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Article

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Dynamics of change in international investment law

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ABSTRACT

This article examines the ways in which international investment law evolves. It argues that its initial focus on prosperity and security, at the expense of justice and freedom, coupled with the system's social and political dis-embeddedness, led to its current state of disenchantment. That current state of affairs is not as easily remedied as it seems. Treaty renegotiations and procedural reforms have largely been ineffective in altering the system's actual operation, reflecting a disconnect between our law-in-books perception of it and its law-in-action reality. Society has to some extent lost control over the system, and never really has had. To understand these dynamics, to facilitate meaningful reform, and ultimately to ensure that the regime better aligns with broader societal values, the article emphasizes the need for an approach drawing on complexity theory: a holistic understanding of the complex interdependencies within the system.

INTRODUCTION: FROM GREATNESS TO DISENCHANTMENT TO NOWHERE

For centuries, an investor in a foreign country had significant difficulties having its claim heard fairly. Pleading with their government to act on their behalf against the offending state (diplomatic protection) offered an unattractive alternative, as even the biggest investors have barely enough political weight. The contemporary international investment law system (or regime),[1] with investment arbitration as the key device turning law in books into law in action, seemingly cured this problem. In historical perspective, this is an experiment—one not entirely unlike Dr Frankenstein's medical experiments, with the same question: what would the creature do once alive and relatively free?

Its first steps drew many people's admiration. The system allowed the international bar (the lawyers and law firms who built the system and run it)[2] to put legal and technocratic chains on political power in situations that, only a generation prior, would have looked

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[1] We use the words 'system' and 'regime' interchangeably.

[2] Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (U Chicago Press 1996); Arman Sarvarian, *Professional Ethics at the International Bar* (OUP 2013).

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desperate. Investors gained unprecedented legal protection abroad.[3] The international bar celebrated the achievement. For a long time, a large part of the world joined in the celebration.

But the creature kept walking. The governments that accepted investment arbitration as a means to address disputes with investors never signed on to a rule that says 'investor trumps all'. Still less was it meant to create a new power elite: the arbitrators and lawyers who argue before them were meant to operate the procedural technicalities of dispute settlement, not pull the strings of international politics. Yet that became the overall feeling. Initially, the political disenchantment was limited to developing countries, where it was felt that the system was eroding their sovereignty for the benefit of a wealthy few foreigners.[4] But soon developed countries proved just as ready to question it all.[5]

From an institution welcomed by the world and praised for protecting investors going abroad, investment arbitration had become an institution denounced on almost every political front. Not to be outdone, academic criticism had long[6] found fault with the system's workings (for instance, inconsistent decisions[7] and the status of states as perpetual respondents[8]), its outputs (policy space interference[9] and the scale of compensation[10]), and its effects (limited economic benefits,[11] limited international depoliticization

[3] With the exception of protection under colonial ruling. See Jeffry A Frieden, 'International Investment and Colonial Control: A New Interpretation' (1994) 48 International Organization 559.

[4] Ibironke Odumosu-Ayanu, 'The Law and Politics of Engaging Resistance in Investment Dispute Settlement' (2007) 26 Penn State International Law Review 251; Muthucumaraswamy Sornarajah, *Resistance and Change in International Law on Foreign Investment* (CUP 2015); Muthucumaraswamy Sornarajah 'Mutations of Neo-Liberalism in International Investment Law' (2011) 3 Law, Trade and Diplomacy 203.

[5] Julia Calvert, 'Constructing Investor Rights? Why Some States (Fail to) Terminate Bilateral Investment Treaties' (2018) 25 Review of International Political Economy 75; Ferdi de Ville and Gabriel Siles-Brügge, 'Why TTIP Is a Game-Changer and Its Critics Have a Point' (2016) 24 Journal of European Public Policy 1491; Simon Lester, 'Liberalization or Litigation? Time to Rethink the International Investment Regime', Cato Institute Policy Analysis, 8 July 2013. For example, the French and German governments have been vocal in their opposition to it in the Transatlantic Trade and Investment Partnership (TTIP). It is not just those on the left: such establishment organs as The Economist and the Financial Times have raised questions about investment arbitration. The Cato Institute, a US think tank known for advocating limited government and free markets, raised the banner of national sovereignty in suggesting that investment arbitration does more harm than good.

[6] David Schneidermann, 'Investment Rules and the New Constitutionalism: Interlinkages and Disciplinary Effects' (2000) 25 Law and Social Inquiry 757; David Schneiderman, 'Investment Rules and The Rule of Law' (2001) 8 Constellations 521; Gus Van Harten, 'Private Authority and Transnational Governance: The Contours of the International System of Investor Protection' (2005) 12 Review of International Political Economy 600; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007).

[7] Susan D Franck 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521.

[8] Mehmet Toral and Thomas Schultz, 'The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations', in Michael Waibel and others (ed.), *The Backlash Against Investment Arbitration* (Kluwer 2010).

[9] Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution of Investment Treaty Law and Arbitration* (CUP 2011). Investment arbitration has been shown to make it more difficult and more expensive to regulate tobacco products (Andrew D Mitchell and Sebastian M Wurzberger, 'Boxed in? Australia's Plain Tobacco Packaging Initiative and International Investment Law' (2011) 27 Arbitration International 623), to protect public health in general (see Elizabeth Sheargold, 'International Investment Law and Public Health: The Need for Forward-Looking Reforms' (2025) 16 Journal of International Dispute Settlement, forthcoming; Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Routledge 2012)), to safeguard the environment (Kyle Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (CUP 2009); Gus Van Harten and Dayna Nadine Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' (2016) 7 Journal of International Dispute Settlement 92), to phase out dependence on nuclear energy (Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffmann, 'The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute Vattenfall v. Germany (II)', International Institute for Sustainable Development, 2012), and to recover from economic crises (Cédric Dupont, Thomas Schultz, and Merih Angin, 'Political Risk and Investment Arbitration: An Empirical Study' (2016) 7 Journal of International Dispute Settlement 92).

[10] Rachel L Wellhausen, 'Recent Trends in Investor–State Dispute Settlement' (2016) 7 Journal of International Dispute Settlement 117; Martins Paparinskis, 'Crippling Compensation in the International Law Commission and Investor–State Arbitration' (2022) 37 ICSID Review 289.

[11] Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2010) 51 Virginia Journal of International Law 397; Lauge N Skovgaard Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' *Yearbook on International Investment*

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effects,[12] limited effect in promoting the rule of law and good governance),[13] as well as several other aspects.[14] It appears, although the evidence is light, that on the epistemological front, there exists a strong correlation between defending investment arbitration in its current guise and having financial and social stakes in it—evidence of an epistemic conflict of interest not dissimilar to early tobacco industry-funded medical research on the effects of smoking.[15] The direct collective financial stake for the international bar is roughly 1–2 billion USD per year.[16]

If the disenchantment is somewhat serious (ie, something different would be preferable), the criticism somewhat accurate (ie the problems are roughly correctly identified), and the epistemic conflict of interest somewhat understood (ie the weight of opinions for stasis are discounted), one should expect significant change. An experiment is made, a creature created; the results are interesting, but significant adjustments are required; something better should follow.

Yet, two recent studies, one by Wolfgang Alschner in 2022 and one by Federico Ortino in 2023, concluded that nothing had really changed over the last 25 years.[17] Nothing in the law in action. Plenty in the law in the books though, with BIT renegotiations and procedural reforms. Legal texts are changed, reducing foreign investor protection and improving arbitration procedures, but the results seem not to have budged much, if at all. As if Dr Frankenstein's creature had been given new instructions but ignored them.

What happened?

This article goes back to the beginning, to try to identify the main structural causes of the disenchantment with investment arbitration: initial problems that made it bound to end up in the current nadir. It suggests that the system is too socially and politically dis-embedded, and too unbalanced, heavy on prosperity and security yet neglecting justice and freedom to choose. The article then discusses why adjustments to the initial set-up have not been effective, focusing on the distinction between law-in-books changes and law-in-action changes. It concludes with reflections on our understanding of the problem(s) attributed to international investment law and prescriptions to fix it.

STRUCTURAL CAUSES OF THE DISENCHANTMENT

The original neglect

The initial idea, which was gospel to economists and international relations specialists, was that international flows of foreign direct investment (FDI) would increase prosperity (ideally

Law and Policy (OUP 2016) 539; Bruce A Bloningen, 'A Review of the Empirical Literature on FDI Determinants' (2005) 33 Atlantic Economic Journal 383; Jonathan Bonnitcha, 'Foreign Investment, Development and Governance: What International Investment Law can Learn from the Empirical Literature on Investment' (2016) 7 Journal of International Dispute Settlement 31.

[12] Geoffrey Gertz, Srividya Jandhyala, and Lauge N Skovgaard Poulsen, 'Legalization, Diplomacy, and Development: Do Investment Treaties De-Politicize Investment Disputes?' (2018) 107 World Development 239.

[13] Mavluda Sattorova, *The Impact of Investment Treaties on Host States: Enabling Governance?* (Hart 2018).

[14] Daniel Behn, Ole Christian Fauchald, and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022); Daniel Behn, 'Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art' (2015) 46 Georgetown Journal of International Law 363.

[15] Pia Eberhardt and Cecilia Olivet, 'Profiting from injustice: How Law Firms, Arbitrators and Financiers are Fuelling An Investment Arbitration Boom' (Corporate Europe Observatory, 2012).

[16] Based on per-case estimates multiplied by the average number of cases per year. Per-case estimates are provided by David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community', OECD Working Papers on International Investment 2012/3 and Wolf von Kumberg, Jeremy Lack, and Michael Leathes, 'Enabling Early Settlement in Investor–State Arbitration: The Time to Introduce Mediation Has Come' (2014) 29 ICSID Review 133.

[17] Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (OUP 2022); Federico Ortino, 'ISDS and Its Transformations' (2023) 26 Journal of International Economic Law 177.

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everyone's, but some more than others), which would further increase FDI flows as the world gets richer and has more to invest.[18] Prosperity would, in turn, lead to peace as needs are met, in classic liberal economic thinking.[19] But as FDI extended to sectors vital to the well-being and security of populations, making governments queasy and leading them to intervene and expropriate, it became the cause of international tensions and conflicts, thus undermining international cooperation, and ultimately reducing FDI flows. This could have been left to self-stabilize at a 'natural' level of FDI, peace, and prosperity. But people wanted more, and the way to get it was the law, in the form of the modern international investment law system: budding international tensions would be deviated into international law and resolved by arbitration, thus depoliticized by several degrees, while states would be given a clearer legal framework within which they can intervene and expropriate, thus reducing problematic government measures. International tensions disappear like water in the sand, leading to peace; peace leads to FDI flows; FDI flows lead to prosperity; prosperity leads to yet more peace; yet more peace leads to yet more FDI; the virtuous cycle turns and turns. States, on whose consent the system rests, should have been satisfied in this model—had the model been correct.

But something was neglected in this original design.[20] Perhaps this was due to a strange belief that the rule of law is necessarily good,[21] that more international law and more predictability are necessarily better,[22] and an oversight that 'law is violence'[23] or certainly can be. Perhaps it was due to experts thinking they know what is good for others without asking (a problem of embeddedness).[24] Perhaps it was due to technocratic thinking (a problem of balancedness). The original neglect is that the system could, as it indeed would, overreach, ordering states to pay 'crippling compensation'[25] and interfering in their policy space, thus impinging on national policy autonomy and creating public dissatisfaction, thus in turn decreasing state satisfaction: peace and prosperity, perhaps,[26] but at a cost that was neither understood nor accepted when the system was designed.[27] This led states to try intervening in the system to fix it, with the results already sketched above, to which we will return.

Put differently, the original neglect was the risk that international depoliticization would lead to domestic politicization, which was insufficiently accounted for structurally. Domestic

[18] Antonio R Parra, *ICSID: An Introduction to the Convention and Centre* (OUP 2020) ch 2, s 1 ('Proposed Multilateral Approaches to the Promotion of Private Foreign Investment').

[19] See for instance Erik Gartzke, 'The Capitalist Peace' (2007) 51 American Journal of Political Science 166; Erich Weede, *Economic Development, Social Order, and World Politics* (Rienner 1996) (discussing capitalist peace theory, namely that economic prosperity decreases wars); John M Keynes, *The Economic Consequences of the Peace* (Harcourt 1919).

[20] The argument and the modelling are much more developed in Cédric Dupont, Thomas Schultz, and Jason Yackee, *Investment Arbitration as a Complex System* (OUP forthcoming).

[21] Matthew Kramer, 'For the Record: A Final Reply to N.E. Simmonds' (2011) 56 American Journal of Jurisprudence 115.

[22] Thomas Schultz, 'Against Consistency in Investment Arbitration' in Zachary Douglas, Joost Pauwelyn, and Jorge E Viñuales (eds), *The Foundations of International Investment Law* (OUP 2014).

[23] Robert Cover, 'Violence and the World' (1986) 95 Yale Law Journal 1601; Austin Sarat and Thomas R Keams, *Law's Violence* (U Michigan P 1993).

[24] The problem was aptly formulated in laypeople's words: Ross Douthat, 'So, You Think the Republican Party No Longer Represents the People', *New York Times* (New York 2 February 2022): 'Contemporary [American] liberalism is fundamentally miscast as a defender of popular self-rule. … [Contemporary American Liberalism has become] the progressive vision of disinterested experts claiming large swaths of policymaking for their own and walling them off from the vagaries of public opinion, the whims of mere majorities.'

[25] Paparinskis (n 10).

[26] On the debate whether the international investment law system actually increases FDI inflows, see: Josef C Brada, Zdenek Drabek, and Ichiro Iwasaki 'Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis' (2021) 35 Journal of Economic Surveys 34.

[27] This account of the design of the system puts the accent on the core values that were collectively sought. This may give a sense of simplicity in the system's design. This is just a heuristic model (Cédric Dupont and Thomas Schultz, 'Towards a New Heuristic Model: Investment Arbitration as a Political System' 7 Journal of International Dispute Settlement 3). The reality of its design was much more complex, in the system thinking sense of the word: see Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed' (2014) 29 ICSID Review 372; Anthea Roberts and Taylor St John, 'Complex Designers and Emergent Design: Reforming the Investment Treaty System' (2022) 116 American Journal of International Law 96.

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politicization can be understood here to mean that domestic constituencies (1) want a say in the system and (2) want to get the balance of its outputs right. These are the matters of dis-embeddedness and balancedness.[28]

Dis-embeddedness, or when society catches up with you

The current international investment law system was mostly designed—and the treaties negotiated, signed, ratified—at a time of what Pepper Culpepper called 'quiet politics.'[29] International investor protection was not a politically salient issue at the time. There seemed to be little cause for political debates about international investment agreements: they were perceived as the international equivalent of an *Act Intended To Make Things Better in General*, political no-brainers.[30] Diplomatic no-brainers too: signing them was for a long time a matter of routine international relations.[31] There was no reason to get excited about them.

When an issue is not politically salient—times of quiet politics—interest groups, in principle, dominate and run the show—not party politics, not public opinion, but the experts of a particular community of interests.[32] The community of foreign investors and the groups representing them could thus easily influence the policies and the general mindset on the topic. As Nicolás Perrone has shown, in the 1950s and 60s 'business leaders, bankers, and international lawyers' shaped the technocratic legal imagination on what international investment law should look like, with very few domestic political constraints, and on this basis, the modern system of foreign investor protection was built.[33] When it consolidated, in the 1990s and 2000s, that mindset was reinforced by the arrival in the system of state cynics: individuals who had witnessed and suffered from dysfunctional and corrupt states, often in the former Soviet bloc and in Latin America; had emigrated to the USA and other mostly Global North capitalist countries; and had taken on an ideology that the behaviour of states (or least of Global South states) is motivated primarily by punishable factors rather than a true pursuit of the welfare of their people.[34] In broad strokes, this was the interest group that governed the system.

Quiet politics in foreign investor protection was, in other words, a time of dis-embeddedness. Embeddedness refers to the degree to which a system is constrained by institutions, in a broad sense, which lie beyond it—for instance the degree to which the economy

[28] The coming analysis could to some extent also have been conducted in reference to the concept of sociological legitimacy, which might be more customary to international lawyers. Domestic politicization in essence means that an issue becomes politically salient at a domestic level. (Dis-)embeddedness refers to the effective structural connections of control, or lack thereof, between a regime and society. Sociological legitimacy is essentially a measure of the public acceptance of something. Thus, if a regime is dis-embedded and not domestically politicized, it tends to escape social control mechanisms, increasing the likelihood that it does something for which there is limited public acceptance—the more a regime is dis-embedded, the greater the risk of a low level of sociological legitimacy. On the other hand, the more domestically politicized a regime is (or an issue created by a regime), the higher the likelihood that it will be re-embedded if it is not already highly embedded. At the moment, the international investment regime is highly dis-embedded, low on sociological legitimacy, increasingly politicized domestically, and thus appears rather likely to become re-embedded. Put bluntly, society is increasingly realizing what is going on with the investment regime, doesn't like it, is starting to realize it can't control it the way it currently works, and would thus seem likely to change how it works so as be able to regain control of it. For a discussion under the heading of legitimacy of some of the same issues, see Thomas Schultz, 'Legitimacy Pragmatism in International Arbitration: A Framework for Analysis' in Jean Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration* (ICCA Series, Kluwer 2019) 25.

[29] Pepper D Culpepper, *Quiet Politics and Business Power* (CUP 2010).

[30] Thomas Schultz and Thomas D Grant, *Arbitration: A Very Short Introduction* (OUP 2021) 87–88;

[31] Lauge N Skovgaard Poulsen and Emma Aisbett, 'Diplomats Want Treaties: Diplomatic Agendas and Perks in the Investment Regime' (2016) 7 Journal of International Dispute Settlement 72; Lauge N Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP 2015)

[32] Marius R Busemeyer and Julian L Garritzmann, 'Loud, Noisy, or Quiet Politics? The Role of Public Opinion, Parties, and Interest Groups in Social Investment Reforms in Western Europe' in Julian L Garritzmann, Silja Häusermann, and Bruno Palier (eds), *The World Politics of Social Investment: Volume II: The Politics of Varying Social Investment Strategies* (OUP 2022) 59.

[33] Nicolás M Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules* (OUP 2021).

[34] Interview with investment arbitrator, 15 February 2024, anonymized.

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is immersed in and restricted by social relations, or the measure of how much economic actions and social relationships are intertwined.[35] For Karl Polanyi, who first theorized the notion, the worry was that a specific system, the economy, may take on a dynamic of its own and may not align with a society's preferences in institutions, policies, or values.[36]

This was thought not to be a problem for the international investment law system. It was assumed that the system was a good calculation for states: they would tie their hands with international investment law commitments (in classic rationalist thinking) because the envisioned advantages (showcasing their economic reliability to international businesses and other countries) exceeded the benefits that greater autonomy would have.[37] And it was assumed that this matched the 'collective intentionality' of society, as John Ruggie put it[38]: the desires for peace and prosperity from above. And it seemed fine too that arbitration would be used for it, with its near exclusive focus on the parties before it, as opposed to the courts' wider societal mandate. (Arbitration, in its 20th-century incarnation, is indeed a highly socially dis-embedded law-interpretation and law-application system, and arguably that is its whole point.[39]) It was assumed that states had appropriately represented the collective intentionality of its peoples; the focus in arbitration on *states*, as one of the parties, would thus be an appropriate proxy for society. If states did something fundamentally good for people by building the investment protection system, then misbehaviour of the states' governments could legitimately be thought to be a problem between the government and the investor alone—the parties to the arbitration. If the realm of reasoning is only populated by (i) the thought that the investment protection system pursues and provides peace and prosperity and (ii) the thought that international law is an unconditional positive, then indeed there seemed to be no cause for concern for *society*. The system, crucially at the arbitration stage, seemed appropriate to deal with it all. One could expect technical disputes or rogue governments, not the international bar becoming a new power elite pulling the strings of international politics. In short, dis-embeddedness seemed fine.

But things got awry. Investment arbitration overreached into axiological domains and national policy autonomy, and problems started.[40] There was a flaw in the system right from

[35] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon 2001 [1944]); Mark Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness' (1985) 91 American Journal of Sociology 481.

[36] Polanyi (n 35).

[37] Robert Axelrod and Robert O Keohane, 'Achieving Cooperation under Anarchy: Strategies and Institutions' (1985) 38 World Politics 226; Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton UP 1984); Stephen D Krasner, 'Global Communications and National Power: Life on the Pareto Frontier' (1991) 43 World Politics 336; Alexander Thompson and Daniel Verdier, 'Multilateralism, Bilateralism, and Regime Design' (2014) 58 International Studies Quarterly 15. From a rationalist perspective, it can be argued that the risk of domestic politicization of the international investment law system was a significantly underestimated cost, which likely would have swayed the cost-benefit analysis.

[38] John G Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52 International Organization 855.

[39] Simon Bezat, *The Concept of Authority in the Arbitral Paradigm: The Legal Philosophy of International Arbitration, its Crisis of Authority and the Hermeneutical Path Forward* (Helbing 2024); Simon Bezat and Thomas Schultz, 'Two Paradigms of Arbitration' in Federica Violi and Piotr Wilinski (eds), Special Issue *Justice in a Post-ISDS World, Journal of International Dispute Settlement*, forthcoming; Clément Bachmann, 'La légitimation de l'arbitage international' (PhD thesis, University of Geneva 2000); Charles Jarrosson, La notion d'arbitrage (L.G.D.J.2989) 103, 369; Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 27; Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer 2014) 2; Kun Fan, *Arbitration in China: A Legal and Cultural Analysis* (Hart 2013) 21; Emmanuel Gaillard, 'Representations of International Arbitration' (2010) 1 Journal of International Dispute Settlement 271; Michael Palmer and Simon Roberts, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (3rd edn, CUP 2020) 213. See also Thomas Schultz, 'The Three Pursuits of Dispute Settlement' (2011) 1 Czech (& Central European) Yearbook of Arbitration 227; Thomas Schultz and Clément Bachman, 'A Wig for Arbitrators: What Does It Add?', in Rita Trigo Trindade, Rashid Bahar and Giulia Neri-Castracane (eds), *Vers les sommets du droit, Liber Amicorum pour Henry Peter* (Schulthess 2019) 105; Thomas Schultz and Clément Bachmann, 'International Commercial Courts: Possible Problematic Social Externalities of a Dispute Resolution Product with Good Market Potential' in Stavros Brekoulakis and Georgios Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication* (CUP 2022) 52.

[40] *Vattenfall vs. Germany*, even though the case settled, illustrates the problem: following a referendum in Germany to phase out nuclear energy, Swedish nuclear-power supplier Vattenfall sued the government under the Energy Charter Treaty, which

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the start—the original neglect from above—and it only manifested itself when the system was used.[41] With arbitration claims, the system moved from potential law to real law, from an uncontroversial law in books to a controversial law in action.[42] And that meant, in quiet politics speak, a move from quiet politics, with expected dominance of interest groups, to *loud* politics, with expected dominance of public opinion.[43] This shift seemed to be happening. Investment treaties were being revised on this basis. Foreign investor protection was decreased and domestic policy space increased, reducing, on paper, the risk of overreach into axiological domains and national policy autonomy.[44]

But it appears that arbitration itself is so socially dis-embedded that public opinion was, in this case, without real effect: while the treaties have been changed, albeit slowly, the decisions based on them remain the same. The creature is deaf or not obeying revised instructions. Public opinion seems to be only able to change the law in books of investor protection, not its law in action,[45] which remains dis-embedded.[46]

had been signed and ratified almost 20 years earlier. This was widely considered an interference in Germany's national policy autonomy, and sparked domestic outrage: how could, the political sentiment went, three private individuals (the arbitrators) be given the power to increase the costs of the energy transition by one or several billion euros (4.7 billion had been claimed by the Claimant, 1.425 have been awarded through settlement), to be paid by taxpayers' money, when that transition was wanted by the people and had been decided by a democratically elected government? Based on open-textured promises made a generation earlier, in a different context? And to be paid into the hands of a foreign and rather far-away corporation? *Vattenfall AB and others v. Federal Republic of Germany (II)* (ICSID Case No. ARB/12/12).

[41] It is one thing for a government to promise, in an investment agreement, not to indirectly expropriate foreign investors; it is another to be found in breach of that investment agreement when, for instance, it bans a certain chemical substance which was found to be harmful for the environment or public health, and ordered to pay several hundred million or even several billions dollars in compensations. The former—the abstract promises in agreements—did not catch the attention of the general public. The latter—the concrete activation of the agreements and the orders to pay—did. The former were a potential problem of illegitimacy affecting an international institution. The latter are the concrete realization of it. Investment arbitration has brought the potential problem to bear on reality.

[42] The application of international investment law, in particular by arbitrators, causes political effects, triggering political reactions, which diminish the quiet politics not only around investment arbitration itself, but more generally the investment regime at large.

[43] Busemeyer and Garritzmann (n 32).

[44] Ryan Brutger and Anton Strezhnev, International Investment Disputes, Media Coverage, and Backlash Against International Law' (2022) 66 Journal of Conflict Resolution 983; Alexander Thompson, Tomer Broude, and Yoram Z Haftel 'Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design' (2019) 73 International Organization 859; Leopoldo Biffi, Thomas Schultz and Umut Yüksel, 'When Does ISDS Go Too Far? Arbitration Claim Sensitivity and Reduction of Foreign Investor Protection in International Investment Agreements', forthcoming (finding that the more investment arbitration is used, making the international investment law system bear on reality, the more foreign investment protection leaves quiet politics, becomes politically salient, and is reined back—on paper, in the treaties).

[45] Amicus curiae interventions have the potential to make the voice of society heard in investment arbitration. The *potential*. To assume that their participation in proceedings will necessarily have an impact on the outcomes would again be a confusion of law in books and law in action. As the entire current discussion seeks to suggest, changing the input cannot be assumed to necessarily change the output, and much less in predictable ways. This is the core feature of a regime or a procedure being a complex system [see Dupont, Schultz, and Yackee (n 20)]. Empirical studies on the procedural and/or substantive impact of amicus curiae interventions are, at the date of writing, extremely limited. They seem to conclude (as mentioned in the discussion reported in Lukas Brunner, 'Can Amicus Curiae Lead Investor-State Arbitration out of its Legitimacy Crisis and Towards More Efficient Dispute Resolution?' (*Kluwer Arbitration Blog*, 15 July 2022) that amicus curiae interventions are statistically associated with shorter procedures (do the amicus curiae interventions *cause* the shortening of the procedures? Unlikely. Does the shorter duration suggest that they *do not* lead to further argumentation and consideration, which would have translated into *longer* procedures, suggesting in turn that they change nothing in the procedure? Descriptive statistics are insufficient for any such conclusion.) or (see Abid Hussain Shah, Sheikh Muhammad Adnan, and Mohsin Raza, 'Role Of Amicus Curiae in Balancing Public Interest and Investor Rights in ICSID Arbitrations: An Empirical Analysis' (2024) 6 Journal of Law & Social Studies 197) that 'Amicus can have persuasive effect on tribunal, but depends on *how much they are close to tribunal views*, the social and specialized background of the Amicus Curiae and the kind of submissions' (do they only really have an 'effect' when they confirm what the tribunal thought all along? This would be an effect on *justifying* the award, not on deciding it, and thus again no output change. Again the data are insufficient.). On the whole, given that arbitrators are legally (by virtue of the arbitrator's contract, to some extent because of the principle of party autonomy), by virtue of 20th century tradition [Bezat (n 39)], rational choice theory (it is in their interest), and ideology [Thomas Schultz, 'The Ethos of Arbitration' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP 2020) 235] answerable to the parties only, one should probably be careful in positing a hypothetical in which amicus curiae briefs do have an impact on the outcome.

[46] Why this is so is a complex question which we seek to address elsewhere (the open-textured character of investment treaty provisions and the often strong ideologically stance or at least mindset of many investment arbitrators certainly have something to do with it: Dupont, Schultz, and Yackee (n 20).

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Unbalancedness, or when experts are siloed

In an influential book, Susan Strange argued that the right balance of values to keep a state or another community content is typically a combination of four elements: wealth, security, justice, and freedom to choose.[47] Strange would maintain that in any setting, these are the four goods that need to be provided in abundance—democracy and value pluralism, yes, but it is really about these four values in particular. Both individuals, real and fictional, with their respective approaches, would find fault with the international investment law system.

Strange tells a tale of her own to illuminate the problem: Three groups from lifeboats land on different parts of a deserted island and organize themselves in three different ways. The first group puts security first, building walls and all, gives some importance to wealth, and neglects justice and freedom to choose. The second group emphasizes justice and freedom, effectively creating a commune, leaving wealth and security to play a secondary role. The third group focuses on creating wealth, with market forces governing, puts freedom and security second, and relegates justice to the margins. The first form of organization is a realist model (and a nationalist approach), the second is an idealist model (and a socialist approach), the third is an economic model (and a liberal approach). For Strange, things become interesting when the groups encounter each other: each will try to bias the whole towards their own model and approach.[48]

The investment arbitration system was created by (certain kinds of) economists and (certain kinds of) international lawyers. The former valued prosperity, economic growth, FDI flows, and wealth (in particular the wealth of capital-exporting states, but not only); the latter valued peace, the reduction of international tensions, and security.[49] So long as the system was politically and socially dis-embedded, this prioritization of values was fine. But when the system encountered wider political spheres and society (it encountered other 'groups' in Strange's metaphor), it spotlighted its de-prioritization of justice and freedom; and this seemed intolerable. Justice in investment arbitration was only really felt by lawyers with paychecks in hand. And people's freedom to choose (through political sovereignty, policy space, regulatory autonomy, etc) seemed reduced to formal pacta sunt servanda—consenting to something makes it your problem, regardless of the historical machinations and the ideological coaxing that made you consent to it.[50] In effect, following the encounter with the investment arbitration system because of the end of quiet politics, political spheres and society are asking for a rebalancing of values, where greater weight would be given to justice and people's freedom to choose.

To use a classical legal distinction, the international investment law regime's *procedural* problem is its dis-embeddedness, its lack of responsiveness to public opinion and society, and its undemocratic character broadly speaking; its *substantive* problem is its unbalancedness, its lack of consideration for justice and freedom, and its near monism in the values it seeks to promote.

[47] Susan Strange, *States and Markets* (Pinter 1989).

[48] ibid 1–3.

[49] Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (OUP 2010) 59; Ursula Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes' (2018) 33 ICSID Review—Foreign Investment Law Journal 14, 14–28; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2015) 48–49, 74, 79; Muthucumaraswamy Sornarajah, The International Law on Foreign Investment (3rd ed, CUP 2010).

[50] Kate Miles, 'International Investment Law: Origins, Imperialism and Conceptualizing the Environment' (2010) 21 Colorado Journal of International Environmental Law and Policy 1; David Schneiderman, *Investment Law's Alibis: Colonialism, Imperialism, Debt and Development* (CUP 2022).

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LAW-IN-BOOKS CHANGES AND LAW-IN-ACTION CHANGES: THE PROBLEM OF AIR LAW

In an article considered iconic in certain circles, Pierre Schlag argues that much legal scholarship is 'air law': an emulation of 'air guitar'.[51] Air guitar is the behaviour of pretending to play a non-existent guitar, typically imitating rock stars. It produces, of course, no real sound. Air law, in Schlag's telling, is the behaviour of pretending to do law, when writing scholarship, by imitating in style the legal brief and the judicial opinion, arguably with the same results as the pretend guitarists, and the same feeling that while this may be entertaining (that is a matter of taste), the real things are happening elsewhere. Something similar seems to be happening in the international investment law regime, though not (only) with scholarship, but (also) with treaties: treaty reform seems to be the air law of the investment regime. Consider Fig. 1.

Studies indeed suggest that states renegotiate BITs after they are hit by investment arbitration claims based on these BITs,[52] and particularly so when the claims are sovereignty sensitive (they interfere with states' regulatory sovereignty) and even more so when they are axiologically sensitive (they interfere with societal value-based choices, such as the prioritization of environmental protection over economic growth).[53] In these cases, BITs are typically renegotiated to lower foreign investor protection and, correspondingly, increase policy space—which is achieved either by adding clauses favoring policy space[54] or by increasing the precision of standard clauses in the classical hope of constraining errant arbitrators/inciting arbitral restraint.[55] The result is that investor protection in the treaties has decreased overall.[56]

Treaty negotiators have thus redesigned the treaties to move towards political and social embeddedness.[57] Embeddedness of the *treaties*, not of the system. Embeddedness of the drafting of the text of legal instruments, not of the system in its effects, which become manifest in investment arbitrations. Indeed, a study by Tarald Laudal Berge finds no statistically significant difference between flexible and precise treaty language for a state's risk of being sued in investment arbitration.[58] If the treaty language is clarified and made more specific, it

[51] Pierre Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)' (2009) 97 Georgetown Law Journal 803.

[52] Lauge N Skovgaard Poulsen and Emma Aisbett, 'When the Claims Hit: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65 World Politics 273; Yoram Z Haftel and Alexander Thompson, 'When Do States Renegotiate Investment Agreements? The Impact of Arbitration' (2018) 13 Review of International Organizations 25; Thompson, Broude, and Haftel (n 44).

[53] Biffi, Schultz and Yüksel (n 44).

[54] Thompson, Broude, and Haftel (n 44).

[55] Mark S Manger and Clint Peinhardt, 'Learning and the Precision of International Investment Agreements' (2017) 43 International Interactions 920. We say 'classical' because it is a classical approach in trying to constrain errant judges: Pierre Schlag, 'The Aesthetics of American Law' (2002) 115 Harvard Law Review 1047, 1066 (speaking of 'restraint anxieties').

[56] Alschner disagrees. He argues that 'the evolution of [investment treaties] cannot be equated with a gradual lowering of investment protection. American-style IIAs instead strive for an optimal balance between commitments and flexibility. … The evolution toward greater contractual completeness in [the treaties] is thus about neither under- nor overprotecting investors, but about getting investment protection just right': Alschner (n 17) 13. Our conclusion [in Biffi, Schultz and Yüksel (n 44)] that investor protection has decreased is based on a computational analysis of a composite index of 63 factors expressing different aspects of substantive investor protection. The data we use are taken from Alschner, Elsig, and Polanco's EDIT database (Wolfgang Alschner, Manfred Elsig and Rodrigo Polanco, 'Introducing the Electronic Database of Investment Treaties (EDIT): The Genesis of a New Database and Its Use' (2021) 20 World Trade Review 73. Doubts may also be had about what exactly Alschner was after, as he seems to confound descriptive empirical points ('gradual lowering') with normative-evaluative points ('optimal balance', under-/over-protecting investors, 'just right').

[57] A typical example is CETA, which owes its still provisional implementation in the EU to the fact that several Member States are still politically reticent to back its investment-protection chapter: de Ville and Siles-Brügge (n 8); Guillaume van der Loo, 'CETA's Signature: 38 Statements, a Joint Interpretative Instrument and an Uncertain Future', CEPS Commentary, 31 October 2016, 1–6.

[58] Tarald Laudal Berge, 'Dispute by Design? Legalization, Backlash, and the Drafting of Investment Agreements' (2020) 64 International Studies Quarterly 919, 925 ('Flexibility and precision levels in IIAs are not associated with the risk of ISDS').

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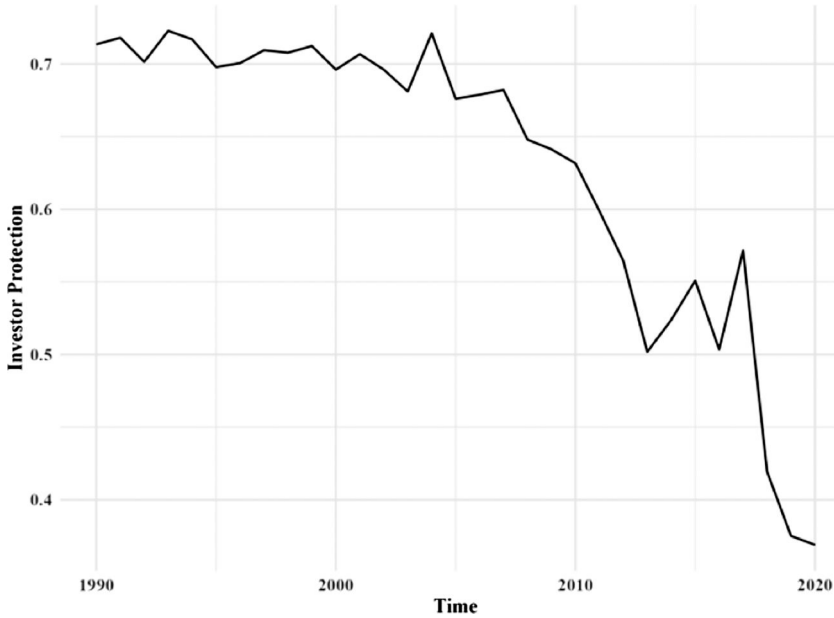

Figure 1. Average investor protection over time (1990–2020).
Source: *Biffi, Schultz, Yüksel, forthcoming*

changes nothing (statistically) about the reality of arbitration claims, for when the regime 'attacks'. 'Errant investors', who push the regime beyond what it is meant to do, are not constrained by precision in treaty language.

Errant arbitrators have been difficult to constrain.[59] General public policy exceptions have been introduced in the treaties, which on paper increase policy space and decrease foreign investor protection, but the exceptions have gone 'missing in action', Wolfgang Alschner and Kun Hui show.[60] Increases in policy space are missing in the law in action.[61] Treaties 'with general public policy exceptions have been interpreted and litigated just like [treaties] that lacked such clauses.'[62] The overall result, Alschner explains, is that 'the regime has … been progressively entrenching rather than gradually resolving existing deficiencies'[63] (where 'resolving deficiencies', evaluative words, really means descriptively responding as expected to interventions in the system). He explains the legal argumentative strategies to get there (or rather, in this case, to *stay* there) are variegated.[64] And perhaps they are just that—strategies.[65] In any event, arbitrators 'have created a "firewall" against interpretive change, rolled

[59] We are not engaging in arbitrator bashing here. Arbitrator bashing assumes they do something wrong. But arbitral (and judicial) activism is sometimes wrong and sometimes right (even essential). Separation of powers is not for nothing.

[60] Wolfgang Alschner and Kun Hui, 'Missing in Action: General Public Policy Exceptions in Investment Treaties' (2018) Yearbook on International Investment Law and Policy 363.

[61] Federico Ortino, 'The Public Interest as Part of Legitimate Expectations in Investment Arbitration: Missing in action?' in Charles Brower and others (eds), *By Peaceful Means: International Adjudication and Arbitration: Essays in Honour of David D. Caron* (OUP 2023).

[62] Alschner, *Investment Arbitration and State-Driven Reform*, op. cit., 7.

[63] Ibid, 8.

[64] Ibid, 7.

[65] Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29 *European Journal of International Law* 551, 566: 'the disadvantage of a doctrinal lens is that one may be track- ing unwittingly a subterfuge of verbiage; arbitrators may simply craft and tweak their foregrounded discourse without visiting any material consequences upon the actual decision-making'.

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back innovation in new-generation IIAs, and reasserted their gap-filling authority by reading new treaties like old ones',[66] with the result that 'reading new treaties like old ones has emerged as a systemic challenge.'[67] This is not new, he insists; errant arbitrators have proven difficult to constrain before: 'Past efforts by states to regain the interpretive reins, for example, through authoritative interpretations have largely failed.'[68] To the point that this entire situation has turned into a 'struggle to control the ISDS machinery.'[69]

So, if people could write in 2010 that the investment regime was 'in listening mode and ready to adapt',[70] this seems to have been true for investment law in books but not for investment law in action. Treaty changes (interventions in the system) seem to have affected neither when the system actually attacks nor when it strikes. Treaty renegotiations appear to be air law.[71]

An important study begs to differ. It argues that 'arbitrators are conditionally reflexive–sensitive to both negative and positive signals from states, especially influential, developed and vocal states'.[72] But the study has a methodological issue. Its analysis is based on success rates of investment arbitrations: the fact that win rates for investors have been decreasing over time, it is argued, shows changing arbitrator attitudes in response to 'the storm outside'.[73] The methodological problem is that if the merit of the claims is constant, it may indeed mean that arbitrators have changed their decision-making criteria, but if instead arbitrators decision-making criteria are constant, then the changing win rates are explained by a decrease in the merit of the claims. The latter hypothesis would align with Krzysztof Pelc's finding that the merit of claims has decreased overall.[74]

Investment *arbitration* arguably shows similar discrepancies between the law in books and the law in action. Despite significant work at UNCITRAL to reform investment arbitration, it 'remains fundamentally the same, at least if one focuses on [its] practice', Federico Ortino finds, in a review of its 'transformations' over the last 25 years.[75] This is due in part, he argues, to the fact that 'arbitral practice has taken a life of its own', as 'investment treaty tribunals and the arbitral community around them might have felt emboldened and legitimized in defending the key features of the system as they have developed over the last twenty-five years', which makes them '"quiet supporters" [of] the system as it currently operates'.[76] He seems to say between the lines that these are people who care about what they have built and want to preserve it—as people do. They are people who have developed a certain mindset about it all, shared through unspoken agreements.

[66] Alschner, *Investment Arbitration and State-Driven Reform*, op. cit., 14-5.

[67] Ibid, 8.

[68] Ibid, 9.

[69] Ibid, 9.

[70] Michael Waibel et al. (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010), xxxix.

[71] An interesting counter-argument would be to point to the inconsistency of investment arbitration awards: how can one claim, the argument would go, that international investment law as determined in the awards is not changing in the face of the inconsistency of the decisions? (Or indeed that it *is* changing.) Dealing with that argument requires thinking in degrees: legal systems exhibit consistency (and thus predictability) in degrees, but never to perfection; every legal system exhibits some inconsistency (see discussion in Matthew Kramer, *Objectivity and the Rule of Law*, CUP 2009, Thomas Schultz, *Transnational Legality*, OUP 2014; Schultz (n 22) 297). This doesn't prevent legal systems from 'saying something', from overall expressing and enforcing norms, and thus values. Bluntly put, the 'average' of investment awards, regardless of their statistical distribution (which would be flat in a system with high levels of inconsistency), has not been noticeably shifting, despite changes in the average normative contents of the treaties that they apply.

[72] Langford and Behn, 'Managing Backlash', op. cit.

[73] ibid 554.

[74] Krzysztof J Pelc, 'What Explains the Low Success Rate of Investor-State Disputes?' (2017) 71 *International Organization* 559.

[75] Ortino, 'ISDS and Its Transformations', op. cit., 177.

[76] Ibid, 187.

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If these findings—the difference between treaties and other texts and the regime's outputs, the dissimilarity between law in book changes and law in action—seem surprising, it may be because of the legal ideology that has been dominating us: legal formalism, in the simplistic, non-philosophical sense that the judge and the arbitrator apply law to fact to come to a result, following logical, syllogistic reasoning, where the law has a direct, exclusive, mechanical, cause-and-effect relationship with the decision. An ideology in Slavoj Žižek's sense, a way of thinking and reading the world that we are not even aware of, a false idea presented as non-ideological, true and right, something anyone sensible would believe.[77] If we lawyers believe that changing a treaty applied by an arbitrator will logically entail a change in the decision she makes, we are within that ideology and read the system as a mechanical one. And it is slightly bizarre: psychologists, sociologists, anthropologists, political scientists, etc, would not be surprised by a situation where behaviour is little or not influenced by a change in rules. The solutions reviewed by Alschner to turn the law-in-books changes into law-in-action changes are telling: 'fix dispute settlement once and for all by rewriting the terms of delegation between contracting states and adjudicators in international investment law'[78]; 'multilateral negotiations at UNCITRAL'[79]; insisting on changing uses of MFN treatment, customary international law, and precedent[80]; changing the proportion of old and new investment treaties.[81] It brings to mind Pierre Schlag, when he wrote of 'the temptation for academics … to think that if one can only be more careful, rigorous or sophisticated in providing definitions, specifications, stipulations or theorizations … then the … problem can be avoided.'[82] Will more and better treaty reform and law-in-action changes be enough? More of the same that has not been effective so far? Or should one be attentive to, for instance, the 'silent agreement between participants in a conversation',[83] as Gadamer would put it when discussing core aspects of interpretation, of turning law in books into law in action, here the conversation between the core actors of the system?

CONCLUSION

The journey of international investment law, and investment arbitration as its key device, has moved from a situation of quiet politics, with support and praise by legal and economic establishments, to one of loud politics, with critical voices from civil society and many governments.[84] This trajectory of increasing disenchantment reflects a system that was initially too socially and politically dis-embedded, and unbalanced, prioritizing prosperity and security at the expense of justice and freedom to choose. Whereas efforts to re-adjust the system have gained momentum, their effects remain wanting, much to the dismay of change advocates and researchers.

The surprise with system inertia stems from the understanding of international investment law, and of many other legal phenomena, to be a complicated, mechanical system: the results of efforts to change it are quite clearly predictable and controllable, and its dynamics

[77] Slavoj Žižek, *Sublime Object of Ideology* (Verso 2009 [1989]).

[78] Alschner (n 17) 9.

[79] ibid.

[80] ibid ch 4, 5, 6.

[81] ibid 10: 'it is ultimately the regime's substantive bifurcation into reformed treaties sitting alongside unreformed ones that stifles change and that needs fixing.'

[82] Pierre Schlag, 'The Dedifferentiation Problem' (2009) 42 Continental Philosophy Review 35, 37. Schlag had a different topic in mind, but the legal academic's reflex he describes apply here too.

[83] Hans-Georg Gadamer 'Language and Understanding (1970)' (2007) 23 Theory, Culture & Society 13.

[84] For a useful matrix to finetune this, see Fabio Costa Morosini & Ely Caetano Xavier Junior, 'A New Analytical Matrix for Understanding International Investment Law in the Global South' (2025) 16 Journal of International Dispute Settlement *forthcoming*.

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of change calculable. Just as in Newtonian physics, the results of the exercise of a force on the system are foreseeable, and can be anticipated if one is only thorough enough, rigorous enough, and precise enough. This article highlights that a different dynamic has been at work, which leaves much more space for the unexpected or unknowns, as is the case in complex systems. Why does changing many bilateral treaties to provide more policy space lead to no real change in the system? Why do widespread social demonstrations against ISDS result in no significant alterations to the system? Because there are forces within the system that can counteract those pressures for change, predictably or unpredictably so. Some differences end up making a difference, some don't.

This is at odds with lawyers' tendency to focus on the specifics and to think that what they see is what is and should be. But what about what they do not see or consider? For instance, in the situation of treaty interpretation, apart from changes in the treaty, sources of change in law in action include the mindset of arbitrators (individual and collective). How have these been affected by, and reacted to, interventions to change the system? Long-term arbitrator bashing may have changed that balance too, by moving out of the field people who are sensitive to bashing, and who care about doing the right thing. If arbitrator bashing was an intervention in the system meant to increase regulatory space for states, it may have achieved the opposite result. To make sense of such complexity, we must adopt a holistic view of international investment law, and investment arbitration, including the full range of interdependences between actors and actions.[85] To see the system that way may, perhaps, allow us as a society to better determine what we want from it and how we might make it do what we want.

Conflicts of interest: None declared.

[85] This is the approach that we adopt in our forthcoming book on investment arbitration, using a range of systems-thinking tools to explore systems dynamics.

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