Introduction

Investment Law among the Ruins

Being past, being no more, is passionately at work in things.¹

This book is prompted by a modest intuition. Thumbing through a well-worn copy of Albert Memmi’s *The Colonizer and the Colonized,*² one can spot arguments familiar to those labouring in the field of international investment law. Memmi’s ‘portrait’ of the colonizer, as revealed to him in colonial Algeria, is strikingly similar to the visage portrayed by investment lawyers, arbitrators and scholars. These are the norm entrepreneurs, promoting and participating in the spread of international investment law, a regime comprising almost 3,300 treaties (bilateral and regional) protecting the property, contract and due process rights of foreign investors.³ Chapter 1 of this book began with the object of drawing out resemblances, but also differences, between colonialism and the newer regime to protect foreign investors abroad. Little attention was paid to the method being deployed⁴ – it looked vaguely like discourse analysis, with which I had some familiarity.⁵ A similarly inductive approach, though now with an emphasis on practices and legal forms, was adopted for Chapter 2 on imperialism in which international lawyer Mohammed Bedjaoui served as the principal informant. Other interlocutors came to inform other

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¹ Benjamin (1999) at 833.
² Memmi (1991). I was thumbing through a second hand, English language paperback edition (Memmi 1967), which I purchased while pursuing undergraduate studies at McGill university.
³ For an introduction to the regime, see my two previous books: Schneiderman (2008) and Schneiderman (2013). On the number of international investment agreements in force, see UNCTAD (2020) at 106.
⁴ On not ‘privileging methodology’, see Foucault (1977a) at 404. On the uncertainty of proceeding without a clear methodological path forward, see Foucault (1985) at 7 (‘as to those, in short, for whom to work in the midst of uncertainty and apprehension is tantamount to failure, all I can say is that clearly we are not from the same planet’).
⁵ In the nature of a ‘discursive account of power’ as theorized by Jessop and Sum (2001) at 93. I was operating under the influence of Hall (1977) and Hall (1982).
chapters of this book, oftentimes from locales outside the mainstream sources of international economic law. What became clear as the writing proceeded was that, in so far as investment law’s rationales and techniques replicated elements drawn from a discredited past, it raised concerns about its very premises. It became apparent that the normative foundations for today’s regime reproduces discursive practices that are less than compelling and whose origins lie in ruins.6 Indeed, they should be embarrassing.

This book is also prompted by a denial. Much of the scholarship on investment law chooses to ignore the past. Institutional memories are of little consequence to contemporary international investment lawyers as it has been overtaken by a new treaty-based regime premised on consent and reciprocity. States in both the northern and southern hemispheres have voluntarily signed onto these treaties, it is said, and they continue to undergo renewal and reform.7 Even if there is dissatisfaction expressed in some quarters, very few states have withdrawn from the regime. Moreover, treaties ensure reciprocity between party states – both capital-exporting and capital-importing states are bound by investment treaty disciplines.8 Scholars, therefore, choose to emphasize rupture over resemblance. Among those who prefer to ignore the past are Dolzer and Schreuer, who write that ‘[w]ithin this new climate of international economic relations, the fight of previous decades against customary rules protecting foreign investment [have] abruptly become anachronistic and obsolete’. If the past is of no consequence, it offers no guidance to grasping the contemporary international regime, they argue.9

There is, happily, a stream of investment law scholarship, if small in numbers, that insists on the past’s reinscription, rather than its rupture, in contemporary investment law.10 Sornarajah is an exemplar who places history at the centre of his analyses. One of his objectives has been to restore the relevance of UN General Assembly resolutions associated with the New International Economic Order (NIEO) – what Sornarajah describes as ‘foundering norms’ of an important branch of international

6 Stoler (2013).
7 If the terms Global North and South are ‘slippery’ terms, smoothing over many complexities, I refer to this hemispheric binary in order to emphasize not only the gaping divide but the intimate relationship between the two. See discussion in Comaroff and Comaroff (2012) at 45–47.
8 Reciprocity in treaty making is no new thing. The question is whether this reciprocity is genuine. See Roy (1961) at 876, 882–83.
9 Dolzer and Schreuer (2012) at 5.
10 On rupture versus reinscription, inspired by Foucault, see Stoler (1995) at 89, 199.
Declarations of newly decolonized states concerning ‘permanent sovereignty over natural resources’ comprise customary international law norms that have not been displaced by international law on foreign investment, it is argued. Sornarajah claims that there is ‘continuity’ between the colonial past and the postcolonial present – the ‘pre-existing system of dominance continues’, he maintains. Miles also traces the origins of foreign investment law to the ‘history of colonialism’. 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. These origins ‘drove’ and ‘shaped’ investment law, but these linkages appear more tenuous than Sornarajah’s claim of continuity.

The historical context, treaty texts and exercises of power that propelled ‘take-off’ of the investment treaty regime all point in the direction of its colonial origins. The rise of investment law clearly has affinities to ‘colonial occupation and its aftermath’, observes Van Harten. Macro-historical work tracing the origins of investment law is likely to grow in volume as will valuable archival work addressing the origins of particular standards of treatment (such as the origins of ‘fair and equitable treatment’ (FET)) and more sweeping intellectual histories. Despite history as a promising growth industry in investment law scholarship, much of the extant literature omits any serious treatment of the past.
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 – it 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’.24 History, after all, generates legitimate sources of authority and reinforces the value of former legal exploits.25 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’.26 If history provides resources that carry significant normative force, it is unusual that it is of little utility to proponents of the contemporary regime. They curiously reject the narrative of progress when it comes to explaining the normative foundations of investment law.

Nor does the ‘historical turn’ in international law seem to have exerted much influence.27 With some exceptions, international law scholarship representative of that turn is in the service of conscripting history in order to make normative arguments today.28 Anghie, for instance, claims that the new international law ‘perpetuates, legalizes and substantiates’ the ‘old international law of conquest’.29 It is not historiography per se that contextualizes past controversies but a style that resurrects history in the service of argumentative ends that connects international law to imperialism. Orford acknowledges the necessity for anachronism in the study of international law. The past, she writes, ‘is constantly being retrieved as a source or rationalization of present obligation’.30 International law requires attentiveness to the ‘movement of meaning’,

24 Bloch (1992) at 32. Similarly, when ‘one discursive formation is substituted for another . . . [it] is not to say that all objects or concepts, all enunciations or all theoretical choices disappear’ in Foucault (1972) at 173.
25 Orford (2012) at 9 observes that, for lawyers, the past is ‘constantly being retrieved as a source or rationalization of present obligation’.
26 Koskenniemi (2016a) at 106.
27 See Arvidsson and McKenna (2019) for a helpful mapping.
28 Foucault (2003a) at 66 describes history’s functions as ensuring the ‘greatness of the events or men of the past could guarantee the value of the present’.
30 Orford (2013) at 175 and Orford (2017) at 304. See also Craven (2016) at 34 (international law is a ‘field of practice whose meaning and significance is constantly organized around, and through the medium of, a discourse that links present to past’). Even d’Aspremont’s call for a radical historical critique of international law calls upon scholars ‘to redraw the past and mobilise it to serve a present claim’. See d’Aspremont (2019) at 114.
which she associates with genealogy, that enables ‘conversations’ to persist over time. 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, be better understood and resisted.

There are, to repeat, isolated contributions to understanding investment law’s origins, but they are uncommon. There might be any number of explanations for the field’s disinterest in the past. One explanation could be its disruptive effects. It would be intolerable, in other words, for discredited forms of domination to be invoked today. This book, however, is not one about history, nor does it employ historical methods. The typical genealogical inquiries associated with the history of international law, namely, narratives associated with the discipline’s founding fathers, are not of concern. Rather, the book interrogates the justifications, techniques and legal forms – the matrix of practices – that arose in the past and that resonate today. In so doing, the book uncovers investment law’s normative ends aimed at producing effects upon its principal target – vulnerable states and citizens of the Global South. What is of interest is how powerful actors have justified and managed politico-legal orders that are now mostly discredited – those associated with colonialism, imperialism, civilized justice, orthodox development and debt – that serve strategic functions today. What is striking is how a matrix of past practices

31 Orford (2013) at 176. Orford has since authored a book-length response to contextual historians, identifying a variety of methods and styles that international lawyers can deploy as they engage with history, in Orford (2021) at 318–19.
33 Foucault (1978b) at 86 famously wrote that ‘power is tolerable only on condition that it mask a substantial part of itself’.
34 D’Aspremont (2020) at 481.
35 The term ‘matrix of practices’ is a mash up of Foucault’s ‘discursive practices’ and his ‘regime of practices’. Foucault describes discursive practices as not confined merely to what is said but ‘embodied in technical processes, in institutions, in patterns for general behavior, in forms for transmission and diffusion, and in pedagogical forms which, at once, impose and maintain them’ in Foucault (1971a) at 200. Bacchi and Bonham (2014) at 177 describe ‘discursive practice/s’ as ‘Foucault’s primary analytic category’. The term ‘regime of practices’ is described by Foucault ‘as places where what is said and what is done, rules imposed and reasons given, the planned and the taken-for-granted meet and interconnect’ in Foucault (1980a) at 248. I prefer ‘matrix’ over ‘regime’ in order to distinguish this network from the investment law regime.
36 Scott (1995) at 204.
37 No single thread predominates. See Forst (2017) at 45 (‘A modern economy is not based on a single grand narrative alone’).
resembles suppositions relied upon at present by investment law’s norm entrepreneurs (lawyers, arbitrators and scholars who articulate and promote its disciplines). It is, indeed, remarkable how salient and durable those methods remain today. These indefensible scenarios continue to ‘yield new damages and renewed disparities’. They are ruinous, in so far as they continue to justify the maintenance of regimes that ‘lay waste’ to certain peoples, social relations and environments.38

I characterize this matrix of practices as ‘alibis’ in so far as they provide cover for a set of rules and institutions – the investment law regime – that increasingly are indefensible. Legal dictionary definitions of ‘alibi’ treat it as a ‘defence that places the defendant at the relevant time in a different place’ than at the scene of a crime.39 It is, in short, an excuse. The plea serves to place an accused ‘somewhere else’ – to a place before and other than where the crime occurs.40 One can envisage investment law having its other places, before having arrived on the scene: in places associated with colonialism, imperialism, development and debt. Investment law also has its own excuses which, rather than generating convincing justificatory narratives, weaken its very foundations. Citizens deserve something more than historically discredited reasons to justify the exercise of power over them – something more than mere pretext.41 This is why these tropes serve as alibis: rules without ‘adequate’ justificatory and without accompanying ‘discursive arenas’ internal to the regime with which to contest its norms.42

I.1 Foucauldian Frame

The intuitive method applied in this book – the ‘instruments’ deployed while ‘actually doing’ the research43 – loosely resembles the analytical tools described by Foucault in *The Archaeology of Knowledge*.44

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38 An understanding of ruination as a ‘process’ is described by Stoler (2013), particularly at 7 and 11.
39 Black (1979) at 61 and Holthouse (1846) at 17.
41 We are ‘justifying beings’, Forst (2017) at 50 reminds us.
42 Forst (2017) at 50–51. Mantena (2010) at 17 distinguishes between ‘justifications’ and ‘alibis’ for empire, identifying a movement away from ambitious universalist and civilized justifications for empire in the direction of a pragmatic and tentative mode of empire associated with ‘indirect rule’ (at 11–12). I prefer, as in colloquial usage, to not distinguish too sharply between the two (see OED, 3rd, 2012).
44 Hereinafter *Archaeology*. By analytics, I borrow Koopman’s distinction between Foucault’s analytics (or methods) and concepts in Koopman 2014 at 90–91.
Identifying some of the strengths and weaknesses of Foucault’s method in that book is instructive regarding the method developed here. The *Archaeology* is described, even by its author, as a ‘difficult’ read\(^{45}\) and is considered the least successful of his books.\(^{46}\) It is offered as a ‘precarious’, ‘groping’ and ‘stumbling’ synthesis of previously published work on madness, medicine and a set of disciplines (nature, political economy and language).\(^{47}\)

Much of *Archaeology* channels Foucault’s disdain with the history of intellectual thought. He rejects the progressive narrative that transforms a ‘tangled mass of continuities’ into a single, ‘uninterrupted’ history.\(^{48}\) Foucault prefers, instead, to treat past statements as revealing ‘homogenous fields of enunciative regularities’ that, together, constitute ‘a discursive formation’.\(^{49}\) Discursive formations are not ‘ideal, continuous, [and] smooth text[s]’, revealing a ‘calm unity of coherent thought’.\(^{50}\) Instead, they are discontinuous and ‘governed by distinct laws of formation’.\(^{51}\) Elements of discursive formations can be ‘constituted, modified, organized’ at one period yet, once ‘stabilized’, can ‘figure in another’\(^{52}\) – they exhibit, in short, the ‘possibility of transformation’.\(^{53}\) ‘In this sense’,

\(^{45}\) Foucault (1969a) at 62.

\(^{46}\) Consider Kermode’s (1973) at 8 harsh judgment: ‘for the most part an elaborate set of methodological doodles in the margins of the old . . . one easily grows impatient’. Compare Deleuze (1988) at 18, who describes the book as a ‘poem of his previous works’. Rueff comments that the book did not arouse zealous critique, as had *Les Mots et les Choses* (*The Order of Things*, 1970a), but it did sell 11,000 copies in its first year in Rueff (2015) at 1423.

\(^{47}\) Foucault (1972) at 16–17 and Foucault (1969a) at 61. Foucault’s archaeology was apparently inspired by prior historians of systems of thought, particularly Georges Dumézil, in Karup (2021).

\(^{48}\) Associated with the ‘whig interpretation’ of history. See Butterfield (1931).

\(^{49}\) Foucault (1972) at 145.

\(^{50}\) Foucault (1972) at 155 (‘A discursive formation is not, therefore, an ideal, continuous, smooth text that runs beneath the multiplicity of contradictions, and resolves them in the calm unity of coherent thought’). Foucault, however, expresses sympathy with Braudel and the Annales school (Braudel 1958) and its account of history without subjects. On this opposition, and affinities with third-generation Annales school historians, see Burke (2015) at 130–31, Hacking (1981) at 29–30 and Dean (1994) at 37–42.

\(^{51}\) Foucault (1972) at 173. See also Foucault (1970a) at 50 (discontinuity begins with ‘erosion from the outside’, by which he means ‘culture’). Koskenniemi (2001) at 3, 9 is animated by Foucauldian discontinuities, describing a ‘radical break’ in the field of international law in the course of the nineteenth century.

\(^{52}\) Foucault (1972) at 173.

\(^{53}\) Foucault (1972) at 120. I interpret the call by d’Aspremont (2019), to unlearn accepted markers, periodisation and causal sequencing as following in Foucault’s footsteps.
Foucault writes, discourse is ‘an inexhaustible treasure from which one can always draw new, and always unpredictable riches...’ It appears as an asset – finite, limited, desirable, useful.\(^{54}\) Though he emphasizes discontinuity, Foucault appears even more interested in less obvious continuities.\(^{55}\)

The advantage of this Foucauldian frame is that it underscores how past discursive formations\(^{56}\) can be recruited and reformed into current debates, mapping dominant practices, unblocking occluded discourses\(^{57}\) and identifying ‘relations’ that the past have with the present.\(^{58}\) Discursive systems, then, are capable of ‘continuity, return and repetition’.\(^{59}\) They comprise not only statements that take place ‘once and for all’ but ‘continue to function’. They are capable of being ‘transformed’ over time, having the ‘possibility of appearing [again] in other discourses’.\(^{60}\) Elements of earlier discourses are, in this way, ‘reworked’ for immediate political ends.\(^{61}\) This reformation, or reinscription, of elements of past discourses resembles how many informants, conscripted for the purposes of this book, understand the continuing presence of colonialism, imperialism, civilized justice, debt and development.

But worries also arise with the analytics described in *Archaeology*. First, Foucault isolates statements, irrespective of the speaker or the times, which has the effect of radically decontextualizing discursive formations. His method is concerned only with the ‘pure event’ of language having taken place independently of linguistic or disciplinary rules.\(^{62}\) His method ‘eliminate[s] the subject but preserves the thought’, it is said.\(^{63}\) If this allows us to break up what was said in the past and

\(^{54}\) Foucault (1972) at 120. For a study of contemporary debates over periodization of international human rights law, see Hoffmann and Assy (2019).

\(^{55}\) ‘As you know’, Foucault insisted, ‘no one is more of a continuist than I am.’ To ‘recognize a discontinuity’, he says, ‘is never anything more than to register a problem that needs to be solved’ in Foucault (1980a) at 248.

\(^{56}\) Historically ‘definite discursive systems for which it is possible to assign thresholds and conditions of birth and experience’ in Foucault (1991) at 62.

\(^{57}\) Foucault (1991) at 62.

\(^{58}\) Foucault (1972) at 155–56.

\(^{59}\) Foucault (1972) at 173.

\(^{60}\) Foucault (1969a) at 57.

\(^{61}\) Stoler (1995) at 72.

\(^{62}\) Agamben (1999) at 139.

\(^{63}\) Vuillemin, proposing a chair on the ‘history of systems of thought’ to which Foucault was elected, quoted in Elden (2017) at 11.
appropriate it into new, later, discursive formations, it renders the past as merely a tool, as ‘an asset’. History appears only to serve – anathema to those faithful to historical methods – only present purposes.  

Second, by radically decontextualizing what was said, Foucault appears less concerned with non-discursive factors like political ideologies or legal institutions and processes. *Archaeology* appears to rule out the reciprocal influence of institutions on discourse, creating the ‘illusion’ of an impossible autonomy. This amounts to the ‘disinterested study of mute monuments’, complain Dreyfus and Rabinow, which ‘can never enter the debates which rage around the monuments its studies’. This helps to explain Foucault’s subsequent turn to ‘genealogy’, a new analytic layered over the old that links truth statements to power and the functions served by discursive formations. Foucault, Hacking insists, was compelled to ‘return to the material conditions under which words were spoken’.

However, it is not quite right to say that Foucault, in the period in which *Archaeology* appears, was disinterested in power operating outside of discourse. There are ‘intimations’ of it in *Archaeology*, Said observes, though Foucault spends little time on the source of discursive ‘strength within institutions’. The non-discursive element in Foucault, Deleuze adds, is present but ‘designated negatively’ – it only takes on a ‘positive form’ once Foucault turns to his work on power. If discourse is ‘an asset’, it is one, Foucault admits in *Archaeology*, that ‘from the moment of its existence . . . poses the question of power; an asset that is, by nature, . . . poses the question of power; an asset that is, by nature, . . .'

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64 I believe this is what Rasulov (2020) at 9 means by ‘strategic deployment of history . . . for the purpose of intra-disciplinary ideological programming’ (emphasis in original removed). It is not quite what Carr (2001) at 117 had in mind when he characterized as ‘objective’ the historian who interprets the past in order ‘to project his vision into the future’.

65 Dreyfus and Rabinow (1982) at viii and Gutting (1989) at 259. Deleuze (1988) at 31 intimates that this would have been self-evident to Foucault (‘Naturally, environments also produce statements, just as statements produce environments’).

66 Dreyfus and Rabinow (1982) at 95.

67 Dreyfus and Rabinow (1982) at 117. Foucault (1985) at 8 acknowledges his debt to their critique.

68 Hacking (1981) at 33.

69 It is hard to explain Foucault’s earlier work as being preoccupied only with discourse. ‘This defines them far too narrowly’, complains Peltonen (2004) at 210.

70 Said (1982) at 61. What was ‘lacking’ with the problem of ‘discursive regime’, was the effects of power peculiar to the play of statements. The ‘central problem of power’ had not yet properly been isolated, Foucault (1976a) at 303 admits.

71 Deleuze (1988) at 32 and 49, referring to Foucault (1977b).
the object of struggle, a political struggle’. So the effects of discursive formations on non-discursive practices is present in Foucault’s approach, even as he does not actively pursue this interest until he turns his attention to genealogy.

Genealogy does not, however, entail a giving up on archaeology but ‘combines it with a complementary technique of causal analysis’, doing for ‘nondiscursive practices what archaeology did for discursive practices’. This is borne out by Foucault’s declarations in 1976 that he had not abandoned his earlier method, which focussed on ‘local knowledge of struggles’. He was now making ‘use of that knowledge in contemporary struggles’. In ‘a nutshell’, he declares, archaeology ‘is the method specific to the analysis of local discursivities, and genealogy is the tactic which, once it has described these local discursivities, brings into play the desubjugated knowledges that have been released from them.’ In the following year, he describes archaeology and genealogy as comprising ‘necessarily contemporaneous dimensions in the same analysis’.

For these reasons, Defert diagnoses genealogy and archaeology not as antagonistic but as ‘mutually supportive’. This becomes apparent as Foucault takes up his chair at the Collège de France and delivers his inaugural lecture in December 1970, shortly after Archaeology’s publication.

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72 Foucault (1972) at 120. ‘Archaeology’, he declares, ‘reveals relations between discursive formations and non-discursive domains (institutions, political events, economic practices and processes)’ in Foucault (1972) at 162. Foucault acknowledges, in a set of written responses to queries, that discursive formations – the ‘whole set of objects, types of formulation, concepts and theoretical options’ – are ‘invested in institutions, techniques, collective and individual behavior, [and] political operations’ in Foucault (1968) at 415. Shortly after Archeology’s publication, Foucault acknowledges that knowledge-savoir is ‘embodied not only in theoretical texts or empirical instruments but also in a whole set of practices and institutions’ in Foucault (1969c) at 7. Later, Foucault (1980c) at 194 adds ‘architectural arrangements, regulations, laws, administrative measures, scientific statements, philosophic propositions, morality, philanthropy, etc’.

73 Foucault (1969b) at 66. This is the ‘grande rupture’ that distinguishes his earlier works from his interest in power (‘rapport de forces’) in Gros (2015) at xxii.

74 Gutting (1989) at 271.

75 Foucault (2003a) at 8.

76 Foucault (2003a) at 10–11. See also Foucault (1980b) at 83.

77 Foucault (1978a) at 277.