Alexander Lecture 2023

'International Investment Arbitration and the Search for Depoliticisation' by Toby Landau KC C.Arb FCIArb

Catherine Dixon: Welcome to everyone joining us around the world for the Chartered Institute of Arbitrators, Ciarb's annual Alexander Lecture, which will shortly be delivered by Toby Landau, KC, Chartered Arbitrator, FCIArb. My name is Catherine Dixon and I'm the Chief Executive Officer. I take this opportunity to warmly welcome Toby and Ciarb's President Jonathan Wood. It's wonderful to be able to host this lecture face to face, whilst also allowing Ciarb members from around the world to join us virtually. The title of this year's Alexander Lecture is 'International Investment Arbitration and the search for Depoliticization'. Toby will examine the role of depoliticization in the genesis, development and justification of international investment arbitration. The role of politics in international dispute resolution is complex and fascinating. Despite its importance, it is rarely addressed head on. The debate on the future of Investor-state arbitration and its possible reform, continues. However, much of the current thinking fails to fully consider the broader geopolitical issues relevant to this form of dispute resolution. Toby will consider the role of politics in the genesis of investor state dispute settlement- ISDs; analyse the critical part that politics continues to play; Assess how ISDs can negatively impact on the rule of law and suggest a fundamentally different course for possible reform. This field is being reshaped and given its crucial relationship with the rule of law and to international arbitration, developments in ISDs will no doubt have a significant impact on the future of international dispute resolution.

Catherine Dixon: I'm really excited to hear from Toby on this fascinating subject. However, before I formally introduce Toby, a few housekeeping issues. For in-person attendees in case of a fire alarm, please follow the staff instructions evacuate the building and the meeting point is outside the main entrance at Bloomsbury Square Gardens. For virtual attendees. You can explore the virtual platform using the navigation bar on the top. During the session, use the chat on the right-hand side of the screen. Please try using the chat- Maybe tell us where you're from and maybe tell us something about yourself. You can use the Q&A function to ask questions of the speaker. We will be taking virtual and in-person questions at the end. If you're struggling with anything, please use the help widget located at the bottom of your screen and or let us know in the chat. The lecture is being recorded and will be available on the virtual platform

immediately after the lecture, and also on Ciarb YouTube channel. I'm. joined today by Jonathan Wood FCIArb, president of Ciarb. Jonathan will be moderating the Q&A discussion after the lecture. Jonathan will try to get through as many questions as possible, but please don't be disappointed if we don't have time for your question. Jonathan is an independent arbitrator with over 40 years' experience in the field. Jonathan is the director of the London Chamber of Arbitration and Mediation, and the chair of the International Arbitration at Reynolds Porter Chamberlain.

Catherine Dixon: He is a founding member of legal UK and also the Virtual Arbitration Forum, and was the chair of the board of Ciarb before being elected as president. It now gives me immense pleasure to introduce Toby Landau, KC, Chartered Arbitrator, FCIArb. Toby is a barrister, advocate and arbitrator and a member of the Bar of England and Wales, Singapore, New York, the British Virgin Islands and Northern Ireland. As counsel, he has argued hundreds of major international commercial investor-state and inter-state arbitrations, as well as ground-breaking cases in England, Singapore, Hong Kong, Pakistan and the Caribbean. He was the first KC to have been permanently called to the Singapore Bar, and since April 2012, he has been a member of the Panel of Advisers to the Attorney General of Singapore. He is a visiting professor at King's College London, vice president of SIAC Court of Arbitration, a member of the Governing Board of ICA, vice chair of the Saudi Center for Commercial Arbitration, was the UK delegate at Uncitral Working Group and arbitration. Past director and court member of the LCA. Past member of the SCC board, drafted the Arbitration Act 1996, the Pakistan Arbitration International Investment Disputes Ordinance 2006, and the Mauritius International Arbitration Act 2008. As well as many other institutional rules. Welcome, Toby, and thank you for taking the time to speak with us this evening. Thank you. Toby.

Toby Landau: Ladies and gentlemen, a very good evening, or possibly good morning, depending on where you are. The Intag Valley Is a remote, mountainous region in the high Andes in northern Ecuador. It is an area of exquisite natural beauty, Commanding mountains, lush verdant valleys, rushing streams, a sea of flowers and flora. Pure mountain air with no sounds but nature's own symphony. This is an area of worldwide biological and ecological importance bordering the internationally recognized Cotacachi Cayapas Ecological Reserve. With a huge diversity of birds and flowers. It's also home to about 17,000 people who live in small communities, sparsely scattered amongst cloud forests and agricultural lands. They've lived there in their close bond with nature for generations, undisturbed in their own Paradise. Growing tropical fruits, Coffee, corn, beans, Raising cows, pigs and chickens. These are quiet, peace loving communities- Untouched. Untouched- That is, until 2003. In 2003, a company called Ascendant Copper, later renamed Copper Mesa, secured three concessions from the Ecuadorian government to conduct open case copper mining in the Intag Valley. This was a project with a potentially devastating ecological impact, the removal of sections of mountain, waste material to be dumped in the main river, Forcible eviction of

communities from their hereditary lands. Copper Mesa met with understandable local resistance, and in response it adopted a shockingly aggressive stance, including hiring paramilitary forces.

Toby Landau: This led to extraordinary confrontations with the locals. There were running battles, there was use of tear gas. There were weapons. The locals were hurt. They were mistreated. Some were taken away. A whole community was deeply traumatized and ultimately- in view, in part of the conduct of the investors- the Ecuadorian government cancelled environmental licenses and cancelled the concessions, and in 2008, Copper Mesa left Ecuador. And then in 2012, Copper Mesa sued Ecuador for alleged violations of the Canada-Ecuador BIT 1996. They sought massive damages for the project of about $73 million, including loss of future profits. Ecuador's case was that the investor was not in compliance with national laws. It sought to deploy human rights as part of its defence, and it put forward some witness statements from the locals who had suffered at the hands of the foreign investors aggression. Now, ultimately, the investors succeeded in their claim, and Ecuador had an award against it for about $19.4 million, with a substantial reduction on account of the investors conduct. This, however, is not a lecture about the substantive rights and wrongs of that decision. It's not a lecture about the treaty guarantees that Ecuador had offered foreign investors- because it had. It's not a lecture about the application of the standards in the treaty which had been freely agreed. This is a lecture about process only, just process about the nature of the investor state arbitration process itself, by which this dispute was addressed. And in particular the aftermath of that process, arbitration came and went. Counsel and arbitrators moved on to their next cases.

Toby Landau: What was left behind? What was its impact? What is the position now in the high Andes in Ecuador? There is a notable blind spot in our field because we never stop to look back at the actual arbitral aftermath as we move on to our next cases. Now for Copper Mesa and Ecuador. This is the subject of a new documentary which has yet to be formally released or will be released very shortly, entitled The Tribunal, directed by Dr. Malcolm Rogge, who actually, I'm happy to say, is in the audience. Produced in association with the Columbia Center on Sustainable Investment 2023. Dr. Rogge spent time in the Intag Valley listening to the locals accounts of this whole experience. It is a fascinating, indeed unique glimpse into the investor state arbitration aftermath, and more particularly, the disastrous wake it has left- the enduring scars of the locals. The inflammation that the process itself actually brought to the issues at stake. Members of the local community spoke of this on, on, on the film spoke of the sheer terror of the violent confrontations with the investors, the trauma of the impending destruction of their community. But what was more interesting, at least to me, was also what they spoke about in terms of the process, the arbitration process. They described a visit by what they said were smartly dressed, what they thought were French or Swiss lawyers who asked for witness statements.

Toby Landau: It's a credit to La Live because apparently it was La Live who was acting, and apparently their counsel was smartly dressed. But what they talked about was the experience of being told to travel thousands of miles away from their Paradise, to Washington, D.C., where under grey skies in a mass of nameless people all dressed in similar suits, they waited amidst the steel and glass of the World Bank building for an unknown tribunal to call them. And they waited and waited for days, and finally they were told they were not needed, and so they were returned to their home, never understanding anything of the process or of the people involved, and never having a chance of actually explaining their story. And then there's a most poignant moment in this film, which, by the way, is open access for you. And there is a link which the Chartered Institute will provide where you can watch the film. There's a very poignant moment where one of the victims, whose life had been changed permanently by the experience, is shown the award, the award that was rendered in Copper Mesa and Ecuador. It's a 255-page document, as it happens, largely redacted. It's in English only. This lady can't read it. She's told that in this document there are determinations as to what happened to her and her family and her people. But she never contributed to that. She doesn't know who wrote it.

Toby Landau: She doesn't know how that came about. Ultimately, it's unreadable, it's incomprehensible, and it's alien. And the overwhelming reality on the ground is one now of enduring pain and trauma. One person says to the camera, if the arbitration would have been held here in Puebla, a huge crowd would have been there. It is the process itself which has failed. It is leading to inevitable fundamental mistrust, a consequent lack of faith in legitimacy. It's actually inflaming the situation itself. There's no answer to the people of Ecuador to say that the award is the necessary result of the application of objective, legal criteria. It may well be, but that's no comfort. This isn't just about scars in popular opinion in Ecuador. This is a much bigger issue. There is an increasing category of case- Not all cases- where ISDS, the ISDS arbitral process, seems to be generating a similar wake wherever it goes. There are long list of examples. Can I just say for the record here, that I've been slightly unfairly treated because my request for a four-hour Alexander lecture was summarily dismissed. That's another due process issue, which will be for another day. So I'm going to give you just a shortened list of some examples, similar examples from Pezold and Zimbabwe. All these cases are very well known. In that case, claims were brought under the Swiss and German- Zimbabwe BITs arising out of the government's expropriation of estates owned by the claimants, which included forestry and agricultural businesses.

Toby Landau: In the context of Zimbabwe's 2000 land reform program, that program was a highly political and emotive topic. It was Zimbabwe President Robert Mugabe's policy, in fact, on which he came to power in 1980 ,to correct the post-colonial state of affairs at the time whereby a small number of white commercial farmers in Zimbabwe

owned a large majority of the farmland. The land reform program began with voluntary sellers and buyers, but patience ran out in Zimbabwe and it led to expropriation without compensation. And indeed, from the beginning of about 2000, there was a wave of popular anti-colonial emotion in Zimbabwe. Black settlers began invading and occupying predominantly white owned farms. In the arbitration that was brought, Zimbabwe essentially conceded that there had been an expropriation, but they claimed that the acts were lawful and for a public purpose. The land was expropriated, it argued, because indigenous people remained disadvantaged given the slow pace of land reform. So what they're telling- what Zimbabwe is telling the tribunal, is that there is a core political, social imperative that needed to be addressed. The March of History, as it was called in Zimbabwe at the time, was a spontaneous movement amongst the indigenous people, and the state said that couldn't simply be stopped. Now, in the result, the tribunal ruled in favour of the investors. Zimbabwe was ordered to make restitution and pay compensation.

Toby Landau: You can't really complain about the substance of that answer. That was the application of the principles that had been agreed in the treaty. And it's understandable that from a technical point of view, this would be discrimination, this would be expropriation. But the actual result was the subject of condemnation afterwards by many, many portions of society. It was noted, in particular that the ISDs tribunal had rejected an application from four indigenous communities of Zimbabwe to file an Amicus submission. So indigenous communities wanted to put their position before the tribunal. The tribunal refused. They did so on a basis that's perfectly understandable to practitioners in the field. The indigenous, potential Interveners wanted to raise human rights issues. They wanted to raise broad political issues. They wanted to raise historical issues. And the answer from the tribunal: those are not live issues in the actual dispute under the treaty. And therefore, we're not going to give you a day in court to hear you. And that meant that the award proceeded, and it was condemned subsequently for being blind to the essential socio-political context of the dispute. One commentator has said, whereas one can agree with the tribunal that non-discrimination must be upheld. Also, when white populations are the target of persecution, the perplexity comes from seeing a private tribunal constituted to decide an investment dispute, taking a position of what is acceptable and what is not acceptable, as a redress measure for past wrongs in a transitional justice process.

Toby Landau: The arbitration in this case laid bare a procedural dilemma which these tribunals increasingly face. And that is whether and how to address the background of historical inequality. What does the tribunal do? Should a tribunal engage with historical context when there is no obvious legitimacy or procedural tools to take a stand on these bigger political issues? Or does the tribunal remove this wider context from the framing of the dispute? And that, of course, is the approach that is now naturally taken. You strip away the background and you end up, I'm afraid, with something which then is

dislocated from its essential genesis and context. One commentator said the tribunal's very intervention is at best unsuitable to partake in the transitional justice process, but it may become a major intrusion in a difficult political balancing act. So there was a difficult balancing act, which is a political balancing act. And the tribunal's involvement actually, in the end, was an intrusion in that. Once again, it's the process which is causing a problem. Forester and South Africa. The same issue. This was a claim by Italian investors against the state of South Africa claiming that South Africans, the South Africa Black Economic Empowerment Policy, which was there to correct historical wrongs, was in breach of a treaty. Now that case settled, but the very fact of the claim being brought fuelled the arbitral aftermath in South Africa, which led to the move to terminate all their bilateral investment treaties.

Toby Landau: My examples will carry on, Could carry on. In fact, they won't because I have to finish at some point. I want to give one more though. Tethyan and Pakistan. Tethyan and Pakistan was a claim involving an Australian mining company called Tethyan that from 2006 to 2011 invested heavily in mineral exploration in Reko Diq. Reko Diq is an area of the province of Baluchistan in Pakistan, with a gold and copper reservoir estimated to hold more than 5.9 billion tonnes of ore. When the government of Baluchistan declined Tethyan's mining lease application, Tethyan brought an ICSID arbitration against Pakistan. It also brought an ICC claim against Pakistan. This was a dispute. Looks like it was just a mining dispute in Baluchistan, but it was a dispute that arose against a very specific local historical and political context. And that context was as follows: a long-term struggle with regard to Baluchistan's own interests and governance within the Pakistan federal state. There is a major issue as to how Baluchistan is integrated into the federal state of Pakistan, who has responsibility for its governance, who has responsibility for its natural resources. And that was the backdrop to this dispute. The Baluch people are a unique ethno-linguistic group spread between Afghanistan, Iran and Pakistan, and this has been a sore point in the history of Pakistan since 1947.

Toby Landau: The Reko Diq project, when it began, led to huge unrest and opposition from the Baluch people. There were a mass of petitions that were filed in the Pakistan courts challenging the actual mining project, and by the time of the investor state case around about 2012, there were no less than eight civil, criminal and human rights petitions pending before the Pakistan Supreme Court. And loads of those, A lot of those were raising issues from the indigenous people of Baluchistan. Now, when the treaty dispute came, it trumped all of that. None of that's relevant in a treaty dispute. So even though those cases had been bubbling away before the Pakistan courts, the dispute then became a much narrower dispute under the treaty between investor and state. And the result of that was an award against Pakistan, which, which had nothing to do with the Baluch people, nothing to do with their interests, had no input from them. Pakistan was held liable to pay damages of 5.9 billion US Dollars. 5.9 billion. When you

add the damages from the ICC parallel case, it was a claim against Pakistan for 11 billion US dollars that was equivalent to the entirety of Pakistan's 2019 IMF loans. That was 10% of Pakistan's annual budget for a project that never proceeded beyond the planning stage. Pakistan said that immediate enforcement would cause devastating effects to its fragile economy. The case settled, the process- The arbitration process has come and it's gone.

Toby Landau: But is the case over? No it isn't. When it settled, most of the Baluchistan political parties stood away from the settlement because to them the whole process still had not engaged them. And what's left behind is a terrible series of scars, of inflammation. And I can tell you this from, from, from being on the ground in Pakistan. It is customary, if you get into a London black taxi to hear about the weather, to hear about the latest football scores, or to hear alarmingly right-wing perspectives on immigration. That's customary. It is customary if you get into a rickshaw in Lahore to hear about the Tethyan case. Honestly! The information is not complete and accurate by any means, but it is of national interest. It is considered as a national injury. The number of times I have been in the back of a rickshaw in Lahore and heard about everything that was wrong with the Tethyan case. That is an inflammation caused by the process. It may not be well informed, but it's important. It's dangerous and it's dangerous because in a similarly ill-informed way, it feeds into an increasing distrust of public international law generally, and disaffection and feeling of a lack of enfranchisement or engagement in that process. It also led to Imran Khan, when he was in power, to propose the termination of all of Pakistan's treaties, bilateral investment treaties. It also led to the caretaker PDM government promulgating what's called a Special Investment Facilitation Council, which has been in there since June 2023, which now involves the Pakistan Army in all decisions on foreign international investment.

Toby Landau: That's the level of inflammation. But this will all get much worse. It will get much worse because the risk of arbitral inflammation and scarring is now rising. And that's because the coverage of ISDS is spreading. There is a category of case, perhaps what was contemplated at the outset of this field, which is not very controversial. Good old-fashioned forms of investment like construction projects, infrastructure projects and good old-fashioned forms of state interference like direct expropriation or a clear denial of justice. Those were the good old days. But since then we've had a massive expansion. We don't just deal in those kinds of easy, safe cases. The field know the fodder has now completely changed. And that's because we are we have developed in its short life in investor state arbitration, a massive expansion on what we say it covers in terms of the definition of investment. We now cover a massive range of sovereign acts, whether they are judicial, executive or legislative. And we also have an expanded view of many treaty guarantees. We now talk about creeping expropriation. We can now talk about any form of sovereign discretion if it causes injury to a foreign investor as a creeping expropriation or a form of a denial of FET, or perhaps breach of a legitimate expectation.

Toby Landau: This is now an area of coverage that actually goes well beyond the scope of what was before- The key method of dispute resolution diplomatic protection. These are forms of disputes that were not included in diplomatic protection traditionally. And now we are dealing with cases such as climate change. We have investor state tribunals ruling on climate change policy. We have measures to address the effects of war, health policy, economic policy, reactions to states of emergency and dislocation. Investor State Arbitration is a barometer now of world events. And the crucial point here is that this is pushing tribunals into ever more sensitive areas of sovereign discretion. And therefore the issues themselves are becoming much more political, and they're issues that now don't involve just the immediate parties. If it's climate change, it might affect the whole region, possibly a whole nation, possibly the whole world. Tribunals are now at the centre of something where inflammation and scarring is more likely. So let's just step back and consider what has happened here. Why is it that we have got this phenomena of arbitral scarring and inflammation? And to answer that, one actually has to start at the beginning and think about why we've got this process in the first place. And that takes us to the extraordinary proposition that this process was designed- Originally, one of its initial drivers was to de-politicize the resolution of these kinds of disputes.

Toby Landau: My punch line now is blindingly obvious, but I've still got some way to go before I deliver it. If you look at the Oxford English Dictionary on the definition of depoliticise, it tells you that the first usage was actually quite recent, about 1960. What's interesting is that that coincides with the first usage of depoliticise in investor state disputes, because where it came from was ICSID. ICSID started in the 60s, and it started by declaring that it was putting forward a process to depoliticize international disputes. And one can track the development of this. It starts with ICSID, It starts with Aaron Broches, one of the architects of ICSID, who in 1963 said that ICSID arbitration could remove investment disputes from the inter-governmental political sphere. On the 27th of April 1964, he made a statement in a chairman's opening address as follows: He said, 'this is a means of settling disputes on the legal plane, investment disputes between the state and foreign investor, which would insulate such disputes from the realm of politics and diplomacy'. That- the crux of that was to shift the resolution of disputes away from the politics of diplomatic protection, to move it to an objective, rule-based system. So the concept, which drove all of this, was to increase formalization, judicialization and proceduralisation of these disputes and thereby replace what was a political process with an objective, neutral, legal process. And that has been described in various ways.

Toby Landau: Shihata, who was then one of the key people in developing this whole area at the World Bank, was very strong on the concept of depoliticization. His focus was a little bit different from Broche's. If you look at his writings and his statements at the time, Shehata focused on the role for investor state arbitration to protect host states

from the abuses of diplomatic protection from home states. This theme runs all through ICSID. I don't have time to go through all the references, but if you look at the annual reports of exit, you will find these references to depoliticization repeatedly= up to the current day. Now, this was then taken up by states when states were negotiating treaties. They themselves championed the idea of depoliticization, of moving from a politics-based system to a rule-based system, an objective system. It's interesting, Some studies show that not all states were convinced by this, Originally. Lauge Poulsen has argued that German officials- remember Germany/Pakistan was the first bilateral investment treaty in 1959. Paulsen argues that German officials declined to provide for investor state arbitration in Germany, First of all, because of a concern that arbitration could turn every case of expropriation into an international litigation with political relevance. How prescient was that? But that was a minority view. The overall view was actually that this was a process to remove politics. If you look at the US negotiators, they've written more than many others.

Toby Landau: For example, Van der Velde, who served as attorney advisor to the United States Department of State from 1982 to 1988, wrote that the policy of the BITS at the inception of the US program, was to depoliticize investment disputes by channelling them into a legal disputes mechanism created by the BIT itself. One can see this in state practice. Where it then develops from there- because I'm now editing as I go along to make sure that you can all leave the room at some point this evening! Where it led from there, from a lot of state practice was to a mushrooming of arbitration scholarship and articles written probing what we really mean by Depoliticization. And for your benefit, I am now going to reduce a library of information on this to three propositions. And they are as follows: Firstly, depoliticization means the removal of political discretion of a home state to take up an issue by way of diplomatic protection. That's the narrowest form of Depoliticization. You remove that discretion from a home state to elevate this into a political issue. Secondly, perhaps more interestingly, Depoliticization impacts the appraisal of the dispute itself. So the arbitration process uses legal rules as opposed to political, arbitrary assessments in order to actually appraise the position of the parties. This is all about objective, legal criteria. Poon has explained this as follows: Legalization is understood to be conducive to peace by providing a civilized framework for apolitical dispute resolution, one that is beyond the unilateral influence of any one state, and one that does not simply reproduce the unequal power relations between disputing parties.

Toby Landau: And then thirdly, depoliticization has been defined as the process that may de-escalate the broader political fallout that would otherwise be associated with a dispute. And that has been explained by one commentator as follows: It does this by compartmentalizing potentially daunting conflicts between states, into individual disputes between investors and states. So if you take a big dispute that could blow up into something nasty and you compartmentalize it into an individual small dispute between investor and state, then you take some of the tension away from it. Now, all of

this depoliticization, of course, has a Rule of Law significance. Rule of Law has an international element and a domestic element. The international investor state process is part of that whole mechanism, because so many disputes are resolved within it, and therefore it is a component of international rule of law and in turn, domestic rule of law itself, i.e., if something goes wrong with this process, it has an impact on rule of law generally. Now let's take stock. How do we put this all together? What are the real realities about depoliticisation? It is manifest now that these goals have not been achieved, at least not achieved in every case. And it's manifest that the risk now is that they will be increasingly thwarted as this process develops.

Toby Landau: And there are two problems: a problem of theory and a problem of practice. So firstly, theory in the old fashioned, nice, containable investor dispute of a construction project and good old fashioned direct expropriation, this is fine. But if you move away from that comfortable field into the new world of disputes involving climate change, involving nuclear power, involving war, then this doesn't make sense anymore. And the reason is because these are essentially political issues. You cannot sensibly, credibly approach this pretending that they're technical. There's a technical element, but they exist in an essential, socio-economic political context. And it's that context that explains the dispute. And so compartmentalizing at that moment isn't actually removing politics. What it's doing is removing reality. That means that tribunals are being themselves placed in the middle of a political storm. What are they to do in that position? Take Vattenfall and Germany, famous case under the Energy Charter treaty arising out of Germany's decision to phase out nuclear power. Professor Stephan Schill wrote this about the Vattenfall dispute. He said this dispute touches on an issue that has marked Germany's social and political culture over the past three and a half decades, like no other issue apart from German reunification. He said, 'Vattenfall 2, which is one of the cases, is seen as a challenge to a fundamental social and political settlement and hence to democracy more generally'.

Toby Landau: You can't approach that kind of dispute and say you are applying simply objective technical norms. That simply doesn't-So as a matter of theory, we are labouring under a fallacy if we say that this is about depoliticization because it patently can't be. That's theory, What about practice? Well, practice I've already spoken about. Practice is Tethyan and Pakistan. Practice is Pezold and Zimbabwe or its Copper Mesa and Ecuador. If the goal of Depoliticization is peaceful, objective un-politicised dispute resolution, we don't have it. We have scarring and we have inflammation. Actually, if the goal is even removing disputes from the state/state level, we also don't have it. Because studies have been published to show, that even when there is investor state arbitration on foot, states are still getting involved. There is a very- One example, of course, is Chevron-Ecuador. Chevron-Ecuador was a dispute that actually prompted state to state proceedings, as well as a whole wealth of other proceedings arising out of an investor state case. Lauge Poulsen has also done research on the extent to which states

will still intervene themselves, like they would have done in the old-fashioned diplomatic protection days. And in a 2016 study, he found that there, for the US, for example, the availability of investor treaty arbitration to US investors had no significant effect on whether or the extent to which the US government would raise the issue at the intergovernmental level.

Toby Landau: So we're not doing very well there either. In terms of the overall scarring and inflammation We must add into our story, concrete manifestations of distrust. We now have an exodus by states away from investor state treaties. That is undeniable, according to UNCTAD. To date, there have been 512 terminations of investment treaties. That number is increasing exponentially. There are now more terminations than new treaties per year. We can add into that the fact that we now have new reports on noncompliance with investor state awards. In October 2023, very recently, there was a second edition of the report on Compliance with Investor Treaty Arbitration published, showing alarming numbers of noncompliance by states, who are surprising. Including EU states, in particular, (not to mention anyone in particular) Spain. And now, two weeks ago, we have the most devastating UN report on climate change, which was presented to the General Assembly. It is a controversial report done by Special Rapporteur David Boyd, and it's entitled, rather neutrally Paying Polluters: the catastrophic Consequences of investor state dispute settlement for climate and environment action and human rights. Where the core problem is as follows: We have imposed on investor state arbitration A commercial arbitration Anglo-US adversarial process and with it an adversarial commercial arbitration mindset. You will know, the nature of investor-state arbitration and commercial arbitration- Completely different, completely different. Contractual commercial arbitration involves parties, even a state in a horizontal relationship.

Toby Landau: They have agreed a contract which encapsulates their mutual rights and obligations. And they are therefore, in that sense, at the same level. And whatever is resolved between them is just between them. Investor-state arbitration is not horizontal, it is vertical. It's like administrative law or public law. It is one entity- investor- challenging the exercise of sovereign discretion, which may affect everybody. Therefore, in nature it is totally different, but we are squeezing it into the commercial arbitration model. And if you do that, there are three adverse consequences. There could be four, but it's now late in the evening, so here are three. Firstly, immediately you have a lack of access of all stakeholders naturally, because in commercial arbitration you're not interested in anybody else apart from the parties who have contracted. And that's not only in process, it's in mindset and therefore other stakeholders will not have an involvement. Yes, we have an amici process. Yes, we have an interveners process. Frankly, they're not taken very seriously. Why? Because partly many amici are not amici. They are NGOs with agendas. And secondly, because there's a concern about expanding the scope of the dispute about imposing an unfair burden of costs on one

party (normally the investor) about the fact that actually in commercial arbitration we don't have third party interventions, so we give limited indulgence. We allow them to come in on a limited basis. Very rarely do they get full access to the full written record.

Toby Landau: This doesn't actually help this process. Just to go back to the two week ago UN report given to the General Assembly on climate change, which is withering and devastating if you read it. One particular criticism is this: the UN Special rapporteur looked at cases like eco, Oro and Colombia and von Pezold in Zimbabwe. And he says in terms- please read paragraphs 24 and 25 of this report- He says, 'public participation and access to justice with effective remedies are fundamental rights in and of themselves, but they're also integral to the full enjoyment of human rights. Inclusive public participation improves the quality of decision making, enhances rights holder support for projects, and fulfils human rights obligations'. But we don't cater for it because we haven't got that model. We've got an investor state, sorry, we've got a commercial arbitration model. That's the first one. The second one Is this: the problem of arbitral tunnel vision. Arbitral tunnel vision. If you use the commercial arbitration procedure, you are placing the tribunal in the elevated position of a neutral umpire waiting to be educated by the parties appearing before them. It is adversarial. It's what F.A Mann Famously called the principle of unpreparedness. He waits or she waits to be educated. And if they're not educated, then it's not on their record and it's not part of the decision. Now that has a major problem with it.

Toby Landau: Firstly, the tribunal doesn't get the full picture unless they're given the full picture. End of story. Next problem- people don't aim to educate the tribunal. If you're counsel, That's not your task. Actually, it should be. Your task, Rather than educating the tribunal, is to win. And by winning, you don't necessarily educate, you provide the information- Of course, it's got to be honest and truthful- that you need to win. That has in it all sorts of limitations. The investor is unlikely to be going out and asking stake holders in any event what their view is. Will the state? Will the state should. But that's not an answer. We know that, practically speaking, yes, the state should be the one who will give voice to the people in Ecuador, but the state doesn't because the state has budget limitations, because the state is dysfunctional, because it has political issues, because it has no institutional memory, because it doesn't have the wherewithal to do it. And worse than this, there is strategy involved. The strategy is that you don't always put the best witnesses forward. You put forward the witnesses who will perform best, who will be best for cross-examination, who can string a sentence together. That isn't always the best person to testify, but that's not your interest. We have a recent and alarming example of the limitations of the adversarial process, and that is the Nigeria case, the recent well known case of Federal Republic of Nigeria and P&NID. 23rd of October Justice Knowles and the Commercial Court in London sets aside an award, which with interest was for $11 billion, an award rendered by the most experienced tribunal chaired by none other than Lord Hoffmann.

Toby Landau: And it was set aside because, Justice Knowles said the arbitration was a shell that got nowhere near the truth. Why? Because there was corruption. That corruption was never brought before the tribunal. So the tribunal proceeded and rendered the award. Actually, it was an award against what Lord Hoffmann later described as a miasma of corruption. My point isn't about corruption, it's about the limitation of this process. That's an example where the highest-level tribunal doesn't have the full picture, and it's the same limitation which causes the scarring and inflammation. If a tribunal is ruling on these highly political disputes without the benefit of all the information. Here's the third problem. The third problem of using the commercial arbitration procedural model is polarization. When you have the commercial arbitration model, you arrange the parties in interest groups: claimant/ respondent. And what naturally happens is polarization. Each side starts to get more and more extreme in the position that they're putting forward. You're not going to argue if you're the state. 'Well it's right...It could be right or wrong. There are a number of possibilities... This was a difficult issue'. You are going to argue through your highly polarized counsel: We were right. That's it. It's black and white in an adversarial system. It's not grey.

Toby Landau: But here's the problem. Policy is grey. It's not black and white. If I'm an arbitrator deciding a climate change policy, it's not a question of yes or no. It's a highly nuanced issue. If I'm a government official deciding climate policy, that is a complex, delicate, nuanced process. But as an arbitrator, you're not doing that. As an arbitrator There's a fundamental mismatch because the middle ground where policy is made is not addressed. You're hearing the peripheries. And if that middle ground is not addressed, it's not going to feature in your decision making. And therefore your result will be totally isolated from the policy making process itself. So here we are with the scarring and the inflammation. It's not about the result itself, of course That's another lecture -mercifully I'm not giving it. But put that aside, 'Rights and wrongs'. It's the process itself which is feeding into all of these problems. It's the limitations which is causing the scarring. And so here I move into what we do about it. You're looking at your watches, There isn't much time left So here we go. What we do about it is something totally counterintuitive. What we don't do is limit ourselves to the current reform debate, because the current reform debate, with all due respect to everybody, especially those participating in Uncitral working Group III at the moment, that reform debate is about improving the arbitration system.

Toby Landau: It's about making it more efficient, more consistent, transparent. But the problems go far, far further than that box. This is a problem about De-politicization. De-politicization is causing a problem. And what I'm going to say is counterintuitive. We actually need to think about injecting politics back in. We need to think about re politicizing. And by that I mean allowing disputes to be resolved against their natural

habitat- in their natural habitat. That means taking into account their natural context. That means if you are deciding von Pezold in Zimbabwe, you are allowing yourself to hear from indigenous people. You are understanding what the political dynamic is that led to the government decision to say they couldn't stop it. That means that if you are deciding to Tethyan and Pakistan you are aware of, you are informed by, informed about the Baluchistan issues, the actual struggle that was happening at the time. Why? Because when you then make your resolution, when you make your award, you are rendering something that is most likely to actually have legitimacy and acceptance. What you're not then doing is walking into the inevitable condemnation, which is what we have at the moment, from all those stakeholders and interests that didn't have their day in court. This is now to remove the fiction of rule based against policy based, because the task at hand is essentially political.

Toby Landau: There have been people, many people have written about this, and I want to refer just to one in particular, and that is Tamar Meshal, writing in 2019 about the original nature of, as it happens, state to state arbitration. Meshal wrote that modern international arbitration has lost sight and the benefit of its mixed political, legal origins. He said that the legal dimension of inter-state arbitration allows state parties to submit legal questions to an arbitral tribunal and to present arguments grounded in law. But the political dimension of inter-state arbitration allows states parties to submit politically sensitive questions to an arbitral tribunal and to advance extra legal arguments based on political, historical and economical considerations or local and traditional customs. So what he's referring back to is, is a form of inter-state arbitration, which actually we've lost sight of nowadays because we're so focused on a contemporary, judicialized form of the process. Everybody in the room is now hating what I'm saying, and it's understandable, because this cuts against everything that we think about when we talk about principled dispute resolution. But what we've got to face is that our current process simply isn't working. It's true It works in a category of case, but there's this expanding sister category which is going to carry on. It's going to carry on expanding- where it's not working. What is the point of our process? If we come, we decide the dispute and we go, and all that we've done is we've left inflammation and we've left scarring.

Toby Landau: And so the procedural proposal is to rethink what we do, both in terms of the commercial arbitration adversarial model, which needs to be different. It needs to be more inquisitorial. It needs to be something possibly completely different in some cases, like commissions of inquiry, where you actually have a tribunal that is determining something, but deciding who it hears from and how it hears it, and what that- how that all comes together, how it's to be resolved in order to enfranchise the very people who otherwise are going to condemn the process as they are driving their rickshaw in Lahore. There are ways of doing that, but it's beyond the scope of working Group three. This is not a rant about the end of ISDS. It's not a lecture about the end of

investor protection. This is a call for a fundamental rethink of our current adversarial system, so that investor state dispute resolution can come and go and leave winners and losers who all equally feel they have been part of that dispute resolution process. High up in the majestic mountains of Ecuador on the lush green slopes of the Intag Valley. Whether or not Copper Mesa had been compensated, the local communities should be able to explain the process that has taken place and they should understand who has ruled upon their lives. Frankly, other than the reluctance to look at our field afresh, there is nothing stopping us achieving this. Thank you very much.

Jonathan Wood: What a tour de force. That was just one of the most extraordinary lectures I've heard, one the most extraordinary Alexander Lectures. So thought provoking in the current Regime, in the world that we live in today, Toby, and I can only thank you. My first point is that the Tethyan case, when I was in Lahore, I not only heard about that, but also the cricket scores from the test match. So, you know, they're not much different to our taxi drivers here. And I suspect that the taxi drivers here are talking about commissions of inquiry. It might be the Grenfell inquiry, it might be the Post Office inquiry, but it's a similar sort of thing. It's involvement of those who are scarred and who are victims, victims of this process that you so eloquently identified. My own experience, if I may go so far, it does involve a case that you were in and this was the Biwater case against Tanzania involving the sewage and water system of Dar es Salaam. And my recollection is that that was probably one of the first cases where amicus briefs were introduced into the process. And my strong recollection is that they were given pretty short shrift. And you were sat on that tribunal, and I think you possibly were one of them who gave them pretty- because everyone said, well, what's this got to do with the issues between the parties? So the amicus brief is not..?

Toby Landau: So that that is a very significant case for me because I was arbitrator. One of the arbitrators on it. Biwater-Tanzania, as you say, was one of the first instances under the ICSID rules which focused upon when an amicus or intervenor would be allowed in. We had four, from memory, four interventions requested, or we had maybe more that we allowed for. That was a huge- it was under protest from everybody. What were these people doing coming into the dispute? As it happened, They were a mixture of NGOs who had issues about privatization and water issues, water policy. So Biwater-Tanzania is a classic, classic configuration in terms of its case of a foreign investor coming in actually under a world Bank sponsored policy, for water privatization, the the performance was highly questionable. Tanzania wanted to stop it. They did the- one of the textbook errors, If you're a state don't don't do this if you want to expropriate- they sent in the army. Top tip: you can expropriate but don't use the army. So they sent in the army and and Biwater were chucked out. And the investor state claim is brought. And that comes before us as a tribunal, as a dispute between the investor company and and the state.

Toby Landau: Then we have interventions. And the interventions were all about the nature of this policy of privatization of water- huge opposition. And at the time, it was early days, it was felt, well, we'll give them a limited involvement, but they can't see everything because that would start to expand the process too much. So they only had a limited glimpse of some of the documents- Not all the documentary record- they they were not allowed to make arguments in front of us. And they made short written submissions. We make our award. What happened after that award was published, was a lot of criticism of us, of the award. Actually, what we found was that there had been a breach of the treaty, but we found there had been no loss, so we didn't actually award any damages. But still people wrote saying what we had done was divorced from reality. And the key point was we never considered the views of 350,000 water users in Dar es Salaam, and it was them, It was their lives, It was their daily water that was impacted. And I have to say that that that has stayed with me, as you may tell, you can tell it stayed with me ever since.

Jonathan Wood: Yes, stayed with me as well, because I was involved in the background on behalf of government, the British government, who had an interest in the outcome under an overseas investment policy of insurance. And again, being a commercial sort of litigator or arbitrator, this idea of an amicus brief from NGOs was totally alien. And, you know, we're so used to our pleading process- narrowed down, These are the issues. And let's get on with the- let's get on with the award, on the issues before us. And what we're now, as you rightly point out, is seeing, is that we're making these decisions in a highly- a much more complicated socio-economic political dimension. I mean, this is, you know, climate change, human rights, water rights and everything like this. So. You now advocate this change of process, which may come as an anathema to many in the audience who, you know, make their daily bread about it. And you come up with this idea of a commission. How do we ensure A commission Maintains this all-important facet that we're all used to, of due process. We've heard the criticisms in the Grenfell case, for example, how do we ensure that people are properly heard in a process like that?

Toby Landau: So it's a very, very important issue obviously, but where one has to start on this is what do we mean by due process or natural justice? In our world of arbitration, which is commercial arbitration in terms of the process, we have come to an understanding of due process and natural justice, which is infected by the adversarial process. So we understand it as the right to put your case and to respond to the case that is put against you. That is defined, calibrated, measured and assessed by court. So obviously in arbitration law, we have it in Section 33 of the English Arbitration Act, You have it in the model law. And then we have a wealth of jurisprudence on that. But the point about due process and natural justice is, yes, everybody has got to have a right to have a hearing. Audi Alteram, Partem and all all our canons that we use. None of that tells you it must be an adversarial process. Actually, we understand it through the lens

of an adversarial process because that's what what we've always done. But there are non-adversarial systems around the world that also apply natural justice and due process. And so what will be required in my magical world, which I am commending to you, is that judges will have to recalibrate and reassess what constitutes due process and natural justice in a process that's not essentially adversarial. And yes, they will have to be that guarantee. There is nothing, as far as I can see to prevent that happening. Why can't- why can't there be an understanding developed of what it means to have a full hearing and to have an opportunity of answering all the points that are being put against you in the context of something that looks different to an adversarial process.

Jonathan Wood: And the selection of those in charge of the of the Committee of inquiry. I mean, from a personal point of view or from having discussed these issues with claimants and of course, respondents, sometimes one questions who the tribunal are really accountable to. I mean, it's, you know, it's a process. But, you know, very intelligent people like self, many other well experienced people in the arbitration world… But what, you know, are you there to be educated about human rights? Are you have- you been in some way elected by those who are- who's issues, who's whose circumstances are being affected?

Toby Landau: So, so this This point was, was was really the crux of the criticism on this Zimbabwe case. In the Zimbabwe case that I spoke about- von Pezold in Zimbabwe. The critics were saying, look, the task that you as a tribunal are doing is whether you whether you like it or not, you are ruling upon a very delicate bit of Zimbabwe history to do with correcting wrongs, historical wrongs in a transitional process. So what's your legitimacy to do that? That's what they were saying. How can you do it? That's partly: Who are you? Who are you accountable to? It's also what tools do you have available to do that, because that's something which actually is an incredibly complex process, a complex thing to do. So, so the individuals can be they can be expert and they can be experienced, but they've got to have legitimacy and they've got to have the correct tools. Now in, my in my 'magical world', they, they, they are people who can be anybody, but they're placed in a position where they are allowed to actually become legitimate because they are taking the lead to ensure that all the voices are heard and that all the interests are considered. And that that's a very different exercise to standing back and waiting for arguments from counsel.

Jonathan Wood: And so this requires a complete change in framework? Where do you think the impetus for generating a new framework might come? We know that UNCTAD three is looking at improving the system. Is it UNCTAD…or is it some other institution? Is it the world Bank for example? You know, where where are we going to start in terms of finding a champion for this proposition that you have so eloquently put forward?

Toby Landau: I think there are two ways in which this might happen. One is more realistic than the other. I start with a more realistic one. The more realistic one is we don't change anything in terms of law. We change nothing. We have treaties already which have arbitration provisions in them, thousands of them, and we live with them and we will live with them whether we like or not for years. We've got arbitration laws and we have arbitration rules. But the point that everybody misses, notwithstanding my repeated ranting on this, is that none of that structure that I've just mentioned dictates an adversarial process. It doesn't. It dictates natural justice and due process. It doesn't say you must follow a strictly adversarial process. It allows tribunals to take the initiative to ask questions, to make inquiries. It allows them to hear from other entities, to call witnesses themselves. But these are the funny bits of the rules that nobody ever wants to use. Tribunals don't want to do it. The mindset is against it. Look at section 34 of the English Arbitration Act 1996. It says in one of the subsections, 'will the tribunal take the initiative in finding fact or law'? That was put in in 1996 to try and encourage people to think differently from just an adversarial process? It was a failure.

Toby Landau: But it's there. And there's nothing in the Uncitral rules. In the ICSID rules. There's nothing saying that tribunals can't do this. They can. So now without changing anything, we can actually make our existing process less adversarial and more inclusive. But the big problem is mindset. That's the big one. The big one is to get arbitrators and lawyers and parties on board to do it. That's the more realistic route. The second route is outside of all of this, which is the true commission of inquiry, which is starting with a blank page and actually creating something which is- which states may want to adopt. And tribunal and arbitrators or whoever or commissioners or whatever we call them, might want to embrace. I don't have a magic answer apart from apart from talking about it and encouraging people and thinking that there should be an overall consensus that we need something different.

Jonathan Wood: But it's like all these things, you've got to get the conversation going, and that's very important. I'd like to turn to the audience now, and we have a roving microphone and see if anybody would like to raise a question of Toby on this very interesting topic. Anybody got any points or questions? Yes. Well-the gentlemen there.

Audience 1: Hello. Thank you very much for the-

Jonathan Wood: Could you stand and tell us your name and where you're from?

Audience 1: Right. My name is Samuel Kuo, and I've just done the membership course. I'm in between careers. Thank you very much for the speech. I just thought I would, if you could dilate on the fact that you talk about the- Actually, instead of depoliticizing, We need to bring politics back into it, I suppose, is one of the issues. Then how would you ensure a commission, as it were, that is neutral and unbiased. At the same time, having

the grasp of, say, I don't know, in Pakistan or in Zimbabwe, of the history of the issues. Would that just naturally strip away ADR in some ways? Strip away the structure of ADR and simply going back to domestic court or simply have a domestic arbitration, then I suppose that would be resolved?

Toby Landau: No, I don't see that it needs to change very much other than make the the decision makers better informed. And I can just give a specific example. I think the Zimbabwe example is one of the most compelling actually. But it's not the by no means is it the only one. If the Zimbabwe argument was- which it was to the tribunal- we have a particular issue, which means we cannot stop our indigenous population from invading white farms, white owned farms. And that problem is a historical one, and it's an economic one and it's a political one. And that if that's the case, which it was, then that needs to be explained. But the tribunal had limited patience for it, frankly, because they felt that these were broader, difficult contextual issues which were not actually going to inform the precise decision they had to take under the terms of the treaty. So that to me is the clearest example. Yes. By all means, decide under the treaty. By all means, you have to do that. That's your mandate. But you're deciding something which exists in a necessary political context. And therefore, how can you do that? By consciously stripping away that context. You can do it. They did it. But you walk into the criticism afterwards that this is disconnected with reality.

Jonathan Wood: Sir.

Audience 2: Thank you very much, sir, and thank you very much for the very wonderful views that you have shared-

Jonathan Wood: Would you like to just tell us who you are?

Audience 2: And my name Chikwendu Madumere from Nigeria, sir. Thank you very much for the wonderful insights you've shared with us this evening. I want to make a comment and then I will ask a question. Talking about the process with regards to ISDS, I have a recollection that in the case of Methanex and the US conducted under NAFTA using the 1978 Uncitral rules, the tribunal bent backwards, you know, under article 17 of the Uncitral rules and said, yes, because the rule allows us to conduct the arbitration in a way that we deem necessary, that they were going to allow amicus submissions. And they did. That is one. Then, number two, is there a possibility that the textual context of, of treaties entered into by states, you know, may be the reason why some tribunals find it very difficult, you know, to allow for third party participation? Because I ask this question, keeping in mind that the modern treaties, you know, framed by states, anticipate third party participation and also anticipate, you know, recognition of regulatory powers of host states.

Toby Landau: Yes, yes. I mean, I essentially agree with everything you said. It's right. But but the thing is that a lot of treaties themselves are not very normative on this. They will just set out guarantees and they'll set out all the other provisions. They're not actually directing a tribunal very much as to how to implement them. That's one of the problems in this field, actually. It just leads me, I'm sorry if this is not completely related, but I think I think it is- One of the problems is we say traditionally it's been said, and these were the references I gave, that the field was designed to take away disputes from politics into a rule-based environment. Now the problem is- look at the nature of that rule-based environment. It's not anything like a rule-based environment that we would understand in domestic law. These are broadly framed principles in treaties. They're very broadly framed without much guidance. FET is not defined. What does FED mean? Well, we know the whole story of this, but if you were an arbitrator, I can tell you, the experience of being an arbitrator In these cases, you do not have clear guidance. You don't have clear guidance in the text. You don't have clear guidance in jurisprudence because there's no doctrine of precedent. And therefore, yes, you can look at previous decisions, but everything technically is up for grabs. Treaties are broadly framed because that's the lowest common denominator that can be agreed between contracting states. That's why they're not that detailed. And, you know, the famous definition of a treaty, which is which is a disagreement set out in writing.

Jonathan Wood: And Entered into for photo opportunity!

Toby Landau: And exactly. So everybody, you know, you sign the treaty, you've got a wonderful moment with a table with flowers. Everybody's shaking hands. It's a moment of love and harmony, and it's a photo moment. And everybody leaves the room thinking the treaty means something different. And then the poor tribunal has got to pick up the pieces. But that is critical in these areas, because if we go back to where I started on this. All right, you're moving apparently from politics based to rule based, except that you're not given many rules in what are essentially political issues. That's the problem.

Jonathan Wood: Interesting. I'll come back to the room in a minute if I may. Mercy. Have we got any questions from our audience online? We have to be inclusive in this-

Mercy McBrayer: We do. One of- one common One of which, I will note, is whether or not- since you were so cruelly forced to fit this into one hour- you'll write a book?

Toby Landau: The answer is the day after I retire.

Mercy McBrayer: So we have a question from Sarita Woolhouse. 'The process of ISDS was and continues to be a search for a one size fits all solution. To what extent is this a root of the problem? BITS have become standardized and so have- So has the process. These are for long terms with no flexibility.?'

Toby Landau: Completely agree. I completely agree. It's become standardized. But what's what's curious also. And I'm afraid this is probably another another lecture for another day. But if you go back to look at where this actually started, why do we have investor-state arbitration in the first place? The the misconception on this is that it was led by users. Investors or states. It wasn't. If you want to look at a brilliant book on this, you have to look at Taylor. Taylor StJohn's book on the origins of this area- where it came from was the world Bank. It started as an idea by the architects of ICSID. It wasn't because investors were asking for it. Of course, when they had it, they liked it. But but they didn't ever say they needed it. In fact, what people wanted at the time, but it couldn't be agreed, was an international insurance system. Or if they couldn't be an international multilateral insurance system, then a substantive system of substantive protections rather than just process. So I'm saying this because, led by world Bank civil servants, we ended up with the Uncitral model. Not because that was a reflection of what the market needed or wanted. It was the promotion of an Uncitral model and an ICSID model, which is, as Sarita is saying, a one size fits all. And as I tried to explain, I think it's the wrong size.

Jonathan Wood: And what we have, of course, is the export credit agencies, which started out in the 20s. Then it developed into the idea of MIGA and OPEC being, you know, international multilateral insurance facilities, which have had sort of variable results overall. So can I just go back to the room before we go online? There's a gentleman there- gentleman sat next to you was the first.

Audience 3: Thank you. I'm not sure I need the microphone. I think you answered the the question. My question, which was, am I right in assuming that there is room for your magical word under the existing treaty frameworks?

Toby Landau: Yes, absolutely. But as I say, the biggest impediment is not law or rules, it's mindset.

Jonathan Wood: Yeah. Lady there. Then? Yes, Frederico. Thank you.

Audience 4: Kim Franklin, Crown Office Chambers, international arbitrator of the traditional sort. And I wonder-

Jonathan Wood: Would you like to define!

Audience 4: Toby will define it! Thank you for stimulating our thoughts. We we need to have more of it. And I'm going to make a suggestion. It's rather against my livelihood. But lawyers are traditionally conservative types. They don't like change. And you only need to suggest that we introduce some of the initiatives of the Green Pledge to see

how keen tribunal members are to reduce flying in business class, to know that change is not popular. So is the answer to have fewer lawyers, or at least to have a non legal chair for the tribunals that you have in mind? Will that take us to your magical land?

Toby Landau: I thank you for the suggestion! I think, I think it's, it will be one element in many other elements. And I say that not because there's a problem with lawyers, but it comes back to what I keep saying, and I forgive me for repeating it, but it is a mindset problem. So, the mindset is not just arbitrators, it's also lawyers. And the truth, of course, the practical reality for all my, my idealistic vision, the truth is that you turn up at a, the first procedural meeting in an arbitration and everybody already is on the same page. They already have in mind procedural order number one. And it has a set system. And for the tribunal, it's quite difficult if the lawyers are saying, we've agreed this and this is how we want to do it. So it is not just, it's not just an arbitral mindset, it's also lawyers. Everybody has got to start afresh. And that's difficult because in our system, if you're a lawyer, your interest is not that, your interest is to win the case. So that's what you do. So so I don't have a magic answer, but I certainly take your suggestion on board.

Jonathan Wood: So the day we all turn up and say, actually, can I refer you to Section 34 of the arbitration act? It's going to take you back somewhat isn't it.

Toby Landau: It's like it's something about the Prague rules. The Prague rules have struggled. People don't like it. Prague Rules is a sort of continental civil law approach to the IBA rules, essentially. I mean, that's unfair, but that's essentially- so it's much more inquisitorial, much more hands on, and it's got a wealth of critics. If we can't even handle the Prague rules, then my magical world is far off, I'm afraid. But, But that's what we have to focus on.

Jonathan Wood: Frederico. Thank you.

Audience 5: Hi. Thanks, Fred. Singarajah. Um, two questions that came up whilst you were saying. So first, do you think that potentially the mindset, certainly on the arbitrator, the tribunal side, might be we have good knowledge of due process Paranoia? Might be impartiality Paranoia? That if you begin to ask questions and lead the Inquisition, you may be actually advocating for one side as opposed to another, First of all. And that that there is an impartiality requirement normally in most rules. And so that that might be what they're interpreting. So yes is the answer to that?

Toby Landau: I just just to pause because that's if I may say a very, very good point. Due process paranoia is one of the biggest impediments to my magical world. Due process paranoia is now… It fashions everything we do in this field. And what that means is that tribunals are so scared of challenge to themselves or their awards, they will do the least, the least that they can, that they need do. So. They will never want to show their hand

because of the problem of bias and the problem of an accusation of prejudgment. They will sit there and they'll try and keep a straight face, even if they're bored out of their minds and think this is completely irrelevant because they have to show neutrality and objectivity. All of this because of the fear of change. Now we have to address due process paranoia. My magical world is not, is just is completely unrealistic Unless we do that. Of course it's a subset of the mindset problem, but to deal with due process paranoia, even without a commission of inquiry, just to get a tribunal to use section 34 and be inquisitorial, we actually need the help of judges. This is starting a little bit in some jurisdictions, like Singapore. We need some healthy judicial statements saying this isn't going to be the basis of a challenge. To give comfort. That is, the cure for paranoia is to know that there is a body of case law that challenges If you want to act inquisitorially, you're going to fail. It's not-But I think that's all possible.

Jonathan Wood: Because the problem with commission of inquiry is you've got judicial reviews. You know you have this Two-year inquiry. And then someone says, okay, it all went wrong. Let's judicially review it. And I mean, that's just-

Toby Landau: So it Has to be a partnership with the whole parts of the dispute resolution ecosystem.

Audience 5: Jonathan's point just leads to my second follow up question, which is if you have an inquisitorial, Commission type, inquiry type setup for ISDS. They are notoriously famous for overrunning, over costing and then being judicially reviewed. And in a ISDS scenario where you effectively technically have two parties- who banks that?

Toby Landau: Yeah. Yeah. Good question. Don't have an immediate answer. We can come up with an answer. All there are so many issues like that, so many points that would have to be designed. My sense, however, is that of course we can come up with an answer. Of course there's a way of structuring it, but it just requires fresh thinking on this. And if you say- the other danger is to say, well, say commission of inquiry. And so people say, well, you mean Grenfell, maybe you mean Saville. You know, I mean, but of course there are many examples you can give, but that's just a really poor way of analysing it. It's not a question of saying, well, we've got limited options and we'll just cut and paste. Why don't we just design something that actually works for what we need?

Jonathan Wood: Mercy- Online?

Mercy McBrayer: Paul Mason asks something that I was actually wondering as well. 'What do you think of the EU Multilateral Investment Court proposal? Does it address your points, or is it just more of the same with judicial robes on?'

Toby Landau: All right. Good. Very, very good question. I have to say I am actually favourable to that as a proposal. I think that there is scope for a multilateral court that it may well go some way to answering some of the points. It doesn't go far enough for me, but I think a court structure immediately takes away from part of the problem of commercial arbitration, which is a limited view. In a court, Normally, courts will allow third parties in in a way that's much, much interveners or people who are interested parties without this constraint of a bilateral relationship in their, in their, in their heads. So I think that it's, it's got lots of problems, Of course, we know in in its detail, but I think it has potential. But it's not my magical world, Actually. It's not- my magical world is more extreme!

Jonathan Wood: Lady there if I may.

Audience 6: Thank you- Agnieszka Zarowna, White & Case. so, in this new, brave, magical world, once we educate the decision makers about all those voices that maybe currently are excluded due to the tunnel vision. What then? How are the decision makers to take them into account and reflect them into their decision making? Is there a call for more ex aequo et bono of an- more of a sort of equities approach to decision making, or how does that, all of that wealth of education will be reflected in the decision making process?

Toby Landau: Yeah. So part, part of the references that I gave, especially towards the end of the lecture were in this, looking at this older version of state-state arbitration, where arbitrators were acting not just legally but also diplomatically. That was one of the last references that I gave. That is more focused on the idea of ex aequo et bono, and that turns a lot of people off immediately. But, I don't think it needs to be that, Actually. what's more interesting to me, because I'm focused on procedure and not substance at the moment, is that even within the application of our existing standards, that is treaty provisions, that is principles of customary international law. Those principles demand in many respects, in my view, better information and better knowledge. You can be applying fair and equitable treatment, but to understand fair and equitable treatment, you actually need to be better educated. So I'm not actually advocating a free for all, ex aequo et bono world. I'm very happy with a principled world. I'm happy with the idea of applying these kinds of principles which have been agreed between the states. But what I want is, I want them applied in there- in an optimum way and applied in a way that doesn't have scarring and inflammation around them.

Jonathan Wood: It makes me think of the law of the sea and how that's dealt with, quite often. Big broad, Much broader. But environmentally very important. Yes.

Toby Landau: Can I just I just want to add sorry on this. There's a whole debate at the moment about the, about, for example, the relevance of human rights in investor-state

arbitration, just as there's a debate at the moment about the relevance of other public international law norms within Investor-state arbitration… Environmental law, all sorts of other areas, that is an active, incredibly important debate. The problem is, I think that part of the answer to that, which is a substantive debate, substantive principles, is being infected by the process because the procedure is so narrowed down to the rights and obligations of these parties only, under this treaty that people feel if you start looking at human rights, you are bringing in a political element, which you shouldn't. That's a confusion of process and substance, actually. But I think that what I'm- what I'm advocating is incredibly important as we start to understand better as we have to how human rights works or may work within our existing legal framework.

Jonathan Wood: We might talk to Jonathan Sumption, who has just written an article in The Spectator about- we should leave the ECHR, but we'd expect that sort of thing from Jonathan Sumption.

Toby Landau: And Some taxi drivers.

Jonathan Wood: And some taxi drivers! One more.

Mercy McBrayer: yes, so Hector Casal, notes that 'many new generations of model trade treaties address these issues. Although most of the ISDS cases currently are arising under the first generation of BITS, as the disputes under the new generation become more common, will this be addressed naturally?'

Toby Landau: To the extent that some do, but interestingly, some of the new generation BITS are worse. It's interesting, I was I didn't have time-I was going to read out- There's a very interesting bit in I think it's one of the Italian treaties, New Generation Treaties, which expressly cautions arbitrators not to pay any attention to political issues or anything outside of the specific issues at stake. It's a kind of a provision that is very interesting provision that is warning against external clamour somehow affecting the process. So it all depends on what's in the new generation treaty. I- some may well help. I imagine most of them won't go far enough.

Audience 7: Ben Baker. I'm a student member currently studying for the bar. Very simple. And just to end with, I suppose, uh, regarding the rate with which the BITS are being revoked being fast and they're being made, would you anticipate that with fresh faith in the arbitral process, that they would then be remade because of it, or will they sort of end up having to be remade anyway as just part of being a country that trades internationally?

Toby Landau: So countries at the moment that are terminating their bilateral investment treaties are doing so on the basis that they feel that they don't need these

treaties to attract foreign direct investment, and they feel that they are being actively hurt by these treaties. And if I'd had more time and I had about three pages on it, I would have listed the countries that are doing this because it's extraordinary. It's the countries now that are actively either terminating or talking about terminating Their treaties- come from north south, east west. They come from all economic profiles. It's not just who you imagine, it's it's all sorts of countries now moving away from it. So they're doing so against the backdrop that there is nothing at the moment that's really shown or proven that foreign direct investment is linked to the existence of treaties. That's a controversial issue. There's a lot written about it. What is what, by the way, is clearer is that there's definitely no link so far empirically shown between foreign direct investment and the arbitration provision in a treaty, because treaties themselves have been around for a limited period of time, foreign direct investment has been around for much longer. It was alive and well before these treaties were implemented, and the first generation of treaties didn't have arbitration clauses in them anyway.

Toby Landau: And then even when they did, claims didn't start coming until 4 or 5 in the 1980s, and which were the early and some of the early NAFTA claims. And then actually, we didn't start getting this as an area of active practice before about the year 2000. In fact, it was Jan Paulsen's article in 1995, in Arbitration International entitled Arbitration Without Privity, which alerted people to this field. And if you chart from the publication of his article the exponential rise of cases, you can see how popular that was. So all that to say that there are reasons why why countries are now walking away. They are. But what's motivating them then is they don't feel they need it, but they also feel they're getting hurt by it. so. But as I say, this was not intended as a rant against investor state protection. And but- but my hope is that if there were a system which is acceptable to states and which was felt to be productive and positive, then that exodus would stop. And actually people would see this as being something positive and with its own particular merits.

Jonathan Wood: So this whole process, this whole critique of BITS, I mean, it has an impact on ordinary day to day commercial arbitration and has tainted it significantly. So, you know, it has an effect all around for those of us who just do, day to day disputes between commercial parties, are being infected by this whole process.

Toby Landau: And the infection. The infection is even, is even more dispersed than that. It's wider because it feeds, as I was trying to say but there was limited time, It feeds into rule of law. It feeds into the international legal order. Because arbitration plays such a key role in dispute resolution as part of that order.

Jonathan Wood: Right. One more question. Any more questions? Yes. So the gentleman there who I think has a vested interest in what we've been- would you Like to stand and Introduce yourself. You should-

Audience 8: Okay. Hi. My name is Malcolm Rogge, and I made the film that Toby Landau referred to, which is actually live now on the Columbia Center on Sustainable Investment website. It went live over the weekend. So if you're interested, you can just go on to the Columbia Center for Sustainable Investment website or do a search on 'The tribunal' Columbia, and you should be able to find it now live so anybody can watch it. Now,

Jonathan Wood: Was That your point?

Audience 8: No, I had a question, actually. I had a genuine question, which was I know that the answer is that it's hard. I know that, but I kind of like to go find out a little bit further beyond, Well, it's really hard to do that. But you talked about- the last part of your lecture. You said that The people in the local people in Intag should be able to understand the process and should be able to converse about it in an educated, informed way and they should be able to understand it. You also talked about fair and equitable treatment, and how there's a lack of clarity or a lack of direction about what that standard really means, and that it's almost up for grabs in some ways, particularly because of the lack of precedent in the system. So it's hard to point to a hierarchy of decisions in terms of interpreting fair and equitable treatment and what it means going forward. So how do you reconcile that? How do you reconcile where at its core in this system, there's this lack of clarity? In a sense, You talked about the rule of- you talked about that in reference to the rule of law. It's a rule-based system where the rules are not clear. So how do we get to the point of- the the goal that you stated at the end of your lecture, where the people who are affected, in this case in the community, understand the process? There seems to be a big, wide diversion there. How do you, how do we get there?

Toby Landau: Yeah Very, very interesting question. My feeling is you have to separate substance from process. So when you when I talk about the fact it's rules based but the rules are not clear, that is substance. It's not unlike- it's no different to the rest of international law. So international law is not just the investor state. It doesn't have precedent. International law doesn't have a hierarchy, doesn't have precedent. So international law, customary international law that all elements of it work in this somewhat nebulous way. It's different in its approach and analysis to domestic law. If I explain to anybody, an area not investor state, some other area of international law, I will be saying similar things, Actually. there is this principle, but it's interpreted in different ways. It's grown up in this way. Some people have this view. It's got that flavour to it. That's all substance and that's an inevitability. There's inevitability about it because of the nature of international law. Process is different. Process is whatever that substance is. How does it get applied and when it's applied, how do people understand it? What's happened? So the short answer to your question is that person in Ecuador should be

able to say on camera, We we had a process. It was told to us that these were the considerations that were taken into account, and it was told to us why they were taken into account. And we had our chance to say what had happened to us. And we understood that that was interpreted in the following way. That's process. Doesn't change the substance, the nature of international law. So I think it's reconcilable in that way. It's just a question of of actually improving, changing the process so it enfranchises the people who are actually affected.

Jonathan Wood: I think that is a very good place to finish. We've overrun the time, but I think, you know, if you had the four hours, I'm sure you'd have plenty more to say. One of the most interesting and informative lectures we've had for some time. Nothing against our previous! But really interesting Toby, as ever. And I'm delighted. And would you thank Toby in the usual fashion? Thank you. Thank you so much. Thank you.