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1

Making the World Safe for Investment

> Law connects 'reality' to 'alternity' constituting a new reality with a bridge built out of committed social behaviour. Thus, visions of the future are more or less strongly determinative of the bridge which is 'law' depending upon the commitment and social organization of the people who hold them.
>
> Robert Cover, 1985[1]

1 Introduction

In this book, I explore a series of international legal events pertaining to the protection of foreign property in the period between 1922 and 1959. In my argument, this period should be considered the prehistory of international investment law, because it prepared the ground for the introduction of the contemporary pillars of international investment law: bilateral investment treaties and the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID) of 1966. Some of the fundamental premises of the contemporary field of international investment law, which is typically said to have emerged in the second half of the twentieth century, were developed during the first half of the twentieth century. The question at the heart of this book then is: *How were the rules of foreign property protection constituted on the international level in the first half of the twentieth century?* I argue that international investment law emerged in response to socialist and anti-imperialist claims over foreign private property in that period. My main contention is that the protection of foreign private property was normalised by removing jurisdictional authority over contracts from the domestic level and elevating it to the international plane. I show that socialist and anti-colonial attempts at the redistribution of wealth on the domestic level in the first half of

[1] Robert M Cover, 'The Folktales of Justice: Tales of Jurisdiction' in Martha Minow et al (eds.), *Narrative, Violence, and the Law* (University of Michigan Press, 1985–1986) 173, at 181.

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the twentieth century constituted the disruption of what many international law scholars and practitioners considered the status quo of the liberal nineteenth century. During each of these disruptions, these same practitioners and lawyers slowly built an international framework for the protection of foreign private property. It turns out that they were steadily making the world safe for investment.

To develop my account, I study three early arbitrations, the *Palestine Railway Arbitration* of 1922, the *Lena Goldfields Arbitration* of 1930 and the *Sheikh of Abu Dhabi Arbitration* of 1951, and an attempt to codify rules on foreign private property into an international treaty, namely the *Abs–Shawcross Draft Convention of 1959*. Through these instances, I trace the emergence of the main elements of the contemporary system. These elements are (i) the granting of international legal personality to companies, (ii) the constitution of an international forum for dispute settlement and (iii) the development of substantive law on the international level. Together they lay the foundation for the implementation of an international legal order for the protection of foreign private property during the second half of the twentieth century.

On a methodological level, I work with an account of law-making that focuses on the formation of rules rather than on their conceptual content. I enquire into the practices involved in rule-making and the modes of authoritative assertion that brought them into being.[2] Focusing on formation allows me to describe the contestations against which the rule became a rule. What becomes visible is the way in which one understanding of a rule was authorised over a different understanding.[3] This enables me to

[2] As Orford puts it: 'In particular, law involves the transmission of concepts or ideas between legal actors, so that those concepts or ideas are worn smooth and cease to be politically volatile.' It is lawyers in argumentative practice who 'undertake the work of making particular meanings appear inevitable or acceptable'. Anne Orford, 'Theorizing Free Trade' in Anne Orford et al (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016), 701, at 709.

[3] Understanding law-making as formation through practice is an understanding based in a tradition that could be called jurisdictional thinking. I draw especially on the work of Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012). See also Peter Rush, 'An Altered Jurisdiction-Corporeal Traces of Law' (1997) 6 *Griffith Law Review*, 144; Sundhya Pahuja, 'Letters from Bandung: Encounters with Another International Law' in Vasuki Nesiah et al (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press, 2017), 552; Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law' (2013) 1(1) *London Review of International Law*, 63; Shaunnagh Dorsett and Shaun McVeigh, 'Jurisprudences of Jurisdiction: Matters of Public Authority' (2014) 23(4) *Griffith Law Review*, 569.

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More Information

uncover the underlying assumptions that have become normalised and were rendered invisible over time through legal practice.[4]

A decisive element in constituting the authority for asserting particular rules was the temporal logic they were built on. First, any legal claim alters its past in the moment it is recognised as a rule by a tribunal. Thus, when each of the decisions I explore was taken, they recast the past by projecting a law backwards. This law was asserted as already existing, but it only came into being at the moment of the decision. This turned the articulation of a novel claim into an iteration of an established rule of law. Second, when paying attention to the specificity of the time and place of the assertions, I show that authority is drawn from a temporalisation of difference that gets refracted through a universal lens of 'civilisation'.[5] Here, a timeless universality of the proposed rules is asserted as an expression of universal 'civilisation'. Contestations over the rules are then placed in the past and thereby superseded. The overall picture that emerges when one applies a lens of jurisdictional practice and focuses on temporal ordering is that the rules of international investment law came into being in a mode of *self-authorisation*.

2 Developing the Framework

The body of scholarly work on the history on international investment law is still relatively small and often consists of a historical chapter at the

[4] This understanding is inspired by Anne Orford's account of her approach to her work on *International Authority and the Responsibility to Protect*. She says:

> So while initially I had planned to move from an abstract discussion of the grounding of authority on protection through the institutional question of who decides what protection means to an analysis of the practices of protection, the book now has the reverse form – it starts with practices and then moves on to their systematization and articulation in the form of the responsibility to protect concept.

Anne Orford, 'In Praise of Description' (2012) 25(3) *Leiden Journal of International Law*, 609, at 615; Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

[5] This argument was advanced by Sundhya Pahuja with regard to the discipline of international law. Sundhya Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2013).

On a wider scale, the temporalisation of difference as hierarchisation of history through the universal notion of modernity was developed by a number of authors. See Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press, 2000); Timothy Mitchell, *Questions of Modernity* (University of Minnesota Press, 2000); James Morris Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, 1993).

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More Information

beginning of a book.[6] There are a number of texts dedicated to certain historic arbitrations or the history of specific features of the discipline.[7] Nevertheless, my work builds on a growing number of comprehensive historical accounts of international investment law.[8] In addition, the book is situated in a scholarly field focusing on the history of international economic law more broadly, with explicit regard to its implications for the unequal distribution of wealth around the globe.[9]

In my account, international investment law was struggling to emerge as a field between the 1920s and the 1960s. This was a period characterised by democratic and socialist movements challenging imperial economic

[6] See, for example, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed., 2012); Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2015); Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016).

[7] Jason Webb Yackee, 'The First Investor-State Arbitration: *The Suez Canal Company* v *Egypt* (1864)' (2016) 17(3) *Journal of World Investment & Trade*, 401; VV Veeder, 'The Lena Goldfields Arbitration: The Historical Roots of Three Ideas' (1998) 47(4) *International and Comparative Law Quarterly*, 747; J Gillis Wetter and Stephen M Schwebel, 'Some Little-Known Cases on Concessions' (1964) (40) *British Yearbook of International Law*, 183. In addition, the Arbitration Academy in Paris features a yearly lecture called *The Berthold Goldman Lecture on Historic Arbitration Stories*, portraying a number of early arbitrations.

[8] See, for example, Nicolás M Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (Oxford University Press, 2021); Greenman Kathryn, *State Responsibility and Rebels: The History and Legacy of Protecting Investment against Revolution* (Cambridge University Press, 2021); Stephan Schill et al (eds.), *International Investment Law and History* (Edward Elgar Publishing, 2018); Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press, 2018); David Schneiderman, The Global Regime of Investor Rights: Return to the Standards of Civilised Justice? (2014) J5(1) *Transnational Legal Theory*, 60–80; Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Brill, 2013); Antonio R Parra, *The History of ICSID* (Oxford University Press, 2012); Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, 2010); Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' (2005) (12) *UC Davis Journal of International Law & Policy*, 157; Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2004) 74(1) *British Yearbook of International Law*, 151.

[9] See, for example, Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality*; Anne Orford, 'Food Security, Free Trade, and the Battle for the State' (2015) 11(2) *Journal of International Law and International Relations*, 1; Andrew Lang, *World Trade Law after Neoliberalism: Re-Imagining the Global Economic Order* (Oxford University Press, 2011); Matthew Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74(3/4) *Nordic Journal of International Law*, 335; David Kennedy, 'The Dialectics of Law and Development' in David M Trubek et al (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006), 174; Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61(1) *University of Toronto Law Journal*, 1; Ntina Tzouvala, *Capitalism as Civilisation: A History* (Cambridge University Press, 2020).

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More Information

arrangements and the concept of individual property as legacies of the nineteenth century. On the one hand, the Empires were being contested through nationalism and the beginning transformation of former colonies into sovereign states.[10] On the other hand, socialist revolutions in various parts of the world were resulting in the implementation of a number of communitarian property systems.[11] Indeed, the relationship between private property and sovereignty was strongly debated in the interwar period since the First World War had ruptured the perceived separation between the private and public spheres for the benefit of state-organised production and distribution. As Slobodian observes: 'In the course of the war, the sacred nature of private property across borders was violated; the space of the private capitalist was desecrated.'[12] Liberals responded to this rupture with 'a series of projects of capitalist internationalism. There needed to be a respect for private property that trumped national law.'[13] Protecting concession agreements through international legal rules was one such project of capitalist internationalism, and installing mixed and commercial arbitral tribunals was one of the sights of this project. As the British international lawyer De Auer wrote in 1927: 'The real importance of these (…) rules of competency [of arbitral tribunals] is, from the standpoint of international law, that *all these rules aim at the inviolability of private property*.'[14] It was during this transformative period that the internationalisation of the investor–state relationship was initiated.

In this book, I understand international investment law as a means of world building.[15] It involves large amounts of wealth and governs its distribution.[16] What is at stake in the operation of this field is the way 'rightful' ownership is defined and the way benefits are awarded to some and not to others. In the past decade, many concerns have been raised regarding various aspects of the international investment regime. To many, the

[10] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2008), 115.
[11] Scott Newton, *Law and the Making of the Soviet World: The Red Demiurge* (Routledge, 2014).
[12] Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018), 29.
[13] Ibid.
[14] Paul De Auer, 'The Competency of Mixed Arbitral Tribunals' (1927) 13 *Transactions of the Grotius Society: Problems of Peace and War*, xvii, at xxiii (emphasis in original).
[15] I follow Dorsett and McVeigh and use the notion of world-making to express how 'jurisdictional thinking, so to speak, gives legal form to life and life to law'. Dorsett and McVeigh, *Jurisdiction*, 1.
[16] The overall global foreign direct investment (FDI) flow amounted to $1.43 trillion in 2018 and 'remains the largest external source of finance for developing countries (39%)'. In 2017, at least 65 new cases were initiated under the mechanism of investor–state dispute settlement (ISDS), bringing the total number of known cases to 855 (UNCTAD, *World*

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More Information

discipline is in 'crisis'.[17] My interest in international investment law is generated by its apparent complicity in creating and sustaining inequality on a global scale, to understand its role in what Orford describes as

> the routine operation of international economic life, organized around global value chains, free trade, border controls, freedom of navigation, investment protection, and open markets [which] produces a system in which poorer countries continue to export vital resources even during periods of scarcity, investments are protected even during periods of civil war, and the people who labour to produce key commodities remain impoverished and undernourished.[18]

This stands against the promise of a better future, which is fundamental to the claim of legitimacy for international investment law by the proponents of the field. Investment is a term that denotes an expectation of profits on invested capital and is thus future oriented. It has been defined as 'the commitment of resources with the goal of achieving a return'.[19] Yet, the notion of investment does not include an understanding of the distribution of profits. It emerged in the 1950s and replaced the notion of property.[20] Property protection has a different directionality and a clear orientation towards the accumulation of wealth. It is not concerned with what is to come but with what is already here. It is an attempt to safeguard relations from the past into the future. My story is then a story of property and investment, of the past and the present, viewed through the lens of legal form.

The introductory chapter is structured in the following way: it starts with a description of the methodology and explains the focus on concession agreements and legal documents surrounding them as the main

Investment Report 2018: Investment and New Industrial Policies), xi–xii. Most frequently, developing countries feature as the respondent state, and most claimants come from developed home states. For statistics between 1987 and 2017, see ibid., 92–93.

17 See, for example, Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 3(4) *Transnational Dispute Management*, 1521; Stephan W Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52(1) *Virginia Journal of International Law*, 57; Christina Binder, 'Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns: Or the Benefits of a Public International Law Approach to Investment Arbitration' in Tulio Treves et al (eds.), *International Investment Law and Common Concerns* (Routledge, 2014), 71; Anthea Roberts, 'Investment Treaties: The Reform Matrix' (2018) (112) *AJIL Unbound*, 191.

18 Orford, 'Theorizing Free Trade', 701.

19 Norton Reamer and Jesse Downing, *Investment: A History* (Columbia University Press, 2016), 2.

20 Andrea Leiter, 'The Silent Impact of the 1917 Revolutions on International Investment Law' (2017) 6(10) *European Society of International Law – ESIL Reflections*, 1.

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archive. The chapter suggests that the internationalisation of concession agreements was at the heart of the making of international investment law. Conceptually, this internationalisation was based on a division between the political and the economic sphere, as proposed by many influential thinkers and practitioners in both law and economics on the global scale in the first half of the twentieth century. The chapter then moves on to explain the merit of reading legal documents surrounding concession agreements as practices of jurisdiction with a special focus on temporal ordering. These strands are then combined into a description of the argument. Finally, the chapter concludes with an outline of the chapters in the book and considerations of the originality and limitations of the contribution.

3 Methodology

This book offers what could be called a critical doctrinal analysis. It views legal documents produced around three early investor–state arbitrations, as well as an attempt at codification, as artefacts of jurisdictional practice. In exploring these legal events, the book examines the constitution of authority for the formation of a novel legal doctrine.

a) Concession Agreements and the Internationalisation of Contracts

The key legal relationship to be studied is contractual relations between foreign investors and states. Such contracts, often called concession agreements, denote 'a broad range of legal instruments under which a state grants certain economic rights and privileges to foreign investors within the framework of a public function',[21] usually involving the exploitation of natural resources or the construction of large-scale infrastructure projects. Concession agreements were the cause of most early investor–state arbitrations[22] well into the 1950s.[23]

[21] Christoph Ohler, 'Concessions' (2013) *Max Planck Encyclopedia of Public International Law*, 1. For a doctrinal characterisation and list of concession agreements concluded between 1492 and 1973, see Peter Fischer, *Die internationale Konzession: Theorie und Praxis der Rechtsinstitute in den internationalen Wirtschaftsbeziehungen* (Springer, 1974).

[22] I found records of 15 investor–state arbitrations before 1934, which were all based on a dispute over a concession agreement.

[23] Even after the ratification of the ICSID Convention in 1966, the 25 cases brought in the first 25 years of its existence were based on a breach of contract or concession. Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment

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More Information

Most importantly, concession agreements are at the heart of what has been called the internationalisation of contracts.[24] Sornarajah argues that 'the removal of the foreign investment transaction from the sphere of the host state's law and its subjection to an immutable, supranational system is seen as essential for the protection of foreign investment under the theory of internationalisation'.[25] On the basis of his critique, I follow the question of how this happened – how were concession agreements moved from the domestic to the international sphere as a matter of practice?

Focusing on the applicable law for concession agreements offers another way to delimit the period I am considering. With this focus, the journey runs from the *Serbian and Brazilian Loans Ca*ses of 1929 to the inclusion of an umbrella clause in the *Abs–Shawcross Draft Convention* in 1959. In the *Serbian and Brazilian Loans Cases*, the Permanent Court of International Justice (PCIJ) made the famous stipulation that 'any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country'.[26] Since concession agreements involved a state on the one hand, but a company or an individual on the other, they would fall under municipal law. However, after a number of 'new' states either changed or annulled concession agreements under domestic laws, the mantra of the primacy of domestic law became a point of contention between Western states with their multinational companies and 'new' states. The inclusion of a so-called 'umbrella clause' in the *Abs–Shawcross Draft Convention* then purported to elevate any contractual breach to the breach of a treaty. This would allow for the application of international law, rather than domestic, to concession agreements.

British international lawyers strongly drove these developments in arbitral practice and scholarly writing, since Britain was one of the largest outward investors in this period.[27] Indeed, a great number of early arbitrations not only involved British companies but were also dominated by a small group of British international lawyers, including, amongst others, Sir Hersch

Law' in Zachary Douglas et al (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014), 30.

24 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010), 289–99.

25 Ibid., 289.

26 *Payment of Various Serbian/Brazilian Federal Loans Issued in France* [1929] (Judgment) (ser A) Nos 20/21 PCIJ 4, 41.

27 Britain was the largest outward investor until 1945 with total overseas investments estimated at £3545 million in 1938. This number included 46 per cent FDI and 54 per cent of portfolio investment. TAB Corley, 'Competitive Advantage and Foreign Direct Investment: Britain 1913–1938' (1997) 26(2) *Business and Economic History*, 599, at 601. The

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Excerpt
More Information

Lauterpacht and Sir Arnold McNair, who worked together as counsel on both sides. Based on these and other arbitrations, the 1950s saw an ever-increasing consensus between a number of scholars that domestic law could not be the appropriate applicable law for concession agreements, which were by then being called 'economic development agreements'.[28] Anghie notes:

> The question then emerged: what was the law applicable to such a contract? Public international law could not govern these agreements because they were entered into by states and private entities. Nor was private international law helpful in these circumstances, because it was used for the purposes of determining which systems of municipal international law applied to the contract. (…) In short, a new system of law, which had an international character, but which was not public international law, had to be developed to deal with these special cases.[29]

One of the best-known propositions was advanced by Philip Jessup with his publication *Transnational Law* in 1956, wherein he proposed a transnational law consisting of a mix of private and public law sources to govern relations on the international level.[30] Other authors made suggestions along similar lines.[31]

These suggestions did not go unchallenged. Some years later, in 1968, Mohammed Bedjaoui, for example, argued in his capacity as UN Special Rapporteur on *Succession of States in Respect of Matters Other than Treaties* that 'the succession of States in the context of decolonization demonstrates that in the recognition of acquired rights in respect of concessions the governing factor is not a general obligation to respect

British share furthermore constituted about 41 per cent of global FDI. Ioannis-Dionysios Salavrakos, 'Determinants of German Foreign Direct Investment: A Case of Failure?' (2009) 12(2) *European Research Studies*, 3, at 7. See also Michael Waibel, 'The UK and the Development of Investor-State Dispute Settlement' (2022, forthcoming) *British Yearbook of International Law* (on file with the author).

The German involvement in the 1950s through Hermann Josef Abs cannot be explained with a high German share in global FDI. It is much more likely that his project was meant to create the possibilities for a large German share in the first place. For a brief historic overview of German FDI, see ibid.

[28] Arnold D McNair, 'The General Principles of Law Recognized by Civilized Nations' (1957) (33) *British Yearbook of International Law*, 1.

[29] Anghie, *Imperialism, Sovereignty and the Making of International Law*, 228.

[30] Philip C Jessup, *Transnational Law* (Yale University Press, 1956).

[31] See, for example, Wilfred C Jenks, 'The Scope of International Law' (1954) 31 *British Yearbook of International Law* 1; McNair 'The General Principles of Law Recognized by Civilized Nations'; Alfred Verdross, 'Quasi-International Agreements and International Economic Transactions', *Yearbook of World Affairs* (Stevens, 1964) vol 18, 230; Robert Jennings, 'State Contracts in International Law' (1961) (37) *British Yearbook of International Law*, 156.

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More Information

acquired rights but the sovereign will of the new State'.[32] The only way to counter such sovereign assertions over foreign-owned property was through shifting the legal authority over concession agreements from the domestic to the international sphere, so that national regulations could not alter the benefits guaranteed in concession agreements.

b) A Split between the Political and the Economic Sphere

The internationalisation of concession agreements rested on an understanding of the relationship of the state, the market and the role of law as split between a political and an economic sphere. The assumption of two distinct spheres was the precondition for establishing two different sets of rules, domestic and international, pertaining to the two spheres, respectively. The idea of the division had both theoretical and material implications and was advanced by political and economic thinkers before and after the Second World War.

As mentioned above, the group of British lawyers working on these early arbitrations revolved around the London School of Economics (LSE) and figures such as Lauterpacht and McNair. Their academic work as well as their practice as lawyers had a strong influence on the development of the norms in international investment law. The other influential thinkers were a group of (neo)liberal economists known as the Geneva School.[33] Economists such as Friedrich Hayek, Lionel Robbins, Gottfried Haberler and Wilhelm Röpke not only shaped the intellectual agenda in global economic thinking but were actively involved in institutional politics in the League of Nations and its sister organisation, the International Chamber of Commerce, from their founding in the early 1920s.[34] They were core actors in the organisation of the first World Economic Conference in 1929 and engaged in the negotiations on the General Agreement on Tariffs and Trade (GATT) in 1947.[35] Members of these two groups crossed paths at

[32] Mohammed Bedjaoui, *First Report on Succession of States in Respect of Rights and Duties Resulting from Sources Other than Treaties* Yearbook of the International Law Commission vol II, 1968 Comm, 20 sess, UN Doc A/CN.4/204 (5 April 1968) 115 [43].

[33] The term has been popularised by Quinn Slobodian in his account of neoliberal intellectual history. 'Geneva School neoliberals transposed the ordoliberal idea of "the economic constitution" – or the totality of rules governing economic life – to the scale beyond the nation.' Slobodian, *Globalists*, 8. I draw on his work, particularly with regard to the relationship between neo-liberal thinkers and international law.

[34] Ibid., 34–42.

[35] Ibid., 218–24.

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