Kate Miles, ***The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital.*** Cambridge: Cambridge University Press, 2013. Pp. 464. £75. ISBN: 9781107039391.

Mainstream investment law scholars have delivered their verdict on the relevance of the past: it is 'anachronistic and obsolete'.[1] Historic controversies over the meaning of customary international law between capital-exporting and capital-importing states have been overtaken, it is said, by nearly 3,000 bilateral investment treaties. This looks mostly like a strategic denial – cabining investment law's past makes the present appear free of the dynamics of domination that characterized prior conflicts. That history, the mainstream maintains, bears no relationship to the meaning and content of contemporary commitments made by states acting in their sovereign capacity and in relative positions of equality.

Kate Miles takes a decidedly different view. History not only matters, but the origins of international investment law reveal a recurring pattern of constraint and resistance through law. We can observe similar patterns of behaviour today, observes Miles. Her book is intended as a contribution to a deep-structure analysis and transformation of the legal regime for the protection of foreign investors. Her object is to rebalance investment law so that it operates in a socially and environmentally sustainable manner.

Both a critical and reconstructivist account, the book begins (in Part 1) with investment law's origins in the quest for imperial control over the resources and persons of the colonized world. Taking a bird's eye view of international legal developments over the course of the 17th to mid-20th centuries, Miles argues that the 'history of colonialism, the calculated, often brutal, use of force, and the manipulation of legal doctrines to acquire commercial benefits … drove the construction of international investment law' (at 32). International law was preoccupied solely with protecting investors, whilst host states 'were unable to call upon the rule of international law to address damage suffered at the hands of foreign investors' (*ibid.*). Drawing on a series of historical case studies, Miles reveals how the international law for the protection of foreign investors tilted in favour of the interests of the powerful at the expense of local communities and their habitats.

Controversies over control of the resources and the environment provided the terrain upon which resistance to imperial legal control would be fought. Opposition via claims over, for instance, the permanent sovereignty over natural resources (associated with the New International Economic Order) attracted a counter-response from powerful interests in the North. This manifests itself in the contemporary investment law project of institutions and norms, like ICSID and the worldwide web of BITs, repeating the cycle of 'constraining and neutralising' resistance by strengthening legal disciplines for the protection of home state investors (at 115).

Only part of the book is taken up with this historical account. It is a history that international investment lawyers mostly would like to forget, but of which the field could use more. Much of that history, it should be noted, relies upon secondary sources that have told similar stories (i.e., Anghie[2] and Lipson[3]) but with less attention paid to the particulars of foreign investment law. To this end, the book makes a nice contribution to the literature. Much more of the book is taken up with a critique of the contemporary regime and prospects of transforming its principal features. For this reason, the book's title is somewhat misleading. The book is only partly about the regime's origins. It is mostly about the deficiencies in, and means of reforming, the contemporary regime. From here on in, the book moves forward with a rich and comprehensive account of the regime's failings and the prospects for change. This includes detailed case studies,

1 R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2008), at 16.

2 A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004).

3 C. Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (1985).

in which Miles reads investment disputes 'against the grain' (another valuable contribution), together with chapters devoted to developments in cognate fields, like corporate social responsibility (CSR) and sustainable financing, which may influence investment law's future trajectory.

The emphasis here is on environmental risks associated with economic development and foreign investment. The connection between the legal imperialism described in Part 1 and the environment could perhaps have been made stronger. Miles claims that contemporary 'commodification of the environment' is a 'conceptualisation .... that harks back to the era of imperialism' (at 139). This generalized connection between contemporary environmental concerns and empire will not be disputed by many readers. What will be contested is Miles' contention that investment treaty disciplines can impede state regulation intending to prevent environmental degradation (at 154). Mainstream investment law scholars and arbitrators work hard at resisting this proposition, mostly, again, for strategic reasons. The international investment law regime cannot be seen to be standing in the way of *bona fide* environmental regulation, and so the task at hand for these scholars is to characterize these disputes as concerning something other than the environment, preferably something that could be labelled 'politics'. Not wanting to come across merely as polemical, Miles digs deep into a number of disputes to buttress her claim (examining the disputes in *Metalclad, Ethyl, Azurix, Methanex*, and *Santa Elena*). She examines substantive standards of protection, such as legitimate expectations doctrine, fair and equitable treatment, national treatment, indirect expropriation, and stabilization clauses, to show how they can inhibit innovation in environmental regulation.

Miles then looks to developments in the kindred domains of CSR and sustainable finance, anticipating that they might generate 'future synergies' and provide a 'key platform from which to bring about reform' (at 213). She analogizes these trends to the 'pre-normative' stage of legal development (Brunée and Toope's term) in which social movements and non-governmental actors serve as 'builders of a [nascent] legal system'.[4] Cognizant of the limits to voluntary codes of corporate conduct associated with these developments, Miles is hopeful that such trends will translate into a 'culture shift' (at 259) in investment law. They might help to reconceptualize investment law 'free from the replication of historical patterns of imperialism' (at 278).

In Part 3, Miles links these tendencies to developments in the domain of investment law. She begins with an account of treaty interpretation that relies on McLachlin's technique of 'systemic integration' as means of incorporating international legal developments elsewhere, principally via the aegis of the Vienna Convention.[5] Her inquiry into the ways in which other fields of international law have been incorporated into investment treaty arbitration reveals a strategic selectivity that benefits mostly foreign investors, and which is consistent with historical patterns. The intellectual movement towards a 'global administrative law' is also being felt in investment law circles but, once again, with an emphasis on obligations that improve investor protections. Hope is placed on NGOs and social movement actors to move investment law's 'shared understandings' in the direction of a more social and environmentally sustainable position. Adopting a 'cultural' approach to investor–state arbitration, Miles seeks to situate investment arbitration within a 'wider systemic framework' in which arbitral tribunals operate, aiming to shift 'the cultural base from which arbitrators begin their analysis' (at 345). This leads, finally, to a series of suggested reforms including revised treaty text (modelled upon the IISD text), a new multilateral agreement, and a permanent and centralized appellate decision-making body.

[4] In Brunée and Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law', 39 *Columbia J Transnat'l L* (2000) 19, at 70.

[5] See McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention', 54 *ICLQ* (2005) 279; McLachlan, 'Investment Treaties and General International Law', 57 *ICLQ* (2008) 361.

The methodology throughout is eclectic. One should not view this as a weakness. A variety of heuristics can aid in shedding light on what is a complex and evolving phenomenon. The author has recourse to constructivism, theories of imperialism, a cultural account of law together with passing references to systems theory (namely, to 'noise', via Braithwaite and Drahos,[6] but not Luhmann[7] or Teubner[8]). The book, for this reason, is significantly undertheorized. The cultural account, for instance, is intriguing but never fully worked out. There are cursory references to culture throughout, but it is only when we are well into the book that the cultural account is explained with reference to Dezalay and Garth's work on commercial arbitration (at 343–346).[9] It is here that the author makes clear how the cultural account has traction in the context of investor–state arbitration. She argues that a shift in the dominant culture of investment arbitration is 'central' to a more balanced investment law regime (at 345). Similarly, the constructivist account leans heavily on Brunée and Toope's 'interactional account' of international law.[10] There is not much engagement with its international relations (IR) origins[11] and with Lon Fuller's legal theory, which provide the foundation for Brunée and Toope's thesis, or with critics of constructivism.[12] Intellectual influences are assembled but not deeply engaged with.

The author adopts, however, a refreshingly reflexive perspective. Much of the investment law literature lacks this reflexivity – a sense of the scholar's place in the production of knowledge and the conditions under which such knowledge is produced. Bourdieu, who inspires the methodology adopted by Dezalay and Garth, insisted that intellectuals be attentive to their complicity in reproducing disciplinary bias and to the tendency of being trapped by the limits of their own self-interest.[13] Mainstream investment law scholars appear to be oblivious to their biases or otherwise prefer to keep silent about them. They certainly do not apply the same standards of inquiry – self-interest appears repeatedly to motivate state actors but never investment lawyers and arbitrators – to their own scholarly production. Miles, by contrast, admits that this book is meant to contribute to the shift in culture that she anticipates is prompted by developments in other fields of international law in combination with the force of social movements, NGOs, and states that are party to investment treaties. She advances a methodological commitment to contribute to the process of reconceptualizing investment law.

There is a sense by the book's end, however, of a deflated optimism regarding the reconceptualization project. This may be, in part, a product of the conceptual tools that Miles relies upon. On the one hand, she insists that investment law, at its origins, was principally a vehicle for controlling through legal means resistance emanating from capital-importing states. The book is, in an important sense, an account of this 'double movement' (Polanyi's phrase) of reaction and constraint. If this is correct, how would CSR and sustainable finance, coupled with the advocacy of epistemic communities, even new model treaties and an appellate body, make any real difference to counteract the predictable reaction of powerful global actors? The author goes so far as to write that the 'establishment of a centralized and permanent appellate body

6 J. Braithwaite and P. Drahos, *Global Business Regulation* (2000), at 32.

7 N. Luhmann, *Law as a Social System* (trans. K.A. Ziegert, 2004).

8 G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012). There is a passing reference (at 341) to Fisher-Lescano and Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan J Int'l L* (2004) 999.

9 Y. Dezalay and B.G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996).

10 J. Brunée and S. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010).

11 See, e.g., A. Wendt, *Social Theory of International Relations* (1999).

12 See, e.g., the discussion in Abbott and Snidal, 'Law, Legalization and Politics: An Agenda for the Next Generation of IR-IL Scholars', in J.L. Dunoff and M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013).

13 See, for instance, 'Preface to the English Edition' in P. Bourdieu, *Homo Academicus* (1988), at xi–xxvi.

for investment arbitration, together with the appropriate rules on transparency and receipt of *amicus* briefs, would address many of the concerns set out above' (at 377). This faith in legality – in appellate review modelled upon the WTO appellate board – seems naïve in light of the account of power she invokes, one where the reaction of dominant economic actors and their home states (together with investment lawyers) should be anticipated. In the concluding chapters to her book she appears to admit as much. 'Given the history of this field,' she writes, 'it would be unsurprising if new doctrine or mechanisms were to emerge to neutralise the effects of these [progressive] developments and maintain the one-sided focus on investor protection within investment treaty regimes' (at 388). The author clearly is torn between optimism and despair. This is a credible place to end up. Imagining a regime more tolerable than the present one gives rise to the substantial risk that things could get worse. Given the shrunken field of available options, there is always the chance, as Foucault reminds us, of having to begin again.

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## Emmanuelle Tourme-Jouannet, ***What is a Fair International Society? International Law Between Development and Recognition***. Oxford: Hart Publishing, 2013. Pp. 252. £30. ISBN: 9781849464307.

Does international law have an answer to the question: 'what is a fair international society'? In her insightful book, Emmanuelle Tourne-Jouannet interrogates in a systematic fashion diverse areas of international law that touch upon or address, directly or indirectly, fairness, equity, or redistribution: from the law of development to minority rights to international economic law. By taking positive law as the point of departure for an inquiry about global justice, Tourme-Jouannet departs, in a refreshing way, from attempts to extrapolate from mainstream legal theory an abstract conception of global justice.[1] '[W]hat is to be addressed here are not contemporary theories of justice and the philosophical questions that the topic raises .... [I]t is the aim to address them here from a different angle: from within legal practice, as it were .... I have opted for an approach based on existing legal practice, with a view to conceptualizing and questioning it' (at 3). For Tourme-Jouannet, the question about the fairness of international legal practice leads to a number of other legal-historical questions regarding the contemporary evolution of international law. The project is 'simply to begin by identifying the principles and legal practices relating to development and recognition' (*ibid.*). In her view, adopting a historical perspective, these practices – notwithstanding their differences – reflect a joint concern with achieving global justice over the years.

In *What is a Fair International Society?*, Tourme-Jouannet reviews the history of international economic law over the last decades. She disaggregates it into two strands of international law – 'the law of development' and the 'law of recognition', which are inextricably enmeshed in today's world that is 'postcolonial and post-Cold War'. In her view, '[t]hese twin characteristics explain why international society is also riddled with the two major forms of injustice that ... afflict national societies' (at 1). These are taken to be 'first, the economic and social disparities between states ... when the first steps were taken towards decolonization ... . Second,

[1] T. Pogge, *World Poverty and Human Rights* (2002); F.J. Garcia. *Global Justice and International Economic Law – Three Takes* (2013).