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Possibilities of the Past: Histories of the NIEO and the Travails of Critique

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Abstract

The resurfacing interest in the New International Economic Order (NIEO) is mainly driven by the ambition of regaining a sense for past possibilities in order to question the present and to open up different futures. This ambition resonates with the core of critical thinking which pushes toward an appreciation of contingencies. What was possible? When approaching this question, however, historical inquiries must not overstate the possibilities of different action at the expense of determining structures. More specifically, they need to deal with the low degree of institutionalized politics on the international plane. And they need to counter a tendency toward excess nostalgia for that which was not. More than anything else, the history of the NIEO testifies to the great difficulties in turning claims about contingency into compelling narratives. Another way of approaching the NIEO, however, does not place actual possibilities at its centre, but unrealized potentials.

Keywords

New International Economic Order (NIEO) – contextualization – contingency – critical legal histories – determination – possibility – nostalgia – normative surplus

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1 Introduction

The resurgent interest in the New International Economic Order (NIEO) is mainly driven by ambitions of reinstating a sense for possibilities of the past so as to reconsider the present and to open up different futures.¹ Introducing a recent special issue on the NIEO, Nils Gilman thus writes that it is ‘crucial ... to appreciate the contingency of the events and decisions that took place.’² Gilman further writes that ‘[r]eappreciating the seriousness with which the NIEO was regarded in its time, not least by its fervent opponents, can help us to reopen the possibility space of contemporary geopolitics.’³ These ambitions resonate with a core feature of critical thinking, which is to change the modality of law from necessity to possibility.⁴ It is a closely related calling for international legal histories to show that the course of international law could have taken different turns. But all too often it seems that the contingency of legal developments—the possibility of something different—remains a mere assertion which is only sustained by a reminder of those past moments of contestation that have since been glossed over. Yet, recalling moments of contestation is not the same as arguing that past debates could have been closed down differently, that the course of international law could have taken different turns. The writing of international law’s histories should turn assertions of contingency into compelling narratives.⁵ What else was possible?

On this account, I will argue, a renewed appreciation of the NIEO turns out to be disappointing. More than anything else, the history of the NIEO serves as an illustration of how difficult it is to tell a compelling story on how things

1 Gilman, Nils. ‘The New International Economic Order: A Reintroduction’. *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 6 (2015), 1–16; Gordon, Ruth. ‘The Dawn of a New, New International Economic Order?’. *Law and Contemporary Problems* 72 (2009), 131–162; von Bernstorff, Jochen. ‘International Law and Global Justice: On Recent Inquiries into the Dark Side of Economic Globalization’. *European Journal of International Law* 26 (2015), 279–293.

2 Gilman, ‘The New International Economic Order’ 2015 (n. 1), 11.

3 *Ibid.*, 11.

4 Menke, Christoph. ‘Die Möglichkeit eines anderen Rechts’. *Deutsche Zeitschrift für Philosophie* 62 (2014), 136–143. Menke argues with reference to Walter Benjamin’s idea of the *Entsetzung* of the law, which Benjamin develops in ‘Zur Kritik der Gewalt’. In *Gesammelte Schriften*, vol. 2, bk. 1, eds. Rolf Tiedemann and Hermann Schweppenhäuser (Frankfurt: Suhrkamp, 1977), 179–203, 197–198; in English translation: ‘Critique of Violence’. In *Reflections*, trans. Edmund Jephcott (New York: Schocken Books 1978), 277–300. See also Mangabeira Unger, Roberto. *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (New York: Verso, 2001).

5 See, in further detail, Venzke, Ingo. ‘Cracking the Frame? On the Prospects of Change in a World of Struggle’. *European Journal of International Law* 27 (2016), 831–851.

could have turned out differently. For example, Gilman and others have noted that the NIEO would have achieved greater success if relevant actors had made different choices.⁶ But could they have made such choices? Under which conditions and with which consequences? Historical inquiry also carries the chore of helping to understand why something happened the way it did. It must not place excessive emphasis on the possibilities of action, nor be imbued by excess nostalgia for that which was not. In short, a quest to regain a sense for possibilities of the past must not proclaim false contingencies.⁷

There is another way of looking at the possibilities of the past, not as a claim about possible developments, but as a recognition of unrealized potentials. On this reading, the return to the NIEO is not an expression of nostalgia but, I will suggest, evidence of its normative surplus. Albeit limited in its success at its time, the NIEO left its mark on discursive structures. Remembering the NIEO keeps alive the actual experience of a much wider, deeper, and more inspired debate about international economic governance and how it could be imagined differently.⁸

While aiming to contribute to the debates about the NIEO, my argument connects to wider methodological challenges in the writing of international legal histories, perhaps the main challenge at present: contextualizing the law can show its contingency and unsettle its pretention to a timeless rationality. But at the same time, critical legal histories must also recognize that debates about law cannot be reduced to their context alone. There must be something that breaks and escapes the context.⁹ There is no such thing as *the* context, it

6 See, e.g., White, John. 'Review: The New International Economic Order: What Is It?'. *International Affairs* 54 (1978), 626–634, 630; Gilman, 'The New International Economic Order' 2015 (n. 1), 11.

7 Marks, Susan. 'False Contingency'. *Current Legal Problems* 62 (2009), 1–21; Beckett, Jason. 'False Contingency'. In *Fundamental Concepts of International Law: The Construction of a Discipline*, eds. Jean d'Aspremont and Sahib Singh (Cheltenham: Elgar, 2017, forthcoming). See also Orford, Anne. 'Food Security, Free Trade, and the Battle for the State'. *Journal of International Law & International Relations* 11 (2015), 1, 25–26.

8 On experience and imagination as crucial sources for normativity, see also Möllers, Christoph. *Die Möglichkeit der Normen—Über eine Praxis jenseits von Moralität und Kausalität* (Berlin: Surhkamp, 2016).

9 Compare Koskeniemi, Martti. 'Histories of International Law: Significance and Problems for a Critical View'. *Temple International and Comparative Law Journal* 27 (2013), 215–240, 216: 'Law cannot just be a reflection of the social or historical context. It contains, and must contain, a utopian, context-breaking aspect. How to integrate that into the studies of international legal history is perhaps the greatest methodological challenge today'. See also Tomlins, Christopher. 'Historicism and Materiality in Legal Theory'. In *Law, Theory and History: New Essays on a Neglected Dialogue*, eds. Maxymilian Del Mar and Michael Lobban (Oxford: Hart, 2016), 57–83.

does not have clear borders in space or time.¹⁰ We could say that it was highly unlikely that the demands of the NIEO would have achieved greater success in the 1970s. But establishing its limited success in the past disregards the potential that it retains in the present and for any future.

I will proceed as follows: I will first situate my argument within debates about the callings of history, and of international legal history in particular. I will thereby argue for a duality of critical historical inquiry, which always strives to unsettle claims to necessity in order to expose contingency while, at the same time, it aims at understanding why something happened the way it did (Section 2.1). I will then discuss more generally what it may mean that something was possible, rather than necessary or impossible, arguing that those distinctions should not be understood as natural properties of a specific historical instance, let alone of historical developments generally. They are the products of writing and thinking about the past (Section 2.2). With regard to international legal history, and the history of the NIEO in particular, I then draw attention to three specific obstacles when trying to regain a sense of past possibilities. Such attempts risk exaggerating the possibilities of different action at the expense of determining structures, they struggle with international law's low degree of institutionalized politics to induce legal change, and they tend to be imbued with excess nostalgia (Section 2.3).

Turning to the histories of the NIEO, I will briefly summarize the resurging attention that the NIEO has received and the main reasons that have sustained this attention (Section 3.1). Diving into the NIEO then is indeed a liberating and uplifting experience that exposes how pale and uninspired most of the debates about international economic governance have been more recently, at least in the standard political fora where the language of neo-liberalism brushed aside meaningful opposition. There was an upward momentum in the 1960s and early 1970s that may also inspire the present as well as a different future (Section 3.2). But this experience should not distract from the determining factors that closed down the debates in a way that mostly failed the NIEO. Developing countries' assertive push for the Charter of Economic Rights and Duties of States (CERDS) led to confrontation and countermoves on the part of developed states. Developing countries' momentarily strong and unified position started to unravel due to defections, diverging interests, and changing conceptions of economic development (Section 3.3).

10 Uncertainties about periodization are an expression of this difficulty. See Diggelmann, Oliver. 'The Periodization of the History of International Law'. In *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press 2012), 997–1010.

Against the background of this reading of the NIEO, I then approach the question of what else could have happened with the help of the diplomatic exchanges at the time, especially as they presented themselves to the Dutch government. The view of the Dutch government recommends itself because after 1973 it was exceptionally sympathetic towards the programme of the NIEO. When voting on the CERDS, it was the only country of the European Economic Community to abstain, rather than to vote against the Charter. This abstention reflects the limitations of how far the Dutch government was willing to go. But its sympathy was genuine and recommends its perspective for gauging what was possible, and what was not. More than anything else, this renewed appreciation of the NIEO testifies to the difficulties in turning claims of contingency into a compelling narrative (Section 4).

I will finally contrast this sobering reading of the possibilities of the past with an appreciation of its unrealized potential. Rather than nostalgia for a past that did not happen, the renewed interest in the NIEO is an expression of its normative surplus. Not the possibility of a different course of international legal developments is key, but the potentiality of the past discourse that continues to be felt in the present (Section 5).

2 Possibilities of the Past

2.1 *The Callings of (International Legal) History*

Trying to understand the past in terms of its own possibilities and not as a mere prelude to the present may well be the defining sensibility of historical inquiry.¹¹ As the eminent Dutch historian Johan Huizinga wrote, a historian ‘must constantly put himself at a point in the past at which the known factors will seem to permit different outcomes’.¹² This is what distinguishes the historian from the social scientist who, according to Huizinga, ‘deals with his material as if the outcome were given in the known facts: he simply searches the way in which the result was already determined in the facts’.¹³ Social scientific inquiry tends to abstract from singular events and from concrete contexts in order to focus on overall regularities instead.¹⁴ Even if historical debate may also be

11 See, e.g., Nipperdey, Thomas. ‘Kann Geschichte objektiv sein?’. In *Nachdenken über die deutsche Geschichte* (Munich: CH Beck, 1986), 232.

12 Huizinga, Johan. ‘The Idea of History’. In *The Varieties of History*, ed. Fritz Stern (New York: Vintage, 1973), 290–303, 292.

13 Ibid.

14 Sewell Jr., William H. *Logics of History* (Chicago: University of Chicago Press, 2005), 1–21; Lebow, Richard Ned. *Forbidden Fruit: Counterfactuals and International Relations* (Princeton: Princeton University Press, 2010), 33.

about causal relationships or, better, determining factors, it is less interested in general laws of society and maintains a good degree of scepticism about their very existence. It zooms in on specific contexts and is mainly concerned with the judgments of concrete possibilities.¹⁵

At the same time, historical writing certainly does not want to produce mere chronologies of events. It wants to tell stories and such stories then include arguments, if not unarticulated assumptions, about *why* something has happened—why the course of international law took one way rather than another. The terrains of historical and social scientific inquiry thus overlap, even if their sensibilities differ.¹⁶ The ‘historian’s noble dream’, in Thomas Nipperdey’s words, is one of giving an open future back to the past.¹⁷

Patrick Boucheron recently affirmed in his inaugural lecture that historical inquiry’s great potential lies precisely in reinstating the futures that were never realized.¹⁸ Boucheron echoes Michel Foucault’s genealogical mode of inquiry that wants to unsettle the foundation on which the present purports to be built, to reveal its contradictions, its malleability, and, above all, its contingency.¹⁹ Foucault’s work has made clear that such a practice of reinstating the possibilities of the past is to be understood as an intervention into the present.²⁰ It is the received memory and the conventional histories in the present that fail to remember the openness of the past, and that ought to change so as to open up different futures.²¹

In large parts of legal historiography this approach has itself become rather conventional. The prevailing approach is one that historicizes law in order to

15 Nijhuis, Ton. ‘Geschiedenis, Toeval en Contingentie’. In *Toeval*, eds. Suzette Haakma and Etienne Lemmens (Utrecht: Studium Generale, 2003), 49–72, 68.

16 Of course, there are strands within both historical and social scientific scholarship that question or deliberately cross this divide. See the discussion in Sewell, *Logics of History* 2005 (n. 14), 1–21. See also Fioretos, Orfeo. ‘Historical Institutionalism in International Relations’. *International Organization* 65 (2011) 367–399; Tucker, Aviezer. *A Companion to the Philosophy of History and Historiography* (Chichester: Blackwell, 2009), 98–108.

17 Nipperdey, ‘Kann Geschichte objektiv sein?’ 1986 (n. 11), 232.

18 Boucheron, Patrick. *Ce Que Peut L’histoire* (Paris: Fayard, 2016).

19 See especially Foucault, Michel. ‘Nietzsche, Genealogy, History’. In *Language, Counter-Memory, Practice: Selected Essays and Interviews*, ed. Donald F. Bouchart (Ithaca: Cornell University Press, 1977), 139–164. See also Bevir, Mark. ‘What is Genealogy?’. *Journal of the Philosophy of History* 2 (2008), 263–275.

20 See in detail Garland, David. ‘What Is a “History of the Present”? On Foucault’s Genealogies and Their Critical Preconditions’. *Punishment & Society* 16 (2014), 365–384.

21 This is worked out nicely in a reading of Georg Büchner’s *Dantons Tod* [Danton’s Death] by Bennett, Michael Y. *Narrating the Past through Theatre: Four Crucial Texts* (New York: Palgrave Macmillan, 2013), 22–36.

'pull down, to render contingent, and to politicize'.²² In the wake of Robert Gordon's seminal 1984 article, critical legal history has become a well-received mode of inquiry.²³ It is also clear that it has gained ground at the loss of specificity. Gordon's 1997 definition of critical legal history hardly excludes anything:

I would say it is any approach to the past that produces disturbances in the field—that inverts or scrambles familiar narratives of stasis, recovery, or progress; anything that advances rival perspectives (such as those of the losers rather than the winners) for surveying developments, or that posits alternative trajectories that might have produced a very different present—in short any approach that unsettles the familiar strategies that we use to tame the past in order to normalize the present.²⁴

Critical legal histories, especially of US law, have arguably succeeded in revealing the possibilities of the past to such an extent that the recognition of contingency has become trite. Interjections have instead become louder to step back and to reconsider what's next.²⁵ Histories of international law, as is the case for other domains of law, are at a different place.²⁶ Critical historical work is well under way, but the production of contingency still has a large terrain to cover, especially if it takes seriously the task of turning the assertion of contingency into a convincing narrative.

Rich methodological reflection and debate have flanked the critical historical work that is now well under way in international law.²⁷ This includes

22 Parker, Kunal M. *Common Law, History, and Democracy in America 1790–1900* (Cambridge: Cambridge University Press, 2011), 279, quoted in Tomlins, Christopher. 'Be Operational, or Disappear': Thoughts on a Present Discontent'. *Annual Review in Law and Social Science* 12 (2016), 1–23, 5. See also Sabel, Charles F. and Jonathan Zeitlin. 'Historical Alternatives to Mass Production: Politics, Markets and Technology in Nineteenth-Century Industrialization'. *Past and Present* 108 (1985), 133–176, 161.

23 Gordon, Robert W. 'Critical Legal Histories'. *Stanford Law Review* 36 (1984), 57–125. For an appreciation and critique see Tomlins, Christopher. 'What Is Left of the Law and Society Paradigm after Critique? Revisiting Gordon's "Critical Legal Histories"'. *Law and Social Inquiry* 37 (2012), 155–166.

24 Gordon, Robert W. 'The Arrival of Critical Historicism'. *Stanford Law Review* 49 (1997), 1023–1030, 1024.

25 Tomlins, 'Be Operational, or Disappear' 2016 (n. 22).

26 See, by comparison, the discussion in Salaymeh, Lena. *The Beginnings of Islamic Law: Late Antique Islamic Legal Traditions* (Cambridge: Cambridge University Press, 2016), 3. I thank Chris Tomlins for this point and reference.

27 See, among others, Kemmerer, Alexandra. 'Turning Aside. On International Law and Its History'. In *Progress in International Law*, eds. Russell A. Miller and Rebecca M. Bratspies (Leiden: Martinus Nijhoff, 2008), 71–94; Skouteris, Thomas. 'Engaging History

the specific point of thinking about international law's development as contingent. As Martti Koskenniemi has put it, critique 'seeks to highlight the contingency and contestability of global institutions and their redistributive consequences'.²⁸ But it must also take seriously the next step of trying to understand why one possibility rather than another was realized. Otherwise accounts of contingency remain false, as Susan Marks has argued.²⁹ The question of how international law could have been otherwise thus involves this duality of historical inquiry: it wishes to show contingency and must simultaneously gain an understanding of why something happened the way it did. These are two sides of the same coin, really.³⁰

2.2 *What is Possible?*

Huizinga continued his take on the task of historians by claiming that '[o]nly by continually recognizing that possibilities are unlimited can the historian do justice to the fullness of life'.³¹ His claim is directed against explanations of the past out of the knowledge of the present, and as such it has purchase. But

in International Law'. In *New Approaches to International Law*, eds. José María Beneyto and David Kennedy (The Hague: Asser Press, 2012), 99–122; Koskenniemi, 'Histories of International Law' 2013 (n. 9); Craven, Matthew. 'Theorising the Turn to History in International Law'. In *The Oxford Handbook of the Theory of International Law*, eds. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press 2016), 21–38; Becker, Lorca Arnulf. 'Eurocentrism in the History of International Law'. In *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 1034–1057. See also the book review symposium in *European Journal of International Law* 25 (2014), 287–341, with contributions by Alexandra Kemmerer, Rose Parfitt, Stefan B. Kirmse, Nahed Samour, Will Hanley, Anne-Charlotte Martineau, Anne Peters and Bardo Fassbender.

28 Koskenniemi, Martti. 'Projects of World Community'. In *Realizing Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press 2012), 3–13, 3 and 12. See also Feichtner, Isabel. 'Critical Scholarship and Responsible Practice of International Law. How Can the Two Be Reconciled?'. *Leiden Journal of International Law* 29 (2016), 979–1000.

29 Marks, 'False Contingency' 2009 (n. 7).

30 Understanding why something has happened also always includes an understanding of why something else did not happen. Conversely, trying to understand what else could have happened thus helps understanding the reasons for what actually happened. See Tucker, Aviezer. *Our Knowledge of the Past* (Cambridge: Cambridge University Press, 2004), 226; Nijhuis, 'Geschiedenis' 2003 (n. 15), 56–57. Also for Christopher Tomlins '[l]egal history fulfills its responsibility by undertaking a dual task, of recovery and rejection—the recovery of memory and right, the rejection of regimes of interpellation'. While embedded in a different argument, the idea is similar and combines the recovery of what was with a rejection of its positioning as a certain foundation. Tomlins, 'Be Operational, or Disappear' 2016 (n. 22), 2.

31 Huizinga, 'The Idea of History' 1973 (n. 12), 292.

it cannot be quite right. Some things are impossible, and others next to necessary. Not recognizing the limits of what is possible risks losing a critical sense for why some things happen rather than others. Ascribing developments to the working of chance alone prevents any critical understanding of why something has happened, and it avoids questions of responsibility for anything.³²

Necessity and impossibility are not natural attributes of historical developments either, certainly not when we inquire into the development of social phenomena such as law. Few authors have made that argument with such clarity and verve as Max Horkheimer in his distinction between traditional and critical theory.³³ What is (im)possible depends on the state of beliefs of historical actors and, in retrospect, on historical judgment.³⁴ This posture does not render everything possible. There were limitations on what actors have believed in the past and there are argumentative constraints in the present of what to make of that past.³⁵ These are the parameters within which critical legal histories need to turn claims of contingency into compelling narratives.

Historical inquiry is, in fact, mainly about judgments of possibility. Placing his argument between thinking in terms of necessity and pure chance, Isaiah Berlin wrote that

no one will wish to deny that we do often argue about the best among the possible courses of action open to human beings in the present and

32 Compare the view of Raymond Aron, who held that 'le fait historique est, par essence, irréductible à l'ordre: le hasard est le fondement de l'histoire'. Quoted in Nijhuis, 'Geschiedenis' 2003 (n. 15), 50.

33 Horkheimer, Max. 'Traditional and Critical Theory'. In *Critical Theory: Selected Essays* (New York: Continuum, 2002), 188–232, 230–231. See also Tomlins, Christopher. 'After Critical Legal History: Scope, Scale, Structure'. *Annual Review of Law and Social Science* 8 (2012), 31–68, 36: 'Notwithstanding frequent claims for the contingency of the moments that critical legal historians study, the softness of existing structures, their "perpetual malleability", the empirical lesson that Witt and Goluboff impart is that contingency is not a given property of history', with reference to Gordon, Robert W. 'The past as authority and as social critic: stabilizing and destabilizing functions of history in legal argument'. In *The Historic Turn in the Human Sciences*, ed. Terrence J. McDonald (Ann Arbor: University of Michigan Press, 1996), 339–378, 364; Witt, John, F. *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, MA: Harvard University Press, 2004); Goluboff, Risa L. *The Lost Promise of Civil Rights* (Cambridge, MA: Harvard University Press, 2007).

34 See also Koskeniemi, 'Histories of International Law' 2013 (n. 9), 230–231.

35 For Niklas Luhmann the whole idea of social structures is built around their function of dividing the possible from the impossible, Luhmann, Niklas. *Kontingenz und Recht* (Berlin: Suhrkamp, 2013), 47–61. See also Salaymeh, *The Beginnings of Islamic Law* 2016 (n. 26), 15–16.

past and future, in fiction and in dreams; that historians ... do attempt to establish, as well as they are able, what these possibilities are.³⁶

Such historical judgment, Berlin continued, 'consists precisely in the placing of what occurred (or might occur) in the context of what could have happened (or could happen) and in the demarcation of this from what could not; that this is what ... the sense of history, in the end, comes to'.³⁷

Could actors at the time have carried parts of the NIEO to greater fruition? John White, who was sceptical of the NIEO, and Richard Falk, who was sympathetic towards it, both see the main reason for the NIEO's failure in mistaken strategic choices of the Group of 77, suggesting that different choices could have ensured the NIEO's considerable success.³⁸ Gilman likewise writes that 'had different choices been exercised, we might have gotten a strikingly different future'.³⁹ But could such choices have been exercised? Many compelling accounts of how the debates of the NIEO were closed down look at structural factors, especially the increasingly dominant ways of neo-liberal thinking.⁴⁰ It is difficult to see plausible alternatives within these structures of discourse, thinking, and thus action.

If nothing else, these difficulties underscore once more that contingency cannot be claimed easily but must be shown to exist in concrete instances. It must be produced, not the least through historical work. In the process of this production, the writing of international legal histories is confronted with three more specific challenges that I will illustrate with reference to the NIEO: it risks overemphasizing the possibilities of action, struggles with international law's low degree of institutionalized politics to induce legal change, and tends to be imbued by excess nostalgia.

2.3 *Action, International Legal Change, and Nostalgia*

In debates about the sense and nonsense of writing counterfactual histories, one of the main points of critique has been that they place too much

36 Berlin, Isaiah. 'Historical Inevitability'. In *Liberty: Incorporating 'Four Essays on Liberty'*, ed. Henry Hardy (Oxford: Oxford University Press 2002), 94–165, 121.

37 Ibid.

38 White, 'Review' 1978 (n. 6), 630; for Falk's position see Rajagopal, Balakrishnan. *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge: Cambridge University Press, 2003), 80.

39 Gilman, 'The New International Economic Order' 2015 (n. 1), 11.

40 Özsü, Umut. 'Neoliberalism and the New International Economic Order: A History of "Contemporary Legal Thought"'. In *In Search of Contemporary Legal Thought*, eds. Christopher L. Tomlins and Justin Desautels-Stein (Cambridge: Cambridge University Press, 2017, forthcoming).

emphasis on the possibilities of choice and different action. Such histories arguably adopt questionable views of history in which great men make history, and could have made history differently.⁴¹ In his controversial volume, Niall Ferguson for instance sees counterfactual histories as a ‘necessary antidote’ to scholarship that makes too much of what has in fact happened.⁴² He sets out in a questionable feud against materialist, especially Marxist, accounts of historical developments that, in his view, leave no room for historical actors and the choices they make.⁴³ In response, he withdraws from any considerations of contextual constraints and comes close to suggesting that the world lends to the great men’s will.⁴⁴ That is not the way to go. I continue to hold with Marx (not Ferguson’s Marx), who wrote that ‘[m]en make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past.’⁴⁵

It is true, however, that possibilities in history are possibilities of different action.⁴⁶ Unless changes were subject to chance alone they require action and mobilization. For the history of international law, the possibilities of choice and different action tend to pose a specific problem that are connected to the dynamics of international lawmaking. There are two related angles in which this problem presents itself. From a first angle, international law stands under the spell of a great powers. It possibly changes in line with their choices, but

41 Ben-Menahem, Yemima. ‘Historical Necessity and Contingency’. In *A Companion to the Philosophy of History and Historiography*, ed. Aviezer Tucker (Chichester: Blackwell, 2009), 120–130; Evans, Richard J. *Altered Pasts: Counterfactuals in History* (New York: Little, Brown, 2014).

42 Ferguson, Niall. ‘Virtual History: Towards a “chaotic” theory of the past’. In *Virtual History: Alternatives and Counterfactuals*, ed. Niall Ferguson (New York: Basic Books, 1999), 1, 89.

43 Ibid.

44 See in detail, Venzke, Ingo. ‘What If? Counterfactual (Hi)Stories of International Law’. *Asian Journal of International Law* 7 (2017), forthcoming.

45 Marx, Karl. *The Eighteenth Brumaire of Louis Bonaparte* (Moscow: Progress Publishers, 1934), 10; also quoted in Marks, ‘False Contingency’ (n. 7), 1. It is a view that seems particularly fitting when approaching the NIEO; it is thus also quoted approvingly in Cox, Robert W. ‘Ideologies and the New International Economic Order: Reflections on Some Recent Literature’. *International Organization* 33 (1979), 257–302, 300.

46 Weber, Max. *Wirtschaft und Gesellschaft* (Paderborn: Voltmedia, 2006 [1922]) 650: ‘The mere change of external conditions is ... neither sufficient nor indispensable. Decisive is rather continuously novel action, which leads to semantic change of valid law or to the creation of new law’. See also Nijhuis, ‘Geschiedenis’ 2003 (n. 15), 51; Sabel, Charles F. and Jonathan Zeitlin. ‘Stories, Strategies, Structures: Rethinking Historical Alternatives to Mass Production’. In *World of Possibilities: Flexibility and Mass Production in Western Industrialization*, eds. Charles F. Sabel and Jonathan Zeitlin (Cambridge: Cambridge University Press, 1997), 1–33, 10–11.

even they cannot readily make it as they please.⁴⁷ From a second angle, which is more pertinent for gauging the prospects of the NIEO, the possibility of a different law through different action presupposes the possibility of the law's politicization.⁴⁸ Unlike other bodies of law, such as those enacted within constitutional democracies, international law is strikingly depoliticized in this sense.⁴⁹ The NIEO shows that large majorities could not make international law through some kind of majoritarian politics. The received ways of making international law through consensual processes put developing countries at a disadvantage from the outset. Because consensus can hardly ever be achieved in the realm of politics where interests collide, developing countries pushed for majority resolutions of international organizations as the new, progressive sources of international law.⁵⁰ But that is not where developments went. Instead, developed countries withdrew from political fora, to act via specialized institutions and via technical expertise instead.⁵¹ It is a different story of how powerful states themselves work around the consensus requirements. With a view to the NIEO, the key question remains how to think of the possibility of a different international law given that the received ways of international lawmaking deliberately shy away from considering possibilities of something like majoritarian legislation.

The risk of overestimating the possibilities of different action in a context that is weakly politicized adds to the travails of critique. What is more, the questions that are asked about international law's past inevitably reflect concerns in the present.⁵² Following Hayden White,

47 Krisch, Nico. 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order'. *European Journal of International Law* 16 (2005), 369–408.

48 See also Rajagopal, *International Law from Below* 2003 (n. 38), xii, drawing attention to the importance of social mobilization for legal transformation.

49 See in detail von Bogdandy, Armin and Ingo Venzke. *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press 2014), 119–128. See also Ley, Isabelle. *Opposition im Völkerrecht: Ein Beitrag zur Legitimation internationaler Rechtserzeugung* (Berlin: Springer, 2015).

50 See Bedjaoui, Mohammed. *Towards a New International Economic Order* (Paris: UNESCO, 1979), 138–140; Cheng, Bin. 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?'. *Indian Journal of International Law* 5 (1965), 23–48. See also Anghie, Antony. 'Legal Aspects of the New International Economic Order'. *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 6 (2015), 145–158, 149; Salomon, Margot E. 'From NIEO to Now and the Unfinishable Story of Economic Justice'. *International and Comparative Law Quarterly* 62 (2013), 31–54.

51 Pahuja, Sundhya. *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011), 95–172.

52 See, with further references, Koskeniemi, 'Histories of International Law' 2013 (n. 9), 229–231; Orford, Anne. 'International Law and the Limits of History'. In *The Law of*

[w]e apprehend the past and the whole spectacle of history-in-general in terms of felt needs and aspirations that are ultimately personal, having to do with the ways we view our own positions in the ongoing social establishment, our hopes and fears for the future, and the image of the kind of humanity we would like to believe we represent.⁵³

Turning to the history of international law remains embedded in present contexts. The inevitability of this condition does not lead to an abdication of responsibility to constantly reflect on the baggage and biases that are carried along.⁵⁴ This is notably an essential part of historians' training, much more so than for lawyers or legal scholars. The resurging interest in the history of the NIEO thus testifies to yet another risk: attempts to regain a sense for the possibilities of the past are vulnerable to being imbued by overflowing nostalgia for that which was not, and for the difference that an alternate course of events would have made. The return to the NIEO is not only sparked by discontent with the contemporary forms of international economic governance and the global distribution of wealth and power. It is also shaped by the belief that the present could have been much better, if only the NIEO had achieved greater success.⁵⁵

International Lawyers: Reading Martti Koskenniemi, eds. Wouter Werner, Alexis Galán and Marieke de Hoon (Cambridge: Cambridge University Press, 2017), 297–320. See also Rosenfeld, Gavriel. 'Why Do We Ask "What If?" Reflections on the Function of Alternate History'. *History and Theory* 41 (2002), 72–89.

53 White, Hayden. *Metahistory: The Historical Imagination in Nineteenth Century Europe* (Baltimore: Johns Hopkins University Press, 1973), 283; also quoted in Koskenniemi, 'Histories of International Law' 2013 (n. 9), 231.

54 Lesaffer, Randall. 'International Law and Its History: The Story of an Unrequited Love'. In *Time, History and International Law*, eds. Matthew C R Craven, Malgosia Fitzmaurice and Maria Vogiatzi (Leiden: Nijhoff, 2007), 27–42; Salaymeh, *The Beginnings of Islamic Law* 2016 (n. 26), 13; Koskenniemi, 'Histories of International Law' 2013 (n. 9). On this problem in the context of investment arbitration see also Schill, Stephan W., Christian J. Tams and Rainer Hofmann. 'Towards a "Historiographical Turn" in International Investment Law: An Introduction' (manuscript, on file with the author), 18.

55 See Bair, Jennifer. 'Taking Aim at the New International Economic Order'. In *The Road from Mont Pèlerin*, eds. Philip Mirowski and Dieter Plehwe (Cambridge, MA: Harvard University Press, 2009), 347–385.

3 Histories of the NIEO

3.1 *Regaining a Sense of Possibility*

In his introduction to a 2015 special issue on the NIEO, Nils Gilman explains that he seeks to respond to a paradox—the paradox, namely ‘how an entity that today has been nearly universally represented (insofar as it is represented at all) as an abject and inevitable failure had in its own moment seemed so entirely plausible to so many of both its proponents and enemies’.⁵⁶ More than anything else, the special issue aspires to regain a sense of past possibilities to thereby question the present state of international economic law. In Gilman’s words, pursuing such a programme ‘helps denaturalize the inegalitarian global political economy which for three decades global authorities like the *Economist* magazine or the World Economic Forum have insisted is the only reasonably available historical possibility’.⁵⁷ In other words, the programme is, quite rightly so, to work against the reification of social, economic, and legal relations by exposing different possibilities.⁵⁸

A renewed push for recognizing the possibilities of this part of international law’s past is a common thread in other more recent interventions. Still part of the same special issue, Tony Anghie laments that previous treatments of the NIEO have ‘obscure[d] the scale of this initiative and the seriousness with which it was treated by states, international institutions, and scholars alike’.⁵⁹ In a recent volume focused on the 1955 Conference of Bandung, Julio Faundez also notes that there was a window of opportunity within the strictures of the Cold War during the times of the NIEO and that it would be a mistake to attribute the NIEO’s failure to the supposed radicalization of developing countries alone—there was a real opportunity for a different course of action, he argues.⁶⁰

In the remainder of this section 3, I will revisit the history of the NIEO and the historical writing about it. Given that the NIEO was an enormous, multi-faceted project, I cannot do justice to all of its dimensions.⁶¹ I will zoom in on the key issue of the international legal protection of foreign investments. I will

56 Gilman, ‘The New International Economic Order’ 2015 (n. 1), 9.

57 *Ibid.*, 11.

58 On both the problem and the remedy see also Honneth, Axel. *Die Idee des Sozialismus* (Berlin: Suhrkamp, 2016), 19–20.

59 Anghie, ‘Legal Aspects of the New International Economic Order’ 2015 (n. 50), 145.

60 Faundez, Julio. ‘Between Bandung and Doha: International Economic Law and Developing Countries’. In *Bandung, Global History and International Law: Critical Past and Pending Futures*, eds. Luis Eslava, Vasuki Nesiah and Michael Fakhri (Cambridge: Cambridge University Press, 2017, forthcoming).

61 For an overview of the breadth of the debates in both practice and academia see Cox, ‘Ideologies’ 1979 (n. 45).

show that the strong upward momentum of developing countries' demands in the 1960s does instil a sense of possibility. The breadth, depth, and importance of the debates indeed tend to be glossed over all too easily in international law's prevailing memory (Section 3.2). At the same time, it is truly difficult to carve out the possibility of a different outcome in face of the determining factors that limited the NIEO's success (Section 3.3).

3.2 *Upward Momentum: The Power of New Ideas and Material Prowess*

A dive into the debates of the 1960s and early 1970s on the prospects of a New International Economic Order (NIEO) may well give the impression that significant change in the economic relations between states was imminent. The Non-Aligned Movement gained considerable momentum after the Conference of Bandung and provided a platform for towering figures such as Josep Tito from Yugoslavia, Jawaharlal Nehru from India, Gamal Abdel Nasser from Egypt, Sukarno from Indonesia and Kwame Nkrumah from Ghana.⁶² Newly independent and non-aligned states started to show the power of their numbers in plenary organs of the United Nations (UN). Among other things, in 1962 they passed the Resolution on the Permanent Sovereignty over Natural Resources (PSNR)⁶³ and, in the same year, a resolution that established the UN Conference on Trade and Development (UNCTAD) in spite of Western countries' opposition.⁶⁴

UNCTAD's first meeting in Geneva in 1964 led to a new chapter on 'Trade and Development' in the General Agreement on Trade and Tariffs (GATT), recognizing for the first time that developing countries may receive benefits on a non-reciprocal basis.⁶⁵ As concerns the institutional set-up of UNCTAD, developing

62 *Bandung, Global History and International Law: Critical Pasts and Pending Futures*, eds. Luis Eslava, Michael Fakhri, and Vasuki Nesiah (Cambridge: Cambridge University Press 2017, forthcoming).

63 United Nations, General Assembly, Resolution 1803 (XVII). Permanent sovereignty over natural resources, 14 December 1962. See in detail Schrijver, Nico. *Permanent Sovereignty over Natural Resources* (Cambridge: Cambridge University Press, 1997), 70–81.

64 United Nations, General Assembly, Resolution 1785 (XVII 1962). United Nations Conference on Trade and Development, 8 December 1962, following the recommendation by ECOSOC, Resolution 917 (XXXIV). For a summary of reactions of Western countries' representations to the establishment of UNCTAD see letters from The Hague to the Dutch Permanent Representation in New York of 10 May 1962 and 18 December 1962, Inv. No. 1724. See also Anghie, 'Legal Aspects of the New International Economic Order' 2015 (n. 50), 148.

65 In 1971 the GATT developed this principle into the General System of Preferences (GSP) and eventually administered it under the so-called Enabling Clause (i.e. enabling discrimination in favour of developing countries). See Faundez, 'Between Bandung and Doha' 2017 (n. 60), 13.

countries ultimately forced a vote to decide that it be given an independent status with its own staff and budget, neither squeezed into the existing structures of the UN Secretariat in New York, nor attached to the Economic and Social Council (ECOSOC).⁶⁶

The G77, the coalition of developing countries, was also set up during that first meeting of UNCTAD.⁶⁷ In October 1967, Algerian President Houari Boumediene then hosted the first Ministerial Meeting of the G77.⁶⁸ The meeting showed a remarkable sense of unity and drive that took most Western diplomats by surprise as they did not have the G77 on the radar as a serious political force.⁶⁹ Developing countries of the G77, on the contrary, rallied behind the Charter of Algiers, which crisply exposed the skewed global economic relations and loudly pushed for change.⁷⁰

The political momentum was paralleled with a renewal in economic thinking. UNCTAD was an important breeding ground for both. The Argentinian economist Raúl Prebisch provided many of the ideas that supported efforts to rethink global economic relations, first as a head of the Economic Commission for Latin America, which provided work on economic relations between developing and developed countries, and then as founding Secretary General of UNCTAD. Together with Hans W. Singer, Prebisch argued that, absent regulatory intervention, developing countries are bound to lose from liberalized trade over time.⁷¹

Developing countries identified four main issues that required change and that dominated the debates leading up to the programme of the NIEO: first, the nationalization of natural resources, which I adopt as the key issue for my

66 Rajagopal, *International Law from Below* 2003 (n. 38), 85.

67 Joint Declaration of the Seventy-Seven Countries, issued at UNCTAD on 15 June 1964. Available at: <http://www.g77.org>.

68 'On the Non-Aligned Movement see Bedjaoui, Mohammed. 'Non-Alignment et Droit International'. *Recueil des Cours* 151 (1976), 337–456.

69 Toye, John. 'Assessing the G77: 50 Years After UNCTAD and 40 Years After the NIEO'. *Third World Quarterly* 35 (2014), 1759–1774, 1765: 'the steep rise in oil prices did not fracture G77 unity ... even though the majority of developing countries were oil importers. Instead it united them more strongly than before pursuit of a New International Economic Order'.

70 'Charter of Algiers'. Available at <http://www.g77.org/doc/algier~1.htm> (last accessed 30 August 2016). For a later legal assessment see Falk, Richard A. 'La Déclaration d'Alger et La Lutte Pour Les Droits de l'Homme'. In *Pour un Droit des Peuples. Essais sur la Déclaration d'Alger*, eds. Antonio Cassese and Edmond Joue (Paris: Berger Levrault, 1978), 83, 85.

71 More specifically, the terms of trade between primary commodities and manufactured goods will strongly shift in favour of the latter so that any ton of raw material (from developing countries) will be able to buy increasingly fewer manufactured goods (from developed countries). See Singer, Hans W. 'The New International Economic Order: An Overview'. *Journal of Modern African Studies* 16 (1978), 539–548.

analysis; second, the reform of the trading system, especially so as to allow for fair and stable commodity prices; third, non-reciprocal trade preferences; and fourth, new forms of finance.⁷² Largely forgotten is also the project of binding obligations on corporations and the rather well developed United Nations Code of Conduct on Transnational Corporations.⁷³ One of the main general arguments underlying the push towards an NIEO was that the process of decolonization had produced new sovereign states that were at best formally independent and, in any event, economically dependent. Emphasis was thus placed on the idea of economic sovereignty.⁷⁴ In Mohammed Bedjaoui's observation:

The obvious inadequacy of the traditional conception of State sovereignty as set down in 1945 in the Charter of the United Nations, becomes manifest. This conception, defined in terms of political factors to the exclusion of economic considerations, has made it possible to confer on a new State the visible and external signs of its sovereignty—a flag, a national anthem, and a seat in the United Nations—while the reality of power resides elsewhere.⁷⁵

During UNCTAD's third meeting in Santiago de Chile in 1972, Mexican President Luis Echeverría then proposed that a Charter of the Economic Rights and Duties of States should be developed to deal with these main issues through

72 Toye, 'Assessing the G77' 2014 (n. 69), 1762; Anghie, 'Legal Aspects of the New International Economic Order' 2015 (n. 50), 147; Özsu, 'Neoliberalism and the New International Economic Order' 2017 (n. 40). See also Sacerdoti, Giorgio. 'New International Economic Order (NIEO)'. In *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2011).

73 But see Sauvant, Karl P. 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations'. *Journal of World Investment & Trade* 16 (2015), 11–87; Bair, Jennifer. 'Corporations at the United Nations: Echoes of the New International Economic Order?'. *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 6 (2015), 159–171.

74 See already Pecourt García, Enrique. 'La Dimension Economica de la Soberania Estatal: Sus Perspectivas Actuales y su Repercusion en el Derecho Internacional Contemporaneo'. *Revista española de derecho internacional* 16 (1963), 459–509; David, Eric. 'Quelques Réflexions sur l'égalité Économique des États'. *Revue belge de droit international* 10 (1974), 399–424.

75 Bedjaoui, *Towards a New International Economic Order* 1979 (n. 50), 81.

international law.⁷⁶ A working group was quickly established to that effect and President Echeverría went to great lengths in securing political support.⁷⁷

At the end of 1973 the oil crises further increased a sense of material prowess on the part of developing countries to accompany the power of new ideas.⁷⁸ For the first time, Western countries felt a sense of vulnerability and at least for a moment they did not find a winning strategy to counter the Organization of Petroleum Exporting Countries (OPEC) and the oil embargo that the organization imposed in the wake of the Arab-Israeli war.⁷⁹ Between October 1973 and January 1974 oil prices rose by 400%, creating social unrest and political turmoil. Whereas the food crises in 1972, when the price of cereal quadrupled, once more underlined developing countries' dependence, the oil crisis of the following year provided the first evidence of genuine *interdependence*.⁸⁰

The oil crises, and the relative unity among developing countries grouped in the G77, contributed to a sense of possibility. In addition, the monetary pillar of the post-war economic architecture had collapsed with the end of the gold standard in 1971. Change was in the air.

The push to effect change in global economic relations peaked around 1974. In April, the Declaration on the Establishment of a New International Economic Order and the Programme of Action were adopted at the Sixth Special Session of the General Assembly (GA) without a vote. Algerian President Boumedienne was the first plenary speaker, highlighting the urgency and gravity of the issue:

In the eyes of the vast majority of humanity it is an (economic) order that is as unjust and as outdated as the colonial order to which it owes its origin and its substance. Inasmuch as it is maintained and consolidated and therefore thrives by virtue of a process which continually impoverishes the poor and enriches the rich, this economic order constitutes the major obstacle standing in the way of any hope of development and progress for all the countries in the Third World.⁸¹

76 Bair, 'Taking Aim at the New International Economic Order' 2009 (n. 55), 350; Toye, 'Assessing the G77' 2014 (n. 69), 1764.

77 On President Echeverría's efforts see the observations by the Dutch Permanent Representations from 9 May 1973, 'The Mexican President is on World Tour—Analysis', Inv. No. 1750.

78 Toye, 'Assessing the G77' 2014 (n. 69), 1764; Cox, 'Ideologies' 1979 (n. 45), 263.

79 Bedjaoui, *Towards a New International Economic Order* 1979 (n. 50), 13.

80 *Ibid.*, 246, critiquing the concept of interdependence for typically shielding unilateral dependence.

81 Quoted in Meagher, Robert F. *An International Redistribution of Wealth and Power: A Study of the Charter of Economic Rights and Duties of States* (New York: Pergamon, 1979), 3.

When US President Ford spoke in the regular session of the GA in the same year, he certainly chose a different vocabulary; but he too embraced international cooperation:

The economy is under unprecedented stress. We need new approaches to international cooperation to respond effectively. Developing and developed countries, market and non-market economies—we are all part of one interdependent economic system. The food and oil crises demonstrate the extent of our interdependence. Many developing nations need the food surplus of a few developed nations and many industrialized nations need the oil production of a few developing nations.⁸²

The West not only felt its vulnerability for the first time. It was also ill prepared to cope with this situation while it had underestimated the unity and drive of developing countries.⁸³ According to Clyde Ferguson, Head of the US delegation to ECOSOC, '[t]he Sixth Special Session of the General Assembly was an unmitigated debacle for the United States and the first world'.⁸⁴ Ferguson saw that the reasons for this debacle 'lay not only in miscalculations of the intentions of the third world, despite the clear signal emanating from Algiers, but also in certain Western attitudes about the role of the third world in global economics'.⁸⁵

During the GA's regular session in December 1974, the CERDS was adopted with 120 to six votes, with ten abstentions.⁸⁶ Still in 1973 the Dutch representation in New York had not expected the working group 'to publish a draft-charter in the foreseeable future ... [I]t believes that the chances are remote that a worldwide economic charter will ever be published'.⁸⁷ Apparent success created momentum and perceptions of possibility.

82 Speech of 18 September 1974, quoted in letter from the Dutch Permanent Representation in New York to The Hague, 'President Ford in GA', Inv. No. 811.

83 Ferguson, Clarence Clyde. 'The Politics of the New International Economic Order'. *Proceedings of the Academy of Political Science* 32 (1977), 142–158, 148.

84 Ibid.

85 Ibid.

86 United Nations, General Assembly, Declaration on the Establishment of a New International Economic Order, A/RES/3201(S-VI) and United Nations, General Assembly, Programme of Action on the Establishment of a New International Economic Order, A/RES/3202(S-VI), both adopted on 1 May 1974; United Nations, General Assembly, Charter of Economic Rights and Duties of States, A/RES/29/3281(XXIX), adopted on 12 December 1974.

87 Letter from the Dutch Permanent Representation in New York to The Hague, 9 May 1973, Inv. No. 1950.

When opening the debates, the Argentinean delegate, Mr Ortiz de Rozas, avowed that the Charter 'is an instrument of economic international law, a branch of law in which there is considerable creative momentum because it reflects urgent needs felt by both Governments and peoples'.⁸⁸ The Chinese delegate, Mr Hsien-wu Chang, stated that '[t]he adoption of the Charter will demonstrate once again that the struggle of the third-world countries in defence of political independence and for economic liberation is an irresistible historical trend'.⁸⁹ While seeing the need for further steps, Mr Sharaf from Jordan likewise averred that the CERDS provides 'the formula for an irreversible future evolution'.⁹⁰

International legal scholars sympathetic to the demands of developing countries flanked the political developments. In his epochal *Toward a New International Economic Order*, Mohammed Bedjaoui writes that 'consider[ing] the long-term ... steady progress of mankind, there is no escaping the conclusion that the advent of a new international economic order is inevitable'.⁹¹ Of course, outward confidence in the possibility of change is an essential part of political and argumentative strategy: it has to be possible! But the sheer depth of the economic crisis in world society reassured Bedjaoui and others that things would change in the immediate future.

Would UNGA resolutions change the reality of global economic relations? After affirming that the CERDS will form part of an 'irresistible historical trend', the Chinese delegate continued that '[e]xperience tells us that the Charter ... will still be only a text on paper. Unremitting struggles will have to be waged before its correct provisions can be translated into reality'.⁹² This is where a sense of possibility, sustained by upward momentum, makes way for sobering assessments. As Margot Salomon asked recently: 'Why have attempts to bring development aspirations to bear on international law over a period of 50 years come to far less than any reasonable person would hope?'⁹³

88 A/PV.2315 and Corr. 1, UNGA Official Records, 2315th Plenary Meeting, 12 December 1974, para. 25. On these debates see also Schrijver, *Permanent Sovereignty* 1997 (n. 63), 100–113.

89 A/PV.2315 and Corr. 1, para. 46.

90 A/PV.2315 and Corr. 1, para. 24.

91 Bedjaoui, *Towards a New International Economic Order* 1979 (n. 50), 13; see also Özsu, Umut. "In the Interests of Mankind as a Whole": Mohammed Bedjaoui's New International Economic Order. *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 6 (2015), 129–143.

92 A/PV.2315 and Corr. 1, para. 47. See also Mr Hashmi, India, A/PV.2315 and Corr. 1, para. 3: 'we welcome this Charter as one more step towards a more orderly and just economic order in the world'.

93 Salomon, 'From NIEO to now' 2013 (n. 50), 31.

3.3 *The Limits of Success: Determining Factors*

3.3.1 Confrontation and Countermoves

It is clear that the CERDS was opposed by a small group of Western states and the power of developing countries' numbers remained at odds with the power of developed countries' purses.⁹⁴ After the vote on the CERDS in the Second Committee, US Ambassador John A. Scali first recalled his earlier words of caution against 'adopting one sided, unrealistic, resolutions that cannot be implemented'.⁹⁵ He then added that

[t]he most meaningful test of whether the Assembly has succeeded in ... bridging the difference among member states is not whether a majority can be mobilized behind any single draft resolution, but whether those states whose cooperation is vital to implement a decision will support it in fact ... [W]hen the rule of the majority becomes the tyranny of the majority, the minority will cease to respect or obey it....⁹⁶

Focusing further on the power of the minority in this case, Ambassador Scali noted that the six countries opposing the CERDS, together with the ten countries who abstained, supply 95% of the UN budget. Without finding an arrangement that would include this group of states, no change would be forthcoming.

Many other delegates expressed their regret that no consensus could be reached. Some were of the opinion that wider agreement could have been gained with more time.⁹⁷ Mr Rougé from France thus deplored the 'abrupt ending of the negotiations'⁹⁸ and Mr Temboury from Spain noted that 'we should not have gone too fast'.⁹⁹ According to the delegate from Fiji, Mr Kacimaiwai, the CERDS 'would indeed be a Magna Carta in the sphere of international economic relations and social co-operation if it were accepted in a genuine consensus by all States Members'.¹⁰⁰

Many delegations paid their tribute to the Mexican President Luis Echeverría as the initiator of the CERDS. When Mr Rabas of the Mexican delegation then

94 Toye, 'Assessing the G77' 2014 (n. 69), 1761, referring to US representative Richard N. Gardner, who asserted that the top six countries accounted for 70% of world trade and should not be outvoted by a majority.

95 Quoted in Meagher, *An International Redistribution of Wealth and Power* 1979 (n. 81), 6.

96 Ibid.

97 See the statement by Mr Hays from Canada, A/PV.2315 and Corr. 1, para. 118.

98 A/PV.2315 and Corr. 1, para. 12.

99 A/PV.2315 and Corr. 1, para. 36.

100 A/PV.2315 and Corr. 1, para. 29.

took the floor he strongly challenged the resistance of the small group of states against the Charter. Echoing the words of the US Ambassador Scali, he argued that ‘the “tyranny of the majority”, if indeed it exists, is a bad thing, but the tyranny of the minority is even worse’.¹⁰¹ A tyranny of the minority was precisely what existed during the early years of the UN when a few states determined the destiny of the world, according to Mr Rabas. He argued that those few states now wished to resist the overwhelming will of the vast majority, obstructing the progressive change of international economic relations.¹⁰²

3.3.2 The International Protection of Foreign Investments

It is as true as it is trivial that the NIEO would have maintained a different, stronger momentum if the CERDS, or a slightly modified version of it, had been backed by the consensus of all states. Under which conditions could it have received that backing? The main contentious issue at the heart of the NIEO and of the CERDS was nationalization and the degree of investment protection. Whereas the 1962 PSNR Resolution still provided that expropriated owners shall be paid ‘appropriate compensation ... in accordance with international law’, the CERDS no longer makes any reference to international law on that matter.¹⁰³ Instead it states in para. 2(c) that

appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals....

Most developed states had tried to amend this provision to reassert that the standard for appropriate compensation must be determined by international law, but their amendments were repeatedly rejected. A large part of diplomacy focused on precisely this issue.¹⁰⁴ In articulating its position towards the

¹⁰¹ A/PV.2315 and Corr. 1, para. 167.

¹⁰² A/PV.2315 and Corr. 1, para. 167.

¹⁰³ United Nations, General Assembly, Resolution 1803 (XVII). Permanent sovereignty over natural resources, 14 December 1962, para. 4.

¹⁰⁴ The summary by the Mexican delegate, Mr Rabas, is correct: ‘natural resources, foreign investments, and nationalization ... were the most controversial issues throughout the deliberations’, A/PV.2315 and Corr. 1, para. 160. See the report of the Dutch delegation (*‘Delegatieverslag 17’*) of 20 April 1974, Inv. No. 804; Letter from Dutch Foreign Ministry to the Permanent Representation in New York, 3 October 1974, Inv. No. 1750; Memorandum of the European Economic Community, 11 November 1974, Inv. No. 1750.

Charter, the US started out by highlighting that the Charter's treatment of foreign investors was 'unacceptable'.¹⁰⁵ Delegates whose countries had voted against the CERDS explained their position mostly with this specific fault. Even those who voted in favour agreed that this issue was overly divisive, preventing the Charter from being adopted by consensus.¹⁰⁶

The fact that the missing reference to international law in the determination of compensation dominated the diplomatic exchanges about the Charter among Western capitals is remarkable first of all as it is a rather specific point against the wide canvas of issues with which the NIEO started. Issues of debt relief are mentioned in passing, if at all. The crucial point of deteriorating terms of trade likewise fell by the wayside. The Charter provides that '[a]ll States have the duty to co-operate in achieving adjustments in the prices of exports of developing countries in relation to prices of their imports so as to promote just and equitable terms of trade for them' (Art. 28). But with the exception of Art. 2 on the protection of foreign investors, Western countries did not deem any of the other articles as overly problematic so as to warrant their attention and concerted reaction. At most they pointed out that provisions such as Art. 28 beg many questions and are next to impossible to implement.¹⁰⁷

At the same time, the missing reference to international law in Art. 2(c) is certainly no marginal matter and the fact that this was the principal element to which many Western delegations objected is indicative of a fundamental opposition that would have been hard to overcome: Western delegations saw it as an established rule of international law that any act of nationalization requires the payment of compensation as determined by international law. Newly independent and non-aligned states contested this rule as a symptomatic example of an international legal obligation in whose making they did not have a say. If they conceded that such a rule existed, it surely would have to change. In the words of the Mexican delegate Mr Rabas, the resistance to such change by some Western states 'is an alarming symptom of neo-colonialism'.¹⁰⁸ At issue was the legitimacy of the international law of the past—imbued by colonial domination and great power politics—and the possibility of some change in international law.

For developing countries, it was clear that the NIEO would require change in international law. To the extent that developed countries signed up to parts

105 United States Positions on United Nations Issues in 1974, Press Release USUN-193(74), 20 December, Inv. No. 807.

106 See, e.g., the statement by Mr Kacimawai from Fiji, A/PV.2315 and Corr. 1, para. 30.

107 See the statement by Mr Rydback from Sweden, A/PV.2315 and Corr. 1, para. 61; by Mr Hays from Canada, A/PV.2315 and Corr. 1, para. 138.

108 Mr Rabas, Mexico, A/PV.2315 and Corr. 1, para. 161.

of the NIEO's ambitions, they were ready to pursue them within the existing framework of international law.¹⁰⁹ As I will continue to show in Section 4, this was also the key consideration that held back the Dutch government which was otherwise exceptionally sympathetic to the demands of the NIEO. The fall-out over Art. 2(c) testifies to a fundamental opposition on a key issue—investment protection—and a structural question—change within or beyond the existing legal framework.

Could this opposition have been bridged? If anything, more time would have further weakened developing countries' position. The stronger reason for NIEO's limited success lies in the fact that the developing countries' side in this opposition started to crumble due to individual defections, diverging interests, and the rising power of neo-liberal thinking. Relatively weak leadership in the G77 might also have played a role.¹¹⁰ Meanwhile, developing countries' opposition to the international legal protection of foreign investments was overtaken by developments in the law that were carried through the practice of arbitral tribunals.

3.3.3 Defection, Divergence, and Economic Development

In the historical constellation of the NIEO, the unified opposition by developing countries was troubled by the most classic of collective action problems: they would probably have been better off if they had stuck together, but in the meantime, they were each better off individually if they defected from the common programme, or so it seemed. While developing countries by and large rejected the international legal protection of foreign investments at the UN, they started to individually sign bilateral investment treaties that ensured precisely that protection. Even at the UN some developing countries tried to better their individual positions, wishing to attract investment for them rather than their neighbour. When voting on the CERDS in 1974, some developing country representatives already voiced their concern that Art. 2(c) would send the wrong message to foreign investors. Mr Awang of Malaysia thus declared that

Malaysia has an active policy of wooing foreign investment and has entered into a number of bilateral and multilateral investment guarantee agreements. Although we voted in favour of paragraph 2 (c) ... our action

¹⁰⁹ A/PV.2315 and Corr. 1, para. 4.

¹¹⁰ Toye, 'Assessing the G77' 2014 (n. 69), 1767, with reference to Weiss, Thomas G, Tatiana Carayannis, Louis Emmerij and Richard Jolly. *UN Voices: The Struggle for Development and Social Justice* (Bloomington: Indiana University Press, 2005), 262.

should not be considered as a departure from our policy on foreign investment and our commitments.¹¹¹

A few others chimed in. According to the Jordanian delegate '[t]he positive side of foreign investment must be realized ... foreign investors must be given sufficient guarantees'. While the G77 showed remarkable unity during the work on the CERDS, these statements signal individual defection.

More generally, interests among developing countries increasingly differed. Whereas they used to converge in the 1950s on shared interests in the modernization of agriculture, the establishment of a manufacturing base and a consolidation of the export market, they now created diverging demands for international economic law, drastically so by the time of the debt crises in South America and Africa in the early 1980s.¹¹²

In addition to individual defections and diverging interests, the developing countries' position was more generally overtaken by a specifically neo-liberal way of thinking about economic development which ultimately undid all conflict between the capital-exporting North and the capital-importing South of the time.¹¹³ In 1974 it was still a delegate from a Western country who articulated this way of thinking most powerfully. In the debates following the adoption of the CERDS, Mr Hays from Canada explained that

[t]he reason why my delegation attaches such importance to [art. 2(c)] is that, if we are to achieve and maintain the equitable distribution of the world's wealth which this Charter is intended to promote, a significant flow of private capital from developed to developing countries in the form of investment will be required. This movement of capital will take place only in conditions which provide at least a certain degree of security—which cannot possibly exist if the rule of law is rejected.¹¹⁴

This narrative gained increasing currency and advanced in mutual support with changing conceptions of economic development.¹¹⁵ Robert Cox was right in his 1979 overview in arguing that '[s]o long as [the less favoured] ac-

111 A/PV.2315 and Corr. 1, para. 7.

112 Faundez, 'Between Bandung and Doha' 2017 (n. 60); Toye, 'Assessing the G77' 2014 (n. 69).

113 Bair, 'Corporations at the United Nations: Echoes of the New International Economic Order?' 2015 (n. 73).

114 A/PV.2315 and Corr. 1, para. 130.

115 John Toye, *Dissent of Development: Reflections on the Counterrevolution in Development Economics* (Oxford: Oxford University Press 1993). 180; see also Sacerdoti, 'New International Economic Order (NIEO)' 2011 (n. 72), mn 25.

quiesce in the dominant mode of thought, their demands are likely to be reconcilable within the existing system of power'.¹¹⁶ Looking back more recently, Sundhya Pahuja has shown how neo-liberal thinking took hold and worked its way through the World Bank and into the development discourse and the positions of developing countries.¹¹⁷ Also Balakrishnan Rajagopal and Umut Örsu ascribe the NIEO's demise to its failure to break with the rationale of foreign-led and market-driven economic development.¹¹⁸ For Tony Anghie it was more specifically the insufficient attention that developing countries and Third World approaches to international law paid to the regulation of the private sphere that would weaken the impact of their efforts. On his account, 'the Third World initiative was unable to expand its reach to regulate power within the private sphere—in particular, the activities of corporations and the vision of property, contract, and economic relations that they furthered'.¹¹⁹

The way in which domestic concession agreements were turned into internationalized contracts or, in other words, into economic development agreements clearly shows the advance of a neo-liberal conception of economic development and how it took hold in the specific field of international investment protection.¹²⁰ Arbitral practice and scholarship supported each other in arguing that the international legal protection of foreign investments was necessary for those investments to flow and that such protection was thus also in the interest of developing countries. The seminal *Texaco* arbitral award put it clearly, citing the earlier award in *Sapphire*: there is a 'new category of agreements between States and private persons: economic development agreements'.¹²¹ Economic development agreements

116 Cox, 'Ideologies' 1979 (n. 45), 259.

117 Pahuja, *Decolonising International Law* 2011 (n. 51). See also the classic study in Rist, Gilbert. *The History of Development: From Western Origins to Global Faith* (New York: Zed Books, 2002).

118 Rajagopal, *International Law from Below* 2003 (n. 38), 80–82; Örsu, 'Neoliberalism and the New International Economic Order' 2017 (n. 40).

119 Anghie, 'Legal Aspects of the New International Economic Order' 2015 (n. 50), 146. See also Gilman, 'The New International Economic Order' 2015 (n. 1), 8: 'What succeeded NIEO was not more state power in the south but rather the emergence of new centers of private authority'.

120 See also Sornarajah, Muthucumaraswamy. *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015).

121 *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*; Award on the Merits of 19 January 1977, 53 ILR 422, 17 ILM (1978), para. 45. For an more detailed treatment see Anghie, Antony. *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 222–236; Venzke, Ingo. 'An Extended Critique of International Investment Arbitration'. In *Debacles: Illusions and Failures in the History of International Adjudication*,

bring to developing countries investments and technical assistance, particularly in the field of research and exploitation of mineral resources ... Thus, they assume a real importance in the development of the country where they are performed ...¹²²

Protecting foreign investments through international law and international arbitration is thus

indispensable for foreign companies, since these companies undergo very considerable risks in bringing financial and technical aid to countries in the process of development. *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.¹²³

Aaron Broches, General Counsel of the World Bank and first Secretary General of the International Center for the Settlement of Investment Disputes (ICSID), leaned on this way of thinking in his advocacy for the ICSID Convention. In his Hague lectures of 1972, he summarizes that '[i]t is beyond doubt that fear of political risks operates as a deterrent to the flow of private foreign capital to developing countries. The World Bank therefore considered it appropriate to explore whether it could make a contribution to an improvement in the investment climate'.¹²⁴ And the best response to political risks was to conclude bilateral investment treaties so as to 'ensure that arbitration agreements voluntarily entered into would be implemented'.¹²⁵ Of course, what looked like a political risk for foreign investors looked like an expression of economic sovereignty for developing countries. But the dominant idea of development sustained the presumption that developing countries' enlightened self-interest would direct them towards an embrace of international legal protection for foreign investment, their initial resistance notwithstanding.

eds. Lorenzo Gradoni and Hélène Ruiz-Fabri (Oxford: Oxford University Press, 2017, forthcoming).

122 *Texaco, Merits* (n. 121), para. 45.

123 *Texaco, Merits* (n. 121), para. 45, quoting from *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*, Award, 15 March 1963, (1963) 35 ILR 136, at pp 175–176 (italics added).

124 Broches, Aron. 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States'. *Recueil des Cours* 136 (1972), 337–350, 343.

125 *Ibid.*, 345.

Political debates and scholarship then repeatedly showed how actual resistance was turned into an emotional, irrational reaction, in contrast to sober economic reasoning that informs enlightened interest. According to the Dutch Office of the Legal Adviser in the Ministry of Foreign Affairs, developing countries' resistance to the international legal protection of foreign investments 'will be primarily emotional in nature, and therefore all the more difficult to fight with reasonable arguments'.¹²⁶ Arbitral practice and scholarship gradually supported the role of international law in the protection of investment, seeing the only reason for a close consideration of the law of the host state to be part of an attempt to avoid offending the *sensibilities* of that state.¹²⁷ Reason was with the West, emotions with the rest.

The neo-liberal conception of economic development gained hold in large parts of the World Bank and in the field of investment arbitration, in some institutional isolation from opposing views that continued to prevail at UNCTAD. It expanded from there to eventually also sweep over most of the UN.¹²⁸ By then the NIEO's political momentum was lost and the opportunity for a different course of international law had been missed.

4 What Could Have Been?

With regard to the key issue of international investment protection, the NIEO hardly left a mark. If anything, it increased the need that investors and many government representatives of developed countries felt for the protection of foreign investments. Could international law have taken a different turn in these times of the NIEO? What was possible, to which degree? I engage in this renewed appreciation of possibilities of the past through the perspective of the Dutch government and by focusing on the crucial moment of adopting the CERDS. This perspective recommends itself above all because with the change towards the progressive cabinet of premier Den Uyl in 1973, the Dutch government was exceptionally sympathetic towards the NIEO. Its political will can expose the constraints that existed and the possibilities *vel non* for overcoming

126 Letter from The Hague, 'Dienst Internationale Organisaties', to the Dutch Permanent Representation in New York, 13 May 1959, Inv. No. 1624.

127 See in detail, Venzke, 'An Extended Critique of International Investment Arbitration' 2017 (n. 121); Weil, Prosper. 'The State, the Foreign Investor and International Law: The No Longer Stormy Relationship of a Menage A Trois'. *ICSID Review* 15 (2000), 401–416, 409: '[it] is indeed a pointless exercise, the sole *raison d'être* of which is to avoid offending the sensibilities of the host State'.

128 Toye, 'Assessing the G77' 2014 (n. 69), 1767.

them. I am mindful of the risk that, by adopting this perspective, I withdraw international lawmaking from its broader social dynamics that lie beyond and outside and the halls of foreign ministries and beyond the channels of diplomacy.¹²⁹

When newly independent and non-aligned states pushed the issues of economic self-determination, permanent sovereignty and foreign investment protection onto the agenda at the UN in the end of the 1950s, the Dutch government at first maintained a skeptical and adverse posture, as did its peers. Dutch representatives saw the UN Commission on Permanent Sovereignty over Natural Resources as a ‘the rampant attempt of a large group of Afro-Asian, communist, and some Latino countries to grant the right of self-determination a limitless and one-sided status’, directed against Western powers and against the international protection of foreign investments.¹³⁰ In the late 1950s the Dutch government was also engaged in a squabble with Indonesia over the nationalization of Dutch-owned enterprises after independence, arguing with vehemence that the nationalizations violated well-received standards of international law.¹³¹

As the draft for the PSNR Resolution became more balanced and included—due to the advocacy of the US, above all—the international protection of foreign investments, the Netherlands accepted it. It thereby also wished to fend off more radical proposals by the Soviet Union. But Dutch companies, especially Royal Dutch Petroleum (‘Shell’), were on their guard. The director of Shell paid a visit to the Ministry of Foreign Affairs to urge the Dutch government not to jeopardize the strong international legal protection of foreign investments. For Shell, even the PSNR Resolution went too far.¹³² The Dutch government still

129 For Falk as for Rajagopal possibilities for change really lie in these social dynamics, especially in the greater mobilization of societies in developed countries for the causes of the global South. That may be the case, but it is also a very remote possibility, also on their account. Rajagopal, *International Law from Below* 2003 (n. 38). For a critique of ‘law office history’ see also Bederman, David J. ‘Foreign Office International Legal History’. In *Time, History and International Law*, eds. Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (Leiden: Martinus Nijhoff, 2007), 43.

130 Letter from The Hague, ‘Dienst Internationale Organisaties’ (DIO), to the Dutch Permanent Representation in The Hague, 13 May 1959, Inv. No. 1624. The Commission was established on 12 December 1958 by resolution 1314 (XIII).

131 See ‘Netherlands Note of 18 December 1959, Regarding Nationalization of Dutch-Owned Enterprises’, reproduced in *American Journal of International Law* 54 (1960), 484–490.

132 Letter from the Dutch Permanent Representation in New York to The Hague, 21 November 1962, Inv. No. 1624.

thought that 'a fair balance was achieved',¹³³ which would only be more difficult to strike further down the line: '[W]ith the passing of time, the number of underdeveloped nations grows. They will then want to reel in a much larger bounty than the present draft resolution'.¹³⁴ Damage control, not idealism, was the leading consideration.

The Dutch position changed when Jan Pronk moved from the opposition into government to become the Minister for Development Cooperation in 1973.¹³⁵ Speaking at ECOSOC in the same year, Pronk held that: '[r]eal improvement will be possible only by change in the structural relations that exist between the rich and the poor nations, or, in other words, we should aim at achieving real freedom of the Third World'.¹³⁶ These were not hollow words for an audience that liked to hear them. Pronk instructed the Dutch representation in New York to 'identify with the position of less well-endowed peoples and individuals. Also measures which can lead to a more equal participation of developing nations in international affairs will be supported by the Netherlands'.¹³⁷ In contrast to other Western countries, the Netherlands supported a legally binding CERDS.

The key question remained how a right to nationalize could be squared with the protection of foreign investments. Newly independent and non-aligned states surely opposed investors' protection under international law and through international arbitral processes. It is quite right, as the Dutch Office of the Legal Adviser of the Ministry of Foreign Affairs (JURA) put it, that in this context 'developing countries are allergic to the term "international law", stating that it is a "European" legal system which has been forced upon them'.¹³⁸

The Dutch delegation had in fact agreed with the formulation in the Declaration on the Establishment of a New International Economic Order at the GA's Sixth Special Session, which did not include any reference to the international legal protection of foreign investments. According to JURA

133 Letter from the Dutch Permanent Representation in New York to The Hague, 10 December 1962, Inv. No. 1624.

134 Statement by Mr Schumann, Dutch Permanent Representative at the UN, 23 November 1962, Inv. No. 1624.

135 In 1973 Jan Pronk also became Alternate Governor at World Bank (until 1977). In 1980 he left national politics to become Deputy Secretary-General of UNCTAD (until 1986). Between 1977 and 1983 he was also a Member of the Independent Commission on International Development Issues (Brandt Commission). See <http://www.janpronk.nl/curriculum-vitae.html> (last accessed 16 May 2017).

136 Fifty-fifth meeting of the Economic and Social Council (ECOSOC), Geneva, 5 July 1973, quoted in 'North-South Dialogue: Jan Pronk'. *Third World Quarterly* 3 (1981), 189–209, 196.

137 1973, Instructions to the Delegation, PR NY, Inv. No. 2054.

138 Memo from JURA to DIO, 24 July 1974, Inv. No. 22027.

[t]he politics of the Netherlands is aimed at understanding the problems and sensitivities of the developing countries, and from this point of view the Dutch delegation has, for political reasons and without interpretative explanation, agreed to the formulation of the paragraph concerning nationalization ..., where the right to nationalize was listed without further clauses.¹³⁹

However, still according to JURA,

developed countries will have to insist—as far as this office is concerned—on the further clauses. This may happen in two ways, either with a general reference to international law, or by naming the international conditions for nationalization: a public goal, non-discrimination, and ‘prompt, effective and adequate’ compensation.¹⁴⁰

The inertia of the law is remarkable. JURA notes ‘political reasons’ in a dismissive fashion. Political meddling troubles the long-held legal doctrine. In the debates about the CERDS, the government then reaffirmed its positive stance towards the NIEO and the Charter.¹⁴¹ It did not want to jeopardize the NIEO by voting against the Charter.¹⁴² At the same time, its own legal doctrine, and the pressure from its peers, did not allow it to vote in favour either. The US delegation in particular was adamant that it would be unacceptable to mention the issue of nationalization, let alone mentioning a *right* to nationalize, without also referring to adequate compensation.¹⁴³

Not only for Pronk, but also for the Dutch Foreign Minister, Max van der Stoep, the Charter was ‘an important element in the structure of a new economic world order’.¹⁴⁴ And yet, in spite of the strong support for the NIEO, a vote in favour of the Charter was not an option. The Office of the Legal Adviser did its part, peer pressure did the rest.¹⁴⁵ Abstention is all that remained for the Dutch delegation. And even that abstention caused a great deal of trouble. The other members of the European Economic Community were not pleased and

139 Memo from JURA to DIO, 24 July 1974, Inv. No. 22027 (underlining as in the original).

140 Memo from JURA to DIO, 24 July 1974, Inv. No. 22027.

141 1974, Instructions to the Delegation, PR NY, Inv. No. 2054.

142 Letter from The Hague to The New York, 3 December 1974, Inv. No. 22027.

143 Letter from New York to The Hague, 3 October 1974, Inv. No. 22027.

144 1974, Instructions to the Delegation, PR NY, Inv. No. 2054.

145 Wiebe Hommes and I did not find references to a renewed intervention by business representatives, as was well documented during the drafting of the PSNR Resolution when the Director of Shell intervened, above note 132.

even considered bringing the Netherlands before the Court of Justice of the European Communities for not following the EEC line, although this step was never taken.¹⁴⁶

Had the Dutch delegation voted in favour of the CERDS, it would not have changed the world. But possibilities for the NIEO's greater success were shaped to a large degree by the opposition to the CERDS, and Dutch diplomacy offers a pathway into that opposition, and into the constraints that would have had to be overcome. More than anything else, this perspective highlights the difficulties for arguing that different outcomes were possible in this part of international law's past.

5 Conclusion: Nostalgia or Normative Surplus?

Claiming that international law could have been otherwise is an essential part of critical thinking. In this posture, the shape in which we find international law today becomes a possibility, rather than a necessity. Possibly it could have turned out differently. The course of international law and its present manifestation are stripped of their destiny.¹⁴⁷ This does not instantly change the way in which the law governs at present, how it distributes wealth, power and opportunities. But it contributes to turning the law from a fateful object into a strategic subject on a terrain of struggle.¹⁴⁸

What is possible, and what is not, are also products of this posture. It thus makes good sense to maintain the claim to contingency even in the face of seeming impossibility, and especially if reality looks so bleak. At present, international economic law is part of a world in which the richest 20% hold 94% of

146 Letter from Brussels to The Hague, 10 December 1974, Inv. No. 22027. The basis would have been art. 5 EEC Treaty.

147 See Bevir, 'What is Genealogy?' 2008 (n. 19), 271, placing emphasis on how genealogy works as a denaturalizing critique.

148 Following Menke, 'Die Möglichkeit eines anderen Rechts' (n. 4), 142. For an understanding of legal argumentation as a struggle, see Koskeniemi, Martti. 'International Law and Hegemony: A Reconfiguration'. *Cambridge Review of International Affairs* 17 (2004), 197–218; Venzke, Ingo. *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press 2012); Kennedy, David. *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton and Oxford: Princeton University Press, 2016).

all wealth and consume 80% of all resources.¹⁴⁹ The question thus suggests itself: how could it have been otherwise? And that is mainly a historical question.

Tasked with regaining a sense of the possibilities of the past, international legal history tries to understand what could have happened and why something has happened rather than something else. The critical posture in fact reflects a duality of thinking—thinking in terms of possibilities and thinking that possibilities are not evenly distributed. The terrain of struggle is not even. Some actors and some arguments win more easily and others tend to lose.

The resurging interest in the NIEO is mostly driven by the first dimension of thinking, aimed at recovering possibilities in order to open up the present and future. The debates of the NIEO do have that potential. They offer an uplifting experience due to the contrast that they provide with the much paler debates in the more recent past. At the same time, a renewed appreciation of this part of international law's past shows the significant difficulties for arguing that another path could have been charted for international law around that time. In fact, if the prevailing interest is in seeing what else could have happened around the 1970s, then the experience of returning to the NIEO is rather disappointing.

What were the possibilities of a different course of action at the time? While the context for action was marked by political confrontation, it also lacked institutional avenues for turning the will of a large majority into international law. With great frustration did the Mexican delegate speak of the 'tyranny of the minority'.¹⁵⁰ Which other choices were possible, and would possibly have made a difference? The difficulties of the Dutch government in the crucial years of 1973 and 1974 testified to the inertia of international law. The government's action in furtherance of the NIEO and CERDS were dismissed in internal debates as being of a political nature only.¹⁵¹ They were contrasted with the calm rationality of international law as it had arguably already developed in the preceding years. How to think about the possibility of a different law in this context? Developed countries then withdrew from political fora altogether to act via specialized institutions and via technical expertise instead.¹⁵² Then as

149 Hardoon, Deborah. 'Wealth: Having It All and Wanting More'. *Oxfam Briefing Issue 12* (19 January 2015). Available at <https://policy-practice.oxfam.org.uk/publications/wealth-having-it-all-and-wanting-more-338125> (last accessed 23 February 2018).

150 A/PV.2315 and Corr. 1, para. 167.

151 Memo from JURA to DIO, 24 July 1974, Inv. No. 22027.

152 On this more general phenomenon see Benvenisti, Eyal and George W. Downs. 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law'. *Stanford Law Review* 60 (2007), 595–631; von Bernstorff, Jochen. 'Procedures of

now, the most important decisions in international economic governance are not taken in political fora, but in the expert groups and committees of the international financial institutions.¹⁵³

It seems that the recent returns to the NIEO show a good deal of nostalgia, which has in turn lead to an exaggeration of the possibilities of the past. But there is also a different way of reading the NIEO and the renewed interest that it has found. This alternative reading sees the renewed attention for the NIEO as a tribute to the normative surplus of those past debates. The normative surplus refers to the claims of social practices that are not yet absorbed by society but that have left a mark on discursive structures.¹⁵⁴ One could call it the generation of normativity, even if the practices did not lead to many tangible changes in international law. Speaking of the normative surplus of the debates places emphasis on their continuous potentiality, not the least to contribute to international legal change.

While predominantly interested in recovering a sense of possibility, recent turns toward the NIEO also aspire to correct the collective memory of what actually happened then, and since then. Rather than a simple failure, according to this strand, the NIEO did have an impact that continues to be reflected in specific fields of international law and in questions of a more general purport. The United Nations Convention on the Law of the Sea (UNCLOS) is a case in point, especially with its provisions on technology transfer and the 'equitable sharing of financial and other economic benefits derived from activities in the Area'.¹⁵⁵ What is more, especially in recent debates about land-grabbing, the idea of permanent sovereignty over natural resources has retained its importance in international legal discourse.¹⁵⁶ On a much more general level, Samuel

Decision-Making and the Role of Law in International Institutions'. *German Law Journal* 9 (2008), 1939–1964.

153 Koskenniemi, Martti. 'Declaratory Legislation: Towards a Genealogy of Legalism'. In *International Law-Making: Essays in Honour of Jan Klabbers*, eds. Rain Lioja and Jarna Petman (London: Routledge, 2014), 17–38; Kennedy, *A World of Struggle* 2016 (n. 148).

154 Honneth, Alexander. *Freedom's Right: The Social Foundations of Democratic Life* (Berlin: Suhrkamp, 2014), 164; see also Herzog, Benno. *Discourse Analysis as Social Critique: Discursive and Non-Discursive Realities in Critical Social Research* (Berlin: Springer, 2016), 34–36 and 85–86.

155 Arts. 140 and 144 United Nations Convention of the Law of the Sea (UNCLOS), 10 December 1982, 1833 UNTS 3; 21 ILM 1261. One particular issue of struggle in this regard is the use of marine genetic resources, Bonfanti, Angelica and Seline Trevisanut. 'TRIPS on the High Seas: Intellectual Property Rights on Marine Genetic Resources'. *Brooklyn Journal of International Law* 37 (2011), 187–232. See also Ranganathan, Surabhi. 'Global Commons'. *European Journal of International Law* 27 (2016), 693–717.

156 See, e.g., Romanin Jacur, Francesca, Angelica Bonfanti and Francesco Seatzu, eds. *Natural Resources Grabbing: An International Law Perspective*, (Leiden: Brill, 2015).

Moyn has credited the NIEO with successfully raising issues of justice globally, and with thereby pushing the philosophical discourse ahead.¹⁵⁷ Quoting Theodor W. Adorno, Moyn notes that ‘philosophy lives on because the moment to realize it was missed’.¹⁵⁸ Even if the NIEO did not leap towards a more just world in the 1970s, it continues to influence the ways in which questions of justice are approached.

The normative surplus of the NIEO sustains and permeates present debates about international economic justice. A project long believed dead breathes new life as it shows its unrealized potential. For that to work, we do not need to regain a sense of the possibility of different outcomes. We need to keep alive the potentiality of the debates. Writing histories of the NIEO has an uptake that still goes further than providing a reminder of the breadth and intensity of those debates. Significant change is possible when a previously dominant rationality is widely exposed as ideology.¹⁵⁹ It then belongs to the past and the present is freed from it. The writing of legal history should also support that realization. Reviving the memory of the NIEO as well as the reasons for its failure may well be one of the strongest cases in point.

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157 Moyn, Samuel. ‘Justice Delayed: The Political Origins and Uncertain Future of Global Justice’, ABC Religion and Ethics, 27 January 2016. Available at <http://www.abc.net.au/religion/articles/2016/01/27/4395512.htm> (last accessed 26 May 2017).

158 Ibid.

159 See Cox, ‘Ideologies’ 1979 (n. 45), 300: ‘The significant breaks or turning points in history are points at which mental constructs which have hitherto been recognized as generally valid science (because practically useful as guides to action under specific historical conditions) come to be seen as ideology’.

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