INTERNATIONAL INVESTMENT ARBITRATION AND THE SEARCH FOR DEPOLITICISATION

OUTLINE OF KEY POINTS FROM

THE ALEXANDER LECTURE 2023

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1. THE CURRENT PROBLEM

1. There are increasing categories of ISDS cases where there is a fundamental mismatch between **(a)** the nature and needs of the dispute and **(b)** the procedural model that is imposed for its resolution.

2. **As to (a) – Nature and Needs of Disputes:**

   i. There remains a core area of activity in ISDS involving what may be termed "standard" types of investment dispute, which have existed since the inception of investment treaties. In political terms, these are relatively uncharged disputes, involving traditional forms of investment (such as construction / infrastructure projects) and traditional forms of state interference (such as direct expropriation), and raising relatively narrow issues as between investor and state.

   ii. But beyond this core, the field has expanded massively – arguably well-beyond that which was ever envisaged by the original architects of the system. In particular, in the hands of creative lawyers and tribunals with mixed PIL experience, (a) the coverage of treaty protection has widened, with ever more broad interpretations of what constitutes an "*investment*"; (b) the scope of sovereign acts that might give rise to culpability has grown; (c) the scope of treaty guarantees has been interpreted ever more generously (e.g. the concepts of indirect or creeping expropriation; the notion of legitimate expectations; etc).

   iii. The subjects that can, and are, litigated under investment treaties now go far beyond those that could be raised through Diplomatic Protection. The field has become something of a barometer of world events. Tribunals are now regularly called upon to assess and review (e.g.) climate change policy; measures to address war; health policy; economic policy; sovereign reactions to states of emergency.

iv. As the diet of cases pushes into ever-more sensitive areas of sovereign discretion, tribunals are increasingly drawn into highly controversial and highly political areas, with issues at stake that go far beyond the rights and interests of the immediate disputing parties. These are matters that may impact upon sectors of a community, an entire region, or an entire country. In the case of climate change, the impact could be global.

v. Investor-state disputes of this kind are completely different in nature to commercial / contract disputes. Commercial / contract disputes are "horizontal" – they involve rights and obligations between two or more entities operating at the same level (e.g. as contracting parties), as between themselves. Adjudication is restricted to issues that arise as between these parties alone. The determination will bind nobody outside this closed relationship. In contrast, investor-State arbitration is "vertical" in nature, akin to public or administrative law. It entails a challenge by one foreign investor to a state's exercise of sovereign discretion (whether legislative, executive or judicial) - with potential effects for every entity who is subject to that state's policies. If a state is forced to change a policy, there may be concrete effects well beyond the immediate disputing parties.

vi. To adequately and effectively resolve disputes of this nature, and arrive at a determination that has legitimacy and acceptability amongst all those who may be affected by it, the decision-makers must (a) have access to the views and submissions of all stake-holders and those potentially impacted; (b) be informed on all aspects of the dispute; (c) be in no less a position in terms of information than those who formulated and implemented the policy or sovereign act that is impugned.

3. **As to (b) – the Current Procedural Model:**

i. For historical reasons, investor-state arbitrations universally follow the Anglo-US procedural model that was developed for commercial – horizontal – arbitrations. It is completely ill-suited to "vertical" disputes, or disputes that may have impacts beyond the immediate parties.

ii. Imposition of the commercial arbitration procedural model in ISDS leads to **3 distinct problems:**

(a) Lack of access for all stakeholders: Tribunals will only receive full submissions and evidence from the disputing investor and disputing state. In the normal course, third parties who might have been exposed to the issues in dispute, or might be impacted by their resolution, will never have their "day in court". The only exceptions is the possibility of a tribunal permitting interventions or an *amicus curiae*. But the reality is that these are extremely limited mechanisms in practice They have always been treated with

scepticism, because those seeking to intervene are often NGOs with their own agendas, and because of a pervading concern that 3rd party involvement will unbalance, complicate and delay the process, and escalate costs (often for one side). Intervenors and *amicii* are routinely barred from full access to the documentary record, and to oral proceedings.

Hence the recent 2023 UN Report on ISDS and climate change:[1]

Para 24:

"*Public participation and access to justice with effective remedies are fundamental rights in and of themselves, but they are also integral to the full enjoyment of other human rights. Inclusive public participation improves the quality of decision-making, enhances rights holder support for projects and fulfils human rights obligations. Yet the ISDS system poses major barriers to participation by affected communities, human rights defenders, Indigenous Peoples and civil society, who have no right to participate as parties and only the possibility of making non-party submissions, called amicus curiae briefs….*"

Para 25:

"*… Amicus briefs are often rejected by ISDS tribunals, meaning that affected communities, human rights defenders, Indigenous Peoples and civil society are unable to participate and thus unable to highlight the devastating impacts of environmental degradation on the right to a healthy environment and other human rights. The exclusive focus of ISDS claims on investors and States routinely results in public participation, community concerns and human rights being ignored at all stages of the process. Even if admitted, amicus briefs represent a limited, one-off form of participation. Applicants often lack access to other case documents, have their submissions limited in scope and length and are not permitted to participate in oral hearings*."[2]

(b) The problem of "*Arbitral Tunnel Vision*": The commercial arbitration model imposes strict procedural constraints, since it is focused on the disputing parties alone, and whatever evidence and submissions those parties choose to bring before the Tribunal. This is a fundamentally adversarial

[1] UN Report A/78/168 *Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights*.

[2] The UN Report focuses on cases where directly affected communities have been excluded from ISDS proceedings. E.g. ***Eco Oro v Colombia***, in which a foreign investor filed a claim based on Colombia's refusal to grant permits for a mine, which was expected to cause significant environmental damage and jeopardize water supplies. Communities and civil society organizations opposing the project applied to submit an *amicus* brief, arguing that the actions taken by Colombia were justified by the State's human rights obligations, including protection of the right to a healthy environment. The Tribunal refused to admit the proposed submissions. Also ***von Pezold v Zimbabwe*** – see below.

model. The Tribunal is positioned as a neutral umpire between the competing camps, and awaits to be educated by each. And if a matter is not brought before it by any party, then it remains beyond the scope of the dispute. This, in turn, has engendered a fundamentally narrow vision on the part of arbitrators. The most common mindset is that the Tribunal's mandate is limited, and that anything beyond the scope of the parties' cases should rarely if ever be considered.[3]

It follows that unless the parties present a full picture before the Tribunal, it will never have the benefit of it. But parties do not present the full picture. Parties do what they consider is necessary to win the case. That is completely different.

Investors are unlikely to present an objective spread of all issues at stake. States might be expected to do so, but generally do not, whether through practical or budgetary limitations; internal politics or difficulties, or a lack of consensus. Or simple dysfunction.

Worse, the adversarial process gives a premium to forensic strategy. There may be active incentives not to call the best evidence, e.g. if the best witness may be the most vulnerable to cross-examination, or a relevant document is particularly damaging, and best sidelined where possible.[4]

(c) "**Polarisation**": An inevitable side-effect of the adversarial process is that each side will adopt an increasingly polarised position in the course of the face-off, and as a means of defending against attack. This is completely anathema to policy review. Policy is rarely a matter of black and white. It is complex, nuanced and often thoroughly grey. But the middle ground in

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[3] For a recent, extreme, example of this "*tunnel vision*" – see the English Commercial Court's judgment in ***Federal Republic of Nigeria v P&ID*** (23 Oct 23 – Knowles J). The Court set aside a USD 6.6 bn LCIA award (USD 11 bn with interest), on the basis of corruption that was never brought within the scope of the dispute. Despite the eminence of the Tribunal (chaired by Lord Hoffmann), Knowles J found that: "*the arbitration was a shell that got nowhere near the truth*".

[4] Recall in this regard paragraph 4.8 of the Award in ***Copper Mesa v Ecuador*****:**

> "*It is regrettable that several persons, with highly relevant testimony, did not testify during this arbitration. These persons include, in particular: Mr Francisco Veintimilla, General Cesar Villacís and Mr Ronald Andrade… The other two persons might have been called as witnesses by the Claimant, as their former employer. Given the usual difficulties in requiring a private person to testify as a witness in an international arbitration, the Tribunal draws no adverse inference against the Claimant for not presenting their testimony in this arbitration. In the circumstances, the Tribunal can only do its best with these missing pieces of the jigsaw….*"

The "*missing pieces of the jigsaw*" sowed the seeds for much of the criticism and discontent following publication of this Award.

which sensitive policy is formulated is rarely, if ever, presented before Tribunals. The result is that the process by which ISDS Tribunals are called upon to assess policy-making bears no relation to the process by which the policy was generated. Tribunals are therefore placed in gravely inferior positions when mandated to make significant determinations – necessarily rendering their awards all the more vulnerable to attack.

2. CONSEQUENCES OF THE PROBLEM

4. This mismatch has far-reaching consequences. It has caused significant criticism in individual cases, and it is feeding a growing disquiet with ISDS in general. Counsel and arbitrators move on from one case to another, but they are leaving behind scars and inflammation. In short, in some categories of case, our current procedural model is simply making things worse.

5. More than this, as the arbitral scars and inflammation accumulate, an even more worrying overarching disaffection with public international law in general is discernible. And this, if it grows, may threaten the international rule of law.

6. Specific examples were elaborated in the *Alexander Lecture*:

(a) ***Copper Mesa v Ecuador:*** Mining project in the Intag Valley in the Andes. Potential devastation of an ecological reserve and ancestral villages. Aggressive and violent investors who traumatised a whole community. A subsequent partially successful claim by the investors against Ecuador for violations of the Canada – Ecuador BIT (1996). The ICSID process effectively excluded the locals from any meaningful participation, and the Intag community remains deeply traumatised by the whole process to this day (as depicted in the documentary *The Tribunal* directed by Dr Malcolm Rogge).

(b) **In *Von Pezold v Zimbabwe:*** Claims under the Swiss & German – Zimbabwe BITs, arising out of Zimbabwe's expropriation of three estates owned by the claimants, including forestry and agricultural businesses, in the context of Zimbabwe's 2000 land reform programme. This was a highly political & emotive subject-matter: Zimbabwe President Robert Mugabe's policy (on which he came to power in 1980) to correct the post-colonial distribution of land-owning rights. Beginning in 2000, in a wave of anti-colonial emotion, black settlers began invading and occupying predominantly white-owned farms. Zimbabwe conceded that expropriation took place, but argued that this was lawful and for a public purpose, because indigenous people remained disadvantaged given the slow pace of land reform – and if the government policed the raids, it would have led to national instability. The "*March of*

History" was a spontaneous movement among the indigenous people of Zimbabwe, which could not simply be stopped. The Tribunal ruled in favour of the investors, and Zimbabwe was ordered to make restitution of land and pay compensation. Whilst result was understandable, the process was subject to widespread criticism. In particular, the Tribunal rejected an application by four indigenous communities to file an *amicus* submission, on the basis that they did not address matters in dispute before the Tribunal (human rights issues). The resulting Award has since been condemned for a blindness to the essential socio-political context of the dispute. E.g. **Le Moli**:

> "*The relevant paragraphs read much as those of a commission of inquiry or other transitional justice mechanism. In essence, it concluded that the need to redress past inequalities was not without bounds*. *Whereas one can only agree with the tribunal that non-discrimination must be upheld also when white populations are the target of persecution*, *the perplexity comes from seeing a private tribunal constituted to decide an investment dispute taking a position of what is acceptable and what is not acceptable as a redress measure for past wrongs in a transitional justice process.*"[5]

The limitations of the commercial arbitration model laid bare a procedural dilemma in this case: whether and how the Tribunal should address the background of historical inequality. Should it engage with 'thick' historical context, when it had no obvious legitimacy or (more importantly) procedural tools to take a stance on this. Or, no less problematically, should it remove this wider context from the framing of the dispute? As one commentator has noted:

> "*its very intervention is, at best, unsuitable to partake in the transitional justice process, but it may become a major intrusion in a difficult political balancing act*".

(c) ***Foresti v South Africa***: Claim by Italian investors challenging South Africa's Black Economic Empowerment policies, designed to assist historically disadvantaged sections of society. The case settled, but the same criticism – and the same procedural dilemma as in ***Von Pezold*** was in play. And the arbitral aftermath directly flamed South Africa's decision to terminate its investment treaties.

(d) ***Tethyan v Pakistan***: Claim by Australian mining company Tethyan against Pakistan. Tethyan invested heavily in mineral exploration in the Reko Diq area of Balochistan, Pakistan, and a gold and copper reservoir estimated to hold more than 5.9 billion tonnes of ore. When the Government of Balochistan declined Tethyan's mining lease application in 2011 (based on allegations of corruption and fraud, and non-compliance with local Balochistan regulations),

[5] Ginevra Le Moli, '*Intruders in a Balancing Act: Black Economic Empowerment, Transitional Justice and Investment Arbitration Tribunals*' 19.

Tethyan initiated ICSID arbitration proceedings under the Pakistan-Australia BIT. This is a dispute that arose against a specific local historical / political context: a long-term struggle with regard to Balochistan's own interests and governance within the Pakistan Federation, and the exploitation of Balochistan's natural resources. The Baloch people are a unique ethno-linguistic group spread between Afghanistan, Iran, and Pakistan. Balochistan is the largest but least populous province of Pakistan. Relations between Baloch nationalists and the central Government have been confrontational since the creation of Pakistan in 1947. Since 2005, Pakistani security forces have clamped down on the Baloch nationalist movement, fuelling ethnic and sectarian violence in the province.

The Reko Diq project attracted severe criticism from Baloch nationalist groups. Alongside the treaty dispute, from as early as 2007, a mass of petitions were filed in relation to the project in Pakistani Courts by the Balochistan Government and other groups. By 2012, when the Supreme Court of Pakistan started hearing the matter -- it had before it at least 8 civil, criminal and human rights petitions which challenged the Reko Diq project on issues ranging from the legality of TCC's mining lease; the circumstances in which it had been granted; its legal and human rights implications. These raised a broad range of critical socio-political issues. But before the BIT Tribunal, the dispute was far narrower. The Tribunal saw the matter as exclusively between investor and State. It felt no need to concern itself with any of the wider issues driving the Petitions, or to hear from any other interests or stakeholders. Or the Balochi people. The Tribunal's award held Pakistan liable to pay damages of USD 5.9 Bn - equivalent to Pakistan's total 2019 IMF loans, and around 10% of its annual budget. For a mining project that never proceeded beyond the planning stage.

The case settled. The arbitral process has come and gone. But deep scars have been left behind. Even if the award was correct as a strict matter of law, the arbitral aftermath is one of widespread dismay at the way the arbitration was conducted, and the size of the award. This is a dismay not just in Balochistan. It is now perceived as a national injury. The scars prompted Imran Khan's proposal to terminate 27 BITs. The caretaker PDM Government then promulgated the Special Investment Facilitation Council (SIFC) in June 2023, which gives the Pakistan Army a place on the table, allowing them to determine how international investments will be handled.

7. There are countless similar examples. And in each one, it is no answer to assert that the decision was simply the necessary result of the application of objective legal criteria. As long as the process itself has left a scar or inflammation, the system and its legitimacy is at risk.

3. THE HISTORICAL GOAL OF "*DEPOLITICISATION*" IN ISDS

8. There is a curiosity here. ISDS is now producing an inflammatory effect in certain categories of case. And yet if one goes back to the dawn of the ISDS system, it is notable that a key driver in establishing the ISDS system was precisely to avoid such inflammation. This was articulated at the time as the intended goal of "*Depoliticisation*" - to elevate disputes away from local, regional & international politics, and into a rule-based, objective system.

9. Aron Broches argued in 1963 that ICSID arbitration would be "*a means of settling directly, on the legal plane, investment disputes between the State and foreign investor, [which] would insulate such disputes from the realm of politics and diplomacy*".[6] Specifically, institutionalised investor-State arbitration was touted as a response to the politics perceived to be inherent in discretionary diplomatic protection, then the principal means for home States to protect investors under international law.

10. Shifting to an objective rule-based system meant introducing increased formalisation, judicialisation and proceduralisation of disputes – or, in short, replacing a political process with a legal one, thereby enhancing both legitimacy and efficacy. This impulse to depoliticise led to the adoption of what became Art 27 of the ICSID Convention, prohibiting States party to the Convention from offering diplomatic protection or bringing international claims in respect of disputes submitted by their nationals to ICSID arbitration. As Broches explained, the purpose of this provision "*was to remove disputes from the realm of diplomacy and bring them back to the realm of law*".

11. The mantra of "*depoliticisation*" was subsequently taken up by those working in the newly-created ICSID. In its Annual Report of 1975-1976, for example, the Centre congratulated itself on having avoided the more political elements of investor-State disputes in its activities, noting:

> "*The fact that the Centre has gained increasing acceptance during a period in which the role of foreign investment has been the subject of sharp political debate and confrontation, proves the wisdom of limiting the scope of the Convention creating the Centre to the procedural aspects of investment disputes. It is also evidence of the pragmatism of governments and investors in the pursuit of common interests*."

12. Shihata, who served as General Counsel in the World Bank from 1983, was a particular proponent of the depoliticisation agenda in investor-State arbitration. As he stated in a 1986 article in the *ICSID Review* (which was subsequently repeatedly cited in ICSID Annual Reports), ICSID "*attempts in particular to 'depoliticize' the settlement of investment disputes*".

[6] 27 April 1964, Chairman's Opening Address, Consultative Meeting of Legal Experts, First Session.

13. Interestingly, some states were slow to adopt this "depoliticization" narrative. Several studies indicate early concerns – e.g. Poulsen's work, which shows that German officials declined to provide for investor-State arbitration in Germany's early investment treaties due to a concern that arbitration "*could turn every case of expropriation into an international litigation with political relevance*".[7] A remarkably prescient concern.

14. Other states, however, embraced this narrative. E.g. Vandevelde (Attorney-Adviser at the US Dept of State from 1982-1988), attests that "*the policy of the BITs at the* inception *of the [US] program was to depoliticize investment disputes by channeling them into a legal disputes mechanism created by the BIT itself*" and that "*[a]n investment dispute […] is nearly always a political problem and can become a foreign policy nightmare*." [8] Daniel Price (the US negotiator for NAFTA) has similarly noted that investor-State arbitration was perceived to ensure that:

> *"[t]he investor's claim would be decided on the merits and would not be subsumed within a larger political or foreign relations dialogue between its government and the host government*." [9]

15. Arbitration scholarship is replete with similar statements. By way of a few examples, Park observes that investment arbitration is "*a way to depoliticize investment disputes by moving them from a 'power-based' to a 'rules-based' form of adjudication*".[10] Poon comments that "*legalization is understood to be conductive to peace by providing a 'civilized' framework for apolitical dispute resolution, one that is beyond the unilateral influence of any one state, and one that does not simply reproduce the unequal power relations between the disputing parties.*"[11] Hirsch (2011) even argues that the objective of depoliticization: "*explains the reluctance among some arbitral tribunals to incorporating human rights norms in their decision-making, as these norms are perceived to be more ideologically controversial*".[12]

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[7] Lauge N Skovgaard Poulsen, 'The Politics of Investment Treaty Arbitration' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (1st edn, OUP 2020) at 748.

[8] Kenneth J Vandevelde, *U.S. International Investment Agreements* (Oxford University Press 2009) 28–30.

[9] Daniel M Price, 'Some Observations on Chapter Eleven of NAFTA' (2000) 23 Hastings International and Comparative Law Review 427; Daniel Price, 'Chapter 11 – Private Party vs Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?' (2000) 26 Canada-United States Law Journal 107, 112.

[10] William W Park, '*Private Disputes and the Public Good: Explaining Arbitration Law*' (2005)

[11] Joshua Poon, 'Beyond State Freedom and International Discipline? Questioning the Place of International Investment Law in Conflict and Post-Conflict Settings' (2021) 52 Georgetown Journal of International Law 735, 743.

[12] Cited in Poon, *supra*, at 780.

16. Puig explains that:

> "*Investor-state arbitration […] attempts to create a mutually beneficial setting for several of the parties involved. It does so by compartmentalizing potentially daunting conflicts between states into individual disputes between investors and states. This – some may argue – helps to 'de-politicize' internationally distressing conflicts, liberating a tense space between states to be employed for building constructive relationships. This approach assumes law tames the role of power in world politics, favouring long-term cooperation and diplomatic solidarity*."[13]

17. Poon further notes:

> *"[…] ISDS contributes to peace by minimizing or removing sovereign caprice, as well as redressing the inherent power imbalances between states of differing levels of development and military might. […] ISDS is said to remove the wide discretionary powers the home states have in deciding which investors' claims to pursue and how to pursue them, which, according to some, suffers from unfairness, inequality of access, and ineffectiveness, as states may base their decision on domestic or external political pressures instead of legal criteria or merits of the claims. Scholars argue that removing the requirement that the home states make that decision would help diffuse inter-state tensions, avert diplomatic crises, or even prevent armed conflicts that might otherwise arise*."[14]

18. Importantly, the "*depoliticisation*" approach also has significance for the international rule of law. As Poon comments:

> *"Appeals to the idea of rule of law also pervade discourse on international investment law and are intimately linked to broader arguments made regarding the relationship between ISDS and peace. The dominant account of the rule of law emphasizes the depoliticizing effects of investment treaty arbitration and its ability to discipline 'unruly' states by reference to some autonomous international standards-which, as some have observed, in effect prioritizes the international rule of law (for private investors) over the host states' domestic rule of law.*" [15]

[13] Sergio Puig, 'No Right without a Remedy: Foundations of Investor-State Arbitration' in Zachary Douglas, Joost Pauwelyn and Jorge Vinuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP) 244.

[14] Poon, *supra*, at 742

[15] Poon, *supra*, at 745

4. PROBLEMS WITH "*DEPOLTICISATION*" - <u>THEORY</u>

19. As the range of subjects that can be litigated under investment treaties has expanded, and Tribunals have been dragged into ever more sensitive areas of sovereign discretion, "*depoliticisation*" as a goal has become ever more unrealistic.

20. It is simply no longer the case that relations between host states and private investors can always be reduced to technical matters located outside material values, political interests or democratic debates. The work of arbitral tribunals is frequently, necessarily, political. In the words of Salacuse: "*because they involve public policy issues, investor-State disputes are political in nature and often become highly politicized, as political groups, non-governmental organizations, the media, and ultimately the general public come to have definite views on the dispute and how it should be settled*."[16]

21. This is all the more so, as Tribunals are faced with the task of resolving highly-charged policy questions by the application of broadly phrased, unspecific, treaty provisions (in a system without *stare decisis*). By way of example, in ***Vattenfall v Germany***, the Tribunal had to assess Germany's decision to phase out nuclear power. As Stephan Schill observed, this dispute "*touches on an issue that has marked Germany's social and political culture over the past three and a half decades like no other issue apart from German reunification […] Vattenfall II, and with it investor-State arbitration generally, is seen as a challenge to a fundamental social and political settlement and hence to democracy more generally*".

22. Anne-Charlotte Martineau has noted:

> "*… There is nothing neutral, normal or apolitical in investment law and adjudication. Relations between states and private investors are always thoroughly political: Investment treaties were typically signed between developed (capital-exporting) states and developing (capital-importing) states and most cases are still being brought by investors from capital-exporting states against capital-importing states. What is more, investments affect vital activities or sectors for national societies, activities that have been – and still are – the object of debates. Indeed, disputes span a wide range of environmental, labour, and health issues (such as the non-extension of operating licences for waste disposal, the control and ban of harmful substances, the implementation of anti-tobacco policies …) including constitutional issues relating to the scope of the legislator's emergency powers. In such circumstances, to say that arbitration tribunals are 'neutral' is itself a political claim, a claim that seeks to normalize power relations and interests by leaving fundamental premises unseen and unquestioned. The process is 'neutral' only if we believe that freedom to invest, freedom to extract resources (including living species), and freedom to*

[16] Jeswald W Salacuse, 'Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution' (2007) 31 Fordham International Law Journal 138, 141.

repatriate capital as understood and agreed upon by a network of private actors and national elites are 'normal' and sitting outside of politics."

"In short, arbitration tribunals do not constitute a 'neutral' forum sitting outside of 'politics'. They address questions regarding the organization of economic life and the distribution of values that remain profoundly debated in the societies in which they operate."[17]

23. Similarly, Dias Simoes:

> "*The hope was that investment disputes would be removed from political territory by locating them near the well-known land of commercial arbitration. The reality, however, is that this change of habitat, was not entirely successful. Because the disputes being adjudicated have an intrinsically political nature, the process is inescapably subject to political influence. Arbitral tribunals are recurrently required to dissect governmental policies addressing issues such as: economic and financial crises, regulating services of public interest, promoting environmental protection, and safeguarding public health, among others. Such matters are of great political sensitivity to host states. While arbitrators perform a technical-legal task, they cannot totally avoid being dragged into an examination that has a clear political scent.*"[18]

24. So the theoretical goals underpinning the current procedural system now need to be reconsidered.

5. PROBLEMS WITH "*DEPOLTICISATION*" - <u>PRACTICE</u>

25. But "*depoliticisation*" is not just problematic in theory. The practical reality in the field of ISDS has now amply demonstrated its failure in practice. On the one hand it has simply not been achieved in individual cases. On the other hand, it has not insulated the ISDS system from widespread criticism.

26. ***Arbitral Inflammation in Individual Cases:*** As already set out above, the practical reality in a number of categories of case is that the current procedural model is actively politicising disputes. Or, at the very least, failing to remove them to some objective rules-based domain, and defusing the politics.

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[17] Anne-Charlotte Martineau, 'A Forgotten Chapter in the History of International Commercial Arbitration: The Slave Trade's Dispute Settlement System' 239–240.

[18] Fernando Dias Simoes, 'Can Investment Dispute Settlement Ever Be Depoliticized?' (2021) 4 Cardozo International & Comparative Law Review 507, 509.

27. Further, investment treaty arbitration arguably makes investment claims more feasible and prominent, because the decision to file them rests with the investor without the broader diplomatic and other considerations which might prompt a home State to decline to pursue them. To this end, investment arbitration may well have produced disputes on which home and host State would have been aligned, and which would therefore not have materialised as claims.

28. Further still, the availability of arbitration itself may result in a *politicisation* of disputes, because investor-state claims are big news for the states that face them. They increasingly hit headlines and stimulate broad public interest. Studies indicate, in such a context, that states may find it particularly challenging to settle cases that are "*sensitive or politicized, with extensive media coverage*" - regardless of the specific merits of the claims at issue.[19]

29. ***Widespread Discontent:*** Discontent with the current ISDS system is not only now undeniably widespread, it continues to produce concrete effects.

30. There is now something of an exodus from BITs and similar treaties. According to the UNCTAD Investment Policy Hub, to date, there have been 512 terminations of investment treaties. The pace of terminations per year is accelerating, with 37 in 2019, 43 in 2020, and 87 in 2021. From 2015 to 2022 alone, there were 310 terminations. Every year since 2017, the number of effective terminations of BITs has exceeded the number of new treaties.

31. The growing exodus has comprised a wide range of countries, and political and economic profiles, including G20 member states (*e.g.* Australia, India, Indonesia, South Africa). Another G20 country – Brazil – has not ratified any BIT with ISDS, preferring investment facilitation and state-to-state dispute settlement. Indonesia has now terminated 23 agreements. India, in 2016, gave notice that it would terminate 58 BITs. To date, it has terminated 74 agreements. Bolivia has terminated 16 BITs since 2009. South Africa has terminated 12 agreements since 2013. Since 2017, Ecuador has terminated 14 agreements. In 2009 and 2010 the Czech Republic terminated its BITs with Denmark, Italy, Malta and Slovenia by mutual agreement. Numerous countries have now withdrawn or indicated that they will withdraw from the ECT.

32. This does not take account of current and threatened treaty renegotiations. Nor does it take account of the full force of the current backlash, with all of its popular support which

[19] See e.g. Esmé Shirlow, *'Back into the Shadows? Public Participation in the Peaceful Settlement of Investment Disputes through Non-Arbitral Means'* in Avidan Kent, Eric de Brabandere and Tarcisio Gazzini (eds), Public Participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes (Brill forthcoming).

has not yet manifested in actual terminations for a variety of reasons, including the difficulty of negotiating terminations and the lack of bargaining power of many states.

33. Then there is increasing non-compliance with ISDS Awards. A recently published 2nd Edition of the Report on Compliance with Investment Treaty Arbitration Awards 2023 (Published by *International Law Compliance* – Oct 2023) confirms that there is an increasing refusal by states to pay adverse Awards. Venezuela currently holds joint first position in this regard with 15 unpaid Awards. Five EU Member States are in the top 20 - Spain, Italy, Czech Republic, Croatia and Poland, all refusing to pay the adverse Awards rendered against them. The total amount of awards unpaid by Spain alonr has almost doubled to at least USD 1.3 Bn. Spain is still facing 51 Energy Charter Treaty (ECT) claims all of them concerning the renewable energy sector.Damages claimed total more than USD 10 billion, with interest rates continuing to be added to that number.

34. To this, one may add the recent UN Report on Climate Change (July 2023), which was presented to the UN General Assembly at the end of October 2023 by the Special Rapporteur on human rights and the environment David Boyd, entitled: "*Paying polluters: the catastrophic consequences of investor-state dispute settlement for climate and environment action and human rights*". This was a withering attack on the ISDS system in the context of climate change – an essentially political area, which has more than demonstrated the limitations of the arbitral system. This report argues that ISDS's "*unjust, undemocratic and dysfunctional process has sparked a legitimacy crisis in the international investment regime*", and hindering states from taking actions to combat climate change, exposing them to liability for billions of dollars in compensation. ISDS, as reported here, has become a "*daunting obstacle*".

35. The UN Report also highlights the critical importance of this issue, given the massive expansion in number of ISDS claims based on fossil fuel investments, as states have begun to phase out non-renewable energy production. Cases targeting actions taken by States to protect the environment have increased from 12 initiated prior to 2000, to 37 in the period 2000–2010, to 126 in the period 2011–2021, with the average amount awarded in those claims now US$600 million (excluding ***Yukos***), or five times the average amount awarded in arbitrations not related to fossil fuels.

6. A CALL FOR "*RE-DEPOLTICISATION*"

36. Given the strength of the current tide, a fundamental re-think of our procedural model is now critical – a re-think far more radical than the limited adjustments to the current system currently on the table (e.g. in UNCITRAL WG III).

37. For certain categories of case, the commercial arbitration model has proved its lack of value, and indeed its potential for harm. Its grip must now be loosened. We need to look far beyond adversarial procedures, and more towards forms of inquiry and investigation

that might allow for the inclusion of all stakeholder interests, and all the subtleties of policymaking.

38. And – however counter-intuitive this may at first appear – we need a system that, contrary to the goal of "*depoliticisation*", allows for a reconnection between disputes and the socio-political forces that have engendered them. As noted by Odumosu, we need to recognise those areas where the goal of "*depoliticization*" has set investment arbitration up to cause harm by seeking to separate law from its social/cultural context.[20] Allowing for the resolution of disputes by reference to their actual political setting, and moving away from the fiction of objective "rule-based" determinations, would allow for the enfranchisement of all interests, and all values, and thereby forestall subsequent legitimacy attacks.

39. As noted by Perrone:

> "*Foreign investment creates a series of challenges regarding the use of resources, and can have large social, cultural, and environmental implications. These are political issues whose resolution requires politics and cooperation. In this regard, the literature referred to overlooks that global governance in a plural world cannot be achieved through litigation only; investment arbitration is simply not enough. Increasing the role of politics in the governance of foreign investment requires the creation of political institutions rather than the improvement of dispute resolution mechanisms. Investment arbitration cannot create consensus, it can only determine winners and losers. Tribunals, in addition, require long periods of time to adapt to new normative views about the subject in question. What the governance of foreign investment needs thus is more space for negotiation and cooperation, and less litigation, whether it is investor-state or state-to-state. The IIR shows that too much legalization and too little politics is a recipe to increase tension. Political institutions, on the other hand, can narrow down the gaps between winners and losers and can be reworked more easily to cope with emerging tensions. Political bodies can react faster because they have a macroperspective of the situation*"[21]

40. In this regard, investor-state dispute resolution might learn from those who have advocated the re-integration of politics into interstate arbitration. In this regard, Tamar Meshel[22] has written:

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[20] Ibironke T Odumosu, 'The Law and Politics of Engaging Resistance in Investment Dispute Settlement' (2007) 26 Penn State International Law Review 251, 271.

[21] Nicolas Perrone, 'The Governance of Foreign Investment at a Crossroad: Is an Overlapping Consensus the Way Forward?' (2015) 15, 18.

[22] Tamar Meshel, '*225 Years to the Jay Treaty: Interstate Arbitration between Progress and Stagnation*' (2019) 3 International Comp, Policy & Ethics Law Review 1, 6–7.

"*The legal dimension of interstate arbitration allows state parties to submit legal questions to an arbitral tribunal and to present arguments grounded in law. It guarantees procedural safeguards […]*

But:

The political dimension of interstate arbitration allows state parties to submit politically sensitive questions to an arbitral tribunal and to advance extra-legal arguments based on political, historical, and economic considerations, or local and traditional customs. It also allows the tribunal to decide such questions ex aequo et bono, or in accordance with what is reasonable and effective in the circumstances of the case.

In this political dimension, the arbitrators act as diplomats of sorts, who look beyond the law and consider both extra-legal factors and the realities on the ground in order to devise a compromise and avoid a winner-takes-all outcome. This role of the arbitrator as diplomat is intended to avoid the restrictive preoccupation with strict legal rules where these rules are inapplicable to the dispute or incapable of providing a comprehensive and practical resolution. It is the combination of these two dimensions that produces the traditional sui generis hybrid nature of interstate arbitration and that has largely been disregarded in its contemporary judicialized form. The current practice of interstate arbitration instead focuses almost exclusively on the legal dimension of the arbitral process, with state parties submitting mostly legal issues to arbitration and arbitrators exercising their role narrowly by applying strict legal principles to resolve such issues. The political dimension of the process, and with it the arbitrators' role as quasi-diplomats, seems to have been largely abandoned.

While the dual role of the arbitrator as judge-diplomat may seem overly demanding and omniscient, arbitrators would be able to exercise this role successfully if state parties are truly committed to the traditional arbitral process, and if both the parties and the arbitrators understand and use it appropriately. If arbitrators were given the opportunity and subsequently chose to act pursuant to the traditional hybrid arbitral process advanced in this article, they would be more likely to devise effective and comprehensive solutions to complex interstate disputes."

41. This is not a call to end ISDS. Rather, it is a call for a robust, inclusive and fair system that takes account of the true nature of the disputes that now fall to be resolved.