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The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital. By KATE MILES. Cambridge University Press, Cambridge, 2013. 464 pp. £75.00 (hardback).

The success of history writing is judged, like any other social activity, in terms of its intention, its performance and its effects. The intensity of the conceptual debate about the writing of history, which continues to the present day, reflects the historian's understanding of the social significance of history writing. To defend one's own idea of history writing is to defend the history that one writes. For a historian to modify a society's idea of its own past is to succeed in justifying that historian's own idea of history.

Allott, 'International Law and the Idea of History'¹

As any legal discipline matures, its students begin to realize that the road travelled may reveal as much about their subject as the road ahead. This is as much the case for international law as for any other legal system. As a relatively young field, international law's attempts to grapple with its own origin myths have materialized relatively recently² but what the history of international law lacks in terms of its own history it has made up for in explosive growth.

One sub-discipline that has thrived through international law's engagement with its past has been the so-called Third World Approaches to International Law (TWAIL). Broadly speaking, TWAIL functions as a 'broad dialectic of opposition to international law' that seeks to expose its subject as 'a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the

¹ Philip Allott, 'International Law and the Idea of History' (1999) 1 *JHIL* 1, 16.

² The leading periodical in the field, the *Journal of the History of International Law* was only founded in 1999. This may be compared with, *inter alia*, *Revue d'Histoire du Droit* (founded 1918), the *American Journal of Legal History* (founded 1957) and the *Journal of Legal History* (founded 1980). However, sustained calls for further research into the history of international law were made by leading international lawyers as early as 1902: see e.g. Lassa Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 *AJIL* 313, 313–14. More generally, see Martti Koskenniemi, 'A History of International Law Histories', in B Fassbender & A Peters (eds), *The Oxford Handbook of the History of International Law* (2012) 943.

Third World by the West'.³ Whatever one's views as to the merits of such a polarizing thesis, even the most enthusiastic international lawyer must admit that, to a certain degree, international law has been arranged around a monolithic Eurocentrism and that Western diplomatic and mercantile priorities—as asserted through a combination of guile, incentive and overwhelming force—form the basis of the system as we know it.

This realization is instantiated in the book presently under review. In *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, Kate Miles does not identify as a TWAIL scholar *per se*, but uses the revelations provided by TWAIL figures such as Antony Anghie,⁴ and specialists in colonial legal studies such as Lauren Benton,⁵ to shine a bright light on one of the most rapidly developing areas of international law, the law of international investment. Since the early 1990s and the signal jurisdictional decision of the tribunal in *Southern Pacific Properties (Middle East) Ltd v Egypt* (the original 'arbitration without privity' to quote Jan Paulsson⁶) the modern regime of international investment law has been one of the dominant subjects within international law. Hundreds of orders, interim awards and awards have been handed down by investment arbitration tribunals, rendering it one of the most successful international dispute resolution systems of all time, whilst at the same time raising potent questions about sovereignty, globalization and diplomatic protection. But despite this fluorescence, the history of the international investment regime has been the subject of relative neglect. True it is, scholars such as Muthucumaraswamy Sornarajah⁷ and Zachary Douglas⁸ have attempted to uncover the presumptions and foundations of the system of investment protection, but there has not yet been any book length work that traces the origins of that system beyond the pre-existing system of diplomatic protection.

Part I of the present volume addresses precisely this topic, and does so in impressive detail and with a command of the historical materials on offer. Miles' work is firstly remarkable in tracing the origins of the present system of

³ Makau Mutua, 'What Is TWAIL?' (2000) 94 *ASIL Proc* 31.

⁴ Antony Anghie, *Imperialism, Sovereignty and the History of International Law* (2004).

⁵ Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2002); Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (2010).

⁶ Jan Paulsson, 'Arbitration Without Privity' (1995) 10 *ICSID Rev—FILJ* 232.

⁷ M Sornarajah, *The International Law on Foreign Investment* (3rd edn, 2010) ch 1.

⁸ Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 *BYIL* 151.

investment law into the Early Modern Period (chapter 1). It was there, in the 17th century, that the interests of certain European states coincided with that of the mercantile classes to create the great trading companies of the East and West Indies. At that time, these states began to shape international law as to protect these companies (33–47). Notwithstanding the fact that the *Alabama* claims between the United States and Great Britain was the first ‘true’ international arbitration, the early history of this form of dispute settlement is very much one intended to safeguard the interests of Western investors in the developing world—witness, *inter alia*, the *Paraguay Navigation Company* claim, the *Finlay* arbitration, the *Delagoa Bay Railroad* arbitration and, of course, the Venezuela Mixed Claims Commissions (47–69). One minor omission in this respect is the decision of President Huber of the Permanent Court of International Justice in the *Sino-Belgian Treaty* case and the Chinese response thereto,⁹ which would have been a useful addition to Miles’ discussion of unequal treaties (25–28).

From this point, Miles examines the evolution of investment law in a changing political environment (i.e. in the context of domestic politics) and the challenges that such developments posed to the nascent system of investor protection (chapter 2). Agrarian reform in the Soviet Union and Mexico (74–7) is examined, followed by a discussion of the wider implications of the decolonization process that emerged from the Second World War (78–93). Interestingly, Miles situates decolonization in the context of a wider conversation between North and South, with Southern demands for regulatory autonomy met with legal (79–84) and institutional (84–93) responses by the North in a bid to reinforce foreign investor protections. The end point of this phase, of course, was the conclusion of the ICSID Convention¹⁰ in 1965, which provided in that institution the cornerstone of modern investment arbitration.

Following this, Miles discusses the legal proposals put forward by the New International Economic Order (e.g. permanent sovereignty over natural resources and the Charter of Economic Rights and Duties of States) in a bid to meet developed economies on their own terms (93–100). The chapter closes with a discussion of the modern phenomena of social movements and grassroots activism emerging to challenge the foreign investment regime (100–119), with particular attention given to environmental groups.

By taking such a long view of the matter, Miles gives life to the claim—often

⁹ Further: Jerzy Stucki, *Interim Measures in the Hague Court: An Attempt at a Scrutiny* (1983) 35ff.

¹⁰ Convention on the Settlement of the Investment Dispute between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.

attributed to Mark Twain, though there is no evidence he ever said it—that ‘history does not repeat itself; but it does rhyme’. Her historical analysis of investor-state relations exposes a dialogue between different interest groups and the multitude of ways in which attempts by developing states to reign in the system of investment protection imposed upon them (to a greater or lesser extent) by the West were met with an institutional and legal response designed to reinforce that system. At the same time, however, one is conscious of the fact that the developing world actively courted—or was even reliant upon—foreign investors and their capital. The result is similar to the response of the famed riverboat gambler William ‘Canada Bill’ Jones (c. 1840–1880) on being told that the faro game in which he was playing in Baton Rouge, Louisiana (although some accounts place him in Cairo, Illinois) was rigged: ‘I know it’s crooked, but it’s the only game in town.’¹¹

That being said, Miles does not address two of the more recent developments in this respect that may, in time, qualify as game-changers. First is the so-called ‘backlash’ against investment arbitration that has led several Latin American states—Bolivia, Ecuador and Venezuela—to attempt to exit the ICSID system. A second, related development is the recent series of cases brought against developed countries by investors that has caused those states to question their own participation in the system, e.g. the political handwringing prompted in Australia by the initiation of the *Philip Morris Limited v Australia* arbitration under the Hong Kong–Australia BIT.¹² It should be noted, however, that such an omission is entirely understandable given Miles’ date of publication, which arrived in the midst of the unfolding crisis—and this notwithstanding, she still mentions the broad parameters of the dispute (185–186).

All of the above encompasses Part I of the book under review. Parts II and III, however, deal with more present concerns. Part II concerns questions of contemporary interaction between investors and states, particularly in the context of environmental disputes, and further discusses how these interactions replicate the patterns of engagement seen in Part I. Chapter 3 examines points of friction between these two groups, including BHP’s activities in Papua New Guinea (135–140), Texaco’s operations in Ecuador (140–146), the catastrophe engineered at Bhopal through the negligence of Union Carbide (146–150) and the investor-led response to attempts by developing states to better regulate

¹¹ Elkan Allan & Hannah Mackay, *The Poker Encyclopedia* (2007) 78.

¹² See e.g. Albert Monichino & Alex Fawke, ‘Australia and the Backlash Against Investment Arbitration’ (2013) 19 *Australian ADR Reporter* 28.

environmental risk through the framing of such regulation as a form of indirect expropriation, a breach of fair and equitable treatment or a breach of national treatment (154–178). It also examines the phenomenon of ‘regulatory chill’ that this response has supposedly engendered (178–187). Finally, the chapter examines a new frontier on which this dialogue may again be replicated, the interaction between investment law and international efforts to combat climate change (187–209). Chapter 4, conversely, covers what Miles refers to as emerging points of ‘synergy’ between these two groups, most significantly through soft law instruments such as the Corporate Social Responsibility (CSR) movement (215–239) and sustainable finance initiatives (239–286).

In Part III, Miles turns her attention towards the future of international investment law, discussing how the historic inequalities identified in Part I and the progress through soft law instruments seen in Part II might be leveraged so as to generate substantive change to the present system of investor-state arbitration. Miles examines the steadily accelerating transfer of legal rules between different areas of international law (293–331) the rise of global administrative law, so-called (331–338) and the plethora of non-state actors entering the arena (338–346), concluding that each of these must be utilized if the ‘patterns of imperialist origins’ contained in the DNA of investment law are to be addressed. She also examines other strides towards equality that have been taken in treaty drafting, unpacking the IISD Agreement for Investment for Sustainable Development (351–367), the 2008 Norwegian Model BIT (367–368) and a proposed codification of the evolving principles of CSR in a multilateral convention (368–372). Other suggestions proffered include reform of the existing system of dispute settlement in investor-state disputes, encompassing increased standards of transparency (373–376), rules for the avoidance of conflicts of interest by arbitrators (376–378) and the introduction of an appellate system for the complete review of investment arbitration awards (to the extent that ICSID *ad hoc* Committees did not already provide such a service) (378–382).

In sum, Miles’ work is remarkable. But the reviewer feels a nagging sensation, expressed reluctantly, that it is also structurally confused and that the volume’s disparate parts do not speak to each other as much as one would like. This is instantiated by the observation that the book’s title is only really explored in Part I, and appears to be of tangential significance at best in the remainder of the volume. If Miles’ aim was to highlight the deep inequalities that exist in modern investment law and to use these as a base from which to call for wide reaching reform, then it might be thought that using a third of the book to detail the former message somewhat distracts from the balance of the volume

that addresses the latter, as the inequalities in question are not exactly a secret. If, alternatively, her aim was to catalogue in unprecedented detail the enormity of these inequalities, then a lengthy call for reform and an assessment of its possibilities is also distracting. The reviewer gets the sense that Parts II and III formed the planned core of the project when it was first laid down, but that on commencing her research (which earlier formed the basis of her doctoral dissertation) Miles became enraptured by the historical aspects of her topic, producing an extended section of such insight and novelty that it nearly took over the book by reverse. The natural consequence of this mission creep is that Miles has in fact written two books—both equally elegant and meritorious—and then attempted to combine them. Whilst the results remain impressive, the joinery is less than seamless.

But, structural quibbling aside, Miles' work provides a fascinating insight into both the historical origins of investment law and the road of reform that lies ahead. The result is full of light and shade—light in the sense that Miles sees clearly the steps that must be taken to revive the perceived respectability of investment law before the backlash causes further damage, and shade in the sense that Miles (perhaps more than any other scholar) understands that the origins of the discipline in gunboat diplomacy have written a measure of inequality into the very marrow of the field, such that removing entirely it may kill the patient. This notwithstanding, Miles' solutions are eminently sensible. She does not propose—as some scholars and politicians have done—junking the present system and starting again, but rather identifies certain processes that are already underway in international law that might be guided so as to level the playing field, as well as several more ambitious reforms that might be possible once the necessary level of political will is demonstrated. In so doing, Miles is not proposing the second coming of Carlos Calvo, but calls for investors and states to work together to the ultimate benefit of both and with an understanding of what has come before. Seen in such a way, *Origins of International Investment Law* is more than an accounting of its subject's past—it further seeks to guarantee its relevance into the future. As such, it is recommended reading for those on both sides of the investor-state divide who see the best days of the field as yet to come.

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