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'These are my principles. If you don't like them I have others.' On justifications of foreign investment protection under international law

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ABSTRACT

This article aims to show that the mainstream discourse of the international law of foreign investment protection has adjusted itself to changing historical circumstances in a way that brings to light its strategic and ideological character. It argues, in particular, that the justifications offered in defence of foreign investment protection under international law appear to have been pretextual rather than principled, having been offered to provide reasons capable of flying at a particular point in time in light of the attending circumstances rather than to serve as an analytically sound, empirically grounded, and diachronically consistent framework.

I. INTRODUCTION

The international law of foreign investment protection has faced an existential question since its inception: why are foreign investors 'granted extraordinary rights'[1] unavailable to most common mortals, including foreign citizens and entities that are not qualified investors under the applicable legal regime, as well as to national investors? This question is both foundational and unsettling. It is foundational because it invites to revisit the grounding premise of the international law of foreign investment protection that foreign investors need the protection of international law against the host state, ideally in the dual form of substantive international standards of treatment and a 'neutral' international forum they can turn to for reparation when those standards are breached. The question is also unsettling because in a world of immense poverty, malnutrition, and human rights abuses in which international law is either conspicuous

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[1] David Schneiderman, 'The Global Regime of Investor Rights: Return to the Standards of Civilised Justice?' (2014) 5 Transnational Legal Theory 60, 70.

by its absence or miserably toothless, a privilege reserved for foreign investors comes off as an emotional shock.[2]

The question has taken on special significance with the recent rise of legitimacy challenges against investor–state dispute settlement and has received some attention in that context. Unsurprisingly, the arbitration industry and numerous scholars affiliated with it have attempted to defend the *status quo*. Some have offered various justifications for the current regime.[3] Others have engaged in anti-intellectualist quietism, arguing that there could be nothing seriously wrong with a regime that exists with the support of 'some 180 countries'.[4] Equally unsurprisingly, critics of the regime have attempted to discredit those justifications, pointing to their conceptual or empirical flaws.[5]

The objective of this article is not to defend the system as it is, nor is it to call for its dismantlement or reform. What it aims at is to zoom in on the most important justifications historically offered in defence of foreign investment protection under international law from a bird's eye view and identify possible patterns. The argument pursued in this article is that the mainstream discourse of the international law of foreign investment protection has adjusted itself to changing circumstances in a way that brings to light its strategic and ideological character.[6] I argue, in particular, that, when they are examined over time, the justifications offered in defence of the foreign investment protection under international law appear to have been pretextual rather than principled in the sense that they seem to have been offered to provide reasons capable of flying at a particular point in time in light of the attending circumstances rather than to serve as an analytically sound, empirically grounded, and diachronically consistent framework.[7]

The two key concepts used in this article—'discourse' and 'ideology'—call for some clarification. The everyday meaning of 'discourse' is fairly straightforward. In Romance languages where it originally comes from, 'discourse' typically refers to a talk or speech delivered on relatively solemn occasions. But as used in this article, 'discourse' is a technical term defined as 'a specified ensemble of ideas, concepts, and categorizations that are produced, reproduced, and transformed in a particular set of practices and through which meaning is given to physical and social realities'.[8] Some discourse theorists deny the distinction between the discursive and the non-discursive, arguing that 'every object is constituted as an object of discourse'.[9] The working definition of discourse quoted earlier is, however, fully consistent with the distinction between discursive and non-discursive realms. One can accept that 'physical and social realities' exist

[2] Gus Van Harten, *The Trouble with Foreign Investment Protection* (OUP 2020) 4–5 (referring to 'the contrast between the wealthy and everyone else').

[3] See Charles N Brower and Stephen W Schill, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law' (2008) 9 Chicago Journal of International Law 471; Christoph Schreuer, 'Do We Need Investment Arbitration?' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill–Nijhoff 2015) 879–89; Stephen M Schwebel, 'In Defense of Bilateral Investment Treaties' (2015) 31 Arbitration International 181; Stephen W Schill, 'In Defense of International Investment Law' in Marc Bungenberg and others (eds), *European Yearbook of International Economic Law* (Springer, 2016) 309–41; Charles N Brower and Sadie Blanchard, 'What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States' (2014) 52 Columbia Journal of Transnational Law 689.

[4] Schwebel, ibid 191 ('can it really be supposed that States of North and South, East and West, developed and developing, of virtually all political complexions and economic models, some 180 countries, have been misguided in concluding some 3000 investment treaties, and that it has taken a think tank here and a group of professors there, or labor union officials here, and environmental proponents there, to reveal to the world the error of their ways?').

[5] See eg Van Harten (n 2); David Schneiderman, *Investment Law's Alibis: Colonialism, Imperialism, Debt and Development* (CUP 2022).

[6] For the purposes of this article, 'strategic' is to be understood by reference to the concept of strategy broadly defined as 'patterns or consistencies in … streams of behaviour'. See Henry Mintzberg and James A Waters, 'Of Strategies, Deliberate and Emergent' (1985) 6 Strategic Management Journal 257, 257.

[7] Hence the quote commonly attributed to Groucho Marx that appears in the title: 'These are my principles. If you don't like them I have others.' Fred R Shapiro, *The New Yale Book of Quotations* (Yale UP 2021) 530.

[8] Maarten A Hajer, 'Discourse Coalitions and the Institutionalization of Practice: The Case of Acid Rain in Great Britain' in Frank Fischer and John Forester (eds), *The Argumentative Turn in Policy Analysis and Planning* (Duke UP 1993) 43–76.

[9] Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy* (Verso 2014) 93.

independently of their descriptions but still maintain that those realities can only acquire meaning through their descriptions. As Richard Rorty powerfully articulated, '[t]he world is out there, but descriptions of the world are not.'[10] The distinction between the world and its descriptions is important, as the social and physical realities can be described in numerous ways depending on our conceptual schemes, vocabulary or pragmatic interests. Ernesto Laclau and Chantal Mouffe capture this distinction with a telling example: 'An earthquake or the falling of a brick is an event that certainly exists, in the sense that it occurs here and now, independently of my will. But whether their specificity as objects is constructed in terms of "natural phenomena" or "expressions of the wrath of God, depends upon the structuring of a discursive field".'[11]

It is, thus, important to bear in mind that the descriptions through which we represent the world to ourselves and others are not merely a matter of passive registration of 'pre-existing significations'; they do 'violence … to things'.[12] In that sense, discourse has a productive and constitutive force. This is particularly true of social realities, as social relations are not 'part of the natural furniture of the world'[13] but 'are lived and comprehended by their participants in terms of specific linguistic or semiotic vehicles that organize their thinking, understanding and experiencing.'[14] To put it in Stuart Hall's terms, 'the social is never outside of the semiotic'.[15]

While ideology is typically associated with Marxism, which regards it as 'deliberately sponsored falsifications',[16] 'an essentially negative phenomenon, the cousin of error and falsehood, the brother of illusion',[17] this article builds on what Clifford Geertz described, after Karl Mannheim, a 'nonevaluative conception of ideology'.[18] The Marxist conception of ideology assumes the existence of an objective truth standing in a relation of correspondence with external reality and distorted by ideology.[19] In contrast, the nonevaluative conception of ideology makes no such assumption and defines ideologies as 'symbolic templates' acting as 'maps of problematic social reality and matrices for the creation of collective conscience'.[20] This article does not, however, see ideology merely as a system of cultural symbols, but rather as 'the ways in which meaning serves to establish and sustain relations of domination'.[21] To be more precise, this article takes the 'directionality' as the defining feature of ideology and insists that 'ideology always works to favour some and to disadvantage others'.[22]

Discourse analysis and critique of ideology are often seen as separate research agendas with limited points of contact. The two strands of analysis are not necessarily inconsistent, however, as demonstrated by what Stuart Hall called a 'discursive conception of ideology'.[23] This does not mean that every discourse is ideological. What is analytically useful is to look at discourse as a *process* that may or may not have ideological *effects*.[24] Discourses can pursue many purposes, but they only become ideological when they are intended to produce ideological effects.[25]

[10] Richard Rorty, *Contingency, Irony and Solidarity* (CUP 1989) 5.
[11] Laclau and Mouffe (n 9) 94.
[12] Michel Foucault, 'The Order of Discourse' in Robert Young (ed), *Untying the Text: A Post-Structuralist Reader* (Routledge & Kegan Paul 1981) 48, 67.
[13] Robert Brandom, *Making It Explicit: Reasoning, Representing, and Discursive Commitment* (Harvard UP 1998) 161.
[14] Trevor Purvis and Alan Hunt, 'Discourse, Ideology, Discourse, Ideology, Discourse, Ideology…' (1993) 44 The British Journal of Sociology 473, 476.
[15] Stuart Hall, 'Signification, Representation, Ideology: Althusser and the Post-Structuralist Debates' (1985) 2 Critical Studies in Mass Communication 91, 103.
[16] Stuart Hall, 'The Problem of Ideology-Marxism without Guarantees' (1986) 10 Journal of Communication Inquiry 28, 33.
[17] Paul Ricoeur, *Hermeneutics and the Human Sciences: Essays on Language, Action and Interpretation* (CUP 2016) 185.
[18] Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973) 194.
[19] Karl Marx and Frederick Engels, *The German Ideology* (Lawrence and Wishart 1970) 47.
[20] Geertz (n 18) 217, 220.
[21] John B Thompson, *Ideology and Modern Culture* (Polity Press 1990) 56.
[22] Purvis and Hunt (n 14) 478.
[23] Hall (n 16) 32.
[24] Purvis and Hunt (n 14), 484. For a similar approach, see Jutta Weldes and Diana Saco, 'Making State Action Possible: The United States and the Discursive Construction of "The Cuban Problem", 1960–1994' (1996) 25 Millennium: Journal of International Studies 361, 377.
[25] Purvis and Hunt (n 14) 484. See also ibid 497 ('what makes some discourses ideological is their connection with systems of domination').

The history of foreign investment protection under international law has been amply investigated in the literature.[26] The previous research has, in particular, brought to light the overt colonial origins of the field. But the history relevant for the purposes of this article starts from the second half of the 20th century. This is not to deny the colonial pedigree of foreign investment protection. The limited focus of this article rather has to do with the object of its investigation, namely, the justifications offered in defence of an international legal protection of foreign investments. This article argues that those justifications were concomitant with the period 'when colonialism was receding and the use of gun boat diplomacy to settle investment disputes was unwise in the context of the nationalistic movements sweeping Asia and Africa, and illegal due to the development of a norm against the use of force'.[27] The same period was also characterized by the emergence of the principle of sovereign equality. The latter is often derided as a myth,[28] but its nominal presence in the international legal order is sufficient to call attention to unequal treatments of states and necessitate that the latter be discursively justified. Following Clifford Geertz' theory of ideology, this article submits that it was a 'loss of orientation' triggered by such new developments that gave rise to formal justifications of foreign investment protection.[29] Giving reasons and providing justifications are indeed 'a sign of respect' for the other,[30] and the least that can be said about the colonial powers is that they were not driven by such noble sentiments in their dealings with the colonized or otherwise dependent territories.

This article proceeds as follows. Section II focuses on the subject positions carved out, respectively, for the host state and the foreign investors in the foreign investment protection discourse in international law. Section III addresses the place of politics in justifications of foreign investment protection. Section IV frames the justifications of foreign investment protection as a strategically oriented ideological discourse. Lastly, Section V concludes.

II. THE CONSTRUCTION OF SUBJECT POSITIONS IN THE FOREIGN INVESTMENT PROTECTION DISCOURSE

An important feature of discourse is its capacity to create subject positions. The concept of subject positions refers to discursively produced positions that can be taken up by actors engaged in social realities.[31] It highlights the contingent nature of identity-making in the sense that 'who one is is always an open question with a shifting answer depending upon the positions made available within one's own and others' discursive practices'.[32]

The process through which subject positions come to be taken up is interpellation. Building on the seminal work of Louis Althusser on ideology,[33] Charlotte Epstein offers a definition of interpellation that is particularly fitting for the purposes of this article: 'Interpellation refers to

[26] See, among others, Sundya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011); Kate Miles, *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital* (CUP 2013). For a short summary, see Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (OUP 2018) 53–67.

[27] Muthucumaraswamy Sornarajah, 'The Climate of International Arbitration' (1991) 8 Journal of International Arbitration 47, 51.

[28] For an insightful discussion, see Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP 2004).

[29] Geertz (n 18) 219.

[30] Frederick Schauer, 'Giving Reasons' (1995) 47 Stanford Law Review 633, 658. See also Mark Tushnet, 'Critical Legal Studies and the Rule of Law' in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (CUP 2021) 339. For an insightful discussion of international law as an argumentative practice, see Monica Hakimi, 'Why Should We Care about International Law?' (2020) 118 Michigan Law Review 1283.

[31] Charlotte Epstein, *The Power of Words in International Relations: Birth of an Anti-Whaling Discourse* (The MIT Press 2008) 101–02.

[32] Bronwny Davies and Rom Harré, 'Positioning: The Discursive Production of Selves' (1990) 20 Journal for the Theory of Social Behavior 43, 46.

[33] Louis Althusser, *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses* (Verso Books 2014) 261–70. For a brilliant book-length discussion of the concept of interpellation, see Jean-Jacques Lecercle, *De l'interpellation: Sujet, langue, idéologie* (Editions Amsterdam 2019).

the ways in which discourses carve out subject-positions that "hail" actors in such a manner that they become the "subject" – the "I" – of that discourse'.[34] While Althusser's theory of interpellation leaves little room for individual actors' agency in taking up subject positions, Epstein insists on the active role of actors in becoming a subject of a discourse, pointing out that 'the subject recognizes the discourse as its own – that is, it relates to, appropriates and endorses it'.[35]

The objective of this part is to identify the specific subject positions into which the host state and foreign investors have been interpellated in the discourse of foreign investment protection.

A. The host state as a site of distrust

The foreign investment protection discourse carved out a subject position that could be described as a site of distrust into which the host state was interpellated. This interpellation primarily took two forms. While the early justifications of foreign investment protection under international law built on what Antony Anghie described as 'the dynamic of difference'[36] by pointing to deficiencies of domestic laws and courts of some countries, the latest justifications tend to universalize the distrust of the host state.

1. The inadequacy of domestic laws and courts: the dynamic of difference

The classic position in international law is that a state has exclusive jurisdiction over persons, properties, and activities within its territory. The case of aliens has long been special through the availability of diplomatic protection, but the latter was never seen as a matter of individual right and was, in any event, not available indiscriminately for any infringement on the rights of aliens. That domestic law's reach within the territory of the host state does not stop at the door of foreign citizens residing on the territory was thus an unquestioned rule of international law: no exception was articulated for foreign citizens engaged in economic activities. Extraterritoriality imposed through unequal treaties was formally an exception confirming the rule.[37] With respect to contracts, in particular, the Permanent Court of International Justice famously noted that '[a]ny 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.'[38] The view that the contracts between a state and foreign investors were subject to the municipal law of the state was 'almost unanimously accepted during the first decades of [the 20th] century'.[39]

Starting from the 1950s, however, a series of arbitral awards involving the oil industry[40] approached the matter differently even in circumstances in which the applicability of the relevant domestic laws was not questioned, making room for the application of international law in the form of general principles of law. The main argument used to reach this result was the alleged underdevelopment of the host states' laws. The award rendered in *Petroleum Development LTD. v Sheikh of Abu Dhabi* provides a good illustration. While the sole arbitrator Lord Asquith of Bishopstone accepted that '[i]f any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi', he added that 'no such law can reasonably be said to exist'.[41] In a passage remarkable for its racist and patronizing undertone, Lord Asquith explained: '[t]he Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would

[34] Epstein (n 31), 94.

[35] ibid. For a similar approach to the concept of interpellation, see Jutta Weldes, 'Constructing National Interests' (1996) 2 European Journal of International Relations 275, 287.

[36] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 203.

[37] See Miles (n 26) 25–28.

[38] *Serbian Loans*, Permanent Court of International Justice, Series A20/21, Judgment of 12 July 1929, 41.

[39] Juha Kuusi, *The Host State and the Transnational Corporation: An Analysis of Legal Relationships* (Saxon House 1979) 9.

[40] As was pointed out in the literature, these awards 'made arbitration known and recognized'. Yves Dezalay and Brian Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (The University of Chicago Press 1996) 75. See also Jean Ho, *State Responsibility for Breaches of Investment Contracts* (CUP 2018) 3 (stating that 'the law of State responsibility for breaches of investment contracts developed principally from arbitral awards').

[41] International Law Reports (1957), *Petroleum Development LTD. v Sheikh of Abu Dhabi* (1 September 1951) 18 ILR 144, 149.

be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.'[42]

Another award rendered in the same period echoed Lord Asquith of Bishopstone's reasoning, pointing out that 'there is no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments', that 'Islamic law … does not contain any principles which would be sufficient to interpret this particular contract', and that 'such law does not contain a body of legal principles applicable to a modern commercial contract of this kind'.[43] In *Aramco*, the arbitral tribunal held that 'the regime of mining concessions and … of oil concessions has remained embryonic in Moslem law'[44] and that 'that law must, in case of need, be interpreted or supplemented by the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence; in particular whenever certain private rights … would not be secured in an unquestionable manner by the laws in force in Saudi Arabia'.[45]

The assumption that contracts entered into between foreign investors and developing countries were by definition subject to international law was reaffirmed in a number of subsequent awards.[46] It was also theorized in high-profile scholarly writings authored by Western scholars. Lord McNair's view is fairly representative:

> One of the difficulties that arises in finding a system of law appropriate to the type of contract under discussion arises from the fact that many of the countries which require skill and capital from outside for the development of their natural resources are governed by some system of law which has not yet been developed to deal with this particular type of transaction. It is believed that the provisions, for instance, of the Islamic law respecting economic development agreements are very inadequate, if indeed there are any at all. Moreover, the content of Islamic law differs according to the particular school of law whose teachings are to be followed, and it is understood that there are at least four schools of law. It is hardly to be expected that the nationals of countries enjoying a well-established system of law, which is familiar with contracts of this type, are likely to be readily disposed to enter into contracts with a foreign Government that are to be regulated by systems of law which are vague and have not been developed in the direction, or to the extent, necessary for dealing with this type of transaction. Accordingly, it is not surprising to find that the negotiators of these contracts, and the tribunals which adjudicate disputes arising upon them, tend to look in some other direction for an appropriate system of law.[47]

Developing countries were also specifically targeted in justifications of neutral international fora for the settlement of investment disputes. Indeed, the standard discourse highlighted

[42] ibid.

[43] International Law Reports (1957), *Ruler of Qatar v International Marine Oil Company, LTD.* (1 June 1953) 20 ILR 534, 544–45.

[44] International Law Reports (1963), *Saudi Arabia v Arabian American Oil Company (Aramco)* (Arbitral Award of 23 August 1958) 27 ILR 117, 163.

[45] ibid 169.

[46] International Law Reports (1967), *Sapphire International Petroleums Ltd. v National Iranian Oil Company* (Arbitral Award of 15 March 1963) 35 ILR 136, 175; International Law Reports (1980), *Revere Copper and Brass, Inc. v Overseas Private Investment Corporation* (Arbitral Award of 24 August 1978) 56 ILR 258, 271–72.

[47] Lord McNair, 'The General Principle of Law Recognized by Civilized Nations' (1957) 33 British Year Book of International Law 1, 4. See also FA Mann, 'State Contracts and State Responsibility' (1960) 54 American Journal of International Law 572; Robert Jennings, 'State Contracts in International Law' (1961) 37 British Year Book of International Law 156; Alfred Verdross, 'Quasi-International Agreements and International Economic Transactions' (1964) 18 Yearbook of World Affairs 230; Prosper Weil, 'Problèmes relatifs aux contrats passés entre un État et un particulier' (1969) 128 Collected Courses of The Hague Academy of International Law 95.

the lack of an independent or corruption-free judiciary in many developing countries to show why foreign investors needed a neutral international forum to receive genuine protection.[48]

2. The structural bias of domestic courts: the dynamic of uniformity

A relatively recent argument in defence of investor–state arbitration is the host state bias. Unlike in the argument of the inadequacy of domestic laws and institutions of developing countries, the host state bias argument is not limited to any country: even courts in countries normally reputed for their rule of law culture are considered to be potentially biased towards foreign investors. The best articulation of this argument has been offered by Vaughan Lowe. According to Lowe, the problem is two-fold. On the one hand, '[n]ational courts … are … as much a part of the State apparatus … as are the Executive and the Legislature.'[49] In other words, a foreign investor cannot expect to receive a fair treatment of its grievances against the state apparatus by an entity that forms part of the same state apparatus.[50] Christoph Schreuer brings the point home: 'Domestic courts are organs of the State and judges are State employees. In arbitration, the appointment of employees of one of the parties as arbitrators is taboo. There is no persuasive argument why different standards should apply to domestic courts in cases against forum States.'[51]

Lowe points out on the other hand that the problem with national courts is not simply that they are part of the state apparatus; it is the very fact that they are *national*:

> National courts are staffed by judges who are not only selected for their legal ability and their impartiality and integrity, but are drawn from the community, to serve the community. It is essential that they should command the confidence, trust and respect of the public; and that depends heavily upon judges being a part of the community, alive to the opinions and feelings of their fellow citizens. They are guardians of the public interest in a broad and important sense that extends far beyond the application of narrow doctrines of public policy when the law so demands.[52]

For Lowe, this is what should be avoided in investment disputes where 'the constant pressure is precisely to separate the tribunal from the communities to which the investor and the host State belong, in order to secure the greatest measure of impartiality'.[53] Investment arbitration allegedly satisfies this imperative because, '[t]hough each party may nominate one arbitrator, the collegiate tribunal is not rooted in or representative of the community in the way that national courts are.'[54]

[48] Brower and Schill (2008) (n 3) 479 ('The problem with most state courts is that they are not — or at least they are not perceived to be — sufficiently neutral in resolving disputes between foreign investors and host states. In many developing and transitioning countries, independent courts that decide cases in accordance with pre-established rules of law in a timely fashion are missing altogether. Corruption in the judiciary is a sad but daily business in the courts of many countries.'); Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 214–15 ('In many countries an independent judiciary cannot be taken for granted and executive interventions in court proceedings or a sense of judicial loyalty to the forum state are likely to influence the outcome of proceedings.'); Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, OUP 2021) 498–99 ('[D]epending on the country concerned, local courts may lack judicial independence and might be subject to the control of the host government, depriving the investor of an impartial forum.').

[49] Vaughan Lowe, 'Regulation or Expropriation?' (2002) 55 Current Legal Problems 447, 463.

[50] Dolzer and Schreuer (n 48) 214–15 ('the investor will fear a lack of impartiality from the courts of the state against whom it wishes to pursue its claim' because 'a sense of judicial loyalty to the forum state [is] likely to influence the outcome of proceedings.'). See also Salacuse (n 48) 498–99.

[51] Schreuer (n 3) 883.

[52] Lowe (n 49) 464. See also Schreuer (n 3) 888 ('Even where courts are independent in principle, their decisions are often influenced by national loyalties.').

[53] Lowe (n 49) 464.

[54] ibid 463–64.

B. The foreign investor as an actor in need of international legal protection

Throughout the history of international investment law, foreign investors have been depicted as actors in need of international legal protection. The construction of this subject position has primarily taken two forms.

1. The foreign investor as a vulnerable actor

The most popular move in the construction of a subject position for foreign investors has been to highlight their vulnerable position. This move has followed several paths. One consists in contrasting a defenceless foreign investor with an all-powerful local sovereign. Even when the host state has a contractual commitment towards the foreign investor, we are reminded that in such transactions, 'one of the parties … is in sole control of the legislative machinery … and thus is in a position to mould the law'[55] to undo its contractual commitments.[56] The protection of international law is presented as 'a precaution against the fact that one of the parties is the State'[57] or, more precisely, 'against the possibility of arbitrary exercise by the State of its sovereignty power either to alter or to abrogate unilaterally their contractual rights'.[58] The argument was expanded to cases in which the state was not even a party to the transaction simply because of the state's control over national laws.[59] It also made no exception for cases in which foreign investors may be wealthier and more powerful than some host states. It is, indeed, presented in an essentialist manner in that the investor–state dispute settlement at the international level is described as being 'necessary to compensate for the structural inequalities between foreign investors and host states'.[60]

The second technique of foreign investor vulnerabilization is premised on the status of foreign investors as aliens. Here, the argument asserts that foreign investors need the protection of international law because they are 'outsiders who do not have access to the political or other avenues by which to seek relief from nefarious practices of governmental units'.[61] Sometimes the alien status of foreign investors is also mobilized to stress that foreign investors are not part of national communities and, as such, cannot be expected to bear the same burden as nationals for value-adverse measures taken in the public interest.[62]

[55] International Law Reports (1979), *B.P. v Libyan Arab Republic* (Arbitral Award of 10 October 1973 and 1 August 1974) 53 ILR 297, 331.

[56] For a doctrinal discussion, see eg Pierre Mayer, 'La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat' (1986) 113 Journal du Droit International 5. This argument is, once again, premised on the suspicion that the host state cannot be trusted.

[57] International Law Reports (1982), *Liamco v Libyan Arab Republic* (Arbitral Award of 12 April 1977) 62 ILR 140, 170.

[58] ibid.

[59] See *Sapphire* (n 46) 171 ('Under the present agreement, the foreign company was bringing financial and technical assistance to Iran, which involved it in investments, responsibilities, and considerable risks. It therefore seems natural that they should be protected against any legislative changes which might alter the character of the contract, and that they should be assured of some legal security. This could not be guaranteed to them by the outright application of Iranian law, which it is within the power of the Iranian State to change.').

[60] Brower and Schill (2008) (n 3) 478.

[61] *Loewen Group, Inc. and Raymond L. Loewen v United States of America* (Award of 26 June 2003) ICSID Case No ARB(AF)/98/3, para 224. For a clearer articulation, see *Técnicas Medioambientales Tecmed S.A. v United Mexican States* (Award of 29 May 2003) ICSID Case No ARB(AF)/00/2, para 122 ('the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitle to exercise political rights reserved to the nationals of the State, such as voting for the authorities that will issue the decisions that affect such investors.'). In the literature, see Andrew Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20 ICSID Review—Foreign Investment Law Journal 1, 46–47; Vicki Been and Joel C Beauvais, 'The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine' (2003) 78 New York University Law Review 30, 87.

[62] *Técnicas Medioambientales Tecmed, S.A.* (n 61) para 122; *Azurix Corp. v The Argentine Republic* (Award of 14 July 2006) ICSID Case No ARB/01/12, para 311; *Renta 4 S.V.S.A and others v The Russian Federation* (Award of 20 July 2012) SCC No 24/2007, para 23. In the literature, see Stephen M Schwebel, 'On Whether the Breach by a State of a Contract with an Alien Is a Breach of International Law' in *Le droit international à l'heure de sa codification: Etudes en l'honneur de Roberto Ago* (vol 3, Giuffrè 1987) 401–13, 413; Lowe (n 49) 463.

The third technique of vulnerabilization highlights varying incentive structures of the foreign investor and the host state over time. Described as the 'dynamic inconsistency problem',[63] the difference between the incentive structures of the foreign investor and the host state is said to come from the fact that while the host state may have to offer attractive benefits to encourage a foreign investor to come and invest in the country, this dynamic is likely to change once the investment is made. Since 'the investor know that once the firm has made its investment, it typically cannot disinvest fully, … [t]he host country can take advantage of this situation, and extract additional value from the firm by, for example, increasing the tax rate beyond the level that was agreed upon when the investment took place.'[64] An international law protection is said to be necessary to disincentivize the host state from reneging upon its commitments towards the foreign investor. In particular, the availability of international arbitration for foreign investors is presented as a mechanism that is necessary to make the host state's commitments credible,[65] confirming once again that the dominant narrative of the international law of foreign investment protection is the narrative of distrust of the host state.[66]

2. The foreign investor as an ally in the development of the host state

It is widely known that liberalization of international trade and inward foreign investments are among the ingredients of the recipe of the so-called Washington consensus for economic development. During the first few decades following the Second World War, the connection between foreign investments and the development of developing countries was so much taken for granted that the contracts entered into between host states and foreign investors were described as 'economic development agreements'.[67] They were said 'to bring to developing countries investments and technical assistance' and were 'associated with the realization of the economic and social progress of the host country'.[68] Despite the assumption too easily made in some quarters that foreign investments automatically lead to the economic development of the host country,[69]

[63] Andrew Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1997) 38 Virginia Journal of International Law 639, 658–66.

[64] ibid 661–62. Similarly, Dolzer and Schreuer (n 48) 4–5 ('Once these negotiations are concluded and the investor's resources are sunk into the project, the dynamics of influence and power tend to shift in favor of the host state. The central political risk that arises for the foreign investor lies in a change of position of the host government that would alter the scheme of burdens, risks, and benefits, which the two sides have laid down when they negotiated the deal and which formed the basis of the investor's business plan and the legitimate expectations embodied in this plan. Such a change of position on the part of the host country becomes more likely with every subsequent change of government in the host state during the period of investment.'); W Michael Reisman, 'International Investment Arbitration and ADR: Married but Best Living Apart' (2009) 24 ICSID Review—Foreign Investment Law Journal 185, 190–91 ('A common feature of foreign direct investment is that the investor has sunk substantial capital in the host State, and cannot withdraw it or simply suspend delivery and write off a small loss as might a trader in a long-term trading relationship… . So rather than having an equality of bargaining power in an exclusively negotiation-based regime, parity will cease and things will tilt heavily in favor of the respondent State. Unless, that is, both sides appreciate that if negotiations fail, compulsory arbitration will follow.').

[65] Brower and Shills (n 3) 477–78 ('the investor's right to initiate arbitration enables the host state to make credible the commitments it made under its investment treaties… . [O]ften the only possibility for the host state to make credible commitments and immunize investor-state cooperation against subsequent opportunistic behavior is through the establishment of independent third-party dispute-settlement mechanisms such as courts or arbitration.'). For a discussion of the credible commitment theory in connection with bilateral investment treaties, see Zachary Elkins, Andrew T Guzman and Beth A Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000' (2006) 60 International Organization 811; Anne van Aaken, 'International Investment Law between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 Journal of International Economic Law 507, 520–22. A recent study shows, however, that investment law has not always been about investment arbitration. Jarrod Hepburn and others, 'Investment Law before Arbitration' (2020) 23 Journal of International Economic Law 929. See also Ingo Venzke and Philipp Günther, 'International Investment Protection Made in Germany? On the Domestic and Foreign Policy Dynamics behind the First BITs' (2022) 33 European Journal of International Law 1183.

[66] For a discussion of the 'prevention of opportunistic behavior of states' argument, see Sergio Puig, 'No Right without a Remedy: Foundations of Investor-State Arbitration' (2014) 35 University of Pennsylvania Journal of International Law 829, 846–48.

[67] James N Hyde, 'Economic Development Agreements' (1962) 105 Collected Courses of The Hague Academy of International Law 267. See also, *Revere Copper* (n 46) 271.

[68] International Law Reports (1979), *Texaco v Libyan Arab Republic* (Award of 19 January 1977) 53 ILR 389, 456.

[69] See eg *Amco Asia Corporation and others v Republic of Indonesia* (Decision on Jurisdiction) ICSID Case No ARB/8171 (Decision on Jurisdiction of 25 September 1983) para 23 (stating that 'to protect investments is to protect the general interest of development and of developing countries').

whether foreign investments can be a reliable driver of economic development has been debated in the literature.[70] What is interesting for the purposes of this article is the connection established between the foreign investor's role as an ally in the economic development of the host state and the international legal protection of foreign investors. This connection was prominently articulated in the arbitral award in *Sapphire*.[71] According to the *Sapphire* tribunal, a protection offered by international law is 'indispensable' because foreign investors 'undergo very considerable risks in bringing financial and technical aid to countries in the process of development'.[72] But the tribunal hastened to clarify that this should not be seen as a one-sided advantage for foreign investors:

> It is in the interest of both parties to such agreements that any disputes between them should be settled according to the general principles universally recognized and should not be subject to the particular rules of national laws, which are very often, unsuitable for solving problems concerning the rights of the State where the contract is being carried out, and which are always subject to changes by this State and are often unknown or not fully known to one of the contracting parties.[73]

The arbitral tribunal in *Revere Copper* offered a similar reasoning, pointing out that '[t]he very reason for [state contracts'] existence is that the private parties entering into such agreements and committing large amounts of capital over a long period of time require contractual guarantees for their security; governments of developing countries in turn are willing to provide such guarantees in order to promote much needed economic development.'[74]

Likewise, the Preamble of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) referred to 'the need for international cooperation for economic development, and the role of private international investment therein'.[75] As pointed out by Anne van Aaken and Tobias Lehmann, the World Bank would not have had the mandate for negotiating the ICSID Convention in the absence of the assumed connection between foreign investments and the goal of development.[76] Several arbitral awards rendered by ICSID arbitral tribunals have described the contribution to the economic development of the host country as part of the definition of foreign investments within the meaning of the ICSID Convention.[77]

III. THE PLACE OF POLITICS: THE DYNAMIC OF INCLUSION AND EXCLUSION

Some justifications of foreign investment protection are premised on a particular articulation of the relation between foreign investment protection and interstate politics. For instance, an argument widely used to justify the internationalization of state contracts is premised on the assumption that, despite their formal characterization as a contract between foreign private investors and the host state, such contracts often implicate a state-to-state dimension lurking

[70] For an insightful discussion and helpful references, see Anne van Aaken and Tobias A Lehmann, 'Sustainable Development and International Investment Law: A Harmonious View from Economics' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy* (CUP 2013) 317, 319–21.

[71] *Sapphire* (n 46) 136.

[72] ibid 175.

[73] ibid 175–76.

[74] *Revere Copper* (n 46) 272.

[75] Convention on the Settlement of Investment Disputes between States and the Nationals of Other States, Washington DC, 18 March 1965, in force 14 October 1966, 575 UNTS 159.

[76] Anne van Aaken and Tobias A Lehmann (n 70) 317.

[77] See eg *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001, para 52; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction, 16 June 2006, para 91.

beneath the surface. The arbitral tribunal in *Revere Copper* neatly summarized this argument, pointing out that even though the contracts between foreign investors and the host states are not 'wholly international' since they are not intergovernmental transactions, such contracts are 'basically international in that they are entered into as part of a contemporary international process of economic development, particularly in the less developed countries'.[78] In particular, the tribunal emphasized that despite their formal status as agreements between private actors and the host states, 'the governments of such parties are very much interested in such agreements and in promoting their conclusion'.[79]

Several Western international law scholars promoted this view, highlighting that state contracts were often secured through interstate negotiations[80] or that '[b]oth in their inception and in their execution they often involve the diplomatic concern or protection of the foreign State to whose laws the corporation owes its existence.'[81]

In contrast, one of the most frequent arguments in defence of investor–state arbitration has been its alleged potential to de-politicize investor–state disputes and avoid 'the abuses of diplomatic protection'[82] and 'political confrontation between the host State and the State of which the investor is a national'.[83] The argument is that conflicts between foreign investors and host states had caused 'fierce confrontations' between states in the past; the removal of 'investment disputes from the intergovernmental political sphere'[84] to a forum 'with objective, previously agreed standards and a pre-formulated dispute settlement process'[85] is said to de-politicize such disputes and prevent interstate confrontations from emerging.

IV. THE STRATEGIC AND IDEOLOGICAL CHARACTER OF JUSTIFICATIONS

The justifications of foreign investment protection under international law presented above have pivoted around a limited number of historically situated propositions that warrant some general observations.

First, while justifications can easily be seen as 'an essentially self-serving theory designed to support a very partisan, capitalist approach' to the matter,[86] they have typically been articulated as 'the impartial equivalent for self-interests'.[87] The logic of such arguments is that if 'an argument coincides too well with the interests of those who deploy it, [it] tends to arouse suspicion'; what is needed is 'an argument that deviates enough from … self-interest to be accepted by others, while not deviating so much that nothing is gained if it is accepted.'[88] Most justifications of foreign investment protection under international law meet this requirement, which is why

[78] *Revere Copper* (n 46) 271–72.
[79] ibid.
[80] Prosper Weil, 'Droit international et contrats d'Etat' in *Mélanges offerts à Paul Reuter: Le droit international: unité et diversité* (Pedone 1981) 549–82, 578.
[81] McNair (n 47) 3.
[82] Ibrahim FI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 ICSID Review—Foreign Investment Law Journal 1, 4 and 25.
[83] *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v Democratic Republic of the Congo* (Award of 1 September 2000) ICSID Case No ARB/98/7, para 15. See also *The Republic of Ecuador v The United States of America*, PCA Case No 2012-05, Respondent's Memorial on Jurisdiction (25 April 2012) 60 (presenting de-politicization as 'a principal rationale for investor-State arbitration').
[84] Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995) 163 (text of a talk given in 1963).
[85] Ursula Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes' (2018) 33 ICSID Review—Foreign Investment Law Journal 14.
[86] Derek William Bowett, 'State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach' (1988) 59 British Yearbook of International Law 49, 51.
[87] Jon Elster, 'Strategic Uses of Argument' in Kenneth Arrow and others (eds), *Barriers to Conflict Resolution* (W.W. Norton 1995) 246.
[88] ibid.

the proponents of foreign investment protection can dismiss suspicions out of hand.[89] This is perfectly in line with the ideological character of those justifications, as every ideology takes the form of universality.[90] They are also consistent with the logic of public justifications in the sense that such justifications are typically expected to appeal to 'common superior principles'.[91]

Second, the justifications have evolved considerably over time in a way that brings to light their ideological function. To appreciate this evolution, it is helpful to mobilize the concept of articulation introduced by Stuart Hall. According to Hall, articulation designates 'the form of a connection or link that can make a unity of two different elements under certain conditions'.[92] As Hall points out, the key point here is that articulation has 'no necessary belongingness'.[93] Through articulation, various elements can be put together to make a discourse look like a coherent whole, but those elements 'can be rearticulated in different ways'.[94] Indeed, as Stuart Hall explains, the very term 'articulation' conveys the idea of 'no necessary belongingness':

> [T]he term has a nice double meaning because "articulate" means to utter, to speak forth, to be articulate. It carries that sense of language-in, of expressing, etc. But we also speak of an 'articulated' lorry [truck]: a lorry where the front [cab] and back [trailer] can, but need not necessarily, be connected to one another. The two parts are connected to each other, but through a specific linkage that can be broken.[95]

Every articulation is a function of specific circumstances and 'can under some circumstances disappear or be overthrown (disarticulated), leading to the old linkages being dissolved and new connections (rearticulations) being forged'.[96] This is exactly what we observe in the foreign investment protection discourse. For instance, 'the image of a failed law'[97] associated with the domestic laws of developing countries became increasingly less convincing with changing circumstances: the assumption that the laws of some countries are too defective to be suitable for foreign investment protection became empirically disputable with 'the modernization of the legal infrastructure of third-world countries'.[98] Its racist and imperialistic undertone also made it ill-suited for use.[99] Similarly, while in the past, foreign investment protection was articulated to the contingent problem of lack of impartiality and independence of courts of some developing

[89] Jan Paulsson, 'Third World Participation in International Investment Arbitration' (1987) 2 ICSID Review—Foreign Investment Law Journal 19, 20 (stating that '[i]t would be a fundamental error to think that arbitration is designed to serve the interests of industrialized countries.'). See also Pierre Lalive, 'Some Threats to International Investment Arbitration' (1986) 1 ICSID Review—Foreign Investment Law Journal 26, 34–35.

[90] Karl Marx and Frederick Engels, *The German Ideology* (Lawrence and Wishart 1970) 65–66 ('each new class which puts itself in the place of one ruling before it is compelled, merely in order to carry through its aim, to represent its interest as the common interest of all the members of society, that is, expressed in ideal form: it has to give its ideas the form of universality, and represent them as the only rational, universally valid ones.').

[91] Luc Boltanski and Laurent Thévenot, *On Justification: Economies of Worth* (Princeton UP 2006) 43. In the specific context of international affairs, see Martha Finnemore, *The Purpose of Intervention. Changing Beliefs about the Use of Force* (Cornell UP 2004) 15 ('Justification is literally an attempt to connect one's actions with standards of justice or, perhaps more generically, with standards of appropriate and acceptable behavior.').

[92] Stuart Hall, *Cultural Studies 1983* (Jennifer Daryl Slack and Lawrence Grossberg eds, Duke UP 2016) 121.

[93] ibid 122.

[94] ibid 121.

[95] Stuart Hall, 'On Postmodernism and Articulation: An Interview with Stuart Hall by Larry Grossberg and Others' in David Morley (ed), *Essential Essays, Volume 1: Foundations of Cultural Studies* (Duke UP 2018) 234–35.

[96] Hall (n 92) 121.

[97] René Urueña, 'Of Precedents and Ideology: Lawmaking by Investment Arbitration Tribunals' in Prabhakar Singh and Benoît Mayer (eds), *Critical International Law: Postrealism, Postcolonialism, and Transnationalism* (OUP 2014) 276, 300.

[98] Georges R Delaume, 'The Proper Law of State Contracts Revisited' (1997) 12 ICSID Review—Foreign Investment Law Journal 1, 2. See also Sornarajah (n 27) 60–61; Ho (n 40) 188. The *Texaco* award specified that the inadequacy of a particular national law was not the only driver of the internationalization of state contracts. *Texaco* (n 68) 453–54 ('T]he invocation of the general principles of law does not occur only when the municipal law of the contracting State is not suited to petroleum problems. Thus, for example, the Iranian law is without doubt particularly well suited for oil concessions … The recourse to general principles is to be explained not only by the lack of adequate legislation in the State concerned … It is also justified by the need for the private contracting party to be protected against unilateral and abrupt modifications of the legislation in the contracting State.').

[99] Muthucumaraswamy Sornarajah, 'The Battle Continues: Rebuilding Empire through Internationalization of State Contracts' in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization*

countries, we are now witnessing a progressive disarticulation of that articulation and the emergence of a re-articulation of foreign investment protection to the very fact that national courts form part of the governmental apparatus and of the community of the host state. Indeed, now that traditionally capital-exporting countries widely praised for their rule of law culture are also on the receiving end of investment arbitration, the argument of defective domestic institutions of some countries has given way to the general argument of 'home state bias' without distinction. Such changes in justifications served to bridge what Paul Ricoeur calls in his seminal analysis of ideology 'a credibility gap'.[100]

Also relevant is the changing object of justification. The shift from the politicization of state contracts to the argument of de-politicization is a good example. The recent literature has shown that the empirical foundations of the de-politicization argument are quite weak.[101] But what is interesting for the purposes of this article is the linkage between the changing needs and the changing justifications. The combination of an 'extra-State law or norms … with an independent forum' is sometimes presented as being 'at the core of the coming into being of what we call international investment law today'.[102] While this is certainly accurate, some nuances are needed to appreciate changing justifications. In arbitrations involving state contracts, the forum (an international arbitral tribunal) was secured in the contracts themselves, so what needed justification was the replacement of relevant domestic laws with international law. With the institutionalization of investment arbitration with ICSID and bilateral investment treaties, the focus of justifications switched from applicable law (largely internationalized as a result of 'treatification' of foreign investment protection) to the forum. This change in what needed to be justified prompted a change in justifications: while the politicization of state contracts was designed to justify the internationalization of the *applicable law* (the forum having been made available through contracts already), the justification of the internationalization of the *forum* took the opposite form of de-politicization.

The argument based on the connection established between foreign investments and the economic development of host countries can be analysed similarly. While it was prominently used to justify the internationalization of the applicable law, it is now falling into disrepute, including in the case law of ICSID tribunals,[103] showing that we are passed the stage when the 'extraordinary rights' of foreign investors taking the form of international law protection needed the justification that those rights are necessary for the contribution to the economic development of the host country.

Third, none of the justifications has ever been unassailable analytically or empirically. Consider some examples:

Era (OUP 2019) 175–97, 186 (stating that 'the reasoning was simply based on racial superiority… . The assumption was that the law of the nomadic tribes of this region may be good enough for dealing with the sale of camels or tents but they lacked the wherewithal to deal with sophisticated contracts of long duration'); Ho (n 40) 185 (observing that 'the imperialistic undertone of internationalisation rendered it incompatible with the equality of nations which developing States were intent on bringing about.').

[100] Paul Ricoeur, 'Ideology and Utopia as Cultural Imagination' (1976) 7 Philosophical Exchange 17, 22. According to Ricoeur, 'authority always claims more than what we can offer in terms of belief'. ibid. An excessive 'credibility gap' can prevent a discourse from creating and maintaining a plausible system of signification about reality. A basic function of ideology is precisely to fill in this gap between the supply and demand sides of legitimacy. ibid.

[101] Geoffrey Gertz, Srividya Jandhyala and Lauge N Skovgaard Poulsen, 'Legalization, Diplomacy, and Development: Do investment Treaties De-politicize Investment Disputes?' (2018) 107 World Development 239. For conceptual perspectives on the de-politicization argument, see Martins Paparinskis, 'The Limits of Depoliticisation in Contemporary Investor-State Arbitration' in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* (Hart Publishing 2012) 271–82; David Schneiderman, 'Revisiting the Depoliticization of Investment Disputes' (2010) 11 Yearbook on International Investment Law and Policy 2010–2011, 693–714.

[102] Andrea Leiter, 'Protecting Concessionary Rights: General Principles and the Making of International Investment Law' (2022) 35 Leiden Journal of International Law 55, 57.

[103] See eg *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* (Award of 31 October 2012) ICSID Case No ARB/09/2, para 295; *Electrabel S.A. v Republic of Hungary* (30 November 2012), ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, para 5.43. As pointed out by Anne van Aaken and Tobias Lehmann, decoupling foreign investment protection from the goal of development raises the question '[w]hy would a state conclude a treaty to protect foreigners just for the sake of protecting foreigners?'. Anne van Aaken and Tobias A Lehmann (n 70) 331.

- The argument of vulnerability of foreign investors based on their political status could not explain why only a special category of foreigners should receive the protection of international law even though formally they are all similarly situated from the vantage point of participation in national political processes.
- The assertion that foreign investors' possible contribution to the economic development of the host state should entail the protection of international law is a puzzling *non sequitur* in the sense that the conclusion does not logically follow from the premise. If the immediate goal of foreign investors is not the economic development of the host state, but the making of profit—which is hardly an objectionable proposition—it is difficult to see why they should be rewarded by the protection of international law on top of the prospect of economic profit.
- No one has provided a compelling response to Derek Bowett's question about state contracts: if the problem to be addressed in these contracts is the dual capacity of the state as the contractual partner and as the law-maker, 'why such contracts are only "internationalized" if concluded by developing States?'[104]
- It is hard to take the argument that national judges are 'State employees' and cannot be trusted in cases brought against the state seriously without dismissing the very concept of judicial review of administrative acts even in countries with independent judiciary.[105]

But none of this is truly surprising: as Ricoeur points out, ideological discourse is always 'simplifying and schematic'.[106] It is, however, important to realize that an ideology cannot be successful if it is not plausible. As Eagleton points out, '[ideologies must] engage significantly with the wants and desires that people already have, catching up genuine hopes and needs, reinflecting them in their own peculiar idiom, and feeding them back to their subjects in ways which render these ideologies plausible and attractive'.[107] In other words, 'successful ideologies must be more than imposed illusions, and for all their inconsistencies must communicate to their subjects a version of social reality which is real and recognizable enough not to be simply rejected out of hand'.[108]

Bearing this in mind, one can see why the justifications for foreign investment protection have 'taken'. The argument of vulnerability of foreign investors facing a local sovereign is likely to be welcomed in a system largely theorized under 'an anti-étatist impulse'[109] in which 'the state was, until recently, the root of all evil [and] anything that attempts to reach beyond the state is laudable and praiseworthy, regardless of its precise contents' so much so that it was thought that

[104] Bowett (n 86) 51. See also Muthucumaraswamy Sornarajah, 'The Myth of International Contract Law' (1981) 15 Journal of World Trade Law 187, 188 ('the notion of the "internationalization" of such contracts is exclusively aimed at developing countries.'); Francisco Parra, *Oil Politics—A Modern History of Petroleum* (I.B. Tauris 2004) 9 ('In industrial countries, exploration and production arrangements are usually called licenses, sometimes leases… . In none of the licensing systems, predominantly contractual or not, is any provision made in industrial countries for international arbitration or for the choice of any law other than the municipal (national) law of the country concerned for resolving disputes arising out of the license terms.').

[105] Anne van Aaken has developed this point insightfully. See Anne van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 721, 752.

[106] Ricoeur (n 17) 188 ('[Ideology] is a grid or code for giving an overall view, not only of the group, but also of history and, ultimately, of the world. The "codified" character of ideology is inherent in its justificatory function; its transformative capacity is preserved only on condition that the ideas which it conveys become opinions, that thought loses rigour in order to enhance its social efficacy, as if ideology alone could mediate not only the memory of founding acts, but systems of thought themselves.'). See also FX Sutton and others, *The American Business Creed* (Harvard University Press 1956) 4–5 cited in Geertz (n 18) 209 ('Ideology tends to be simple and clear-cut, even where its simplicity and clarity do less than justice to the subject under discussion. The ideological picture uses sharp lines and contrasting blacks and whites.').

[107] Terry Eagleton, *Ideology: An Introduction* (Verso 1991) 14–15.

[108] ibid. See also Paul Veyne, *Bread and Circuses* (Penguin Books 1990) 379 ('People do not succeed in making us believe just anything they choose, and we do not believe just anything… . [I]deology is not a blind "drive", but a judgement which takes account of the facts and of the condition which is ours historically. It is suggested by reality, from which it extrapolates tendentiously.').

[109] Christian J Tams, 'International community' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 505, 510 (stating that 'the State is perceived as a threat to individual rights, and State sovereignty as an obstacle to the effective realization of community concerns.').

'State sovereignty needs to be overcome if life will ever get better.'[110] The appeal of the argument of de-politicization is easy to understand when arbitration is presented as an alternative to mere power politics and to the use of force for the enforcement of contractual commitments. In a similar vein, the fact that international law has long lacked adjudication mechanisms, that the latter have always been cherished in the discipline, and that compliance with international legal commitments has generally been seen as a problem in the absence of credible enforcement avenues explains that the promoters of investment arbitration can present foreign investors suing host states as 'private attorneys general' acting in the interest of compliance with international law.[111] Likewise, the argument that foreign investors are differently positioned from the members of the national community of the host state is just a variation on some well-known arguments made by the US Supreme Court[112] and the European Court of Human Rights.[113] None of these articulations has any 'necessary belongingness', but this does not mean that they are random or arbitrary. Paraphrasing Raymond Williams, one can say that if something has a social grounding, it cannot be arbitrary.[114] All the articulations described earlier have led to a 'chain of connotative associations'[115] in the broader universe of international law, making the relevant justifications look plausible. The point is not that the justifications offered for the foreign investment protection have ever been fully convincing, but rather that international law offered them a 'plausibility structure'.[116]

Fourth, some arguments are in significant tension with each other. For instance, while the argument that state contracts are often secured through interstate negotiations brings back the politics, the de-politicization argument asserts that politics is evacuated out of dispute settlement between foreign investors and host states, thanks to investment arbitration. Similarly, the failure of the domestic law and institutions of some countries is an empirically contingent proposition, while the host state bias is an essentialist proposition. This diachronic inconsistency further demonstrates the strategic character of the foreign investment protection discourse, showing that it does not shy away from internal contradictions and tensions: in other words, the goal is not analytical coherence; it is to provide justifications that fly at a particular point in time in light of the attending circumstances.

[110] Jan Klabbers, *An Introduction to International Institutional Law* (CUP 2002) 340. As Nicolás Perrone shows, the early promoters of foreign investment protection were indeed ideologically committed to 'escaping the "straightjacket of government control"'. Nicolás M Perrone, *Investment Treaties and the Legal Imagination. How Foreign Investors Play By Their Own Rules* (OUP 2021) 9–11.

[111] José E Alvarez, 'A Bit on Custom' (2009) 42 New York University Journal of International Law and Politics 17, 21–22.

[112] *United States v Carolene Products Co.* (1938) 304 US 144, fn 4 ('It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation … Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.').

[113] European Court of Human Rights, *James and Others v United Kingdom* (Judgment of 21 February 1986) Application No 8793/79, para 63 ('[A]s regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.'). For a critical assessment of the relevance of this judgment to foreign investment protection, see Anne van Aaken and Jan-Philip Elm, 'Framing in and through Public International Law' in Andrea Bianchi and Moshe Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (OUP 2021) 48–50.

[114] Raymond Williams, *Politics and Letters: Interviews with New Left Review* (Verso 1981) 330.

[115] Hall (n 92) 137.

[116] On the concept of plausibility structure, see Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Anchor Books 1966) 154 (defining the plausibility structure as 'the social base for the particular suspension of doubt without which the definition of reality in question cannot be maintained in consciousness.').

Finally, the justifications were offered not by actors that simply happened to be like-minded but by a genuine 'discourse coalition' composed of traditional capital-exporting countries, corporate interest groups from those countries, along with scholars and arbitration industry players,[117] in other words, by actors that were united by their ideological preferences and shared 'a particular set of storylines over a particular period of time'.[118] As highlighted by Nicolás Perrone, these actors 'made ambitious proposals, lobbied governments and international organizations, and, most momentously, crafted a legal imagination devoted to the international protection of foreign investment'.[119] In particular, the subject positions created for the host state and the foreign investor were discursively sustained through time by arbitral awards, writings, and conference presentations authored by members of the coalition of the foreign investment protection discourse.[120] The role of Western international law scholars deserves a special mention here. Charges of complicity in the promotion of foreign investments' interests to the detriment of the interests of developing countries are often dismissed by Western academics,[121] but as Karl Mannheim observed, the connection between 'human thought' and 'the existing life-situation of the thinker' cannot be ignored.[122] Some Western scholars were wearing a double hat, acting as counsel for foreign investors on the one hand, and justifying the foreign investment protection in their scholarly capacity on the other.[123] The discursive disqualification of Third World scholars and their counter-arguments was another strategy used by the coalition in its ideological work.[124] Understandably, what Dezalay and Garth called 'the collective image of neutrality of the academy'[125] gave such 'scholarly' interventions an aura of respectability and made the latter an object of desire for multinational business interests.[126]

V. CONCLUSION

It is no news that foreign investment protection is a historical construction. What is often overlooked, however, is the fact that the need for foreign investors to receive the protection of international law has been justified by a discourse coalition starting in the second half of the 20th century. The objective of this article was to zoom in on the main justifications offered in defence of foreign investment protection under international law. What it revealed is that foreign investment protection is a discursive construction that has adjusted itself to changing circumstances in a way that brings to light its strategic and ideological character. This process is not just

[117] For a detailed account of such norm entrepreneurs composed of 'bankers, business leaders, and international lawyers', see Perrone (n 110) 43, 51–80. See also David Schneiderman, 'The Paranoid Style of Investment Lawyers and Arbitrators: Investment Law Norm Entrepreneurs and Their Criticis' in CL Lim (ed), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (CUP 2016) 131–55.

[118] Maarten A Hajer, 'Coalitions, Practices, and Meaning in Environmental Politics: From Acid Rain to BSE' in David Howarth and Jacob Torfing (eds), *Discourse Theory in European Politics* (Palgrave Macmillan 2005) 297, 302.

[119] Perrone (n 110) 80.

[120] On the role of reiteration in the creation of subject positions, see Judith Butler, *The Psychic Life of Power* (Stanford UP 1997) 99.

[121] See eg Prosper Weil, 'Avant-propos' in Leila Lankarani El-Zein (ed), *Les contrats d'État à l'épreuve du droit international* (Bruylant 2001) XVII. In an earlier writing, Prosper Weil acknowledged, however, that lawyers close to Western investors acted as 'determined advocates of [the theory of] internationalization', adding that law often is nothing but 'the continuation of politics by other means'. Weil (n 47) 122 (the author's translation from the original French).

[122] Karl Mannheim, *Ideology and Utopia: An Introduction to the Sociology of Knowledge* (Routledge 1979) 71. As Terry Eagleton highlights by way of an example, 'Most novelists … do not produce work that is dramatically subversive to the status quo.' Terry Eagleton, *Why Marx Was right* (Yale UP 2011) 114.

[123] Sornarajah (n 99) 188 ('The project was one that the leading lawyers of the times engaged in probably because the making of the law was profitable to them as well as to the MNCs and the states they advised. It was evident that they acted for the companies and states that were bent on creating such law.').

[124] For instance, Pierre Lalive dismissed the notion that 'international arbitration is "a one-way street serving the interests of industrialized countries"' as a 'myth' and chalked it up to a 'lack of familiarity and expertise in arbitration matters'. Lalive (n 89) 34–35. For other examples, see Sornarajah (n 104) 199, fn 62.

[125] Dezalay and Garth (n 40) 89. See also Geertz (n 18) 195 (referring to academics' 'vocational commitment to neutrality').

[126] Tellingly, B.P. requested the consent of the Libyan Ministry of Petroleum and Mineral Resources to the publication of the *B.P. v Libyan Arab Republic* award in 'the interests of international scholarship'. *B.P.* (n 55) 297.

a historical episode: as the recent 'host state bias' justification shows, the discourse coalition promoting foreign investment protection under international law is very much alive and actively at work.

This work has, however, become increasingly difficult given the backlash from developing countries[127] and the heightened awareness of civil society actors so much so that today foreign investment protection suffers from a serious image problem. Even though we are certainly far from the Middle Ages as described by Albert Hirschman where '[n]o matter how much approval was bestowed on commerce and other forms of money-making, they certainly stood lower in the scale of medieval values than a number of other activities, in particular the striving for glory',[128] it is well understood that investment is not about charity or 'benevolence', but profit-making by private actors.[129] Unless they have some sort of interests at stake, most audiences are unlikely to feel sympathy for foreign investors facing public interest regulations of a host state.[130] In response, we are seeing attempts to 'position' foreign investors more favourably. The re-articulation of foreign investors' property rights to the international protection of human rights is precisely such an attempt.[131] It is too early to assess whether this attempt will be successful. But such re-articulation shows already what difference one discursive representation of social reality can make relative to another and why discourse is 'the thing for which and by which there is struggle'.[132]

[127] This backlash can be framed as a form of counter-interpellation rejecting the subject position to which the foreign investment protection discourse has historically relegated developing countries. On the concept of counter-interpellation, see Lecercle (n 33) 99–100.

[128] Albert Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (Princeton UP 1997) 9.

[129] Adeoye Akinsanya, 'International Protection of Direct Foreign Investments in the Third World' (1987) 36 International & Comparative Law Quarterly 58–75, 58 cited in Perrone (n 110) 21.

[130] Anthea Roberts, *Investment Treaty Arbitration and International Law*, vol 6 (Juris 2013) 295 ('We don't often have a lot of sympathy for cigarette companies maintaining or increasing their business').

[131] For example, José E Alvarez, 'The Human Right of Property' (2018) 72 University of Miami Law Review 580; Eric De Brabandere, 'Human Rights Considerations in International Investment Arbitration' in M Fitzmaurice and P Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Martinus Nijhoff 2012) 183.

[132] Foucault (n 12) 52–53.