality*, *supra* note 106, at 111.

145. *See* PIERRE BOURDIEU, PRACTICAL REASON: ON THE THEORY OF ACTION 75–91 (1998).