

BOOK REVIEW

The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital. By KATE MILES, Cambridge: Cambridge University Press, 2013. ISBN 978-1-107-03939-1, 464pp.

Kate Miles's monograph is one of the most important contemporary contributions to the field of investment law. In today's context, the book's title could be misleading, since 'investment law' often invokes an emphasis on laws and principles derived from investment treaties and their related dispute resolution institutions. Instead, Miles draws on a tradition that broadly defines the field as the 'international law on foreign investment'.¹ As a result, this is the rare text that provides a historical, theoretical, and doctrinal survey of investment law that is nearly comprehensive. It is broad in scope because Miles tells the story of investment law as one of 'actors and interests, constructed doctrines of international law, and recurring dynamics' (p. 2). Thus, this book is attentive to questions of who the relevant social actors are, what the roles of legal ideas and practices are, and how history plays a role in conditioning the present. It is also varied in its theoretical perspective, drawing from Third World Approaches to International Law (TWAIL), constructivist theories of international relations and international law, and new governance perspectives. While the sources relied upon are not new, Miles's assembly of a wide range of historical and doctrinal material is an interpretive and constitutive act intended to change the field and not merely reflect it.

This book may be read in at least three ways, each of which I outline below. These multiple readings attest to the richness of the study. First, one may read this book as a global account of investment law. In this way, this book is an excellent reference that any student, scholar, or practitioner should use. Approaching the book as a reference guide, one can dive into the book at any point, since most of the chapters are easily read on their own. I have a minor stylistic quibble, however, with the large number of conceptual road-markers and summaries; when I read the book from cover to cover, I found at times the author was repetitive with her thesis and argument. Second, one may read Miles's book as an intervention into the ongoing debate over defining international economic law. Finally, one could read the book as an illustration of the influential way in which people imagine and govern the world through investment law. While on its face the book may not advance specific

1 M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed. (Cambridge: Cambridge University Press, 2010).

theoretical debates into new territory, as a whole it provides vital clues as to how scholars can proceed towards novel, complex ways of understanding international law.

Reading the book as a global account of investment law, Part One of *The Origins of International Investment Law* is a historical examination of the evolution of the international law of foreign investment. To Miles, investment law is a regime of law that entwines the interests of capitalists with those of their home state, and protects the interests of these capital-exporting states—and in doing so, claims to be universal and impartial while commodifying nature and subjugating indigenous communities to capitalist priorities. Still, although written to protect host states' interests, investment laws also provide means by which host states can allay the concerns of their dispossessed and environmentalist constituents to counter or resist exploitative foreign investor claims.

Miles's first argument is that the field of investment law did not originate in 1959 with the advent of bilateral investment treaties. Instead, she traces the field's beginnings to the 17th century, when Europeans developed legal tools to protect expanded conceptions of property and promote the interests of capitalists investing abroad. The legal tools of this European commercial and imperial expansion included friendship, commerce, and navigation treaties; unequal treaties; concessions; and the *de jure* subjugation of non-Western peoples and lands to European capitalist interests. Miles cites the Dutch East India Company as an exemplary legal manifestation (amongst other trading companies) of how extraterritorial sovereign power and commercial interests were intertwined. Here, Miles situates origins of investment law within the historical context of corporate law, diplomatic pressure, military intervention, and colonial annexation.

Next, Miles hones in on the 19th century and the law of diplomatic protection (also within the context of diplomatic pressure, military intervention, and colonial annexation). The law of diplomatic protection obligated alien investors to submit to a host state's jurisdiction unless their property was expropriated without some compensation. Capital-exporting European and Anglo-American states and investors used this exception whenever possible to avoid local or indigenous legal systems. Miles also identifies an instance of how investment law was used to resist capitalist expansion, namely through the Calvo doctrine—which holds that jurisdiction in international investment disputes lies with the country in which the investment is located. She identifies how the sentiments behind the Calvo doctrine continued to remerge through the League of Nations, and later through the United Nations.

When Miles turns to the early 20th century she examines how investment law and investor protection was challenged by agrarian reforms and nationalization (focusing on the Soviet Union and Mexico). During this time, investment law continued to ignore or discount host states perspectives. As former colonies gained independence, the nationalization trend continued into the mid-20th century. Newly independent states wanted compensation rules governing nationalization to be derived from domestic law rather than international law. As this century progressed, Third World countries deployed the doctrine of permanent sovereignty over natural resources and put forward a call for a New International Economic Order. The

response from capital-exporters was to protect their interest by creating the International Centre for Settlement of Investment Disputes (ICSID) and expanding the number and scope of bilateral investment treaties.

Thus Miles, like others,² identifies how broad-based resistance fails to stop investment law's long march of capital-protection; and how resistance demanded a response from investment law, in effect causing capital-exporters to reassert themselves through novel legal forms and claims. Miles extends her argument beyond the proposition that the origins of investment law arise from imperial commercial and political contexts, to hold that as long as investment law continues to prioritize the interest of investors and capital-exporting countries, it continues imperial patterns of subjugation. To Miles, imperialism is a legal technique through which an authority expands its power unequally over land, people, and resources by asserting (and reasserting) its particular property claims as universal—and by discounting or excluding other claims. By this definition one can trace imperial patterns in contemporary South-South investment treaties as well (p. 91–92).

Part Two examines how and why in contemporary times investment law has been pitted against environmental regulation. In the 19th century, conservation laws and investment laws were both part of imperial expansion—they were a means to control and regulate the use of natural resources in an effort to ensure that supply lines to European markets remained uninterrupted (p. 20). By the 20th and 21st century, however, environmental law has come to be treated as a violation of investment law. Miles reads this as investment law's continuation of an imperialist conceptualization of nature as commodity, along with a general disregard for communities living in these ecological systems subjected to exploitation. To understand this tension, Miles first provides a series of case studies, instances where corporate misconduct heightened polarization between international investment claims and local environmental concerns. Second, by examining several investment disputes, she identifies how investment law adapted and changed to continue to protect investor claims and deem most environmental claims to be treaty violations.

Miles ends Part Two on a hopeful note, framing the problem as a matter of corporate culture and finding some solace in attempts to align corporate behavior and interests with environmental concerns. While I do not share her optimism in this regard, this portion of the book provides an excellent survey of corporate social responsibility (CSR) mechanisms and a nuanced account of how they operate as a complex mix of governance tools. According to Miles, corporations often change the very nature of how and why they do business through the manner in which they engage with and articulate CSR principles. Accordingly, if CSR principles are followed in a way that changes corporate culture, investment law and investment arbitration will follow suit by evolving to better balance investor rights with responsibilities (p. 231). This line of argument suggests that legal or quasi-legal mechanisms can change what investors think of as their own interest, which will perforce change an investment regime dedicated to protecting investors' interests as they define them.

2 Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

Part Three is a blueprint for the future, with a focus on investment arbitrations and proposals for new treaty text. Continuing to frame the problem in cultural terms, Miles finds the most promising avenue for investment law reform arises from expanding the range of actors that interact with investment law and institutionalizing their influence. This could move the culture of investment arbitrators, state advisors, and treaty-negotiators away from a tradition of international commercial arbitration and toward a culture of public international law (pp. 307–08). This dynamic also suggests new directions for investment law if it continues to interact substantively with other areas such as environmental law and human rights. Miles also turns to Global Administrative Law and its principles of transparency and public participation, to provide new social actors a more democratic means through which they may navigate investment disputes.³ She concludes Part Three with models for a balanced multilateral agreement that takes into account the needs of host countries significantly more so than existing bilateral investment treaties, and for a treaty to regulate the conduct of multinational corporations.

Turning to my second suggested reading of the book, as an intervention into broader conversations about how to understand the field of international economic law, the place to begin is to recall that the debate over the definition of international economic law is about more than outlining the boundaries of a discipline.⁴ At stake are fundamental questions of the function and purpose of international economic law, what theories can be drawn from or should inform it, and against what notions of legitimacy it should be measured and judged.⁵ The debate also highlights how jurists have different assumptions about who are the principal generators of norms (or social actors), and whom international economic law is supposed to serve.

The question of ‘what is international economic law’ may be answered in several ways. Charnovitz has already done a fine job outlining different influential approaches⁶ and a recent turn to socio-legal approaches has broadened our understanding of what elements constitute the field.⁷ The dominant approach is a

3 Miles takes briefly notes some of the limits of this approach in reference to B.S. Chimni, ‘Co-option and Resistance: Two Faces of Global Administrative Law’, 27 *New York University Journal of International Law and Politics* 799 (2005).

4 Simon Lester, ‘Finding Boundaries of International Economic Law’, 17 *Journal of International Economic Law* 3 (2014).

5 Mohsen Al Attar and Edward Miller, ‘Rethinking Legitimacy in International Law: the ALBA-TCP’s Place for Justice’, in Thomas Muhr (ed.), *Counter-Globalization and Socialism in the 21st Century: The Bolivarian Alliance for the Peoples of Our America* (London: Routledge, 2013) 80.

6 Steve Charnovitz, ‘What is International Economic Law’, 14 *Journal of International Economic Law* 3 (2011).

7 See for e.g. Andrew Lang, ‘Some Sociological Perspectives on International Institutions and the Trading System’, in Colin Picker, Isabella Blum and Douglas Arner (eds), *International Economic Law: The State and Future of the Discipline* (Oxford and Portland, OR: Hart Publishing, 2008) 73; Moshe Hirsh, ‘The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System’, 19 *European Journal of International Law* 277 (2008); Amanda Perry-Kessaris (ed.), *Socio-legal Approaches to International Economic Law: Text, Context, Subtext* (Abingdon, UK & New York, USA: Routledge, 2013); Sungjoon Cho, *The Social Foundations of World Trade: Norms, Community and Constitution* (Cambridge: Cambridge University Press, 2014).

functionalist one, and involves determining (and arguing over) the internal coherence and rationality of the law⁸ or the professional ethos of its practitioners.⁹

However, trying to define the boundaries of a discipline like international economic law is not only about describing the insides but also the outsides, and includes an account of how the field relates and interacts with other fields. For example, in trade law the linkage debates were not simply about reconciling objective, self-evident understandings of different fields of law. The linkage debates were one way in which trade law was in effect defined: in the argument over the relationship between trade and human rights, one has to first put forward a contestable understanding of trade, then of human rights, before relating the two.¹⁰ The same dynamic is currently playing out in investment law, and Miles' chief contribution on this second reading is to guide us into this larger conversation from the vantage point of investment.¹¹

Within international law broadly speaking, scholars have developed several techniques to assess and configure different fields of law. For example, a constitutional approach generally tries organizing different regimes and norms through some sort of hierarchy, although scholars may disagree over the structure of the hierarchy.¹² Global administrative law imagines international law as norms created by international institutions, and interrogates these norms as a question of regulatory accountability. It thereby prescribes global standards of transparency, review, participation, reasoned decision, and legality.¹³

Miles has adopted both of these perspectives. In constitutional terms, her worry is that states are only defining their interests through investment law and only value the protection of investors. As such, Miles wants to include sustainable development concerns as part of investment law, in order to broaden the values states must consider through international law. And in administrative terms, she considers different 'new governance' mechanisms to control the expanding power of non-state actors (namely corporations) within international investment law.

Anne Orford provides another way of examining and configuring different fields of law. She suggests that one should focus on the form of law, which she means to

- 8 Charnovitz, above n 6, at 6; Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan Journal of International Law* 999 (2003–2004).
- 9 Robert Hudec, 'The GATT Legal System: A Diplomat's Jurisprudence', 4 *Journal of World Trade* 615 (1970); Joseph H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 35 *Journal of World Trade* 191 (2001); Martti Koskeniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* 553 (2002).
- 10 Andrew Lang, 'Reflecting on "Linkage": Cognitive and Institutional Change in the International Trading System', 70 *Modern Law Review* 523 (2007).
- 11 See for e.g. Lise Johnson and Rahim Moloo, 'Symposium on International Law and Sustainable Development: Bridging the Divide', in Andrea Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2012-2013* (Oxford: Oxford University Press, 2014) 265.
- 12 See for e.g. Ronald St. John Macdonald and Douglas M. Johnston (eds), *World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005); Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009); Jeffrey Dunoff and Joel Trachtman (eds), *Rule the World: Constitutionalism, International Law and Global Governance* (Cambridge: Cambridge University Press, 2009).
- 13 The literature in this area continues to grow. See *Global Administrative Law: A Bibliography*, <http://www.ijl.org/gal/Bibliography/default.asp> (visited 5 August 2015).

be 'the pattern of relations and subject positions to which these laws attempt to give shape'.¹⁴ It also includes 'the desire to create the proper order of things, the proper arrangements between subjects often imagined and constituted as parts of a greater whole (the state, the international community, the global economy)'.¹⁵

In other words, each particular form of law is a way of creating certain subjects and constructing an order around those subjects. But, the debate of what constitutes a particular field also hinges on what one thinks is the greater whole. Is the larger context through which one examines different fields of law such as investment law something like public international law? How does one's analysis change if the context is something instead, like the 'global economy' or 'international environmental law'? By answering these questions, we are making determinations both of what internally constitutes a particular field, and how it relates to other fields.

For example, let us assume one adopts 'international economic law' as the appropriate analytical context. By any definition of international economic law, international trade law and investment law are inside the field. In this way, it is common to think about trade law and investment law as somehow related to each other.¹⁶ But why is it so easy for international economic law scholars to discuss trade and investment law as comparable?¹⁷

There is nothing innate about treating trade and investment as part of the same whole. The history of the investment regime as described by Miles involves a very different group of people and institutions when compared to some accounts of international trade law¹⁸ or public international law.¹⁹ Many trade agreements, with the notable exception of the North American Free Trade Agreement (NAFTA), have very little to say about investment (though there are notable attempts to institutionalize the two together more broadly). The World Trade Organization (WTO) lightly touches on investment issues through the General Agreement on Trade in Services (GATS) regulation of commercial presence, Agreement on Trade-Related Investment Measures (TRIMS), and the plurilateral Agreement on Procurement. Miles rightly points out that trade and investment law share certain doctrines such as

14 Anne Orford, 'Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice', 18 *Leiden Journal of International Law* 179 (2005), at 180.

15 *Ibid.*

16 See for e.g. Friedl Weiss, 'Trade and Investment', in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 183; Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade*, 4th ed. (London: Routledge, 2012), at 566–604; Sergio Puig, 'Conflict or Convergence? On the Relationship of International Trade & Investment Law', 33 *Berkeley Journal of International Law* 1 (2015).

17 On adopting a comparative approach in international law see Martti Koskeniemi, 'The Case for Comparative International Law', 20 *Finnish Yearbook of International Law* 1 (2009 [2011]); Boris N. Mamlyuk and Ugo Mattei, 'Comparative International Law', 36 *Brooklyn Journal of International Law* 385 (2011). For a comparative approach on global legal thought see Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 19.

18 Michael Fakhri, *Sugar and the Making of International Trade Law* (Cambridge: Cambridge University Press, 2014).

19 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2007).

national treatment and most favored nation (pp. 195–96). But she cautions that the meaning of these doctrines can be quite different in each field.

The strongest argument for comparing trade with investment is the economic argument that the flow of trade affects the flow of investments and capital. Thus, when anyone defines the core of international economic law as trade *and* investment law, they are suggesting that international economic law is primarily about the relationship between the state and the flow of capital. However, it is important to recognize that this approach has a normative propensity toward increasing and liberalizing the flow of capital—whether through goods or investments.

We also learn something about a field by identifying its internal cores and peripheries. If trade and investment are in the center of the field, why are international sales law and the United Nations Convention on Contracts for the International Sale of Goods (CISG) at the margins? Like trade law and investment law, commercial law affects the patterns of capital flow. Moreover, it is treaty based and thus draws on similar legal techniques of interpretation. It also has a rich body of jurisprudence developed through the practice of business people and disputes resolved in arbitration or domestic courts. Perhaps it is marginalized because the CISG builds around a transactional sensibility—it is state-derived law augmenting private legal ordering and commercial intercourse—whereas trade and investment build around a rationality of governance—a mode of delineating the line between the state and market, and determining what are legitimate state economic policies.

What if we shift the frame and instead assume that the greater whole is public international law? In recent years, this has become a very popular way of contextualizing international economic law. International law is often understood as a project committed to global social improvement and progress. It is both a commitment to creating a better world and to international law itself. From this perspective, tension arises within public international law because trade law and investment law derive from very different normative traditions than human rights and environmental law.²⁰

All sorts of people turn to international law, and the common thread is that they often go to international law for its promise of justice.²¹ Yet only now are different concepts of justice being discussed as part of defining the field of ‘international economic law’.²² Miles’ analysis invites us to consider whether environmental law will be the way in which investment law jurists redefine the field through concepts of justice.²³ To be sure, including concepts of justice or sustainability does not

20 Donald McRae, ‘International Economic Law and Public International Law: The Past and the Future’, 17 *Journal of International Economic Law* 627 (2014).

21 Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011), at 35.

22 Chi Charmody, Frank J. Garcia, and John Linarelli (eds), *Global Justice and International Economic Law* (Cambridge: Cambridge University Press, 2014); Frank J. Garcia, *Global Justice and International Economic Law: Three Takes* (Cambridge: Cambridge University Press, 2013); John Lanarelli, ‘Book Review of *On Global Justice* edited by Mathias Risse’, 16 *Journal of International Economic Law* 959 (2013).

23 For one of the earliest calls for inclusion of notions of justice in international investment law see M. Sornarajah, ‘Power and Justice in Foreign Investment Arbitration’, 14 *Journal of International Arbitration* 103 (1997).

guarantee political change. As we already see, it is not difficult for investors (and investor-friendly institutions like the World Bank) to also employ the language of human rights and sustainable development to serve their property interests (pp. 83–84; 239–47; 273–78).

The jurist's main task should not be to reconcile the fragmented institutional landscape of international law and weave some utopian doctrinal cohesion. Instead, the questions that the jurist must answer are the following: how can we examine the implications of each different configuration of multiple fields of law?; what counsel does one provide to those people who want to be involved in making and configuring international law?; and whom should one counsel? Miles' book offers us valuable insights toward answering each of these questions. In many regards, Miles is as she claims a 'radical reformist' working to reorient the field of investment law (pp. 15; 212). She seeks widespread changes across the investment law regime, and her prescriptions focus on changes within the existing structures and call for more balanced treaties in the future.²⁴ To Miles, imperialism is a problem because it is the imposition of power by a significantly stronger party over a weaker party, and the solution is therefore a recalibration of that power through law.

The advantage of her approach is that practitioners such as activists, treaty negotiators, adjudicators, and legal advisors can rely on this text to help achieve much-needed changes to the regime as they work their way through various investment law claims and conflicts.²⁵ Moreover, given this book's emphasis on the role of corporations in international law, the growing literature on how corporate governance can be understood as a mechanism of global governance becomes a valuable complement.²⁶ Thus, new proposals could focus on both regulating corporate behavior and corporations' inherent power.

My third and final suggestion is to read Miles's book in a more radical way as offering an understanding of investment law that foregrounds how law itself responds to constant (and maybe fundamental) changes—whether it be in international investment law, economic law, or environmental law.²⁷ This book highlights how investment law addresses more than questions of investor protection. Investment law is not only a financial and economic issue; it is one way in which people configure and govern the world.

It is no accident that Miles links international legal questions of investment and capital with environmental issues. As she shows, investment law profoundly affects the environment, and environmental law directs the flow of capital in a particular

24 For example, she does not explore the idea of moving disputes away from investor–state arbitration and allow other institutions such as domestic courts or the International Court of Justice to balance investor against host state claims.

25 Similarly, see Nicolás M. Perrone, 'The Governance of Foreign Investment at a Crossroad: Is an Overlapping Consensus the Way Forward?', 15 *Global Jurist* 1 (2015).

26 See for e.g. Kent Greenfield, 'Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)', 87 *Virginia Law Review* 1279 (2001); Dan Danielsen, 'Corporate Power and Global Order', in Anne Orford (ed.), *International Law and Its Others* (Cambridge: Cambridge University Press, 2006) 85.

27 On what I mean by reform and radical see Luis Eslava and Sundhya Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law', 3 *Trade, Law, and Development* 103 (2011).

direction.²⁸ For example, with cap-and-trade schemes and measures such as the Kyoto Mechanism (pp. 192–203), environmental law creates carbon markets, thereby further blurring the line between environmental and investment law. Or one could imagine a complementary relationship whereby environmental law imposes certain regulations against major polluters, and investment law provides relief for those polluters who are aliens. This complementary relationship would continue imperial patterns of inequity, since aliens would be exempt from local legal jurisdiction and domestic polluters would not have access to such relief provided by bilateral investment treaties.

This raises the question of whether environmental law is necessary to keep investment law in check by stopping investors' drive to exhaustively exploit natural resources. It may be that environmental law is the backstop that allows nature to continue to grow resources for future exploitation and enable future investments. It remains to be seen whether jurists will (or are able to) employ environmental law in a way that fundamentally transforms investment law. A more radical relationship between investment and environmental law would be a conceptual and institutional linkage that restructures the economy in a way that reduces the global consumption of natural resources, ensures a high standard of living for all, and provides a re-evaluation of humans' presence within the ecosystem.

This perspective leads us back into Miles' own historiography. This book is not history as a series of directly interlinked events, where one event causes another. Rather, this is a look back to how investment law as we know it today, appeared in various legal forms and operated over the past.²⁹ Miles's has an implicit premise that connects the various historical moments and provides the engine for change in her narrative, which I take as this: investment law may be identified at various points in time in functional terms as the law that protects the interests of holders and investors of capital; events in investment law are usually delineated and conditioned by external global political, economic, social, and cultural forces; but, the politics of investment law (i.e. who the investment regime favors) and changes in investment law can only be understood as an intervention against pre-existing investment regimes.

At times, however, Miles can be a bit too quick to determine that a legal form was created as a particular response to a previous form. What remains unclear is why the form of investment law changed over time. Why does international investment law sometimes appear through friendship, commerce, and navigation treaties, and at other times through exceptional legal powers enacted through corporations? At other points in time, investment law is articulated and contested through the doctrine of diplomatic protection, and occasionally it is a state-investor contract. The answer may have something to do with global trends of legal thought and consciousness. Or it may have something to do with assumptions

28 See also Thijs Etty et al., 'Norms, Networks, and Markets: Navigating New Frontiers in Transnational Environmental Law', 2 *Transnational Environmental Law* 203 (2013).

29 Cf. Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law,' in Mark Toufayan, Emmanuelle Tourme-Jouannet, and Hélène Ruiz Fabri (eds), *International Law and New Approaches to the Third World: Between Repetition and Renewal* (Paris: Société de Législation Comparée, 2012) 97.

regarding the state and market widely held by certain legal actors; these would be the people who happen to be the progenitors, disseminators, manipulators, and adopters of each particular legal form—the lawyers, social movements, investors, corporate actors, state actors, negotiators, scholars, international institutional civil servants, arbitrators, and judges. Likely, it is some interaction amongst both dynamics.³⁰

I suspect that many of these questions of legal form could be answered with a sustained inquiry into the dynamics of capitalism as a regime. By capitalism I mean the regime that constitutes and enables one group—capitalists—to control and restrict the means and tools of production. This same regime subjects other people to produce goods through work—laborers—and to sell their time for money in order to gain access to the very goods that they produced and all their other needs. This regime is defined by a functional rationality whose principal goal is to indefinitely accumulate and employ labor, land, money, and technology—capital—in order to accumulate and generate more capital.³¹

Such an inquiry would have to include noting how and where capitalist regimes overlap, augment, and contradict imperialist regimes. An understanding of capitalism as a regime also means determining which mesh of explicit and implicit rules govern global patterns of production, distribution, and consumption at any given time. Often this regime acts by regulating power and property within and amongst states as well.³² International economic jurists are very well positioned to examine such dynamics, and it is a testament to the imaginative scope of this book that it invites us to reflect on the farther reaches of our research agenda in this way.

To return to this book's premise and most innovative contribution, Miles convincingly highlights how both investment law and environmental law are legal techniques that different people use to define, make claims over, and argue over territory, land, and property. Both are international legal regimes that are historically based on European conceptions of property. Both arise from the same assumptions regarding empire and ecology. To Miles, imperialism is also a particular way of understanding the ecosystem—that nature is something that people can govern and manage. Imperial power's working premise is that the global natural environment is something that people can exploit, buy, and sell for the purpose of creating products to be consumed. Accordingly, imperialism by definition was ecologically degrading. Conservationism introduced some sustainable practices to 'colonial resource extraction and enterprise'. But, it also was a colonial tool 'for political subjugation of indigenous communities, imposing control structures through land use regulations' (pp. 20–21). So, conservation as a practice was an attempt to respond to unprecedented natural exploitation, a means to ameliorate humans' transformative, industrial effects within the ecosystem while at the same time governing and

30 See Kennedy, above n 17; Michael Fakhri, 'Globalizations of Law From the Perspective of International Trade Law (and Agricultural Commodities)', 1 *Jindal Law Journal* (forthcoming 2015).

31 Eric R. Wolf, *Europe and the People Without History* (Berkeley, CA: University of California Press, 1982 [1997]), at 73–100.

32 I adapt this concept from Harriet Friedmann, 'The Political Economy of Food: A Global Crisis', 197 *New Left Review* 29 (1993).

sustaining the ecosystem in a way that was good for commerce and empire alike (pp. 42–47).³³

Only now are we gaining deeper insights into how international environmental law, on its own terms and separate from investment law, has its particular imperial and anti-imperial origins.³⁴ In fact, environmental claims are still used—in cases like China and Tibet,³⁵ and the UK, USA, and the island of Diego Garcia³⁶—to justify investment expansion, military occupation, and indigenous population transfer.

Read this way, this book's implications raise the question of whether investment law and environmental law have more in common than one thinks at first glance. One may have the impression after reading this book that investment law's salvation lies in environmental law. However, I do not think environmental law or politics in their current form are necessarily a corrective, especially since there is a growing consensus that international environmental law and the environmental movement have failed to address the speed and ubiquity of ecological change.³⁷ It may be that investment law and environmental law still inhabit the same imperial and ecological context and share concomitant legal concepts of territory, property, and governance. The differences between (and within) the two fields today arise over different notions of acceptable levels of natural exploitation.³⁸

In international law, what matters then is not the degree of exploitation, but who gets to decide when and how much to conserve and exploit.³⁹ For example, international law has a long history of characterizing and categorizing non-European

33 See also Peder Anker, *Imperial Ecology: Environmental Order in the British Empire, 1895-1945* (Cambridge: Harvard University Press, 2001); Alan Mikhail, *Nature and Empire in Ottoman Egypt: An Environmental History* (Cambridge: Cambridge University Press, 2011).

34 Antony Anghie, "'The Heart of My Home': Colonialism, Environmental Damage, and the Nauru Case', 34 *Harvard Journal of International Law* 445 (1993); Usha Natarajan and Kishan Khoday, 'Locating Nature: Making and Unmaking International Law', 27 *Leiden Journal of International Law* 573 (2014); Shawkal Alam et al. (eds), *International Environmental Law and the Global South* (Cambridge: Cambridge University Press, 2015).

35 For two different interpretations of the same phenomenon see, Gongbo Tashi and Marc Foggin, 'Resettlement as Development and Progress? Eight Years On: Review of Emerging Social and Development Impacts of an "Ecological Resettlement" Project in Tibet Autonomous Region, China' 16 *Nomadic Peoples* 134 (2012); Sophie Richardson, 'China's Failing Policy in Tibet is "Self-defeating"', *Human Right Watch*, 25 March 2013, <http://www.hrw.org/news/2013/03/25/chinas-failing-policy-tibet-self-defeating> (visited 5 August 2015).

36 From US Embassy, London to Secretary of State, Washington, DC 'HMG Floats Proposal For Marine Reserve Covering the Chagos Archipelago (British Indian Ocean Territory)' (15 May 2009), Wikileaks Reference ID 09LONDON1156, <https://wikileaks.org/cable/2009/05/09LONDON1156.html> (visited 5 August 2015); David Vine, *Island of Shame: The Secret History of the US Military Base on Diego Garcia* (Princeton: Princeton University Press, 2011 [2009]). With thanks to Sergio Puig for introducing me to this case.

37 James Gustave Speth, 'Beyond Reform', *Our Planet*, UN Environment Programme, February 2007, 16, <http://new.unep.org/pdf/Ourplanet/2007/february/en/OP-2007-02-en-ARTICLE5.pdf> (visited 5 August 2015); Natarajan and Khoday, above note 34, at 578–85.

38 With thanks to Anastasia Telesetsky for pointing out to me this tensions within environmental law.

39 For a recent trade law example see Michael Fakhri, 'The WTO, Self-Determination, and Multi-Jurisdictional Sovereignty', *AJIL Unbound* (2015), online: <http://www.asil.org/blogs/wto-self-determination-and-multi-jurisdictional-sovereignty> (visited 5 August 2015).

societies in terms of differing degrees of control over nature. Europeans deemed societies who exercised less control as less civilized.⁴⁰

Therefore, in order to do away with investment law's imperial patterns in how it globally distributes wealth and power, we must also transform environmental law—and really, all of international law—along the same lines.⁴¹ Law sometimes articulates a system of domination of human over human and then extends that notion into a system of defining and governing the natural world.⁴² There are also instances where the governance dynamic goes in the other direction and law is first a narrative about the power of humans over things, which then turns into a story of how humans should govern over each other.⁴³ We may free ourselves from international law's imperial patterns if we stop assuming that people have power *over* nature and other people. The future will begin when we start arguing over and making an international law that imagines people living amongst each other in a multitude of ways, navigating and negotiating within the power of nature.

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- 40 Karin Mickelson, 'The Maps of International Law: Perceptions of Nature in the Classification of Territory', 27 *Leiden Journal of International Law* 621 (2014). These insights are best articulated by a group of international legal scholars who have recently conducted a study of how Western perspectives regarding human relationships with nature have been central to the formation of international law writ large. Kishan Khoday et al., 'Locating Nature: Making and Unmaking International Law: Introduction', 27 *Leiden Journal of International Law* 571 (2014).
- 41 I explore these ideas in the context of international trade law in Michael Fakhri, 'Food As a Matter of Global Governance', 11 *Journal of International Law and International Relations* (forthcoming 2015).
- 42 Murray Bookchin, 'The Ecological Crisis, Socialism, and the Need to Remake Society', 2:3 *Society and Nature* 1 (1994).
- 43 Martti Koskeniemi, 'The Political Theology of Trade Law: the Scholastic Contribution', in Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011) 90; Yoriko Otomo and Edward Mussawir (eds), *Law and the Question of the Animal: A Critical Jurisprudence* (Abingdon, UK & New York, USA: Routledge, 2013).