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MEET THE SCHOLARS: CUTTING-EDGE ISSUES IN INTERNATIONAL DISPUTE RESOLUTION

As part of the 2022 ASIL Annual Meeting, on Thursday, April 7, 2022 at 9:00 a.m., the ASIL Dispute Resolution Interest Group (DRIG) hosted a works-in-progress workshop titled "Meet the Scholars: Cutting-Edge Issues in International Dispute Resolution." Two distinguished scholars presented their works-in-progress and recent publications on international dispute resolution, with commentary by two leading practitioners. The event featured Esmé Shirlow of Australian National University, Ben Love of Boies Schiller Flexner LLP, Mohamed Mahayni of Queen Mary University, and Luciana Ricart of Curtis, Mallet-Prevost, Colt & Mosle LLP. The session was moderated by DRIG co-chairs Simon Batifort of Curtis, Mallet-Prevost, Colt & Mosle LLP and Rémy Gerbay of Hughes Hubbard & Reed LLP. The summary below was prepared by all the participants as well as DRIG Secretary Belén Ibañez of Curtis, Mallet-Prevost, Colt & Mosle LLP.

Cutting-Edge Issues in International Dispute Resolution

By Simon Batifort, Rémy Gerbay, Belén Ibañez, Ben Love, Mohamed Mahayni, Luciana Ricart, and Esmé Shirlow

I. Approaches of International Courts and Tribunals to the Award of Compensation in International Private Property Cases and Implications for the Reform of Investor-State Arbitration

A. Presentation by Esmé Shirlow

Esmé Shirlow presented the findings of a policy paper developed in collaboration with the International Institute for Sustainable Development (IISD), titled *Approaches of International Courts and Tribunals to the Award of Compensation in International Private Property Cases and Implications for the Reform of Investor-State Arbitration*.[1] The policy paper follows previous IISD work on compensation in investor-state arbitration,[2] which left open the question of whether approaches to issues of compensation in investor-state arbitration differ from the approaches of other international courts and tribunals (hereinafter, courts), and the extent to which this comparative practice might offer inspiration or ideas for ongoing investor-state dispute settlement reform. The research presented by Dr. Shirlow seeks to answer this question by analyzing how issues of compensation have been analyzed in cases concerning alleged state interferences with private property filed before the Permanent Court of International Justice (PCIJ), International Court of Justice (ICJ), International Tribunal for the Law of the Sea (ITLOS), United Nations

[1] The paper was published shortly after the ASIL Annual Meeting: Esmé Shirlow, *Approaches of International Courts and Tribunals to the Award of Compensation in International Private Property Cases and Implications for the Reform of Investor-State Arbitration* (2022), *at* https://www.iisd.org/publications/report/international-courts-private-property-cases-reform-investor-state-arbitration.

[2] Jonathan Bonnitcha & Sarah Brewin, *Compensation Under Investment Treaties* (IISD Best Practices Series, 2020), *at* https://www.iisd.org/system/files/publications/compensation-treaties-best-practicies-en.pdf.

Convention of the Law of the Sea Annex VII Tribunals, European Court of Human Rights (ECtHR), African Court on Human and Peoples' Rights (ACtHPR), and the Inter-American Court of Human Rights (IACtHR).

Dr. Shirlow first outlined the approaches of these courts toward setting the standard by reference to which reparation is analyzed. Most international courts work by reference to the customary international law standard of "full reparation," rather than by reference to other rules or standards. In applying this standard, most international courts have adopted the view that reparation must aim to "wipe out" the consequences of an internationally wrongful act and re-establish the situation that would have existed but for the breach.[3] The standard of "full" reparation is likely to be used as a reference point even if a treaty provision refers to something other than "full reparation" as the requisite standard (as the practice, for example, of the human rights courts indicates) or is otherwise silent as to the standard that applies (as the practice, for example, of ITLOS indicates). Dr. Shirlow next addressed the types of reparation that have been awarded by international courts, noting the role of restitution, compensation, and satisfaction for achieving "full reparation" under customary international law.[4] While international courts have accepted that restitution is in principle favored under customary international law, certain practical considerations—including the difficulties associated with enforcing restitutionary relief—have meant that awards of compensation have also been particularly common.[5] Dr. Shirlow noted that the IACtHR has been particularly creative in crafting different forms of relief in order to secure "full reparation" for applicants.[6]

The presentation next addressed the types of loss or damage for which international courts have awarded compensation, and applicable valuation techniques. Dr. Shirlow noted that the surveyed international courts have awarded compensation for both material and non-material damage. To value material loss, international courts have often adopted market-, income-, and asset-based valuation techniques, but have also at times valued material loss by reference to equitable techniques.[7] Such equitable techniques have also proven influential in assessing non-material harms.[8] The precise methodologies underpinning these equitable techniques are often not clearly explained in judicial or arbitral decisions, but generally involve a discretionary assessment of what would be fair

[3] In this way, international courts and tribunals have referred frequently to the standard for reparation articulated by the PCIJ in: Factory at Chorzów (Ger. v. Pol.), Claim for Indemnity (The Merits), Judgment, 1928 PCIJ (ser. A) No. 17, at 47 (Sept. 13). *See, e.g.*, Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgment on Compensation, 2018 ICJ Rep. 15, paras. 29–30 (Feb. 2); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment on Reparations, paras. 69–70, 100–01 (Int'l Ct. Just. Feb. 9, 2022); The M/V "Virginia G" Case (Pan./Guinea-Bissau), Judgment, para. 430 (ITLOS Apr. 14, 2014); The M/V "Norstar" Case (Pan. v. It.), Judgment, para. 316 (ITLOS Apr. 10, 2019); The M/V "SAIGA" (No. 2) Case (St. Vincent v. Guinea), Judgment, para. 170 (ITLOS July 1, 1999); Georgia v. Russia (I), Judgment (Just Satisfaction) (ECtHR Jan. 31, 2019); Velásquez Rodríguez v. Honduras, Judgment (Reparations and Costs), para. 26 (IACtHR July 21, 1989).

[4] *See especially* International Law Commission, Responsibility of States for Internationally Wrongful Acts (2001), *at* https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf. In addition to reparation, an internationally wrongful act will also generate additional obligations on the wrongdoing state, including a requirement that they cease the wrongful conduct. Such consequences are distinct from reparation, though may reinforce or support reparation (including, in particular, orders of restitutionary relief).

[5] *See, e.g.*, *The M/V "Norstar Case"* (*Pan. v. It.*) *supra* note 3, paras. 320–21; *see also* European Court of Human Rights, *Practice Directions: Just Satisfaction Claims*, para. 23 (2007), *at* https://www.echr.coe.int/documents/pd_satisfaction_claims_eng.pdf. On the different standards being applied to findings of an "impossibility" of restitution (including the difference between material and practical impossibility) see: Octavian Ichim, Just Satisfaction Under the European Convention on Human Rights 37, 39 (2015).

[6] *See further* Shirlow, *supra* note 1, at 15–17.

[7] *Id.* at 21–32.

[8] *Id.* at 32–35.

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and just in the circumstances of the case.[9] Dr. Shirlow further briefly noted the practice of international courts in relation to the award of compensation for lost profits,[10] and their use of various procedures to support the analysis of compensation, including for example engagement of tribunal-appointed valuation experts.[11]

Dr. Shirlow next examined the various requirements imposed by international courts when awarding compensation, focusing particularly on requirements of causation, mitigation of loss, and non-contribution to loss.[12] She noted that while the requirement of causation had been widely endorsed by international courts and tribunals, they have differed in how they have set the requisite causal link when assessing compensable damage. Dr. Shirlow noted, further, the approaches adopted by the surveyed international courts to awarding interest, including their propensity to award simple versus compound interest and the range of interest rates selected in doing so.[13]

Following this thematic overview, Dr. Shirlow explained how the comparative snapshot contained in the paper could offer ideas and inspiration for those engaged in investor-state arbitration reform efforts. States could, for instance, consider crafting new treaty language to expressly require investor-state tribunals to apply a different standard of reparation (be it "fair," "reasonable," "partial," or some other standard) instead of the standard of "full" reparation under customary international law.[14] States could otherwise retain the customary standard of "full reparation," but provide tribunals with greater guidance as to how to give effect to that standard. This could include, for instance, directions concerning the types of reparation available or preferred for different types of breaches, the types of loss or damage for which such reparation may be provided, and the quantification methods capable of identifying what will constitute "full reparation" for such loss or damage. Already, for example, some states have concluded treaties specifying that compensation should not be awarded on a punitive basis,[15] or should reflect only the loss incurred by the investor less any loss that has been rectified by the award of another form of reparation like restitution.[16] States could also provide greater guidance on applicable approaches to causation and interest.

In light of the difficulties associated with amending treaties, Dr. Shirlow also identified various approaches that could be adopted under the existing procedural powers of investor-state tribunals. Tribunals could, for instance, have greater engagement with, or give greater deference to, domestic decisions relevant to compensation.[17] Some international courts, for example, require applicants to have recourse to domestic procedures to secure compensation before making a ruling as to whether any or additional reparation is required for the international law breach.[18] Some courts have also elaborated principles to guide domestic analyses of reparation following a finding of a breach of

[9] *See, e.g.*, Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment on Compensation, 2012 ICJ Rep. 324, para. 24 (June 19, 2012); Varnava and Others v. Turkey, Grand Chamber Judgment (Merits and Just Satisfaction), para. 224 (ECtHR Sept. 18, 2009).

[10] Shirlow, *supra* note 1, at 29–32.

[11] *Id.* at 35–39.

[12] *See further id.* at 40–44.

[13] *Id.* at 45–49.

[14] This would be consistent with the residual nature of the general rules of state responsibility under international law. International Law Commission, *supra* note 4, Art. 55.

[15] EU-Canada Comprehensive Economic and Trade Agreement, Art. 8.39(4).

[16] *Id.* Art. 8.39(3).

[17] See, on such techniques generally, Esmé Shirlow, Judging at the Interface: Deference to Domestic Decision-Making Authority in International Adjudication (2021).

[18] *See generally* Shirlow, *supra* note 1, at 36–38.

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international law.[19] Relatedly, some international courts are particularly active in encouraging parties to reach negotiated or mediated settlements on matters of reparation following a judicial decision on the merits.[20] Several international courts also appoint their own experts to value loss, rather than relying on party-appointed experts.[21]

Such procedures entail certain benefits, but also particular risks. These considerations highlight the interconnected nature of reform efforts. In particular, it is necessary to ensure that reforms to address one issue—such as compensation—do not themselves generate unintended impacts in other areas or even undercut other reform goals.[22] Moreover, the approaches of other international courts may only be feasible or desirable in their specific institutional context. As such, it is necessary to consider investor-state arbitration reform holistically and by reference to the precise institutional contexts in which, and legal frameworks under which, investor-state disputes are arbitrated. Similarly, the practice of other international courts highlights various approaches which may not be practicable, appropriate, or desirable to adopt in the context of the current investor-state arbitration regime.[23] Equitable approaches to awarding compensation are, for instance, likely to lead to greater inconsistency and unpredictability in awards of compensation and so may undercut the goals of other reform efforts. Awards of restitution may also be impracticable or undesirable, including due to concerns about such relief impacting the public regulatory functions of host states. Some states for this reason have adopted provisions reserving their right to elect to pay compensation in lieu of restitution in investor-state proceedings.[24]

A key message underpinning the presentation was therefore that any effective reform of approaches to compensation in investor-state arbitration may require further, coherent, institutional, substantive and/or procedural reforms. Such reform efforts can benefit from recontextualizing that regime within the broader context of public international law through this type of comparative research. The research highlights to what extent investor-state arbitral approaches to compensation converge or diverge from approaches to similar issues in other international regimes, and further brings into focus lessons and opportunities from the practice of other international courts relevant to specific reform options for investor-state dispute settlement.

B. Comments by Ben Love

Ben Love commented that Esmé Shirlow's paper is a novel and welcome addition to the canon of scholarship on investor-state dispute settlement. The paper, which compares the approach to compensation of six other international dispute resolution regimes to that in investor-state arbitration, curiously omitted the practice of the Iran-U.S. Claims Tribunal (IUSCT) from its analysis. As the permanent international dispute resolution body deciding cases that most closely resemble those in investor-state arbitration, an examination of the comparative approach of the IUSCT and investment treaty tribunals to compensation is perhaps a further project to supplement Dr. Shirlow's excellent paper.

[19] *See, e.g.*, 'Five Pensioners' v. Peru, Judgment (Merits, Reparations and Costs), para. 178 (IACtHR Feb. 28, 2003); Santo Domingo Massacre v. Colombia, Judgment (Preliminary Objections, Merits and Reparations), para. 337 (IACtHR Nov. 30, 2012).

[20] *See generally* Shirlow, *supra* note 1, at 38–39; *see, e.g.*, European Convention on Human Rights, Art. 39(1), Nov. 4, 1950, ETS 5; American Convention on Human Rights, Art. 48(1)(f), Nov. 22, 1969.

[21] Shirlow, *supra* note 1, at 35–36.

[22] *See further* David Caron & Esmé Shirlow, *Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences*, *in* THE JUDICIALIZATION OF INTERNATIONAL LAW – A MIXED BLESSING? (Geir Ulfstein & Andreas Føllesdal eds., 2018); Esmé Shirlow, *Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration*, 31 ICSID REV. – FOR. INV. L.J. 622 (2016).

[23] Shirlow, *supra* note 1, at 55–56.

[24] *See, e.g.*, United States-Mexico-Canada Agreement, Art. 14.D.13, July 2, 2020.

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1. Comment on the Paper's Comparative Approach

In reviewing the approach of this regime, the paper focuses on five elements: (1) the standard of reparation; (2) the form(s) of reparation; (3) the types of loss giving rise to compensation; (4) the requirements for awarding compensation (causation, mitigation, etc.); and (5) awards of interest.

First, starting with the standard of reparation, famously articulated by the PCIJ in *Chorzów Factory*,[25] the paper notes that *lex specialis* regimes can displace this standard. The paper further observes that the ECtHR applies a "fair balance" test to achieve full reparation, rather than the unvarnished interpretation adopted by investor-state arbitral tribunals to achieve full reparation. The paper commends this divergence in approaches achieving full reparation, but it is not clear why differing approaches to a single standard is desirable for investor-state arbitration or international law more generally.

Second, the paper addresses the forms of reparation in the International Law Commission's Draft Articles on State Responsibility—i.e., restitution, compensation, and satisfaction.[26] The practice of international tribunals represented in the paper appears to track what investor-state arbitral tribunals typically do, which is order compensation contingent on restitution not taking place or, in most cases, simply to award compensation because restitution is an unrealistic or unenforceable remedy. Satisfaction, of course, is of limited use in this form of dispute resolution.

Third, the paper addresses the types of loss warranting compensation, starting with approaches to valuing loss. The section on methodology marks the crux of the paper. Mr. Love's remarks here included the following:

- The paper notes that both *damnum emergens* and *lucrum cessans* are available, though these concepts are not frequently discussed in investor-state arbitration, in which loss is typically measured by loss in value rather than typical concepts of contractual and tort damages.
- Even though it is perceived that the size of awards in investor-state arbitration is far above that awarded by other international adjudicators, the reasoning of other international tribunals presented in the paper closely resembles that of investment treaty tribunals and the arguments made before them. Like those tribunals, investment treaty tribunals frequently (in fact more frequently than not) decline to award loss including future cash flows due to insufficient evidence.
- Still, in investor-state arbitration claimants more frequently claim and advance evidence for more fulsome claims than are often seen before other tribunals. This is unsurprising given that many claimants in investor-state arbitration are sophisticated international investors with meticulous habits of recordkeeping and often have reporting obligations that mean their investments are valued on, at least, an annual basis.
- The differences that the paper identifies between these regimes and investor-state arbitration is that non-investor-state tribunals appear more willing to acknowledge non-material loss, which is rarely available in investor-state arbitration. Investor-state tribunals also do not typically defer to domestic courts for valuation questions, precisely because they are designed to provide a decision independent of those processes.

Fourth, the paper addresses the requirements for awarding compensation. This section, while informative, does very little work in the way of recommending reform in investor-state arbitration.

[25] *Factory at Chorzów (Ger. v. Pol.)*, *supra* note 3, at 47.

[26] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries Art. 34, UN Doc. A/56/10 (2001).

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That is perhaps because there is no meaningful difference between the approach of investor-state arbitral tribunals and other international adjudicators to the requirements of awarding compensation, at least conceptually. In practice, however, investor-state arbitral tribunals have been more willing to entertain and occasionally grant large damages awards, which remain uncommon in other forms of international adjudication.

Fifth, the paper addresses the awarding of interest. It notes that international adjudicators have traditionally awarded simple, rather than compound, interest. What is missing from this discussion is that this tradition is now widely seen as outdated from a commercial perspective. There is ample scholarship on the debate between simple and compound interest, and it could be used to show that this is an issue of economics and finance, rather than one with a correct "legal" answer. In other words, international tribunals should take their cues on the appropriate rate of interest from professionals with the analytical tools needed to establish those rates, not what is held out to be legal tradition.

Finally, the paper addresses the implications of its analysis for the reform of investor-state dispute resolution. As a general matter, the paper identifies the overarching implications of its comparative study as a call to investor-state tribunals to recontextualize their approach to compensation to consider the practice of other international courts and tribunals. But the paper does not address why the approaches of those tribunals are preferable to the quickening developments of two decades of investor-state arbitration. If investor-state tribunals have gone too far, why is that? Could investor-state tribunals—or at least some of them—be on the cutting edge of approaches to compensation necessary to achieve full reparation, rendering the practices of other international tribunals obsolete? That is perhaps an issue for another paper.

2. *Comments on the Paper's "Key Messages" for Reform of Investor-State Dispute Resolution*

The specific self-identified "key messages" of the paper are also five-fold and loosely track the five areas of focus identified for its survey of jurisprudence. In particular, the paper proposes that new language be developed: (1) for a different standard of reparation for breaches of international law; (2) to give greater guidance on how to give effect to the customary international law standard of reparation; (3) to give greater deference to domestic mechanisms; (4) to encourage more negotiated and/or mediated settlements; and (5) to encourage tribunal-appointed experts (as opposed to dueling party-appointed experts). Many of these suggestions have appeared before in reform discussions, but they are nonetheless serious and worth considering.

The first proposal to establish a different standard of reparation for breaches of international law is the most radical. The standard of full reparation articulated by the PCIJ in 1928 and effectively codified by the ILC in 2001 has served as a beacon for international adjudicators for nearly a century, with some notable commentators referring to it as a "source of wisdom."[27] As Dr. Shirlow observes, alternatives to the full reparation standard are not necessarily without their complications. The concept of equitable compensation in particular would increase inconsistency in the outcome of arbitral awards, thereby undercutting a basic pillar of the investor-state disputes reform movement.

Dr. Shirlow's second proposal—to provide tribunals with guidance on applying the standard of full reparation, rather than reform an established rule of international law—is a sound one. After over a quarter of a century of investment treaty arbitration, there is no shortage of jurisprudence and commentary to inform the preparation of guidelines for achieving full reparation in investor-state arbitration.

[27] R. Baxter, *Forward*, *in* THE VALUATION OF NATIONALIZED PROPERTY, VOL. II, at vii (R. Lillich ed., 1973).

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Dr. Shirlow next proposes that international tribunals give greater deference to domestic courts on matters of compensation. But that would be a step backward. The primary advantage of international arbitration (and one of the virtues of international law more generally) is an independent remedy that is not subject to undue influence by the courts of the very state whose conduct is under review.

The fourth proposal that Dr. Shirlow advances, which is to encourage more negotiated or mediated settlements, is a laudable one. It is not one that international law can do much work to address, however. At the center of the difficulty reaching mediated settlement is the internal machinery of states themselves. Even where it might be possible as a matter of domestic law for a particular individual or state organ to reach a settlement on a state's behalf, the fear of political backlash or worse all too often precludes settlement as a practical option. To address that problem, states must build internal capacity that alters the incentives many of their officials face when considering a mediated or negotiated settlement.

Dr. Shirlow's last proposal of tribunal-appointed experts is particularly interesting. Practitioners are familiar with cases in which the claimant investor puts forward a high damages figure, only for the respondent state's expert to assert that the investment was worth nothing (or even less). This stark difference in approach naturally yields the sense that at least one of the parties' experts are hired guns. In that sense, a neutral tribunal-appointed expert might appear appealing.

Still, Mr. Love did not share the view in the paper that the participation of party-appointed experts "have been perceived to add greater complexity and expense to investor-state arbitration proceedings." On the contrary, he noted cases with tribunal-appointed experts often involve delays in the issuance of a final award.[28] More quantum-savvy tribunals, which are increasingly the norm, have other methods of inducing party-appointed experts to provide impartial and useful information. These include hot-tubbing expert examinations and instructing the party-appointed experts to recalculate damages based on a range of assumptions chosen by the tribunal, rather than the parties that instructed the experts.

II. The Ideology of Investment Treaty Arbitrators

A. Presentation by Mohamed Mahayni

Mohamed Mahayni presented his doctoral research on the ideology of investment treaty arbitrators. He noted that his research led him to discover that he was a hypocrite, and explained how he discovered this and why he hoped his discovery may be as instructive to others as it had been for him.

In his thesis, Mr. Mahayni analyzes arbitral awards that include dissenting opinions.[29] He did this with the primary aim of explaining ostensibly polarized legal opinions among investment treaty arbitrators and the wider arbitration community. These awards are particularly insightful because they reveal differences of opinion despite most variables being absent. That is, the arbitrators will have read, heard, analyzed, and presumably also deliberated on the same treaty, arguments, and evidence. Despite the constants, one—and sometimes two—arbitrators issue dissenting

[28] *See, e.g.*, Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/04/16, Final Award (Feb. 25, 2016) (arbitration initially registered with ICSID nearly twelve years before the issuance of the final award); Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic, ICSID Case No. ARB/03/19, Final Award (May 25, 2016) (arbitration initially registered with ICSID nearly thirteen years before the issuance of the final award); Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Final Award (Nov. 27, 2013) (arbitration initially registered with ICSID over nine years earlier).

[29] Doctoral thesis titled *The [Anti]-ideology of Investment Treaty Arbitrators*, University of Paris 1 Panthéon Sorbonne. Mohamed Mahayni noted that he is indebted to Prof. Sylvain Bollée for prompting and probing his thinking on this thesis.

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opinions. They mainly tend to disagree on the legal qualification of facts. But many disagree on the interpretation of "the law"—namely the investment treaty, the rules of interpretation and international law. When they do, they typically emphasize their own objectivity or attack that of their peers, either covertly or overtly. And they do this despite the considerable scope for subjectivity in the interpretation of the law, and despite the *ad hoc* design of international arbitration.

Mr. Mahayni explained that during his research, he often found himself frustrated and cynical when reading opinions of the Gary Borns, Charles Browers, Francisco Orrego Vicuñas, and Guido Santiago Tawils of this world, as well as the interpretations of tribunals that seemingly share them. In contrast, he found himself nodding in effortless agreement when reading the opinions of the Georges Abi-Saabs, Marcelo Kohens, Philippe Sands, Brigitte Sterns, and Raúl Vinuesas of this world, as well as the interpretations of tribunals which seemingly share those. He found himself willing to spot weaknesses and inconsistencies in interpretations with which he disagreed, yet simultaneously found himself readily able to overlook the weaknesses and inconsistencies in ones with which he agreed. In the process, he acknowledges that he was oblivious to his hypocrisy in criticizing certain arbitrators for their subjectivity without introspecting into his own. Equally, he recognized that he was—and to some extent remains—persuaded by his own sense of objectivity. Why?

Mr. Mahayni submitted that ideology must have something to do with it. In his thesis, and in his paper, he argues that the notion of ideology has an important explanatory function which is still taboo and underexplored in both the theory and practice of investment treaty arbitration.

Although it is capacious,[30] the notion has a dual sense. On one level, it refers to a collection or system of beliefs. In this sense, the law is "infused with ideology"[31] and "[e]very area of law has, at all times, an ideology."[32] Accordingly—and at the risk of oversimplification—the ideology of international investment law resides in the relative dominance of the international investment protection value as against the subordinate value of state welfare and regulatory freedom. It further resides in the collection of beliefs that underpin that relative dominance. By identifying these beliefs and their counter-beliefs, and by questioning the underlying assumptions of both, we can better explain opinions and interpretations which legal reasoning, on its own, fails adequately to explain or justify.

On another level, ideology refers to the phenomenological experience of holding those beliefs. For individuals, ideology has a normative, socio-psychological function that "[endows them] with a sense of identity, purpose, and reality, and [enables them] them to be convinced of the self-evident justification and normality of their actions."[33] That self-evidence and normality means that ideology "is lived out and experienced non-ideologically."[34] For those entrusted with interpreting and applying the law, this starts with the "sincere belief that one is following the law and not one's own personal predilections."[35] In contrast, for the outsider to the experience or external observer, that

[30] Malcolm B. Hamilton, *The Elements of the Concept of Ideology*, 35 POL. STUD. 18, 20–21 (1987).

[31] Michael Waibel & Yanhui Wu, *Are Arbitrators Political?*, 12 (July 5, 2012), *at* https://ssrn.com/abstract=2101186; RICHARD A. POSNER, HOW JUDGES THINK 43 (2010) (criticizing studies of American judicial voting behavior that define law too narrowly).

[32] Julius H. Grey, *The Ideology of Administrative Law*, 13 MANITOBA L.J. 35, 35 (1983) ("Every area of law has, at all times, an ideology.").

[33] Roger Griffin, *Ideology and Culture*, 11 J. POL. IDEOLOGIES 77, 81 (2006).

[34] *Id.* at 80.

[35] Jack M. Balkin, *Ideology as Constraint*, 43 STANFORD L. REV. 1133, 1153 (1991) (arguing that ideological decision making should be seen as the norm rather than the exception, because "[w]hat we call 'non-ideological' decisions are ideological decisions whose ideology is simply not noticed"; submitting that it is not normally a source of legal indeterminacy unless judges' ideologies differ greatly).

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individual's actions may on interpretation seem "constructed," "artificial," "illusory," "subjective," or "generated by psychological drives, material interests, or supra-individual factors."[36]

It is the second, phenomenological sense of ideology that makes it such a "trip."[37] It allowed Mr. Mahayni to identify his above-mentioned hypocrisy. It also incited him to entertain the possibility that it may be the product of his own ideology, which leads him to mistake his subjectivity for objectivity and others' objectivity for subjectivity or, worse yet, a lack of integrity. He explained that his paper essentially argues that this realization can be useful for wider members of the community in bridging apparently irreconcilable differences of opinion on—and interpretations of—the law.

To Mr. Mahayni's mind, ideology helps explain why some arbitrators see the investor's glass as half empty while others see it as half full.[38] It helps explain why some arbitrators often insist on the objectivity of their perceptions while undermining competing ones. It helps explain why some arbitrators go as far as accusing their co-arbitrators of reverse-engineering their interpretations even though their own reasoning is arguably just as engineered. It helps explain why some arbitrators dismiss outside critics as inexperienced, leftist, agenda-driven, or anti-globalization ideologues, oftentimes ignoring that this dismissal is just as revealing of their own ideology as that of the critics whom they ignore. It helps explain why some tribunals ascribe onto other tribunals' interpretations a "pro-investor" or "pro-state" label even though those tribunals never purported to interpret the law in any manner other than objectively.[39] It also helps explain why some annulment committees are willing to pin their annulment decisions on a "process of reasoning" even though that process was sufficiently traceable on the form.[40] It helps explain why members of the community have managed to overpoliticize investment disputes that are already highly politicized to begin with.[41]

Of course, ideology does not entirely explain everything. It would be reductionist to say that law does not have a great deal to do with it. And so might personality, psychology, sociology, and culture. The explanatory function of ideology is not intended to substitute these concurrent explanations. But it does help dispense with cynical explanations that focus on career-motivated self-interest and materialism. For example, while self-interest can explain why an arbitrator fails to disclose doubts as to his or her impartiality, it does not explain why that arbitrator may see no reason to doubt his or her impartiality in the first place. Whilst self-interest can also explain why an arbitrator chooses to emit or even withhold a dissent, it does not necessarily explain the intensity with which he or she expresses opinions in a given dissent.

That said, until ideology in the law and its phenomenology among arbitrators is understood and candidly discussed, there is a risk that members of the community will continue to misunderstand and distrust each other. There is a further risk that the community will continue to sidestep or, worse yet, overreact to the ideological dissensus underlying the polarization of opinions. For example,

[36] Griffin, *supra* note 33, at 80–82.

[37] Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 4 J. LEGAL ED. 518, 522 (1986) (describing the law as a "trip" because of its malleability through legal work).

[38] International Thunderbird Gaming Corporation v. The United Mexican States, Award, para. 5 (UNCITRAL Jan. 26, 2006) (diss. op., Wälde, J.) (describing the source of his disagreement with the majority against whom he was dissenting: "They rather see the glass of the investor half empty; I rather see it half full").

[39] Wintershall Aktiengesellschaft v. Republic of Argentina, ICSID Case No. ARB/04/14, Award, para. 89 (Dec. 8, 2008) (characterizing the *SGS v. Pakistan* and *SGS v. Philippines* tribunals' respective interpretations of umbrella clauses as "avowedly" pro-state and pro-investor respectively).

[40] Enron Corporation and Ponderosa Assets, L.P. v. Republic of Argentina, ICSID Case No. ARB/01/3, Annulment Committee Decision (July 30, 2010).

[41] BG Group PLC v. Republic of Argentina, Judgment of the United States Supreme Court (Mar. 5, 2014) (see antagonistic *amici* briefs filed before the Court).

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some in the community shift the blame onto states for failing to particularize their investment treaties, even though conflicting interpretations have arisen on clearly drafted treaty provisions. Some propose to expand arbitrators' disclosure obligations to avoid legal issue conflicts, even though these will drive arbitrators to self-censor or water down their opinions. Some propose certain criteria that can be used to determine which interpretations are better, or they advocate in favor of establishing an international investment court, a preliminary ruling mechanism, or a moral duty to follow a series of consistent cases. However, these potentially exacerbate the problem by obnubilating deeper ideological differences under layers of make-believe in arbitral objectivity and objective law.

Ultimately, Mr. Mahayni seeks to make a case for candidly and collectively discussing the role and impact of ideology in practice, not least for the sake of quelling arrogance as to one's own objectivity and encouraging humility in the criticisms of others' supposed subjectivity. Perhaps at that stage we may then come to accept arbitration for what it truly is: an *ad hoc* method of "binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers."[42] In this context, the "chosen decision-makers" are individuals. These individuals will inevitably be guided by their ideologies. It is precisely ideology which, notwithstanding its possible subjectivity, should be understood and respected. Perhaps it should even be valued and encouraged if the "special trust" placed in the arbitrator hinges on it. Mr. Mahayni admitted that this is more "rough-edged" than "cutting edge," and he noted that he hoped he had not disappointed those attending the session.

Mr. Mahayni concludes his paper with the somewhat speculative hypothesis with which he concluded his thesis: the main obstacle to collectively discussing the role and impact of ideology stems from the dominant ideology in international arbitration and among international arbitrators. He calls it "the ideology of the rule of law," which fetishizes objective law and romanticizes arbitral objectivity.[43] In line with sociologists' takes on the legal field generally and the arbitration field specifically, he suspects this ideology to be at the root of the denial of ideology,[44] namely because the community comprises lawyers for the most part,[45] and lawyers are notorious for being "anti-ideologists."[46] If there is a unifying ideology among investment treaty arbitrators—as the singular in the title of his paper suggests—he submits that this would be it.

B. Comments by Luciana Ricart

Luciana Ricart agreed with Mohamed Mahayni's thesis that arbitral subjectivity in investment treaty interpretation is real. Subjectivity is common in any legal system, given that any rule of law

[42] Jan Paulsson, The Idea of Arbitration 1 (2013); William W. Park, *Rectitude in International Arbitration*, 27 Arbitration Int'l 473, 525 (2011) (cautioning against "transplant[ing] judicial standards into the world of arbitration," in the sense that arbitrators owe their duties to the parties only and not to the "citizenry as a whole").

[43] Miro Cerar, *The Ideology of the Rule of Law*, 97 Archiv Für Rechts- Und Sozialphilosophie [Archives for Philosophy of Law and Social Philosophy] 393, 404 (2011) (positing that all members of the legal class—law professors, judges, prosecutors, lawyers, notaries—instrumentalize the social importance of the law—whether intentionally or not; stating that they develop an "ideology of the rule of law," which is exacerbated by the exclusionary nature of the law).

[44] Duncan Kennedy, A Critique of Adjudication (Fin de Siecle) 14 (1997) (on the one hand, theorizing that judges pursue "conscious, half-conscious or unconscious ideological projects with respect to [issues of social hierarchy]," which projects "of course vary in their intensity or degree"; on the other hand, noting that this reality is oftentimes "denie[d], (suppresse[d], mystifie[d], distorte[d], conceale[d], evade[d])" in legal and political discourse).

[45] Joost Pauwelyn, *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus*, 109 AJIL 761, 773 n. 45 (2015) (noting that 99.6% of arbitrators are legally educated; arguing that ISDS legitimacy would benefit from having more arbitrators with experience in government service; calling for "the rule of law without the rule of lawyers").

[46] Cerar, *supra* note 43, at 403.

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is typically open to multiple interpretations. Certain characteristics of investment law make it more prone for the subjectivity in the interpretation of the law to be more pronounced along outcome-specific pro-state or pro-investor lines. Mr. Mahayni suggests that subjectivity and its roots in ideology may be tolerable. While Ms. Ricart agreed with his position in principle, she took issue with it in two respects. First, she considers that there are reasonably objective and, therefore, determinate limits to arbitral subjectivity. Some tribunals exceed those limits without properly accounting for the knock-on effects this has on states. Second, and relatedly, she finds that a certain pro-system ideology permeates certain awards and practices, and that this ideology can be consequential in practice.

1. The Objective Constraints on Investment Treaty Interpretation

Preliminarily, investment treaty interpretation is not unbounded. Investment treaties must be interpreted in accordance with their terms and their applicable law, which necessarily includes international law. There are of course lasting disagreements over how treaty interpretation should be approached and how international law is shaped and interpreted. However, there are arbitral awards which ostensibly overstretch or entirely circumvent the objective constraints resulting from the investment treaty or international law, or both. Interpretations in investment law have at times gone beyond what the state parties in the investment treaties expressly negotiated or clarified in joint interpretative statements.

Take the example of *Eco Oro v. Colombia*.[47] In that case, the Canadian investor made investments in the development of its gold and silver mines in the concession area which Colombian authorities had granted it. Colombia subsequently took various measures which reduced the concession area by half, on the stated objective of protecting the ecosystem in and around it.[48] The investor commenced arbitration against Colombia pursuant to the Canada-Colombia Free Trade Agreement 2008, invoking various substantive protections it contains. However, the agreement also contained an explicit exception at Article 2201 for measures "necessary to protect human, animal or plant life or health" and for "the conservation of living or non-living exhaustible natural resources." Despite the clarity of the exception and the state parties' intentions in including it, a 2017 joint interpretative statement which reaffirmed the right of each party to regulate including protection of the environment, and the submission of Canada in the arbitration as a non-disputing party, the tribunal by a majority held that this exception did not operate to exclude Colombia's liability to pay compensation.[49] Neither subjectivity nor ideology can reasonably justify the majority's decision. To interpret the exception in this way, the majority ended up drawing on previous awards which are circumstantial and, in any event, not binding. For example, the majority relied on the reasoning in *Bear Creek Mining v. Peru*'s interpretation of the environmental exception in the Canada-Peru FTA, which—while similar—was not identical to the exception at issue in the Canada-Colombia FTA.[50]

The majority likewise relied on past awards to justify its interpretation of other provisions in the FTA. For example, it upheld the investor's claim that Colombia breached the minimum standard of

[47] Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (Sept. 9, 2021).

[48] *Eco Oro v. Colombia*, Request for Arbitration, paras. 4–12.

[49] *Eco Oro v. Colombia*, Decision, *supra* note 47, paras. 212, 826–37.

[50] *Id.*, para. 834 ("The Tribunal's analysis is supported by the decision of the tribunal in *Bear Creek* which considered an **identical** provision.") (emphasis in original); *see also id.*, para. 365 ("Colombia posits that the second sentence in Article 2201(4) of the FTA does not appear in either of the treaties giving rise to the disputes in *Bear Creek* (the Canada-Peru FTA) and *Infinito* (the Canada-Costa Rica BIT), cited by *Eco Oro* in support of its interpretation of Article 2201(3)[.]").

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treatment (MST) under Article 805(1) of the FTA,[51] considering that Colombia's actions constituted "arbitrary vacillation and inaction which inflicted damage on Eco Oro without serving any apparent legitimate purpose."[52] In doing this, the majority lowered the standard for breach of MST to the point of effectively rewriting it.[53] In its reasoning, the majority referred to the explicit footnote to Article 805(1), which clarified that customary international law refers to both state practice and *opinio juris*. The majority rightly considered that this did not prevent it from relying on other sources in order to interpret the meaning of the MST. However, the majority wrongly placed overdue emphasis on past arbitral awards' interpretations of customary international law even though, under international law, these cannot substitute for an independent examination of state practice or *opinio juris*, or both.

2. *The Pro-system Ideology of Investment Treaty Arbitrators*

Luciana Ricart argued that regrettably a pro-system ideology is discernible in practice, above and beyond the polarized and outcome-specific pro-state or pro-investor ideologies. Pursuant to Mr. Mahayni's point regarding the explanatory function of ideology, the ideology of the investor-state dispute settlement system must be acknowledged. This ideology at times appears to prioritize the continuation of the system itself.

Ms. Ricart noted that various examples came to mind, and presented a single, glaring one. Let us say that an investor from a member state of the European Union sues another member state for breach of fair and equitable treatment in an investment treaty. After attracting foreign investment in the renewable sector through investment schemes, the host state retracted or altered those schemes in alleged breach of the investor's legitimate expectations. It did so, however, congruently with EU law, which the investor argues falls short of the protection the host state owes pursuant to the investment treaty. What importance should the arbitrators attribute to EU law in this context? The matter is illustrated in recent cases against the Czech Republic, Italy, and Spain arising from these states' partial retraction of feed-in tariffs. In certain cases, the retractions were made in accordance with EU law and, more specifically, with EU Commission findings that considered those retractions to be proportionate under EU law and consistent with EU principles. Yet, some tribunals minimized EU law's relevance in their determination of the dispute under the investment treaty, even though it forms part of international law.[54]

The same disregard for EU law appears in determinations of jurisdiction arising from intra-EU BITs. Despite arguments based on Article 30 of the Vienna Convention on the Law of Treaties by EU member states and by the European Commission as *amicus curiae*, the January 2019 Declarations of the EU member states and the 2020 Termination Treaty and the decisions by the European Court of Justice in *Achmea*, *Komstroy*, and *PL Holdings*, until June 16, 2022, no arbitral tribunal had declined to exercise jurisdiction in an intra-EU BIT or intra-EU ECT

[51] Canada-Colombia FTA, Art. 805(1) ("Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.").

[52] *Eco Oro v. Colombia*, Decision, *supra* note 47, paras. 743–821.

[53] *Id.*, paras. 5–37, esp. para. 36 (diss. op., Sands, J.) ("The effect of its approach is to significantly lower the bar, and in effect rewrite the FTA and the content and effect of MST.").

[54] *See, e.g.*, Foresight Luxembourg Solar 1 S.A.R.L., et al. v. Kingdom of Spain, SCC Case No. 2015/150, Final Award, paras. 218–19, 381 (Nov. 14, 2018); Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and a Partial Decision on Quantum, paras. 156–60 (Feb. 19, 2019).

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arbitration. Yet, many of these tribunals were composed of arbitrators who are prominent public international lawyers and even many times identified with a pro-state ideology.

The first known investor-state tribunal to ever dismiss a case based on the intra-EU objection was a Stockholm-seated SCC tribunal composed of Hans van Houtte (chair), Inka Hanefeld, and Jorge Viñuales in a claim under the Energy Charter Treaty brought by two Danish companies which had invested in several Spanish photovoltaic power plants.[55] The tribunal relied on the ECJ decisions in *Achmea*, *Komstroy*, and *PL Holdings* and held that EU law prevailed over the legal relations between the EU states involved (i.e., Denmark, Spain, and Sweden as the seat of the arbitration), concluding that Spain's offer to arbitrate in Article 26 of the ECT was not applicable in the context of an intra-EU arbitration.[56]

Until this recent decision under the ECT, all but one arbitrator had taken this stance, namely Marcelo Kohen in his dissent against the majority decision on jurisdiction in *Theodoros Adamakopoulos v. Cyprus*.[57] As Kohen noted, the BITs pursuant to which the dispute was commenced provide for the application of the host state's law and international law.[58] And, in this respect, "EU law is part of *both*."[59] Because Article 351 of the TFEU and the BLEU-Cyprus and Greece-Cyprus BITs have the same scope of application, and in line with Article 30 VCLT's *lex posterior* rule on the precedence of subsequent treaties between state parties, Kohen considered that EU law effectively prevents the tribunal from assuming jurisdiction.[60]

Ms. Ricart concluded that ideological interpretations may be tolerated on the basis that they are rendered in good faith. However, she noted that it is important to bear in mind the consequences that these interpretations can have on respondent states. It is equally important to recognize the systemic repercussions that result from the normalization of interpretations which depart from treaty text or international law, or both.

[55] Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain, SCC Case No. V2016/135, Award (June 16, 2022).

[56] *Id.*, paras. 468–78.

[57] Theodoros Adamakopoulos and Others v. Republic of Cyprus, ICSID Case No. ARB/15/49, Decision on Jurisdiction (Feb. 7, 2020).

[58] *Id.*, para. 3 (diss. op., Kohen, M.) (noting that EU law applies as part of: (1) the BLEU-Cyprus BIT's Article 10(5), which explicitly provides for the application of the host state's law, the BIT, any specific agreements regarding the investment, and international law; and (2) the Greece-Cyprus BIT's applicable law which is deemed to be the host state's law and international law by application of Article 42 of the ICSID Convention).

[59] *Id.* (emphasis in original).

[60] *Id.*, paras. 76–82 (diss. op., Kohen, M.) (emphasizing the importance of not overstepping jurisdiction; noting at paragraph 80 that: "It is not in the interest of investment arbitration to extend jurisdiction where there is none and where there is not even any political or moral reason to do so. This policy only serves to discredit the system of international investment arbitration. The current practice at different levels, including treaties, looking for alternative ISDS systems should provoke a reflection in this regard.").

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