MAKING THE WORLD SAFE FOR INVESTMENT

Western governments, companies, economists and lawyers established the international legal order now known as international investment law to protect foreign property from a redistribution of wealth through domestic law making. This book offers a pre-history of these legal arrangements, focusing on the time before 1959 and the ratification of the first bilateral investment treaty and the ICSID Convention. It introduces new archival material, such as arbitral awards, diplomatic notes and concession agreements, as well as scholarly writings pertaining to developments in these proceedings. These materials are systematised into a coherent argument on the protection of foreign property. The book develops the important role of concession agreements and their internationalisation for the making of international investment law, thereby insisting on the private law character of the foundations of the field. In doing so it displays the analytic force of viewing law as jurisdictional practice, rather than as a system of norms.

ANDREA LEITER is an Assistant Professor at the Amsterdam Center for International Law at the University of Amsterdam, whose research for this book has been funded by a competitive Fellowship awarded by the Austrian Academy of Sciences. She is a former visiting researcher at the Institute of Global Law and Policy at Harvard Law School.

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW: 178

Established in 1946, this series produces high quality, reflective and innovative scholarship in the field of public international law. It publishes works on international law that are of a theoretical, historical, cross-disciplinary or doctrinal nature. The series also welcomes books providing insights from private international law, comparative law and transnational studies which inform international legal thought and practice more generally.

The series seeks to publish views from diverse legal traditions and perspectives, and of any geographical origin. In this respect it invites studies offering regional perspectives on core *problématiques* of international law, and in the same vein, it appreciates contrasts and debates between diverging approaches. Accordingly, books offering new or less orthodox perspectives are very much welcome. Works of a generalist character are greatly valued and the series is also open to studies on specific areas, institutions or problems. Translations of the most outstanding works published in other languages are also considered.

After seventy years, Cambridge Studies in International and Comparative Law sets the standard for international legal scholarship and will continue to define the discipline as it evolves in the years to come.

A list of books in the series can be found at the end of this volume.

MAKING THE WORLD SAFE FOR INVESTMENT

The Protection of Foreign Property 1922–1959

ANDREA LEITER
University of Amsterdam

CAMBRIDGE UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment,
a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of
education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781009330459

DOI: 10.1017/9781009330428

First published 2023

A catalogue record for this publication is available from the British Library

ISBN 978-1-009-33045-9 Hardback

Für Angela und Karl - in Dankbarkeit für Ihren Mut

CONTENTS

PREFACE AND ACKNOWLEDGMENTS

This book is the product of a journey that spans three continents and four years, and it is the result of the influence of many generous scholars, colleagues, friends, institutions and family members. I want to express my gratitude to those who accompanied me on this journey. Most importantly, during my doctoral research, upon which this book is based, I had the great luck to be supervised by three fantastic female academics who have not only helped me to develop my thinking but also have modelled academic behaviour on the highest levels. Sundhya Pahuja has helped me to become a junior academic with her warmth, generosity and readiness to include me in the academic life inside and outside of Melbourne Law School. With her constant support, I learned to take myself and my own thinking seriously, probably the greatest achievement of this journey. Ursula Kriebaum has paved the way for me in Vienna, always encouraging me to follow my intuitions and think outside the box. It is due to her that I was able to bridge the academic cultures of Melbourne and Vienna and appreciate the best of both worlds. Hilary Charlesworth has taught me what it means to be a dedicated mentor, a thorough scholar and a generous peer. Her humility and confidence have shaped my understanding of the scholar I aspire to become.

Melbourne Law School is a uniquely supportive environment for PhD students. Its institutional setup allows for exchange and support within the PhD cohort. I was fortunate that my arrival in Melbourne coincided with the start of Anne Orford's Laureate Program in International Law. The fellows of the Program became my closest intellectual companions. I am glad to have shared this journey with Sebastián Machado, Marnie Lloyd, Luis Bogliolo, Anna Saunders, Kathryn Greenman, Ntina Tzouvala and Fabia Veçoso. I am grateful to Anne Orford for including me into the many terrific events of the Program. I am equally grateful to the Institute of International Law and the Humanities for the vibrant academic life it offered and the opportunities it provided me for thinking, discussing and learning. Outside these programmes, I thank Natalia Jevgelvskaja,

Florence Seow, Valeria Vázquez Guevara, Anna Dziedzic, Arturo Villagran, Liz Sheargold, Robi Rado, Tim Baxter, Clair Oppermann, Jan Mihal, Cait Storr, James Parker, Julia Dehm and Adil Khan for the many intellectual and personal exchanges. I would also like to thank the chair of my advisory committee Tim Lindsey and my academic advisor Shaun McVeigh.

My journey would not have been the same without the network of the Institute for Global Law and Policy (IGLP) and the many opportunities it provided, allowing me to build a global network of friends and colleagues. I want to thank David Kennedy for enabling me to participate in this network and for welcoming me as a visiting researcher at the Institute (IGLP) in Boston for the academic year 2018–19. It was a year characterised by an ongoing conversation about what it could and should mean to be a scholar of international law with Luca Bonadiman, Michael Picard, Love Rönnelid, Zina Miller, Roxana Vatanparast, Maria Adele Carrai and Erick Komolo and the many other scholars and friends who participated in our events. I also want to thank Kristen Verdeaux and Ginelle McDonald for all their help with administrating life at the IGLP.

This journey ended in Cambridge, but it started at the Section for International Law and International Relations at the University of Vienna, and I want to thank Jane Hofbauer, in particular, for being not only a friend but also a mentor from early on. I also want to thank Stephan Wittich, Karolina Januszewski, Florian Dunkel, Mike Moffatt, Markus Beham and Ralph Janik, who shaped my induction into international law. Sahib Singh is to be credited with opening the world of critical international law to me and encouraging me to reach out to Sundhya in Melbourne in the first place. What a difference it made!

Besides the intellectual support, this undertaking was enabled through financial support from different institutions. The Austrian Academy of Sciences provided me with a generous scholarship as Doctoral Fellow from 2016 to 2019. I received support from the University of Melbourne Law School in the form of a Melbourne Research Scholarship to offset the tuition fee and a studentship stipend in 2019. In addition, I received funding from the Law School's Research Support Funds at various occasions, also contributing to final editorial assistance by Sam Osborn.

With a final word, I want to thank my most important allies, my family: Nate, Angela, Karl, Kristina, Daniel, Lisi, Ed, Seth and Angie who have kept me grounded in the world through our many conversations about politics and life. Finally, Lumen and Olivia, the source of most joy in my life. Thank you all very much!

PROLOGUE

> In this account, the critical project is 'to make visible precisely what is visible' –
> To arrange 'what we have always known'.
> But how to make visible what is visible?
> And how to arrange what we have known?[1]

As a research assistant at the Department for International Law and International Relations at the University of Vienna between 2012 and 2015, my main subject of research was international investment law. During that period, I encountered the same conundrum over and over again. Many of the cases I engaged with ended with the finding that, even though the policy measure that a state was implementing seemed desirable in the public interest, the state could not escape having to pay high amounts of compensation to companies losing the profitability of their investments. This, it was argued, was so, because the state had consented precisely to these terms in a written agreement, namely in a bilateral investment treaty. This explanation, however, seemed unsatisfying. In most cases, the respondent state was a state from the global South already lacking public funds; the companies, by contrast, were often large and very profitable; the local population, with little or no means for an effective defence, ended up worse off than before the investment. My journey took me through an exploration of human rights as a counterbalance to international investment law, as well as to business and human rights proposals with the goal of holding companies accountable. But in the end, the argument always returned to the sanctity of the bilateral investment treaty.

Having moved to Melbourne Law School as part of my PhD project, I began to think that the most promising question seemed to be: *How did we get to this legal regime in the first place?* And with this question, I embarked on a journey into the scholarly world of history and historiography in international law. During a workshop on critical histories of international

[1] Anne Orford, 'In Praise of Description' (2012) 25(3) *Leiden Journal of International Law*, 609, at 618.

law organised by Anne Orford and the Laureate Program in International Law at Melbourne Law School, I experienced a moment of vertigo. What I realised was that I had never fully understood the narrative power of history writing. What does it actually mean to write history? How do people decide what they present as truth or fact? What place does method have in these debates? Is there such a thing as truth or is it all about politically motivated choices? For a while, I thought that I would be unable to write anything before having studied the whole canon of the philosophy of history, and so, for a while, I tried. Of course, I soon realised that even if I studied historiography, I would still be confronted with unsolved questions and that I might as well be looking for an answer to the question: 'What is life and how ought we to live it?'[2] So, I slowly and steadily developed an incomplete, yet thorough, account of what my project might turn out to become. What follows in this Prologue is a brief outline of what I have come to learn about historiography in international law and how I see my own project.

The role of the past remains challenged within international legal scholarship.[3] There is boundedness as well as choice in the writing of history, so that the task means to account for both, understanding what is taken as a given and what is added. The boundedness stems from both systemic constraints and pressures,[4] as well as a sensibility of scholars in the field that finds certain accounts intuitively plausible.[5] On the other side is the power

[2] This insight was prompted by my supervisor Sundhya Pahjua in one of the many instances when she accompanied me through my intellectual battles, without allowing me to get lost down a rabbit hole.

[3] See, for example, Anne Orford, *International Law and the Politics of History* (Cambridge University Press, 2021); Lauren Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21(1) *Journal of the History of International Law/Revue d'histoire du droit international*, 7; Matthew Craven, 'Theorizing the Turn to History in International Law' in Anne Orford et al (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016), 21; 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; Anne Orford, 'International Law and the Limits of History' in Wouter Werner et al (eds.), *The Law of International Lawyers* (Cambridge University Press, 2017), 297.

For a helpful annotated bibliography on international law and history, see Thomas Skouteris, *The Turn to History in International Law* (Oxford Bibliographies, 2017).

[4] Susan Marks writes that: 'While current arrangements can indeed be changed, change unfolds within a context that includes systematic constraints and pressures.' Susan Marks, 'False Contingency' (2009) 62(1) *Current Legal Problems*, 1, at 2.

[5] Koskenniemi described his writing in *The Gentle Civilizer* as a set of essays that 'form a kind of experimentation in the writing about the disciplinary past in which the constraints of any

of narrative to shape the authority of an historical account.[6] The particular narrative chosen for a history often depends upon what the particular history is written *for*.[7] However, blind spots about our sensibilities and biases affect how we understand our respective disciplines.[8] It is thus difficult to know what a history is written for and what our sensibilities are. In addition, legal scholars are trained in a way that makes the choices that go into doctrinal formation harder to see.[9] Against this background, in this book, I am attempting to write an account of a history of international investment law that 'point[s] to its limits in conscious awareness'.[10]

If my starting point considers that there is boundedness as well as choice, then I write with a dedication to plurality that accepts the need for exclusion. The need for exclusion fundamentally ties ethics to the practice of narration.

> This is because, at the abstract level, exclusion is every bit as important as inclusion; indeed, it is in the latter that our taking of responsibility is most dramatically manifested and defined. Any attempt to include only inclusion in the category of the ethical is inimical to the notion of post-foundational ethics quite simply because it seeks to exclude the act of exclusion that is central to the assumption of responsibility – it would lead, by logical extension, to an inclusion of everything.[11]

In 2018, I participated in a seminar on the theme of *Genealogies of Memory and Perception – Photography and Literature* guided by Professor Eduardo Cadava, offered as part of the annual six-week *School for Criticism*

rigorous "method" have been set aside in an effort to create intuitively plausible and politically engaged narratives about the emergence and gradual transformation of a profession'. Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001), 10.

6 David Kennedy argues that: 'I return to the nineteenth century drawn to the hypothesis that the classical synthesis I have been taught to anticipate may in fact have been generated by very twentieth century argumentative habits.' Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1996) 65(3) *Nordic Journal of International Law*, 385, at 388.

7 Orford, 'International Law and the Limits of History', 310.

8 David Kennedy, 'The Disciplines of International Law and Policy' (1999) 12(1) *Leiden Journal of International Law*, 9.

9 As Riles puts it: 'In fact, the purposes for the creation of the legal fiction recede from view as students replicate the practice.' Annelise Riles, 'Is the Law Hopeful?' in Hirokazu Miyazaki and Richard Swedberg (eds.), *The Economy of Hope* (University of Pennsylvania Press, 2016), 99, at 110.

10 Thomas Skouteris, 'Engaging History in International Law' in José María Beneyto and David Kennedy (eds.), *New Approaches to International Law: The European and the American Experiences* (TMC Asser Press, 2013), 99, at 118.

11 Euan MacDonald, *International Law and Ethics after the Critical Challenge: Framing the Legal within the Post-Foundational* (Brill, 2011), 159.

and Theory hosted by Cornell University. Inspired by this seminar, I have come to understand my reading of legal documents and the way I write about them as analogous to *photographic snapshots*.

The first cue I take from the idea of snapshots is that they reflect a particular moment. They interrupt the flow of experience and halt an image in a certain moment. It is this halting of experience that forms the basis of ordering. Legal archival artefacts such as contracts, diplomatic notes, transcripts of pleadings, arbitral awards and attempts at codification could be read like this. Legal artefacts are written in the form of an imperative. They are the results of a reflection and not the process of reflection. Or, to speak with yet another metaphor, they are the map and not the considerations that went into the making of the map. Thus, like a snapshot, they interrupt the flow of things and fix a particular moment in time.

The second cue points to the constructive nature of a legal document. Like the snapshot, it constitutes its subject; it determines what is and what is not part of it. A photographic image, more than any painting, invites us to believe that it is a representation of the world, that what we see on the photograph is given. However, the photograph never gives us what is before the camera; it transforms it. In the same manner, a legal document constitutes its subject. The legal form precedes the event. It only becomes legible as a legal document by giving it form, by *trans*-forming it. Once the legal document is there, it invites the same confusion as the photograph: it invites us to read it as a mere representation of what is already given.

The third and final cue relates to the construction of a linear progression of time through the indexical organisation of snapshots and legal documents. By fixing a moment in time, we construct events in a linear way. Spaces come to occupy places next to each other on a line. By lining up photographs one next to the other, we build an index of the passing of time. The time stamp becomes the mechanism of ordering. In the same way, legal documents depend on being indexed along a linear chronology. This progression of time is the foundation of the possibility of normative progression that law's authority rests on. It depends on the idea that a later moment remedies the former.

My journey finally led me to write what slowly emerged as a prehistory of international investment law, one that starts in 1922 and ends in 1959. This is before the signing of the first bilateral investment treaty between Germany and Pakistan, the legal event usually taken to mark the beginning of contemporary international investment law. Regarded as such, the institutionalisation and solidification of the field emerge as a conclusion rather than a starting point.