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### Race & International Investment Law: On the Possibility of Reform and Non-Retrenchment

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## REVIEW ESSAY

### RACE & INTERNATIONAL INVESTMENT LAW: ON THE POSSIBILITY OF INVESTMENT REFORM AND NON-RETRENCHMENT

By *Olabisi D. Akinkugbe*

*Investment Law's Alibis: Colonialism, Imperialism, Debt and Development.* By David Schneiderman. Cambridge, UK: Cambridge University Press, 2022. Pp. ix, 235. Index.

*Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes.* By Wolfgang Alschner. New York: Oxford University Press, 2022. Pp. xxvii, 310. Index.

#### I. INTRODUCTION

The international investment regime is in flux. The mainstream practice of investment law and arbitration works on the basis of the regime's foundations in contract and property law. However, critical scholarship in the field has unearthed the coloniality of power that permeates both the practice of international investment law and the current reform exercise led by the United Nations Commission on International Trade Law (<10>UNCITRAL<10>) Working Group III. These critical scholars warn of the imminent reproduction and entrenchment of the systemic inequities, power asymmetries, and investment law's investor-state dispute settlement (ISDS) regime which is skewed against post-colonial host states. The two books<sup>1</sup> under review offer a range of thought-provoking approaches for analyzing the past, present, and future of investment law. This Review Essay categorizes these books into two modes of critical scholarship on international investment law: *moderate* and *radical*.<sup>2</sup> In Part II, I flesh out the conceptual categories of *moderate* and *radical* critique. In Part III, I analyze the books under review through the lens of these two conceptual frameworks. In Part IV, I turn to the question of race and investment law. This Review Essay suggests that race should not be neglected in our analysis of the past, present, and, most importantly, the future of investment law—a core theme that both books under review does not engage with. Part V briefly concludes.

#### II. MODERATE AND RADICAL CRITICAL INTERNATIONAL INVESTMENT LAW SCHOLARSHIP

*Moderate* critical legal scholarship on investment law exists within the framework of the dominant and powerful post-colonial international legal order. This scholarship is *moderate* in the

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<sup>1</sup> WOLFGANG ALSCHNER, INVESTMENT ARBITRATION AND STATE-DRIVEN REFORM: NEW TREATIES, OLD OUTCOMES (2022); DAVID SCHNEIDERMAN, INVESTMENT LAW'S ALIBIS: COLONIALISM, IMPERIALISM, DEBT AND DEVELOPMENT (2022).

<sup>2</sup> This categorization differs from the *strong* and *weak* versions of critical international legal scholarship offered in James Gathii's Review Essay in one fundamental way. Unlike Gathii, I conceptualize critical scholarship in investment law as existing on a spectrum as opposed to a body of writings that are easily delineated as falling within one of two categories. James Thuo Gathii, Review Essay, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 184 (1998).

sense that it embraces reformist goals and does not address the systemic and asymmetry concerns radical critics raise regarding the investment regime. It does not center race as a technology of economic governance.<sup>3</sup> Neither does it problematize questions of how the Third World is disciplined by the investment regime—which consists of the international investment agreements and the investor-state dispute settlement. It uses theoretical lenses, such as law and economics and contract theory, that prioritize the efficiency of the regime over its systemic and structural concerns. As such, *moderate* critical scholarship is blind to such issues as race, indigeneity, and feminism, among others.

Even if the *moderate* critical investment law scholarship prevails in its reform of the investment regime around issues such as transparency, diversity, fairness, and costs, it still falls short in how it addresses the structures of power dynamics and asymmetries on investment law. This approach can be illustrated briefly through the work of the <10>UNCITRAL<10> Working Group III. The categories of reform that are being considered range between procedural and substantive. The procedural reforms now finalized include provisions on the use of mediation in ISDS, and the codes of conduct for adjudicators in ISDS that will be presented to <10>UNCITRAL<10> for approval at its annual meeting in Vienna.<sup>4</sup> A contested substantive, or perhaps hybrid, reform proposal includes the Multilateral Investment Court (MIC) that the European Union has presented and that has gained momentum in the Working Group. The proposed MIC keeps key features of the ISDS system in that investors retain their exclusive access to sue host states in relation to any measure or public policy issue that is considered to undermine their investments and that have not been carved out from the scope of the applicable IIA.<sup>5</sup> The proposed MIC—an institutional improvement that I liken to “window dressing”—could entrench and even cascade many flaws of the current ISDS system and fails to address many of the developmental concerns of the Third World. As such, these *moderate* reforms and the proposals they offer are inherently limited and less disruptive to the regime. Not coincidentally, they are championed by “insiders,” rather than “outsiders.”<sup>6</sup> Yet, it is important to note that “outsiders” may also wield power in a reform process, especially where they are from the dominant Western states in investment law. . As such, investment reform has failed to draw on model bilateral investment treaties (BITs) from such places as India, Morocco, Brazil’s Cooperation and Facilitation Investment Agreements, or South Africa’s domestic Protection of Investment Act 2015.

*Radical* critical legal scholarship centers coloniality, power, and governmentality in their analysis of the international economic order. *Radical* critical legal scholarship draws on theoretical

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<sup>3</sup> Chantal Thomas, *Race as a Technology of Global Economic Governance*, 67 UCLA L. REV. 1860 (2021). (focusing on the role of race in global political economy and how to understand racialization as part of the process by which institutions of economic hierarchy not only were created but continue to be legitimated).

<sup>4</sup> See Foley Hoag LLP, <8>UNCITRAL<8> Working Group III Reaches Notable Milestones in Recent New York Meeting (Apr. 18, 2023), at <https://www.jdsupra.com/legalnews/uncitral-working-group-iii-reaches-8220470>.

<sup>5</sup> Jane Kelsey & Kinda Mohamadieh, <8>UNCITRAL<8> Fiddles While Countries Burn, GLOB. & REGIONAL ORDER, THIRD WORLD NETWORK & FRIEDRICH EBERT STIFTUNG, at <https://library.fes.de/pdf-files/bueros/genf/18297.pdf>.

<sup>6</sup> Anthea Roberts & Taylor St. John, *The Originality of Outsiders: Innovation in the Investment Treaty System*, 33 EUR. J. INT’L L. 1153, 1158 (2023) (“Insiders in a given field are more likely to propose sustaining innovations, while individuals who are outsiders to that field are more likely to produce disruptive innovations.”).

lenses such as Marxism, Third World Approaches to International Law (<10>TWAIL<10>),<sup>7</sup> post-colonialism, among others, and pushes against privileged perspectives of knowledge, legal rules, and practices from powerful states that have been made globally hegemonic over other forms, especially those from the periphery or the Third World. A unique feature of the radical approach is that it seeks to curtail the spread and disciplinary power of purveyors of imperialism—whether from the Global North or South—and the overreach of investors through their transnational corporations in the Third World. Notably, the *radical* approach reveals how power and structural relationships are baked into and are manifested by the relationships of capital exporting states with non-capital exporting states. The range of issues that their analyses foreground include unequal relations relating to gender, social classes, and labor relations, among others. Ultimately, *radical* approaches fundamentally seek to restructure our international economic order as opposed to *moderate* “window-dressing.” *Radical* approaches self-identify with the subaltern and center issues of race and indigeneity in their scholarship.<sup>8</sup> Speaking about the disruptive nature of the “outsider” proposals, Roberts and St. John note about Brazil’s officials at the <10>UNCITRAL<10> “encourage others to think more broadly and imagine a wider range of reforms . . . .”<sup>9</sup>

Contrary to the narratives and discourses that have been successfully constructed around the economic development potential of the investment regime, *radical* scholarship on investment law exposes false narratives of the purveyors of the virtues of foreign direct investment flow from capital-exporting countries. These narratives constantly mutate to disguise the asymmetries of investment law. *Radical* scholarship exposes the regime of investment agreements, and their investor-state dispute system (ISDS) is a reservoir that offers rationalization(s) for the codification of profit-making by investors and neutralizes the racialized foundation on which the investment system is constructed.

Longstanding backlash from developing countries, and more recently from the developed states, has not turned the tide on the purveyors of investment regime’s deeply entrenched imperialist and hegemonic internal logic. However, seeing through the proposals of the *radical* critical scholarship is a difficult task. “Brazil’s innovations in investment policy-making” Roberts and St. John note “are gaining ground internationally, but these innovations have been sidelined at <10>UNCITRAL<10> where the focus is on ISDS reform.”<sup>10</sup> Indeed, experience shows that former colonizers and dominant capital-exporting states are in the best position to wield power as rule-makers and their entrench the shortcomings of the investment regime.<sup>11</sup>

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<sup>7</sup> MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (5th ed. 2021).

<sup>8</sup> See Ibronke T. Odumosu-Ayanu, *Indigenous Peoples in International Investment Law: A <8>TWAIL/UNDRIP<8> Reading*, in *RESEARCH HANDBOOK ON THE INTERNATIONAL LAW OF INDIGENOUS RIGHTS* (Dwight Newman ed., 2022); SERGIO PUIG, *AT THE MARGINS OF GLOBALIZATION: INDIGENOUS PEOPLES AND INTERNATIONAL ECONOMIC LAW* (2021); JON BURROWS & RISA SCHWARTZ, *INDIGENOUS PEOPLES AND INTERNATIONAL TRADE: BUILDING EQUITABLE AND INCLUSIVE INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS* (2020).

<sup>9</sup> Roberts & St. John, *supra* note 6, at 1172.

<sup>10</sup> *Id.* at 1174.

<sup>11</sup> See generally James Thuo Gathii, *Reform and Retrenchment in International Investment Law*, (SSRN) <https://deliverypdf.ssrn.com/delivery.php?ID=68309900606612303111302908210802806902804007005209102002400306502509611809512409311103301703312702405611407701502700401607912402402308706402900411207809907711210901901108506700508309802902509200106710308702406901002910600812011601306712607802>

To be sure, both the moderate and the radical approaches have their strengths and shortcomings and even if fully elaborating on them is beyond the scope of this review, it is important to note their differences: while moderate approaches entrench the regime, radical approaches risk—or promise—a utopian disruption. Each book under review falls into a different one of these categories. *Investment Law's Alibis: Colonialism, Imperialism, Debt and Development* by David Schneiderman, professor of law at the Faculty of Law, University of Toronto, is *radical* in orientation; *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* by Wolfgang Alschner, associate professor at the Common Law Section at the University of Ottawa, is *moderate*.

### III. IMPERIAL PURVEYORS VS INTERPRETIVE INNOVATION: THE PAST, PRESENT, AND THE CHALLENGE OF INVESTMENT REFORM

*Investment Arbitration and State-Driven Reform* offers a technical but compelling diagnosis of how we might make sense of the complex web of international investment agreements (IIAs).<sup>12</sup> Alschner's analysis permits readers to track innovations between old and new IIAs, understand the limitations that are inherent in interpretive techniques to address the system's deficiencies, and assess the possibility of a *multilateral tax-style* reform proposal with a flexible architecture built on three ideas—a framework convention, separate opt-in protocols, and a central forum—as a solution to the complex web of IIAs.<sup>13</sup> The book comprises of nine (9) intricately woven Chapters that make up three equal part: Part I (*State-Driven Reform*); Part II (*New Treaties, Old Outcomes*) and Part III (*New Treaties as Anchor Points*).

Drawing on legal data science, Chapter 1 (Treaties as Data) foregrounds the utility of computational legal studies as a theoretical approach for understanding the complex universe of old and new IIAs and the latter's claims to innovation. Computational methods make sense of big data and circumvent the limitations of traditional legal approaches that thrive in small data environment. Inductive data science, Alschner argues, “lets treaties speak for themselves to reveal the major content evolution of more than 3,300 IIAs” (Alschner, p. 24). Data science, thus, offers an economic efficiency advantage which saves time and cost. In Chapter 2 (*Change as Gap Filling*), Alschner argues that the main difference in the universe of international investment agreements “is the level of completeness”. (Alschner, p. 24) The book uses contract theory, a branch of law and economics, to study the incompleteness of investment agreements and urge gap-filling strategies to produce more complete agreements.<sup>14</sup> Notwithstanding the shortcomings of

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4065070&EXT=pdf&INDEX=TRUE; DANIEL S. HAMILTON & JACQUES PELKMANS, *RULE-MAKERS OR RULE-TAKERS? EXPLORING THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP* (2015).

<sup>12</sup> For some individual reviews of *Investment Arbitration and State-Driven Reform*, see, Benton Heath, *The Phantom Menace*, (ICSID REVIEW) Forthcoming. Available on SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4354316](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4354316); Berge, Tarald Gulseth. “Review of Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes by Wolfgang Alschner Oxford: Oxford University Press.” *WORLD TRADE REVIEW*, 2023, 1–4; Eichberger, Fabian. “Investment Arbitration and State-Driven Reform by Wolfgang Alschner [Oxford University Press, Oxford, 2022, 352pp, ISBN: 9780197644386, £64.00 (h/Bk)].” *INTERNATIONAL & COMPARATIVE LAW QUARTERLY* 72, no. 2 (2023): 567–69.

<sup>13</sup> See also Anthea Roberts, Taylor St. John & Wolfgang Alschner, *UNCITRAL and ISDS Reform: A Flexible Framework*, AUSTRALIAN NAT'L U. & REGNET, 37, at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/anthea\\_roberts\\_uncitral\\_and\\_isds\\_reforms\\_a\\_flexible\\_framework.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/anthea_roberts_uncitral_and_isds_reforms_a_flexible_framework.pdf).

<sup>14</sup> AIKATERINI FLOROU, *CONTRACTUAL RENEGOTIATIONS AND INTERNATIONAL INVESTMENT ARBITRATION: A RELATIONAL CONTRACT THEORY INTERPRETATION OF INVESTMENT TREATIES* (2020).

computational legal methods—“[a] focus on data and methods may come at the expense of theory or risks losing touch with normative international law debates”—the book pushes the boundaries of our learning at the intersection of law and computer science approaches. Thus, Alschner cautions the readers not to let data “think for itself” (Alschner, p. 26). From the contract theory point of view, the increase in ISDS arbitration reveals incomplete contracting with “adjudicators filling gaps through unanticipated or conflicting interpretations” (Alschner, p. 56). As more developed states face the backlash of ISDS—“the cost of incomplete contracts” (*id.*) has increased (Alschner, p. 81). Accordingly, the evolution of IIAs is a narrative of progressive gap-filling.<sup>15</sup> Alschner’s computational analysis distinguishes between high-scoring new IIAs, which are more complete, and early low-scoring old BITs, which have more gaps and ambiguities. For example, new generation IIAs have more precision, detail, and exceptions to balance investment protection and host state sovereignty. Interestingly, while conventional wisdom would suggest that the innovations toward more complete IIAs should yield different outcomes in dispute settlement, Alschner’s analysis of a handful of cases<sup>16</sup> “that have been decided under high-scoring treaties seem to defy conventional wisdom and suggest a different trajectory: new treaties reproduce old outcomes” Alschner, p. 41). “We are thus left with a puzzle,” declares Alschner (Alschner, p. 45). Chapter 3 – Evolution as Americanization – closes Part 1 of the book as it “contextualizes and explains the transformation of investment agreements toward more contractual completeness” which is mainly driven by powerful capital exporting states which he dubs as *American-styled*. (Alschner, p. 81)

As *Investment Law’s Alibis* shows, however, new treaties generating old outcomes should not be surprising. Chapters 4, 5 & 6, – *Reversing Innovation through MFN; Overriding Differences through Custom; Perpetuating Mistakes through Precedent* – therefore focuses on these “three normative devices chiefly responsible for why new, more complete, American-style treaties produce interpretive outcomes that mirror those of old, incomplete, European-style IIAs.” (Alschner, p. 123) New IIAs, despite all their innovations, do not exist in a vacuum. As a doctrinal matter, Alschner highlights the role precedent, customary international law, and most-favored nation (MFN) clauses play in interpretive approaches that recycle, expand, and entrench the results that low-scoring old-style IIAs would produce.<sup>17</sup> As a theoretical matter, the book underscores the ongoing resistance to acknowledging expressions of global hegemony. This, along with a dogged insistence on history and continuity, the ideological leanings and agency of arbitrators all serve to undercut the transformative impact of the new-style IIAs.<sup>18</sup> In short, through sustained and persuasive case law analysis, Alschner shows that MFN, custom, and precedent each create a discursive link between old and new generations investment agreements as Tribunals have turned to them to roll back clarifications and exceptions.

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<sup>15</sup> “States have made use of the four gap-filling strategies identified by contract theory—(1) more complete contracting, (2) escape clauses, (3) relational contracting, and (4) refined terms of delegation—to render IIAs more complete” (Alschner, 80).

<sup>16</sup> *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012, Award, March 15, 2016; *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/1421; *Eco Oro Minerals Corporation v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021.

<sup>17</sup> Richard C. Chen, *Precedent and Dialogue in Investment Treaty Arbitration*, 60 HARV. INT’L L.J. 47 (2019).

<sup>18</sup> Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L.J. 211 (2012); Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A <8>TWAIL<8> Perspective*, 43 OSGOODE HALL L.J. 171, 173 (2005).

Chapters 7, 8, and 9 which complete the book focus on looks forward respectively on “how states and tribunals can leverage clarifications in new, more complete treaties to fill interpretive gaps in older, incomplete treaties”; “how states can go further and modify old IIAs in light of new treaties through data-driven renegotiations”; and “how such interpretations and modifications can be multilateralized by modeling investment law reform on the international tax regime.” (Alschner, p. 219) Alschner offers a bouquet of proposals to forestall the erosion of innovation in investment law, including forward-looking interpretation, renegotiation that clarifies and amends thousands of investment agreements timeously, and adoption of a *Tax-Style Multilateralism*.<sup>19</sup> Alschner makes a strong case for pursuing *Tax-Style Multilateral* reform. This approach offers investment law reformers with two complementary routes to achieve wholesale reform of investment agreements: First, “multilateral tax soft law retroactively clarifies the interpretation of existing agreements, which, applied to investment law, would scale the forward-looking interpretation of outdated IIAs in light of more recent practice . . .” (Alschner, p. 282). Second, “multilateral tax hard law directs investment law reformers to classify substantive and procedural reform issues into buckets (minimum standards, opt- out, opt-in) depending on their underlying state-backing and bundle them into a treaty to reform IIAs” (*id.*). Pursuing both of these tracks produced “a holistic modernization of thousands of tax treaties and could form the template for comparable reforms of investment treaties.” While Alschner is careful to note that tax-style reform should be adapted with the necessary adaption—which the book diligently offers—it remains doubtful how much the multilateral tax-style approach alleviates the systemic issues that *radical* critical scholarship highlights.

Notably, while persuasive on its own terms, a tax-style approach to investment regime reform is *moderate* and portends at least four challenges. First, the “flexible model” premise which offers states the choice to opt in and out of the system risks deepening incoherence and the transaction costs associated with participation in the regime.<sup>20</sup> Second, the approach does not address the systemic challenges of the ISDS. Third, the approach risks entrenching power asymmetries as the forum for negotiating reforms would be based on an approach that powerful capital-exporting states urged. Specifically, tax multilateralism was led by the Organization for Economic Development and Cooperation (OECD), which raises an inclusion, participation, and legitimacy gap for many developing states that mirrors systemic issues in investment law. OECD led reforms are seen to entrench the power and dominance of capital exporting states. OECD member states, including the United States, are rule-makers in the tax world and not rule-takers. Developing countries have been critical of this process as the OECD has a reputation of representing the interests of wealthy countries.<sup>21</sup> The OECD is a representation of the empire and its ongoing legacies in the tax context; thus international tax law reform is embedded in the politics of race and discriminatory exclusion.<sup>22</sup> As such, an OECD-led process is inherently problematic as a model of reform. Participatory governance from below is essential to the reform of investment law and ISDS.

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<sup>19</sup> The approach “can modernize IIAs in substance and procedure by modeling reforms on the international tax regime.” (Alschner, p. 269).

<sup>20</sup> This idea is reminiscent of the incoherence critique of the GATT 1948.

<sup>21</sup> Jingyi Wang, *Global Development of Information Exchange: Rule-Maker Versus Rule-Taker in International Tax Law*, 49 HONG KONG L.J. 951 (2019).

<sup>22</sup> Steven A. Dean & Attiya Waris, *Ten Truths About Tax Havens: Inclusion and the “Liberia” Problem*, 70 EMORY L.J. 1659 (2021).

As a radical critique, *Investment Law's Alibis* centers coloniality, power asymmetry, domination, and imperialism—and their continuing manifestations and interconnectedness—as technologies of governance and of disciplining the subaltern. The book “is an exercise that unearths the dispositive—the ‘knowledge-power interlay’—that sustains a regime-specific subfield of international law” (Schneiderman, p. 12). The book effectively makes the case for “decolonial thinking” arguing that its transdisciplinary nature offers the “Advantage of uncovering linkages while insisting that we cross over seemingly impenetrable lines that allow for engagement with histories that are otherwise displaced or marginalized.” (Schneiderman, p. 23) The book uncovers the discursive ways that the rules and institutions of investment regime effectively disguise contemporary nodes that entrench imperialism. While the connection between debt and ISDS is not new, the book’s rigorous analysis of problematic investment awards and how they entrench the under-development of the Third World host states is productive.<sup>23</sup> Their operation is “far more entangled and complex . . . [and] empire continues to serve as a heuristic for understanding how capital-exporting metropolises manage governing at a distance through the medium of law” (Schneiderman, p. 38). Structurally, *Investment Law's Alibis* comprises of six substantive and provocative chapters between the Introduction and the Conclusion. The introduction – *Investment Law Among The Ruins* – sets the scene for the ensuing analysis of “how narratives and forms of that buoyed colonialism, imperialism, debt and development continue to circulate in investment law’s domains, unearthing the shaky foundations upon which investment law edifice is built.” (Schneiderman, p. 12) In Chapter 1 – *Colonialism as Investment Law* – Schneiderman brings to the fore “how narratives of European supremacy are institutionalized through methods and forms of legal rule . . . under international investment law.” (Schneiderman, p. 17) Colonial subjugation of the Third World, Schneiderman argues, has been sustained by narratives of profitability, improvement, distrust, and enclaves while illustrating these linkages with examples. Chapter 1 concludes on a somber note as Schneiderman wonders whether the beneficiaries of colonialism “can . . . learn to learn from below.” (Schneiderman p. 37) In Chapters – *Imperialism of Investment Law* –the book concretizes investment law’s imperial features by “resurrect[ing] notions of empire associated with colonial and neocolonial relations of the nineteenth and twentieth centuries, conjoined with the spatial relationship of core and periphery.”<sup>24</sup> (Schneiderman p. 38) The Chapter reflectively concludes by inviting the us to “consider what role privileged populaces play in perpetuating the structural inequalities that have carried over into the domains of international economic law.” (Schneiderman p. 65). Chapter 3 – *Standard of Civilized Justice* – Schneiderman demonstrates that methodologically, investment lawyers from powerful capital exporting reproduce – through international law – the discourse of civilized justice which characterized the twentieth century in contemporary regime of international investment law. In Chapter 4 – *The Stifling Threat of Debt* – the book draws on the notorious *Tethyan Copper Company Pty Limited v. Pakistan* to illustrates the interconnectedness of damages in investment law, debt and the reproduction of economic underdevelopment in the peripheries. Chapter 5 examines *The Difficulty of Decolonizing Investment Law* by drawing on the indigenous peoples on Canada and Chapter 6 focuses on the idea of *Divesting for Development* where Schneiderman

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<sup>23</sup> Stephen K. Park & Tim R. Samples, *Tribunalizing Sovereign Debt: Argentina's Experience with Investor-State Dispute Settlement*, 50 VAND. L. REV. 1033 (2021).

<sup>24</sup> Haynes, Jason, and Antonius Hippolyte, *The Coloniality of Investment Law in the Commonwealth Caribbean*, INTERNATIONAL & COMPARATIVE LAW QUARTERLY 72, no. 1 (2023): 105–45. (drawing “important connections between historic colonialism and the contemporary regime for the protection of foreign direct investment by situating the Caribbean's experience in the light of the rationales, tropes and methods arising in the past which endure in investment law's domains, as advanced by Schneiderman in his new book, *Investment Law's Alibis*...”)



offers new thinking about the possibilities of reform of international investment law. The Conclusion reflects on the value of new thinking for reconceptualizing investment law.

While the theoretical construct of *Investment Law's Alibis* draws principally on Albert Memmi's *The Colonizer and the Colonized*, the book richly blends other classic post-colonial works from Frantz Fanon and Aníbal Quijano, and discourse analysis from Michel Foucault and Jacques Derrida to clarify the discursive threads of investment treaty law and arbitration that traffic colonial legacies. Crucially, the advantage of decolonial thinking is that it discloses linkages and the double fold nature of enduring ideas "while insisting that we cross over seemingly impenetrable lines that allow for engagement with histories that are otherwise displaced or marginalized" (Schneiderman, p. 23).

Investment law institutions are purveyors of colonial legacies. Schneiderman argues that "the narratives of modernity familiar to investment law—development, rule of law, and good governance—are conjoined with muscular rules and institutions that disguise the presence of coloniality"<sup>25</sup> (Schneiderman, p. 17). The book distinguishes between formal and informal empire and identifies four features of the current regime that underscore their proximity with earlier forms of empire: investment regime disciplines states to remain open to the orthodoxy of private investment as an engine for economic growth; investment protection standards confine policy space; the absence of empirical evidence that truly backs the investment regime's promise of economic benefits to developing states; and today's investment law norm entrepreneurs perform roles that are comparable to those of the lawyers that influenced metropole policy.<sup>26</sup>

Investment arbitration awards,<sup>27</sup> the debt crisis, and more recently the COVID-19 pandemic—and especially measures taken to curtail them that are likely to be the basis for arbitral claims filed by investors—have deepened the vulnerability of Third World countries.<sup>28</sup> The implications that arise from these interconnected themes from different subfields of international law takes center stage in *Investment Law's Alibis*.<sup>29</sup> Using the debt crisis of the 1980s and the *Tethyan Copper* arbitration award against Pakistan,<sup>30</sup> the book illustrates the linkages and

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<sup>25</sup> James Thuo Gathii, *Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 VILL. L. REV. 971 (2000); RITA ABRAHAMSEN, *DISCIPLINING DEMOCRACY: DEVELOPMENT DISCOURSES AND GOOD GOVERNANCE IN AFRICA* (2000).

<sup>26</sup> Vanessa Ogle, "Funk Money": *The End of Empires, The Expansion of Tax Havens, and Decolonization as an Economic and Financial Event*, 249 PAST & PRESENT 213 (2020).

<sup>27</sup> For a deeper analysis of this connection, see Martins Paparinskis, *Crippling Compensation in the International Law Commission and Investor-State Arbitration*, 37 ICSID REV. 289 (2022).

<sup>28</sup> More recently developed countries have also joined the pushback. In protest to an award against it and despite claims its action could deter investment, Albania is the latest country planning to establish a local commercial court to replace ICSID. See Fjori Sinoruka, *Albania Moves to Establish Local Arbitration Court to Replace ICSID*, BALKANINSIGHT (Apr. 21, 2023), at [https://balkaninsight.com/2023/04/21/albania-moves-to-establish-local-arbitration-court-to-replace-icsid/?utm\\_source=dlvr.it&utm\\_medium=twitter](https://balkaninsight.com/2023/04/21/albania-moves-to-establish-local-arbitration-court-to-replace-icsid/?utm_source=dlvr.it&utm_medium=twitter); *Spain Tells World Bank It Will Not Pay €2-Billion Awards for Renewable Energy Debts*, CAPITAL MADRID (Apr. 26, 2023), at <https://www.capitalmadrid.com/2023/4/26/64924/spain-tells-world-bank-it-will-not-pay-2-billion-icsid-awards-for-renewable-energy-debts.html>.

<sup>29</sup> SOVEREIGN DEBT DIPLOMACIES: RETHINKING SOVEREIGN DEBT FROM COLONIAL EMPIRES TO HEGEMONY (Pierre Pénet & Juan Flores Zendejas eds., 2021); Liliana Obregón, *Empire, Racial Capitalism and International Law: The Case of Manumitted Haiti and the Recognition Debt*, 31 LEIDEN J. INT'L L. 597 (2018).

<sup>30</sup> *Tethyan Copper Company Pty Limited v. Pakistan*, ICSID Case No. ARB/12/1, Decision on Stay of Enforcement of the Award (Sept. 17, 2020).

continuities of debts' disciplinary power over time and the "pathologies of empire."<sup>31</sup> Pakistan's precarious economic position, its challenging debt crisis, and the crippling effect of the punitive award arising from the *Tethyan* arbitration on Pakistan's economy generate the image of a country on the cusp of financial collapse and under the ruins of investment arbitration award. The point is "investment arbitration . . . [is] not only a mechanism for swelling indebtedness but also a device for domination. Damages stifle the possibility for political action, and inhibit present possibilities, while projecting political constraints into the future [including stifling fiscal space to take climate action]"<sup>32</sup> (Schneiderman, p. 90). In reality, the promise(s) of debt and its linkages to excessive damages in investment law tends to not only reinforce and perpetuate the financial precarity of the periphery host states, but also deepen their economic underdevelopment.

Yet, *Investment Law's Alibis radical* critique and unraveling of investment law is not a utopian analysis that simply deconstructs. The book acknowledges the limits of a transformational change that hinges on a *radical* critique of investment law. As Schneiderman notes: "interests promoted by investment treaties, and enforced by its dispute resolution mechanisms are not Indigenous interests and do not channel their preferences" (Schneiderman, p. 151). Consequently, it would amount "to wishful thinking to envisage international economic law as serving indigenous peoples and their relations to land" (Schneiderman, p. 152). Likewise, in inviting the readers to consider the possibility of "divesting for development"—an example of radical discontinuity—the book highlights the potential of imposing economic hardship on citizens. Soberly, Schneiderman notes he "would not want to suggest that radical revision of the investment law regime is imminent" (Schneiderman, p. 168). Unlike Schneiderman's skeptical analysis, other scholars have called for centering Indigenous law in international economic law to bridge the gap.<sup>33</sup> Schneiderman leaves the reader with three suggestions to confront investment's alibis meaningfully: first, access to define the content of international law must be made available to those marginalized by processes associated with economic globalization and investment law in particular; second, the powerful developmentalist discourse that justifies investment law must be reorientated; and third, redistribution is critical.

Notwithstanding its power, *Investment Law's Alibis radical* critique falls short in at least two aspects: first, the book does not address the coloniality of Sino-African relations as a purveyor of neocolonial imperial power that disciplines African states' economic development interests. Second, having identified "[r]ace . . . [as] an organizing principle of colonialism[.]"<sup>34</sup> the book does not take the next step and center its role in contemporary domination and subordination of the *uncivilized*. Thus, an opportunity to connect the dots to wider practices of subjugation of the Indigenous and Black populations of host communities and states was missed.

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<sup>31</sup> "Billion-dollar awards are now a routine." Paparinskis, *supra* note 29, at 291. Paparinskis illustrates other cases like: *Crystallex International Corporation v. Venezuela*, <8>ICSID<8> Additional Facility Case No. ARB(AF)/11/2, Award (Apr. 4, 2016); *Unión Fenosa Gas, SA v. Egypt*, <8>ICSID<8> Case No. ARB/14/4, Award (Aug. 31, 2018); *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v. Venezuela*, <8>ICSID<8> Case No. ARB/07/30.

<sup>32</sup> Olabisi D. Akinkugbe & Adebayo Majekolagbe, *International Investment Law and Climate Justice: The Search for a Just Green Investment Order*, 46 FORDHAM INT'L L.J. 169 (2023); Olabisi D. Akinkugbe, *Africanization and the Reform of International Investment Law*, 53 CASE W. RES. J. INT'L L. 7 (2021).

<sup>33</sup> Odumosu-Ayanu, *supra* note 9; Sergio Puig, *International Indigenous Economic Law*, 52 UC DAVIS L. REV. 1243 (2019).

<sup>34</sup> Schneiderman, p. 35.

Although the two books vary in the nature of their critiques, their analyses also overlap and complement each other in certain ways. An example of such convergence arises from the authors' analysis of the globalization of legal rules and forms that privilege the views of powerful Western states. The content of investment law and its treaty standards of protection are filled with reference to the law and legal forms of capital-exporting states<sup>35</sup>—as well illustrated by the “Americanization of investment law” discussed in *Investment Arbitration and State-Driven Reform*. In turn, the investment law regime discards “legal experiences that are dissonant with prevailing accounts. In which case the preferences of powerful capital-exporting states continue to determine the content of international law”<sup>36</sup> [Alschner, p. 19]. Crucially, “the choice of country models that get taken up for description is highly selective and productively so” (Alschner, p. 69).<sup>37</sup> This Review Essay's analysis of the UNCITRAL Working Group III's focus on the European Union's MIC proposal illustrates this point. From this perspective, together the two books illustrate the value of thinking about positions on the reform of investment law as existing on a spectrum, from moderate to radical.

#### IV. CENTERING RACE IN THE STUDY OF INTERNATIONAL INVESTMENT LAW: THE CASE OF LAND GRABS UNDER THE GUISE OF FOOD SECURITY

Radical proposals for reform investment reform are insufficiently attentive to the role of race in past and present of the regime. As other scholars have explained, international investment law is racially coded. International investment law and its ISDS regime are constructed on a history of racialized legacies of economic governance.<sup>38</sup> Racial hierarchies of power are baked into the technologies of governance of the colonized by the colonizers.<sup>39</sup> Yet, racial hierarchies as an analytical frame for the study of the practice and reform agenda of investment law, often slip beneath the surface and are consigned to the margins.<sup>40</sup> Importantly, racial hierarchies in investment law relations are not confined to the traditional Global North and Global South binaries, they are also manifested in South-South economic relations, which sometimes act as purveyors of neocolonialism.<sup>41</sup> This approach introduces new levels of complexity to discussions of race and international investment law that go beyond the Global North/Global South axis

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<sup>35</sup> For similar narratives of the globalization of forms of economic governance that emanate from the European Union, see ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* (2020).

<sup>36</sup> Cf. Roberts and St. John's analysis on the United States and Bahrain as *insiders* versus EU and Brazil as *outsiders* analysis. Roberts & St. John, *supra* note 6.

<sup>37</sup> DOMINIC NPOANLARI DAGBANJA, *THE INVESTMENT TREATY REGIME AND PUBLIC INTEREST REGULATION IN AFRICA* (2022).

<sup>38</sup> See Felipe Ford Cole, *Race and the History of International Investment Law*, U. CHI. L. REV. ONLINE (2022), at <https://lawreviewblog.uchicago.edu/2022/03/02/cole-investment>.

<sup>39</sup> “[T]he idea of race was a way of granting legitimacy to the relations of domination imposed by conquest.” Aníbal Quijano, *Coloniality of Power and Eurocentrism in Latin America*, 15 INT'L SOCIOLOGY, 215 (2000).

<sup>40</sup> See generally James T. Gathii & Ntina Tzouvala, *Racial Capitalism and International Economic Law: An Introduction*, 25 J. INT'L ECON. L. 199 (2022); Ntina Tzouvala, *Full Protection and Security (for Racial Capitalism)*, 25 J. INT'L ECON. L. 224 (2022).

<sup>41</sup> For example, in June 2022, the Chinese Embassy in Malawi was forced to address the incidence of video that first appeared online in 2020 of a Chinese investor assaulting a Malawian employee. This practice of slavery on the uncivilized is a barbaric exercise of power under the guise of foreign direct investment. See Chinese Embassy in

Land grabs are a potent example of the heuristics that carry forward the civilizing mission and employ racially laden logics whose politics are obscured through use of neutral-sounding economic vernaculars. Land-grabs and the illegitimate acquisition of land for mass agri-processing to service the Global North (but also rich countries in the Middle East and China) are fruitful arenas to briefly explicate the perpetuation of racial hierarchies. Land acquisitions through corporate structures contributes to obscuring the racial manifestations of investment law. The overlap between land, race, and the state is an important battleground where capital accumulation, economic development, political sovereignty, resistance to exploitation, and contemporary imperialism are manifested. With lenses like racial capitalism and international (economic) law gaining renewed momentum,<sup>42</sup> the need for more work that illuminates the enmeshment of race in investment law through land grabs disguised as food security becomes more apparent.

Consider the *Case of Shonga Farms Project in Kwara State Nigeria*. This project dates to 2003 when the then governor of Kwara State in Nigeria envisioned agriculture and agro-allied industries as key to his administration's development agenda.<sup>43</sup> The initial focus on the provision of seedlings, fertilizers, and land cultivation to farmers was unsuccessful. To overcome the perceived inertia, the government turned its attention to modernized approaches of farming and financing when it welcomed white farmers that were expelled from Zimbabwe. The Shonga Farms Project promised transfer of technology to the local farmers and education for the local farmers on the mechanics of modernized farming. Significantly, however, the agreement between the government of Kwara State and the farmers was not made public. As events unfolded, this much-feted project was not a vehicle for economic development, local farmer education, and technology transfer; instead, the project failed and Kwara State is now in debt.<sup>44</sup> According to recent newspaper reports, not only was the Shonga Project "funded 100 per cent at inception with taxpayers money without any gains accruing to the people of the state under whatever guise," nine of the thirteen

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Malawi (@ChineseEmbassy\_MW), TWITTER (June 13, 2022, 3:06 p.m.), at [https://twitter.com/ChinaEmbassy\\_MW/status/1536424718294827009](https://twitter.com/ChinaEmbassy_MW/status/1536424718294827009). The Department of African Affairs, MF, China director-general's tweet's emphasis on "crack down on such racial discrimination videos in the future" in fact reveals a dimension of a failure to take responsibility. Wu Peng (@WuPeng\_MFACHina), TWITTER (June 14, 2022, 12:08 p.m.), at [https://twitter.com/WuPeng\\_MFACHina/status/1536742427205070848?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etwetembed%7Ctwtterm%5E1536742427205070848%7Ctwtgr%5Ec3bcf122df930b497877d76ff511918a4bb5b519%7Ctwcon%5Es1&ref\\_url=https%3A%2F%2Fglobalbar.se%2F2022%2F09%2Fracism-made-in-china%2F](https://twitter.com/WuPeng_MFACHina/status/1536742427205070848?ref_src=twsrc%5Etfw%7Ctwcamp%5Etwetembed%7Ctwtterm%5E1536742427205070848%7Ctwtgr%5Ec3bcf122df930b497877d76ff511918a4bb5b519%7Ctwcon%5Es1&ref_url=https%3A%2F%2Fglobalbar.se%2F2022%2F09%2Fracism-made-in-china%2F). See also Joseph Goldstein, *Kenians Say Chinese Investment Brings Racism and Discrimination*, N.Y. TIMES (Oct. 15, 2018), at <https://www.nytimes.com/2018/10/15/world/africa/kenya-china-racism.html>

<sup>42</sup> Gathii & Tzouvala, *supra note* 41. Contemporary international (economic) law scholarship is engaging more expressly with race and racialization. Achume, E. Tendayi & James Thuo Gathii, *Introduction to the Symposium on Race, Racism, and International Law*, 117 AJIL UNBOUND 26 (2023), at <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/introduction-to-the-symposium-on-race-racism-and-international-law/80C3B08700190E77F2CCDF484922D311>; James Thuo Gathii, *Beyond Color-Blind International Economic Law*, 117 AJIL UNBOUND 61 (2023), at <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/beyond-colorblind-international-economic-law/29AAA04E4E8B8B66AF27231A6288B002>.

<sup>43</sup> See generally Justitia O. Nnabuko & Chibuike U. Uche, *Land Grab and the Viability of Foreign Investments in Sub-Saharan Africa: The Nigerian Experience*, in *Environment, Agriculture and Cross-Border Migrations* (Emmanuel Yenshu Vubo ed., 2015).

<sup>44</sup> *Shonga Farm Debts: Kwara Govt, Ex-governor Ahmed Disagree as AMCON Seizes Properties*, PREMIUM TIMES NIGERIA (Feb. 11, 2022), at <https://www.premiumtimesng.com/agriculture/510906-shonga-farm-debts-kwara-govt-ex-governor-ahmed-disagree-as-amcon-seizes-properties.html?tztc=1>.

autonomous farms established with public funds have been sold with no returns to the state. The lack of transparency with which the financial component of the Shonga Farms was handled is reminiscent of the odious debt in some developing countries.<sup>45</sup>

Shonga Farms provides a concrete example of how an investment project billed as furthering the development of agro-allied farming can be turned on its head and entrench the underdevelopment and debt status of host communities. Central to this narrative is that the investor farmers are white farmers who had been ejected from Zimbabwe. Shonga Farms is just one of many similar projects that affirm the centrality of race in contemporary international (investment) scholarship. As James Gathii cautions, “race-neutral framings make inequality, especially racial inequality, invisible, thereby perpetuating racialized disadvantages and inequalities” for the local communities at the forefront of these “investment” projects.<sup>46</sup>

Hierarchy is central to investment law even as it remains intricately intertwined with the imperialist colonial and neocolonial expansion for profits. The discipline of international investment law is “deeply implicated in how relationships of expropriation, exploitation, and hierarchy along race and ethnicity are produced and in the ways in which some people are subordinated by others through processes of economic extraction and wealth acquisition.”<sup>47</sup> Put differently, racially coded hierarchies are well disguised expressions of Eurocentricity that thrive on the binaries of superior and inferior relative to knowledge production and legal institutions, among others. The case for more racially conscious scholarship on international investment law is clear, and this emerging literature should grow with concrete illustrations going forward.

## V. CONCLUSION

While the calls for systemic reform of investment law are rife, the path ahead remains deeply contentious. Reform of the investment regime is being undertaken in the shadow of geopolitical tensions between imperial powers, intensified climate change debates, and calls for reform of international financial institutions and the World Trade Organization. There are no easy answers to the challenges that the reform of the investment regime pose, yet any reforms must be inclusive and truly account for the systemic concerns of the Third World. Exorcizing the purveyors of the expansion of power and imperialist legacies is a major task for both moderate and radical critical international investment scholars. The two books under review provide fruitful, and complementary, insights as we collectively consider the path ahead.

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<sup>45</sup> “For instance, the sale of nine farms—in which the government ought to have 10 per cent equity shares—was done secretly without any document left for the government to trace how the transaction was done, at what amount they were sold, the billions of naira proceeds of the sale, and who the buyers were, while no board resolution existed to show that shareholders consented to the divestment process in line with the law.” *Id.*

<sup>46</sup> Gathii, *supra* note 43, at 64.

<sup>47</sup> Gathii & Tzouvala, *supra* note 41, at 199.