A Quest for a 'TWAIL' Approach in International Investment Arbitrations: An Appraisal of Tethyan v. Pakistan

Jason Beckett*

Abstract

International Investment Arbitration is an institution of growing importance to global economic governance. Twenty years ago, its Tribunal awards were measured in the tens of millions USD, today they can reach tens of billions – enough to push under-developed states into financial crisis. This study contends that the growth in awards, and the reasoning used to justify the awards, manifest a structural bias in favour of investors. To illustrate this bias in practice, the present work focuses closely on a single arbitral award, offering a granular analysis of its reasoning. Thus, it explores in what ways, and to what extent, did the Tribunal in *Tethyan* transform the law regarding investors' legitimate expectations, and states' correlative duties? In doing so it uncovers the subjectivity and politics of this supposedly objective decision. To demonstrate this, this study highlights the ways in which the Tribunal in *Tethyan* v. *Pakistan* invented facts, imposed duties that it had previously ruled not to exist, and manipulated novel obligations to produce the grounds it needed to establish that the "readily ascertainable" value of a $ 219 million investment amounted to $ 4.1 billion ($ 5.9 billion including interest accrued).

Keywords: Investment Arbitration, TWAIL, Critical Legal Theory, Poverty, Development, Adjudication

* The author is an Associate Professor of Law at the Department of Law, American University in Cairo, Email: jasonbeckett@aucegypt.edu.

1. Introduction

The case, *Tethyan* v. *Pakistan*,[1] a classic example of the bias of neo-liberal economic policies, is discussed in the present work. It concerned the expropriation of a mining project by the government of Pakistan. This expropriation was held to be unlawful, and damages were awarded. Tethyan invested $ 219 million in the project. The Tribunal ordered Pakistan to pay them $ 5.9 billion in compensation. The disparity between investment and return is startling: a $ 5.7 billion profit; a 2600% return over thirteen years! Examining the reasoning employed to justify this astonishing return, the author found it to be technically sloppy and formally unpersuasive. It was structured by an ideology favourable to investors' interests; a subconscious bias.

It is argued that this award is unreasonable, even punitive. It is based on a logic that traps under-developed states, locking them into the neoliberal structures and imbalances of the contemporary global economy. International Investment Arbitration does not take place in a vacuum, let alone a heaven of legal concepts; rather, it is part of a wider system of contemporary neocolonial global governance. The critique presented in this study is in the context of the role it plays there. This analysis is inspired by Third World Approaches to International Law (TWAIL) insights, and the TWAIL quest for a just global economic order.

The underdeveloped world is ruled by a neocolonial legal system, which the author has previously conceptualised as the "Global Legal Order" (GLO).[2] This system is characterized by its commitment to neoliberal

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[1] Tethyan Copper Company PTY Limited (Claimant) and Islamic Republic of Pakistan (Respondent), ICSID Case No. ARB/12/1 (International Centre for the Settlement of Investment Disputes 2019), para 1735, https://www.italaw.com/sites/default/files/case-documents/italaw10737.pdf.

[2] Jason Beckett, 'The Divisible College: A Day in the Lives of Public International Law', *German Law Journal* 23, no. 9 (December 2022): 1159–92,

economic policy and its capacity to enforce its commands coercively. It is comprised of four interlocking institutions: the IMF; the World Bank; the WTO; and the system of International Investment Arbitration. There is more to neocolonial governance than the GLO, which co-exists, and interacts, with other aspects of "material" Public International Law (PIL).[3] Nonetheless, the GLO functions as an autonomous legal system, with all its structural biases toward neoliberal economic and social policies.[4] It needs to be critically analyzed to progress towards a just legal and economic system worldwide. This study, therefore, will set out a granular analysis of one of its component parts – International Investment Arbitration. International Investment Arbitration is a key and rapidly evolving element of the modern world's Law & Economics scheme, especially as the WTO dispute settlement system is currently paralysed by the USA's refusal to approve the nomination of Appellate Body members.[5]

Given its increasing importance, it is vital to examine the practices, politics, and biases of investment arbitration. In the present paper, the focus is on the case of *Tethyan Copper Company* v. *The Islamic Republic of Pakistan.* This concerned the indirect expropriation of a gold and copper mining project in Balochistan, Pakistan.[6]

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doi:10.1017/glj.2022.79; Aya Kamil, 'Debunking the Neoliberal Globalization Success-Story', *LSE Undergraduate Political Review*, 18 February 2021, https://blogs.lse.ac.uk/lseupr/2021/02/18/debunking-the-neoliberal-globalization-success-story/; Ian Bruff and Cemal Burak Tansel, eds., *Authoritarian Neoliberalism: Philosophies, Practices, Contestations* - (London: Routledge, 2021).

[3] Geoff Gordon, "Contradiction & the Court: Heterodox Analysis of Economic Coercion in International Law", *Temple International and Comparative Law Journal* 34, no. 2 (2021) 283.

[4] Beckett, "The Divisible College".

[5] Matteo Fiorini, et al, "WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences." Available at: WTO dispute settlement and the Appellate Body crisis | VOX, CEPR Policy Portal (voxeu.org).

[6] On the distinction between direct and indirect expropriation, see Christoph Schreuer, "The Concept of Expropriation under the ECT and other Investment Protection Treaties" in *Investment Arbitration and the Energy Charter Treaty* (C. Ribeiro ed., 2006) 108.

It is impossible to build a pattern from a single case, but equally it is impossible to do justice to the analysis of individual cases within a complex pattern. In this paper the author presupposes the pattern without a claim that the bias of this single decision demonstrates the bias of International Investment Arbitration as a whole. In fact, through this case the hypothesis of neocolonial, neoliberal, governance can be genuinely exhibited. The Tethyan case offers a particularly clear articulation of International Investment Arbitration's biases, but it is not an aberrant decision. Rather it is its very mundanity that marks it out as important:

> Billion-dollar-plus awards, unknown in investors – State arbitration before late 2012, have become less unusual in the last five years, and even with all the excessive saltiness added to the soup of their likely success, billion-dollar disputes are now completely routine.[7]

International Investment Arbitrations are typically decided by three-member Tribunals appointed by the parties (each party nominates one arbitrator, and those two agree on a third arbitrator to chair the Tribunal). Decisions are taken by majority vote, and dissenting opinions are allowed. *Tethyan* took place under the International Centre for the Settlement of Investment Disputes (ICSID) institutional structure, which is the most commonly used. The Tribunal decided it unanimously in favour of the investor. This is not atypical. As others have demonstrated, International Investment Arbitration Tribunal decisions heavily favour foreign investors and offer little acknowledgement of the regulatory and social needs of host states.[8] This delimits the economic options available to under-developed

[7] Martins Paparinskis, "Crippling Compensation in the International Law Commission and Investor–State Arbitration," *ICSID Review - Foreign Investment Law Journal* 37, no. 1& 2 (2021) 2-3.

[8] For an expert, but accessible, overview see Toni Marzal "Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS," *Journal of World Investment & Trade* 22, no. 2 (2021): 249–312. See also John Linarelli et al., *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford University Press 2018), 145-174; Mafruza Sultana, "The Fair and Equitable Treatment

states, and adds further restrictions to the policy-space open to them. International Investment Arbitration,

> … intrudes into an internal process and externalizes it by demanding conformity with imposed standards of treatment, ensuring that the state has to sublimate its essential national interests to the protection of the foreign investment or face the heavy cost of arbitration and the possibility of an even heavier burden by way of an award for damages against it.[9]

International Investment Arbitration is also taking over judicial functions previously held by the WTO, which has been gradually sidelined by over-developed states. This is a strategic response to a power struggle as,

> … developing countries have gained negotiating power in the WTO, 'and cannot so easily be pressured, marginalized or ignored by richer members' … the US and the EU have come to see PTAs [Preferential Trade Agreements] as superior tools for the pursuit of their commercial interests.[10]

These PTAs complement and extend a network of Bilateral Investment Treaties (BITs). Both PTAs and BITs contain arbitration clauses which remove jurisdiction from the domestic courts and grant it to the institutions of International Investment Arbitration instead. This allows corporations from one state to have their foreign investments in another protected at the international level. International Investment Arbitration is justified as superseding corrupt, inept, or inefficient local judiciaries, as it has been since colonial times.[11]

(FET) Standard in International Investment Arbitration: Developing Countries in Context by Rumana ISLAM. Singapore: Springer, 2018," *Asian Journal of International Law*, Book Review 10, no. 2 (July 2020): 414–15, doi:10.1017/S2044251320000119; Muthucumaraswamy Sornarajah, Resistance and Change in the International Law on Foreign Investment, (Cambridge: Cambridge University Press, 2015).

[9] Linarelli et al., *Misery*, 5

[10] Silke Trommer "The WTO in an Era of Preferential Trade Agreements: Thick and Thin Institutions in Global Trade Governance" *World Trade Review* (2017) 501, 502.

[11] Kate Miles, *The Origins of International Investment Law.*

The institutions of International Investment Arbitration display an inordinate bias in favour of investors, and against the interests of host states. Its internal logic is pro-investor because "a powerful group of multinational corporations, large law firms, and a select group of arbitrators" have implemented "rules developed in arbitral awards to create an inflexible system of investment protection to the detriment of developing states."[12] This serves a disciplinary and deterrent end, reminding under-developed states of their place in the global pecking order, and structurally reinforcing this by subjugating their interests to those of foreign investors. In fact, "International Investment Arbitration today operates essentially as a vehicle of neo-imperial governance",[13] where "investor-state arbitration reflects [the] colonial … outlook of the developed countries, with the abuse of natural resources of developing countries at its focal point."[14]

Arbitral awards must be taken seriously, as they can be executed against state assets anywhere in the world. And under the New York Convention,[15] domestic courts globally are obligated to enforce these awards. In the Tethyan case, the award was also enforceable under the

[12] Linarelli et al., *Misery*, 148.

[13] Akbar Rasulov, "The Empty Circularity of the Indirect Expropriations Doctrine: What International Investment Law Can Learn from American Legal Realism." Jurisprudence & Legal Philosophy eJournal (2015): 21, available at https://ssrn.com/abstract=2618621. A slightly modified version of this work is also available in Akbar Rasulov, 'The Empty Circularity of Regulatory Takings: The Legacy of a Legal Realist Critique for a 21st-Century Context', in *Research Handbook on Political Economy and Law*, ed. Ugo Mattei and John D. Haskell (UK: Edward Elgar Publishing Limited, 2015), 371–99, https://www.elgaronline.com/edcollchap/edcoll/9781781005347/9781781005347.00033.xml.

[14] Syeda Eimaan Gardezi and Faqiha Amjad, 'A TWAIL Perspective on the Challenges Associated with Upgrading International Arbitration in Developing Countries like Pakistan | SAHSOL', 106-117, accessed 28 September 2024, https://sahsol.lums.edu.pk/node/17096.

[15] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Available at: Texts The New York Convention » New York Convention.

ICSID Convention.[16] The case was determined by the Tribunal's interpretation of the BIT between Australia and Pakistan,[17] specifically its provisions on fair and equitable treatment and legitimate expectations.

There are almost 3000 BITs in effect today.[18] Most include Fair and Equitable Treatment (FET) clauses, which were rejected in earlier multilateral conventions.[19] In effect, "the major capital exporting countries have used BITs as a means of achieving their expectations, which were difficult to achieve at the multilateral level."[20] The texts of most BITs are relatively benign, but their interpretation and application by tribunals is not. The arbitral tribunals' decisions consistently favour investors over host-states.[21] In their implementation, BITs become analogous to the "unequal treaties" of the colonial era. Arbitral awards make manifest contemporary "regimes of economic exploitation",[22] just as they clearly reflect historical antecedents. When analysing such inequalities, Matthew Craven has put it rightly as follows:

> … agreements to promote free trade or the protection of foreign investments, the parallels with 19th Century extraterritorial regimes predicated upon maintaining the 'open door', [and] insulating traders and investors from the arbitrary excesses of local law … appear all too obvious.[23]

[16] Convention on The Settlement of Investment Disputes Between States and Nationals of Other States (1966). Available at: CRR_English_CRA.qxd (worldbank.org).

[17] 'Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments' (1998).

[18] Rumana Islam, *The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration Developing Countries in Context* (Singapore Springer Singapore, 2018), 2.

[19] Ibid., 35; See also Christoph Schreuer "Fair and Equitable Treatment in Arbitral Practice" *The Journal of World Investment and Trade* (2005) 357-8.

[20] Islam, "FET", 2.

[21] Sornarajah, *Resistance*.

[22] Matthew Craven "What Happened to Unequal Treaties? The Continuities of Informal Empire," *Nordic Journal of International Law* 74, no. 3-4 (2005): 335-382.

[23] Ibid., 382.

These 19th Century regimes, "unequal treaties", were negotiated under force of arms or threat thereof, a form of legalised extortion. As the name suggests they benefitted one party at the expense of the other, the treaties ending the Opium Wars offer striking examples of inequality.[24] This colonial system of governance-through-violence was used to force open markets to Imperial capital, industry, and merchants: to Imperial plunder. Today the coercive force used is economic rather than military, but "the latent conditions for the persistence of unequal treaties remain intact". These enable "the continuance of colonial models of power and authority."[25] Under-developed states are governed through their debt, and dependence on foreign investment. This neocolonial governance-through-debt is used to force open markets to Imperial capital, industry, and merchants: to neocolonial plunder.[26]

As this study will demonstrate, the neoliberal bias of the awards – and the expanding scope of FET protections[27] – has exposed "the unbalanced foundations of investment regulation that overprotect investors at the expense of the home state's regulatory space."[28] While this has already been generally shown by Sornarajah,[29] and by Linarelli et al.[30] The contribution of the present work is to offer a more granular analysis of a single decision as an illustration of how this system functions in practice. It endorses Sornarajah and Linarelli's claims and analyses, but acknowledges

[24] Jason Beckett, "Harry Potter and the Gluttonous Machine: Reflections on International Law, Poverty, and the Secret Success of Failure," *Trade, Law, and Development* XIII, no. 2 (2021): 317.

[25] Craven, "Unequal Treaties", 381.

[26] The author examines some of this plunder in "Harry Potter", and "The Divisible College".

[27] See Scheuer, Fair and Equitable, 364-7.

[28] Fabio Morosini and Michelle Badin (eds), 'Introduction' in *Reconceptualizing International Investment Law from the Global South*, (Cambridge: Cambridge University Press, 2017) 2.

[29] Sornarajah, *Resistance*.

[30] Linarelli et al., *Misery*.

that they are sweeping. This work, therefore, will offer a detailed analysis of a single Award to add substantive meat to their analytic bones; to illustrate the plausibility of their arguments as they play out in arbitration. This analysis takes place in the context of the increasing value of arbitral awards:

> In the early 2000s, awards of compensation in the tens of millions of USD were considered large. These sums seem quaint in retrospect. Today, the largest award of compensation in investment treaty arbitration is the USD 40 billion awarded in Hulley v. Russia. This was the largest of several related claims arising out of the nationalization of Yukos, in which a total of USD 50 billion was awarded. There are now 50 known cases in which a tribunal has awarded compensation in excess of USD 100 million.[31]

One such award is the *Tethyan* case. There, the Tribunal awarded compensation of $ 5.9 Billion (including interest accrued at the date of the award) for the indirect expropriation of an investment of just $ 219 million. I want to explain how this happened, and show the structural biases at play in such decisions.

2. Tethyan Copper v. Pakistan

It has been claimed, "the starting point is that investment law is a field of public international law, and the same generalist rules and assumptions on sources and dispute settlement law apply as they would in any other field of international law."[32] However, the *Tethyan Copper v. Pakistan* Award is illustrative of particular biases specific to International Investment Arbitration. It is important to remember that International Investment Arbitration is not merely an academic discourse, it is an institutional

[31] Jonathan Bonnitcha and Sarah Brewin, 'IISD Best Practices Series: Compensation Under Investment Treaties' (IISD), 1, accessed 8 May 2024, https://www.iisd.org/publications/guide/iisd-best-practices-series-compensation-under-investment-treaties.

[32] Paparinskis, "Crippling Compensation", 3.

practice. It is an object of analysis, a thing which can be empirically described. Thus, it is not enough to speculate on what International Investment Arbitration should be, we must also interrogate what it currently is, and why it is that way. The Tethyan award offers a particularly clear illustration of the biases of International Investment Arbitration.

The Tethyan Copper Company, part of an Australian corporation, sought to open a copper and gold mine in Balochistan, Pakistan. They negotiated with the Government of Pakistan (GOP), and were awarded an Exploration License. Once in possession of the license, Tethyan invested in geological and metallurgical surveys of the site, economic extrapolation of the results, and plans for the mine. There was a "total of USD 219 million that Claimant actually spent on its further exploration work".[33] The surveys showed that the site had vast potential reserves of both copper and gold, and these were commercially extractable.

Tethyan entered negotiations to convert their exploration license into a mining lease. In accordance with Pakistani law, these negotiations took place between Tethyan and the regional Government of Balochistan (GOB). The negotiations did not go well, and Tethyan was refused the mining lease. The mining lease application was rejected on 21 September 2011 with the formal reasons for rejection listed.[34] Tethyan objected to the validity of these reasons, and took the matter to arbitration under the prevailing Australia-Pakistan BIT.

The arbitration took place in two stages: first a decision on jurisdiction and liability, then a separate award of damages. The first Tribunal established jurisdiction over the case, and held Pakistan liable for indirect expropriation in breach of legitimate expectations. The study at

[33] Tethyan Quantum, 1735.
[34] Ibid., 141.

hand does not offer a critique of these awards. Instead, it has picked up the story at the second, so-called Quantum of Damages, award. This is the space in which liability is transformed from an abstract concept to a concrete cost – the quantum of liability is "established". It is a space of expertise, where law defers to economics, and "facts" (such as fair market value) are objectively assessed. At least such is the mythology.[35]

In the Quantum Phase, the Tribunal affirmed that it had jurisdiction over the case as the "Claimant had an "investment" within the meaning of Article 1(1)(a) of the Treaty".[36] It also affirmed that this investment had been indirectly expropriated by the GOB.[37] Consequently, the GOP was liable to compensate for the harm Tethyan had suffered. The Tribunal also revisited the question of liability, declining to formally consider potential alternative reasons for refusal, which Pakistan had sought to adduce in arbitration. This return to the question of liability facilitated the Tribunal's determination of the *extent* of Pakistan's liability. This established the scope of Tethyan's legitimate expectation, which was delimited implicitly and widely. Delimiting the extent of liability is integral to establishing the value of an award. The Tribunal held that the harm Tethyan had suffered could be quantified – under either customary international law or art. 7 of the BIT – as the "readily ascertainable" "fair market value" of their investment, "but-for" Pakistan's unlawful acts.[38]

Having outlined the structure, the study will put forward a critical analysis of the reasoning supporting the Tribunal's judgment. This is designed to expose the ideological core of the Tribunal's decision. First, the author will look at the Tribunal's reasoning in rejecting Pakistan's newly

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[35] Marzal, "Quantum Injustice".
[36] Tethyan Quantum, 134.
[37] Ibid., 156.
[38] Ibid., 281.

raised concerns, and how their belief that the GOB going it alone with the mining venture was somehow *ultra vires* influences their judgement. The paper then exposes the implicit logic driving the Tribunal's construction of Tethyan's legitimate expectation. Then it would be demonstrated how this was unnecessarily, and perhaps unlawfully, expansively delimited.

2.1 Liability Reaffirmed and Delimited

Although liability was established in earlier proceedings, the Tribunal returned to the issue to clarify the extent of Pakistan's liability. That meant they had to establish the scope of Tethyan's legitimate expectation, they did so, using an economic, rather than a legal, approach. Three questions arose for the Tribunal:

1. The delimitation of the extent of the GOB's *duty* to award the lease;
2. To what extent they had breached this duty;
3. And, the consequent scope of liability (how the investment should be valued.)

There was a further complication, as Tethyan were required to negotiate *both* a Mining Lease *and* a Mineral Agreement with the GOB. These two sets of negotiations had been conducted in parallel. However, the negotiations over the Mining Lease were unsuccessful, and no settlement was ever reached over the terms of the mineral agreement, "the Tribunal notes that the applicable tax and royalty rates were still subject to the Mineral Agreement negotiations. While such negotiations had apparently stalled".[39] The Mineral Agreement negotiations were discontinued after the lease was denied.[40]

[39] Ibid., 148.
[40] Ibid.

Tethyan challenged the rationality and legality of the reasons given for the denial of the mining lease. They alleged that the GOP had breached the Fair and Equitable Treatment (FET) provisions of the treaty, in particular breaching Tethyan's "legitimate expectation" that the exploration license would be converted into a mining lease.[41] Pakistan defended the reasons given, and adduced alternative justifications during the proceedings; these were rejected on a mixture of procedural and substantive grounds. Pakistan was held to have expropriated the investment, and focus turned to the effects, if any, of the purported illegality of this expropriation.

Tethyan argued that compensation for unlawful expropriation should be established according to customary international law standard of fair market value. Pakistan countered that, if they had breached their obligations, the case amounted to an indirect expropriation, and damages should be awarded according to the provisions on expropriation in article 7 of the BIT. These potentially allowed for a more discretionary approach to valuation, balancing the interests of the parties. There were two intertwined disputes at stake in the arbitration:

1. The scope of Tethyan's legitimate expectation (did it include an expectation of a Mineral Agreement?)
2. The value of Tethyan's investment (which depended on the scope of the legitimate expectation and the choice of valuation method)

Tethyan's legitimate expectation was a derivative of its protection under the FET provisions of the treaty. Schreuer concedes that the "standard of fair and equitable treatment is relatively imprecise", but argues "this lack of precision may be a virtue rather than a shortcoming".[42] He reasons that the "principle of fair and equitable treatment allows for independent and

[41] Ibid., 153.
[42] Islam, "FET", 364-5.

objective third-party determination".[43] The author's aim in this paper is to show that the so-called "independence and objectivity" of the Tribunal is an inaccurate representation of the process. Tribunal awards are ideologically determined, and appear objective only to those who share that ideology. The arbiters demonstrate their external sympathies, which in fact determine the ruling.

2.2 The Legitimate Expectation

As Marzal emphasises, the 'legal' concept of legitimate expectations is quite distinct from the 'economic' concept of fair market value.[44] Indeed, the latter is determined by the former. But the Tribunal rarely attends explicitly to the legal concept it is constructing. Rather it determines the scope of the expectation implicitly, as part of constructing fair market value. This treats the expectation as a fact whose content can be determined by economic analysis, rather than a legal construct, with a legal definition and a legal delimitation. The Tribunal have, in effect, transformed the *legal definition* of legitimate expectations, moving from a focus on formal legal obligation to an emphasis on rational economic behaviour, a duty on under-developed states to behave as economically rational actors constrained by the current, unchallengeable, economic order. They have done so without analysis.

The arbiters' faith in economics is misguided, they are ultimately dealing with a question of law. Put simply, "tribunals are wrong to interpret the law in relation to calculation of compensation/damages the way they do."[45] There should be legal standards, not purely economic ones:

> The economic value of foreign investment is still inevitably shaped through law. The law in question, though, is a

[43] Ibid., 365.
[44] Marzal, "Quantum Injustice".
[45] Ibid., 253.

> privileged regime that, hidden under the pretence of value as a pre-legal phenomenon, has been autonomously developed by arbitrators themselves, leading to a greatly expanded notion of compensable harm.[46]

This is the ideological core of contemporary investment arbitration practices, and it determines the Tribunal’s decision. It is also logically flawed. In reality, “the harm that must be fully compensated is not a brute fact, but a contingent legal construct.”[47] The harm is defined by the extent of the legitimate expectation. This is true regardless of how the Tribunal conceptualises the matter. In attempting to treat Tethyan’s legitimate expectation as an economic fact, the Tribunal has precisely altered the *legal definition* of legitimate expectations, at least for this award. The problem is that they have done so without examining the previous legal definition, nor explaining or justifying why it had to be replaced with this particular new one. “The Tethyan award is probably the best and most extreme example of this tendency to replace legal authority with deference to economics”.[48]

Turning to the award itself, the Tribunal held that the protection of an investor’s legitimate expectations is an important element of the FET standard under Article 3(2) of the Treaty.[49] The Tribunal further held that,

> Respondent had created legitimate expectations on Claimant’s part that it would be entitled to convert its exploration license into a mining lease ‘subject only to compliance with routine Government requirements.’[50]

These were the requirements of applying for a mining lease and negotiating a minerals agreement. The government encouraged them to expect this to be a formality.[51] Consequently, Tethyan had a legitimate

[46] Ibid., 295.
[47] Ibid., 281.
[48] Ibid., 279.
[49] Tethyan Quantum, 138.
[50] Ibid., 153.
[51] Ibid., 138.

expectation to receive the mining lease unless adequate reasons were adduced to refuse it. Through their assurances to Tethyan, the governments had forfeited their sovereign discretion to deny the lease.

2.3 The Reasons for Refusal: Given in the Letter, and Adduced at Trial

In situating this critique of the damages phase, it is important to highlight that pro-investor biases run throughout the Tribunal's award. Their focus was directed to the Notice of Intent to Reject, in which the GOB proffered several reasons for denying the mining lease. However:

> For the reasons set out in detail in the Decision on Jurisdiction and Liability, the Tribunal concluded that "none of the reasons given in the Notice of Intent to Reject could have justified the denial of the Mining Lease Application."[52]

The Tribunal went further, also dismissing the reasons adduced by Pakistan's advocates for how the decision could have been justified. It did not give them much weight, often noting they had not been brought up at the time. "Respondent should not be allowed to rely on reasons additional to those invoked in the Notice of Intent to Reject".[53]

> As a result, the Tribunal's finding that Respondent *should not be allowed to rely on any additional reasons in this arbitration* in order to avoid liability under the Treaty applies with equal force.[54]

This is not an impartial judgement; it is an ideological decision – as indeed is the Tribunal's judgment as a whole. Such judgments "derive … despite pretences to the contrary, from subjective perceptions of what fairness or policy requires."[55] The politics of the award are subtly manifest in this refusal to allow Pakistan to adduce new reasons for refusal in arbitration.

[52] Ibid., 141.
[53] Ibid., 143.
[54] Ibid., 172.
[55] Marzal, "Quantum Injustice", 253.

This prevents Pakistan ameliorating its administrative and bureaucratic shortcomings by employing external expertise at the arbitral stage. That is, Pakistan may actually have had a right to refuse the lease for reasons their less expert staff did not know of. This possibility could have been considered seriously, but the Tribunal *chose* not to do so:

> The challenges that the host developing countries face under current interpretations of their treaty obligations reflect the catalyst role of a lack of resources, experience, sophisticated administrative capacity and other vulnerabilities in the investment dispute context.[56]

Pakistan's advocates were not in fact allowed to introduce new arguments, as these were simply discounted by virtue of not being part of what the Licensing Authority wrote. Pakistan may have had a right to refuse the agreement, but not for the reasons actually given. The alternative reasons were excluded from the analysis though they may have been pertinent. Consequently, without adequate analysis, Pakistan becomes bound to issue to the license that they may have had no duty to agree to. They were punished for a lack of expertise in governmental bureaucracies – penalised for things they may have been allowed to do, but have done in the wrong way. There was a subtext to the Tribunal's reasoning:

> However, the Tribunal did find that the Licensing Authority denied TCCP's Mining Lease Application because the GOB had decided to develop its own mining project rather than to continue collaborating with Claimant.[57]

This decision to go it alone appears to have been considered *ultra vires* by the Tribunal, who assume that FDI is the only way to get megaprojects financed. State, and especially under-developed state, investment of this form is anathema to the neoliberal ideology that infuses International Investment Arbitration. In this worldview, states develop by

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[56] Ibid.
[57] Tethyan Quantum, 413.

attracting FDI, and so conditions favourable to FDI (i.e. favourable to the investors) must be fostered.[58] Both the GOB's decision, and their failure to disclose it, were deemed acts of bad faith:

> The Tribunal is convinced that the real motive for the denial was the fact that the GOB had decided to develop and implement its own mining project rather than to collaborate with Claimant … and that the grounds invoked by the Licensing Authority served only as a pretext to conceal this motive.[59]

Pakistan could have expropriated lawfully; by simply stating they were taking over the project and initiating negotiations over fair compensation. Instead, they chose to expropriate indirectly, by denying the lease under false pretexts. The Tribunal views this as unlawful behaviour. This moral judgement of bad faith hangs over their decision:

> The Tribunal further recalls that while Respondent now points to numerous allegedly critical issues that rendered the project unfeasible, neither [sic] of these issues was raised by the Licensing Authority in its Notice of Intent to Reject. Based on the record of these proceedings, the Tribunal is also not aware that any other agency or official of the GOB or the GOP raised these issues during the time period in which the joint venture partners were still collaborating or even when the GOB had decided to take over the project and deny TCCP's Mining Lease Application in violation of Respondent's obligations under the Treaty.[60]

This focus on Pakistan's actual conduct, rather than on their legally permissible options, is a choice; a choice to punish them for a lack of administrative sophistication, by refusing to allow this to be ameliorated during proceedings. This punitive posture is perhaps unsurprising, as:

> Tribunals will often consider that the victim of an unlawful expropriation is entitled to damages for two additional items

[58] Beckett, "The Divisible College".
[59] Tethyan Quantum, 153.
[60] Ibid., 173.

> that would otherwise not be compensable: the first is the loss of any increases in value up to the date of the award, and the second is consequential losses.[61]

This widens the scope of the host state's liability, effectively punishing them for behaviour the Tribunals deem uncivilised. It widens the scope of the investor's legitimate expectation, and thus increases the size of their award. The Tribunal was not only restating Pakistan's liability, but setting the ground to determine the extent of that liability; the extent of Tethyan's legitimate expectation.

Next the author will examine the Tribunal's interpretation of the expropriation clause, demonstrating its political nature and structural bias. From there it will be shown how this same bias determines the valuation method used, and the way the dispute is framed.

2.4 Valuing Liability: The Expropriation Clause

The subjectivity, the politics, the bias, of the award come much more clearly into relief in the reasoning on the quantum of damages. The Tribunal take a dim view of the GOB's covert intention to develop the mine alone. Implicitly held to be *ultra vires*, this intention is never modelled as a serious prospect, let alone accounted in evaluation models. This implicit holding clouds the judgment, as the Tribunal sides with the investor at every turn. Performing a mix of sly normative sleights of hand and spectacular syllogistic summersaults, they gradually lower the necessary standards for the ascertainment of the value of the award. Their reasoning is littered with obvious ideological assumptions, and a clear preference for Tethyan's paid experts.

The parties disagreed as to whether the case should be assessed under the rules on (lawful) expropriation in Article 7(2) of the BIT, or based

[61] Marzal, "Quantum Injustice", 284.

on the standard of full reparation under customary international law.[62] Article 7(2) provides:

> The compensation referred to in paragraph 1(c) of this Article shall be computed on the basis of the market value of the investment immediately before the expropriation or impending expropriation became public knowledge. *Where that value cannot be readily ascertained*, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, and other relevant factors."[63]

Pakistan made two interrelated arguments. First, that art. 7(2) applies to both direct and indirect expropriations, and therefore covers so-called unlawful expropriations.[64] Second, the market value of Tethyan's investment cannot be "readily ascertained", and therefore the alternative valuation provisions of art 7(2) should apply.[65] Tethyan countered that art. 7(2) only applies to lawful expropriations and "maintain[ed] that the market value of its investment can be ascertained based on the valuation performed by its valuation expert Prof. Davis."[66]

The Tribunal avoided the decision on the applicability of art 7(2) by holding that, in the circumstances of this case, it and customary international law mandated the same standard: fair market value.[67] It then sided with Tethyan, holding that the market value of the investment was "readily ascertainable" using a "discounted cashflow" (DCF) method:

> … the Tribunal does not consider that there are "fundamental uncertainties" that would preclude the application of a DCF method or, more precisely, the

[62] Tethyan Quantum, 276.
[63] Ibid., Emphasis added.
[64] Ibid., 230.
[65] Ibid., 279.
[66] Ibid.
[67] Ibid., 281.

> application of the modern DCF method used by Prof. Davis.[68]

Here the Tribunal altered the question, from whether the valuation is "readily ascertainable" to whether there are "fundamental uncertainties" in the valuation method. This implies that some uncertainty is permissible in a "readily ascertainable" valuation.

Moreover, this reasoning is based on a series of contestable assumptions, including at least: the applicability of modern DCF over the Pakistan's proposed evaluation methods; the GOB accepting an offer it had already rejected; the level of deposits; the prices of copper, gold, and oil across the projected 56-year lifespan of the project; the renewal of the lease; the availability of adequate water to facilitate the mine's functioning; and the likelihood of political or social unrest. To hold that all of these are "readily ascertainable" (or even ascertainable without "fundamental uncertainties") offers an illustration of the Tribunal's structural bias toward investors. This substantiates Rumana Islam's argument that FET is not extended to host states' legitimate interests:[69]

> The Tribunal considers that Prof. Davis' methodological argument, i.e., that it would be inaccurate to refer to analyst forecasts to determine risk-adjusted prices sought as input for the modern DCF model and that forward market prices are the best and in fact only indication of how the market prices that risk, is generally plausible.[70]

Note that the test appears to have changed again, this time from "readily ascertainable" to "generally plausible", which seems a far more lenient standard.

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[68] Ibid., 301.
[69] Islam, "FET".
[70] Tethyan Quantum, 1508'

2.5 Choosing a Valuation Method

Having determined that the market value was readily ascertainable, the question facing the Tribunal was *how* to ascertain the "market value" of Tethyan's investment at the point of expropriation. Pakistan rejected DCF as an appropriate evaluation technique, while Tethyan insisted on the applicability of modern DCF.[71] The Tribunal had to choose between these to make the market value "readily ascertainable", as they produced radically different results. Only once they had settled on a method could the Tribunal begin the task of unveiling the project's "readily ascertainable" value.

The Tribunal chose Tethyan's method, the modern discounted cashflow (DCF) technique, to determine the but-for valuation of the lease's value:

> While this approach may be associated with some uncertainties, e.g., regarding the projection of future metals prices … these uncertainties also affect the traditional DCF method and therefore do not justify rejecting this method or the use of risk-adjusted prices.[72]

This is a somewhat absurd and yet not uncommon, line of reasoning, "some uncertainties" actually means completely conflicting approaches and valuations. This is a concession that the approach doesn't work "scientifically", it requires political and economic choices on the part of the Tribunal – who must estimate the fates of the multiple variables involved in modern DCF. That however, is apparently OK, because traditional DCF suffers from the same flaws. The logic appears to be: if it doesn't work there, it might work here:

> Some mining professionals oppose the use of forward curves in metal price forecasts. This opposition is often supported by citing concerns about liquidity, incomplete forward

[71] Ibid., 304.
[72] Ibid., 356.

> curves, or the observation that a forward price is a mathematical calculation. … however, … these reasons do not prevent the use of forward curves in generating a price forecast since they would also invalidate the use of derivative methods when generating cash flows and estimating value in a wide range of valuation problems.[73]

So, despite opposition based on reasonable concerns, the method should be retained, because the same valid concerns would also critique other methods. All methods are subject to critique, the choice between them is entirely subjective, yet the Tribunal concludes:

> Prof. Davis explained that the methodology he uses has been developed precisely in order to avoid the practical "fixes" that are sometimes used the industry in order to arrive at a value within the range of what they consider reasonable. Specifically in the present case … [we see] the method using a scientific approach to adjust the risk at source.[74]

Behold, from the morass of political decisions that preceded it, a *scientific approach* has emerged! Prof. Davis has objectivised the discipline of valuation, or rather discovered its objective form:

> … the Tribunal considers that certain adjustments have to be made to the inputs used by Prof. Davis in his calculation. In the Tribunal's view, however, none of these adjustments warrants the conclusion that the DCF method cannot produce a sufficiently reliable result. To the contrary, the Tribunal is convinced that in the particular circumstances of this case, it is appropriate to … [use] a DCF method.[75]

There are two things of note here. First that the test has morphed, again, from a "readily ascertainable" value, into "a sufficiently reliable result", which seems a somewhat lower standard. And second, the reasoning is nonsense, but it appears to be sincerely held nonsense. As Marzal has noted:

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[73] Ibid., 354.
[74] Ibid., 358.
[75] Ibid., 335.

> such calculations are premised on a fundamental consensus that presents the work of arbitrators in this area as essentially uncontroversial fact-finding assessments … this consensus is in reality built on a series of myths and unjustifiable assumptions.[76]

Throughout their analyses, the Tribunal assumes the objective superiority of modern DCF. This reflects a "profound shift in the legal reasoning of tribunals, which has made the three pillars of full compensation/reparation, FMV [fair market value] and DCF seem unquestionable."[77] Marzal argues that:

> … the main reason for the unstoppable rise of DCF as the preferred valuation methodology, is the popularity of the idea that 'value' is not a legal but an economic concept, and that 'valuation' is governed entirely by economic and financial logic rather than by legal principle. It is probably this idea that has contributed the most to the inflation of awards.[78]

Rasulov likewise argues "that all value is essentially a creature of law."[79] Value cannot exist without an entire legal-regulatory apparatus around it, determining what can be appropriated (owned), what can and cannot be done with it, how it can be traded, and, ironically, what would be its expropriation value.[80] The Tribunal's specific decision (the quantum award) is paradoxically made into a variable in its own determination. However, the Tribunal was not presented with this penetrating critique, and simply assumed value is an "economic concept", a pre-legal fact. Conscious or not, this is an ideological decision on the Tribunal's part, a decision to join a growing trend toward the, "… widespread use of DCF, a method that

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[76] Marzal, "Quantum Injustice", 250
[77] Ibid., 254.
[78] Ibid., 271.
[79] Rasulov, "Empty Circularity", 384.
[80] Ibid.

until recently tended to be resisted by lawyers as excessively speculative, and which is generally known to lead to much higher amounts.”[81]

This decision is both problematic, it inherently advantages the investor, and structuring, it holds the judgment together. Even if we were to accept it (which we should not) it raises the subsequent question of when modern DCF (as opposed to DCF generally) came into being. “In this regard, the Tribunal also takes note of Prof. Davis’ oral testimony in response to the question whether the approach he had presented would actually have been used in the market at the relevant time, i.e., at the valuation date.”[82]

Interestingly, the Tribunal does not actually provide an answer to this question, but given the novelty of the modern DCF approach (it had been suggested in only one arbitral case to date[83]) it would not seem unfair to assume the answer would be no. The Tribunal fudges this issue, discretely introducing a presentist narrative. “As valuation practices for mineral properties develop in the industry itself, the assessment of damages may likewise evolve in investment treaty arbitration.”[84]

But the question was not “how has the industry developed?”, but “what valuation would a buyer have sought in 2011?” The presentism elides this temporal shift, and the Tribunal evades its own question, allowing for the use of its preferred method: “the Tribunal concludes that it is appropriate to value Claimant’s investment in the Reko Diq project by using the modern DCF approach”.[85] This is because, “[i]f in practice a buyer was most likely to have adopted the methodology recommended in the CIMVal opinion, it

[81] Marzal, “Quantum Injustice”, 274.
[82] Tethyan Quantum, 357.
[83] Ibid., 359.
[84] Ibid., 360.
[85] Ibid., 361.

is irrelevant that an expert considers that some other methodology would have been better."[86] So, now we have a new "most likely" test. It may also be worth noting that the CIMVal opinion was a response to a discussion paper written in 2012,[87] while the valuation date for the project was 2011.

2.6 The Scope and Value of the Legitimate Expectation: The Question of the Mineral Agreement

Having chosen a valuation method, the question then turns to the scope of Tethyan's legitimate expectations. Fair market value was to be determined by working out what an arm's-length buyer would have paid for the lease, at the time of expropriation, "but-for" the governments' unlawful acts. In this regard, "the Tribunal agrees with Respondent that a but-for valuation cannot assume that a Mineral Agreement would have existed as of the date of valuation."[88] This holding could have framed the question: what was the mining lease worth without the mineral agreement? Assuming a government acting in good faith, but having (relatively) high expectations and a willingness to go it alone if needs be, what would an arm's-length buyer have paid for the lease, and the opportunity to negotiate? Two points arise here, first that this framing is no more readily ascertainable than the alternative, and second that the very existence of alternative possibilities renders the notion of ready ascertainability absurd.

The Tribunal ignored these problems and returned to its finding that "there would have been a mutual interest to achieve agreement on the remaining issues".[89] In other words, the Tribunal precisely *do* "assume that a Mineral Agreement would have existed as of the date of valuation". In fact, as we shall see, they actually invent that agreement in their judgment.

[86] Ibid., 348.
[87] Ibid., 347.
[88] Ibid., 285.
[89] Ibid.

This is how the Tribunal defines the scope of Tethyan's legitimate expectation. Tethyan clearly had a legitimate expectation to the mining lease.[90] However, the *value* of Tethyan's legitimate expectation was entirely contingent on that expectation's scope.

The scope of Tethyan's legitimate expectation was central to the Award, yet never actually discussed. The expectation was held to be the fair market value of the investment, and that was deemed to be a pre-legal economic fact. It had simply to be measured, not justified. But this is inaccurate, both "legitimate expectations" and "fair market value" are creatures of law, they exist only as they are protected by law. One key question elided by this line of reasoning was: "What is the scope of the legitimate expectation?" That is: "Does the legitimate expectation to the mining lease include a legitimate expectation to a Mineral Agreement?"

Recall, negotiations over the Mineral Agreement had stalled before the refusal of the mining lease, and were terminated entirely in its aftermath. Yet in an audacious piece of reasoning the Tribunal noted that had the Mining Lease Application been granted, "the parties may well have decided to revive [negotiations on the Mineral Agreement] after the grant of the mining lease, given that Claimant would then have been the only one allowed to conduct mining operations in the area."[91] Yet again the Tribunal substituted the "readily ascertainable" standard, this time to a lowly "may well have". Moreover, their reasoning deviates significantly from the traditional logic of legitimate expectations.[92]

The traditional question is: Was Tethyan legally entitled to expect a minerals agreement, that is, did the Government of Baluchistan have a legal duty to conclude an agreement? The answer to this question, as the Tribunal

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[90] Ibid., 20
[91] Ibid., 148
[92] Marzal "Quantum Injustice", 297-300

acknowledged, is no;[93] and the matter should have ended there. However, the Tribunal instead introduced a new standard, a new definition of legitimate expectations. This led to a new question: Were the parties likely to conclude negotiations in the hypothetical reality where a mining license had been awarded? This evidently subjective and speculative question is given material form by the underlying assumption that the parties would act as "rational economic actors".

The Tribunal stopped short of holding that Tethyan had a legitimate expectation to a mineral agreement, but did gesture towards their own reconstruction of the definition of legitimate expectations:

> The Tribunal recalls that Respondent had created legitimate expectations on Claimant's part that it would be entitled to convert its exploration license into a mining lease … As a result of this finding, the Tribunal did not have to express an opinion as to whether the Governments' conduct in the Mineral Agreement negotiations amounted to a breach of the FET standard.[94]

This suggests that the GOB had obligations under the FET standard to conduct Minerals Agreement negotiations in a particular way. The tribunal does not directly rule on these obligations, and so we are left unsure as to what they are. However, in the context of the overall judgment, it becomes clear that these obligations concern the economic parameters of the negotiations. Pakistan's "permanent sovereignty" over its natural resources notwithstanding, the GOB has a legal obligation not to be economically unreasonable in negotiating the sale of those resources.

Without ever explicitly making the incentive to negotiate into a duty, the Committee determines that reasonable negotiations would (likely) have been concluded between Tethyan and the GOB. This turn from

[93] Tethyan Quantum, 285
[94] Tethyan Quantum, 153-4.

legitimate expectations in their traditional sense of bearing a legal obligation, to the new notion of economic probability, presupposes that the parties will behave as rational economic actors respectful of context and current market expectations. It grants Tethyan the legitimate expectation that Pakistan behave as a rational economic actor. That is, it imposes on Pakistan (and potentially other host states) a legal duty to act in economically rational ways. This is a radical alteration to the concept of legitimate expectations, and a significant expansion of their scope. This reasoning, in effect, allows the Tribunal to rule as if Tethyan *did* have a legitimate expectation of a Mineral Agreement at the prevailing market rate. This flows from Pakistan's duty to negotiate in an economically rational manner.

2.7 Justifying the Imaginary Mineral Agreement

Having determined, in effect and only ever by implication, that the GOB did in fact have a duty to grant Tethyan's legitimate expectation of a Mineral Agreement, the Committee held:

> … if the GOB had not decided to take over the project from Claimant, it would have continued to negotiate with Claimant and an agreement would likely have been reached between the negotiating parties, including the GOB, regarding the terms and in particular the fiscal regime that would apply to the project.[95]

Note that the test of "readily ascertainable" has been altered again, this time to a rather lowly "would likely" standard.

Although the Tribunal acknowledged that the GOB did not have a duty to reach a mineral agreement, this did not entail that the GOB had the right to reject an unsatisfactory proposal, only an unreasonable one. However, in their view, no satisfactory proposal had been submitted,

[95] Ibid., 415.

negotiations had stalled, "… while some issues could be solved in the fall of 2008, "there were also remaining certain terms which we could not resolve" which included the fiscal regime and stability, royalty rate, stamp duty exemptions and amendments to the 2002 BM Rules.[96] However,

> On the other hand, the Tribunal recalls its findings that in the absence of Respondent's breaches, once Claimant would have received a mining lease, there would have been a mutual interest to achieve agreement on the remaining issues in the Mineral Agreement negotiations.[97]

Still the Committee claim that this mutual interest is not tantamount to a duty:

> The Tribunal wishes to emphasize that is not assuming that the Governments were under a legal obligation to conclude a Mineral Agreement or that they did not have any discretion as to the terms that they would negotiate with Claimant. However, as the Tribunal already held in the Decision on Jurisdiction and Liability and as it maintains in this Award, it would have been in the mutual interest of the negotiating parties to reach an agreement in order to ensure that the project would in fact be financed, constructed and become operational.[98]

This is a consequence of redefining legitimate expectations as predictable facts (what was likely to have occurred) rather than traditional legal obligations. Traditionally, the legal concept of legitimate expectations is concerned with what the duty-bearer (here Pakistan) is legally bound to do, not what they might, in fact, be likely to do. In this framework, Pakistan has no duty to award the minerals agreement, and Tethyan has no legitimate expectation of it. The Tribunal ignored this legal delimitation, replacing it with a legitimate expectation of rational economic behaviour. Consequently, Tethyan had a legitimate expectation that an agreement

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[96] Ibid., 394. The "BM Rules" refers to the Mineral Rules enacted by Baluchistan in 2002 to implement the National Mineral Policy, dated September 1995.

[97] Ibid., 285.

[98] Ibid., 408.

would be reached at prevailing market rates – that is, that the GOB had no right to set its own terms, demand its own rates for its own resources, or go it alone. Although the Tribunal acknowledged that:

> … the Governments were not willing to accept whatever terms Claimant suggested but they "wanted a fair deal, and they were willing to walk away from the table if TCC would not give it to them." According to Respondent, the Governments were also conscious of creating precedents for other investors that would request similar exemptions or concessions if these were granted to Claimant.[99]

And that:

> Respondent further argues that the Governments would have little interest to make any concessions regarding the tax and royalty structure and that Claimant would have been under an obligation to realize the project regardless of any concessions to be made.[100]

Ultimately the Tribunal rejected this position: "In the Tribunal's view, this argument is detached from reality."[101] In other words, under-developed states have no right to hold out for fair terms for their resources; that is economically unreasonable behaviour. This brings us to the subtext of the Tribunal's judgement, under-developed states are used to the imposition of neocolonial governance, they accept it, and investors are entitled to expect it.[102] The Tribunal seems to have settled into the view that GOB would take what they were given, and that their attempts to set up an alternative option (running the mine themselves) were in bad faith. Going it alone ought to be a legitimate option for governments, it would enhance their bargaining power vis a vis foreign investors. But that does not appear to be the Tribunal's project at all.

[99] Ibid., 389
[100] Ibid., 407
[101] Ibid.
[102] The author has expanded on neocolonial governance in Beckett, "Divisible College".

The GOB, which was after all providing 100% of the minerals to be processed, wanted a bigger slice of the pie. However, they were not entitled to expect this, as Claimant's financing expert Mr. Pingle stated

> … "[t]here is a point in almost every large project when the foreign governmental institutions meet with the host government, without private parties present. At that point, the foreign governmental institutions lay out their minimum requirements for them to make their loans or investments. It makes a significant difference to a host government when it realizes that massive FDI and a loan package worth billions of US $ turn on its unwillingness to agree to standard documentation." … The Tribunal finds this statement convincing and considers that it supports its finding that a Mineral Agreement providing in particular for fiscal stability would have been concluded after the mining lease was granted to TCCP.[103]

The (neo?) colonial tone of this "convincing statement" is striking, as is its casual denigration of host state sovereignty and agency. Moreover, "standard documentation" is a euphemism for imposed terms, low royalties, demand of a special tax regime, etc. This seems to fly in the face of basic freedom of contract, the GOB obviously felt the deal was not sufficiently beneficial to them, and that they could do better elsewhere or by themselves. But that option was denied to them by the Tribunal.

Having implicitly deemed the options of negotiating a better deal or running the project alone to be invalid, the Tribunal effectively held that the GOB had an obligation to grant the Minerals Agreement. This flows from Tethyan's legitimate expectation of rational economic behaviour on Pakistan's part. The Tribunal would then construct the minerals agreement that rational economic actors would have reached; the deal the GOB were legally obligated to accept.

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[103] Tethyan Quantum, 416-17.

2.8 The Imagined Negotiations of a Reasonable GOB. Settling on a Set of Outcomes the GOB had Specifically Rejected

Tethyan and the GOB were far apart on the key issues of royalty and tax regimes. Tethyan was proposing a 2% Royalty, GOB wanted 5-6%; Tethyan wanted Export Processing Zone (EPZ) status, GOB refused this idea:

> Respondent submits that: (i) Pakistan would not have agreed to a royalty rate below the minimum of 5% required by law; (ii) Pakistan never agreed to grant EPZ status and Claimant abandoned this request during negotiations; (iii) the parties "were nowhere close to agreeing to the overall fiscal regime"; and (iv) the Governments "roundly rejected" a provision providing for an automatic renewal of the 30-year mining lease.[104]

The Tribunal emphasises in places that the GOB was under no legal duty to conclude the minerals agreement, or grant an EPZ. However, having discounted their alternative proposition (going it alone) as somehow unethical, nonetheless concludes that they would probably have done so. This economic probability is then transformed into a legal duty by the Tribunal. This is the effect of the choice to frame the issue in economic terms. Rather than focus on the conventional legal question of what Pakistan was legally bound to do, the Tribunal changes the definition of legitimate expectations into a right to expect the host state to act in an economically rational manner – as it "most likely" would have. In Tethyan, this rational action was defined in very precise terms:

> … the Tribunal finds that it is most likely that Claimant and the Governments would have reached an agreement on the terms of a Mineral Agreement. It further finds that those terms would most likely have included:
>
> (i) a sliding scale increasing from 2% to 4% over the life of the mine, on the basis that the GOB's interest in

[104] Ibid., 388.

> the project would have been restructured to a 25% net profit interest;
>
> (ii) EPZ status or similar tax concessions for the first fifteen years of the project while returning to the normal tax regime for the remainder of the mine's life; and
>
> (iii) a provision regarding the renewal of the Mining Lease. As for the renewal, the Tribunal finds, however, that a willing buyer would have factored in the risk that the value of the renewal would not materialize or that the renewal would not be on the same commercial terms and would thus have been prepared to pay 75% of the value associated with a renewal of the Mining Lease.[105]

Note that the "readily ascertainable" test has been amended again, this time to a "most likely" test. Moreover, the Tribunal has essentially determined that the GOB was obligated to accept Tethyan's terms, with two amendments:

1. Royalties were raised from 2% to a sliding scale 2-4%.
2. The certainty of renewal of the lease was discounted 25%.

Otherwise, the Tribunal imposed the rejected Tethyan offer.[106] This was an evidently biased, and poorly reasoned, decision, at odds with the standard conventions of legal reasoning. The mining lease renewal, for example, should – under conventional legal analysis of legitimate expectations – have been discounted 100%, because the GOB had the right to refuse it. From a conventional legal perspective, the *likelihood* of the lease being renewed is irrelevant, the question does not focus on what the investor is likely to receive, but on what they are entitled to demand:

> The fact that discretion is involved … means that the beneficiary of the extension lacks any legitimate claim to it (from a legal point of view). The extension is, in other words,

[105] Ibid., 459.
[106] Ibid., 460.

> in the hands of the State, and to award damages for its loss would negate this.[107]

The Tribunal holds quite the opposite, looking only at the likelihood of, rather than the legitimate expectation to, renewal. This is based on Pakistan's newly minted duty to behave in an economically rational manner. This is the substitution of conventional legal analysis with pseudo-economic theory, which the Tribunal has effectuated throughout its award. In doing so, it has quietly, and expansively, delimited (extended) the scope of Tethyan's legitimate expectation, to the detriment of Pakistan. This is done without reasoning, without apparent thought. It is common-sense, the reapplication of unjustified assumptions about facts and the respective roles of economics and law in determining value. This is how ideology works. It remains nonetheless a form of legal reasoning, defining the legal construct of value, to reach a legal decision.

The Tribunal is deploying a form of legal reasoning that differs substantially from conventional understandings. In this new form of reasoning, the host states' duties under legitimate expectations are not discovered by looking at traditional legal rules and sources – such as the jurisprudence and literature on legitimate expectations – but by normativising economic predictability. They have, in effect, created a duty for Pakistan to act as it "most likely" would have, i.e. as a reasonable economic actor constrained by circumstance. That probability is manifested as a legal duty.

The logic appears to be that Tethyan would eventually have made a bid that offered fair market value, which the ("reasonable") GOB would "most likely" have accepted. This "fact" determines the scope of Tethyan's legitimate expectation; its predicted likelihood becomes the substance of

[107] Marzal, "Quantum Injustice", 304.

Pakistan's duty. Law is implicitly redefined as economic prediction – the Tribunal's prediction of Pakistani action becomes Pakistan's *duty* to act as predicted. Their neocolonial duty to act in an economically reasonable manner. The Tribunal's offer is final, and Pakistan is obliged to accept this. Owners of mineral reserves can only negotiate the value-split of their exploitation within defined parameters:

> … the Tribunal considers it reasonable to assume that in return for an arrangement under which the GOB would not have been required to make any equity contributions and would have received guaranteed annual minimal payments during the initial payback period, the GOB would have agreed to a lower royalty rate during this period. At the same time, the GOB may well have maintained its request for a higher royalty rate in subsequent years and the Tribunal therefore considers it likely that the parties would have agreed on a sliding scale.[108]

The readily ascertainable test has once more been replaced, this time by "reasonable to assume" and "considers it likely" standards. Moreover, it is not really "reasonable to assume" that the GOB would have accepted a combination of offers it had already rejected. What if the GOB was "unreasonable" in its expectations, because it believed the alternative offered more value? Why does the Tribunal have the right to decide on a reasonable agreement? Because of their alleged expertise:

> The Tribunal therefore concludes that it was likely that the GOP would have granted EPZ status or similar tax concessions to the Reko Diq project for the first fifteen years of the project, as it has been assumed by Prof. Davis.[109]

Note: the GOB specifically rejected an EPZ.

> As demonstrated by the sensitivity analysis performed by Prof. Davis on this point, granting EPZ status for the first fifteen years of the project would still have provided the

[108] Tethyan Quantum, 425.
[109] Ibid., 440.

> Federal State with 29.6% of the project's total cash flows (compared to 42.6% if no EPZ status were granted).[110]

This is an imposed loss of 13% of total cashflow for 15 years, but it is apparently justified because Tethyan were providing the equity. However, it is, again, worth noting that while GOB would provide no equity in the project, they would provide 100% of the minerals to be processed for profit. This seems a fair equivalent to a capital injection, a joint investment between equal parties; in fact, in value terms the state's investment is significantly larger. To make the project viable, the value of the minerals must vastly outweigh the costs of extraction. But the Tribunal never configures things in that way. It never asks why the investor should be entitled to 70.4% and then 57.4% of the total cash flows, when the host is providing (investing) all of the resources.

This choice of 'resources-for-sale' frame is an ideological decision, it is under-reasoned, but it is important. Imposing this frame, rather than a 'co-investment' one, produces the structural imbalance, or bias, of the Tribunal. Framing the parties as co-investors would alter the legitimate expectations of each. Recognised as the larger investor, the state would be entitled to expect, and indeed demand, the larger share of the profits. The concepts of reasonable negotiations and a reasonable agreement would be turned on their heads. However, the Tribunal does not reflect on its framing of the dispute.

Instead, having devised its "reasonable deal", the Tribunal went on to calculate the value of the investment based on that deal being in place. From the prediction that a hypothetical reasonable GOB would most likely have accepted a hypothetical reasonable offer, the Tribunal constructs a legal duty for the actual state of Pakistan. The Tribunal's award entailed

[110] Ibid., 439.

that the GOB was legally obliged to accept a reasonable offer, and sanctioned them for not doing so. From here it follows that they were obliged to grant the mineral agreement, and so the investment should be valued as if they had done so. This valuation should not merely reflect the money and time invested by Tethyan, but rather what an arm's-length buyer would have paid for the lease, and the *specific* mineral agreement that the Tribunal created, given the metallurgical reports and predicted profits. This would be done on the basis that the mine would have been a success, "… the Tribunal is convinced that in the particular circumstances of this case, it is appropriate to assume that Claimant's investment would have become profitable and to determine these future profits by using a DCF method.[111]

Put together, the mining lease, mineral agreement, and expected profits yielded a surprisingly determinate value:

> Respondent shall pay to Claimant USD 4,087 million as principal amount of compensation for the breaches, as determined in the Tribunal's Decision on Jurisdiction and Liability dated 10 November 2017, of Respondent's obligations under Articles 3(2), 7(1) and 3(3) of the *Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments* relating to Claimant's investment in Pakistan.[112]

So, to recap, the GOP's experts claimed that the net value of the asset was close to zero, Tethyan's expert claimed it to be $8.5 billion, and the Tribunal held it to be $4.1 billion. To reach this conclusion, the Tribunal made assumptions about the GOB accepting a Mineral Agreement it had rejected (and was, officially, under no duty to accept), the applicability of modern DCF, the nature of value, the scope of Tethyan's legitimate expectation, the extent of the reserves, the future prices of copper, gold, and oil, the presence of sufficient accessible water, the possibilities of political and social unrest,

[111] Ibid., 335.
[112] Ibid., 1858.

or environmental catastrophe. So many assumptions, all contested, so many calculations, all incompatible, and yet the market value of the investment was deemed “readily ascertainable”. “On that basis, the Tribunal concludes that, based on the modern DCF valuation model of Prof. Davis, the value of Claimant’s investment amounts to USD 4,087 million.”[113]

It is only *after* this reasoning process – and its assumptions about the Mineral Agreement, the forecast prices of gold, copper, and oil, the level of deposits, the availability of funding, the discounts for risk and the renewal of the lease, and the applicability of the novel “modern DCF” – that the value of the investment, with the expected mining lease *and* the imaginary Mineral Agreement, becomes “readily ascertainable”:

> Based on its findings with regard to water, security, environmental and social impacts, permitting and the negotiation of a Mineral Agreement, the Tribunal is convinced that these risks are adequately captured in the delay modelled by Prof. Davis.[114]

Yet initiating the process in the first place was predicated on market value already being “readily ascertainable”. The market value of the investment was not readily ascertainable until the Committee made it so. Ascertainment was not made because it was objectively ‘ready’. Instead, market value was constructed by the Tribunal’s decisions to make it appear (somewhat implausibly in author’s opinion) “readily ascertainable”. The award was not made because it was “readily ascertainable”; the value was made “readily ascertainable” because the Tribunal ordered a precise award to be enforced.

[113] Ibid., 1601.
[114] Ibid., 1565.

3. An Alternative Approach to Valuation – Article 7 (2) of Australia-Pakistan BIT

The political economy of international investment arbitration needs to be examined, especially given its growing role in global governance. There is a punitive feel to FET, not only does it expand the investors' protection, but it locks-in specific assumptions about how the market ought to work, and how the spoils ought to be shared:

> … current practice, even if operating under the pretence that the calculation of compensation/damages leaves little room for discretionary judgment, is in reality built upon a series of contestable choices that have served to construct a notion of compensable harm, one that is both contingent and specific to international investment law, as well as largely favourable to investors.[115]

This is a result of treating legitimate expectations as an economic fact which can be delimited scientifically. Ideological choices are being hidden behind a technocratic veneer. Legitimate expectations are being defined and expanded beyond their conventional legal form. The Tethyan case comes close to suggesting that being charged only current "market rates" is a legitimate expectation for prospective investors. This would appear to preclude individual, or groups of, host-states from challenging the current global distributional models.

Had the GOB's right to reject a bad deal and go it alone been respected, we could easily argue that the value of Tethyan's investment could not be readily ascertained. Indeed, nothing requiring so many speculative and contested assumptions could really be said to be "readily ascertainable". In that case, under art. 7(2):

> … the compensation shall be determined in accordance with generally recognised principles of valuation and equitable

[115] Ibid., 295.

> principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, and other relevant factors.[116]

Application of this provision could have allowed a balancing of interests, rather than the all or nothing approach pursued by the Tribunal. Tethyan deserved compensation for the expropriation of its investment, but the award given was excessive – in effect a $5.9 *Billion* award from a $219 *Million* investment. In the Tribunal's words, "Claimant's losses are equivalent to the (entire) value that its investment would have had if TCCP's Mining Lease Application has not been denied in violation of Respondent's obligations under the Treaty."[117]

This makes sense insofar as we assume Tethyan had a legitimate expectation of a mining lease. However, the *value* of that lease is dependent upon the existence, and terms, of a Mineral Agreement, and all the other assumptions detailed above. This agreement did not exist, and the Tribunal appeared to rule that Tethyan did not have a legitimate expectation of it. Nonetheless, the Tribunal's decision unfolds on the premise that because the Mineral Agreement would likely be forthcoming in theory, Pakistan had a legal duty to realise this in practice. This allows it to determine the content of the reasonable agreement that the parties would have produced. Market Value, at least here, is blatantly a legal construct, not an economic fact:

> The realisation that profits largely depend on the applicable legal environment, and that determining that regulatory background forms part of the legitimate exercise of State prerogatives, means that tribunals cannot determine appropriate levels of future profits on any objective basis.[118]

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[116] Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments, art. 7 (2).

[117] Ibid., 273.

[118] Marzal, "Quantum Injustice" 308.

This means Market Value could have been constructed differently, or the Tribunal could have accepted that market value could not be "readily ascertained". The Tribunal chose a particular understanding of value and ascertainability; they constructed a particular legal object, a manifestation of value to be valued. An alternative reading of "loss suffered" might be developed. This could cover only the initial investment, plus loss of time and effort – Tethyan being equitably paid for what they have put in. "Some form of equitable balancing of the various legitimate interests and prerogatives at stake is inevitable, which should lead tribunals to determine compensation for loss of profits based on a fair or reasonable rate of return."[119] Instead, we have the speculative, and effectively punitive, full market value standard imposed. This manifests a compound analysis, dependent on the GOB having breached its Tribunal imposed *duty* to reach a reasonable Mineral Agreement. Without the assumption of a "reasonable Mineral Agreement" the investment's value cannot be readily ascertained. Put simply Pakistan is being punished for wanting a fairer deal for *its own resources*.

Pakistan's resources are conceptualised as assets to sell, but could be alternatively understood as multi-billion-dollar investments by the state. In that framing, we are reminded that the state is actually the larger investor, and it is unclear why they ought to accept the smaller part of the return. The structural bias, or internal logic, of international investment arbitration is exposed by this perspective. The preference for a 'resources-for-sale' frame, over a 'co-investment' one, is a political decision. It produces the structural imbalance, or bias, of the Tribunal. This may be unintentional, but it is not unimportant. Conceptualising the parties as co-investors would

[119] Ibid.

radically alter the parameters of the legal construct of “reasonable negotiation”.[120]

In another alternative, Tethyan could even be framed as service providers, with Pakistan commissioning them to provide the infrastructure to exploit the resources in return for a share of the profits. The three frames position the parties differently relative to one another. In the third the state has the upper hand, in the second the parties are equal, but in the first (currently hegemonic) framing, the interests of the investor are prioritised over those of the State and its citizens. The under-developed state is framed as dependent, rather than as abundant.

The decision in Tethyan also serves as a warning to other states that FET will be defined and defended expansively, that investor rights will be prioritised over host-state needs. Such awards and potential awards constrain state policy-making space, after all labour and environmental legislation is not always economically rational, this, “raises the concern that too much investor protection will create an impression that the ‘national sovereignty has been given up to control by faceless international tribunals, whose decisions may restrict the regulatory powers of host countries’.”[121]

4. The Award in Context, the IMF Loan and Pakistan’s Political and Economic Circumstances

As the Tribunal was ordering a near $6 billion award against them, Pakistan was negotiating an Extended Fund Facility with the IMF to bail out its economy. These negotiations, and the gradual drawdowns from the Facility, continued until Imran Khan’s ouster as Prime Minister, recommenced under

[120] For an earlier, more comprehensive attempt to re-imagine the law on expropriation from a Third World perspective, see Norman Girvan, ‘Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint’ in Richard B Lillich (ed), *The Valuation of Nationalized Property in International Law*, vol. III (USA: University Press of Virginia 1972–1987), 149.

[121] Islam, “FET”, 16.

the new government, and were eventually concluded in 2024, with Pakistan securing a $7 billion loan.[122] Ironically, the bailout fund has ended up little over $6 billion (after 2 more years of interest). What the global legal order lends with one hand, it takes with another. what the global legal order lends with one hand, it takes with another. Pakistan returned to arbitration seeking both an annulment of the award, and an interim stay of execution. These were to be determined by an Arbitral Committee.

The annulment proceedings did not conclude, but as part of their argument in the stay hearing, Pakistan cited both the necessity for, and the fragility of, the IMF loan. Pakistan simply could not meet its domestic commitments if it were to pay the full value of its IMF loan to Tethyan. Tethyan was unsympathetic as, “TCCA cites that the IMF rescue is not new to Pakistan because it suffers from chronic problems with the IMF as indicated by it receiving 21 IMF loan agreements and 12 bailouts for over the past three decades.”[123]

The Committee held that the decision on a stay had to be made under article 52(5) of the ICSID treaty: “The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision”.[124] This gives the Committee a wide discretion,[125] and neither the Convention nor the ICSID Arbitration Rules give any guidance on how to exercise it.[126] However, the Committee does hold that “the right to life under Article 6(1) of the ICCPR” and “public health rights and public health

[122] ‘IMF Executive Board Concludes 2024 Article IV Consultation for Pakistan and Approves 37-Month Extended Arrangement’, *IMF*, 27 September 2024, https://www.imf.org/en/News/Articles/2024/09/27/pr-24343-pakistan-imf-concludes-2024-aiv-consultation-pakistan-approves-37-mo-extended-arr.

[123] Tethyan Copper Company PTY Limited (Claimant) and Islamic Republic of Pakistan (Applicant) (ICSID Case No. ARB/12/1) Annulment Proceeding, 147. Hereinafter Tethyan Annulment. Available at: italaw11880.pdf.

[124] Ibid., 126.

[125] Ibid., 129.

[126] Ibid., 130.

emergencies of international concern" as provided under Article 13(1) of the WHO's International Health Regulations 2005", are *not* "relevant rules". "Insufficient basis has been provided to consider such rules in the interpretation of Article 52(5)."[127] So, the Committee is not bound by even the most fundamental of human rights commitments when it decides whether circumstances merit a stay of enforcement. Nonetheless:

> Pakistan submits that immediate enforcement of the Award would lead to dire consequences to the country at a "uniquely bad moment in time". Pakistan emphasizes the hardship it would suffer due to the delicate state of the economy that needed a USD 6 billion IMF Extended Fund Facility in July 2019. … Immediate payment would lead to removal of funding for health, social, and welfare programs that would have "disastrous impacts for the people of Pakistan … particularly the most disadvantaged and vulnerable".[128]

However, the Committee was largely unmoved:

> Applicant's concerns that its right to life obligations under ICCPR or its obligations under the WHO's International Health Regulations might be affected could hardly be triggered by any lifting of the stay.[129]

The author is unable to understand the logic of this argument beyond the fact that enforcement can take some time. It seems to suggest that lifting the stay would have no immediate impact, and therefore the harm would be too remote:

> The chain of events that exists between lifting a stay of enforcement and the triggering of the right to life, public health rights, or public health emergencies of international concern appears too long and tenuous.[130]

[127] Ibid., 133.
[128] Ibid., 143.
[129] Ibid., 156.
[130] Ibid., 133.

It is worth remembering that the Tribunal were happy to indulge a rather "long and tenuous" "chain of events" to procure the mineral agreement and the not "fundamentally uncertain" price forecasts needed to "readily ascertain" the value of Tethyan's investment. Nonetheless, the Committee continued:

> … while the Committee recognizes the potential hardship that Pakistan may suffer due to a lifting of the stay, it is not convinced of the likelihood that Pakistan would suffer the severe hardship on an immediate basis to the degree it claims.[131]

It is unclear whether "severe hardship" is a relevant consideration[132] because the Committee reasons that stripping Pakistan of the $6 billion emergency loan it got from the IMF would not cause severe hardship – at least in the short term.

Turning to the question of whether Tethyan would suffer any harm if the stay was not lifted, the Committee noted the argument of applicant, "that Claimant will not suffer any prejudice if the stay of enforcement is continued since post-Award interest is accruing at a rate of USD 700,000 per day."[133] To an outsider, this interest, which amounts to $256 million per year, may seem an exorbitant return for an actual investment of just $219 million. But for the Committee, the "interest does not adequately compensate an award creditor".[134] By way of explanation, the Committee continued approvingly:

> As the ad hoc committee in NextEra v. Spain determined: "Depriving the award creditor of their rightful remedy denies them the opportunity to allocate the benefits of such remedy as they see fit" and "while post-award interest may provide

[131] Ibid., 157.
[132] Paparinskis, "Crippling Compensation", argues that severe hardship or ruinous consequences should always be a consideration in the enforcement of awards, regardless of whether annulment proceedings are initiated.
[133] Tethyan Annulment, 81.
[134] Ibid., 161.

> some relief, it may not adequately compensate for the uncertainty, delay, and deprivation suffered by the award creditor".[135]

In contrast to Pakistan's irrelevant predicament, the harm facing Tethyan was deemed to be real and immediate. It had to be taken into account. The Committee compromised, extending the stay, but ordering Pakistan to produce:

> … an unconditional and irrevocable bank guarantee or letter of credit for 25% of the Award, plus accrued interest as of the date of this Decision, from a reputable international bank based outside of Pakistan, pledged in favour of Claimant and to be released on the order of the Committee.[136]

Pakistan failed to produce this guarantee, and the stay was briefly lifted. Enforcement proceedings ensued in numerous jurisdictions, and assets of Pakistan International Airlines were seized.[137] But that was then in the future, to where the Committee also looked, this time for justification. They actually held that lifting the stay might be in Pakistan's best interests:

> Demonstrating Pakistan's commitment to abide by its treaty obligations arguably might provide comfort to foreign investors on how Pakistan adheres to the rule of law and attract more foreign investment that could contribute to the country's economic development.[138]

That is, alleviating the suffering of the people of Pakistan would be less important than securing the confidence of foreign investors. Such it seems is the logic of the Committee.

5. Conclusion

The Tethyan case, like all arbitration cases, is unique and was decided on its own circumstances; perhaps not too much should be drawn from it. Yet

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[135] Ibid., 161.
[136] Ibid., 213.
[137] Pakistan, foreign mining firm to revive megaproject - News | Khaleej Times.
[138] Tethyan Annulment, 132.

it also taps into, and extends, a long history of international investment arbitration practice, which has systematically privileged investors. In the Tethyan award, the Tribunal frequently bent over backwards to find interpretations that suited the investor's interests. This was never clearer than in their deployment of the "readily ascertainable" criteria (and its various surrogates) and the arbitral creation of a reasonable Mineral Agreement, which reflected Tethyan's terms almost exactly. A quantum injustice one might say. Fortunately, international investment arbitration has no formal system of precedent, though tribunals borrow liberally from previous decisions. Tethyan embraced a fundamentally new conception of legitimate expectations, not as legal construct but as economic predictability. This, at the very least, sets the ground for arguing that investors have a legitimate expectation to an agreement on market terms, and all but asserts that host states have a duty to conduct mineral negotiations "reasonably". This, like the rule of the Global Legal Order generally, is bad news for those of us with dreams of constructing a more equitable global economic order, where the interests of the under-developed states are prioritised over those of global capital. This is where reconceptualising natural resources as co-investments and thus host states as co-investors could come in. In this framework, the host country (here the governments of Pakistan and Baluchistan) would be understood as the major investor in any project. Logically no investor will invest more in any mining project than the value of the resources to be extracted. A project's profit lies in the difference in value between an investor's investment (small) and the state's investment (large). It is with this axiom in mind that we should evaluate how that profit ought to be divided between the investors – that is, how *reasonable negotiations* ought to take place.

International investment arbitration is of great, and growing, importance as a form of global governance. It is justified as protecting investors from the whims or incompetencies of local judiciaries in under-developed states. This clearly colonial framing ought to give pause as to the intentions and neutrality of international investment arbitration Tribunals. In the Tethyan case, we witnessed the Tribunal strip the GOB of their agency and freedom of contract. This manifested a clear neoliberal worldview, and an ideology aligned to promoting investor rights in the name of attracting investment. This eviscerates the political and economic agency of host states, and their capacity to develop. It is a political choice, and should not go unchallenged, international investment arbitration remains capable of better, more equitable, framings. It is our challenge to work towards these, and international investment arbitration is one of the arenas in which we must situate the struggle for global justice.

Postscript: Negotiating in the Shadow of This Law:

In March 2022, the Government of Pakistan and Tethyan came to an agreement to resume co-operation and develop the mine.[139] The terms of the agreement, negotiated in the shadow of an enforceable but unpayable debt, have not been publicly disclosed.

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[139] Pakistan, foreign mining firm to revive megaproject - News | Khaleej Times