
Book Reviews

Anne Orford and Florian Hoffmann (eds), with Martin Clark. **The Oxford Handbook of the Theory of International Law**. Oxford: Oxford University Press, 2016. Pp. xxxi + 1088. £125.00. ISBN: 9780198701958.

1 The New Epistemic Consensus

Metaphorically speaking, should wringing out global history soaked in inequities and injustices not yield the theory of international law? Theorizing international law is an exercise, as it were, in milling the history of international law.¹ The *Oxford Handbook of International Legal Theory* (the *Handbook*) advances an epistemic consensus that two tributaries of international legal theory – historical and ontological schools – currently exist. While the historical school deploys a history-as-theory lens, as Antony Anghie says (at 158), the ontological school argues that existing legal theories might inadvertently nourish imperialism. Nevertheless, both of the schools take a literary-narrative approach while offering analyses. Naturally, some occupy the ground in between the two approaches while a few live outside of the two schools. The *Handbook* invites us to compare the history of freeing markets in Asia with the theory of free markets, the latter being the alleged original intention of the European colonial companies (at 707).

While writing on the history of the law of nations in South Asia, a visibly upset C.H. Alexandrowicz had noted the theoretical replacement of the natural law approach by positivism in the works of the writers of ‘the Hegelian brand’.² This approach – constitutivism, as Alexandrowicz put it – erased in the 19th century not just the history of the Asian nations but also their theories. That is why, soon after decolonization, Indonesian publicist J.J.G. Syatauw began questioning the analytical category called the ‘newly established Asian states’.³ The histories of Asian nations were erased by both Western colonialism and the appropriation of international law by the non-Western lawyers during the 19th century. Therefore, after decolonization, legal theory had to determine whether colonialism or capitulationism, whatever the case, laundered states anew or not by their inclusion in the family of nations. Syatauw understandably found the analytic ‘new states’ misleading and inaccurate, and one that excised such newly decolonized states from contributing to international legal theory. Even in the

¹ For Alexander Orakhelashvili, ‘the ultimate aim of studying international legal theory is to understand the principle systemic and structural categories of international legal system’ even as he notes that ‘Over-theorizing has a significant history’. A. Orakhelashvili (ed.), *Research Handbook of on the Theory and History of International Law* (2010), at 3.

² C.H. Alexandrowicz, *An Introduction to the Law of Nations in the East Indies* (1967), at 9.

³ J.J.G. Syatauw, *Some Newly Established Asian States and the Development of International Law* (1961), at 3–4. Arnulf Becker Lorca has added a nuance to the tale by asserting that the lawyers from semi-peripheral nations, in fact, contributed to the erasure of their own nations’ histories as they were compelled to use a positivist framework to argue for their inclusion in the family of civilized nations. Lorca, ‘Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation’, 51 *Harvard International Law Journal (HILJ)* (2010) 536.

21st century, between the parallel histories of full-blown colonialism⁴ and the unequal treaty regimes,⁵ what is pivotal to international legal theory continues to remain an unsettled issue. Consequently, international legal theory remains, so to speak, a ritual performed within the four corners of global history.

2 Arguments

The *Handbook* studies not just the classic naturalist and positivist publicists of international law. Going further, Fleur Johns tries to bring multinational corporations to the centre of international legal theory, a place reserved for states in classic legal theory (at 635). International legal theory, for the editors and a number of authors in the *Handbook*, is a theory of free trade, finance and achieving low tariffs. It is least surprising, then, that Anne Orford's chapter on the theory of free trade actually offers the history of free trade as its theory (at 704, 710, 734). An ontological approach, where one pays attention to delete process, focuses on actors – big and small – while offering a narrative is emerging. When deployed in the theory of international law, the ontological approach offers agency to private actors such as colonial entrepreneurs, ambitious servants and lawyers of the European colonial companies, publicists, merchants and freelance voyagers as the agents of international law alongside the states.⁶ Since economic gains were the primary motive of the European corporate expeditions in the colonies, the ontological approach engenders a shift to the study of the history of international economic law (at 709).

The obvious role of the various European corporations in the history of the law of nations notwithstanding, the role of European companies in the production of international legal theory has remained an overlooked area. Consequently, Orford seems to suggest that the focus of international legal theory, today, should essentially be international economic law as many of the doctrines and theories of this discipline stem from the defence of free markets in the colonies (at 701). Arguably, then, the new epistemic consensus is that international economic law has midwived public international law and not the opposite.

Now that is a radical proposition, one that subverts the classic notions of the state, law and theory. Thus, Horatia Muir Watt gives up the established method of private international law to seek alliances with 'political philosophy and the social sciences' for private international legal theory (at 881). Surely, then, her contribution – not just a token to complete a *Handbook* of international legal theory – is very much a robust intervention in the theory of international law that she finds hiding behind the fig leaf of statism.⁷ Dan Danielsen is a close ally of Watt's. The latter's call for social science is matched by the former's study of the law-and-economics approach. Danielsen thinks the law-and-economics approach ignores issues 'that receive regular research attention from economists and international legal scholars working in other theoretical traditions' (at 457). Consequently, Danielsen revisits the tendency of law and economics lens to focus on 'general' economic behaviour to tease out a 'normal' economic behaviour and rules (at 470). Danielsen attempts to expose the weakness of the prevalent law and economics scholarship that avoids, to no good ends, 'questions regarding the impact of culture, institutional context or

⁴ A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), at 2–3

⁵ M. Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire', 74 *Nordic Journal of International Law* (2005) 381.

⁶ See L. Benton and L. Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (2016).

⁷ Notably, although dualism is included in the *Handbook*'s index, monism is not. Monism-dualism has been an important lens in legal theory. Maniruzzaman, 'State Contracts in Contemporary International Law: Monist versus Dualist Controversies', 12 *European Journal of International Law* (2001) 309, at 312.

power asymmetries on the behaviour of different public and private actors in the global order' (at 457).

The interventions made by Thomas Skouteris about the idea of progress deserve primary attention. Not just the grand theories of progress, a progeny of economic ambitions to increase the wealth of the European nations, the law of nations must not ignore the importance of the pervasiveness of the idea of progress in everyday conversations (at 953). Jason Beckett's enterprise, close in spirit to Danielsen's, that attempts to understand poverty as a legal regime is both timely and necessary. Indeed, colonial poverty that translated into global poverty has been a blind spot in international law and it remains under-theorized to this day (at 1010).

And Kerry Rittich's law and development approach – 'normatively and theoretically porous' as theory – does well to capture the economics of international theory that mostly under-develops the Third World (at 842). Of course, the Third World in the 21st century is much less a synonym of Asia and Africa than a state of material destitution beating boundaries and betraying geographies. This aspect of the Third World becomes apparent when Chantal Thomas theorizes the crisis in North America where the migration of children from El Salvador, Honduras and Guatemala has created a humanitarian situation (at 882). Somewhat comparable to the refugee crisis in Europe, the North American crisis, for Thomas, has a profound impact on legal theory as it allows for the combined reading of economic law, refugee law and criminal law (at 911). The election of Donald Trump as President of the United States of America and his executive orders banning various kinds of subalterns make Thomas ever more relevant.

The *Handbook's* first part is bookended between theorizing the turn to history (Matthew Craven) and international legal theory in Russia (Lauri Mälksoo). Conceptually, however, two thought-provoking chapters by Craven and Anghie delimit the first part. Four chapters devoted to the study of Roman law (Randall Lesaffer) and the natural law school (Immanuel Kant, Hugo Grotius, Emer de Vattel and Cornelius van Vallenhoven) precede the chapter on early 20th-century positivism. Lesaffer concludes that Roman law has well and truly become history (at 58). Martti Koskenniemi notes that a number of crises in today's world have 'intensified the search for the natural' (at 81). In terms of personalities, the first part of the book discusses leading naturalists and positivists such as Samuel Pufendorf and Kant (Koskenniemi), Grotius (Martine Julia van Ittersum),⁸ Hans Kelsen (Jochen von Bernstorff), Carl Schmitt (Robert Howse) and Hannah Arendt (Deborah Whitehall). Howse insightfully notes that the living reality of international law has two ends, 'authoritative hierarchy' and 'normative chaos' (at 229). The chapters on personalities, rich in contextualized description, are mostly biographical-analytical.

Craven identifies 'the problem of historical method'. He opines that a historical consciousness has fundamentally reshaped the conceptualization of what was to become international law (at 22). Craven introduces a new figure of Robert Ward who had 'something inaugural' about him. While attempting to write a book on diplomatic law, Ward ended up authoring a book on the history of the law of nations or 'a distinctly European law of nations'. Ward came to pen a European law of nations while doubting the 'universal pretensions of natural law'. For Craven, the most arduous task might be to examine the historic conditions 'that delimit the parameters of what may or may not be rendered as the past of international law today' (at 37). Reut Yael Paz, while discussing Ward, calls for a more vocal questioning of the role of Christianity in international law, but only after the lawyers offer a definition of Europe beforehand (928–929).

⁸ Syatauw has critically noted 'the enormous respect still paid in some Afro-Asian countries to Grotius as the real 'father of international law,' an honour that obviously does not belong to any one scholar however great his contributions to international law'. Syatauw, 'The Relationship between the Newness of States and Their Practices of International Law', in R.P. Anand (ed.), *Asian States and the Development of Universal International Law* (1972) 21.

Anghie raises perhaps the most important issue of the *Handbook*: what it means to theorize and that the legitimacy of scholarship in terms of its recognition, and reward, depends upon the choice we make about what to theorize. He looks at the impact imperialism wielded on the theory of international law (156–157). By casting the issue of colonialism and postwar imperialism as a political question, post-war international law has skirted the issue of its impact on the international legal doctrines. The doctrinal and theoretical marginalization of the new international economic order (the NIEO) presents the most obvious of cases where imperialism was brushed under the carpet. This has heralded the ‘imperialism of theory’. Thus, for Anghie, the real task of international legal theory is to theorize the lived experience of the Third Worlders, if needed, by developing a new language and vocabulary (at 172).

Umüt Özsu speaks of extraterritoriality. While talking ostensibly about the Ottoman Empire he seeks to theorize more – China, Korea, Morocco, Muscat, Persia, Siam and Zanzibar – since they were all seen to fall between the civilized and the savages. One of these semi-peripheries, the Ottoman extraterritoriality, Özsu claims, enlivened the path for the subsequent Euro-American attempts in East Asia and parts of Africa (at 137). Subsequently, Teemu Ruskola attempts to place China at the centre of international legal theory (at 139). Unsurprisingly, this exercise for Ruskola’s legal Orientalism is an ‘aspect of’ political ontology of the modern world’. While a turn to ontology is rather obvious here, we also see Ruskola, and later Peter Goodrich (at 365), deploying a literary style of writing. New to international law, Ruskola identifies himself as a comparativist with an Oriental focus. While the chapter offers novelty in addressing China as a subject of international legal theory, Ruskola – at least in the *Handbook* – does not explain why Thailand is not a better candidate given that Siam was also never formally colonized. Ruskola appears decidedly sarcastic when he states that ‘international law at the end of the day’ has ‘emancipated’ the Third World (at 155).

The second part of the *Handbook* is framed by naturalism and positivism. Is it any surprise that the opening chapter on naturalism begins by making the exact same claim as does the chapter on positivism? For example, Jörg Kammerhofer observes that positivism is as dead as alive (at 407), while Geoff Gordon notes that naturalism is, simultaneously, omnipresent and omni-absent (at 279). Indeed, approaches to international legal theory vary with the disciplinary training and personal methodological convictions of individual scholars. Consequently, the second part of the book treats the readers with a sumptuous feast of naturalist, positivist, Marxist, realist, constructivist, semantic, moralist, formalist and feminist approaches to international law.

Gordon argues that natural law has never deserted international legal imagination. A good part of the natural law approach is devoted to curbing the hegemonic ambitions of parallel legal traditions. A natural law approach continues to offer possibilities for an ‘alternative normative programme’ (at 305). Robert Knox’s Marxist approach to international law identifies and acknowledges the Marxist tradition’s long and short-term goals. The short-term goal, as a matter of tact, is to critique the system from within, while the long-term goal of the Marxist theory is to overthrow the capitalist regime of international law (at 325–326).⁹

While evaluating the role of realism, Oliver Jütersonke thinks that the argumentative resort to realism arbitrates the tussle between normativity and concreteness in a liberal vision of international law (at 330). This is so, as Jütersonke further explains, because for international law to have a concrete form we need to know, objectively, what the content of the law is. However, an empirical approach alone might not always yield the most appropriate normative ideals (at 343). Next, Felipe Dos Reis and Oliver Kessler argue that constructivism was born within the

⁹ G.I. Tunkin, *Theory of International Law* (1974), at xv, is, however, a curious exclusion, given, as translator W. Butler notes, that Tunkin’s was the most profound study of the ‘Marxist-Leninist’ international legal theory.

international relations school in order to neutralize the misgivings of the international relations theory. Although inspired by social sciences, international relations scholars used a very positivist approach for a very long time. A move to rules and norms allowed the constructivist international relationists to fight positivism (344–346). Hence, in a moderate constructivist view, the assemblage of states and non-state actors are seen as politicizing the process of norm creation (at 363).

In his allegorical text, Goodrich talks about international signs law. He argues if we accept that images, pictures and paintings are of some importance to 'the juridical', then the trajectory that such images took – 'from note, to sign, to emblem, then the inscription of law upon the sea' – is a proof of 'a test case for the international signature of law'. Samantha Besson argues for the application of moral philosophy. Besson finds this approach to be of use in advancing a normatively theoretical and meta-theoretical research in international law. Moral philosophy, for Besson, is important to moderate the anti-normative stance of realists and post-modern theorists of international law (at 405).

Hengameh Saberi writes about the New Haven school's contribution to policy conceptualism. She is of the opinion that the New Haven approach has disguised the local as the global. The reason behind this disguise, in her view, has to do with the 'epistemic structure of the New Haven's jurisprudence'. This policy-based knowledge structure of the New Haven approach has historical implications. Despite the efforts of this school, Saberi thinks, the concept of policy and its place in international legal imagination remains under-theorized even today (at 450).¹⁰ Daniel Joyce points out that liberal internationalism, in its Euro-American incarnations, has been central to the modern development of international law. That liberal internationalism is often presented as a response to events – a narrative of progress from anarchy to government – is a significant observation (at 477).

Dianne Otto concerns herself with the betrayal of the diversity of the doctrinal and substantive areas of feminist interventions in international law. There exists a tendency to offer an originary account of the movement. The long history of feminist labours, which Otto compares with the struggle of the Third World, has led to a 'critical instability' offering a dual quality to international law (at 503). And yet despite its long history, a feminist approach to legal theory has barely begun. Wouter Werner and Geoff Gordon begin with an instructive note on why their write up on Kant and cosmopolitanism finds a place not in the *Handbook's* history section but, rather, in the section on legal theory. In particular, Werner and Gordon deploy a Kantian lens on the functioning of an international judiciary where they identify three working strands of Kantian cosmopolitanism – liberal, contractual and innate – that are both complementary and contradictory (at 524).

In their well-known global administrative approach, Benedict Kingsbury and others use a post-national framework. By post-nationalism, they mean that not just the state but also various natural and judicial persons have visible bearings on international law. They argue that democracy for now lacks the tools to respond to the globalization and diffusion of political authority. Their admittedly bureaucratic approach identifies law and law-like principles for global governance. Arguably then, both colonialism and the unequal treaty regime – as bureaucratic as these were and where European sovereigns and companies worked side-by-side in the colonies –

¹⁰ However, Saberi's exclusion of two very important texts written within the New Haven tradition is enigmatic. They are: B.S. Murty, *Propaganda and World Public Order: The Legal Regulation of the Ideological Instrument of Coercion* (1968) and P.S. Rao, *The Public Order of Ocean Resources: A Critique of Contemporary Approaches* (1975). Between the beginning of negotiations of the Convention on the Law of the Sea in 1973 and its adoption in 1983, Rao's book was perhaps one of the most important texts on the law of the sea, which, by embodying the New Haven approach, exhibited that the approach could also advance a developing country perspective. Convention on the Law of the Sea (UNCLOS) 1982, 1833 UNTS 3.

were also post-national phenomena. In that sense, the global administrative project flirts with the spectres of colonial history. Indeed, as Kingsbury and others note, the sharpest and the most detailed rules are those of international trade and investment, which seek to protect commercial interests (at 538). The global administrative legal theory ought to theorize this as well.

Jean d'Aspremont claims to advance a 'new theory of sources'. The theories of sources were once 'the embodiment of progress' (at 545). While he points to the failures of that liberal and progressive project, d'Aspremont advances a 'social theory of sources' where the sources are seen rather as 'a matter of tradition and practice than as a set of rules that operates mechanically' (at 546). Gerry Simpson writes about state and self-determination. He thinks that sovereignty is two-faced – diplomatic and legal-rational-universal – and, therefore, sovereignty is managed through the dialectics of form and functions and unity and fragmentations (at 582).

Rose Parfitt finds a Hegelian thinking resilient in international legal theory (at 599). More importantly, she recognizes the task of collapsing the dichotomy of fact and law in awarding or recognizing international legal personality as the project for the future. Gregor Noll's contribution looks at all the possible avatars of the idea of jurisdiction, its meaning and scope in international law as well as the notion of jurisdiction as a 'call to conscience'. He concludes that a topic as doctrinal as jurisdiction is connected to 'a hierarchical creative-redemptive understanding of human history' (at 616). In line with the spirit of the historical school, he offers human history as a theory of jurisdictions.

Jan Klabbers begins by recognizing that the subject of international organizations has not been rich in 'overt theorizing' (at 618). The political project of international organizations has always been functionalist (at 634). Johns, while pointing out the paucity of work on corporations, argues that today states are invited, not without unease, to learn from them. Today, corporations are bearers of the newly cogent and legitimate practices of rules. While, in the case of investment law, states have given in to a global 'business concept', it is in the business and human rights setting that states are invited, not without unease, to learn from corporations (at 653). Dino Kritsiotis theorizes the use of force and intervention within international law. Very importantly, states do not have the obligation to provide either basic or elaborate accounts of the legal basis of their respective actions of interventions (at 656). Next, Ben Golder, while theorizing human rights, limits his scope to a pragmatic study of five scholars (at 685). The human of human rights, for Golder, is legally contoured, and the question of form is an important part of the process (at 698).¹¹

Sarah Nouwen argues that international criminal law has a theory that is all over the place. Often theorization in international criminal law has come after the crimes have already happened (at 761). However, now a variety of factual, operational, foundational, external and popular theories are being advanced. Nevertheless, a persistent challenge for international criminal theory is to link all of these parallel theories for a cogent outcome. Next, Frédéric Mégret theorizes the laws of war. He raises the question whether there exists in the laws of war, a war of laws. The lack of theory building within mainstream writings is complemented by the healthy crop of available theories at the outskirts of the field. It is in this sense that Mégret thinks the area of laws of war is alive and well. Anne Peters is of the view that fragmentation of international law is overstated, while constitutionalism, a German theme, is not keeping well (at 1028).

¹¹ This admittedly limited work, as a matter of choice, looks only at Richard Rorty, Michael Ignatieff, David Kennedy, Martti Koskenniemi and Florian Hoffmann. While Golder continues to use 'human' rights, Baxi has suggested its replacement by a gender-neutral term 'huper'. Baxi achieves 'Huper' by the unification of the leftovers after losing the male gender of 'man' and 'son' embodied in, respectively, 'hu-man' and 'per-son'. See U. Baxi, *The Future of Human Rights* (2002), at 1; Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', 42 *HILJ* (2001) 201.

Vasuki Nesiah theorizes transitional justice to say that the heterodoxy of the field is characterized by redefinitions and interruptions. Further, Stephen Humphreys and Yoriko Otomo take a historical approach to international environmental law that emerges from European Romanticism. They go on to argue that the rise of ecological sensitivity coincided with decolonization as it involved '[the] dismantling of a key coordinating mechanism', working to oil the 'global movement of primary commodities' (at 818).

3 Critical Evaluation

Both established and younger publicists populate the *Handbook*. The physical weight of the *Handbook* is set off by the plenitude of emotions – familiar, novel, and anticipatory but none disappointing – that its 48 chapters evoke. The editors of the *Handbook* deserve extravagant praise. During the Cold War period, scholars saw global institutions as the epitome of progress that was, purportedly, instilling economic and financial hygiene in the Third World. With the rise in the prosperity of certain ex-Third World states, as well as the general failure of progress globally, there has been a soul-searching shift in theoretical focus. The discipline of international law is now seen with a critical eye. Undoubtedly, critical legal studies, Third World approaches and feminism have successfully pollinated discourses and methods that remained intra-European for a very long time.

Clearly, a re-thinking has surfaced in the form of a tussle between the doctrine and the theory of international law. The neo-positivist camp takes issue with extra-legal materials that are seemingly corrupting the pristine discipline. The New Haven approach and realism, among others, constantly try to bring not just historical, but also an assortment of sociological, political, and philosophical material into the fold of international legal theory. Or, as Florian Hoffmann puts it, the roots of international legal discourse cannot be exposed by simply comfortably walking the known roads but, rather, by 'a march out into the wild' (at 984).

Even so, the *Handbook* is a reflection of an ongoing struggle about a pecking order of international legal theories. However, the *Handbook* does not intend to tell us what accentuates or depresses a particular theory in the pecking order – from naturalism, positivism, realism, constructivism, moralism, formalism, feminism, Marxist, policy perspectives and Third Worldism, to name but a few. The history of international law is characterized by colonialism and unequal treaty regimes between Afro-Asian kingdoms and European powers and the willingness of the Western powers to 'act in concert'. Given that history and theory are inextricable in international law, the history of a power-colony/semi-colony binary should have a significant impact on legal theory.

The end of formal colonialism, and the continuance of imperialism during the Cold War, is characterized by the diffused nature of new powers and their non-European origins. That new Asian powers in the 21st century, having signed multi-party conventions, refuse to put one into operation while fully complying with the other should have been part of the *Handbook's* four corners of theory. The *Handbook's* prime focus on European history, and, therefore, on European theory leaves the reader with the impression that the developments in Asia and Africa do not have much to add to theory just yet. The absence of African and Latin American scholars from the *Handbook's* line-up is a corollary to this concern. Must the milling of the history of colonialism and inequity be done without including those whose history is being milled?¹²

¹² See Landauer, 'Regionalism, Geography, and International Legal Imagination', 11 *Chicago Journal of International Law* (2011) 581.

It is surprising that the *Handbook* should exclude the law of the sea and international investment law and their impact on international legal theory from within its remit. These two sub-topics, albeit robust in practice, are in dire need of theoretical explorations. This omission undermines both the history and theory of international law. Arguably, the Convention on the Law of the Sea (UNCLOS) was the only opportunity ever for the developing countries to push for equity and justice in sharing the profits from technological explorations. Major developed countries – with the exception of Iceland – unsuccessfully objected to this issue at the time.¹³

From a critical perspective, the *Handbook's* exclusion of the law of the sea and international investment law is question-begging. The NIEO (1974) was a truly profound attempt by developing countries to de-colonize international law. At the time, the UN General Assembly found the NIEO declaration as 'one of the most important bases of economic relations between all peoples and all nations'.¹⁴ However, with the *Texaco v. Libya* arbitral award, the denial of the NIEO began immediately that led to a host of similar cases. The *Texaco v. Libya* award dismissed the NIEO on the grounds that it did not have enough normative force as capital-exporting countries had rejected it.¹⁵

Lest the international legal theorists forget, it is important to offer context to the relationship between the UNCLOS and the NIEO during the 1970s. The optimism for the law of the sea among the Afro-Asian countries had survived the ongoing subversion of the NIEO in international investment disputes. Developing countries were hopeful that the acceptance of the NIEO would seed the ongoing law of the sea negotiations with justice and equity. In such ways, developing countries wishfully thought that instrumentally functional advances in the direction of economic decolonization would be achieved. That such an operationalization of the NIEO in the law of the sea would impact international legal theory was a legitimate belief.¹⁶ Thus, for developing countries, the law of the sea negotiations represented the only opportunity ever to simultaneously modify Eurocentrism and imperialism in a Hegelian moment of synthesis. The *Handbook's* lack of yield in legal theory *vis-à-vis* developing countries, the law of the sea, investment law and the NIEO raises questions about the methods of milling the history of international law.

Like the subversion of the NIEO in the 1970s, the Sino-Philippine *South China Sea* dispute today unfortunately discounts UNCLOS to situate power at the core of the law of the sea. In other words, the attempts to theorize China – either as a civilization or a Westphalian state – is happening at a time when China is, as a new power, inheriting American exceptionalism. It is notable that Outi Korhonen and Toni Selkälä refer to UNCLOS and the World Trade Organization while theorizing responsibility. They disparage an international legal theory that exists divorced from responding to 'real world problems' (at 859). Those defeated in the past by the interpretation of international law should not be vanquished by its theories in the future. Unfortunately, such concerns have not died in legal theory as they simply keep shifting through geographical and epistemological spaces.

Effectively, a wilful fragmentation of legal theory allows new powers to create a new neo-colonial situation where those treaties that offer profits are respected, while those that do not are bypassed. This leads us to the most important theoretical issue of international investment

¹³ R.P. Anand, *Origin and Development of the Law of the Sea* (1982), at 96–106. UNCLOS, *supra* note 10.

¹⁴ Declaration on the Establishment of a New International Economic Order, Doc. A/Res/s-6/3201, 1 May 1974, para. 7.

¹⁵ *Texaco Overseas Petroleum Co. v. Libya*, Ad Hoc Award of 19 January 1977, reprinted in 104 *Journal de Droit International* (1977) 350.

¹⁶ Developing states were open to the law of the seas after decolonization. Indonesia became the first nation to recognize the principle of straight base lines set out in the *Anglo-Norwegian Fisheries Case*, Judgment, 18 December 1951, ICJ Reports (1951) 116. Kusuma-Atmadja, 'The Contribution of New States to the Development of International Law', 32 *Santa Clara Law Review* (1992) 889, at 903.

law, excluded in the *Handbook*, where developed European countries are now retreating into the principles of sovereignty like the Afro-Asian states of the 1960s. Does that make history a category of law or not? The *Handbook* leaves us with that question. What it also suggests is that theories are a product of choices we make while attempting to achieve objectivity. To that end, the *Handbook* has been successful in exposing international lawyers' politics of choices. Notably, a large percentage of authors are influenced by Koskenniemi's masterful *œuvre* – literary in style and historical in method. The rest have shown a sensibility towards critical legal studies, Third World approaches as well as the feminist approach, although in smaller measure.

The *Handbook* instructively points out that not just the positivist and naturalist schools, but also international legal theory, in general, is, to use Ruskola's expression, a product of 'warships, telescopes, maps, and clocks' (at 155). The *Handbook* is then an agent of productive subversion, chipping away, slowly but surely, at the established, but challengeable, notions of our discipline. A composite reading of the statist, naturalist, and transnational approaches in the *Handbook* lead to a counter-intuitive conclusion that international economic law is the mother of public international law. The *Handbook* offers us the timely opportunity of confirming our convictions as well as hearing voices that we ignore because of our own professional preoccupations and epistemological locations.

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Individual Contributions

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 Randall Lesaffer, *Roman Law and the Intellectual History of International Law*;
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The speed at which bilateral investment treaties (BITs) multiplied through the 1990s and into the 2000s takes one's breath away. Senior government officials in the developing world, without much apparent objection, signed onto standards of protection long promoted as representing customary international law by those in the developed North. How can one explain the rapidity with which investment treaty norms were embraced? One standard response is that treaties served to signal openness to foreign investment. Despite the costs to sovereignty, BITs were signed in the competition for scarce capital. Treaties both created conditions for the attraction of new capital and raised the 'reputational stakes' of poor countries.¹ Yet, as Lauge

¹ Elkins, Guzman and Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000', 60 *International Organization* (2006) 811, at 841.

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