

emphasized, this coerced ‘openness’ to the free market devastates states and immiserates their populations.¹⁴

As Ntina Tzouvala has demonstrated, the standard of civilization as an argumentative pattern has never been removed from international law, only hidden from sight.¹⁵ Sripati has shown that even one of its most intrusive measures – trusteeship – has been hiding in plain sight all along. Sripati’s book stands at an interesting cross-section between PIL, constitutional law and political economy, drawing insights from, and offering fresh provocations to, each field. I hope it draws interest from all of those fields. But, in PIL, I fear it will not persuade those not already drawn to TWAIL, as it does tend to assert, rather than fully argue, its central assumption – namely, that the system is rigged by the West against the rest. At the same time, perhaps this is not the task of this book given that others have done that work already.¹⁶ Sripati engages a common TWAIL concern – neo-colonial governance – from a new angle, showing it to be more widespread and intrusive than we might have realized. Sripati’s unique contribution is to offer a wealth of knowledge, evidence and analysis to future researchers inside and outside the TWAIL tradition.

Jason Beckett

Assistant Professor of Law,
American University in Cairo, Egypt
Email: jasonbeckett@aucegypt.edu

<https://doi.org/10.1093/ejil/chac015>

Nicolás Perrone. ***Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules***. Oxford: Oxford University Press, 2021. Pp. 272. £80. ISBN: 9780198862147.

Describing two International Centre for Settlement of Investment Disputes (ICSID) tribunal decisions, Nicolás Perrone observes that ‘they silenced the environment and social context’ of the host country (at 129). The tribunals took the disputes out of their local context and, instead, adjudicated them in a global context, against standards defined globally and with reference to precedents developed by previous tribunals. For Perrone, this is investment treaty arbitration working how it was intended to work. Intended, that is, by a group of transnational norm entrepreneurs in the 1950s and 1960s.

The argument at the centre of this fascinating book is that investment law still embodies the ‘legal imagination’ of those norm entrepreneurs from the 1950s. Legal imagination, a concept drawn from philosopher Charles Taylor, is a ‘specific way of thinking about foreign investor rights and investment relations’ (at 4). While it emerges from these norm entrepreneurs’ theories as well as their practical activities,

¹⁴ Linarelli, Salomon and Sonorajah, *supra* note 6.

¹⁵ N. Tzouvala, *Capitalism as Civilisation: A History of International Law* (2020).

¹⁶ Chimni, *supra* note 6, offers an accessible introduction to this critique.

we cannot ‘expect the legal imagination to be openly discussed in ISDS [investor–state dispute settlement] cases or policy debates about international investment law’ because the legal imagination is not found in the concrete proposals made by these norm entrepreneurs (at 11). It is more a set of background ideas, notably certain beliefs about states and markets, that Perrone argues have achieved canonical stature and are taken for granted in investment law today.

To show us where these ideas come from and how they continue to appear in investment law, the book takes readers from the 1950s to contemporary ISDS in three sections. The first section grounds the book’s claims in contract and property theory. The second section is historical, introducing the norm entrepreneurs in the 1950s, then looking at competition between different imaginaries in the 1970s, and finally turning to the emergence of ISDS practice in the 1990s, showing how most tribunals approached investment treaties in a way that is remarkably similar to the legal imagination of the earlier norm entrepreneurs. Then the third section analyses a series of contemporary ISDS cases and how they connect to regulation, to regulatory ‘givings’ and to local communities.

One of the book’s strengths is its sweeping scope: it provides a sense of how seemingly disparate things fit together and illustrates continuities across long periods of time. When a field grows as rapidly as investment law has in recent decades, books tend to become narrower and arguments become smaller. Perrone pushes against this trend with ambitious scope and bold claims of world-making. Books like this are a joy to read (and to review) because they raise new questions and invite debate. In that spirit, I highlight three choices made in crafting the book: to conceptualize transnational norm entrepreneurs as a collective, to emphasize continuity and to develop alternative imaginaries. These choices make the book distinctive and provide a point of departure to reflect on where Perrone’s work takes us and where we might go from here.

The first choice is to conceptualize transnational norm entrepreneurs as a collective. One of the benefits of doing this is that it highlights the sophistication of debates in earlier decades, particularly the 1950s and 1960s. Private sector actors were interested in so much more than protection from, or compensation for, direct expropriation. The contributions of private sector actors in debates on the definition of investment or indirect expropriation suggest striking parallels between the concerns discussed in the 1950s and the contemporary investment treaty system (at 68–72).

Studying these actors as a cohesive group of norm entrepreneurs also has the benefit of enabling us to see continuities very clearly. And if we look across time, we see that Hermann Abs and other private sector actors in the 1950s wanted foreign investors to have direct standing with substantive rights, and today there exists an investor-friendly system broadly in line with what Abs wanted. Yet this conceptual move also comes with a downside of making a single voice out of what may have sounded more like a diverse cacophony. If we move down a level of abstraction to look at the concrete policy actions they sought, the views of the norm entrepreneurs were less cohesive, but the book does not spend much time exploring the differences between various individuals or coalitions within the private sector community or changes over time – the emphasis is on illustrating cohesion and continuity.

The terminology chosen gives these private sector actors a stature and ambition closer to intellectuals than businesspeople. The term ‘world-making’, usually reserved for creative visionaries or intellectuals (for instance in Adom Getachew’s scholarship on post-colonial intellectuals¹), is here bestowed upon private sector actors. Beyond merely seeking to protect their property, these private sector actors were ‘involved in a world-making project for the expansion of free enterprise at a global scale’ (at 60). To expand free enterprise, they sought to limit the role of the state. A major claim running throughout the book, and one that distinguishes Perrone’s work from previous accounts, is that ‘the norm entrepreneurs for international investment protection favoured minimal state intervention in the economy’ (at 58). In making this claim, Perrone hints at a fundamental tension between the norm entrepreneurs’ ends and their means: while they sought minimal state intervention and less legal regulation (ends), they brought this about through maximal state intervention in the form of state-led international law-making (means). To support his claim that norm entrepreneurs sought to minimize state intervention, he draws on recent scholarship examining the influence of neoliberal intellectuals like Wilhelm Röpke and Friedrich Hayek on investment law.² Yet in contrast to other recent work, Perrone leaves the relationship between these neoliberal intellectuals and the norm entrepreneurs somewhat open: ‘they were not neoliberals, and it is unclear whether neoliberals influenced the norm entrepreneurs, or vice-versa. Most likely the influence was mutual’ (at 58).

While he places the norm entrepreneurs alongside neoliberal intellectuals and uses terminology that recognizes the norm entrepreneurs as actors with ideas rather than mere interests, Perrone argues theirs was not an intellectual project but a practical one, and they insisted on concrete solutions to real problems (at 59). But was it an insistence on particular solutions or was it a search for stronger protection of property by any means? If we take Hermann Abs, the most prominent norm entrepreneur in the text, the picture is mixed. Abs did not like bilateral investment treaties, and strongly preferred a global treaty or at least a Europe-wide one. Abs did not particularly like arbitration; he preferred a court, but investor–state arbitration was better than state–state dispute settlement, and all of those options were better than insurance. What did Abs get, though? Bilateral treaties with insurance, backed up by state–state dispute settlement. Abs, the book mentions, still considered this a victory (at 59).

Examining Abs is instructive in another way too: he was asking states, especially the Federal Republic of Germany, for new policies, and sometimes they told him no. Perrone hints at norm entrepreneurs not getting their way (for instance, member states at the Organisation for Economic Co-operation and Development (OECD) objecting to a particular provision sought by the norm entrepreneurs, at 75), but by and

¹ A. Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (2019).

² See, especially, Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018); Tzouvala, ‘The Ordo-Liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale’, in J.D. Haskell and A. Rasulov (eds), *New Voices and New Perspectives in International Economic Law* (2020) 37. The influence of Hayek and Röpke are also considered at length in L. Rönnelid, ‘The Emergence of Routine Enforcement of International Investment Law’ (2018) (PhD thesis on file at Uppsala Universitet). I am grateful to Filip Batsel for discussing his thoughts and archival materials on this point with me.

large, we do not hear the norm entrepreneurs being told no. States are absent from the story, or at least are not main protagonists in it. The narrative skips from private individuals pushing for a new legal regime giving them standing to private individuals serving as arbitrators. But states, ultimately, held the pen. Even if private investors held a pencil writing preliminary drafts, states held the pen. If investment treaties stood for a certain legal imagination, does it mean that states supported that legal imagination when they signed investment treaties? Or did states not realize that investment treaties stood not just for investment protection but also for minimal state intervention in the economy? Or was the demand from the private sector for these treaties with arbitration so overwhelming that states negotiated them despite concerns that they were at odds with national economic policy at the time? We do not learn the answers to these questions.

Another consequence of examining norm entrepreneurs as a collective is that it might lead us to overstate private sector interest in investment treaties. Here I need to declare a conflict of interest, in that I have argued investor demand was limited to strong interest from relatively few individuals, so sentences in Perrone's book like 'Abs and [Hartley] Shawcross are sometimes described as two individuals on a sort of personal quest, rather than as the most visible faces of a broad coalition in favour of international investment protection' (at 8) are at least somewhat directed at me.³ While I am happy to concede that my approach may have understated private sector interest – and certainly agree that large oil and gas companies with arbitration experience, like Shell, had a pronounced interest in investment arbitration in the 1950s and 1960s – there are reasons to be careful in how we assess private sector interests. If we say 'business' is for or against something, 'business' can be invoked in the same way 'the market' is invoked as a justification for policy or constraint on policy, whereas if we see the private sector as a heterogeneous mix with diverse interests that change over time and vary by industry, home country and circumstance, it may make the available policy options look different, and likely broader.

The second of Perrone's three choices in crafting his book is to emphasize continuity. While his chapters on recent cases note some evolution in ISDS practice, particularly the shifting balance between investor expectations and states' right to regulate, 'the changes are marginal' according to Perrone (at 170). The book's focus is on demonstrating continuity between the norm entrepreneurs and later actors. For instance, 'in the 1990s, the work of the World Bank and UNCTAD [United Nations Conference on Trade and Development] was quite consistent with the norm entrepreneurs' world-making project' (at 96), and in deciding disputes in the late 1990s and 2000s, 'arbitrators embraced the legal imagination of the norm entrepreneurs' (at 108). The book concludes by observing that the 'similarities between the interpretations [that the norm entrepreneurs] promoted and contemporary ISDS practice is remarkable' (at 199).

Yet in any system that survives over several decades, continuity is likely to be laced with elements of transformation. As new generations or new types of actors emerge,

³ T. St John, *The Rise of Investor–State Arbitration: Politics, Law, and Unintended Consequences* (2018).

they often reproduce the ideas of the earlier generations while at the same time adapting them and adding their own spin. Reading Perrone's chronological chapters, I kept wondering where the original norm entrepreneurs end and later generations begin. I wondered in particular where someone like Heribert Golsong, the second Secretary-General of ICSID, might fit. Golsong worked at the European Court of Human Rights for many years before joining the World Bank and ICSID. After leaving ICSID, Golsong served as counsel for the claimant in the first investment treaty claim, which means it is arguably Golsong who pioneered arbitration without privity.⁴ Golsong, born a generation after Abs, is a bridge between the 1960s discussions and the actual practice of investment treaty arbitration as it emerges in the 1980s. Should we understand him as one of the norm entrepreneurs, or as a later generation implementing the ideas of the norm entrepreneurs, or as a legal innovator attempting a new type of claim?

Maybe it does not matter how we think about Golsong specifically, but it does matter how we think about generational change and transformation generally. The emphasis on continuity leads Perrone to conclude that without a full-scale remaking of investment law from new foundations, there will not be meaningful change: 'for those who favour making significant reforms to this international regime but still think that can be achieved without reconsidering its pillars, the fact that present ISDS reflects the norm entrepreneurs' vision of foreign investment relations should be more than just an anecdotal observation' (at 8). This emphasis on continuity leads Perrone to dismiss ongoing reform debates and speak instead to an audience of 'those who believe the current regime cannot be fixed' (at 205).

But what if current reform debates are understood not as efforts to fix the regime but to transform it? That is, to put it to new ends gradually? Transformative change may not arrive through rewriting investment law off a clean slate; it may arrive through piecemeal adjustments and experiments on the margins of the existing system, things like states insisting on the exhaustion of local remedies, a framework convention for ISDS reform with a preambular purpose of sustainable development or even drafters saving space for investor obligations that cannot be agreed today to be added by the next generation.⁵ For Perrone, and many others, these changes may not be fast enough or dramatic enough, but we risk missing the transformative potential of these changes if our analytic lenses are calibrated to focus on continuities alone. How we understand continuity and change matters for what we see happening today.

Continuity and change are present in the book in another way: how do, and how should, tribunals deal with changing circumstances? This question emerges as a strong undercurrent in the chapters analysing cases. Describing recent ISDS cases against Spain related to renewable energy, Perrone notes that 'new issues and expectations

⁴ ICSID, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, 27 June 1990, ICSID Case no. ARB/87/3.

⁵ UNCITRAL, *Submission from the Republic of South Africa, Possible Reform of Investor–State Dispute Settlement (ISDS)*, UN Doc. A/CN.9/WG.III/WP.176, 17 July 2019, at 43–46; CCSI, CAROLA and Harrison Institute for Public Law, *Reforming the International Investment Regime through a Framework Convention on Investment and Sustainable Development*, 6 October 2020, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a_framework_convention_on_investment.pdf; UNCITRAL, *Submission from the European Union and its Member States, Possible Reform of Investor–State Dispute Settlement (ISDS)*, UN Doc. A/CN.9/WG.III/WP.159/Add.1, 24 January 2019, at 37.

came into focus, such as industrial effects, employment, social cost, or the specificities of national political and economic contexts' that led Spain to review and change its policy (at 166). Increasingly, the question that many tribunals face is some version of: how did governments deal with updated information or new democratic contestation? Perrone argues that tribunals still prioritize protecting foreign investors' legitimate expectations, consistent with the expectations of the norm entrepreneurs in the 1950s and 1960s. Tribunals still 'unplug foreign investment relations from domestic public law imperatives and interpret those relations through the lens of a transactional model whereby states must treat foreign investors according to their expectations despite the local context' (at 170). In other words, for Perrone, tribunals show little appreciation for change and expect continuity. Decisions by arbitral tribunals handed down since his book's publication – notably *Eco Oro v. Colombia*, a dispute that Perrone has written about elsewhere from a layered, sociological perspective – underline his argument that arbitral tribunals often fail to respect the concerns of local actors.⁶

Perrone's third choice is identifying and developing alternative imaginaries. The third chapter in *Investment Treaties and the Legal Imagination* explores the alternative legal imagination that emerged at the United Nations with leadership from the Global South in the 1970s. The reports and processes at the United Nations in these years 'favoured a legal imagination whereby the primary expectation would be that foreign investors adapt and contribute to host states' plans' (at 88). The apex of this alternative imagination was the Charter of Economic Rights and Duties of States (CERDS) Resolution adopted by the General Assembly in December 1974.⁷ There is more deference to the policy decisions of the host state, and foreign investors have both obligations and rights at the international level in this imagination.

Examining this alternative legal imagination from the 1970s is always instructive, but it also makes me wonder: is it still today's alternative legal imagination? Perrone does not address this directly, but my reading of his work is that while there are certainly elements of this 1970s legal imagination that should be carried forward into today's alternative, there are also new elements in the alternative legal imagination he would propose today. For instance, investor obligations were central to the 1970s alternative legal imagination and are central to alternative imaginations today. On the other hand, the participation of local communities was not discussed much in the 1970s, but building a regime based on inclusion, and in particular a regime that includes local communities, is central to Perrone's contemporary alternative imagination (at 206).

There is a fundamental normative argument that underlies Perrone's alternative legal imagination: foreign investments should be re-embedded in their local contexts. The norm entrepreneurs of the 1950s and 1960s pushed for foreign investors to be dis-embedded from local contexts, a move that became sacrosanct after being celebrated as de-politicization. This move also, as Perrone shows us, has 'made local communities invisible' and put those communities

⁶ Perrone, 'Foreign Investment, Knowledge, and International Arbitration: Insider a Research Trip', *International Institute for Environment and Development*, 22 June 2020, available at www.iied.org/foreign-investment-knowledge-international-arbitration-inside-research-trip.

⁷ GA Res. 3281 (XXIX), 12 December 1974.

‘in tragic situations, as their lifestyles, values, and cultures are put on trial in disputes they are not party to’ (at 201–202). So how, through what concrete steps, can local communities be made visible? How might foreign investors be re-embedded into local contexts?

In the conclusion, Perrone draws lessons from the norm entrepreneurs on how to re-imagine investment law: ‘our efforts must be ambitious, like theirs, and ideas alone are not enough’ since their success at dis-embedding disputes from context is due to their mix of theory and practice, with practice including lobbying for specific policies (at 205–206). If one were to push for an alternative legal imagination, what specific policies would one push and where? How would one include the issues that have been silenced and ensure the actors who have been made invisible are heard? Who is in a position to take what concrete steps, and what constraints do they face? Perrone’s book takes us to the brink of a new legal imagination, one in which foreign investors are no longer extraordinary, but rather embedded in communities and national contexts like other actors. The question now is: How do we get there?

Taylor St John 

Lecturer in International Relations, University of St Andrews,
St Andrews, United Kingdom
Email: taylor.stjohn@st-andrews.ac.uk

<https://doi.org/10.1093/ejil/chac002>

Thomas Burri and Jamie Trinidad (eds). ***The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion***. Cambridge: Cambridge University Press, 2021. Pp. 300. £85. ISBN: 9781108841276.

As Friedrich Nietzsche once noted, only that which has no history can be defined. This dilemma, however, has not prevented the decades-long efforts by international lawyers to condense self-determination’s ‘amusing history’, as C.E. Carrington once described it, into a concrete legal definition.¹ The International Court of Justice’s (ICJ) role in this process has been a chequered one, though not for want of opportunities. Cases arising out of the colonial era’s application of self-determination have offered numerous junctures for the Court to confront the rules governing the exercise of self-determination and the entitlements of its beneficiary peoples. Its most recent judgment on the right of self-determination is the subject of a new edited collection by Thomas Burri and Jamie Trinidad that provides a comprehensive overview of the Court’s reasoning and explores some of the broader ramifications of the decision. The Court’s 2019 advisory opinion on the separation by the United Kingdom (UK) of the Chagos Archipelago from Mauritius, during the latter’s independence, follows a near 60-year battle by the Chagossians to redress their enforced exile from the islands. The opinion ultimately affirmed what had already become a political and material reality for the islanders: that the UK had wrongly detached and maintained control of the

¹ C.E. Carrington, *The Liquidation of the British Empire* (1962), at 11.