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978-1-107-03939-1 - The Origins of International Investment Law: Empire, Environment  
and the Safeguarding of Capital

Kate Miles

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## Introduction

The questions that occupy this book concern the evolution of international investment law and the notion that the circumstances of its original emergence continue to have resonance in its modern manifestation. Several years ago, I was struck by what appeared to be the inseparability of international investment law from its socio-political environment and I sought to explore the implications of such a proposition. Indeed, throughout the investigation of these issues, I came to the view that politics and commerce are not only important to the substance of international investment law, but that the social, commercial, and political context in which its rules emerged, in fact, determined its core character.

As the origins and historical evolution of international rules on foreign investment protection are analysed, it is ever more apparent that this character has confronting implications for the current form of international investment law. If its substantive principles and institutional frameworks are, in essence, drawn from centuries-old conceptualisations, and continue to this day to reflect those origins, then a re-evaluation of the modern manifestation of international investment law and its contemporary tensions will be needed. Engagement with theories of international law-making, political narratives, histories of colonialism, and questions on the relationship between host states, capital-exporting states, investors, and the use of legal doctrine would be central to such a re-articulation of the present system of investment protection. Ultimately, an historical account of international investment law would also provide insight into current controversies surrounding the interplay of public and private interests within investment law, the systemic design of international investment dispute resolution, the substantive focus of investment law principles, and the treatment of non-investment issues within international investment law. In this way, a complex story can begin to

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emerge of intertwined actors and interests, constructed doctrines of international law, and recurring dynamics.

The origins of international investment law are located well before the modern network of bilateral investment treaties was established in the latter half of the twentieth century. They are, in fact, deeply embedded within the global expansion of European trading and investment activities that occurred during the seventeenth to early twentieth centuries.<sup>1</sup> Although international rules on the protection of foreign-owned property initially emerged from legal arrangements amongst European nations,<sup>2</sup> it was the transformation from a regional system into international investment law that fundamentally changed its character. In broadening their application to non-European nations, foreign investment and trade protection rules became part of an array of tools used to further the political and commercial aspirations of European states, and, in so doing, became rooted within the processes of colonialism and oppressive protection of commercial interests.<sup>3</sup>

While considering the more enduring impact of these historical circumstances, a picture emerged of international investment law as having been shaped at a fundamental level through this ‘colonial encounter’<sup>4</sup> into a mechanism that protected only the interests of capital-exporting states, excluding the host state from the protective sphere of investment rules.<sup>5</sup> It appeared that, as a result of this early moulding, the host state was unable to call upon the rules of international investment law to address damage suffered at the hands of foreign investors. Furthermore, by the mid-nineteenth century, in a seeming continuation of this initial mode of exclusion, international investment principles had been constructed, using the language of universality and neutrality, to create an ostensibly objective and apolitical regime, but, in fact, one that largely consisted of protection for investors and obligations for capital-importing states to facilitate trade

<sup>1</sup> Lipson, *Standing Guard*, pp. 11–12.

<sup>2</sup> Lipson, *Standing Guard*, pp. 11–12; see also Neufeld, *The International Protection of Private Creditors*, p. 6; Dawson and Head, *International Law*, pp. 4–5.

<sup>3</sup> Lipson, *Standing Guard*, pp. 11–12; Dawson and Head, *International Law*, p. 5.

<sup>4</sup> Anghie, *Imperialism*, pp. 6–7. Anghie conceptualises the doctrines, principles, and institutions of international law as products of the interaction between coloniser and colonised, that is, the legal resolution to problems arising within the colonial context. He coins the phrase ‘colonial encounter’ to encapsulate this process.

<sup>5</sup> Lipson, *Standing Guard*, pp. 4, 8, 37–8; Schrijver, *Sovereignty*, pp. 173–4; Malanczuk, *Akehurst’s Modern International Law*, pp. 9–10.

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and investment.<sup>6</sup> This generated a permanent condition of ‘otherness’ in the host state within international investment law, one that seemed to me to still inform its modern context.<sup>7</sup> What, then, did all this mean for the twenty-first century? For the current raft of investor-state disputes, the thousands of bilateral investment treaties now in existence, and the states in negotiations for new investment agreements?

These were the questions that carried me into this book to explore the origins of international investment law and their implications for foreign investment protection law and policy in the twenty-first century. In essence, my argument is that the political context in which the rules emerged shaped international investment law in fundamental ways, and that these origins still resonate within its modern principles, structures, agreements, and dispute resolution systems. I seek to show how this is illustrated in its sole focus on investor protection,<sup>8</sup> its lack of responsiveness to the impact of investor activity on the local communities and environment of the host state,<sup>9</sup> the alignment of home state interests with those of the investor,<sup>10</sup> the categorisation of public welfare regulation as a treaty violation,<sup>11</sup> and the commodification of the environment in host states for the use of foreign entities. I put forward the argument that these factors are not isolated occurrences

<sup>6</sup> Lipson, *Standing Guard*, pp. 37–8; Anghie, *Imperialism*, pp. 224, 238–9.

<sup>7</sup> For a discussion of the concept of ‘otherness’ in international law and colonialism, see Anghie, *Imperialism*, pp. 3–12; Koskenniemi, *The Gentle Civilizer of Nations*, pp. 126–30; Anghie, ‘Finding the Peripheries’; Weeramantry and Berman, ‘The Grotius Lecture Series’, 1555–69; Fitzpatrick, ‘Terminal Legality’, 9; Gathii ‘Imperialism, Colonialism, and International Law’.

<sup>8</sup> See the discussion in Mann et al., *IISD Model International Agreement*; Sornarajah, ‘The Clash of Globalizations’.

<sup>9</sup> For a discussion of this issue, see Bernasconi-Osterwalder and Brown Weiss, ‘International Investment Rules and Water’, 263; Cosbey et al., *Investment and Sustainable Development*.

<sup>10</sup> See the discussion on ‘commercial diplomacy’ in Sands, ‘Turtles and Torturers’, 541–3; Lee, ‘The Growing Influence of Business in UK Diplomacy’; Sherman and Eliasson, ‘Trade Disputes and Non-State Actors’.

<sup>11</sup> See, e.g., *Methanex Corporation v. United States of America*, (2005) 44 *International Legal Materials* 1345; *S.D. Myers, Inc. v. Canada*, Partial Award (Decision on the Merits), November 2000; *Ethyl Corporation v. Canada*, Jurisdiction Phase, (1999) 38 *International Legal Materials* 708; *Metalclad Corporation v. The United States of Mexico*, Award, 25 August 2000, (2001) 40 *International Legal Materials* 35; *Clayton and Bilcon of Delaware v. Government of Canada*, Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter 11 of NAFTA, February 2008, Appleton & Associates, available at [www.appletonlaw.com/Media/2008/Bilcon%20NAFTA%20Notice%20of%20Intent.pdf](http://www.appletonlaw.com/Media/2008/Bilcon%20NAFTA%20Notice%20of%20Intent.pdf) (last accessed 13 March 2008); *Marion Unglaube v. Republic of Costa Rica*, (ICSID Case No. ARB/08/01, Notice of Intent registered 25 January 2008).

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or approaches, but are, instead, linked and part of a more homogenous web of law, politics, culture, and commerce. In exploring these connections that reach across centuries, this book examines the historical context within which core principles of this area of law were developed, the methodologies of imposition, and modern manifestations of the historical relationship between foreign investors, the host state, and international law. In particular, this research examines recent factors contributing to current pressure to reform international investment law, such as environmentalism, emerging principles of corporate social responsibility (CSR), and the sustainable finance movement.

Notions of empire, colonialism, and imperialism have been afforded a range of meanings within different analytical frameworks and disciplines.<sup>12</sup> Throughout this book, however, I use the term ‘colonialism’ as a reference to explicit policies of formal territory acquisition and establishment of colonies. ‘Imperialism’ has more informal implications, referring to policies that were not limited to formal colonialism, but rather those that continued to employ the practices of dominance, pursued commercial and political expansionism, and involved the economic exploitation of target territories in circumstances beyond actual annexation.<sup>13</sup> The term ‘empire’ is used here to refer to the continuation of these imperialist practices, as well as to refer to the colonial empires created by Britain, France, Germany, the Netherlands, Spain, and Portugal, from the seventeenth to early twentieth centuries.<sup>14</sup> For Doyle, ‘empire’ constitutes:<sup>15</sup>

a relationship, formal or informal, in which one state controls the effective political sovereignty of another society. It can be achieved by force, by political collaboration, by economic, social or cultural dependence. Imperialism is simply the process or policy of maintaining an empire.

<sup>12</sup> See the discussion in Alvarez, ‘Contemporary Foreign Investment Law’. Alvarez traverses a number of approaches, including that of limiting the term ‘empire’ to only those classical empires of Ancient Greece and Rome, examining the characteristics of empire, such as the pursuit of universality and control, and considering the application of the term ‘imperialism’ by political scientists to contemporary hegemonic international relations.

<sup>13</sup> Anghie, *Imperialism*, pp. 11–12; Said, *Culture and Imperialism*, p. 8; Craven, *The Decolonization of International Law*, pp. 19–21; see also the description of ‘empire’ in Doyle, *Empires*, pp. 19–20, 45–6.

<sup>14</sup> Anghie, *Imperialism*, pp. 11–12; Said, *Culture*, p. 8; Craven, *The Decolonization*, pp. 19–21; Doyle, *Empires*, pp. 45–6.

<sup>15</sup> Doyle, *Empires*, p. 45.

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Although Anghie states that '[c]olonialism refers, generally to the practice of settling territories, while "imperialism" refers to the practices of an empire', he also explains that he tends to use the terms interchangeably because of their close relationship with each other.<sup>16</sup> He goes on to describe 'imperialism' as:

a broader and more accurate term with which to describe the practices of powerful Western states in the period following the establishment of the United Nations. This period witnessed the end of formal colonialism, but the continuation, consolidations and elaboration of imperialism.<sup>17</sup>

For Hopkins, the operation of 'informal empire' or 'imperialism' entails the 'diminution of sovereignty through the exercise of power', a state of affairs which itself constitutes a complex set of relations and processes taking many forms.<sup>18</sup> In particular, Hopkins refers to the theories of Strange to explore the power dynamics of informal empire, applying her concepts of 'structural power' and 'relational power' to imperialism.<sup>19</sup> Structural power is described by Strange as entailing control over credit, production, security, knowledge, beliefs, and ideas. A consideration of the interrelated concept of relational power examines the outcomes within contested spaces of authority.<sup>20</sup> Encompassing such spheres of influence clearly takes the examination of empire beyond the limited acts of formal annexation of territory. These approaches, then, of Anghie, Craven, Doyle, and Hopkins, are essentially the understandings and conceptualisations of colonialism, imperialism, and empire that are also employed throughout this book.

## I. Patterns, challenge, and reconceptualisation

At the outset of this research, I was very much of the view that through an historical analysis of its evolution, new light could be shed on the

<sup>16</sup> Anghie, *Imperialism*, p. 11.   <sup>17</sup> *Ibid.*, pp. 11–12.

<sup>18</sup> Hopkins, 'Informal Empire', 476–7; see further Cain and Hopkins, *British Imperialism*; see also the discussion in Akita, *Gentlemanly Capitalism*, pp. 1–5; see further the definition of 'imperialism' in the seminal article of Gallagher and Robinson, 'The Imperialism of Free Trade', 5–6:

Imperialism, perhaps, may be defined as a sufficient political function of this process of integrating new regions into the expanding economy; its character is largely decided by the various and changing relationships between the political and economic elements of expansion in any particular region and time.

<sup>19</sup> Hopkins, 'Informal Empire', 477–8; Strange, *States*, pp. 24–8.

<sup>20</sup> Strange, *States*, pp. 24–8; Hopkins, 'Informal Empire', 477–8.

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current form of foreign investment protection law. I was, of course, at that stage, unsure as to quite what would emerge through such an investigation. However, by adopting an historical perspective, patterns of ‘assertion of power and responses to power’<sup>21</sup> in the evolution of international investment law began to take shape. And those conceptualisations and dynamics derived from its origins in imperialism appeared to have remained imbued within modern international investment law. Deliberating further on whether this was the case, I also asked the question: can those patterns be broken, and, if so, what form would a reconceptualised international investment law take?

A. *Structure*

Approaching these questions through a prism of historical evaluation, this book is divided into three components that mirror significant periods in the development of international investment law: emergence and early events, contemporary interaction, and future trajectories.

## 1. Origins of international investment law

Part I of the book contains two chapters examining the origins of foreign investment protection law through to the changing dynamic generated by the process of decolonisation in the mid-twentieth century. This section serves as the foundation for key arguments developed throughout the book, establishing the historical links between investor and state, the political circumstances surrounding the emergence of international rules on foreign investment protection, the interplay of power and responses to power, and the deeply intertwined processes of assertion and creation of international investment law.

To this end, Chapter 1 explores the trading and investment arrangements of seventeenth- to early twentieth-century Western states with non-European nations. It examines the close alignment of state interests with those of their trading and investing nationals, with a particular focus on the Dutch East India Company,<sup>22</sup> and the way in which these

<sup>21</sup> The power relations involved in processes of emergence of legal rules and regimes are explored in Benton, *Law and Colonial Cultures*. Her framing of the emergence of international law as a process of ‘repetitive assertions of power and responses to power’ and its implications for the emergence of international rules on foreign investment protection are explained further in this chapter and explored in depth below in Chapter 1.

<sup>22</sup> This book concentrates on the Dutch East India Company as illustrative of the relationship between states and the large trading companies, such as the English East

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entwined relationships influenced the development of international legal doctrine to protect foreign-owned property.<sup>23</sup> It examines the legal tools that were used at the time to legitimise the commercial and political aspirations of capital-exporting states and their nationals, together with the influence of these approaches on the emergence of international rules of foreign investment protection.<sup>24</sup>

Chapter 1 also applies Benton's theories on the power relations involved in the emergence of international law to the evolution of international investment law.<sup>25</sup> Benton identifies the creation of legal institutions and international rules during this era with social, political, and economic control, asserting that international law emerged through a process of 'repetitive assertions of power and responses to power'.<sup>26</sup> This insight is equally applicable to the development of the legal rules that formed the basis of the modern system of international investment law. Viewing early forms of interaction in this field through an understanding of Benton's theories reveals that the emergence of these rules involved a dual process of assertion and creation. Through the assertion of foreign investment protection rules as existing international law, together with the use of force, capital-exporting states directed the evolution of the substance of international investment law solely into that of investor protection. It was a process by which one perspective became entrenched as law and the methods used to enforce that perspective were legitimised by the conferring of legal justification. And by the nineteenth century, capital-exporting states were regularly asserting their viewpoint on foreign investment protection as representing international law and they enforced it as such.<sup>27</sup> These assertions by

India Company, Dutch West India Company, and French East India Company. It is beyond the scope of this book to analyse all international trading companies of the sixteenth to nineteenth centuries. For information on the trading companies and the sovereign powers they exercised, see Steensgaard, 'The Dutch East India Company', 235, 237, 244–6, 251; Vos, *Gentle Janus*, p. 1; Philips, *The East India Company*, p. 23; Keay, *The Honourable Company*, pp. 9, 39, 363; Sutherland, *The East India Company*, pp. 3–5.

<sup>23</sup> Anghie, *Imperialism*, p. 224; Sornarajah, *The International Law on Foreign Investment*, p. 38.

<sup>24</sup> See, e.g., the use of the doctrine of diplomatic protection of alien property, concession contracts, capitulation treaties, diplomatic pressure, extraterritorial jurisdiction, military intervention, colonial annexation of territory, and friendship, commerce, and navigation treaties. See the discussion in Lipson, *Standing Guard*, pp. 12–21; Sornarajah, *Foreign Investment*, pp. 19–20; Schrijver, *Sovereignty*, pp. 173–5; see also Porras, 'Constructing International Law', 744–7, 802–4.

<sup>25</sup> Benton, *Law and Colonial Cultures*, pp. 10–11. <sup>26</sup> *Ibid.*, p. 11.

<sup>27</sup> See, e.g., the disputes surrounding *The United States and Paraguay Navigation Company Claim* (Moore, *A History and Digest*, pp. 1485, 1865); *Britain (Finlay) v. Greece* (1846) 39 *British*

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capital-exporting states, however, did not go uncontested by capital-importing states.<sup>28</sup> Chapter 1 explores the outcomes of that contest.

Chapter 1 also considers the relationship of early traders, investors, and colonisers with the environment of host states and argues that this historical mode of interaction has shaped the modern relationship between foreign investors and the environment and the narrow conceptualisation of the environment reflected in modern international investment law – essentially that of a commodity for exploitation – and that the contentious nature of current interaction between the investment sector and environmental protection advocates may be related to this core form of perception.

The approach to the environment of the host state in the era of empire was largely one of possession and control. Its manifestation ranged from indiscriminate destruction, such as the devastation of St Helena<sup>29</sup> and Mauritius,<sup>30</sup> to controlled regimes, such as imperial forestry conservation programmes in India,<sup>31</sup> and to the indirect consequences of colonial activities.<sup>32</sup> Despite individual variants, colonial encounters with the environment of host states were experienced by foreign traders, investors, and settlers through the lenses of their own European culture.<sup>33</sup> Although they adapted to the local context, their fundamental understanding of the land and its inhabitants was created through Western expansionist eyes.<sup>34</sup> It was that vision that shaped imperial natural resource extraction, local environmental management practices, regulatory regimes, and the displacement of indigenous communities from their land.<sup>35</sup> The effects of this imperial perspective are still felt in the

*and Foreign State Papers* 410; *Delagoa Bay Railroad Arbitration*; *Britain v. The Kingdom of the Two Sicilies* (1839–1840) 28 *British and Foreign State Papers*, pp. 1163–1242; and the *Venezuelan Arbitrations* (Ralston, *Venezuelan Arbitrations*).

<sup>28</sup> Schrijver, *Sovereignty*, pp. 177–8; Shea, *The Calvo Clause*, pp. 21–30.

<sup>29</sup> Grove, *Green Imperialism*, pp. 98–9. <sup>30</sup> *Ibid.*, pp. 150–1.

<sup>31</sup> *Ibid.*, pp. 6–12; Barton, *Empire Forestry*, pp. 163–6.

<sup>32</sup> See, e.g., the treatment of the island of St Helena. Accounts are given of ships' crews in the early seventeenth century destroying trees on the island for the sole purpose of preventing rival nations from benefiting from the fruit. Following the 1658 acquisition of St Helena by the English East India Company, the activities of the Company and the settlers caused the once lush tropical island to suffer droughts, deforestation, soil erosion, species loss, and multiple effects from the introduction of foreign species: see the discussion in Grove, *Green Imperialism*, pp. 98–9, 103–25.

<sup>33</sup> Richardson, Mgbaoji, and Botchway, 'Environmental Law', 413, 415–16; Dunlap, 'Ecology', 76, 76.

<sup>34</sup> Dunlap, 'Ecology', 76.

<sup>35</sup> Gathii, 'Imperialism'; Kameri-Mbote and Cullet, 'Law, Colonialism'.



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land management regulations of postcolonial societies<sup>36</sup> – and I sought to explore whether a comparable process had occurred with respect to modern international investment rules.

## 2. Foreign investment protection in a changing political environment

Politics were central to the formation of international rules on foreign investment protection, and, in multiple ways, they continued to play a fundamental role in the development of this field. Significantly, as global political conditions shifted during the twentieth century, challenges were made to the form and substance of foreign investment protection law.<sup>37</sup> Chapter 2 of this book examines those challenges. It analyses key events and the emergence of social movements that embodied host state resistance to the international system of foreign investment protection asserted by capital-exporting states. It examines the agrarian reforms of the Soviet Union and Mexico in the early part of the twentieth century.<sup>38</sup> It considers the postcolonial nationalisations and the promotion of the New International Economic Order (NIEO) in the mid-twentieth century as attempts by postcolonial states to play an active role in the development of international investment law and to reshape the rules to take account of their needs.<sup>39</sup>

While the decolonisation period initially held the promise of economic autonomy and prosperity for postcolonial states, it also posed a significant challenge to the structural hegemony of capital-exporting states within foreign investment protection law.<sup>40</sup> It brought uncertainty and political risk to investments secured under colonial regimes.<sup>41</sup> I argue in Chapter 2 that this era of postcolonial nationalisations and calls for reform to international economic structures embodied an assertion of

<sup>36</sup> Kameri-Mbote and Cullet, 'Law, Colonialism'; Richardson, Mgbefo, and Botchway, 'Environmental Law', 415–21; for a discussion on the connections between the impacts of 'empire-building' on indigenous peoples and the continuing effects of those policies, see Richardson, Imai, and McNeil, 'Indigenous Peoples', 3, 4–5.

<sup>37</sup> Anghie, *Imperialism*, pp. 10–11, 196–9, 211–20; Lipson, *Standing Guard*, pp. 65–70, 77; Odumosu, 'Law and Politics'.

<sup>38</sup> Lipson, *Standing Guard*, pp. 65–70, 77; Kunz, 'The Mexican Expropriations', 25–7; Gathii, 'Third World Approaches', 255, 257; see also the discussion in Newcombe and Paradell, *Law and Practice*, p. 18.

<sup>39</sup> Anghie, *Imperialism*, pp. 10–11, 211–20; see the discussion in Newcombe and Paradell, *Law and Practice*, pp. 18–19; Subedi, *International Investment Law*, p. 21.

<sup>40</sup> Anghie, *Imperialism*, pp. 196–9, 212–15; Odumosu, 'Law and Politics', 255; Mickelson, 'Rhetoric and Rage', 362; Richardson, 'Environmental Law', 2.

<sup>41</sup> Odumosu, 'Law and Politics', 255; Anghie, *Imperialism*, pp. 196–9, 212–15.

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host state interests within international investment rules – and that this generated responses from the investment sector and capital-exporting states designed to constrain those attempts and maintain a similar *de facto* level of control as had been enjoyed under colonial systems. It is argued that capital-exporting states and investor interests framed host state attempts to ameliorate the often harsh effects of the investor-focused international rules on foreign investment as ‘politicising’ investment disputes. This chapter examines the response to this need for ‘depoliticisation’.

In considering the role of social movements in bringing pressure to reform international investment law,<sup>42</sup> Chapter 2 also examines the NIEO as a movement developed within a wider context of protest. It continues to develop the idea of international investment law evolving through a complex process of ‘ebb and flow’, ‘challenge and response’, but, in Chapter 2, these themes are unpacked within the context of social movements and investment sector responses to those challenges. I argue that this particular form of engagement has been instrumental in the construction of new rules, mechanisms, and institutions designed to maintain high levels of foreign investment protection as close as possible to that created under the era of empire. Adding a further layer to this picture, I also explore the proposition that while social movements of various kinds have agitated for reform of international investment law since the mid-twentieth century, ironically they have also provided fuel for the investment sector to legitimise the means taken to preserve the prevailing conceptualisations of investor protection regimes.<sup>43</sup> Again, in this milieu, the spectre of the ‘political’ is often raised to support investor perspectives and the consequential need to remove it from investment disputes.<sup>44</sup>

To animate these arguments, Chapter 2 focuses on two forms of social movement that have been particularly potent in the foreign investment discourse – grassroots activism and environmentalism. It explores

<sup>42</sup> See, e.g., the discussion on the New International Economic Order in Anghie, *Imperialism*, pp. 10–11, 211–20; see Odumosu, ‘Law and Politics’; see also for a discussion on the role of social movements in the development of international institutions, Rajagopal, ‘From Resistance to Renewal’.

<sup>43</sup> For examples of recent arguments warning of the need to protect against the influence of pressure groups on investment issues, see Wälde and Kolo, ‘Environmental Regulation’; Wälde and Ndi, ‘Stabilizing’, 230–1.

<sup>44</sup> Wälde and Kolo, ‘Environmental Regulation’; see also Wälde and Ndi, ‘Stabilizing’; see also, e.g., the comments in Weiler, ‘Good Faith’, 701.