

# Angels, Virgins, Demons, Whores: Moving Towards an Antiracist Praxis by Confronting Modern Investment Law Scholarship

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## Abstract

Racism is not a natural phenomenon. Historically, it was socialised into global existence through intentional acts that have become embedded parts of the international legal order and domestic social systems. Rejecting racism and developing alternative antiracist approaches similarly require intentionality. One area of concern for scholars is how our linguistic and framing choices perpetuate or reproduce racialised hierarchies. In this article, I employ I. Bennett Capers's 'Reading Black' methodology to interrogate racialised narratives embedded in four contributions to modern international investment law debates. The purpose is not to condemn the individual authors but to identify how the socialisation and structures of racism continue to affect our scholarship. Premised on the belief that countering implicit, racialised biases is a normative good, I examine how it can also facilitate better scholarship. I offer suggestions that researchers and journals can take, individually and collectively, to develop anti-racist praxes.

## Keywords

antiracist praxis – critical race theory – implicit bias – investment law – racism

## 1 Introduction

Immanuel Kant argued that by nature White Europeans possessed a 'more beautiful body, work[] harder, [are] more jocular, more controlled in [their]

passions, more intelligent than any other race of people in the world.<sup>1</sup> His belief, first published in 1802, reflected not only the ideas of the time, but also an intentional socialisation of White supremacy that had begun in the 1400s and was intimately tied to colonialism and slavery.<sup>2</sup> In many ways – explicit and implicit – that socialisation of White supremacy and attendant racialized assumptions continues today.<sup>3</sup> It manifests in biases, assumptions, and beliefs that allow for the privileging of racial majorities at the expense of racial minorities.<sup>4</sup> Critical race theory (CRT) grapples with how racialized thinking manifests in the law.<sup>5</sup> Developed in the United States of America,<sup>6</sup> CRT has been adopted by legal scholars elsewhere who wish to better understand and respond to embedded racism and colonial legacies within their own legal systems.<sup>7</sup> This article continues that trend, utilizing I. Bennett Capers' 'Reading Black' methodology<sup>8</sup> to interrogate racial hierarchies embedded in modern international investment law (IIL) scholarship.

Race is a social construct, not a biological one.<sup>9</sup> For most of the past 600 years, writers, politicians, philosophers, economists, and biologists intentionally constructed a belief in race, racial identities, and racial

- 1 See Immanuel Kant, *Physical Geography* (1802) reprinted in Emmanuel Chukwudi Eze, *Race and the Enlightenment* (Wiley Blackwell 1997) 58, 64. While the immediate quote discusses those from 'temperate parts of the world,' elsewhere Kant clarifies that he means White Europeans with 'blond color, well formed, with blue eyes.' See *ibid* 59–60.
- 2 Eric Williams, *Capitalism & Slavery* (UNC Press 1944) 4; Carter A Wilson, *Racism: From Slavery to Advanced Capitalism* (Sage 1996) 37–42; Ibram X Kendi, *How to Be an Antiracist* (Bodley Head 2019) 17.
- 3 See generally *ibid*; Angela Saini, *Superior: The Return of Race Science* (Fourth Estate 2019).
- 4 Kendi (n 2) at 8. In the current article, majorities and minorities do not refer to numerical presence within a State or territory but to their social, political, economic and legal power.
- 5 Richard Delgado and Jean Stefancic, 'Introduction' in Richard Delgado and Jean Stefancic (eds) *Critical Race Theory: The Cutting Edge* (3rd edn, Temple UP 2013) 2.
- 6 *ibid* 2–3.
- 7 See Kojo Koram (ed), *The War on Drugs and the Global Colour Line* (Pluto Press 2019); Gabriela de Freitas Figueiredo Rocha, 'The Construction of Indigenous Citizenship in Brazil and Its Contributions to the Critical Race Theory' (2021) *Rev Direito e Práx* <<https://doi.org/10.1590/2179-8966/2020/59762>> accessed 28 April 2022; Mathias Möschel, *Law, Lawyers and Race: Critical Race Theory from the US to Europe* (Routledge 2014); E Tendayi Achiume and Devon W Carbado, 'Critical Race Theory Meets Third World Approaches to International Law' (2021) *UCLA Law Review* 1462; Natsu Taylor Saito and Akilah J Kinnison, 'Critical Race Theory and Children's Rights' in Jonathan Todres and Shani M King (eds), *The Oxford Handbook on Children's Rights Law* (OUP 2020).
- 8 See I Bennett Capers, 'Reading Back, Reading Black' (2006) 35 *Hofstra Law Review* 9.
- 9 Steve Garner, *Whiteness: An Introduction* (Routledge 2007) 4; Achiume and Carbado (n 7) 1467.

hierarchies.<sup>10</sup> The centuries of intentional justification means that racist beliefs are ‘pervasive, permeating the fabric of everyday life and normalised in ways that render [racism] invisible and neutral.’<sup>11</sup> A racist statement or action reinforces racial inequalities whereas an antiracist one deconstructs and counters racialized privileges and hierarchies.<sup>12</sup> Despite the disavowal of racist intentions, racist assumptions are often concealed in ‘coded’ language and framing choices in the media, politics, and law.<sup>13</sup> While individuals can choose to consciously adopt or amplify racist beliefs, one need not consciously embrace racist ideas or hierarchies to replicate them.<sup>14</sup> It is therefore unsurprising that legal scholarship and practice can manifest racist beliefs.<sup>15</sup> It takes intentional conduct to both unlearn racist assumptions and to develop alternative, antiracist approaches.<sup>16</sup>

Understanding how our language perpetuates or reproduces racialized hierarchies is a necessary step to developing an antiracist praxis. That is the purpose of this article. Scholars have analysed the racialised and colonial foundations of international law generally and IIL specifically.<sup>17</sup> In this piece, I focus on how racism continues to embed in modern IIL scholarship. I argue that addressing implicit biases is not only a normative good but can facilitate better scholarship.

Capers’ ‘Reading Black’ involves an ‘oppositional’ approach to textual readings, one that ‘reveals sites of contestation’ in the assumptions and beliefs that

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- 10 For comprehensive histories, see Ibram X Kendi, *Stamped from the Beginning* (Bodley Head 2017); Garner (n 9); Saini (n 3); Gloria Wekker, *White Innocence: Paradoxes of Colonialism and Race* (Duke UP 2016).
  - 11 Hurriyet Babacan, Narayan Gopalkrishna and Alperhan Babacan, *Situating Racism: The Local, National and the Global* (Cambridge Scholars 2020) 1.
  - 12 Kendi (n 2) 9, 10. There is debate as to whether an action or statement can be not-racist, meaning it is neither racist nor antiracist. For an extended discussion on this issue, and my own reflections, see Erika George, Jena Martin and Tara Van Ho, ‘Reckoning: A Dialogue About Racism, AntiRacists, and Business & Human Rights’ (2021) 30 Washington International Law Journal 171.
  - 13 Capers (n 8) 9, note 3; Babacan, Gopalkrishna and Babacan (n 11) 2–3, 90, 102.
  - 14 Kendi (n 2) 4.
  - 15 See Capers (n 8) 9.
  - 16 Kendi (n 2) 10–11.
  - 17 See eg Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005); Ntina Tzouvala, *Capitalism as Civilization: A History of International Law* (CUP 2020); Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (CUP 2019); John Linarelli, Margot E Salomon and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018); M Sornarajah, *The International Law on Foreign Investment* (5th edn CUP 2021) 27–40.

underpin judicial decisions.<sup>18</sup> This approach is significant. Where assumptions and choices reflect racialized thinking, IIL scholarship can cause or contribute to structural, racialised inequalities. Reading Black provides an opportunity to reflect on the language scholars use, the assumptions such language embed, and how they may reproduce racist beliefs and conduct. Ntina Tzouvala used the methodology in her important work on the impact of capitalist ideology on legal notions of civilization in international law.<sup>19</sup> In this article, I focus on the discourse and framing choices in modern, mainstream IIL scholarship. This appears to be the first time the methodology has been explicitly and narrowly employed on IIL scholarship, and the purpose is to raise awareness within the IIL community about how linguistic and framing choices commonly employed can exacerbate racist structures, harming both marginalised and marginalising scholars.

I proceed on three assumptions that may at times feel in tension with one another. The first is that being racist is normatively bad and being antiracist is normatively good. This assumption aligns with the general prohibition on racial discrimination in international law,<sup>20</sup> and the claim of an anti-discriminatory purpose within IIL itself.<sup>21</sup> Second, the terms 'racist' and 'antiracist' are not static identities, nor are they slurs or badges of honours.<sup>22</sup> They are 'usefully descriptive' terms that identify the impact of statements or actions in a particular moment and a particular context.<sup>23</sup> Finally, the purpose of this article, uncomfortable as it is at times, is not to condemn the scholars I analyse but to highlight how racialized beliefs continue to inform, and thereby undermine, modern IIL scholarship while pointing to opportunities to do better. While this article addresses individual contributions it is not aimed at individual failures. As racism is socialized and structural, it can affect our thinking even where we have no intention of being racist. The impact can only be adequately addressed through unflinching honesty and open dialogue about what we, as a field, can do differently.

The remainder of the article has five components. In Section 2, I explain the Reading Black methodology and the 'register' for Reading Black in international

18 Capers (n 8) 12.

19 Tzouvala (n 17) 9–10.

20 See eg Charter of the United Nations (1945) 1 UNTS XVI, art 1(3). For a critique of the approach to a prohibition on racial discrimination rather than a prohibition on racism, see Anna Spain Bradley, 'Human Rights Racism' (2019) 32 Harv Hum Rts J 1.

21 See Nicolas F Diebold, 'Standards of Non-Discrimination in International Economic Law' (2011) 60 ICLQ 831–65.

22 Kendi (n 2) 4.

23 *ibid* 3.

law. To do this, I examine the development of racialised stereotypes and their embedding within ‘coded language’ and modern linguistics and framing choices. In Section 3, I examine the racialised histories and impacts embedded within IIL debates. In Section 4, I Read Black four scholarly pieces and consider the impact of racialized thinking on the rigour of IIL scholarship. I propose some initial steps towards an antiracist praxis in Section 5 and conclude in Section 6 that while racist assumptions have hampered IIL scholarship this is something we can address with better, antiracist practices. I point to the value of Reading Black in international legal contexts and highlight areas in which this technique, and broader considerations of race, might serve IIL.

## 2 Methodology

This article explicitly engages in a methodology from CRT rather than Third World Approaches to International Law (TWAIL). Both CRT and TWAIL developed in response to the intentional and implicit use of law as a means of securing privileges for White colonial populations at the expense of racialized individuals and communities.<sup>24</sup> The former was a domestic response to racism in the United States; the latter an international legal response to the ongoing legacy of colonialism. Despite their different origins, the two often converge in their findings.<sup>25</sup> Both identify capitalism as a root cause for the subjugation of enslaved and colonised people, and the law as a means of advancing the subjugation of racialised societies.<sup>26</sup> These significant contributions to legal literature are often considered political and ‘read out of the scholarly domains.’<sup>27</sup> Finally, scholars within CRT and TWAIL recognize that the law can facilitate social change, although it alone will not offer salvation.<sup>28</sup>

24 James Thuo Gathii, ‘Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix)’ (2021) ASILPROC 165, 166; Delgado and Stefancic (n 5) 2.

25 See Achiume and Carbado (n 7).

26 Gathii (n 24) 165. See also Derrick A Bell Jr, ‘Property Rights in Whiteness: Their Legal Legacy, Their Economic Costs’ in Delgado and Stefancic (n 5) 63; Ibironke T Odumusu, ‘Challenges for the (Present/) Future of Third World Approaches to International Law’ (2008) 10 Intl Community L Rev 467, 468.

27 Achiume and Carbado (n 7) 1491–92. See also Pamela J Smith, ‘The Tyrannies of Silence of the Untenured Professors of Color’ (2000) 33 UC Davis L Rev 1105, 1106.

28 Achiume and Carbado (n 7) 1492–99; see also Luis Eslava and Sundhya Pahuja, ‘Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law’ (2012) *Verfassung und Recht in Übersee* (VRÜ) 195, 204.

While they share commonalities, the different contexts in which CRT and TWAIL have developed allows each to make unique contributions to legal scholarship and thinking. Amongst their contributions are different methodological approaches. Utilising the full variety of methodologies and adapting them as necessary offers profound new opportunities for interrogating the law as it is and as it could be. In this section, I explain the Reading Black methodology and its adaptability for international law.

## 2.1 *Reading Black*

Law is a ‘cultural production,’ as is legal scholarship.<sup>29</sup> As such, when racist assumptions or beliefs exist within society, they are likely to embed in the law either through scholarship, political development, or both. Racialised hierarchies can exist explicitly or they can be implicit, informing underpinning assumptions or manifesting in coded language.<sup>30</sup> The impact of socialized racism on legal scholarship can be concealed when scholars work to treat our opinions as self-evident or the natural consequence of a particular reality.<sup>31</sup> As Capers recognized, language that is objective or ‘[d]istancing is used to give the impression or illusion of objectivity and universality.’<sup>32</sup> ‘Reading Black’, which Capers assures us can be done by White scholars, is a means of close textual reading and analysis with attention to coded language and embedded assumptions around race.<sup>33</sup> It aims to reveal where assumptions or socialized expectations produce racialized impacts, even in cases that are not evidently about race, by remaining ‘sensitive to the stated and unstated, revealed and the concealed,’ and to the frequencies and registers of race within a specific context.<sup>34</sup> In doing so, it makes audible or visible that which is implicit, assumed, and unsaid.<sup>35</sup>

With his method, Capers explained how even cases that are seemingly unrelated to race can be built upon a racialized foundation. He utilised *The Queen v Dudley & Stephens*,<sup>36</sup> an infamous English criminal case about cannibalism from the nineteenth century, to demonstrate how this occurs. In that

29 See Capers (n 8) 9, note 3.

30 *ibid* 9.

31 *ibid* 9, note 3.

32 *ibid*. This insight motivates the use of first- and second-person pronouns, although I recognize that the intimacy of this practice will be uncomfortable for some readers.

33 *ibid* 12.

34 *ibid* 12–15.

35 *ibid*.

36 *R v Dudley and Stephens*, EWHC [1884] 14 QBD 273 DC <[www.bailii.org/ew/cases/EWHC/QB/1884/2.html](http://www.bailii.org/ew/cases/EWHC/QB/1884/2.html)> accessed 28 April 2022.

case, seamen stranded off the coast of South Africa were convicted of murder for cannibalising a younger and sicker sailor when they believed it was the only way they would survive.<sup>37</sup> Scholars have long critiqued the judgment for failing to appreciate the danger the sailors faced.<sup>38</sup> When Capers read *Dudley & Stephens*, however, he identified unspoken concerns over the identity and meaning of Englishness.<sup>39</sup> Victorian-era travel writers had often conveyed stories of cannibalism by the ‘savages’ in Africa ‘to underline ... the negation of European values.’<sup>40</sup> That English seamen had long practiced cannibalism became irrelevant as ‘it was the linkage between cannibalism and the “Other” that mattered’ for the case.<sup>41</sup> To be English was to refrain from such savagery.<sup>42</sup> Breaching that standard required punishment.<sup>43</sup> By remaining attuned to how beliefs about race manifested and influenced the society in which the case occurred, Capers’ reading of *Dudley & Stephens* reveals a tension the authoring judges may not have consciously intended.

To Read Black is to bring the history and sociology of race into conversation with legal reasoning to reveal implicit associations, motivations, and dichotomies authors have introduced consciously or unconsciously. As with all textual interpretations, this involves some subjectivity. Yet, the process advances legal scholarship by identifying areas of contested interpretations of objectivity and rationality. It is a means of inviting reflection and debate over how the law and legal scholarship embeds, amplifies, or challenges racialised hierarchies.

## 2.2 *Reading Black Internationally*

Moving the Reading Black methodology from domestic US scholarship to international legal scholarship necessitates some reflection. The methodology requires a register against which to read an accounting or common understanding of race and racialized language that allows for us to identify anomalies and embedded hierarchies or privileges.<sup>44</sup> While there is a common global history on the development of racism,<sup>45</sup> it manifests differently within each society.<sup>46</sup> It is the common history that gives us the register for Reading

37 *ibid* 274–75.

38 Capers (n 8) 14.

39 *ibid* 15.

40 *ibid*.

41 *ibid* 16.

42 *ibid*.

43 *ibid*.

44 *ibid* 12.

45 See eg Anghie (n 17); Tzvuouala (n 17); Kendi (n 10).

46 See eg Benjamin P Bowser (ed), *Racism and Anti-Racism in World Perspective* (Sage 1995); Ian Law, *Racism and Ethnicity: Global Debates, Dilemmas, Directions* (Routledge 2010). See

Black in international law. Because this work has been developed elsewhere, this Section provides a brief overview on that history and a discussion of how language and discourse can both obscure and amplify historical racist tropes. In Section 3, I focus on racialised debates within IIL.

Slavery and hierarchies of worth predate capitalism.<sup>47</sup> These early iterations, however, were not focused on race (at least for any extended period of time).<sup>48</sup> The process of racialisation took the impetus of economic interests.<sup>49</sup> The Portuguese first introduced racialised justifications of slavery to assuage the concerns of the Catholic Church and other European States when the State bypassed northern African traders to seek direct access to gold and slaves in Guinea.<sup>50</sup> Portugal employed the writer Gomes Eanes de Zurara for this exact purpose.<sup>51</sup> In what is perhaps the first apologia for racism, he argued that the enslaved Africans had 'lived like beasts, without any custom of reasonable beings' and 'had no understanding of good but only knew how to live in bestial sloth.'<sup>52</sup> Portugal quickly secured more wealth from the sale of enslaved Africans to other European States than from taxation at home.<sup>53</sup> Other European States quickly followed and with each new expansion came further racist justifications.<sup>54</sup> As Eric Williams and Cedric Robinson have explained, it was early capitalist interests that gave rise to racism and slavery.<sup>55</sup>

White Europeans – which can be understood culturally rather than geographically to include White people in the United States, Canada, Australia, and New Zealand<sup>56</sup> – spent decades assigning and reassigning traits to each race that justified White supremacy. Debates amongst sociologists, anthropologists, and politicians over how many races existed, and who was considered

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also generally the reports and conclusions of the Committee on the Elimination of Racial Discrimination <[www.ohchr.org/en/hrbodies/cerd/pages/cerdindex.aspx](http://www.ohchr.org/en/hrbodies/cerd/pages/cerdindex.aspx)> accessed 28 April 2022.

47 See Kendi (n 10) 17.

48 Wilson (n 2) 37–42.

49 Kendi (n 10) 22.

50 *ibid.*

51 *ibid* 23–25.

52 *ibid* 24.

53 *ibid.*

54 *ibid* 25–33.

55 Williams (n 2) 4–7. Cedric Robinson provided a robust defence of, and expanded on, Williams' work. See Cedric J Robinson, 'Capitalism, Slavery and Bourgeois Historiography' (1987) 23 *History Workshop Journal* 122.

56 The United Nations has adopted this cultural rather than geographic approach in its regional designations. See United Nations, 'Regional Groups of Member States' <[www.un.org/dgacm/en/content/regional-groups](http://www.un.org/dgacm/en/content/regional-groups)> accessed 28 April 2022.



'White,'<sup>57</sup> led to inconsistencies in categories, stereotypes, and explanations for racism, but there was a consistency in the creation of dichotomies that justified racism.<sup>58</sup> White Europeans were godly, capable of controlling their passions, and rational leaders.<sup>59</sup> The other races were all deviations from this ideal.<sup>60</sup> Specific flaws were assigned and reassigned to the 'other' races. Africans were beastly, violent, hypersexualized, and less than pure humans; sometimes cursed by God, sometimes descended from Satan, and often deemed to have mixed with monkeys.<sup>61</sup> East Asians were considered cruel and both 'possessing mindless horde-like qualities *and* subversive intent'.<sup>62</sup> South Asians were 'semi-civilized' or 'half-children and half-demon'.<sup>63</sup> In the Americas, indigenous peoples were either weak, lazy, and unfit for significant labour,<sup>64</sup> or deadly savages.<sup>65</sup> The approach positioned White Europeans as a neutral norm that others should (but never truly could) aspire to.<sup>66</sup> The result was a series of clear dichotomies: White Europeans were intellectually superior and rational, morally virtuous and godlike (angels and virgins). The 'others' were incapable, in one way or another, of controlling their minds or their passions: hypersexualised and lazy, too subversive and too submissive (demons and whores).

It is uncomfortable to recount this history, for me and I hope for you. Some of that discomfort likely comes from the recognition that the purpose of these racialized descriptions was not scientific accuracy or curiosity but the

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- 57 The notion of whiteness itself is ever-changing and contextually and culturally specific. See generally Garner (n 9). It is worth noting that I was raised and socialised as a White person. See George, Martin and Van Ho (n 12).
- 58 See eg Johann Friedrich Blumenbach and others, *The Anthropological Treatises of Johann Friedrich Blumenbach* (1865) at 273–74; Michael Keevak, *Becoming Yellow: A Short History of Racial Thinking* (2011); Sun Jiang, 'Blumenbach in East Asia: The Dissemination of the "Five-Race Theory" in East Asia and a Textual Comparison' (2012) 51 *Oriens Extremus* 107.
- 59 See Kant (n 1).
- 60 See Blumenbach (n 58).
- 61 Kendi (n 10) 24, 26–27, 29, 32, 69.
- 62 Keith Aoki, 'Foreign-ness' & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes' (1996) 4 *UCLA Asian Pacific American Law Journal* 1, 4 (emphasis in original), 38–39. See also Keevak (n 58).
- 63 Azmi Arifin, 'Eurocentrism and the Historical Perception About the Malays' (2018) 45 *SHS Web of Conferences* 4, 4 <<https://doi.org/10.1051/shsconf/20184506005>> accessed 28 April 2022.
- 64 Kendi (n 10) 27.
- 65 Jesus Garcia, 'Native Americans in US History Textbooks: From Bloody Savages to Heroic Chiefs' (1978) 17 *Journal of American Indian Education* 15; Joel T Nadler and Elora C Voyles, *Stereotypes: The Incidence and Impacts of Bias* (ABC-CLIO 2020) 284.
- 66 See Kant (n 1); Kendi (n 10) 31–32; Anghie (n 17) 65–71; Tzouvala (n 17) 50–52.

justification of White supremacy.<sup>67</sup> There is also a discomfort in recognising how these socialised beliefs remain embedded in Western societies.

Sociolinguists, sociologists, historians, and political scientists looking at the intersections of race and language have broadly reached a consensus that people create in- and out-groups through linguistic choices, creating and imposing identities in the process.<sup>68</sup> The use of language to create race and identity, first wielded by White Europeans to justify slavery, is something we still do today. What has changed is the language we use for this. Explicit calls of racial supremacy have given rise to more implicit centrings or 'coded language' that embeds an 'us' and 'them' narrative and identity.<sup>69</sup> This reflects changing social attitudes on the acceptability of racism as a value or identity.<sup>70</sup> But, it means racialised thinking and framing choices can be evident even when terms that are less problematic than 'White' and 'non-White' are used, like 'Global North' and 'Global South'.<sup>71</sup> Coded framings allow a speaker deniability if they are criticised for the intent or value of their speech.<sup>72</sup> When political and social leaders use it to obscure and advance racist thought, there is an evolution of the social and linguistic associations that allows for embedding, evoking, and continuing historical tropes without explicit reference to them.<sup>73</sup> Similar to the development of racism, the modern use of coded language appears to be a universal phenomenon that takes on specific contours within each culture and context.<sup>74</sup>

67 See Williams (n 2).

68 See eg Ruth Wodak, 'The Semiotics of Racism: A Critical Discourse-Historical Analysis' in Jan Renkema (ed), *Discourse, of Course: An Overview of Research in Discourse Studies* (John Benjamins 2009) 311; Tuen A van Dijk, *Society and Discourse: How Social Contexts Influence Text and Talk* (CUP 2009); Todd Shields, 'The Not-So-New Southern Racism' in Angie Maxwell and Todd Shields (eds), *The Long Southern Strategy: How Chasing White Voters in the South Changed American Politics* (OUP 2019) 43; Cassie Herbert and Rebecca Kukla, 'Ingoing, Outgroup, and the Pragmatics of Peripheral Speech' (2016) 2(4) *Journal of the American Philosophical Association* 576, 576–78.

69 See Ruth Wodak and Martin Reisigl, 'Discourse and Racism: European Perspectives' (1999) 28 *Annual Review of Anthropology* 175, 175–76; Mary Bucholtz, 'You da Man: Narrating the Racial Other in the Production of White Masculinity' (1999) 3(4) *Sociolinguistics* 443, 444–45.

70 See eg Wodak and Reisigl (n 69); van Dijk (n 68) 91–92.

71 See Anghie (n 17) 196–268.

72 See Justin Khoo, 'Code Words in Political Discourse' (2017) 45 *Philosophical Topics* 33, 35.

73 Ishani Maitra, 'Subordinating Speech' in Ishani Maitra and Mary Kate McGowan, *Speech and Harm: Controversies over Free Speech* (OUP 2012) 94. Maitra argues that the power of this speech is not limited to political or social leaders.

74 Compare eg Wodak (n 68); van Dijk (n 68); Sara Salem and Vanessa Thompson, 'Old Racisms, New Masks: On the Continuing Discontinuities of Racism and the Erasure

Reading Black allows for consideration of coded language and framing choices.<sup>75</sup> In this article, I examine modern manifestations of three dichotomies Europeans used to justify White supremacy and which are reflected well in the title of this piece and the quote by Immanuel Kant that introduced this article: rationality; criminality; and morality. The ‘rationality’ divide continues to emphasize the importance of White/Western approaches to reasoning as a universal ideal or objective.<sup>76</sup> One way this happens is through perfunctory engagement with racialised scholars as critical voices or ‘special interests’ that sit beyond the core of a discipline or that are irrelevant for broader disciplinary development.<sup>77</sup> By making the racialised a niche there is an implicit declaration that the rationale or core of a discipline is White. This centring allows the White/Western voice to be ‘objective’ while all others are deviations from that. Views from racialised groups, States, or individuals can also be dismissed with explicit language around emotionality, irrationality, or scholarly worth, all of which signal that the ideal of White/Western rationality has not been met.<sup>78</sup> Now, obviously, this does not mean racialised scholars cannot be criticised nor that they need to be engaged with simply because they are racialised, but we need to question why and how criticism or lack of engagement manifests. Richard Delgado has argued that within law, White scholars may ignore relevant contributions from racialised scholars so as to control the narrative and ensure ‘that legal change occurs, but not too fast,’ meaning not at a pace that would threaten White power but also does not reflect the needs of racialised communities.<sup>79</sup> In these cases, the marginalising scholarship adds to

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of Race in European Contexts’ (2016) *Nineteen Sixty Nine: An Ethnic Studies Journal* <<https://escholarship.org/uc/item/98p8q169>> accessed 28 April 2022.

75 Capers (n 8) 12–15.

76 See Dolores Delgado Bernal and Octavio Villalpando, ‘An Apartheid of Knowledge in Academia: The Struggle Over the “Legitimate” Knowledge of Faculty of Color’ (2002) 35 *Equity and Excellence in Education* 169, 171–72. See also bell hooks, *Teaching to Transgress: Education as the Practice of Freedom* (Routledge 1994) 79–80; Shana Almeida, ‘Race-Based Epistemologies: The Role of Race and Dominance in Knowledge Production’ (2015) 13 *Wagadu* 79.

77 Richard Delgado, ‘Imperial Scholar Revisited: How to Marginalize Outsider Writing’ (1992) 140 *U Pa L Rev* 1349, 1362; hooks (n 76) 79–80. For criticisms of this within international law, see Mohsen al Attar, ‘Must International Legal Pedagogy Remain Eurocentric?’ (2021) 11 *Asian JIL* 176, 183–84; see also Alonso Gurmendi Dunkelberg, ‘It’s a Trap! Re-Thinking Samuel Moyn’s *Humane* Beyond the North Atlantic’ (2021) 12 *Journal of International Humanitarian Legal Studies* 345.

78 See Delgado Bernal and Villalpando (n 76) 171–72; Delgado (n 77) 1366. See also hooks (n 76) 79–80.

79 Richard Delgado, ‘The Imperial Scholar: Reflections on a Review of Civil Rights Literature’ (1984) 132 *U Pa L Rev* 561, 574.

the structures that impede racial equality and, regardless of intent, becomes a racist act.<sup>80</sup>

The 'criminality' binary relates to and stems from the stereotype of the unruly essence of racialised populations and their need for White governance. In modern discourse, the narrative is amplified by justice systems that disproportionately target racialised groups through legislation or selective enforcement, as well as other social factors that can mean racialised communities are over-represented in national statistics on crime.<sup>81</sup> Targeted criminalisation perpetuates the myth that certain racialised groups are inherently more criminal.<sup>82</sup> As such, the coded language has not needed to move significantly. Instead, it has morphed to a focus on respect for the law, without consideration as to when or how the law itself is racist.<sup>83</sup>

Finally, related to but distinct from questions of criminality are issues of 'morality.' This can take many forms, but one is the portrayal of certain races as hard-working economic 'givers' and others as lazy economic 'takers' who unduly benefit from or take advantage of the former.<sup>84</sup> Studies indicate that in modern societies, this association is used in coded language such as 'work ethic' and 'welfarism' to evoke, exploit, and inspire hostility towards out-groups including racialised minorities and migrants.<sup>85</sup>

Because of the relationship between the intentional socialisation of racism and linguistic coding, we each have the potential to reproduce racist associations through our language choices without intending to do so.<sup>86</sup> In fact, the

80 See the definition of racist and antiracist at supra n 12.

81 See eg Shaun L Gabbidon, *Race, Ethnicity, Crime and Justice: An International Dilemma* (Sage 2010) 2–3.

82 *ibid.*

83 Kathryn Benier, Rebecca Wickes and Claire Moran, "African Gangs" in Australia: Perceptions of Race and Crime in Urban Neighbourhoods' (2021) 54 *Journal of Criminology* 220; Hanna E Brown, Jennifer A Jones and Andrea Becker, 'The Racialization of Latino Immigrants in New Destinations: Criminality, Ascription, and Countermobilization' (2018) 4 *RSF: The Russell Sage Foundation Journal of the Social Sciences* 118; Angéla Kóczé, 'Race, Migration and Neoliberalism: Distorted Notions of Romani Migration in European Public Discourse' (2018) 24 *Social Identities: Journal for the Study of Race, Nation and Culture* 459.

84 Suman Gupta and Satnam Virdee, 'Introduction: European Crises: Contemporary Nationalisms and the Language of "Race"' (2018) 41 *Ethnic and Racial Studies* 1747, 1749, 1761–62; Ian Haney-López, *Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class* (OUP 2015) 167.

85 See eg Khoo (n 72) 149–51; Gupta and Virdee (n 84); Haney-López (n 84); Karen Wren, 'Cultural Racism: Something Is Rotten in the State of Denmark' (2001) 2 *Social & Cultural Geography* 141, 152–54.

86 See eg Wodak (n 68) 323.

literature on racism and coded language indicates that most of us will reproduce racist structures unless we are intentional with our language and actions.<sup>87</sup> As such, I do not ascribe ill-intentions or individual blame to the authors I Read in Section 4. Nor do I suggest my own writing – here or elsewhere – is a model of what should be done or is above reproach. Instead, the purpose of this article is to call for greater communal reflection on how this sociolinguistic and historical reality continues to influence, and undermines the rigor of, modern IIL scholarship. Some literature suggests that when racially coded messages are identified in contexts where racial equality is valued, the coded message loses its power.<sup>88</sup> The hope underpinning this piece is that by using the Reading Black methodology within IIL scholarship, the article can lead to more cognizant, antiracist practices and language. To do this also requires understanding how the debates within IIL have had racialised dynamics.

### 3 Racialised Debates in International Investment Law

The global story of racism provides one part of the register for Reading Black IIL. Another part of the register stems from debates within IIL. During the colonising, colonial, and post-colonial periods, White European States – in its broad meaning<sup>89</sup> – insisted on heightened protections for their citizens when operating abroad.<sup>90</sup> From the late 1800s until the 1990s, Latin American States objected to this claim.<sup>91</sup> Invoking what became known as the Calvo Doctrine, they argued that foreign citizens were entitled to equality but not priority.<sup>92</sup> This ‘was consistent with every tenet of the then existing international law.’<sup>93</sup> Despite a clear dispute over the existence of this minimum standard – meaning a lack of either consistent State practice or *opinio juris*<sup>94</sup> – Western States declared their investors were entitled to heightened protections specific

87 See eg van Dijk (n 68) 67–68.

88 See Tali Mendelberg, ‘Racial Priming Revived’ (2008) 6 Perspectives on Politics 109.

89 See (n 56).

90 Sornarajah, *Foreign Investment* (n 17) 27–28.

91 Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Bloomsbury 2009) at 38–48; see also, Luis Eslava, ‘The Developmental State: Independence, Dependency, and the History of the South’ in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (OUP 2019).

92 Montt (n 91) 39; Linarelli, Salomon and Sornarajah (n 17) 154–55.

93 Linarelli, Salomon and Sornarajah (n 17) 155.

94 See *Banco Nacional de Cuba v Sabbatino* (1964) 376 US 398, 429–31.

to foreigners.<sup>95</sup> The exact contours of this standard were unclear but Western States frequently employed ‘gunboat diplomacy’ to enforce the standard, often without consideration as to the facts of a particular case.<sup>96</sup>

Following the Second World War, the ‘customary’ minimum standard was codified in human rights treaties and IIL. The former extended protections to a State’s own citizens; the latter retained the heightened protection for foreign investors through bilateral and multilateral investment treaties. While technically reciprocal, IIL treaties have largely been used by Western investors to pursue restitution from developing States. Of the 1,061 known treaty-based investor-State dispute settlement (ISDS) cases, only 164 (15.5%) have been filed by claimants whose home State sits outside the EU or the United Nations’ designated ‘Western Europe and Other’ regional group (WEOG).<sup>97</sup> This suggests that White, Western investors take advantage of ISDS at far greater rates than their racialised counterparts. Similarly, White, Western States enjoy greater foreign direct investment with fewer risks posed by ISDS than their racialised counterparts. Only 287 treaty-based cases, or roughly 27%, have been against members of the EU or WEOG.<sup>98</sup> This is despite the fact that the EU and the United States alone – not accounting for other White, Western States – are two of the top destination countries for inward foreign direct investment and hosted a yearly average of 45% of global inward foreign direct investment between 2006 and 2020.<sup>99</sup>

95 Montt (n 91) 36–38.

96 *ibid.*

97 This is based on disaggregated data found in: UNCTAD, ‘UNCTAD Releases Data on over 1,000 Investor-State Arbitration Cases’ (11 February 2021) <<https://unctad.org/news/unctad-releases-data-over-1000-investor-state-arbitration-cases>> accessed 26 April 2022. Collectively, the EU and WEOG consist of: Andorra; Australia; Austria; Belgium; Bulgaria; Canada; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Ireland; Israel; Italy; Latvia; Lithuania; Liechtenstein; Luxembourg; Malta; Monaco; Netherlands; New Zealand; Norway; Poland; Portugal; Romania; San Marino; Slovakia; Slovenia; Spain; Sweden; Switzerland; Turkey; United Kingdom; and the United States. An additional 13 (1.2%) claims involve multiple home States, of which at least one claimant is outside the EU and WEOG.

98 This excludes 29 cases filed against eight States in the UN’s designated Eastern European region who joined the EU in 2004 and two that joined the EU in 2007 before those States were part of the EU. This choice reflects the inherently flawed and ever-changing social construction of ‘Whiteness.’ See Garner (n 9).

99 This is based on disaggregated data on inward FDI flows from 2005–2021 at OECD, ‘FDI Flows, 2005–2020’ <<https://data.oecd.org/fdi/fdi-flows.htm>> accessed 26 April 2021.

Scholars have criticised ISDS for its impact on developing States.<sup>100</sup> A growing amount of literature looks to ‘measure’ whether accusations of bias against developing States are justified.<sup>101</sup> Within this section, I examine the racialised impacts and discourse within IIL, focusing on (1) the development of, and resistance to, the New International Economic Order (NIEO), and the (2) substantive and (3) procedural expansion of ISDS. These issues provide the underpinning knowledge and debate for Reading Black four modern IIL texts in Section 4.

### 3.1 *The New International Economic Order*

The development of IIL sits within a broader framework of economic law development, beginning with colonisation and the Calvo Doctrine debate. While the decolonisation era facilitated greater formal equality in international law, it did not eradicate the ongoing racialised impacts of colonialization.<sup>102</sup> Between the 1950s and 1970s, newly independent States developed and asserted their own economic law priorities via the NIEO.<sup>103</sup> The debate over the NIEO largely broke down along colonial and racialised lines.<sup>104</sup> In 1967, then-Senegalese Foreign Minister Doudou Thiam set forth a framing for the NIEO and a right to development that was ‘conceptualised ... as a collective right to correct the

100 See eg Linarellia, Saloman and Sornarajah (n 17); Anil Yilmaz Vastardis, ‘Justice Bubbles for the Privileged: A Critique of the Investor-State Dispute Settlement Proposals for the EU’s Investment Agreements’ (2018) 6 *Lond Rev Intl L* 279; Anil Yilmaz Vastardis, ‘Investment Treaty Arbitration: A Justice Bubble for the Privileged’ in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP 2020) 617, 630 <DOI: 10.1093/law/9780198796190.003.0026> accessed 28 April 2022; Fola Adeleke, ‘Human Rights and International Investment Arbitration’ (2016) 32 *SAJHR* 48; Daria Davitti, *Investment and Human Rights in Armed Conflict* (Hart 2019) 175; Tara L Van Ho, ‘Is It Already too Late for Colombia’s Land Restitution Process? The Impact of International Investment Law on Transitional Justice’ (2016) 5 *International Human Rights Law Review* 60.

101 See eg Gus Van Harten, ‘Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration’ (2012) 50 *Osgoode Hall L J* 211, 237–40. Susan D Franck, ‘Development and Outcomes of Investment Treaty Arbitration’ (2009) 50 *Harv Intl LJ* 435; Thomas Schultz and Cédric Dupont, ‘Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study’ (2014) 25 *EJIL* 1147.

102 See Anghie (n 17) 196–268.

103 Declaration on the Establishment of a New International Economic Order (adopted 1 May 1974) UN Doc A/RES/3201(S-VI) (NIEO Declaration).

104 See Antony Anghie, ‘Legal Aspects of the New International Economic Order’ (2015) 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 145.

wrongs wrought by colonial rule.<sup>105</sup> In this approach, the NIEO becomes a form of reparations owed by the West as a result of its past wrongdoing. They also sought to tie their claims to ‘principles that were fundamental and well established, just as it sought legal justification for its position by reference to the UN Charter, the most authoritative statement of international law.’<sup>106</sup>

Passed as a non-binding resolution at the United Nations General Assembly, some aspects have been implemented but Western States have largely refused to fully implement the NIEO.<sup>107</sup> The NIEO included several legal propositions and included an acknowledgement that States have a right to permanent sovereignty over their natural resources and a right to benefit fairly from the export of their raw materials for production in developed (‘White,’ colonising) States.<sup>108</sup> Western leaders objected. Central to the debate was whether nationalisation, as a form of ‘expropriation’ required compensation.<sup>109</sup> Developing States wanted to establish their own standards of compensation.<sup>110</sup> Their former colonisers claimed that existing, customary international law established the standard of compensation, although as M. Sornarajah has detailed there was no consensus amongst western international lawyers as to what that standard should be.<sup>111</sup>

The US Supreme Court sided with developing States, finding customary international law did not require compensation in the face of nationalisation.<sup>112</sup> The US legislative and executive branches did not. They asserted that under customary international law expropriation required full compensation.<sup>113</sup> During the debate over NIEO, Henry Kissinger attempted to consolidate Western opposition to the developing States’ approach.<sup>114</sup>

At times, the debate became overtly racialised. In 1975, American journalist Irving Kristol invoked racialised terms to defend the West’s approach: ‘[W]hen the poor start “mau-mauing” their actual or potential benefactors, when they begin vilifying them, insulting them, demanding as a right what is

105 James Thuo Gathii, ‘Africa and the Radical Origins of the Right to Development’ (2020) 1 TWAIL Review 28, 38.

106 Anghie (n 104) 146.

107 Nils Gilman, ‘The New International Economic Order: A Reintroduction’ (2015) 6 Human-ity: An International Journal of Human Rights, Humanitarianism, and Development 1, 1–2.

108 NIEO Declaration (n 103).

109 See Anghie (n 104) 150.

110 Sornarajah, *Foreign Investment* (n 17) 562.

111 *ibid.*

112 *Banco Nacional* (n 94) 428–34.

113 Sornarajah, *Foreign Investment* (n 17) 562.

114 Anghie (n 104) 145–46.



not their right to demand – then one's sense of self-respect may take precedence over one's self-imposed humanitarian obligations.<sup>115</sup> The term 'mau-mauing' is itself racist,<sup>116</sup> deriving from the colonial British term for a Kikuyu-led independence movement in Kenya.<sup>117</sup> It was transformed in the United States to mean efforts to intimidate for petty reasons or out of a mere desire to commit violent acts.<sup>118</sup> The only purpose of the term is to 'otherise' demands by invoking the historical tropes of savagery and violence identified in Section 2. In this context, Kristol not only denies any legitimacy to the Global South's demands but portrays it as violent, irrational, and unnatural. Kristol did not speak officially for the US Government but he held persuasive authority in the neoconservative movement that became dominant in the late 1970s.<sup>119</sup>

Kristol's quote also invokes the criminality and morality dichotomies. The violence inherent in 'mau-mauing' coupled with the assertion that the developing States were 'demanding as a right what is not their right to demand' suggests a threatening or abusive relationship, something akin to what we see with gang violence or organised crime. In contrast, the West is not only a victim but also a moral actor whose 'self-imposed' sense of responsibility stems from its humanitarianism. Any legitimacy to the Global South's claims, and any wrongdoing by the Global North, is ignored. As will be seen in Section 4, Kristol's language is still reflected in framing choices today.

### 3.2 *Substance-Based Concerns*

In addition to the customary international law standard, most investment agreements reference some variation of 'fair and equitable treatment,' 'full protection and security,' and a prohibition on expropriation without compensation. Over the years, the meaning of these provisions have each expanded,<sup>120</sup> albeit in an inconsistent way.<sup>121</sup> Most controversially, the contours of fair and

115 Quoted in Pranav Jani, 'The Destruction of the Third World Project' 95 *International Socialist Review* (2014–15) <<https://isreview.org/issue/95/destruction-third-world-project/index.html>> accessed 28 April 2022.

116 See supra n 12 for the meaning of racist.

117 See Jani (n 115).

118 Merriam-Webster Dictionary, 'mau-mau' <[www.merriam-webster.com/dictionary/mau-mau#usage-1](http://www.merriam-webster.com/dictionary/mau-mau#usage-1)> accessed 28 April 2022.

119 See generally Michael Franczak, 'Losing the Battle, Winning the War: Neoconservatives versus the New International Economic Order, 1974–82' (2019) 43 *Diplomatic History* 867.

120 See eg Davitti (n 100) 55–83; CL Lim, Jean Ho and Martins Paparinskis, *International Investment Law and Arbitrations: Commentary, Awards and Other Materials* (CUP 2018) 258–84.

121 I have described this elsewhere as jurisprudence incohérente. See Tara Van Ho, 'Obligations of International Assistance and Cooperation in the Context of Investment

equitable treatment have expanded to protect an investor's 'legitimate expectation to regulatory stability' and add requirements beyond the traditional promises of due process and equal protection.<sup>122</sup>

These expansions and their applications raise questions as to whether substantive protections undermine democratic governance and impede regulatory reforms needed to secure action against climate change or the protection of human rights.<sup>123</sup> The expanded protections and legal uncertainty threatens the rights and interests of other stakeholders, including those stemming from States' international human rights and environmental obligations.<sup>124</sup> Investors have challenged several non-discriminatory human rights and environmental measures – Uruguay's plain packaging of tobacco and Colombia's environmental protections amongst the more obvious and infamous – by alleging they breach one of the substantive protections.<sup>125</sup> In light of who uses ISDS and who is targeted by ISDS claims,<sup>126</sup> this expansion has had a racialised impact.

Whether the racialised impact is exacerbated by investor bias is debated. Gus Van Harten concluded that arbitrators are more generous in their interpretation of investors' claims when the claim is against a developing State.<sup>127</sup> Susan Franck disagrees.<sup>128</sup> She argues that any perception of bias can be explained by differences between States' legal protections and governance structures.<sup>129</sup> When focused on what arbitrators do, such measurements can build in a presumption that all claims by investors are equally valid. Such a

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Law' in Mark Gibney and others, *Routledge Handbook on Extraterritorial Human Rights Obligations* (2021) 325, 329.

122 Davitti (n 100) 55–65; and generally Emmanuel T Laryea, 'Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 97; J Roman Picherack, 'The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone too Far?' (2008) 9 JWIT 255.

123 Olabisi D Akinkugbe, 'Africanization and the Reform of the International Investment Law' (2021) 53 Case W Res J Intl L 7, 18–19; Jesse Coleman, Kaitlin Y Coredes and Lise Johnson, 'Human Rights Law and the Investment Treaty Regime' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Elgar 2020) 288, 295–96.

124 See UN Working Group on Business and Human Rights, 'Report on Human Rights-Compatible International Investment Agreements' (27 July 2021) UN Doc A/76/238, paras 20–23; Van Ho (n 100) 71–84; Van Ho (n 121) 329–30.

125 See eg *Philip Morris Brands Sarl et al v Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016); *Eco-Oro Minerals Corp v Colombia*, ICSID Case No ARB/16/41 <[www.italaw.com/cases/6320](http://www.italaw.com/cases/6320)> accessed 28 April 2022.

126 See supra nn 97–99 and accompanying text.

127 Van Harten (n 101) 237–40.

128 Franck (n 101) 435.

129 *ibid* 435.

presumption ignores the potential (and in light of historical notions of rationality, the likelihood) that investors disproportionately target developing States because of investor bias.

### 3.3 *Process-Based Objections to Investor-State Dispute Settlement*

Just as the expansion of substantive protections can be viewed through a racialised lens, so can the expansion of procedural protections. In 1990, the tribunal in *AAPL v Sri Lanka* determined for the first time in history that its jurisdiction could arise solely on the basis of an investment treaty between the home and host States.<sup>130</sup> While treaty-based arbitration was envisioned during the negotiation of the ICSID Convention, prior to this decision ISDS had been used to enforce direct investor-State contracts, which meant there was a specificity in their consent and in the privity of relations between the investor and the State.<sup>131</sup> With the expansion of ISDS via *AAPL*, both the specificity of consent and the privity of relations were transformed. States which had reason to believe they had consented to arbitration with a narrow number of foreign investors had the potential to face arbitration claims from a significantly broader pool of potential claimants.

The choice to expand ISDS protections is significant. States pay on average USD 8 million to defend investment law claims, and costs have sometimes been in excess of USD 30 million in individual cases.<sup>132</sup> This means that the expansion of ISDS itself is a costly endeavour before one considers the merits of any decision or the cost of any award. ISDS also provides foreign investors with procedural advantages that are quite anomalous within international dispute settlement processes: investor participation in the appointment of arbitrators; no need to exhaust domestic remedies; privity of proceedings that exclude others affected by the investment or the case;<sup>133</sup> no binding precedent to follow; and a binding decision that is not subjected to appeal,<sup>134</sup>

<sup>130</sup> See *AAPL v Sri Lanka*, ICSID case No ARB/87/3, Final Award (27 June 1990); Sornarajah, *Foreign Investment* (n 17) 265.

<sup>131</sup> M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 2–3, 139–43.

<sup>132</sup> OECD, 'Investor-State Dispute Settlement' (2012) 18 <[www.oecd.org/daf/inv/internationalinvestmentagreements/50291642.pdf](http://www.oecd.org/daf/inv/internationalinvestmentagreements/50291642.pdf)> accessed 28 April 2022.

<sup>133</sup> See Vastardis, 'ITA' (n 100) 630. Arbitrators generally can, in their discretion, allow affected individuals to submit amicus briefs.

<sup>134</sup> But see Gabriel Bottini, 'Present and Future ICSID Annulment: The Path to an Appellate Body?' (2016) 31 ICSID Rev – FILJ 712.

cannot be substantively challenged before domestic courts, and is enforceable transnationally.<sup>135</sup>

In a 2018 article, Anil Yilmaz Vastardis articulated at least three ways in which ISDS can harm domestic judiciaries.<sup>136</sup> First, ISDS deprives national judiciaries (and other state-based mechanisms) of resources by requiring excessive financing for a system capable of resolving only narrow disputes.<sup>137</sup> Second, because investors need not exhaust local remedies before seeking ISDS, the international system deprives States of an opportunity to develop local expertise in a complicated but important area of law.<sup>138</sup> Finally, Yilmaz Vastardis notes that ISDS, whether on an *ad hoc* or a standing court basis, 'is likely to exacerbate inequality by providing special paths of investor protection enhancing privileges already enjoyed by wealthy litigants, thus widening pre-existing gaps in domestic legal systems.<sup>139</sup> In contrast, as others have noted, domestic systems could hear the entirety of a dispute, facilitating equal access to justice not only for foreign investors but also from them.<sup>140</sup> This could reduce structural inequalities.

Given the racialised disparity between which States house investors benefiting from ISDS and which States are facing ISDS claims,<sup>141</sup> the extension of ISDS has a racialised impact. The defences of the system also carry a racialised dynamic. ISDS and investment law are often promoted as necessary to address weak governance in developing States.<sup>142</sup> Some assert ISDS can help improve States 'good governance' by encouraging States with 'weak institutional capacity ... to develop an effective normative framework' that would benefit society as a whole.<sup>143</sup> Existing evidence suggests otherwise.<sup>144</sup> The assertions

<sup>135</sup> Convention on the Enforcement of Foreign Arbitral Awards (1958) 330 UNTS 38, art V; Convention on the Settlement of Investment Disputes Between States and Nations of Other States (International Centre for Settlement of Investment Disputes) 575 UNTS 159, art 53–54. See also Yilmaz Vastardis, 'ITA' (n 100) 631.

<sup>136</sup> Vastardis, 'Bubbles' (n 100).

<sup>137</sup> *ibid*; OECD, 'Investor-State Dispute Settlement' (2012) 18 <[www.oecd.org/daf/inv/internationalinvestmentagreements/50291642.pdf](http://www.oecd.org/daf/inv/internationalinvestmentagreements/50291642.pdf)> accessed 28 April 2022.

<sup>138</sup> Vastardis, 'Bubbles' (n 100) 296.

<sup>139</sup> *ibid*; see also Coleman, Cordes and Johnson (n 123) 297–98.

<sup>140</sup> *ibid* 298.

<sup>141</sup> See *supra* nn 97–99 and accompanying text.

<sup>142</sup> See Celine Tan, 'Reviving the Emperor's Old Clothes: The Good Governance Agenda, Development, and International Investment Law' in Stephan W Schill (ed), *International Investment Law and Development: Bridging the Gap* (Elgar 2015) 147, 155.

<sup>143</sup> See *ibid* (internal quotations omitted).

<sup>144</sup> See Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart 2018). See also Jennifer Tobin and Susan Rose-Ackerman, 'When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties' (2011) 6 *Review of International Organizations* 1, 17.

also rest on an assumption that racialised States need to be disciplined by an external authority.<sup>145</sup> In this way, ISDS will mitigate the ‘political risk’ of an unruly State.<sup>146</sup>

Celine Tan has brilliantly explained that the notion of what constitutes a ‘political risk’ has evolved in a problematic way.<sup>147</sup> Whereas historically it concerned ‘overt interference’ with property rights, it increasingly centres on constructs of ‘good governance.’<sup>148</sup> With this expansion, the use of a State’s regulatory powers is seen as a destabilising force, undermining the proper relationship between the public and private actors.<sup>149</sup> As such, investment law and the enforcement through ISDS is needed to constrain the State’s regulatory power.<sup>150</sup> It is interesting how the interplay between the procedural and substantive expansions of IIL and ISDS have created a self-justification for the regime: ISDS is needed to protect investors from policy developments of corrupt or abusive States because policy development itself is a form of bad governance. As Tan notes, this self-justification requires an acceptance of current western reasoning and beliefs as to the proper role of governance, one that the west itself has only recently adopted and one for which there is limited evidentiary support.<sup>151</sup> This reflects the rationality dichotomy: the legitimacy of a State’s approach is measured by whether it follows western belief or not, while western belief remains legitimate even if its promised reasoning does not come to fruition.

The dynamic is beginning to shift as European States have recognized the need for ISDS reform. Yet even this change can be seen through a racialised lens. While scholars and States from the Global South have long flagged concerns about the system, the EU only grew concerned when ISDS began to truly affect White, European States. Of the 287 known treaty-based cases against members of the EU and WEOG between 1990 and 2020, 141 (~49%) were filed between 2013 and 2017.<sup>152</sup> Between 2017–2019, the UN Commission on International Trade Law (UNCITRAL) developed its ISDS reform agenda.<sup>153</sup> In 2018, the Council of the European Union adopted its negotiating directives

145 Tan (n 142) 155.

146 *ibid* 153–54. See also Linarelli, Salomon and Sornarajah (n 17) 149.

147 Tan (n 142) 153–54.

148 *ibid*.

149 *ibid* 152–53.

150 *ibid* 152–55.

151 *ibid* 155.

152 UNCTAD (n 97). Again, this number excludes cases filed against Eastern European States that are currently a part of the EU but were not when the case was filed. See *supra* n 100.

153 See UNCITRAL, Working Group III: Investor-State Dispute Settlement Reform, ‘Status of Work as of December 2021’ <[https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state)> accessed 28 April 2022.

for a convention establishing a multilateral investment court.<sup>154</sup> And, while the OECD has long worked on investment treaty interpretation, its agenda started to change in 2017 with a paper on the balance of investor protections and States' right to regulate.<sup>155</sup> In 2021, it released a paper on avenues for possible reforms of investment treaties.<sup>156</sup>

There have been a wide range of proposals for ISDS reform, from procedural tweaks to multilateral courts to a full overhaul of the system.<sup>157</sup> Unfortunately, as Jean Ho has rightly noted, many of the more modest proposals are presented 'with a pragmatic aura' intended to shut down debate over 'the systemic failings of ISDS.'<sup>158</sup> That distancing and 'pragmatic aura' implicitly invokes the rationality dichotomy. It also mimics the 'distancing' approach to legal reasoning that Capers' Reading Black is intended to address.<sup>159</sup>

With this background, or 'register' in mind, I turn to employing the Reading Black methodology in the next section.

#### 4 Reading Black Modern Investment Law Scholarship

The purpose of this piece is to analyse how racism manifests in modern, mainstream IIL scholarship. I define 'modern' as scholarship published between 2016–2020, when there was a sufficiently well-known body of critical discourse on biases, privilege and exclusion in international law.<sup>160</sup> As there is no authoritative list of the 'mainstream' IIL, I constructed one with articles published in six prominent, peer-reviewed journals: this journal; Journal of International Economic Law; European Journal of International Law; American Journal of

154 Council of the European Union, 'Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes' (20 March 2018) 12981/17 Add 1 DCL 1.

155 See David Gaukrodger, 'Addressing the Balance of Interests in Investment Treaties' (24 February 2017) OECD Working Papers on International Investment 2017/03 <<https://doi.org/10.1787/18151957>> accessed 28 April 2022.

156 See David Gaukrodger, 'The Future of Investment Treaties – Possible Directions' (28 June 2021) OECD Working Papers on International Investment 2021/03 <<https://doi.org/10.1787/18151957>> accessed 28 April 2022.

157 For overviews of these proposals, see Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 AJIL 410.

158 Jean Ho, 'Hegemony 101 in International Investment Law' (*AfronomicsLaw*, 2020) <[www.afronomicslaw.org/2020/09/09/hegemony-101-in-international-investment-law/](http://www.afronomicslaw.org/2020/09/09/hegemony-101-in-international-investment-law/)> accessed 28 April 2022. See also Akinkugbe (n 123) 7.

159 See supra nn 32–35.

160 For a comprehensive overview of TWAIL scholarship, much of which addresses this issue, see Gathii (n 24) 166.

International Law and AJIL Unbound; and ICSID Review. I supplemented this with a list of publications by scholars sitting on the editorial or advisory boards of those journals and all members of the UNCITRAL Academic Forum.<sup>161</sup>

Given the large number of potential items from which to choose, I focused on those written by individuals I deemed to have power and influence in the field. Reading *Black* is itself an assertion of power as the reader is asserting interpretations that may or may not have been conscious choices by the individual being read. By focusing on those with power and influence, through their academic work or in their practice, I hope to mitigate power dynamics. The criticism is not intended to harm the individuals I Read but to address the structural realities in which they operate and which we can replicate without intention. With that, I chose four pieces: book reviews by Stephen Schwebel<sup>162</sup> and Cameron Miles,<sup>163</sup> an article by Daniel Behn, Tarald Laudal Berge and Malcolm Langford;<sup>164</sup> and a pivotal chapter in a book from Gabrielle Kaufmann-Kohler and Michele Potestá.<sup>165</sup> Formerly a President of the International Court of Justice and a prolific investment arbitrator, Schwebel reviewed Jochen von Bernstorff and Philipp Dann's edited collection *The Battle for International Law – South-North Perspectives on the Decolonization Era*, a book focused on the fight over the NIEO.<sup>166</sup> Miles, an arbitration practitioner, reviewed Aloysius Llamzon's book on the treatment of corruption within investment law.<sup>167</sup> In their journal article, Behn, Berge and Langford – all of whom are members of the ISDS Academic Forum, which aims to influence UNCITRAL reform efforts and which Langford formerly chaired and Behn currently co-chairs<sup>168</sup> – attempt to test whether arbitration panels are unfairly

161 The list was based on those who were members as of November 2020. See University of Oslo, 'Academic Forum on ISDS' <[www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/](http://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/)> accessed 28 April 2022.

162 Stephen M Schwebel, 'Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law – South-North Perspectives on the Decolonization Era*' (2020) 21 JWIT 631.

163 Cameron A Miles, 'Where the Shadow Falls: Corruption in International Investment Arbitration, by Aloysius P Llamzon' (2016) 17 JWIT 489.

164 Daniel Behn, Tarald Laudal Berge and Malcolm Langford, 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration' (2018) 38 *Northwestern J Int L & Bus* 333.

165 Gabrielle Kaufmann-Kohler and Michele Potestá, *European Yearbook of International Economic Law: Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Springer 2020).

166 Schwebel (n 162).

167 Miles (n 163).

168 See Academic Forum on ISDS (n 161).

biased against developing States.<sup>169</sup> One of the more prolific arbitrators, Kaufmann-Kohler joins Potestá in providing an accounting of the relationship between ISDS and national courts.<sup>170</sup> At the time of their book's release, Kaufmann-Kohler and Potestá were both serving on the Academic Forum's Steering Committee, a role Potestá retains.<sup>171</sup> Here, I focus on the second chapter of their book *Investor-State Dispute Settlement and National Courts*, which establishes the contours of their study.

Again, my purpose in Reading Black these pieces is not to malign the values or intentions of the original authors. It is not my assertion that the original authors are, by their values, racist nor do I assume they have a static identity of being racist.<sup>172</sup> I did not seek obvious or intentionally racist language or framing choices because the evolution of our approach to racism and racist language outlined in Section 2 suggests that is less likely to be a problem than implicit biases and framing choices. This allows for consideration as to how the socialisation and structures of racism can embed in scholarship even if that is not an author's intention. By using Capers' counter-discursive reading<sup>173</sup> and invoking the three dichotomies (rationality, criminality, morality) introduced in Section 2, I demonstrate how linguistic and framing choices reflect the historical discourse, embedding and advancing racialised thinking. I also consider the scholarly impact of that reality, not only on the marginalised but also on the marginalising authors. Given space constraints, what follows is a targeted examination centred on the three dichotomies. I Read Black particular points of the four pieces and then consider the harms done by and to the Read pieces as a result of their linguistic and framing choices. I start with the rationality dichotomy. I then examine manifestations of the morality and criminality dichotomies. While the morality and criminality dichotomies are distinct, they do overlap within the Read pieces and are addressed collectively. I conclude this Section by considering the harm caused by the framing and linguistic choices, both to the marginalised scholars and arguments and to the marginalising piece.

#### 4.1 *The Rationality Dichotomy*

Three of the pieces evidenced the rationality dichotomy: Schwebel, Kaufmann-Kohler and Potestá, and Behn, Berge and Langford.

<sup>169</sup> Behn, Berge and Langford (n 164).

<sup>170</sup> Kaufmann-Kohler and Potestá (n 165).

<sup>171</sup> Academic Forum on ISDS (n 161).

<sup>172</sup> See supra n 22.

<sup>173</sup> See Capers (n 8) 13.



#### 4.1.1 Schwebel

Von Bernstorff and Dann's book brings together pieces by prominent scholars in the Global North and Global South to reflect on the underpinning philosophy and vision of the NIEO as well as its development and implementation. Despite the credibility of the scholars involved, Schwebel's review almost immediately adapts this same dichotomy, using framing choices to create doubt over the book's credibility. He writes that the book, 'mainly consists of a collection of essays that energetically espouse perspectives of scholars of the South, while qualifying some of them with notation of their shortfalls.'<sup>174</sup> The juxtaposition of 'energetically espouse,' which suggests enthusiasm (emotion) but not necessarily accuracy (rationality), with an indication that the authors only address 'some ... shortfalls' invites the reader to dismiss the book's intellectual and scholarly contribution. This, Schwebel implies, is not a balanced examination of the NIEO but an apologia for the excesses of the Global South.

When Schwebel engages with the individual chapters of the book, he largely fails to engage with the critiques from the Global South scholars. This is perhaps clearest in his discussion of Luis Eslava's chapter, which focuses on the nature of the developmental State as the main 'vehicle through which ... imperial restructuring was executed.'<sup>175</sup> Eslava's chapter is broad in its remit, examining how the 'developmental state' is a common characteristic across the Global South.<sup>176</sup> He argues that it both grew out of European approaches to economic development and effectively (but, ultimately, unsuccessfully) challenged European hegemony in the 'decolonization' era. He also explains, in part of the chapter, how the experiences of Latin American States in the 1800s help set the stage for subsequent efforts by other States in the South in the 1900s.<sup>177</sup> In Schwebel's retelling, however, Eslava's chapter is reduced in its breadth and depth. Schwebel introduces Eslava's chapter as one that 'evokes the history of Latin America.'<sup>178</sup> Beyond this, Schwebel does not engage with Eslava's work. He merely includes two quotes before moving to the next chapter.<sup>179</sup>

Notice how these framing choices for Eslava's chapter manifest the marginalising techniques of the rationality dichotomy. A focus on the history of a region as diverse as Latin America should never be used to undermine any piece's scholarly contribution, but with international law scholarship

<sup>174</sup> Schwebel (n 162) 631.

<sup>175</sup> Eslava (n 91) 72.

<sup>176</sup> *ibid* 71–100.

<sup>177</sup> *ibid* 76–82.

<sup>178</sup> Schwebel (n 162) 633.

<sup>179</sup> *ibid* 633–34.

an emphasis on the region in which the work originates instead of the topic or scholarly contributions of the Chapter can suggest there is limited international import. If to belong to the IIL academy is to be international, centring Eslava's contribution as regional and un-European places distance between Eslava and the broader scholarly community. As explained in Section 2, one way to marginalise scholarship is to suggest it is of 'niche' value, and historically and racially that has meant of limited value to European thinking.<sup>180</sup> The distance Schwebel imposes onto Eslava grows when the former fails to engage with latter, emphasising the gap between the 'ideal' and the contribution. Schwebel could have closed, or at least bridged, the distance by acknowledging the broader scope of Eslava's work or explaining to the reader how Eslava's work relates to the field as a whole.

I return to Schwebel shortly but it is worth bringing him into conversation with Kaufmann-Kohler and Potestá.

#### 4.1.2 Kaufmann-Kohler and Potestá

The second chapter in Kaufmann-Kohler and Potestá's book provides their central framing. As noted in Section 3, there are numerous critiques of ISDS as a process because of its effects on developing States. Yet, Kaufmann-Kohler and Potestá begin by asserting that 'there are essentially two inter-related criticisms' relevant to the discussion on the relationship between ISDS and national courts.<sup>181</sup> The first is that 'there is no need to put or maintain in place an international system' of investment arbitration since investors can avail themselves of domestic systems, which 'are often assumed, but not established to be inadequate.'<sup>182</sup> This means that the 'investment arbitration regime does not account for situations in which domestic courts do offer adequate access to justice to a foreign investor.'<sup>183</sup> Investors, they note, are not required to 'exhaust domestic remedies even for countries that have mature and advanced legal systems.'<sup>184</sup> The second criticism is that 'only (certain) foreign investors ... benefit from' the ISDS process.<sup>185</sup> According to Kaufmann-Kohler and Potestá's telling, the objection is that domestic investors cannot avail themselves of protection and neither can those foreign investors who are not covered by a treaty with investor-State dispute settlement.<sup>186</sup>

<sup>180</sup> See *supra* n 76.

<sup>181</sup> Kaufmann-Kohler and Potestá (n 165) 8.

<sup>182</sup> *ibid.*

<sup>183</sup> *ibid.*

<sup>184</sup> *ibid.*

<sup>185</sup> *ibid.*

<sup>186</sup> *ibid.*

There are three ways in which Kaufmann-Kohler and Potestá embrace and amplify the rationality dichotomy. First, Kaufmann-Kohler and Potestá reduce a series of complex and nuanced complaints into ‘essentially’ two criticisms. That word ‘essentially’ does a great deal of work. Kaufmann-Kohler and Potestá frame the criticisms in a way that emphasises the good of ISDS. As they tell it, there is concern that only some can benefit from ISDS, and also that some ‘mature’ States may grow out of a need for ISDS. With this framing, they lose several voices of those concerned with the impact of investment law on the national judicial systems while centring the White rationality of ISDS as a natural benefit.

Recall Yilmaz Vastardis’ three concerns, discussed in Section 3. She acknowledges the division between foreign and domestic investors that Kaufmann-Kohler and Potestá raise but her concerns are broader. She asserts that ISDS deprives national judiciaries of (1) necessary resources and (2) the opportunity to develop expertise in a complex area, or to use Kaufmann-Kohler and Potestá’s term, ‘maturity,’ while (3) exacerbating existing inequalities with regard to the right to an effective remedy.<sup>187</sup> All three of Yilmaz Vastardis’ concerns relate to the relationship between investment law and national courts, but Kaufmann-Kohler and Potestá fail to engage with the broader, structural issues that scholars like Yilmaz Vastardis raise. That investors are not required to exhaust domestic remedies is no longer about the impact of depriving local systems of justice of the opportunity to remediate the claim; it is about requiring ‘mature’ systems to also subordinate themselves to the dispute mechanism.

The second embrace of the rationality dichotomy is in the framing of when ISDS is needed and who should be constrained by it. For Kaufmann-Kohler and Potestá, ‘mature and advanced legal systems’ should not be subjected to ISDS. The linguistic framing of the in- and out-group is reminiscent of historical narratives around who can govern themselves. The coded language here conveys to the reader that there is a difference between a developed European State and a developing ‘other’ State. Only the European would have a legitimate right to complain about being subjected to ISDS. To be free of ISDS, a State would need to prove itself sufficiently European in nature. This echoes the choice of the EU to intervene on ISDS only when its sting was adequately felt by EU member States. Bringing Yilmaz and Kaufmann-Kohler and Potestá together, one might ask how a non-European State deprived of the opportunity to demonstrate ‘maturity’ with regard to foreign investors could ever become sufficiently European to show it should no longer be governed or overseen by ISDS. By reducing the breadth and depth of criticisms on ISDS’s relationship

<sup>187</sup> Vastardis, ‘ITA’ (n 100); Vastardis, ‘Bubbles’ (n 100).

to national courts, Kaufmann-Kohler and Potestá can sufficiently ignore this uncomfortable question.

Their reductionism also allows Kaufmann-Kohler and Potestá to set the terms of their inquiry in a manner that favours the interests of investors and the existing regime. By concentrating on the necessity and sufficiency of ISDS to meet the needs of investors threatened by national courts, Kaufmann-Kohler and Potestá eliminate the need to consider the negative impact of ISDS on national courts. In other words, Kaufmann-Kohler and Potestá can frame questions that centre (historically) White investors while ignoring non-White host communities.

Finally, Kaufmann-Kohler and Potestá's chapter requires brief attention is how they describe and engage with communities of scholars. In discussing the reasons for investment agreements, they articulate only positions that legitimize the system: (1) facilitating investment; (2) depoliticizing disputes; and (3) ensuring remedies where domestic courts 'are perceived to be inadequate'.<sup>188</sup> This ignores a large body of research from TWAIL and other critical approaches about the use of ISDS to capture and protect the power and privileges White European States enjoyed in the pre-colonial era.<sup>189</sup> By ignoring this work, Kaufmann-Kohler and Potestá implicitly render those concerns irrelevant. This mimics what Schwebel did with Eslava. Elsewhere, Kaufmann-Kohler and Potestá juxtapose 'sceptics of the existing system' with 'a number of scholars' concerned about how eliminating the current system might politicise investment law.<sup>190</sup> The choice constructs in- and out-groups, imposing identities of scholars and sceptics on groups of accomplished and respected researchers. The connotations here are important. Scepticism can either be well-founded or not, and sceptics can be academics, activists, or conspiracy theorists, but scholars are those who have demonstrated study and expertise. The reader is implicitly told that only one group is trustworthy – those who value ISDS – while the other may or may not have some valid concerns.

188 Kaufmann-Kohler and Potestá (n 165) 13.

189 See eg Anghie (n 17) 241–42; Linarelli, Saloman and Sornarajah (n 17) 149–51, 159–62; Sattorova (n 144) 1–9; M Sornarajah, *The International Law on Foreign Investment* (4th edn CUP 2017) 23–29; Kate Miles, *Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013) 73, 78–89. For a more recent contribution, see Nicolás M Perrone, *Investment Treaties and the Legal Imagination: Foreign Investors Play by Their Own Rules* (OUP 2021).

190 Kaufmann-Kohler and Potestá (n 165) 24–25.

#### 4.1.3 Behn, Berge and Langford

Developing States have lost more ISDS cases than developed States.<sup>191</sup> What Behn, Berge and Langford attempt to do is identify why that is.<sup>192</sup> They seek to test Franck's theory that any perception of bias against developing States is actually a reflection of the differences in the strength of States' democratic governance. Behn, Berge and Langford look at several factors, but conclude that an anti-developing State bias does not exist.<sup>193</sup> Instead, arbitrators merely favour developed States.<sup>194</sup> Other differences in success rates, they argue, are explained by the strength of 'impartial bureaucracies' and 'property rights protections'.<sup>195</sup>

Behn, Berge and Langford claim their empirical examination of existing cases demonstrates this, but they did not control for the strength of the individual cases behind their data.<sup>196</sup> They acknowledge that they reach their conclusion without knowing whether investors 'predatorily target[]' developing States or not.<sup>197</sup> This omission is significant. Bias occurs when two States in similar situations are treated differently because of their status. If one cannot and does not control for the strength of a case, it is impossible to know whether bias exists. Yet, Behn, Berge and Langford code with the presumption that 'good' investors would only pursue legitimate cases, and 'good' arbitrators would notice significant differences in the strength of a case. As such, any biases must be attributable to the State's failures.

Behn, Berge and Langford do not use the language of developing State failure. They focus on a favourability bias towards developed States and attribute other variations to the internal governance of the State.<sup>198</sup> The natural corollary to their conclusion, however, is that any problems are attributable to the developing (and middle-income) States. These 'others' can contribute to and experience more favourable outcomes by securing stronger property protections and more independent controls on the executive. It is reminiscent of the good governance narrative Tan critiqued.<sup>199</sup>

By arguing that the bias only favours developed States rather than harms developing States, Behn, Berge and Langford also suggest – as did

191 Behn, Berge and Langford (n 164) 336–37.

192 *ibid.*

193 *ibid* 381.

194 *ibid.*

195 *ibid* 380.

196 *ibid* 379.

197 *ibid* 370.

198 *ibid* 380–81.

199 Tan (n 142).

Kaufmann-Kohler and Potestá – that developing States have no place to complain about their treatment. Developing States are treated, after all, as if they were the same as middle-income States. This posits the experience of middle-income States as being the ‘norm’ from which developed States derogate. An alternative framing might recognize that the developed (White) States are the norm from which all other (non-White) States derogate in their treatment. Behn, Berge and Langford do not consider this alternative framing and as a result they miss an opportunity to reflect on the appropriateness of their conclusions.

#### 4.2 *The Criminality and Morality Dichotomies*

In addition to the rationality dichotomy, modern IIL scholarship evidences an embrace (or at least a failure to contravene) the criminality and morality dichotomies. Here, I examine manifestations in the book reviews by Schwebel and Miles.

##### 4.2.1 Schwebel

In his piece, Schwebel’s argues that the NIEO movement’s demands were not adequately defined:

A review of their terms makes clear why the industrialized democracies were unwilling to accept their core concepts, such as exclusion of the governance – or even pertinence – of international law in the treatment of foreign Investment [*sic*] and NIEO’s support for OPEC’s cartel-like price fixing as a model for the international economy.<sup>200</sup>

He also introduces another set of framing choices for the book, claiming it:

fail[s] to address ... why the middle classes of the industrialized democracies should accept being taxed to pay for an international welfarism administered by Third World governments which too often are incompetent or corrupt. The prospects of such unconstrained generosity seem the unlikelier still as nationalist and isolationist sentiment has subsequently revived in some of the industrialized democracies.<sup>201</sup>

Notice the juxtaposition Schwebel chooses. First, Western States did not object to the NIEO out of economic considerations but because of their democratic

<sup>200</sup> Schwebel (n 162) 631–32.

<sup>201</sup> *ibid* 632.

principles. The non-White States of OPEC, on the other hand, are ‘cartels,’ which carries a negative connotation. Even in its technical meaning within competition law, it suggests an illegal and exploitative purpose aimed at depriving others of what is right and fair. While critiquing OPEC as cartel-like is common, and is not necessarily racialised, taken in the broader context in which Schwebel places at odds the generosity and humanity of Western States and the ‘cartel-like’ nature of OPEC, there is a clear implication that OPEC is operating not just illegally but also immorally. In doing so, they are unfairly taking from the West.

Kristol’s call for Western ‘self-respect’ instead of ‘self-imposed humanitarian obligations’<sup>202</sup> reverberates in Schwebel’s portrayal of Western States as morally good and benevolent but ‘others’ as too often incompetent or corrupt. According to Schwebel, the West does not owe reparations for harms caused by their colonial and exploitative past. Such measures would be indicative of wrongdoing. Nor do they have a responsibility to act, the terminology of which might suggest an international legal or moral obligation that the West has failed to meet. Instead, the NIEO demanded ‘unconstrained generosity’ from the West to support the ‘welfarism’ of the Global South. The West must provide, in a manner that echoes what Zurara once argued,<sup>203</sup> because others are incapable of governing themselves honestly and competently.

Interestingly, Schwebel employs an intersectional framing in his piece. It is not merely that White Westerners would be unduly required to support needy and dependent ‘others,’ but rather it would be their middle classes that must do this. An interesting rhetorical device, Schwebel’s approach distances the West’s wealthy – those with the greatest responsibility and who benefitted most from historical exploitation – from those who are being asked to support the dependent ‘other.’ White middle classes, one can understand from Schwebel, have earned their limited resources and should not bear the burden of someone else’s deficiencies.

To his credit, Schwebel also takes to task the isolationist policies of the United States and United Kingdom, acknowledging that this resurgence of nationalism has been ‘coupled with the decline in the competence and probity of administration’ which ‘threatens the level of international aid and investment’ that the West might offer.<sup>204</sup> But, he then returns to the problematic framing of Western innocence versus non-White dishonesty. He explains to the reader that ‘Third World populations suffer too from exploitation not by

<sup>202</sup> See Jani (n 115).

<sup>203</sup> See supra nn 51–52.

<sup>204</sup> Schwebel (n 162) 632.

former colonial rulers but by that of home grown autocrats.<sup>205</sup> The reader is left with the impression that Western decline in competence is a recent, and potentially temporary, reality for a few western States but exploitative and undemocratic approaches are dominant and static realities for non-White States. Significantly, Schwebel's statement that the Third World suffers from its own's malfeasance represents his final general introductory note about the book. The general conclusion he wishes for the reader to retain is that the economic, democratic, and social problems experienced by non-White societies is that of their own doing, or at least that of their leaders' doing. The West has no further responsibilities.

#### 4.2.2 Miles

Miles' review of Llamzon focuses on the treatment of corruption within investment law. Since *World Duty Free v Kenya*,<sup>206</sup> arbitrators and scholars have recognized that investors should be precluded from bringing investment law claims when the investments have been procured via corruption. Llamzon's monograph analyses whether and under what conditions this is appropriate. Miles' review was published in 2016, but Llamzon's original work was from 2014, meaning it sits outside the article's temporal scope. This is at times uncomfortable as some of the criticism refers to quotations taken from Llamzon's piece. Even where this occurs, the concern for this article is why Miles used those quotes to further the narrative he develops throughout his piece.

Early in the review, Miles adopts a framing, similar to that of Schwebel's, which suggests that the West is responsible for fighting corruption while the racialized others take advantage of it. He introduces a quote from Llamzon by noting that it is 'a remarkable statement (oft thought, but rarely voiced) that rings in the reader's ears for the remainder of the work.'<sup>207</sup> Llamzon's quote asserts that:

one has to acknowledge, however, grudgingly, the fact that in most if not all of the developing world, every foreign investor who has made long-term commitments of large amounts of capital would have had to engage in some form of corruption ... The degree of voluntariness and the amounts may vary, but improper payments will have been made.<sup>208</sup>

<sup>205</sup> *ibid* 632.

<sup>206</sup> *World Duty Free v Kenya*, ICSID Case No Arb/00/7, Award (4 October 2006).

<sup>207</sup> Miles (n 163) 492.

<sup>208</sup> *ibid* 492 (quoting Aloysius P Llamzon, *Corruption in International Investment Arbitration* (OUP 2014) 33).



Miles leaves the reader with the impression that Llamzon was brave and bold to adopt such a position publicly, but that most knowledgeable people will agree that corruption is necessary in the developing world.<sup>209</sup> The responsibility of foreign investors for facilitating, demanding or participating in this remains unaddressed. This could be understood as a neutral focus on state responsibility but Reading Black reveals greater complexity and bias in Miles' approach.

On its own, Miles' choice of this quote reduces a diverse group of States and experiences to a monolith with a singular identity: the developing world is corrupt. The concern grows when one considers the placement of Llamzon's quote within Miles' piece. It is bookended by assertions over the West's commitment to fighting corruption, or at least to legitimizing its own forms. Before Llamzon's 'ringing' quote, Miles explains that there is a legal 'distinction between corruption (prohibited) and inducement (permitted) as played out in the murky interstices of US campaign finance law.'<sup>210</sup> In the paragraph that follows, he lists several instruments aimed at fighting corruption.<sup>211</sup> With the exception of the UN Convention against Corruption, the instruments Miles chooses to emphasize are from the White, Western world (an OECD treaty and domestic laws from the United States, United Kingdom, and Canada).<sup>212</sup> He fails to acknowledge instruments adopted in 1996, 2001, and 2003 by, respectively, the Organization of American States,<sup>213</sup> the Southern African Development Community,<sup>214</sup> and the African Union.<sup>215</sup> The absence of these instruments, whether to assure us that Llamzon has addressed them or to question why he has not, leaves the reader with the impression that it is only Western States

209 *ibid.*

210 *ibid.*

211 *ibid* 492–93.

212 *ibid.*

213 Inter-American Convention Against Corruption (B-58) (29 March 1996, entered into force 6 March 1997) S treaty Doc No 105–39, 35 ILM 724.

214 Southern African Development Community, 'Protocol Against Corruption' (14 August 2001) <[www.sadc.int/files/7913/5292/8361/Protocol\\_Against\\_Corruption2001.pdf](http://www.sadc.int/files/7913/5292/8361/Protocol_Against_Corruption2001.pdf)> accessed 28 April 2022). For more on this, see DDN Nsereko and Z Kebonang, 'The SADC Protocol Against Corruption: Example of the Region's Response to an International Scourge' (2005) 1 University of Botswana Law Journal 85.

215 African Union Convention on Preventing and Combating Corruption (adopted 1 July 2003, entered into force 5 August 2006) <<https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>> accessed 28 April 2022. For more on this, see Kalowole Olaniyan, 'The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal' (2004) 4 AHRLJ 74–92; Akeem Olajide Bello, 'United Nations and African Union Conventions on Corruption and Anti-Corruption Legislations in Nigeria: A Comparative Analysis' (2014) 22 Afr J Intl & Comp L 308.

that have taken the issue of corruption seriously. Miles' framing is not only problematic because it suggests White European States care about corruption while the 'others' do not. It also fails to interrogate how corruption is defined internationally so as to prohibit certain forms of corruption while legitimizing the types of 'inducements' that are prevalent in the West.

The Llamzon quote that rang in Miles' ears also references '[t]he degree of voluntariness' with which foreign investors engage in corruption.<sup>216</sup> This suggests that at least some investors are victims rather than co-conspirators. The investors-as-victims is a dominant theme in Miles' review. He laments a regulatory shift that focuses on the payment of bribes rather than their receipt, and the ability of States to use such allegations to defeat investors' claims for mistreatment.<sup>217</sup> 'The potential for injustice in such situations is writ large,' he explains.<sup>218</sup> While Miles acknowledges the oft-quoted maxim, 'no one can profit from his own wrongdoing,' he argues that there is a 'vital distinction' between corruption and other forms of illegality in that 'one expects an official of the host state to be in some respect complicit.'<sup>219</sup> Consequently, Miles does not question the legitimacy of Llamzon's recognition of and proposal for 'a jurisprudence in the shadows' in which arbitrators would differentiate investors' responsibility rather than always preclude claims founded on corrupt transactions.<sup>220</sup> In Miles' words, Llamzon 'realiz[es] that if both parties are complicit in corruption, then it might be considered unfair to deprive one party of a remedy by refusing to hear the dispute.'<sup>221</sup> The domestic law equivalent of this would be to chastise courts for leaving those who hire contract killers without a remedy when the contract is unfulfilled, a point Miles' does not fully address.

The notion that investors can be the victims of corruption is not controversial nor is it necessarily racial. What is problematic is that Miles does not entertain the ways in which investors push for, and benefit from, corruption at the expense of others based in the developing world. In doing so, his critique reflects Schwebel's problematic framing of developing States as 'cartels.'<sup>222</sup> Miles' framing posits investors as victims to manipulative States. Developing States, rife as they are with corruption, are unfairly using investment law's and Western States' progressive and good governance attempts to eradicate illegal

<sup>216</sup> Miles (n 163) 492.

<sup>217</sup> *ibid* 499.

<sup>218</sup> *ibid*.

<sup>219</sup> *ibid* 500.

<sup>220</sup> Miles (n 163) 496, 500–01 (internal quotations omitted).

<sup>221</sup> *ibid* 496.

<sup>222</sup> See *supra* n 200.

corruption in a manner that oppresses and punishes the victim-investors. Miles' framing invites the reader to consider investment arbitrators as a saviour capable of restoring fairness in the developing world. With this construct, Miles never needs to question whether the international legal differentiation between the West's 'inducements' and the developing world's 'corruption' is a legitimate one. Nor does he need to consider how the West or investment law might have set conditions that have led to any current issues with corruption. What goes unsaid is that this restoration of fairness means the protection of corruption rather than its refutation. He does not consider whether that is a legitimate prerogative for those who have pledged to protect all victims from the scourge of the corrupt, developing world. Finally, by portraying investors as victims, he never delves into the responsibilities owed – by the investors, the State, or investment arbitrators – to those who are actually the victims of State-investor corruption: the local populations who are not reaping the benefits they should have from whatever arrangement was pursued.

#### 4.3 *Understanding the Harm*

The problem with the embedding of implicit biases – and the reason we need to guard against them in scholarship – is not simply that being racist is normatively bad. These biases also undermine the rigour of IIL scholarship and should cause doubts about the veracity of the arguments made. The marginalising techniques employed in these four pieces harm both marginalised scholars and the marginalising pieces in interrelated ways. I briefly explain how that happens here, before examining what we can do better in the next section.

With Schwebel and Kaufmann-Kohler and Potestá, there are linguistic and framing choices that eliminate the need to, or seriousness with which they, engage with racialised criticisms. By presuming that certain questions are more 'relevant' because of who raises them and how readily they accept the mainstream answers – which both Schwebel and Kaufman and Potestá do with their framing choices – scholars can reduce the complexity embedded in the law to easily defended positions. It ignores (and thereby harms) the marginalised scholars but it also harms the rigour and significance of Schwebel's and Kaufmann-Kohler and Potestá's work. Marginalising racialised scholars can lead an author to offer an incomplete accounting of the dispute or scholarly literature, including downplaying issues of institutional or structural racism.<sup>223</sup> The result is a failure to fully grapple with criticisms of the law and with issues of responsibility central to the needs, claims, and demands of racialised

<sup>223</sup> See Delgado (n 79) 570–72.

scholars and communities.<sup>224</sup> This incomplete knowledge or understanding of the field therefore harms the marginalising scholar as it renders their work less relevant to the communal debate.<sup>225</sup>

We can see this with these pieces by Schwebel and Kaufmann-Kohler and Potestá. Reading with Schwebel suggests the book broadly, and Eslava's work specifically, is of little use to international economic law. Reading against Schwebel, in line with the Reading Black technique, raises questions about whether Schwebel understood the critiques or merely saw engagement with complaints from developing States generally, and Latin America specifically, and dismissed the positions out of hand. Similarly, reading with Kaufmann-Kohler and Potestá one could focus on the legitimacy of the ISDS regime but reading against them, one needs to ask why they chose not to engage with the broader issues of concern. In both circumstances, it reduces the scholarly worth of the contributions, suggesting a starting position of advocacy rather than interrogation.

Delgado notes that marginalising in this way can render an urgent, 'novel, hard-edged, and discomfiting thesis [into something] familiar, safe, and tame.'<sup>226</sup> In turn, any proposed 'solutions' are also of less value.<sup>227</sup> By failing to engage with structural critiques, marginalising scholars can offer 'solutions' that simply reinforce privileges for White Westerners at the expense of racialised communities.<sup>228</sup> They may call for tweaks while the issues racialised scholars identify require greater reform.<sup>229</sup> This is evident in Kaufmann-Kohler and Potestá's approach as well as in the pieces by Miles and Behn, Berge and Langford. By failing to engage with the range of criticisms on the relationship between ISDS and national courts, Kaufmann-Kohler and Potestá have rendered the difficult and broad-based concerns of scholars like Yilmaz Vastardis into a safe set of questions that can be answered with limited tweaks to a system others argue is structurally flawed.

Miles and Behn, Berge and Langford do not engage in the same marginalising practice as Kaufmann-Kohler and Potestá, but their pieces still suffer from their creation of racialised in- and out-groups. By implicitly elevating the governance of White, Western States, they miss opportunities to more deeply interrogate structural issues. Reading with Miles, one might presume that ISDS needs to be more nuanced with businesses engaged in corruption.

<sup>224</sup> *ibid.*

<sup>225</sup> *ibid* 569–71.

<sup>226</sup> Delgado (n 77) 1364.

<sup>227</sup> Delgado (n 79) 572.

<sup>228</sup> *ibid.*

<sup>229</sup> *ibid.*

Reading against him, however, raises questions about the power of foreign investors and the privileging of Western forms of corruption. With Behn, Berge and Langford, reading with them leads to the belief that developing States are not disadvantaged by biases against them. Reading against Behn, Berge and Langford, however, one must ask why they did not consider the strength of a case and the potential for predatory investors.

Collectively, Miles, Behn, Berge, Langford, Kaufmann-Kohler and Potestá incompletely depict the central problems they intend to address. It is not surprising, then, that the solutions they propose would simply embed and amplify the structural inequalities they have chosen to ignore. This is unfortunate, and it demonstrates a common flaw with marginalising scholars' work. As Luis Eslava and Sundhya Pahuja once observed, the 'uncomplicated understandings of international law at best reduce, or at worst completely negate, whatever political or emancipatory potential might exist in calls for the international.'<sup>230</sup> Because Miles, Behn, Berge, Langford, Kaufmann-Kohler and Potestá do not engage fully with the existing debate, they fail to account for racialised structural criticisms relevant to their work. This limits the benefit of their scholarly contribution. They do not add as much as they could because they do not engage as completely as they needed to.

## 5 Understanding the Impact and Moving Towards an Antiracist Praxis

If socialised racism impacts our thinking even when one does not intend to embrace those biases, and if failing to address such biases negatively impacts the rigour of scholarship, the necessary question is: how do we guard against the manifestation of implicit bias within our scholarship? As noted at the start, the purpose of this piece was not simply to identify how implicit biases embed in our language but to identify ways in which the field can move to an antiracist praxis. Obviously, this cannot be solved within a single article. But, there are opportunities for individual authors, for journals (and peer reviewers), and for the community at large. Here, I identify six such opportunities. In this section, I draw on the lessons of Section 4 to make a series of recommendations for individual scholars, journals (and their reviewers), and for the field at large. I must admit that I have not always practiced these recommendations myself, but by focusing on how racism embeds within IIL scholarship, the necessity of some of these practices became clearer to me and I hope to you.

<sup>230</sup> Eslava and Pahuja (n 28) 195.

### 5.1 *Recommendations for Individual Scholars*

First, even mainstream scholars can begin by centring critical scholarship within their framing. By engaging with – rather than summarizing – the criticisms, they can avoid the trap Kaufmann-Kohler and Potestá fell into. Scholars can address the nuance of the argument in a way that deepens understanding rather than diminishes the criticisms without regard for their real complaints. Second, scholars can Read Black in our work as part of the editing process. This requires some distance from the initial completion of a project, but it can be an important contribution to our own development. One can only wonder how the framing in Miles' piece might have become more inclusive had he stepped back from Llamzon's arguments and asked himself how his own language reinforced or deconstructed barriers to equality. With a different framing, would his arguments have gone deeper into questions of how international investment law should conceive of 'victims' within cases of corruption?

The process of Reading Black our own work cannot guarantee bias-free results. We are influenced by international and domestic legal and non-legal cultures as well as our experiences and development. Yet, the process of interrogating our own work under the Reading Black lens can help scholars identify problematic language and framing decisions and respond to them at an early stage.

Individual scholars and journals can also centre communities of scholars working on these issues. Where an individual has made an original or controversial break-away argument, highlighting that is an important form of recognition. But, where a community of scholars is engaged, presenting their work as a sole endeavour not only excludes recognition for others but has the effect of denying the strength of consensus behind the argument. Authors should give greater attention to the balance between citing an individual who has advanced a unique argument and reflecting the community of scholars who have advanced an understanding of an issue.

### 5.2 *Recommendations for Journals (and Reviewers)*

Journals can support antiracist efforts in a few different ways. First, they can better centre communities of scholars working on issues of racism, colonialism, and equality not only in special issues but throughout their publications. Issues of equality are never fringe but are central to the purpose of the law itself. Yet, they are often given limited space within international legal journals.<sup>231</sup> Where a journal fails to attend to issues of race and equality, the journal itself

<sup>231</sup> James Gathii has examined the limited engagement with the issues of race and equality in the American Journal of International Law and AJIL Unbound. James Thuo Gathii,

serves as a barrier to equality (being racist) rather than deconstructing those barriers (being antiracist).

Second, journals should consider how their style manuals might exacerbate the problem of 'othering' scholars. When style manuals encourage 'limited' citations, they are encouraging authors to exclude the community in order to focus on the individual. This might not always be a problem, but when it comes to engaging with critical scholarship that questions the racialized and colonialist foundations of the law, the use of limited citations can diminish the strength of the criticism by suggesting the individual authors sits outside the broader community. They become, to invoke Kaufmann-Kohler and Potestá's framing, sceptics instead of scholars. This damages the accuracy and authenticity of the debate.

Finally, since implicit biases can affect the rigour of the peer review process, it is necessary to ask questions aimed at identifying biases. Editors can ask pointed questions of reviewers: does this piece explicitly or implicitly grapple with issues of inequality? If so, how do the authors address those issues? Have the authors considered critical scholarship? Do they do so for more than a sentence or a paragraph? Individual reviewers can raise such issues even when they are not asked to do so by the journal. This will allow journals to better understand when and how authors grapple with issues of inequality and critical scholarship. Where biases affect the rigour of work, this should be noted so that journal editors are aware of the issue. I anticipate this suggestion will be met with outrage and accusations of 'cancel culture,' but the purpose here is not to limit lines of inquiry or beliefs but to ensure that the implicit is considered and made explicit where necessary.

### 5.3 *A Final Note for Everyone*

These suggestions carry an inherent danger: there may be an inclination to transfer some of this work onto (either exclusively or predominately) scholars from racialized backgrounds. First, there may be a belief that they are uniquely qualified to assess questions of bias in scholarship. Second, there may be a reluctance on the part of 'White' scholars to do this work while they remain unsure or afraid of how biases manifest in their own thinking. The process of transferring this work to racialized scholars would itself be the construction of a barrier to equality. It would also be based on wrong assumptions. Being racialized does not remove someone from the structures of racism.<sup>232</sup> Some

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'Studying Race in International Law Scholarship Using a Social Science Approach' (2021)

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232 See Kendi (n 2) 4–10.

scholars from racialized backgrounds will be well adept at addressing implicit biases and others will not be; the same is true with White scholars. More importantly, it is not the burden of one part of our scholarly community to 'fix' this issue. It is necessary for all scholars to do this work, and to learn from and build upon one another just as we do with all other areas of scholarly practice.

## 6 Conclusion

This article utilized the Reading Black methodology to interrogate how racialized biases continue to manifest in modern, mainstream IIL scholarship. After providing a 'register' against which to read IIL scholarship, it examined two book reviews and two articles from powerful scholars. The focus on multiple scholars in positions of power allows for a discussion that identifies the problematic embedding of racialized beliefs without centring a single individual's practice. As I have recognized in Section 3, biases are the result of the intentional socialization of racism, generally to justify capitalist expansions. International law, IIL, and individual scholars can adopt and amplify these biases without intention. To undo the harm of socialized racism requires both understanding how it affects our approaches and developing a practice that allows us to confront and respond to those biases. In this article, I used four pieces of scholarship to identify ways in which implicit biases manifest in scholarship and the harm that can have not only on those who are 'othered' in the process but also on the rigour of our scholarly community. I point to six specific practices individuals and journals can take in order to guard against the impact and influence of socialised racism within the field.

This was a narrow, first attempt at applying the Reading Black methodology to modern IIL scholarship. As such, it points to further scholarly needs. The Reading Black methodology can contribute to antiracist efforts within IIL and international economic law scholarship more broadly by helping us to better identify how biases manifest within our writing and our thinking. As the selected texts largely focus on investment law, further scholarship should use the Reading Black methodology to examine embedded assumptions and racialized thinking within other economic law sub-fields. Additionally, space constraints precluded consideration of any textbooks, but they play a vital role in knowledge reproduction. Future scholarship should address that gap. It would also be interesting to see a quantitative analysis of the racial identities of those cited within mainstream IIL articles. Finally, and more broadly, greater attention should be paid to the construction of in-groups and out-groups, in text and in practice, that exclude racialized scholars from mainstream IIL.



### **Biographical Note**

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