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International Investment Law and Discipline for the Indebted

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Abstract

The object of the article is to recover the institutional memory of the 1980s debt crisis, when the decolonized world experienced forms of tutelage at the hands of international financial institutions, so as to sketch out material and discursive continuities with investment law's present. The paper asks whether damage awards in investment arbitration serve functions analogous to state indebtedness in the 1980s. As during the 1980–1989 debt crisis, states are expected to generate the conditions for investor confidence by, among other things, guaranteeing rights to property and to contract. State indebtedness, in both periods, places stress on government budgets and reduces the living standards of poor people, contributing to heightened inequality within and between states. The article begins with a social-theoretical discussion of how debt serves to curb the possibilities for political action. This is followed by a review of IMF borrowing practices in the 1980s and a discussion of the merits of comparison with contemporary investment law. The narrative frames arising during the 1980s debt crisis that continue to have resonance in the era of investment law are taken up in subsequent sections, focusing on the refrains of mismanagement, the missing development angle, shrunken policy space and irrelevance of ability to pay. The method is predominantly qualitative, although reference is made to relevant empirical work. In the course of the discussion, the Tethyan Copper v. Pakistan (2019) ruling is periodically revisited as a specimen of how tribunals arrive at damages assessments in investment arbitration. The upshot is that indebtedness in the contemporary world serves functions similar to that in the 1980s: principally to constrain policy capacity in a wide range of sectors. These binding constraints serve the interests of only a small set of actors, while those rendered most vulnerable by these constraints are relegated to the margins.

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1 Introduction

In July 2019, Tethyan Copper Company, a joint venture of Antofagasta of Chile and Barrick Gold of Canada, was awarded US$5.84 billion in damages by an investment tribunal for denial of a mining licence at Reko Diq. This is the site of one of the largest undeveloped copper and gold deposits in the world, located in the remote province of Balochsitan, bordering Iran. The tribunal had earlier concluded, in March 2017, that Pakistan was liable for wrongfully terminating Tethyan's mining licence.[1] The enormous award of damages followed 52 months later, though no large quantities of gold or copper were ever unearthed.[2] Only two months prior to the damages award, the International Monetary Fund (IMF) had granted US$6 billion in financing to Pakistan in order to avert economic disaster. The extension of funding was intended, among other things, to 'reduce public debt' and 'expand public spending'.[3] Even if less than the full amount of the damages is paid out, the size of the ICSID award means that practically all of the IMF funding would get eaten up in the payout.[4] 'Global economic governance is broken', opined one observer.[5] Abolition of investor–state dispute settlement (ISDS) is 'a very good place to start', declared another.[6]

Investment treaties warrant to investors that their investments will be protected from substantial diminution in value should states engage in conduct that runs foul of laconic standards of treatment embodied in international treaty texts. For states that misbehave, tribunals are authorized to award damages to investors in order to penalize transgressors.[7] Damages awards can range from the tens of millions to hundreds

1 ICSID, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan – Decision on Jurisdiction and Liability*, 10 November 2017, ICSID Case no. ARB/12/1, available at https://www.italaw.com/sites/default/files/case-documents/italaw10737.pdf (last visited 6 April 2022); Barrick Gold, *ICSID Issues Decision in Favor of Antofagasta plc and Barrick in Reko Diq Arbitration Proceedings* (21 March 2017), available at https://www.barrick.com/news/news-details/2017/ICSID-Issues-Decision-in-Favor-of-Antofagasta-plc-and-Barrick-in-Reko-Diq-Arbitration-Proceedings/default.aspx (last visited 6 April 2022).

2 Tethyan was awarded this vast sum despite the fact that the Pakistan Supreme Court ruled that the investor could not profit from crimes committed, 'e.g. fraud or bribery'. See 'Editorial: Reko Diq Fiasco', *Dawn* (16 July 2019), available at https://www.dawn.com/news/1494359 (last visited 6 April 2022); ICSID, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan – Decision on Respondent's Application to Dismiss the Claims (With Reasons)*, 10 November 2017, ICSID Case no. ARB/12/1, available at https://www.italaw.com/sites/default/files/case-documents/italaw10739.pdf (last visited 6 April 2022).

3 International Monetary Fund, *IMF Executive Board Approves US$6 billion 39-Month EFF Arrangement for Pakistan* (3 July 2019), available at https://www.imf.org/en/News/Articles/2019/07/03/pr19264-pakistan-imf-executive-board-approves-39-month-eff-arrangement (last visited 6 April 2022).

4 As explained below, *infra* in text associated with notes 66–67, IMF funds are dispensed in tranches over several years. As a consequence, they cannot simply be handed over to an investor in one lump sum in order to satisfy an arbitration award.

5 K. P. Gallagher, quoted in K. Tienhaara, 'World Bank Ruling Against Pakistan Shows Global Economic Governance is Broken', *The Conversation* (22 July 2019), available at https://theconversation.com/world-bank-ruling-against-pakistan-shows-global-economic-governance-is-broken-120414 (last visited 6 April 2022).

6 *Ibid.*

7 On the hegemony of normalcy in international trade law, see Tarullo, 'Beyond Normalcy in the Regulation of International Trade', 100 *Harvard Law Review* (1987) 546.

of millions of dollars.[8] In the Reko Diq case, the award was an atypical one, at the higher end of the scale.[9] Damages naturally have an uneven impact on states with different fiscal capacities. Even legal costs incurred in defending investor claims will be prohibitive for some states. If compensation varies widely,[10] large damages awards issued by investment tribunals have precisely the effect of redirecting public finance to paying off debts rather than to satisfying basic needs that promote equality.

Assurances provided to investors in investment treaties thereby enhance the potential for state indebtedness. Debt inhibits possible trajectories for collective action and can cause irreparable social harms. Actual awards, and the threat of an award of damages, serve to ensure that states do less.[11] State indebtedness typically prompts the adoption of 'fiscal consolidation' measures, drastically reducing public expenditure, swelling privatization and exacerbating the exposure of vulnerable populations to the exigencies of markets.[12] If public finance is critical to the systems of support that promote economic equality, fiscal consolidation increases poverty and enhances inequality, while having a 'particularly devastating impact on vulnerable groups'.[13] Investment arbitration, for this reason, turns out to be not only a mechanism for swelling indebtedness, but also a device for domination.[14] Damages stifle the possibility for political action and inhibit present possibilities, while projecting political constraints far 'into the future'.[15]

The outcome is not unlike the ruination produced by the debt crisis of 1980–1989,[16] when the decolonized world experienced forms of tutelage at the hands of international financial institutions acting at the behest of states home to powerful creditors. According to the Report of the South Commission, under the leadership

[8] 'Compensation' and 'damages' are here used interchangeably. In the literature, 'compensation' typically refers to reparation for unlawful expropriations while 'damages' often refers to reparations for violation of other treaty standards. On the distinction, see Wälde and Sabahi, 'Compensation, Damages and Valuation', in P. Muchlinski, F. Ortino and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008) 1051, at 1052–1053.

[9] S. D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (2019), at 164–165.

[10] *Ibid.*, at 167.

[11] Streeck, 'The Crises of Democratic Capitalism', 71 *New Left Review* (2011) 5, at 28.

[12] Organization for Economic Co-operation and Development, 'Restoring Public Finances: Fiscal Consolidation in OECD Countries', 11 *Journal on Budgeting* (2011) 15, at 17, defines 'fiscal consolidation' as concerning 'policies aimed at reducing government deficits and debt accumulation'.

[13] Lumina, 'Sovereign Debt and Human Rights: Making the Connection', in I. Bantekas and C. Lumina (eds), *Sovereign Debt and Human Rights* (2018) 169, at 184, 181; UNSG, Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, UN Doc. A/74/178, 16 July 2019, at 8, 10; Bohoslavsky and Černič, 'Placing Human Rights at the Centre of Sovereign Financing', in J. P. Bohoslavsky and J. L. Černič (eds), *Making Sovereign Financing and Human Rights Work* (2014) 1, at 2.

[14] M. Lazzarato, *The Making of the Indebted Man: An Essay on the Neoliberal Condition*, tr. J. D. Jordan (2011), at 115, 123. Similarly, J. Linarelli, M. E. Salomon and M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2018), at 219, qualify Eurozone states' handling of the Greek sovereign debt crisis as 'authoritarian'.

[15] Lazzarato, *ibid.* at 71.

[16] This is the timeline identified by an official IMF history associated with the international debt crisis. See J. M. Boughton, *Silent Revolution: The International Monetary Fund 1979–1989* (2001), at 274.

of former Tanzanian president Julius Nyerere, state indebtedness produces a 'form of bondage' that generates 'indentured economies'.[17] Stiglitz, after a stint as chief economist and senior vice-president at the World Bank, similarly described the IMF's relationship with developing countries as having 'the feel of a colonial ruler'.[18] Like colonial relationships of the past, aggressively steering domestic policy so as to favour private foreign actors, the IMF agenda failed to deliver on its economic promises. Its 'close association … with low economic benefits and high political costs' exhausted the IMF's utility in promoting economic gains.[19] The same might be said of the crisis today facing international investment law.

The object of this paper is to recover the institutional memory of the 1980s debt crisis and to draw out affinities with investment law's present. As in the past, states are expected to do no more than generate the conditions for investor confidence by guaranteeing rights to property and to contract, which has the effect of stifling the capacity to envisage alternative paths to economic betterment that lead to greater economic equality. The message today is the same as it was in the era of colonial rule: change becomes 'impossible', and any 'revolt would be absurd'.[20]

It is true that, as between the IMF and ISDS, the institutional settings in which indebtedness is assumed vary significantly – only the latter mechanism produces debt following upon an adjudicative process. Rather than serving as the arbiter of investment disputes, the IMF instead is characterized as the 'principal arbiter of international financial stability'.[21] However much the two processes differ, both have recourse to similar justificatory tropes, including those premised on the assumption that indebtedness (actual or threatened) has the virtue of imposing constraints on state policy space. Both serve as instruments of governance by which states are converted into 'debt collection agencies on behalf of a global oligarchy of investors', observes Streeck.[22] International law, rather than promoting a 'duty to protect', establishes a 'duty to pay'.[23] The imposition of debt, via either mechanism, causes more, not less, suffering for those most vulnerable to disciplines for the indebted.

The argument begins with a brief review of IMF lending practices in the 1980s and a discussion of the merits of comparing this past with the present foreign investment protection regime (Section 2). The narrative frames arising during the 1980s debt crisis that resonate in the era of investment treaties are taken up in subsequent

[17] South Commission, *The Challenge to the South: The Report of the South Commission* (1990), at 227. Derrida likens 'foreign debt' to a 'new form of slavery', in J. Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International*, tr. P. Kamuf (1994), at 94.

[18] J. E. Stiglitz, *Globalization and its Discontents* (2002), at 40–41.

[19] Pastor, 'Latin America, the Debt Crisis, and the International Monetary Fund', 16 *Latin American Perspectives* (1989) 79, at 102.

[20] A. Memmi, *The Colonizer and the Colonized* (expanded ed., 1991), at 74.

[21] Bianco and Fontanelli, 'Enhancing the International Monetary Fund's Compliance with Human Rights: The Issue of Accountability', in J. P. Bohoslavsky and J. L. Černič (eds), *Making Sovereign Financing and Human Rights Work* (2014) 213, at 215.

[22] Streeck, *supra* note 11, at 28.

[23] W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (2014), at 116.

sections (Sections 3–6). The methods deployed are mostly qualitative,[24] although recourse will be had to some quantitative work. In the course of the discussion, the *Tethyan* award is periodically returned to. The aim is to reveal that indebtedness in the contemporary world secures ends similar to those in the 1980s: to constrain public capacity in a wide range of sectors that impede the promotion of economic equality and well-being.[25] It turns out, however, that these binding constraints serve the interests of only a small set of actors, while those rendered most vulnerable by such disciplines remain at the margins. Measures for societal self-protection that have as their purpose mitigating social and economic inequality are rendered out of bounds and vulnerable to reversal.

2 Disciplines for the Indebted

Several recurring themes appear in the discourse around state indebtedness that emerged in the early 1980s, culminating in the Mexican debt crisis of 1982. The origins of this cycle of indebtedness were typically linked to large deposits of money available for borrowing caused by the rise in oil prices.[26] Seeking an outlet for a return on their surplus OPEC funds, banks found willing customers in the leadership of the global South. This 'recycling' of petrodollars turned out to be highly profitable for commercial banking sectors in the global North.[27] Funds were secured by indebted states for a variety of purposes, including what an official IMF history describes as 'low-return investment projects and current consumption', but a predominant aim was to assist non-OPEC states in coping with rising oil prices.[28] Because interest rates were low when lending commenced, once interest rates rose – from an average of 8.3

[24] By invoking narrative frames and justifications used in the era of the 1980s debt crisis, the method is a *mélange* of Foucauldian archaeology and genealogy, resembling somewhat the notion of *dispositif*: 'a heterogenous ensemble consisting of discourses, institutions, … regulatory decisions, laws, scientific statements, philosophical, moral and philanthropic propositions', incorporating 'the said as much as the unsaid', in Foucault, 'The Confession of the Flesh', in M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, ed. C. Gordon (1980) 194, at 194. This method is discussed more fully in 'Introduction' to D. Schneiderman, *Investment Law's Alibis: Colonialism, Imperialism, Debt, and Development* (2022).

[25] Admittedly, this is not investment arbitration's only or exclusive function. Beyond the scope of this discussion is the ability of holders of sovereign debt to pursue investment disputes. For a discussion, see Goldmann, 'Foreign Investment, Sovereign Debt, and Human Rights', in I. Bantekas and C. Lumina (eds), *Sovereign Debt and Human Rights* (2018) 128; Pahis, 'BITs & Bonds: The International Law and Economics of Sovereign Debt', 115 (2021) 242; Thrasher and Gallagher, 'Mission Creep: The Emerging Role of International Investment Agreements in Sovereign Debt Restructuring', 6 *Journal of Globalization and Development* (2015) 257; M. Waibel, *Sovereign Defaults before International Courts and Tribunals* (2011).

[26] Eichengreen and Lindert, 'Overview', in B. Eichengreen and P. H. Lindert (eds), *The International Debt Crisis in Historical Perspective* (1989) 1, at 1; Nyerere, 'Africa and the Debt Crisis', 84 *African Affairs* (1985) 489, at 490; O'Brien, 'The Latin American Debt Crisis', in S. P. Riley (ed.), *The Politics of Global Debt* (1993) 85, at 88.

[27] Boughton, *supra* note 16, at 272; P. Nunnenkamp, *The International Debt Crisis and the Third World: Causes and Consequences for the World Economy* (1986), at 99.

[28] Boughton, *supra* note 16, at 267, 269; Nyerere, *supra* note 26, at 490.

per cent in 1975–1979 to 14.8 per cent in 1980–1992[29] – and income from exports declined – falling by 21 per cent in 1980–1982[30] – lending became more difficult to service, resulting in increasing indebtedness of varying intensity.[31] Debt service charges outpaced any increase in lending,[32] while new debt was deployed to service old debt.[33] In the case of Mexico, the first country to threaten default in this period, public sector external debt grew from US$4 billion in 1973 to US$43 billion in 1981.[34] For severely indebted low-income countries, total external debt in 1988 amounted to 11 per cent of their combined GDP.[35] Not only did the IMF pursue policies that were in the immediate interests of creditor states, but funds were used to 'bail out' creditors headquartered in those states.[36]

Placing blame for the initial spread of indebtedness at the feet of powerful home states of the global North has been resisted. Grieve concludes that it 'is hard to find evidence that the deliberate policy of the United States and other advanced capitalist states was to burden the Third World with debt'. 'If anything', he surmises, 'policy makers in the North were guilty of neglect'.[37] Things changed dramatically, however, once Northern states became concerned about the sustainability of their banking systems, increasingly vulnerable to default. The possibility of systemic risk resulted in these states taking an active interest in increasing bank indebtedness, channelling their anxiety by directing that action be taken by international financial institutions such as the IMF and the World Bank.[38] By conditioning assistance upon the adoption of notorious 'structural adjustment' policies – the neoliberal strategies of privatization, deregulation, wage freezes, abolition of subsidies and decreases in public expenditure – heavily indebted states could receive financing from the IMF, allowing them to carry forward their debt burdens. IMF financing was only partial, short-term, not very low-cost ('at 9 per cent interest, 3 years' grace period and 3 years' repayment'[39]) and all in foreign currency.[40] Letters of Intent, together with policy framework papers, prescribed policy commitments that would be taken in the course of borrowing periods. Performance would be measured for an ensuing three years.[41]

29 South Commission, *supra* note 17, at 57.

30 *Ibid.*

31 O'Brien, *supra* note 26, at 88–89. This was even the case with Mexican oil, where the volume of exports declined precipitously. See Boughton, *supra* note 16, at 283.

32 O'Brien, *supra* note 26, at 104.

33 South Commission, *supra* note 17, at 227.

34 Boughton, *supra* note 16, at 282.

35 South Commission, *supra* note 17, at 228.

36 Stiglitz, *supra* note 18, at 201, 210.

37 Grieve, 'Debt and Imperialism: Perspectives on the Debt Crisis', in S. P. Riley (ed.), *The Politics of Global Debt* (1993) 51, at 59–60.

38 Boughton, *supra* note 16, at 277.

39 For example, Brazil required US$12.7 billion in financing, of which the IMF provided only US$2.5 billion. See Boughton, *supra* note 16, at 340.

40 Nyerere, *supra* note 26, at 493, 494; Polak, 'The Changing Nature of IMF Conditionality', *Essays in International Finance*, No. 184 (1991), at 6–7. Credit purchases have high conditionality attached to the upper tranches.

41 Polak, *ibid.*, at 12.

Nyerere labelled it a 'kind of international authoritarianism' – 'Economic power is used as a substitute for gun boats'.[42] For Grieve, if imperialism is equated with 'any relationship involving threat and submission', then the resulting policy prescriptions should be understood as exhibiting characteristics of empire.[43] This intuition is underscored by empirical work revealing that some states – those who were closely allied to the United States,[44] for instance, or temporary members of the UN Security Council[45] – have had fewer and more favourable conditions attached to IMF lending. In other words, powerful capital-exporting states deploy IMF conditionality to their strategic advantage, imposing greater and harsher conditions on states that are deemed less worthy of their beneficence.[46]

Drawing out comparisons between the 1980s debt crisis and the contemporary investment law regime, admittedly, is unusual. It is the disciplinary function of debt, in both time periods, that renders the task of comparison self-evident. States are expected to adopt policy positions going forward that are starkly different from those previously preferred. States, in each period, are assumed to be acting voluntarily. There is no compulsion, it is said, to enter either into Letters of Intent with the IMF or into bilateral investment treaties.[47] It also may seem too easy a comparison. Excessive damages awards in investment arbitration serve as bright, shiny objects that can inflame public opinion against the investment law regime, as did IMF-induced indebtedness in the 1980s. This is because monetary awards are 'more easily intelligible' than investment arbitration awards that address jurisdictional questions and the merits of disputes (these are too complex for critics of ISDS, it is assumed), which reinforces the perception that the regime is unfair.[48] 'Any plausible criticism of "excessive" awards is therefore likely to undermine the essential political legitimacy of investment arbitration', worry Wälde and Sabahi.[49] However, the ease with which comparisons of this sort can be undertaken makes excessive indebtedness no less alarming. If the *Tethyan* award heightens legitimacy concerns in ways that are easily comprehended, there is nothing simple about the three lengthy rulings involved. Each of them is hundreds of

[42] Nyerere, *supra* note 26, at 494.

[43] Grieve, *supra* note 37, at 52. There is in fact 'little difference' between analyses grounded in empire or hegemony, in Grieve, *supra* note 37, at 61.

[44] Dreher and Jensen, 'Independent Actor or Agent? An Empirical Analysis of the Impact of US Interests on IMF Conditions', 50 *Journal of Law and Economics* (2007) 105; Stone, 'The Scope of IMF Conditionality', 62 *International Organization* (2008) 589.

[45] Dreher, Sturm and Vreeland, 'Politics and IMF Conditionality', 59 *Journal of Conflict Resolution* (2015) 120.

[46] Of course, sovereign debt is no new thing. See Eichengreen and Lindert, *supra* note 26, at 5; Lindert and Morton, 'How Sovereign Debt Has Worked', in J. D. Sachs (ed.), *Developing Country Debt and Economic Performance*, Vol. 1, *The International Financial System* (1989) 39, at 230.

[47] On negotiation of Letters of Intent, see C. Payer, *The Debt Trap: The IMF and the Third World* (1974), at 32. On the context in which investment treaties are negotiated, see L. N. Skovegaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (2015).

[48] Wälde and Sabahi, *supra* note 8, at 1054.

[49] Wälde and Sabahi, *supra* note 8, at 1055.

pages long (cumulatively 1,411 pages in length, not including the Pakistan Supreme Court ruling), covering complex commercial transactions over several decades and comprising not easily penetrable legal details. So as to move beyond merely flagging the shocking sums involved, I will have occasion to return to the dispute throughout this discussion.

It might be thought that one significant distinction between contemporary investment law and the 1980s debt crisis is that the poorest states in the world are not respondent states in ISDS proceedings. But the poorest states in the world were not necessarily the most heavily indebted, requiring IMF bailouts, either. In fact, many of the states receiving IMF assistance in the 1980s are familiar respondents in investment treaty disputes: Mexico, Poland, Argentina, Ecuador and Peru. As might be expected, contemporary investment disputes are mostly 'between high and upper middle-income countries'.[50] Because the poorest states do not receive much in the way of foreign investment, Fauchauld finds that they will not typically be found to be engaged in ISDS.

Nevertheless, impoverished states continue to rely upon IMF funding and, also, are respondents in investment disputes. Pakistan is a case in point, having repeatedly called upon the IMF for financing (the 2019 loan was the 13th in 30 years[51]), giving rise to indebtedness of US$5.8 billion[52] (not including US$6.4 billion in debt owed to China[53]), all the while continually failing to live up to some of the strictest IMF conditionality.[54]

Conditions attached to the 2019 Letter of Intent accompanying the US$6 billion draw on the Extended Fund Facility look similar to Pakistan's past commitments.[55] They include tightening monetary policy, increasing gas and power tariffs and taking measures to 'avoid the recurrent policy slippages of the past' and 'repeated cycles of instability'.[56] Privatization of state-owned enterprises is considered 'a key component'

[50] Fauchauld, 'International Investment Law in Support of the Right to Development?', 34 *Leiden Journal of International Law* (2021) 181, at 192.

[51] S. Lakhani, 'The IMF Repeats Old Mistakes in Its New Loan Program for Pakistan', *The Diplomat* (3 August 2019), available at https://thediplomat.com/2019/08/the-imf-repeats-old-mistakes-in-its-new-loan-program-for-pakistan/ (last visited 6 April 2022).

[52] S. Masood, 'Pakistan Says It Will Accept I.M.F. Bailout Of $6 Billion', *New York Times* (13 May 2019).

[53] S. Shah, 'Pakistan Offers Sharp Shifts to Win IMF Bailout', *Wall Street Journal* (1 July 2019), available at https://www.wsj.com/articles/pakistan-offers-sharp-shifts-to-win-imf-bailout-11561973412 (last visited 6 April 2022).

[54] In each of the years 1989–1992 and 2003–2004. See Stubbs and Kentikelenis, 'Conditionality and Sovereign Debt: An Overview of Human Rights Implications', in I. Bantekas and C. Lumina (eds), *Sovereign Debt and Human Rights* (2019) 359, at 364–365.

[55] See, e.g., International Monetary Fund, *Pakistan: Eighth Review Under the Extended Arrangement and Request for Waivers of Nonobservance of Performance Criteria – Press Release; Staff Report; and Statement by the Executive Director for Pakistan*, IMF Country Report No. 15/278 (16 September 2015), available at https://www.imf.org/en/Publications/CR/Issues/2016/12/31/Pakistan-Eighth-Review-Under-the-Extended-Arrangement-and-Request-for-Waivers-of-43329 (last visited 6 April 2022).

[56] International Monetary Fund, *Pakistan: Request for an Extended Arrangement Under the Extended Fund Facility – Press Release; Staff Report; and Statement by the Executive Director for Pakistan*, IMF Country Report No. 19/212 (8 July 2019) available at https://www.imf.org/en/Publications/CR/Issues/2019/07/08/Pakistan-Request-for-an-Extended-Arrangement-Under-the-Extended-Fund-Facility-Press-Release-47092 (last visited 6 April 2022), at 52–53.

to 'reduce' fiscal burden and more clearly separate 'ownership' from the 'regulatory functions of the state', according to the attached Memorandum of Economic and Fiscal Policies.[57] Allowance is made in this lending exercise for 'strengthening and broadening of safety nets to support the most vulnerable' (exhibiting a turn away from sheer indifference). In the 2019 Letter of Intent, Pakistan pledges to enhance 'social protection to strengthen social safety nets'.[58] The Memorandum on Economic and Fiscal Policies announces poverty reduction as the 'cornerstone' of Pakistan's commitment to its people.[59] The IMF cynically acknowledges that an emphasis on social protection 'should help garner broad buy-in and political support to implement the ambitious policy measures'.[60] If a commitment to social protection was meant to blunt the sharp edges of IMF conditionality, it turns out to have been a hollow one. It is 'like shock therapy', observed one Pakistani economist.[61] This is borne out by austerity measures resulting in 40 per cent cuts to higher education, as well as plans to privatize health care and for electricity price hikes.[62] The COVID-19 pandemic exacerbates the social suffering. According to the World Bank, half of Pakistan's working population lost jobs or income in 2020. Two million people fell below the poverty line and 40 per cent of households experienced 'moderate to severe food insecurity'.[63] This necessitated a further draw upon the IMF's Rapid Financing Instrument in 2020 of almost US$1.4 billion.[64]

In the aftermath of the *Tethyan* award, the equation looks deceptively simple: Pakistan will suffer through an IMF austerity programme in order to pay off an ISDS award equivalent to twice Pakistan's health care expenditures. It is not that simple, however, as IMF lending arrives only in tranches over three years, rather than in one lump sum (like the amount owing to Tethyan). Meanwhile, post-award interest is accumulating at a rate of US$700,000 per day.[65] If Pakistan is to pay out to the investor an amount approaching the US$6 billion award, funds will have to be found elsewhere. The Pakistan government admits that opposition to the 'tough austerity measures' already adopted will be exacerbated if damages are immediately paid out: it

[57] *Ibid.*, at 63.

[58] *Ibid.*, at 53.

[59] *Ibid.*, at 58.

[60] *Ibid.*, at 19.

[61] Shah, *supra* note 53.

[62] Jan, 'The IMF Is Using the Debt Crisis to Hollow Out Pakistan's Sovereignty', *Jacobin Magazine* (14 April 2021), available at https://www.jacobinmag.com/2021/04/pakistan-debt-sovereignty-covid-economic-crisis (last visited 6 April 2022).

[63] World Bank, *The World Bank in Pakistan* (29 March 2021), available at https://www.worldbank.org/en/country/pakistan/overview (last visited 6 April 2022).

[64] International Monetary Fund, *Pakistan: Request for Purchase Under the Rapid Financing Instrument – Press Release; Staff Report; and Statement by the Executive Director for Pakistan*, IMF Country Report No. 20/114 (17 April 2020), available at https://www.imf.org/en/Publications/CR/Issues/2020/04/16/Pakistan-Request-for-Purchase-Under-the-Rapid-Financing-Instrument-Press-Release-Staff-49342 (last visited 6 April 2022), at 1.

[65] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan – Decision on Stay of Enforcement of the Award*, Annulment Proceeding, 17 September 2020, ICSID Case No. ARB/12/1, at para. 81, available at https://www.italaw.com/sites/default/files/case-documents/italaw11880.pdf (last visited 6 April 2022).

would 'trigger more strikes and protests and, therefore, threaten social stability'.[66] The award amounts to a death sentence, writes Sachs.[67]

The following sections take a deeper dive into the debt crisis of 1980–1989, contrasting the impact of IMF indebtedness with the contemporary regime for the protection of foreign investors. The object is to identify selective discursive and normative refrains, several decades old, that continue to resonate today. These recurring discursive frames have to do with development (Section 4), policy space (Section 5) and ability to pay (Section 6). I begin with a discussion of the refrain of mismanagement (Section 3).

3 Mismanagement

A frequently recurring frame in debates over indebtedness are allegations of widespread mismanagement. Heavily indebted states have only themselves to blame for their predicament, it is said. 'IMF and orthodox economists', writes Pastor, 'generally blamed domestic policy' for high rates of indebtedness in the 1980s.[68] Southern states were alleged to be responsible for their own poverty, complained former Tanzanian president Nyerere. This is 'then explained in terms of its socialism, its corruption, the laziness of its people and such-like alleged national attributes'.[69] This is, in part, because Northerners imagine Africa as embodying a 'sign of lack' that is 'incomprehensible, pathological, and abnormal'.[70] In Latin America, corruption is alleged to have been 'endemic'. Borrowed funds were used to finance imports of wealthy consumer goods, serving as a substitute for domestic savings.[71] This refrain of blameworthiness was a principal trope invoked to justify the imposition of structural adjustment on economically vulnerable states.

Even as the ostensible rationale for enhanced bank lending was to shield fuel-importing countries from rising OPEC cartel prices, it was alleged that public monies were not used 'productively' and, instead, wasted on 'Pharaonic projects' and on social welfare.[72] According to this narrative, states largely mismanaged their economies, adopting policies that ran 'counter to the norms required for freely functioning markets'.[73] These countries, the managing director of the IMF explained in 1982, 'failed to adopt

66 *Ibid.*, at para. 65.

67 Sachs, 'How World Bank Arbitrators Mugged Pakistan', *Project Syndicate* (26 November 2019), available at https://www.project-syndicate.org/commentary/world-bank-corrupt-arbitration-ruling-against-pakistan-by-jeffrey-d-sachs-2019-11 (last visited 6 April 2022).

68 Pastor, *supra* note 19, at 82; also in Riley, 'Introduction: The Politics of Debt Crises', in S. P. Riley (ed.), *The Politics of Global Debt* (1993) 1, at 11. See also D. F. Lomax, *The Developing Country Debt Crisis* (1986), at 240.

69 Nyerere, *supra* note 26, at 489.

70 A. Mbembe, *On the Postcolony* (2001).

71 O'Brien, *supra* note 26, at 90–91.

72 Corbridge, 'Discipline and Punish: The New Right and the Policing of the International Debt Crisis', in S. P. Riley (ed.), *The Politics of Global Debt* (1993) 25, at 34.

73 *Ibid.*

policies that can reassure its foreign creditors'.[74] Having placed 'excessive' demands on the economy, emancipation of economic interests was the only prescribed remedy. If sources of mismanagement were endogenous, as maintained by Fund managers, then a cure could be found only in repairing faulty political regimes. The IMF was indispensable insofar as it could dish out the kind of painful medicine that leadership in indebted countries were otherwise reluctant to embrace. If there were exogenous factors that gave rise to the debt crisis, they were disregarded. Only 'individual and purely domestic adjustment' would be the object of IMF conditionality.[75] Metropolises home to banking elites, relatedly, felt no obligation to ameliorate the conditions of states and citizens in the South. They bore 'no moral responsibility for the plight of the poor and powerless'.[76] Only unencumbered free markets could improve their situation.

This refrain of mismanagement is common, too, in investment arbitration. Investment tribunals adjudicating disputes launched by investors suffering losses as a consequence of the Argentine financial crisis of 2001 invoked precisely this narrative. Argentina enthusiastically followed directives issuing out of the IMF in pursuit of the developmental path long promoted by international financial institutions.[77] True, the IMF did not actively promote one of the main pillars of Argentina's economic transformation, the 1991 convertibility plan pegging the Argentinian peso to the US dollar at an exchange rate of one-to-one. Despite initially expressing 'misgivings' about Argentina's currency board, the IMF soon thereafter joined the chorus of support.[78] Argentina was applauded for the adoption of 'regime shifts' that, ultimately, led the country down a path to economic ruin.[79] Other 'regime shifts', enthusiastically described by the IMF in a 1998 staff report, included trade reforms (eliminating export tariffs and non-tariff barriers to trade), deregulation (abolishing regulatory and marketing boards), privatization (of 90 per cent of all state-owned enterprises yielding about US$20 billion in revenue) and financial system reform (banking deregulation and accelerated foreign ownership).[80]

The ensuing economic crisis prompted the temporary suspension of prices and freezing of profits converted into dollars. The Argentine government, by emergency decree in 2001, limited the capacity to withdraw funds from bank deposits, abolished dollarization and refused to convert tariffs due to foreign investors into US dollars.[81] The Republic of Argentina defended the redenomination of all contracts into pesos

[74] Jacques de Larosière's address to executives of the largest US banks, New York, January 1982, quoted in Boughton, *supra* note 16, at 267. On the strategy of blame shifting at the IMF, see Stiglitz, *supra* note 18, at 212–213.

[75] Pastor, *supra* note 19, at 101.

[76] Corbridge, *supra* note 72, at 34.

[77] P. Blustein, *And the Money Kept Rolling In (and Out): Wall Street, the IMF, and the Bankrupting of Argentina* (2005), at 23.

[78] International Monetary Fund, *Lessons from the Crisis in Argentina* (8 October 2003), available at http://www.imf.org/external/np/pdr/lessons/100803.pdf (last visited 6 April 2022), at 8, 66.

[79] International Monetary Fund, *Argentina: Recent Economic Developments* (April 1998), available at http://www.imf.org/external/pubs/ft/scr/1998/cr9838.pdf (last visited 6 April 2022), at 4.

[80] *Ibid.*, at 5–6. The IMF complained that Argentina was a laggard in labour market reform, however, at 7.

[81] ICSID, *CMS Gas Transmission Company v. The Argentine Republic - Award*, 12 May 2005, ICSID Case no. ARB/01/8, at para. 66.

as ensuring that, in the wake of economic collapse, all 'participants in the economy' shared in the economic 'burdens collectively'.[82]

Michigan-based CMS would have none of that. CMS purchased almost 30 per cent of the shares of the public gas transportation company, Transportada de Gas del Norte (TGN), in the course of its 1995 privatization.[83] Suffering a devastating loss following pesification – CMS shares dropped 92 per cent in value – the investor launched a dispute under a 1991 US–Argentine bilateral investment treaty, claiming indirect expropriation and a failure to comply with the standard of 'fair and equitable treatment' (FET) mandated under the treaty.[84] The tribunal accepted the FET argument. As the terms of the gas transportation licence virtually provided a 'guarantee' to the company that it would be rewarded with profits over the years, the state was obliged to pay CMS US$133.2 million.[85]

In the course of issuing its ruling, the investment tribunal entered into a version of the blame game. The Argentine programme of privatization, the tribunal concluded, 'was conceived to overcome the crisis of the late 1980's [sic]', which was 'characterized by hyper inflation, the inefficient operation of many publicly-owned companies, including those responsible for public utilities, and a dramatic shortage of investments'. The tribunal celebrated privatization as having been 'very successful' even though it precipitated 'another major crisis'.[86] In other words, Argentina got what it deserved – windfall profits followed by economic disaster – as a consequence of its own mismanagement.

The narrative of blameworthiness emerges with more clarity in the tribunal's discussion of the customary international law defence of necessity. According to the International Law Commission's draft articles, a state may not invoke necessity if it 'has contributed to the situation of necessity'.[87] This, it is said, mitigates against states profiting from mismanagement (aka moral hazard) when they have substantially contributed to the conditions that warranted extreme measures.[88] In this instance, the

[82] ICSID, *CMS Gas Transmission Company v. The Argentine Republic - Application for Annulment and Request for Stay of Enforcement of Arbitral Award*, 8 September 2005, ICSID Case no. ARB/01/08, at para. 20.

[83] *Ibid*, at para. 58.

[84] *Ibid.*, at para. 88.

[85] Argentina subsequently filed an application for annulment of this award under an extraordinary procedure available at the World Bank to set aside ICSID panel rulings. See 'I.B.R.D.: Convention on Settlement of Investment Disputes Between States and Nationals of other States; Report of the Executive Directors', 4 *International Legal Materials* (1960) 524. The application was denied by an ICSID annulment committee, though it did find errors in the tribunal's decision, including a mix-up of the treaty defence of necessity and the defence available under customary international law (ICSID, *Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic*, 25 September 2007, ICSID Case no. ARB/01/08, at paras. 130–134). This, however, did not amount to a 'manifest excess of power' and grounds for annulment under the ICSID Convention, Art. 52(b). See para. 76.

[86] *CMS*, *supra* note 81, at para. 152.

[87] Article 25(2)(b) cited *ibid.*, at para. 316. Kurtz describes this as a 'poor candidate' to assist in judicially resolving questions of necessity, in J. Kurtz, *The WTO and International Investment Law: Converging Systems* (2016), at 216.

[88] Sykes, 'Economic "Necessity" in International Law', 109 *American Journal of International Law* (2015) 296, at 313.

tribunal acknowledged that 'the roots [of this crisis] extend both ways and include a number of domestic as well as international dimensions'. Nevertheless, the contribution was sufficiently substantial to preclude Argentina's access to this defence. The crisis was the product of ongoing policy choices of successive governments 'and their shortcomings significantly contributed to the crisis and the emergency'. While 'exogenous factors did fuel additional difficulties', they did 'not exempt' Argentina from responsibility.[89]

Nor did Argentina fare much better in most other cases arising out of the 2001 financial crisis.[90] Where a tribunal found Argentina liable for violating FET,[91] the tribunal was as likely to conclude that Argentina had contributed to the economic crisis giving rise to the emergency.[92] In *Enron*, for instance, the tribunal attributed significant responsibility to Argentina,[93] relying exclusively on the opinion of an expert economist who condemned Argentina's 'misguided internal policies' which 'greatly amplified the effects of external shocks on the Argentine economy'.[94] The same point was made, in almost identical language, in the *Sempra* award.[95] The *National Grid* tribunal, relying mostly on the IMF's evaluation of Argentine state policy, concluded that the state contributed to its own economic crisis and so could not rely on customary international law.[96] On many of these occasions, the arbitral reasoning was less than satisfactory.[97]

[89] *CMS*, *supra* note 81, at paras. 328, 329. It is believed that the financial downturn was sparked by financial instability in Russia and then in Brazil. See Powell, 'Argentina's Avoidable Crisis: Bad Luck, Bad Economics, Bad Politics, Bad Advice', *Brookings Trade Forum* (2002) 1, at 2.

[90] See Sabahi, Duggal and Birch, 'Limits on Compensation for Internationally Wrongful Acts', in M. Bungenburg *et al.* (eds), *International Investment Law* (2015) 1115, at 1125.

[91] This was the most likely ground upon which a claimant would succeed. See Alvarez and Topalian, 'The Paradoxical Argentina Cases', 6 *World Arbitration and Mediation Review* (2012) 491, at 504.

[92] Exceptions to this trend line can be found in ICSID, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic – Award*, 25 July 2007, ICSID Case no. ARB/02/1 and ICSID, *Continental Casualty Company v. The Argentine Republic – Award*, 5 September 2008, ICSID Case no. ARB/03/9, at para. 234. For a discussion, see Alvarez-Jiménez, 'Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law: A New Approach Based on the Complexity of Argentina's 2001 Crisis', 27 *Journal of International Arbitration* (2010) 141.

[93] ICSID, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic – Award*, 22 May 2007, ICSID Case no. ARB/01/3, at para. 312.

[94] ICSID, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic – Decision on the Application for Annulment of the Argentine Republic*, 30 July 2010, ICSID Case no. ARB/01/3, at paras. 391–392.

[95] ICSID, *Sempra Energy International v. The Argentine Republic – Award*, 28 September 2007, ICSID Case no. ARB/02/16, at para. 354.

[96] *National Grid plc v. The Argentine Republic*, Award, 3 November 2008 (UNCITRAL), at para. 260. Also ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic – Decision on Liability*, 30 July 2010, ICSID Case no. ARB/03/17, at para. 263; ICSID, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic – Decision on Liability*, 30 July 2010, ICSID Case no. ARB/03/19, at para. 241.

[97] Waibel, 'Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E', 20 *Leiden Journal of International Law* (2007) 637, at 642; Binder, 'Circumstances Precluding Wrongfulness', in M. Bungenberg *et al.* (eds), *International Investment Law* (2015) 442, at 451.

The takeaway is that Argentina not only contributed to its own economic demise but also benefited from its aggressive embrace of the Washington consensus.[98] If Argentine politicians and citizens were not 'wholly innocent' victims in setting the country's economy on a collision course, they nevertheless adhered mostly to IMF directives.[99] It seems perverse to attribute mismanagement in circumstances where the state slavishly followed IMF diktat about those 'norms required for freely functioning markets'.[100] In this light, the polemic about mismanagement looks like a pretext for international financial institutions avoiding their own culpability.[101]

The *Tethyan* dispute precipitated a version of this, though not expressly in the tribunal's reasons. Instead, the discourse of blameworthiness circulated in the public sphere, with analysts insisting that the government of Pakistan badly mismanaged the situation. It was a case of 'bureaucratic incompetence', one commentator opined.[102] Other actors were implicated, including the Pakistan Supreme Court for having voided the joint venture agreement, jump-starting the investment (discussed in Section 6) dispute. 'Why would an international investor come to the country when your courts are passing judgements without considering the prevailing circumstances?', a senior lawyer asked. The newspaper headline accompanying this story declared that the ex-chief Justice's 'verdict costs Pakistan $6b'.[103] In another such instance, the 'hyper-nationalist … intrusive and politicised' Pakistani military was to blame. What is described as the 'permanent state apparatus' enmired Pakistan in this debacle by sidestepping constitutional and legal restrictions.[104] By allowing the deep state to have its way, the country was more impoverished than ever. And by playing the blame game, investment law's disciplines and remedies escape public scrutiny.

4 Development

During the course of the 1980s global debt crisis, economic development was not a primary or even secondary concern for private US banks. As a result, the 'debt-led economic boom' resulted in 'few benefits' flowing to the citizens of indebted states.[105] IMF lending, after all, is intended to be short term, without lengthy terms for repayment. This could not possibly permit the 'gestation' of meaningful projects

98 Blustein, *supra* note 77, at 25.

99 *Ibid.*, at 6; Alvarez-Jiménez, *supra* note 92, at 151.

100 Corbridge, *supra* note 72, at 34.

101 Mbembe, *supra* note 70, at 3.

102 The Newsmakers, 'Pakistan's Gold Mine', *TRT World* (23 July 2019), available at https://www.youtube.com/watch?v=kXeWKv9Is0A (last visited 6 April 2022).

103 H. Malik, 'Reko Diq case: Ex-CJP's verdict costs Pakistan $6b', *Express Tribune* (14 July 2019), available at https://tribune.com.pk/story/2013028/1-reko-diq-case-ex-cjps-verdict-costs-pakistan-6b/ (last visited 6 April 2022).

104 H. Haqqani, 'Fool's Gold – Pakistan Could Have Made Big Money from Gold Mines, Now It's Paying Penalties', *The Print* (16 July 2019), available at https://theprint.in/opinion/fools-gold-pakistan-could-have-made-big-money-from-gold-mines-now-its-paying-penalties/263312/ (last visited 6 April 2022).

105 O'Brien, *supra* note 26, at 92.

for economic development.[106] Instead, the South Commission concluded, IMF borrowing 'led to inequitable income distribution and inefficient resource allocation, and … blocked long-term growth'. Servicing these large debts placed 'immense strain on government budgets … [and] depressed the living standards of the poor'.[107] In Latin America, '[p]overty, despair, social unrest and social explosions' were the norm.[108] Riots in Venezuela in 1989 resulted in the death of 246 people and injuries to another 1,831.[109] Before the debt crisis, literacy and sanitation improved in some countries, while 'income distribution worsened' in most.[110] After the debt crisis broke, social suffering increased beyond all expectations.

In the period immediately preceding the debt crisis, funds from aid, government borrrowing and foreign direct investment (FDI) flowed into more productive channels. After the debt crisis, new FDI into Latin America mostly ceased, confined to natural resource investment.[111] Paradoxically, the continent became a net exporter of capital to Northern states.[112] In 1985, an astonishing sum of US$74 billion was transferred from the global South to the North.[113] The aim was 'profit not development', Nyerere declared in 1985. Should 'we continue to try to pay on the terms set, even at the cost of letting our people starve?', he asked.[114] 'I cannot see how responsible leaders of the Third World can continue watching their people sink further and further into poverty and misery without any kind of protest against an international system which produces that poverty and misery', he concluded.[115] The social impact of debt on states largely was ignored by IMF officials. Indebted states could lift themselves out of this condition only by following IMF edicts and, as hoped, if world economic conditions improved.[116] It was only a matter of time, indebted states were told, before their balance sheets improved, as would the well-being of their citizens.

Deriving actual benefits from state indebtedness has long been a consideration in determining successor state responsibility to pay debts incurred by colonial states. This was a particular concern of the special rapporteur to the International Law Commission, Mohammed Bedjaoui, in his 1977 report. Victorious allies in the Treaty of Versailles acknowledged, for instance, that inhabitants of German colonies 'had derived no benefit from German investments' and should not, therefore, assume responsibility for debts incurred.[117] Bedjaoui recommended that a decolonized entity assume

[106] H. W. Singer and J. A. Ansari, *Rich and Poor Countries* (1977), at 183–184.
[107] South Commission, *supra* note 17, at 50.
[108] O'Brien, *supra* note 26, at 96.
[109] *Ibid.*, at 85.
[110] *Ibid.*, at 92.
[111] *Ibid.*, at 96.
[112] *Ibid.*, at 95.
[113] Riley, *supra* note 68, at 9.
[114] Nyerere, *supra* note 26, at 494.
[115] *Ibid.*, at 496.
[116] The IMF purports to now be interested in poverty alleviation and economic growth. See Polak, *supra* note 40, at 24–27, 17–19.
[117] ILC, Ninth report on succession of States in respect of matters other than treaties by Mr. Mohammed Bedjaoui, Special Rapporteur – draft articles on succession in respect of State debts, with commentaries, UN Doc. A/CN.4/301 and Add.1, 20 April 1977, at 102.

debt only if it is 'established that the corresponding expenditures actually benefited the formerly dependent territory'.[118] The argument, he maintained, has 'never lost its validity'.[119]

It has long been an operating premise of the investment regime's promoters that benefits will be derived from the spread of investment treaty disciplines. This remains so even though evidence of the correlation (between signing treaties and attracting new inward investment) remains ambiguous. As the investment treaty regime was undergoing construction, reassurances that new inward investment would be forthcoming were 'likely perceived as a politically useful piece of public rhetoric, not a statement that reflected expert understanding'. 'In other words', writes St. John, investment law's norm entrepreneurs 'knew better'.[120] Since the regime has taken off, reassuring evidence of such a correlation has not been forthcoming. According to one recent account, 'enough studies' have produced evidence that it would be 'unwise to entirely discount any relationship', yet the 'fragility of this statistical relationship cautions observers against taking an overly optimistic view'.[121] Another meta-analysis concludes that treaty effects are 'economically negligible'.[122] In a study of 12 Central and Eastern European states, the authors conclude that BITs do not attract 'development-enhancing FDI'.[123] Their study challenges 'the idea that BITs are a desirable policy tool to enhance development'.[124] It also is pretty clear, as Fauchauld observes, that investment agreements do not generate flows of FDI to those who need it most.[125] To sum up, an apparent consensus has emerged that treaties have only a marginal effect in attracting investment required for development. This is underscored by UNCTAD's finding that an annual 'investment gap' of US$2.5 trillion needs to be filled in order for developing countries to meet the development goals set out in its 2030 Agenda for Sustainable Development.[126] While indebtedness is not the sole cause of lagging

[118] *Ibid.*, at 104, Article F.

[119] *Ibid.*, at 103.

[120] T. St. John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (2018), at 118.

[121] Summarizing the social science evidence in Bauerle Danzman, 'The Political Economy of Bilateral Investment Treaties', in M. Krajewski and R. T. Hoffman (eds), *Research Handbook on Foreign Direct Investment* (2019) 11, at 26. Also, J. Pohl, 'Societal Benefits and Costs of International Investment Agreements: A critical review of aspects and available empirical evidence', OECD Working Papers on International Investment No. 2018/1 (2018).

[122] C. Bellak, 'Economic Impact of Investment Agreements', Vienna University of Economics and Business, Department of Economics Working Paper No. 200 (2015), available at https://epub.wu.ac.at/4625/1/wp200.pdf, at 19 (last visited 6 April 2022).

[123] Colen and Guariso, 'What Type of Foreign Direct Investment Is Attracted by Bilateral Investment Treaties?', in O. de Schutter, J. Swinnen and J. Wouters (eds), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (2013) 138, at 156.

[124] *Ibid.*

[125] Fauchauld, *supra* note 50, at 192.

[126] UNCTAD, SDG Investment Trends Monitor, UN Doc no. UNCTAD/DIAE/MISC/2019/4, 2019, available at https://unctad.org/en/PublicationsLibrary/diaemisc2019d4_en.pdf?utm_source=World+Investment+Network+%28WIN%29&utm_campaign=1241d28d7e-EMAIL_CAMPAIGN_2017_05_18_COPY_01&utm_medium=email&utm_term=0_646aa30cd0-1241d28d7e-70080233 (last visited 6 April 2022).

improvement, debt repayment is a 'major contributing factor to poor human development', because it drains money away from the public fisc.[127]

Nor is investment treaty arbitration overly preoccupied with development, nor is it of apparent concern to the regime as a whole. This is suggested, in part, by the abandonment of the criterion of 'contribution to host state economic development' as a factor in determining whether a tribunal can take jurisdiction under the ICSID Convention.[128] Flummoxed by the difficulty of ascertaining such a 'contribution', tribunals have abandoned this inquiry and have settled, instead, on an 'emerging' consensus around a narrower set of questions: whether there has been an 'economic contribution, entailing the assumption of risk, with the expectation of a commercial return'.[129] This cramped inquiry is urged upon arbitrators as it averts 'subjective judgment' and the transformation of 'arbitrators into policy makers'.[130] Easing the path to taking jurisdiction in investment disputes, however, elides the role that arbitrators play, not as jurists, but as development economists.[131] It is not that development is entirely irrelevant to international financial institutions and to investment arbitrators, only that a certain kind of development, associated with the assumed benefits accruing to states that reduce impediments to 'free' markets, is endorsed. All other paths to economic improvement are considered out of bounds.

The *Tethyan* ruling could be read as one intended to improve economic conditions. The tribunal scolded Pakistan for stripping the investor of its project without any feasible plans to exploit the copper and gold reserves that Tethyan had discovered. It is reported that Pakistan is still seeking partners to get the project up and running.[132] In tension with this benevolent reading is another in which, in the events leading up to the denial of the mining licence, the decision to take over was motivated by a desire on the part of state actors to secure greater economic benefits from the mining venture. It was believed that the goal of economic development would be better advanced by

[127] A. Pettifor and R. Greenhill, 'Debt Relief and the Millennium Development Goals', Background Paper for *Human Development Report 2003* (2003), available at http://www.hdr.undp.org/sites/default/files/hdr2003_pettifor_greenhill.pdf (last visited 6 April 2022), at 10.

[128] See ICSID, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco – Decision on Jurisdiction*, 31 July 2001, ICSID Case no. ARB/00/4, at para. 52, interpreting 'The Convention on the Settlement of Investment Disputes Between States and Nationals of other States', *supra* note 85. An ICSID annulment committee declared this to be a faulty reading of the ICSID Convention in ICSID, *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia – Decision on the Application for Annulment*, 16 April 2009, ICSID Case no. ARB/05/10.

[129] Z. Douglas, *The International Law of Investment Claims* (2010), at 189.

[130] Arbitrator Jan Paulsson in ICSID, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania – Award*, 30 July 2009, ICSID Case no. ARB/07/21, at para. 43.

[131] T. Tucker, *Judge Knot: How the Crusade for Global Investor Rights Tangles Our Democracies and Economies* (2018), ch. 3.

[132] The Pakistani military, through its engineering firm Frontier Works Organization, continues to express an interest in participating in development of the Reko Diq site. See D. Jorgic, 'Pakistan Military Eyes Key Role Developing Giant Copper and Gold Mine', *Reuters* (12 March 2019), available at https://www.reuters.com/article/uk-pakistan-mine-military-insight/pakistan-military-eyes-key-role-developing-giant-copper-and-gold-mine-idUSKBN1QT03K (last visited 6 April 2022).

undertaking smelter operations within Pakistan rather than sending minerals overseas for processing.

The tribunal addressed this tangentially when it was asked to sort through the disagreement between Pakistan and the claimant about whether the state's motivation was to build mineral-processing facilities that would complement the investor's mining activities, or whether it was about scrubbing the investor clean out of the project. The tribunal resolved this disagreement in favour of the investor, agreeing that it was a 'takeover' and not meant to fill the gap created by the investor rejecting the smelter proposal.[133] Referring to newspaper sources in support of this finding, the tribunal acknowledged, however, that cancelling the project was considered 'a step towards getting control over provincial resources in accordance with the wishes of the people'.[134] This also was the principal motivation of Dr Mubarakmand, who appeared as a witness before the tribunal, as expressed in a 2015 article published in Pakistan military's magazine *Hilal*. Bemoaning the share of revenues that would accrue to Pakistan from this large deposit of copper and gold, Mubarakmand described the joint venture revenues accruing to Pakistan as 'paltry', as something that only happens to a 'nation which doesn't do anything itself and entrusts all it has to foreign companies'.[135] Mubarakmand insisted that Pakistan could, instead, refine pure metals in the province of Balochistan and provide thereby 'hundreds of thousands of jobs to the local people'. Otherwise, 'the province would remain poor and prone to extremist activities'.[136] It seems pretty clear that what culminated in the mining licence refusal was a determination to process mineral products within Balochistan for the purposes of improving local economic well-being. This motivation, however genuine, was not of much assistance to Pakistan or of much interest to the *Tethyan* tribunal. No public interest could excuse Pakistan for misleading the investor into believing the company would reap abundant profits from its investment.

5 Policy Space

Discipline was required if heavily indebted states were to emerge out of the 1980–1989 debt crisis. The vehicle for this would be IMF structural adjustment programmes that conditioned assistance on vulnerable states adopting edicts associated with orthodox neoliberal strategy. Reminiscent of Margaret Thatcher's sloganeering,[137] the World Bank advised states that '[t]here is no viable alternative to adjustment'.[138]

[133] *Tethyan, supra* note 1, at paras. 452–454.

[134] *Ibid.*, at para. 447, quoting from *The Dawn* (25 December 2019).

[135] S. Mubarakmand, 'Destined Towards a Rich Pakistan: Reko Diq Mineral Resources', *Hilal* (31 January 2015), available at https://www.hilal.gov.pk/eng-article/destined-towards-a-rich-pakistan:-reko-diq-mineral-resources/MTMxOQ==.html (last visited 6 April 2022).

[136] *Ibid.*

[137] M. Thatcher, *Speech to Australian Institute of Directors Lunch* (15 September 1976), available at https://www.margaretthatcher.org/document/103099 (last visited 6 April 2022) ('there is no alternative').

[138] World Bank, *World Development Report 1987*, at 35, quoted in Corbridge, *supra* note 72, at 29.

Rather than avoiding interference in state policy space, the IMF attached conditions to its lending activities, their harshness dependent on the amount and duration of the borrowing. Although the IMF initially was authorized to ensure that funds were made available 'under adequate safeguards' (Art. 1.v), conditionality was introduced in 1952 and strengthened by the late 1970s, expanding the availability of IMF funds at the same time as adjustment policies turned their harshest.[139] Greater access to more funds, it was claimed, inevitably gave rise to more conditionality. The trade-off, according to one bank official, was 'controlled' adjustment with conditions attached versus 'calamitous' adjustment without conditions.[140] The intended effect was to shrink the domestic policy space of even operative democracies while contributing to the destitution of the most vulnerable.[141]

The IMF's 'Guidelines on Conditionality' in 1979 insisted vaguely that members be encouraged to 'adopt corrective measures'. If unspecified, measures would be tailored to each country's specific circumstances.[142] To this end, the 1979 policy declared that the Fund establish 'performance criteria [which] may vary because of the diversity of problems and institutional arrangements'.[143] Nonetheless, IMF policy directives exhibited a number of 'common themes' giving rise to 'similarities [that] are strikingly … remarkable'.[144] Among the common prescriptions were currency devaluation, deficit reduction and privatization, precipitating price increases, increasing unemployment and shrinking public services.[145] A critically important component was displaying '[g]reater hospitality to foreign investment'.[146] Another overarching theme was 'faith in unimpeded market processes as the most effective means' of solving a country's balance of payments problems.[147] The cure was to reverse 'faulty domestic and external

[139] Buira, 'IMF Financial Programs and Conditionality', 12 *Journal of Development Economics* (1983) 11, at 112. The Extended Fund Facility (EFF) was made available in 1974, the Structural Adjustment Facility (SAF) in 1986 and the Extended Structural Adjustment Facility in 1988. See Polak, *supra* note 40, at 6.

[140] Wiesner, 'Discussion', in Federal Reserve Bank of Boston (ed.), *The International Monetary System: Forty Years After Bretton Woods; Proceedings of a Conference Held in May 1984* (1984), available at https://www.bostonfed.org/news-and-events/events/economic-research-conference-series/the-international-monetary-system-forty-years-after-bretton-woods.aspx (last visited 6 April 2022) 236, at 237–278.

[141] Nooruddin and Simmons, 'The Politics of Hard Choices: IMF Programs and Government Spending', 60 *International Organization* (2006) 1001.

[142] Guitián, 'Conditionality: Past, Present, Future', 42 *Staff Papers (International Monetary Fund)* (1995) 792, at 823, Annex I, s. 1.

[143] *Ibid.*, at 824, Annex I, s. 9.

[144] Buira, *supra* note 139, at 114 and Stiglitz, *supra* note 18, at 34 on the IMF's one-size-fits-all approach.

[145] R. W. Cox, *Production, Power, and World Order: Social Forces in the Making of History* (1987), at 283 ('The methods advocated were strict control of national money supplies, strict restraint on government spending, and equally strict deterrence of increases in real wages. High and persisting levels of unemployment, it was recognized, would inevitably accompany this kind of adjustment'); Stiglitz, *supra* note 18, at 53 ('Fiscal austerity, privatization, and market liberalization were the three pillars of the Washington Consensus').

[146] Payer, *supra* note 47, at 31.

[147] Eckaus, 'How the IMF Lives with Its Conditionality', 19 *Policy Sciences* (1986) 237, at 240. The IMF, Stiglitz complained, often confused 'means with ends, thereby losing sight of what is ultimately of concern', in Stiglitz, *supra* note 18, at 27.

policies' by depriving states of their power to steer private markets,[148] and imposing foreseeable social and economic costs on countries 'ill-equipped to incur them'.[149] Managing the blow of such policies on defenceless citizens was simply not an element of the Fund's common faith, however.

Governments were expected to increase exports, earn hard currency with which to buy imports and remove impediments that previously enabled them to 'meet basic needs'.[150] These were the only policies considered 'sustainable' in the face of a debt crisis.[151] Personnel in dominant economic capitals worked jointly with those 'socialized to the norms of [IMF's] professional cadres' to fix the 'parameters of the developmental options of late industrializing countries'.[152] The resulting policy space was narrowed significantly, while depicting a 'rosy view' of the consequences that would follow.[153] Anything other than policy responses that attended to the 'requirements of normalcy' was considered a 'policy error'.[154] In these circumstances, under the 'tutelage' of international creditors and having lost the capacity to resolve distributional conflicts, states no longer had 'credit with the public', Mbembe wryly observed.[155]

Insistence upon such disciplines was, in part, a product of the concerted action of creditor nations[156] coordinating with indebted nation elites (e.g. military forces).[157] Willing accomplices included finance and central bank 'technocrats' who were closely aligned with the views of IMF and private bank staffers. O'Brien reports that '[p]ersonal accounts of the negotiations reveal how close the negotiators of the debtors were in values and attitudes to those on the creditors' side'.[158] A single set of shared values, associated with neoliberal orthodoxy, steered policy prescriptions in only one direction. Conversely, heavily indebted states offered no real resistance to the discipline that was imposed upon them. 'Unilateral debt renunciation is rare', Lipson reported, 'as is the flat refusal to submit to IMF controls'.[159] Unlike their creditors, the indebted were 'keen to avoid unilateral action', particularly when a vague and inadequate response (the Baker Plan) was offered as a way out.[160] According to official IMF

[148] Wiesner, *supra* note 140, at 239–240, quoting E. W. Robichek, 'The IMF Conditionality Re-examined', in J. Muns (ed.), *Adjustment, Conditionality, and International Financing* (1984), available at https://www.elibrary.imf.org/view/books/071/00153-9780939934287-en/ch04.xml (last visited 6 April 2022). *IMF, Universidad Federico Santa Maria and Central Bank of Chile Seminar*, Vina del Mar (April 1983), at 3.

[149] Stiglitz, *supra* note 18, at 54.

[150] Corbridge, *supra* note 72, at 38.

[151] Boughton, *supra* note 16, at 268.

[152] Cox, *supra* note 145, at 260.

[153] Corbridge, *supra* note 72, at 36.

[154] Boughton, *supra* note 16, at 277.

[155] Mbembe, *supra* note 70, at 74, 76.

[156] Concentration of debts in 'top money-center banks [means] that their financial survival is a focal concern of creditor-country policy. Accordingly, creditor countries felt pressure to intervene in the debt settlement process', in Eichengreen and Lindert, *supra* note 26, at 2–3.

[157] O'Brien, *supra* note 26, at 94–95.

[158] *Ibid.*, at 102.

[159] C. Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (1985), at 173.

[160] O'Brien, *supra* note 26, at 103. It was described, by one insider, as 'primarily rhetoric … pasted together quickly in breakfast meetings', in R. Broad, 'How About a Real Solution to Third World Debt?', *New York Times* (28 September 1987), quoted in Boughton, *supra* note 16, at 418.

history, procedures for 'enhanced surveillance' were 'requested' by indebted states as a 'service' provided to them.[161] The appearance of voluntariness was a key component in the creditors' strategy. Yet Letters of Intent signed with the IMF mostly were the product of disparities in bargaining power intended to assuage Northern public opinion.[162] As Bhagwati concedes, 'surveillance, performance criteria and scrutiny' were critical, so as to make 'more substantial flows acceptable to public opinion and parliamentary institutions of the donor countries'.[163] With no debtor cartel to resist the imposition of creditor disciplines, states succumbed to the narrow policy views of economic elites and public opinion in the global North.

There is no question that investment law is intended to cramp host state policy space. Where policy innovations deviate from investment treaty norms, states are strong-armed into submission and, where circumstances warrant, disciplined by being required to pay a sum of damages.[164] This is undeniably the single-minded purpose driving the regime: to ensure state compliance with investment disciplines and to award compensation in cases of non-compliance. This is even more so in circumstances where states feel forced to comply as a consequence of the regime's 'chilling effects'. On these occasions, governments choose not to adopt a course of action (self-censorship of a sort) because of threatened or pending investment disputes.[165] The regime would function more efficiently, investment law norm entrepreneurs maintain, if states simply internalized these constraints (precisely what worries those who hypothesize about the regime's chilling effects). Even if the arbitration industry would, in theory, see a reduction in the number of disputes, the world would be made safer for the free movement of capital.[166] Internalizing investment disciplines expresses investment law's faith, as in the case of IMF conditionality, in 'unimpeded market processes as the most effective means' of improving host state economic prospects.[167]

The *Tethyan* ruling exemplifies the cramped confines imposed on state policy space. If, as the tribunal ruled, Pakistan was determined to deny the investor anticipated profits, it was because the state had changed its mind about the terms of the joint venture agreement. In accordance with principles of representative democracy, if the

[161] Boughton, *supra* note 16, at 431.

[162] Stiglitz, *supra* note 18, at 41–42.

[163] Bhagwati, 'Introduction', in J. Bhagwati (ed.), *The New International Economic Order: The North-South Debate* (1979) 1, at 20–21, quoted in Cox, 'Ideologies and the New International Economic Order: Reflections on Some Recent Literature', in R. W. Cox and T. J. Sinclair (eds), *Approaches to World Order* (1996) 376, at 387.

[164] UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (2015), at 125 ('like any other international treaty – they limit the regulatory space of the contracting parties').

[165] See Van Harten and Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada', 7 *Journal of International Dispute Settlement* (2016) 92; dissenting arbitrator Donald McRae in PCA, *Clayton/Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, PCA Case no. 2009-04. I explain the origins of this in US First Amendment doctrine in D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (2008), at 70.

[166] UNCTAD, *supra* note 164, at 125 ('IIAs can help facilitate cross-border investment and become part of broader economic integration agendas').

[167] Eckaus, *supra* note 147, at 240.

revenue accruing to Pakistan and the citizens of Balochistan was as 'paltry' as Dr Mubarakmand alleged,[168] then Pakistan was entitled to reverse course. But such a change of course is not tolerated under the tenets of international investment law. Not only must the state pay a sum of damages representing sunk costs, but it was also expected to compensate Tethyan for future expected profits in the billions of dollars (this distinction, between sunk costs and future lost profits, is discussed further below).[169]

More significant are the impediments investment law 'common sense' poses to divided polities, such as Pakistan, with deeply entrenched economic inequality. The Baloch nationalist movement has been agitating for self-determination for the people of Balochistan since before the establishment of Pakistan.[170] The region is worse than a backwater – over 90 per cent of Baloch settlements have no access to potable water.[171] Balochistan remains 'the poorest and least developed', having the highest infant mortality and poverty rates, together with the lowest literacy rates, of all of Pakistan's provinces.[172] At the same time, Ahmed and Baloch report, '[n]o efforts have been made to establish … industries in Balochistan that will process locally produced raw material into finished products'.[173] They liken the situation of the Baloch people to one of colonization, as did 16 members of the European Parliament in July 2019.[174]

The Baloch movement gained strength, calling for increased gas royalties in the 2000s. Tensions became 'palpable' with the discovery of gold and copper reserves in Saindal (under the control of Chinese investors) and Reko Diq.[175] With the assassination of Baloch leader Akbar Bugti in 2006, Balochistan nationalism became increasingly radicalized. Successive Pakistani administrations have resisted demands for political autonomy and have, instead, preferred to associate the Baloch political movement with Islamic terrorism. This is a position the Trump administration endorsed, designating, at the behest of Pakistani officials, the Balochistan Liberation Army (BLA) as a foreign terrorist organization, also in July 2019.[176] By contrast, the

[168] Mubarakmand, *supra* note 135.

[169] See Section 6 below.

[170] Ahmed and Khan, 'The History of Baloch and Balochistan: A Critical Appraisal', 32 *South Asian Studies* (2017) 39, at 48.

[171] Ahmed and Baloch, 'The Political Economy of Balochistan, Pakistan: Development: A Critical Review', 11 *European Scientific Journal* (2015) 274, at 281.

[172] *Ibid.*, at 290.

[173] *Ibid.*, at 283.

[174] *Ibid.*, at 280, 283; G. Mohan, '16 EU Members of Parliament Write Letter to Trump to Intervene in Balochistan', *India Today* (22 July 2019), available at https://www.indiatoday.in/world/story/16-eu-members-of-parliament-write-letter-to-trump-to-intervene-in-balochistan-1572028-2019-07-22 (last visited 21 September 2019), reproducing the parliamentarians' letter of July 2019 to President Donald Trump, which likens rule by Pakistan to colonialism.

[175] Wani, 'The Changing Dynamics of the Baloch Nationalist Movement in Pakistan', 56 *Asian Survey* (2016) 807, at 809.

[176] U. Jamal, 'The Baloch Liberation Army's New US Terrorist Designation: Why Now?', *The Diplomat* (9 July 2019), available at https://thediplomat.com/2019/07/the-baloch-liberation-armys-new-us-terrorist-designation-why-now/ (last visited 6 April 2022). The BLA has been perniciously targeting foreign – particularly Chinese – citizens, carrying out 25 terrorist attacks in 2018 alone. See Z. U. Rehman, 'What's Behind the US Decision to Proscribe a Baloch Militant Group?', *TRT World* (19 July 2019), available at https://www.trtworld.com/magazine/what-s-behind-the-us-decision-to-proscribe-a-baloch-militant-group-28363 (last visited 6 April 2022).

moderate Baloch National Movement (BNM) has been seeking political, rather than military, solutions. Regarding the fight against grinding poverty in the remote province, Baloch leadership has been consistent. The *Tethyan* award, the BNM declared, amounts to the 'looting of billions of dollars' worth [of] natural resources'. The 'exploitation of Baloch national wealth', the statement continued, 'has been going on … without benefitting the people of Balochistan'. They continue to live 'under abject poverty without access to drinking water and other basic necessities of life'. Balochistan is 'occupied land', they concluded, 'where every form of investment is against the will of Baloch nation'. Pakistan, the central BNM spokesperson declared, 'should avoid investing in this occupied land'.[177] Investment law disciplines have the capacity to impede a change of course. Were Pakistan to seek reconciliation with the BNM, any policy reversal that impacted negatively on foreign investors, whether Chinese, Canadian or Australian,[178] would attract the ire of investment lawyers and arbitrators. As intended, the threat of indebtedness operates in such a way as to neutralize departures from any indefensible status quo.

6 Ability to Pay

Heavily indebted states in 1980–1989 found it impossible to repay in compliance with the terms and conditions under which they had borrowed without further assistance from private banks and international financial institutions. New loans barely covered the interest owed. The initial US arrangement to assist Mexico – a swap of US credits against Mexican oil – resulted in the equivalent of an annual interest rate of 30 per cent.[179] The refrain, as mentioned, was that their economies would improve with time if only they let markets do their work.[180] Corbridge identified, over five years of World Development Reports (1983–1988), a 'tone of persistent optimism'. Ultimately, an indebted state's own domestic policies, the authors of the 1988 World Development Report wrote, would determine success.[181] A discourse of optimism would prevail so long as the policies associated with neoliberal orthodoxy were faithfully followed. Indebted states' ability to pay, it was assumed, would be enhanced, but only after economic health was restored through the 'natural' course of events. But there was no likelihood of restoring solvency any time soon, proving that indebtedness was never a 'strictly economic calculation'.[182]

[177] Balochistan National Movement, 'Investment by Any Company in Occupied Balochistan Is Illegal – BNM', *Balochistan Post* (19 July 2019), available at https://thebalochistanpost.net/2019/07/investment-by-any-company-in-occupied-balochistan-is-illegal-bnm/ (last visited 6 April 2022).

[178] Investment treaties are in force, but only under negotiation in the case of Canada. See Global Affairs Canada, *Canada-Pakistan Foreign Investment Promotion and Protection Agreement Negotiations* (19 December 2016), available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/pakistan/fipa-apie/background-contexte.aspx?lang=eng&_ga=2.198195823.1970641468.1569575654-660771635.1569575654 (last visited 6 April 2022).

[179] O'Brien, *supra* note 26, at 94. The rate is described as being at 18 per cent in Boughton, *supra* note 16, at 292.

[180] Corbridge, *supra* note 72, at 33.

[181] World Bank, *World Development Report 1988* (1988), at 39, quoted in Corbridge, *supra* note 72, at 33.

[182] R. Dienst, *The Bonds of Debt: Borrowing Against the Common Good* (2011), at 174.

The South Commission, for this reason, asked that the 'negative transfers of resources' – from poor countries to rich ones – immediately cease and debt servicing 'be related to the ability of the economy to pay and to grow'.[183] But this would run counter to IMF edicts that exacted pain from citizens whose states proved blameworthy. Because an incapacity to pay debts is 'an age-old problem', Bedjaoui preferred to adopt the view of Gaston Jèze in his 1935 Hague Academy lectures.[184] Jèze writes that 'a government is justified in suspending or reducing the service of its public debt whenever essential services would have to be jeopardized or neglected in order to service the debt'. Only the 'government of the debtor country is competent to say', Jèze added.[185] Upon this premise, Bedjaoui proposed the following article to the International Law Commission: 'Nothing in the assumption of State debts by the newly independent State shall have the effect of seriously jeopardizing its economy or delaying its progress, of running counter to the right of its people to dispose of its own means of subsistence, or of limiting its right to self-determination and to the free disposal of its natural wealth.'[186] Importantly, he added that this was 'a provision that would be equally valid for debts *proper to the dependent territory*, which are not the subject of this study' – namely, debts that are not assumed by successor states.[187]

Investment treaty obligations, however, have no regard for a respondent state's ability to pay.[188] Despite continual reform and evolution in treaty texts, ability to pay simply has not been a part of the agenda. It could even be said that taking into account financial capacity in determining liability or the amount of compensation owed is beyond the jurisdiction of most investment tribunals and, instead, is a matter left for negotiation between the parties to the dispute.[189] It could also be said, however, that investment tribunals have paid some attention to this issue by resisting, in earlier periods, over-inflated damages awards. Though states may marginally lose more disputes than they win, if damages in losing cases were in the realm of the stratospheric, this adverse outcome likely would drive states to exit the regime.[190] It is imperative to

[183] South Commission, *supra* note 17, at 227.

[184] ILC, *supra* note 117, at 106.

[185] G. Jèze, *Les défaillances d'États*, Vol 53 (1935) at 391, 392, quoted in ILC, *supra* note 117, at 105.

[186] ILC, *supra* note 117, at 107, Article H.

[187] The study addressed debts 'recognized and assigned' in the ordinary course to the debtor state. See *ibid.*, at 107 (emphasis added). Determining an ability to pay, admittedly, is a difficult thing and 'may be open to abuses'. Nevertheless, for newly independent states the ILC offers an 'almost undeniable assumption of incapacity to pay' (at 106).

[188] Paparinskis, 'A Case Against Crippling Compensation in International Law of State Responsibility', 83 *Modern Law Review* (2020) 1246, at 1266 ('investment law provides a strong, if implied endorsement' of the view that crippling compensation awards are of little concern to international law).

[189] As the PCIJ held in *Société Commerciale de Belgique (Belg. v. Greece)*, 1939 PCIJ Series A/B, No. 2, at 162–163, described in Waibel, *supra* note 25, at 95–96.

[190] S. Ripinsky with K. Williams, *Damages in International Investment Law* (2008), at 231 (when arbitrators award compensation based upon 'actual investments', they may view it as 'allowing them to achieve a better balance between the interests of investors and States. They may be reluctant to apply the DCF [future profits] method' because it is 'seen as putting too much of a burden on the respondent State'); also, Wälde and Sabahi, *supra* note 8, at 1060 ('large damage awards have … more politically intrusive potential than direct orders requiring specific conduct').

the future of investment treaty arbitration that states sign onto and respect investment treaty commitments. Arbitrators seemingly behave with the knowledge that the system would collapse if states perceived the regime as systematically hostile to the public fisc.

Such reflexivity, it can be said, is on display when tribunals award damages based upon sunk costs (the amount invested) rather than upon future lost profits.[191] The former is described as a 'prudent' and 'successful' method of valuation as it relies on historical data rather than speculative future projections, 'which tend to be easily manipulated'.[192] The latter method for valuation of damages for treaty breaches, represented by Discounted Cash Flow (DCF) estimations, is treated with 'scepticism' by many tribunals, because predicting future income streams is too hypothetical.[193] For this reason, DCF is described by Wälde and Sabahi as entirely uncertain: 'in essence a speculation about the future dressed up in the appearance of mathematical equations'.[194] Yet it is said that it is 'universally accepted that international law provides for the recovery of lost profits' and awards, increasingly, look to future, rather than to historical, losses.[195] Marboe describes a trend line in which DCF is deployed 'on a more regular basis'.[196] This is the most 'appropriate method' of determining compensation, according to Ripinsky, as it 'satisfies the legal requirement' to award compensation 'equivalent to the award's fair market value'.[197]

The damages awards issued against Argentina as a consequence of its 2001 economic crisis roughly approximate this trend line. If almost every tribunal issued an award well below claimed amounts,[198] arbitrators repeatedly, though not uniformly, used DCF in assessing compensation owed due to a breach of FET obligations. If the amount of compensation owed was, therefore, lower and the impact on public revenues less dramatic than they otherwise could have been, they were higher than awards based only on historic loss. Of the top 10 damages awards publicly available before 2014, seven were issued against Argentina – four of them calculated on the basis of DCF.[199] Of the top 10 awards, six utilized DCF.[200] An ability to pay simply is not part of the calculus.

[191] Having recourse to the 'actual' amounts invested is described as 'popular in arbitral practice' in Ripinsky with Williams, *ibid.*, at 227; also, Marboe, 'Valuation in Cases of Breaches of International Law Unrelated to Expropriation', in M. Bungenburg *et al.* (eds), *International Investment Law* (2015) 1082, at 1093.

[192] Wälde and Sabahi, *supra* note 8, at 1072.

[193] I. Marboe, *Damages in Investor-State Arbitration* (2018), at 47; Marboe, 'Valuation in Cases of Breach of Contract', in M. Bungenburg *et al.* (eds), *International Investment Law* (2015) 1103, at 1110 (tribunals have 'often rejected' awards based upon lost profits).

[194] Wälde and Sabahi, *supra* note 8, at 1074.

[195] Ripinsky with Williams, *supra* note 190, at 278 (referring to the ILC Articles on State Responsibility, Art. 36[2]); Wälde and Sabahi, *supra* note 8 at 1062.

[196] Marboe, *supra* note 193, at 47.

[197] Ripinsky and Williams, *supra* note 190, at 211, 231.

[198] At the time of completion of most of the Argentinian disputes, of the US$80 billion claimed, US$1.2 billion was awarded, which was later reduced to US$541 million. See Alvarez and Topalian, *supra* note 91, at 504.

[199] Hart, Credibility International, *Study of Damages in International Center for the Settlement of Disputes Cases* (1st ed., June 2014), available at https://www.credibilityinternational.com/wp-content/uploads/2014/06/Credibility-ICSID-Damages-Study-June-2014-1.pdf (last visited 6 April 2022), at 12–13.

[200] *Ibid.*

Franck's empirical assessment of damages awards in investment treaty arbitration is generally consistent with this pattern. One of the objectives of her study was to rebut allegations about the exorbitant damages available under investment arbitration. She warns investors, consequently, to 'readjust their expectations'.[201] Her study reveals that investors typically are awarded only a third of damages, or about 30–35 US cents on every dollar claimed. Only 8 per cent of investors were awarded more than 50 per cent of damages alleged to be owed to them.[202] This finding suggests that claimants have been systematically over-claiming damages owed (accurately predicting, however, that sums awarded are on the rise).[203] Still, this looks to be in the range of the haircuts taken by Argentine bondholders following the 2001 economic crisis, receiving 20–25 US cents on every dollar owed.[204] Ironically, as Franck acknowledges, seven of the nine largest awards in her dataset were awarded to claimants in disputes against Argentina.[205] But it does not seem to justify her conclusion that states should be 'somewhat comforted by their relative success'.[206]

More dismaying is data suggesting that poorer states are less likely to succeed as respondents in investment disputes. and so more likely to have to pay damages. Franck[207] and Van Harten[208] have come to opposite conclusions as regards tribunals seizing jurisdiction and interpreting substantive treaty texts. Wellhausen concludes that OECD states have a greater success rate than non-OECD countries,[209] while Strezhnev finds 'conditional evidence of pro-claimant bias among arbitrators from advanced economies',[210] both of which substantiate Van Harten's findings. Rao reviews and tweaks

[201] Franck, *supra* note 9, at 179.

[202] *Ibid.*, at 173–174.

[203] On increases, see *ibid.*, at 166–167; D. Behn and A. M. Daza, 'The Defense Burden in Investment Arbitration? An Empirical Assessment of Costs and Capacity', PluriCourts Working Paper (2019); Bonnitcha and Brewin, 'Compensation Under Investment Treaties', IISD Best Practices Series (November 2020), available at https://www.iisd.org/system/files/publications/compensation-treaties-best-practicies-en.pdf (last visited 6 April 2022).

[204] Franck, *supra* note 9, at 174.

[205] *Ibid.*, at 165.

[206] *Ibid.*, at 176.

[207] Franck, 'Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes', 55 *Virginia Journal of International Law* (2014) 13, at 60. In an earlier study, she sought empirically to refute claims about bias in investment arbitration, but her initial inquiry proved inconclusive. See Franck, 'Development and Outcomes of Investment Treaty Arbitration', 50 *Harvard Journal of International Law* (2009) 435, at 435, 437, based on a sample of 52 cases as of 2007.

[208] Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration', 50 *Osgoode Hall Law Journal* (2012) 211, at 233–234; G. Van Harten, *Sold Down the Yangtze: Canada's Lopsided Investment Deal with China* (2015), at 121.

[209] Wellhausen, 'Recent Trends in Investor-State Dispute Settlement', 7 *Journal of International Dispute Settlement* (2016) 117.

[210] A. Strezhnev, 'Detecting Bias in International Investment Arbitration', draft paper presented at the 57th Annual Convention of the International Studies Association, Atlanta, Georgia, 16–19 March 2016 (12 March 2016), available at http://scholar.harvard.edu/files/astrezhnev/files/are_investment_arbitrators_biased.pdf?m=1459524441 (last visited 6 April 2022). Strezhnev, by contrast, argues that because high-income states are less likely to settle weak claims than poorer states, they accrue greater win rates, in Strezhnev, 'Why Rich Countries Win Investment Disputes: Taking Selection Seriously', *Semantic Scholar* (2017), available at https://static1.squarespace.com/static/5931baca440243906ef65ca3/t/59c55e2829f187ed71aba071/1506106921710/why_rich_countries_win_investment_disputes.pdf (last visited 6 April 2022).

the datasets employed in Franck and Van Harten's studies and concludes that 'more developed states are still significantly less likely to lose in investment treaty arbitration cases than less developed states'.[211] The tendency for investors to have an advantage against poorer states in investment arbitration has also been substantiated in empirical studies by Schultz and Dupont and by Behn, Berge and Langford. The former conclude that economically powerful states are more likely to succeed in defending investor claims as compared to economically weaker ones.[212] The latter conclude that investors have a 'more than four times better chance of winning against a low-income respondent state than a high-income' one.[213] Both studies confirm that it is those states that are least well-positioned to fulfil obligations arising under investment arbitration that are most likely to incur indebtedness without reference to their ability to pay.[214]

How do the rulings on Reko Diq fit into this empirical record? They reveal an inclination, when the opportunity arises, to take the investor's side in the dispute.[215] This is made most plain when contrasting the tribunal's 2019 award with the Pakistan Supreme Court's 2013 ruling. The Supreme Court determined that the investor was not in compliance with a 'large number' of Pakistan's laws,[216] ruling that the joint venture agreement of 2000 with the Balochan development authority (supplanting an earlier agreement of 1993) was 'illegal, *void*, and *non est*' for non-compliance and could safely be ignored.[217] The Pakistan Supreme Court also documented numerous 'undue favours' granted to the company that ran foul of the law[218] but were hard to explain or justify without reference to the unseemly influence of the foreign investor over the host state.[219] The tribunal, by contrast, preferred to take a relaxed view of the investment treaty's legality clause.[220] The tribunal could thereby sidestep the Supreme

[211] Rao, 'Development Status and Decision-Making in Investment Treaty Arbitration', 59 *International Review of Law and Economics* (2019) 1, at 10.

[212] Schultz and Dupont, 'Investment Arbitration: Promoting Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study', 25 *European Journal of International Law* (2014) 1147, at 1166.

[213] Behn, Berge and Langford, 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration', 38 *Northwest Journal of International Law and Business* (2018) 333, at 370.

[214] It might be said that poorer states (and their investors) succeed less because their legal positions are less meritorious, as suggested in Strezhnev, *supra* note 210. This supposition does not refute the empirical finding, however, that poorer states are more likely to incur indebtedness via investment arbitration.

[215] The investor's home state was Chile, which is not typically a capital-exporting state.

[216] Supreme Court of Pakistan, *Baloch v. Balochistan – Secretary Industries and Mineral Development*, 2013 SCMR 511, available at https://www.supremecourt.gov.pk/downloads_judgements/C.P.796of2007-dt-10-5-2013.pdf (last visited 6 April 2022), at para. 44.

[217] *Ibid.*, at para. 122; J. Hepburn, 'Tethyan Copper Company v. Pakistan: Until-Now Confidential 2017 Liability Decision Reveals Tribunal's Reasons for Finding Breach of Legitimate Expectations to Receive a Mining Licence', *Investment Arbitration Reporter* (29 July 2019); M. Ahmed, 'Magic Mountains: The Reko Diq Gold and Copper Mining Project', *Herald* (29 September 2017), available at https://herald.dawn.com/news/1153283 (last visited 6 April 2022).

[218] *Baloch*, *supra* note 216, at paras. 39, 41.

[219] *Ibid.*, at para. 45.

[220] 'In the Tribunal's view, the ordinary meaning of the phrase ["admitted by [Pakistan] subject to its law"] does not impose a strict legality or a formal admission requirement … but rather implies that, at the time the investment is made, it must be accepted by the relevant authorities or officials representing the host State', which cannot then 'be revoked retroactively', in *Tethyan*, *supra* note 1, at para. 637.

Court's findings about the illegality of the amended joint venture agreement. The Supreme Court, the tribunal wrote, failed to appreciate that these lapses in legal compliance were internal failures on the part of the government and not the claimant's responsibility.[221] Yet the claimant sought concessions along these lines so that legal constraints could be flouted. Taking no direction from the Pakistan Supreme Court, the tribunal preferred to treat as 'reasonable' the extraordinary privileges accorded to the investor.[222]

When it came to assessing damages owed to the claimant, the tribunal acceded to the investor's request that future lost profits be awarded based upon a 'modern' DCF evaluation. The amount owed would be 'equivalent to the (entire) value that its investment would have had' if the mining lease application had not been denied in violation of the treaty.[223] This 'but for' test did not merely put the parties in the position they would have been in if the investment had not been made. Instead, the method of valuation was 'income-based' – accounting for income that would have been earned, just as the investor had hoped.[224] The tribunal appeared to incorporate the 'industry standard' of 'finders-keepers' into the treaty's compensation provisions.[225]

The amount owed, based on income projections provided by the investor, was reduced by half following a series of deductions, while other deductions were rejected by the tribunal. The absence of a social licence from local communities and the prospect of environmental harm, for instance, would not reduce the amount owed despite the presence of organized political resistance to resource exploitation in Balochistan and the environmental degradation associated with copper and gold mining. The investor ultimately was rewarded with US$4.087 billion in damages, 17 times the amount of the capital it had invested (US$240 million). To this was added US$1.753 billion in interest and US$62 million in legal costs, an astonishing total sum by investment arbitration industry standards.

An ICSID annulment committee, considering arguments that would justify vacating the arbitral award, has also exhibited little regard for Pakistan's ability to pay.[226] Ruling on Pakistan's application to continue a stay of enforcement of the nearly US$6 billion award, the committee was not convinced that the state or its citizens would suffer if the award was immediately honoured. 'The chain of events that exists between lifting a stay of enforcement and the triggering of the right to life, public health rights or public health emergencies of international concern appears too long and

[221] *Tethyan*, *supra* note 1, at para. 641, also at para. 833. The tribunal also acknowledged that while it would 'give due consideration to the findings' of the Court, it would 'not consider itself bound by them in the context of its analysis of whether the actions' of the development authority 'can be attributed to Respondent under international law', in *Tethyan*, *supra* note 1, at para. 733.

[222] Detailed in Ahmed, *supra* note 217. Including a 15-year tax holiday. See J. Hepburn, 'Newly-Published Damages Award Reveals that Tethyan v. Pakistan Tribunal Adopted "Modern DCF" Valuation Method', *Investment Arbitration Reporter* (14 August 2019); *Tethyan*, *supra* note 1, generally see Pt. VII.C.7.

[223] *Tethyan*, *supra* note 1, at para. 273.

[224] *Ibid.*, at paras. 301, 557.

[225] *Ibid.*, at paras. 933, 935.

[226] *Tethyan*, supra note 65.

tenuous', the committee declared.[227] There was no 'likelihood of severe hardship', nor was there a credible basis for Pakistan to allege that its creditworthiness would suffer if the stay were lifted.[228] The 'international community has been well aware of the contingent liability of the Award and the potential lifting of the stay', the committee surmised.[229] After all, it hypothesized, the 'IMF and others must have been aware of the potential liability of a multi-billion award when the IMF announced' its lending package in July 2019 and approved a further disbursement in April 2020 once the pandemic hit, adding 'it must be presumed that the IMF was aware that the entire amount of the award could be subject to enforcement action at a moment's notice with a lifting of the stay'.[230]

If the annulment committee is correct to presume that the IMF was aware of this immense liability, there is no mention made of it in the initial funding arrangement of July 2019. Pakistan's ability to repay the IMF 'in a timely manner remains adequate', even if 'subject to higher than usual risks', the IMF concluded.[231] Nor does there seem to be any awareness of this indebtedness in its decision to disburse supplemental funds in April 2020. Pakistan's indebtedness is 'sustainable', the IMF concluded, even if 'risks have increased'. Important 'bilateral creditors' such as China, Saudi Arabia and the UAE have agreed to the rollover of 'maturing obligations' owed to them.[232] As if to prove the thesis that international law has fragmented into distinct subsystems,[233] the IMF exhibits no awareness of this multi-billion-dollar obligation, despite the ICSID system's insistence otherwise.[234]

7 Conclusion

This inquiry has revealed that state indebtedness serves, as it has in the past, to govern alternative futures. The horizons of possibility inevitably shrink in the face of possible destitution. Alvarez, for instance, describes the investment treaty regime 'as the only option'. Those states that remain 'outside its domain … may as well be barbarians or

[227] *Ibid.*, at para. 133 (referring, presumably, to the COVID-19 pandemic).

[228] *Ibid.*, at para. 152.

[229] *Ibid.*, at para. 157.

[230] *Ibid.*, at paras. 154–155.

[231] International Monetary Fund, *supra* note 3, at 20.

[232] International Monetary Fund, *supra* note 64, at 7.

[233] See ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (M. Koskenniemi), UN Doc A/CN.4/L.682, 13 April 2006.

[234] While denying severe hardship, the annulment committee agreed to grant a stay of enforcement upon the posting of 25 per cent of the value of the award in escrow together with an undertaking from Pakistan to pay the full amount if annulment proceedings are unsuccessful. See *Tethyan*, *supra* note 65, at para. 209. Pakistan did not comply with these conditions and so the stay was subsequently lifted in October 2020. Tethyan now seeks enforcement of the award in US courts. See discussion in Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, Memorandum Opinion, Case No. 1:19-cv-02424 (TNM) (US District Court of D.C.) (10 March 2022), p. 4.

the uncivilized'. 'In today's global market', Alvarez concludes, 'not participating in the free trade and investment regimes is tantamount to fiscal (and possibly political) suicide'.[235]

Exhibiting the appearance of neutrality (international law is non-national) and naturalness (only states worthy of punishment are disciplined), there seems not a lot of interest in sparking reform about this facet of the contemporary regime. A handful of scholars have been ringing the alarm bell about the size of arbitral awards, calling for an end to 'crippling compensation'[236] or reform in the direction of limiting compensation to, absent a specific commitment, a 'reasonable level of profits'[237] or reducing awards to the lesser of the investor's loss and the host state's gain.[238] Each of these reform proposals would undoubtedly reduce the incidence of large and devastating awards like *Tethyan*. It would leave intact, however, the regime's ability to shape the future by imposing debt obligations that can have negative fiscal impacts and place downward pressure on states to do less, having a negative impact on programmes for equality promotion.[239] Other reform proposals, such as looking to local administrative and judicial bodies to apply local law, might better serve the objective of equality. Processes designed to accommodate the inclusion of those who claim to be overlooked, whether they be foreign nationals or local communities, could generate opportunities for all those affected to have a voice. As I have argued elsewhere, machinery designed to be attentive to harms suffered by investors, in addition to others, which issues out of democratically authorized institutions would do better to serve equality and fairness concerns of everyone, and not just the economically powerful.[240]

There remains, however, much disinterest in these issues on the part of capital-exporting states, for which such issues of indebtedness arising from ISDS simply do not register. One would expect capital-importing states, on the other hand, to be leading

[235] Alvarez, 'Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?', 60 *Alabama Law Review* (2009) 943, at 972. Though the quote suggests otherwise, the subject of Alvarez's paper is not international trade law but international investment law.

[236] Paparinskis, *supra* note 188, defined at 1255 as compensation that results 'in depriving the population of a State of its own means of subsistence', quoting ILC, Draft Articles on State Responsibility with Commentaries, Report of the International Law Commission on the work of its forty-eighth session, UN Doc. A/51/10, in *Yearbook of the International Law Commission 1996*, vol. II, pt 2, UN Doc. (A/CN.4/SER.A/1996/Add. I (Part 2). This formulation was deleted from ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), ch. IV.E.1.

[237] Marzal, 'Quantum (In)justice: Rethinking the Calculation of Compensation and Damages in ISDS' 22 *Journal of World Trade and Investment* (2021) 249, at 308.

[238] Aisbett and Bonnitcha, 'A Pareto-Improving Compensation Rule for Investment Treaties' 24 *Journal of International Economic Law* (2021) 181.

[239] Salomon, 'Of Austerity, Human Rights and International Institutions' 21 *European Law Journal* (2015) 521.

[240] For more on the direction such a proposal would take, not specifically directed at the compensation question, see Schneiderman, 'Listening to Investors (and Others): Audi Alteram Partem and the Future of International Investment Law', in A. de Mestral (ed.), *Second Thoughts: Investor-State Arbitration Between Developed Democracies* (2016) 131, at 133.

the charge against the regime. While numerous complaints continue to be articulated, vociferous resistance has not been a dominant feature of contemporary investment law politics. Few states have exited from the regime, while those states participating in multilateral fora in which reform is on the agenda (e.g. UNCITRAL Working Group III) have issued mostly modest critiques.[241] The government of South Africa, one of the few to have exited the regime, expressed concern about damages awards and their chilling effect on regulatory space in a written submission to UNCITRAL, but few other states have raised such wide-ranging concerns.[242] Worries about the punishing effects of indebtedness are being raised obliquely at UNCITRAL in complaints about 'increased costs' and 'inconsistent' arbitral awards. The calculation of damages has been raised as a 'cross-cutting issue' that is worthy of discussion in future negotiating rounds, but the proposed work plan, in which these and a host of other substantive concerns would be discussed, are 'clustered together' and not allocated 'specific time for deliberations'.[243]

It is not all that surprising that poorer states have softened their objections. Not only are they in weak bargaining positions, but they have not heretofore defined the rules of this particular game. Instead, they are having to respond defensively, resisting lobbying efforts from the European Commission, for instance, to establish a multilateral investment court which will have the intended outcome of legitimating the disciplining effects of treaty standards of protection.[244] It is not as if knowledge and expertise is limited to a small cadre of lawyers in metropolitan centres of the North Atlantic, as in the early stages when the regime was under construction. Instead, knowledge is now diffuse and the capacity to carry on a meaningful debate about the investment law regime is now widespread. There is at present, however, little likelihood that global South priorities will move from the periphery to the

[241] Desierto is 'intrigued by the relative silence, insistence on flexibility, or minimalist approaches to substantive or procedural reforms in ISDS from various States that are styled as "developing countries" during the April 2019 UNCITRAL Working Group III sessions on ISDS Reforms', in D. Desierto, 'The Right to Development and Archaic Dichotomies in UNCITRAL ISDS Reforms', *EJIL: Talk!* (2 May 2019), available at https://www.ejiltalk.org/uncitral-isds-reforms-demystifying-the-monolith-of-developing-countries-from-the-right-to-development/#more-17157 (last visited 6 April 2022).

[242] UNCITRAL, Possible reform of Investor-State dispute settlement (ISDS): Submission from the Government of South Africa, UN Doc. A/CN.9/WG.III/WP.176, 17 July 2019, available at https://uncitral.un.org/sites/uncitral.un.org/files/176-e_submission_south_africa.pdf (last visited 6 April 2022).

[243] J. Kelsey and K. Mohamadieh, 'UNCITRAL's Work Plan on ISDS Reform: The Role of the Commission in Stopping Marginalisation of Issues of Concern to Developing Countries', Third World Network Briefing Paper (August 2021), available at https://twn.my/title2/briefing_papers/twn/WGIII%20WP%20TWNBP%20Aug%202021%20Kelsey%20&%20Mohamadieh.pdf (last visited 6 April 2022); L. Sachs *et al.*, 'The UNCITRAL Working Group III Work Plan: Locking in a Broken System?', *Columbia, Center on Sustainable Development Blog* (4 May 2021), available at https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system (last visited 26 August 2021).

[244] Sornarajah, 'An International Investment Court: Panacea or Purgatory?', *Columbia FDI Perspectives*, No. 180 (2016), available at https://academiccommons.columbia.edu/doi/10.7916/D8RN389W (last visited 6 April 2022).

centre of investment law practice.[245] All that may be achieved at this moment is little more than an ability to name the problem. It may only be later on that the 'the terms of the conversation' can be changed and the 'content' shifted to benefit states and peoples who have not, in contrast to already wealthy capital-exporting states, profited from international investment law.[246]

[245] Schneiderman, 'Promoting Equality, Black Economic Empowerment, and the Future of Investment Rules' 25 *South African Journal on Human Rights* (2009) 246, at 279.

[246] Mignolo, 'The Decolonial Option', in W. D. Mignolo and C. E. Walsh, *On Decoloniality; Concepts, Analytics, Praxis* (2018) 105, at 144.