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**Intruders in a Balancing Act:
Black Economic Empowerment, Transitional Justice
and Investment Arbitration Tribunals**

Ginevra Le Moli*

ABSTRACT

This article examines the role of ad hoc investment arbitration tribunals in arbitrating highly sensitive matters in transitional justice contexts, focusing on disputes arising from black economic empowerment policies (BEE) in countries formerly under racially discriminatory regimes. After an overview of the investment protection system, the article introduces the historical context of BEE policies. It subsequently analyses three main disputes, one against South Africa and two against Zimbabwe, where white concession-holders and landowners relied on Bilateral Investment Treaties to claim compensation for the consequences of BEE mining and land redistribution policies. These disputes provide a testing ground to shed light on the role of investment arbitration in the context of transitional justice. The article concludes that such role essentially amounts to an intrusion in the perilous 'balancing act' of managing a transitional justice process.

KEYWORDS: Black Economic Empowerment (BEE) – transitional justice – investment arbitration – land – property rights

1. Introduction

The involvement of international and internationalized mechanisms is relatively frequent in the management of transitional justice processes. There is, indeed, a wide spectrum of international participation. Limiting the analysis, for illustrative purposes, to prosecution mechanisms only, the ways in which international involvement is organized range from international tribunals, as in the case of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone or the Special Tribunal for

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Lebanon, to hybrid mechanisms, such as the special chambers in Bosnia Herzegovina, Serbia, Cambodia, Kosovo or East-Timor, to a large number of mainly domestic mechanisms with international support, such as Tunisia's Criminal Chambers Specialised in Transitional Justice or Colombia's Special Jurisdiction for Peace, its Commission for the Clarification of the Truth, Coexistence and Non-Repetition and the Special Unit for the Search of Disappeared Persons during the Armed Conflict. Another approach, which may be combined with prosecution, is the establishment of a range of investigative mechanisms, including truth commissions, commissions of inquiry, fact-finding missions and independent investigative mechanisms.¹ The level of international involvement also varies in this context depending on how the mechanism is created, its composition, its funding, its terms of reference and coordination with the relevant stakeholders. Yet another adjudicatory approach to transitional justice processes is the establishment of mixed or international commissions, specifically to hear claims – or at least determine the level of compensation – relating to war, revolution and other major disruptions.²

In all these cases, the establishment, composition and terms of reference of the relevant body are major considerations, given the symbolic and political dimension of any mechanism which adjudicates a transitional process.³ For all the controversies regarding whether a specific mechanism has been legitimately established, composed and staffed, funded and resourced, and whether the scope

¹ For a chronological listing of UN-established Investigative Mechanisms and the list of their reports here examined, see UN Library and Archives, International Commissions of Inquiry, Fact-finding Missions: Chronological list, <<http://libraryresources.unog.ch/factfinding/chronolist>>. In the literature, see, more recently, Catherine Harwood, *The Roles and Functions of Atrocity-Related United Nations Commissions of Inquiry in the International Legal Order* (Leiden: Brill, 2020).

² See, on the topic, Howard M. Holtzmann and Edda Kristjánsdóttir, *International Mass Claims Processes. Legal and Practical Perspectives* (Oxford University Press, 2007).

³ See e.g. Hala Khoury-Bisharat, 'The Unintended Consequences of the Goldstone Commission of Inquiry on Human Rights Organizations in Israel', 30 *European Journal International Law* 3 (2019): 877–901.

of its mandate is adequate,⁴ what is uncontroversial is that legitimacy is a paramount consideration of transitional justice adjudication. This is the context in which the emerging practice of bringing claims arising from transitional justice programmes before investment arbitration tribunals (IATs) must be analysed. IATs are *ad hoc* in nature, i.e. they are formed to hear a single dispute on the basis of an arbitration clause typically in an investment agreement, and they most frequently consist of three private individuals (rarely a single arbitrator) who are given the power to render binding decisions, sometimes involving very substantial amounts.⁵

Resort to arbitration tribunals is widespread in the context of contractual commercial disputes.⁶ During the second half of the twentieth century, it was also occasionally used to adjudicate disputes arising from the revision or revocation of oil and other natural resource concessions granted to foreign investors by developing and newly independent countries.⁷ Since the 1990s and particularly after the 2000s, resort to IATs has become increasingly frequent, both as a result of contractual clauses providing for such form of dispute resolution and, importantly, also of arbitration clauses in 'bilateral investment treaties' concluded between two States (BITs). There is now a wide body of practice and scholarship on foreign investment law and investor-State arbitration.⁸ This practice has come under much criticism for the possible interference by IATs with public policy

⁴ See Christian Henderson (eds), *Commissions of Inquiry - Problems and Prospects* (Oxford: Hart Publishing, 2017).

⁵ The literature on investment arbitration is very extensive. A major reference work introducing IATs is R. Dolzer, C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012), chapter X (Settling investment disputes).

⁶ See e.g. Gary B. Born, *International Commercial Arbitration* (The Hague: 2nd ed., Kluwer Law International 2014).

⁷ Charles Leben, *La théorie du contrat d'état et révolution du droit international des investissements*, 302 RCADI 197 (2003).

⁸ Muthucumraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2018); Dolzer and Schreuer, *supra* n 5.

decisions, most notably those regarding human rights, health, environmental protection, national security and other analogous considerations.⁹

For present purposes, a key issue is the involvement of such tribunals in adjudicating claims arising from transitional justice programmes. Although, historically, many important transitional justice processes had been largely completed by the time resort to IATs started to accelerate, in the early 2000s, there are several, albeit very different, transitional justice contexts where IATs have been called to adjudicate property-related claims arising from measures taken as part of the transitional process. Prominent illustrations include the transition of East European countries from the former Soviet bloc to a market economy,¹⁰ some claims arising from the civil war in Sri Lanka,¹¹ Libya,¹² and other countries,¹³ and some relating to black economic empowerment policies (BEE) in countries formerly under racially discriminatory regimes, such as South Africa¹⁴ and Zimbabwe.¹⁵ More recently, concerns relating to the potential involvement of IATs in adjudicating claims relating to land redistribution measures in Colombia's peace process have received sustained attention.¹⁶

⁹ The seminal work is that of Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007).

¹⁰ See for instance, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 27 August 2008; *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic* (ICSID Case No. ARB/97/4), 29 December 2004.

¹¹ See *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3), 27 June 1990.

¹² See e.g. *Cengiz İnşaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, 7 November 2018; *Way2B ACE v. Libya*, ICC Case No. 20971/MCP/DDA, 24 May 2018.

¹³ See e.g. *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), 8 May 2008; *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (21 February 1997). See also *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017).

¹⁴ See *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (Foresti v South Africa) (ICSID Case No. ARB(AF)/07/1), 4 August 2010.

¹⁵ *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe* (Funnekotter et al v Zimbabwe) (ICSID Case No. ARB/05/6), 22 April 2009; *Bernhard von Pezold and others v. Republic of Zimbabwe* (von Pezold et al v. Zimbabwe) (ICSID Case No. ARB/10/15), 28 July 2015; *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25), 28 July 2015.

¹⁶ See Marco Alberto Velásquez-Ruiz, *The Colliding Vernaculars of Foreign Investment Protection and Transitional Justice in Colombia: A Challenge for the Law in a Global Context* (PhD thesis,

Despite the diverse range of contexts where the issue has arisen, there is still a relatively limited number of publicly known investment arbitration decisions concerning property-related claims triggered by transitional justice processes. This may be explained by the aforementioned historical mismatch between major waves of transitional processes and the later rise of investment arbitration, the rather exceptional nature of investment claims, in this and other contexts, as compared with resort to ordinary domestic litigation, and the fact that many investment disputes – precisely because of their political implications – tend to remain confidential. It is nevertheless an area that deserves consideration in transitional justice circles for two main reasons. First, it sits at the intersection of important and growing lines of scholarship, such as the interconnections between transitional justice and development policies,¹⁷ the place of corporate accountability in transitional justice programmes,¹⁸ and the need for foreign investment in reconstruction,¹⁹ raising difficult questions touching all of them. For example, foreign investment claims, whether large or small, may act as an irritant within the extremely delicate balance between supporters of the former and the new regime. They may catalyse pressure from domestic constituencies for a new government to take firm action against a real or perceived foreign intrusion, at the price of alienating international support for the transition, whether from other States

2016, Osgoode Hall Law School of York University); Tara Von Ho, 'Is It Already Too Late For Colombia's Land Restitution?', 5 *International Human Rights Law Review* (2016), 60-85.

¹⁷ See e.g. Roger Duthie, 'Toward a Development-sensitive Approach to Transitional Justice' (2008) 2 *International Journal of Transitional Justice* 3 (2008): 292-309; Pablo De Greiff and R Duthie (eds), *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009); Rhodri C. Williams, 'The Contemporary Right to Property Restitution in the Context of Transitional Justice,' *ICTJ Occasional Paper Series* (May 2007).

¹⁸ See e.g. Irene Pietropaoli, *Business, Human Rights and Transitional Justice* (London: Routledge, 2020); Laura García Martín, *Transitional Justice, Corporate Accountability and Socio-Economic Rights* (London: Routledge, 2020); Horacio Verbitsky, Juan Pablo Bohoslavsky, *The Economic Accomplices to the Argentine Dictatorship: Outstanding Debts* (Cambridge University Press, 2016); Sabine Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice* (London: Routledge 2013).

¹⁹ See e.g. Gearoid Millar, 'Investing in peace: foreign direct investment as economic restoration in Sierra Leone?' 36 *Third World Quarterly* 9 (2015): 1700-1716.

or from potential investors. Secondly, foreign investment disputes may arise in a wide range of highly-politicised transitional contexts or posing similar questions, from actual regime transitions, to post-conflict situations, to the aftermath of major socio-economic crises. In fact, one of the main sources of foreign investment disputes decided by IATs was the 2002-2003 economic crisis in Argentina, following a political crisis which saw several presidents succeed each other.²⁰

This article examines the conundrums arising from the involvement of IATs in transitional justice processes by reference to one particularly illustrative context, foreign investment disputes arising from BEE policies in South Africa (*Foresti v. South Africa*²¹) and Zimbabwe (*Funnekotter et al v. Zimbabwe* and *von Pezold et al v. Zimbabwe*²²). In both contexts, white concession-holders and landowners relied on BITs to claim compensation for the consequences of BEE mining and land redistribution policies. The context of BEE policies is particularly apposite to study the implications of IATs' involvement in a transitional justice process because of the commonalities between South African and Zimbabwe as regards the deep historical roots of land and resource inequality, the differences between the transitional processes followed in these two countries and their external perception, the fact that they resulted in at least four known investment disputes, in some cases from closely connected parties, and the content of some of these decisions, which openly engaged with matters of land redistribution in a transitional justice process.

After a brief overview of the international investment protection system, the article analyses the historical context of black economic empowerment policies,

²⁰ For a retrospective overview of the dozens of claims brought against Argentina see Stephen Park and Tim Samples, 'Tribunalizing Sovereign Debt: Argentina's Experience with Investor-State Dispute Settlement', 50 *Vanderbilt Journal of Transnational Law* 4 (2017): 1033-1063.

²¹ See *supra* n 14.

²² See *supra* n 15.

then the three aforementioned cases, and finally offers some observations on the resort to investment arbitration in the context of transitional justice processes. The article concludes that, in many ways, investment arbitration in such contexts is an unwelcome intruder in the perilous 'balancing act' of managing a transitional justice process.

2. Investment arbitration and international involvement in transitional justice

There is a vast body of literature on investment law and arbitration, although limited attention has been paid in this literature to transitional justice issues. Existing contributions frame the role of BITs²³ as an incentive for foreign investment in the reconstruction effort and a venue for compensation of 'foreigners' for the losses arising from the conflict.²⁴ They recognise that there is more to this relation, as compensation (of foreigners) for losses and post conflict reconstruction, while important, do not address the redress of the domestic population for historical injustice or even the viability of post-conflict stabilisation.

One article by Jonathan Bonnitcha discusses, among other topics,²⁵ how BITs can play a role in a democratic transition, either by inducing elites to accept the transition (because their rights would be protected) or, more interestingly for present purposes, by impeding a more fundamental economic re-organization and democratic consolidation.

Similarly, in his 2016 doctoral dissertation, Velásquez Ruiz argues that the network of BITs signed by Colombia introduce limitations to the scope of State

²³ See Special Issue: 'Jus Post Bellum and Foreign Investment' in the *Journal of World Investment & Trade*, vol. 16, issue 4 (July 2015), particularly Jure Zrilić, 'International Investment Law in the Context of Jus Post Bellum: Are Investment Treaties Likely to Facilitate or Hinder the Transition to Peace?', 16 *Journal of World Investment & Trade* 4 (2015): 604-632.

²⁴ Zrilić, *supra* n 23, at 610.

²⁵ Jonathan Bonnitcha, 'Investment Treaties and Transition from Authoritarian Rule' 15 *Journal of World Investment and Trade* 5 (2014): 965-1011.

action which have ‘the potential to restrict the country’s democratic and sovereign choice to achieve durable peace through the production of profound transformations at the level of social justice’.²⁶ Velasquez Ruiz explores the tensions regarding access and use of land and natural resources between foreign investors and the people relying on the Colombian transitional justice project. He does so with specific reference to international investment law and arbitration, but his focus is on the case of Colombia.

Also on the case of Colombia, but more specifically on the issue of land restitutions, Von Ho argues that international investment law could render ‘financially difficult for the state to implement the [Victim’s Law] if it is required to pay compensation for the property taken for restitution’.²⁷ She further observes that such financial implications could have an inhibiting effect on the very adoption of redistribution policies as well as, more generally, undermine compliance by Colombia with its obligations under international human rights and humanitarian law.

More generally, the literature on the role of international and hybrid mechanisms in transitional justice has only occasionally touched upon investment arbitration mechanisms with respect to specific cases²⁸ or only indirectly, whether focusing on post-war or post-revolutionary reparation processes (which involve some form of foreign investment disputes adjudication)²⁹ or on corporate accountability in transitional justice processes.³⁰

For present purposes, this brief survey of the most relevant literature is useful to highlight the still tenuous – albeit growing – connection between two vast bodies

²⁶ See Velásquez-Ruiz, *supra* n 16, at 5.

²⁷ Von Ho, *supra* n 16, at 80.

²⁸ See e.g. David Schneiderman, ‘Promoting Equality, Black Economic Empowerment, and the Future of Investment Rules’ 25 *South African Journal on Human Rights* 2 (2009): 246-279.

²⁹ See Jura Zrilić, *The Protection of Foreign Investment in Times of Armed Conflict* (Oxford University Press 2019), 200-207.

³⁰ See *supra* n 18.

of literature, which are of great relevance to one another. It also justifies the need to introduce some core aspects of investment arbitration in a discussion intended for an audience of social scientists, historians and lawyers working on the area of transitional justice, who may not be familiar with this area. Rather than concentrating on the need and potential contribution of foreign direct investment as a vector for reconstruction, which is often discussed in the literature,³¹ or the contested empirical link between the adoption of BITs and the ability to attract foreign investment flows,³² this brief introduction is only intended to inform the subsequent analysis.

The development of foreign investment law, in its contemporary form, is rather recent. The type of contracts between foreign investors and host States on which the first wave of expropriation cases was based (so-called 'State contracts')³³ dates back to the second half of the twentieth century. Throughout the 1960s, the decolonization process and the emergence of an increasingly assertive movement seeking to revisit the concessions over natural resources granted during the colonial period led, as a counter-reaction from capital-exporting States,³⁴ to the development of a network of BITs and of international arbitration.³⁵ BITs as well as the more advanced investment chapters of free trade agreements have three main

³¹ See e.g. Benjamin J. Appel and Cianne E. Loyle, 'The economic benefits of justice: Post-conflict justice and foreign direct investment' 49 *Journal of Peace Research* (2012): 685-699; Tricia D. Olsen, Andrew G. Reiter and Eric Wiebelhaus-Brahm, 'Taking Stock: Transitional Justice and Market Effects' (2011) 10 *Journal of Human Rights* (2011): 521-543; Virtus C. Igbokwe, Nicholas Turner, Obijiofor Aginam, *Foreign direct investment in post conflict countries: opportunities and challenges* (London: Adonis & Abbey Publishers, 2010).

³² For an overview of the literature and evidence see Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford: Oxford University Press, 2017).

³³ See Leben, *supra* n 7.

³⁴ UNGA Resolution 1803 (XVII). Permanent sovereignty over natural resources, United Nations General Assembly Seventeenth Session, Resolution No. A/RES/1803/(XVII), 14 December 1962.

³⁵ Particularly, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159, 1965.

components³⁶: (i) the definition of their scope of application, particularly as regards the covered ‘investments’ and ‘foreign investors’; (ii) certain standards of treatment, such as the protection against unlawful expropriation, the requirement to grant protected investments of foreign investors ‘fair and equitable treatment’, ‘full protection and security’, non-discriminatory treatment, and some other guarantees; and (iii) a dispute settlement clause enabling a foreign investor to bring a claim against the host State for alleged violation of one of the standards under point (ii) before an arbitration tribunal, most frequently consisting of three private persons (or, more rarely, of five arbitrators or a single arbitrator) constituted for each specific dispute. There are over 3000 agreements with this basic structure and over 1000 publicly known disputes brought under them.³⁷ The BITs relevant for the disputes discussed in the next section³⁸ have this same overall structure.

Seen from the broader perspective of mechanisms often used in transitional justice processes (e.g. prosecution mechanisms,³⁹ truth and/or reconciliation commissions,⁴⁰ vetting of the officials of the former regime,⁴¹ institutional reform,⁴²

³⁶ See Jorge E. Viñuales, ‘International investment law and natural resource governance’, in K. Kulovesi, E. Morgera (eds.), *Research Handbook on International Law and Natural Resources* (Cheltenham: Edward Elgar, 2016), at 26-46.

³⁷ At the time of writing, it is possible to count 1023 cases, at <https://investmentpolicy.unctad.org/investment-dispute-settlement> (accessed 13 June 2020).

³⁸ *Foresti et al v. South Africa*, supra n 14, was brought under two BITs, the Agreement between the Government of the Republic of South Africa and the Government of the Italian Republic for the Promotion and Protection of Investments, of 9 June 1997, and the Agreement between the Republic of South Africa and the Belgo-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments, of 14 August 1998; *Funnekotter et al v. Zimbabwe*, supra n 15, was brought under the Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Zimbabwe and the Kingdom of the Netherlands, 11 December 1996; *von Pezold et al v. Zimbabwe*, supra n 15, was brought under two BITs, the one between the Republic of Zimbabwe and the Federal Republic of Germany, of 29 September 1995, and the other between the Republic of Zimbabwe and the Swiss Confederation signed on 15 August 1996.

³⁹ OHCHR, Rule-of-law tools for post-conflict States. Prosecution initiatives, HR/PUB/06/4, 2006.

⁴⁰ OHCHR, Rule-of-law tools for post-conflict States. Truth commissions, HR/PUB/06/1, 2006.

⁴¹ OHCHR Rule-of-law tools for post-conflict States. Vetting: an operational framework HR/PUB/06/5, 2006.

⁴² OHCHR Rule-of-law tools for post-conflict States: Archives, HR/PUB/14/4, 2015; Rule-of-law tools for post-conflict States. Maximizing the legacy of hybrid courts, HR/PUB/08/2, 2008; Rule-of-law tools for post-conflict States. Mapping the justice sector, HR/PUB/06/2, 2006; Rule-of-law tools for post-conflict States. Monitoring legal systems, HR/PUB/06/3, 2006.

disarmament, demobilization and reintegration (DDR) programs,⁴³ amnesty laws and statutes of limitations,⁴⁴ and a range of compensation and redress mechanisms⁴⁵) the peculiarities of investment arbitration come easily into view.

First, the focus is on the protection of investments of 'foreign' investors and not on the redress of the wrongs suffered by the population of the State in transition. Although the scope of BITs may be stretched to some extent to grant indirect protection to domestic operators, such will be the case only of a tiny minority, often privileged and possibly linked to the previous regime.

Secondly, the focus is on the protection of economic transactions, 'investments', and not of broader goals such as peace, human rights or the redress of historical inequalities. Some broader aspects may be brought into the picture, as we shall see later, but only to a (very) limited extent.

Thirdly, the dispute settlement mechanism established under BITs operates in isolation from the much wider and often fragile processes reluctantly agreed by the different stakeholders in the transition. That makes investment arbitration proceedings a potentially destabilizing factor, capable not only of favouring the privileged or of instilling a new sense of injustice in the fragile transitional process but also, more prosaically, of weighing heavily on the usually very tight budget with which the transition is managed.

Fourthly, the broadly formulated standards of protection of BITs leave a significant margin of discretion to investment tribunals to take into account (or not) the wider context of the measures challenged by the foreign investor. The scope for intervention, indeed interference, is potentially significant.

⁴³ OHCHR, Rule-of-law tools for post-conflict States. Amnesties HR/PUB/09/1, 2009, at 35-37.

⁴⁴ Ibid., at 5-43.

⁴⁵ OHCHR Rule-of-law tools for post-conflict States, Reparations programmes (HR/PUB/08/1), 2008.

Finally, investment tribunals are made of private individuals, usually law professors or lawyers, who may have legitimacy to decide an economic dispute but less clearly so for a public policy one, let alone an issue arising from a complex history of oppression and inequality. BITs and, more specifically, investor-State arbitration procedures, were not designed to manage complex transitional justice processes. The scope of the dispute submitted to them is limited by the scope of jurisdiction in the dispute settlement clause, which, despite significant variations, concerns questions arising from the treatment of an economic transaction, an 'investment', by a 'foreign' investor. An IAT may have to cover a wider set of issues to decide such economic disputes. From a legal standpoint, they can indeed do so, within their overall scope of jurisdiction. More often than not, IATs try to stay away from highly politicised questions. But, as it will be discussed in the next section, there are cases where IATs, whether cautious or not, cannot circumvent core factual issues which are, at the same time, genuinely relevant to decide the economic claim and deeply controversial from a transitional justice perspective. Hence the inherently ill-suited nature of IATs in this context: whether they overreach or take pains to be cautious, in both cases, they have neither legitimacy nor the actual ability to do justice to the 'thicker' historical context of the dispute.

3. Black economic empowerment policies before investment arbitration tribunals

3.1. *Black economic empowerment policies*

The expression 'black economic empowerment' (BEE)⁴⁶ refers to a wide range of measures which share two main features: their purpose to correct racially-based

⁴⁶ For an overview see Vinayak Uppal, *Global Experience of Black Economic Empowerment and Indigenisation Policies*, Oxford Policy Management Report (February 2014), surveying Zimbabwe, Malaysia, South Africa, Namibia, the United Arab Emirates.

disadvantages in the distribution of land and resources, and their main challenge, namely the introduction of a new ownership structure to the detriment of entrenched and powerful domestic and international interests.⁴⁷ BEE overlap to a significant extent with other broad sets of policies, sometimes called 'indigenisation' policies. A classic example of the latter is provided by Malaysia, which following racial riots in 1969, implemented a New Economic Policy to fight poverty and increase the share of corporate ownership by Malay Bumipera in the economy.⁴⁸ From this perspective, the distinctive features of BEE policies concern their focus on the redress of disenfranchised black populations in a transitional context, typically from a colonial to a post-colonial situation. In this broad understanding, BEE policies have been implemented in several African countries, including Namibia, South Africa and Zimbabwe.⁴⁹ There is a large consensus among writers that the main problem has been not the goal pursued by the policies or even the inability to face the opposition of previously ruling elites, although this remains a key challenge, but the implementation of BEE programmes and, more specifically, their misuse to reward political allies,⁵⁰ garner popular support⁵¹ and

⁴⁷ See e.g. Louis P. Kruger, 'The impact of black economic empowerment (BEE) on South African businesses: Focusing on ten dimensions of business performance', 15 *Southern African Business Review* 3 (2011): 207-233; Okechukwu C. Iheduru, 'The Politics of Black Economic Empowerment in South Africa', 1 *International Journal of African Studies* 2 (1998): 27-72.

⁴⁸ See e.g. Edmund T. Gomez, 'Affirmative Action and Enterprise Development in Malaysia: The New Economic Policy, Business Partnerships and Inter-Ethnic Relations', 21 *Kajian Malaysia: Journal of Malaysian Studies* 1-2 (2003): 59-104; Mavis Puthuchear, *The Politics of Administration: The Malaysian Experience* (Oxford University Press, 1978).

⁴⁹ The literature is vast. See e.g. Audrey Sibanda, 'The Corporate Governance Perils of Zimbabwe's Indigenisation Economic Empowerment Act 17 of 2007' 4 *International Journal of Public Law and Policy* 1 (2014): 24-36; Stefan Andreasson, 'Confronting the settler legacy: Indigenisation and transformation in South Africa and Zimbabwe' (2010) 29 *Political Geography* (2010): 424-433; Roger Southall, 'Ten Propositions about Black Economic Empowerment in South Africa' 34 *Review of African Political Economy* 111 (2007): 67-84; John Craig, 'Privatisation and indigenous ownership: evidence from Africa' 73 *Annals of Public and Cooperative Economics* 4 (2002) 559-576.

⁵⁰ See Bill Freund, 'South Africa: The End of Apartheid & The Emergence of the "BEE Elite"', 34 *Review of African Political Economy* 114 (2007): 661-678.

⁵¹ Flavian Kondo, and Jabulani Moyo, 'The Rhetoric of Indigenisation in Zimbabwe: An Electioneering Ploy or an Appeasement of an Embittered History?' 2 *International Journal of Asian Social Science* 12 (2012): 2313-2321.

the socio-economic difficulties that have followed from such misuse.⁵² This context will be important to assess the involvement of IATs in this volatile processes.

In South Africa, with the end of the apartheid in 1994, the ANC government made it a major goal to reduce poverty and increase the share of black South Africans in corporate ownership. In its Reconstruction and Development Programme for the 1994 democratic elections, the ANC emphasised BEE policies as key aspect of dealing with the apartheid legacy.⁵³ Progress was slow during the 1990s, and BEE initiatives were mired in allegations that only a small politically connected sector was benefiting from them. Deputy President Thabo Mbeki's 'Two Nations' speech, in May 1998, is seen as a turning point in the recognition of the need for change. This recognition led, in the 2000s, to the reformulation of the BEE policy so as to reach a much broader part of the black population. In 2003, a key piece of legislation was enacted, the Broad-based Black Economic Empowerment Act (B-BBEE),⁵⁴ which provided the foundation for the adoption a range of measures promoting BEE. Section 9 authorized the government to issue 'codes of good practice' introducing BEE requirements in a range of areas, whereas Section 10 required state bodies and public companies to 'take into account and, as far as is reasonably possible, apply' such codes in decisions on matters such as the granting of licenses, concessions and authorization, preferential public procurement, public-private partnerships or the sale of State-owned assets. Section 12 also authorized the government to issue 'Transformation Charters' for

⁵² On the link between BEE policies and economic performance see Booker Magure, 'Foreign investment, black economic empowerment and militarised patronage politics in Zimbabwe' 30 *Journal of Contemporary African Studies* 1 (2012): 67-82; Matthews Andrews, *Is Black Economic Empowerment a South African Growth Catalyst? (Or Could it Be ...)*, Centre for International Development, Harvard University, Working Paper No 170 (2008).

⁵³ Stefano Ponte, Simon Roberts and Lance Van Sittert, "'Black Economic Empowerment', Business and the State in South Africa', 38 *Development and Change* 5 (2007):933-955.

⁵⁴ Broad-Based Black Economic Empowerment Act 53 of 2003 as Amended by Act 46 of 2013.

particular sectors of the economy, such as mining.⁵⁵ The negotiations regarding mining are particularly apposite to the *Foresti* case. In essence, the Mineral and Petroleum Development Act (MPDA) adopted in October 2002 asserted the sovereignty of South Africa over all resources (before, ownership of the land included ownership of the underlying resources) and required right-holders to reapply for their exploration and mining rights, with the understanding that such applications would be reviewed in the light of the BEE commitments. In particular, the transformation charter adopted in October 2002 for this sector required a BEE target of 26% of ownership or control within ten years (down from an initial draft requiring 51%). One interesting aspect of the charters policy is that, rather than exiting the country, corporations largely complied with the BEE ownership/control requirements.⁵⁶ This is noteworthy as a contextual element of the *Foresti* case.

With respect to Zimbabwe, following the independence of the country in 1980, the initial approach – agreed in the negotiations leading to independence (the Lancaster House Agreement⁵⁷) – was the so-called ‘willing buyer willing seller’ approach.⁵⁸ Such an approach essentially left any land transfers to market forces, which meant that historical inequalities in land ownership were simply not corrected. In 1992, two years after the expiration of the Lancaster House Agreement, Zimbabwe adopted a Land Acquisition Act.⁵⁹ Then, in 1997, and despite pressure from international donors, the government began a compulsory acquisition programme, based on certain criteria (ownership of more than one

⁵⁵ On this issue see R. Hamann, S. Khagram, S. Rohan, ‘South Africa’s Charter Approach to Post-Apartheid Economic Transformation: Collaborative Governance or Hardball Bargaining?’ (2008) 34 *Journal of Southern African Studies* 21.

⁵⁶ See Iheduru, O., ‘Why “Anglo licks the ANC’s boots”: globalization and state-capital relations in South Africa. *African Affairs*, 107 (2008): 333-360.

⁵⁷ Lancaster House Agreement, 21 December 1979.

⁵⁸ For an analysis of this approach focusing on South Africa, see E. Lahiff, ‘Willing buyer, willing seller’: South Africa’s failed experiment in market-led agrarian reform’ (2007) 28 *Third World Quarterly* 1577.

⁵⁹ Land Acquisition Act of Zimbabwe, 8 May 1992.

farm; farmer is absentee; the farm is derelict or underutilised; or it borders a communal area; payment of compensation to expropriated owners).⁶⁰ However, acquisitions and land transfer remained extremely slow and, by the end of the 1990s, war veterans began to occupy lands. The rejection, in 2000, of a draft constitution including a clause facilitating forced acquisitions, the withdrawal of certain farms from the resettlement program and the slow pace of redistribution led, in February 2000, to massive occupation of mainly white-owned lands by war veterans. The government found itself under crossfire from foreign donors, at the international level, and angry war veterans, at the domestic level. It reacted in 2000 with the introduction of a Fast-Track Land Resettlement Programme and an amendment of the Constitution (Section 16A). Under this amendment, landowners subject to compulsory acquisitions were to be compensated by the 'former colonial power', with the Zimbabwean government only offering compensation for improvements of agricultural land (rather than the value of the land itself). These steps were instrumental in the ruling party's narrow victory in the parliamentary elections of late June. The government's reaction was emboldened by this victory, which further helped R. Mugabe's re-election as Zimbabwe's President in March 2002. In 2005, another constitutional amendment removed the possibility to challenge compulsory acquisitions and even criminalized the continued possession of acquired land by its former land-owners. This configuration of historical inequality, international donor pressure and political strategizing is at the heart of the *Funnekotter* and *von Pezold* cases. In 2007, a key piece of legislation, the 'Indigenisation and Economic Empowerment Act' (IEE)⁶¹ extended the

⁶⁰ See N. H. Thomas, 'Land Reform in Zimbabwe' (2003) 24 *Third World Quarterly* 691, at 700. The following discussion of this aspect of Zimbabwe's transition follows Thomas.

⁶¹ Indigenisation and Economic Empowerment Bill of Zimbabwe, H.B. 6A, 2007. See Taonaziso Chowa and Marshal Mukuvare, 'Zimbabwe's Indigenisation and Economic Empowerment Programme (IEEP) As an Economic Development Approach' 1 *Journal of Economics* 2 (2013): 1-18.

redistribution movement to other economic sectors, such as mining, banking and manufacturing. The main measure introduced by the IEE is the requirement that indigenous Zimbabweans own or control 51% of businesses in every sector (the 'minimum indigenisation equity').

3.2. *The South African context: the Foresti case*

The *Foresti* case concerned mineral rights secured under laws from the apartheid times by operating companies indirectly owned by Italian and Luxembourg investors. A request of arbitration under the Italy-South Africa BIT and the Belgium-Luxembourg-South Africa BIT⁶² was filed with the International Centre for the Settlement of Investment Disputes (ICSID) in early November 2006. The arbitral tribunal did not reach a decision on actual merits of the case, which was discontinued at an early stage in July 2010. The main facts and claims are therefore not public and only known indirectly from the information publicly available.⁶³ Yet, the case is instructive for present purposes for two main reasons: (i) foreign investors challenged the BBE measures as such (rather than the modalities of their implementation), i.e. the transformation of their rights by the passing of the Mineral and Petroleum Development Act and the divestment requirement in the transformation charter for the mining sector; (ii) the historical and political context of the dispute had significant influence on the vicissitudes of the arbitration procedure. These two aspects are significant for the analysis of the adequacy and legitimacy of IATs involvement in a transitional justice context.

⁶² The texts of both BITs are available at UNCTAD's BIT database: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa> (no. 30 and 38).

⁶³ See the materials available in <https://www.italaw.com/cases/446> (accessed 13 June 2020). An additional filing from the International Commission of Jurists is reproduced in Koen de Feyter (ed.), *Bronnenboek Volkenrecht* (Antwerp: Maklu, 2010), 175-184. All the materials referred to in the following discussion can be found in these two sources.

Regarding the measures challenged, they are specific measures introduced for the purpose of redistribution of ownership and empowerment of black populations in the mining sector. Aside from the debate as to whether these measures were effective or rather created a new elite,⁶⁴ what is noteworthy is that measures deliberately designed to accomplish an important social justice goal in a context of widely acknowledge historical inequality, racial discrimination and abuse could nevertheless be challenged because they allegedly interfered with economic interests. What is striking is not that such measures are subject to the 'rule of law' or to some legal safeguards but, more specifically, that economic considerations may operate, in the context of investment arbitration under a BIT, as the overarching yardstick by reference to which such measures, in their very design and possibility, are to be measured. To fully grasp this point, one technical dimension of investment law must be mentioned. Some BITs include clauses relating to the exclusion of certain measures (non-precluded measures) or the justification of measures adopted under certain circumstances (emergency situations).⁶⁵ In the practice of investment arbitration, however, arbitral tribunals have interpreted these clauses in a debatably narrow manner.⁶⁶ Whereas it is reasonable to limit the grounds on which a State can seek to excuse action which adversely affects the economic interests of foreign investors or other economic operators, the problem lies elsewhere: instead of interpreting such clauses as simply stating that the BIT does not apply to certain measures ('nothing in this treaty shall preclude the adoption of measures ...'), which would exclude the

⁶⁴ Freund, *supra* n 50.

⁶⁵ See Jorge E. Viñuales, 'Defence Arguments in Investment Arbitration' in Jorge E. Viñuales and Michael Waibel, *ICSID Reports*. Volume 18 (Cambridge: Cambridge University Press, 2020), 13-108, at 26-29 and 78.

⁶⁶ *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, 12 May 2005; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, 28 September 2007; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, 22 May 2007. The latter two of these awards were annulled on this point.

measures from the ambit of the BIT, the interpretation retained brings the measures under this ambit, hence both conferring jurisdiction to an IAT and tasking it with reviewing a situation now framed as possibly excused on exceptional grounds.⁶⁷ This apparently purely technical operation has three combined effects: (i) highly political transitional justice measures of overriding importance are brought under the remit of the BIT, (ii) in addition to giving jurisdiction to the arbitral tribunal, the foregoing operation frames such measures as mere 'domestic' law which remain under the overarching and controlling remit of BIT standards, and (iii) those clauses that could have prevented such an outcome are merely interpreted as grounds for 'excuse' of what are otherwise transitional justice measures inconsistent with an economic treaty, and as such the interpretation of these grounds is narrow and demanding. Thus, there is a frontal collision between two constellations: one which seeks to redress a historical process of injustice and abuse through far-reaching measures and another that reduces such measures a mere interference with an investment transaction in a scenario where the expectation is business as usual.

Moving to the second aspect, aware of the highly political context in which it was operating, the arbitral tribunal pro-actively sought to include voices from civil society. The tribunal's initiative is instructive to understand how narrow the space for such voices and, even more, for the actual integration of their reasoning is in investment proceedings. On 17 July 2009, four non-governmental organizations led by the Centre for Applied Legal Studies submitted a petition to participate in the proceedings as non-disputing party or NDPs (*amicus curiae*).⁶⁸ A similar petition was later (20 August 2009) submitted by another NGO, the International

⁶⁷ See Viñuales, *supra* n 65.

⁶⁸ The application is available at: <https://www.italaw.com/sites/default/files/case-documents/ita0333.pdf>.

Commission of Jurists.⁶⁹ The tribunal set a schedule and process for the submission and consideration of these filings in two letters of 25 September (Letter 1) and 5 October (Letter 2) 2009.⁷⁰ Such process is noteworthy because it clearly conveys the tribunal's proactivity in providing for some measure of civil society participation in the proceedings. In Letter 1, the tribunal set the two broad parameters under which participation was to take place, namely: in order 'to give useful information and accompanying submission to the Tribunal' but not 'to obtain information from the Parties', and under the proviso that such participation remain 'both effective and compatible with the rights of the Parties and the fairness and efficiency of the arbitral process'. The tribunal thus decided that these NGOs would have access to some of the materials in the proceedings and would be allowed to submit written statements, leaving open the possibility to participate in oral proceedings. Of particular note, the tribunal took a further remarkable step in inviting 'the parties and the NDPs to offer brief comments on the fairness and effectiveness of the procedures adopted for NDP participation in this case', which would then be included in 'a section in the award, recording views (both concordant and divergent) on the fairness and efficacy of NDP participation in this case and on any lessons learned from it'. The justification for such a 'satisfaction feedback' exercise was said to be 'the novelty of the NDP procedure', but having regard to the context of the dispute, the content of the NDP submissions (emphasising the need to give priority to human rights considerations), and the existence of a sizeable previous practice with NDPs,⁷¹ it seems clear that the tribunal was anxious to provide sufficient channels of public participation and to get confirmation that the channels had been satisfactory. Both the granting of access to some (redacted)

⁶⁹ Reproduced in de Feyter, *supra* n 63, 175-184.

⁷⁰ Both available at: <https://www.italaw.com/sites/default/files/case-documents/ita0333.pdf>.

⁷¹ See Astrid Wiik, *Amicus Curiae Before International Courts and Tribunals* (Baden-Baden: Nomos, 2018).

materials from the proceedings and the 'performance review' exercise were unprecedented in investment arbitration. Yet, however useful, they can certainly not be substitute for a full consideration of historical context of BEE policies in the proceedings.

Given that the tribunal did not reach the merits of the dispute, the extent of consideration of the latter aspects remains hypothetical. But, as noted in Section 2 of this article, if it had, the tribunal would have been placed in the dilemma of either engaging with 'thick' historical context it did not have the legitimacy to take a stance on or, no less problematically, removing it from the framing of the dispute, as if such profoundly important context could be filtrated through a focus on the economic aspects of the dispute. In other words, given the content of the claim, which challenged a BEE measure as such, even a cautious tribunal would have been forced, as a result of the BITs, to intrude in South Africa's handling of the transition. Of particular note, the outrage caused in South Africa by this investment dispute led the government to terminate all BITs with European countries,⁷² thereby raising questions of future access to foreign investment and development.⁷³ The latter point further highlights the need to integrate the investment arbitration questions with the strands of the transitional justice literature mentioned earlier in this article.

3.3. *The Zimbabwean context: the Funnekotter and von Pezold cases*

The two disputes discussed in this section arose from the intensification of land redistribution policies and the emboldening of both governmental action and the

⁷² For a list of treaties terminated see UNCTAD's BIT database: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa>.

⁷³ For an overview of the South Africa's reaction see Mmiselo Freedom Qumba, 'South Africa's move away from international investor-state dispute: a breakthrough or bad omen for investment in the developing world?', 52 *De Jure Law Journal* 1 (2019): 358-379 (who sees the *Foresti* case as 'the central factor in government's decision to terminate BITs', at 359).

land occupations by war veterans over the 2000s. Of note, it is not the land acquisition programme itself that is the specific target of these claims but the way in which it was implemented.

The *Funnekotter* case⁷⁴ illustrates clearly the extent to which an investment tribunal can focus on the economic aspects of a transaction, making abstraction of the wider political context. In this case, a group of Dutch investors brought an investment claim against Zimbabwe under the relevant BIT⁷⁵ for the manner in which the process of land acquisition had been implemented, most notably: the issuance of notices of acquisition restricting the rights to resell, which although temporally limited, in theory, were maintained in practice; the support given to war veterans illegally occupying the lands; and the lack of due process and compensation. The tribunal focused its assessment on the expropriation clause of the BIT (Article 6) and, more specifically, on the requirement to pay compensation, which, if violated, would entail the violation of Article 6. One interesting aspect of the dispute is the invocation by Zimbabwe of a 'defence' argument, namely that it had not been in a position to pay compensation between 2002 and 2005 due to the existence of 'a state of necessity or emergency', which is reserved under Zimbabwean law, the BIT and customary international law.⁷⁶ The tribunal rejected this argument, making in passing a number of determinations which provide a clear illustration of why such forums are ill-suited to take into account the complexities of transitional justice processes. First, the tribunal noted that whereas Zimbabwean law may provide 'useful information' on the situation which prevailed in Zimbabwe during the relevant period, it is 'ultimately international law, not the domestic law of

⁷⁴ The award in *Funnekotter et al v. Zimbabwe*, supra n 15, is available at: <https://www.italaw.com/cases/467> (accessed 13 June 2020).

⁷⁵ The BIT is available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/233/zimbabwe> (no 26).

⁷⁶ *Funnekotter et al v. Zimbabwe*, supra n 15, para. 102.

Zimbabwe, [which] must determine the effect any state of emergency would have on the dispute'.⁷⁷ This is legally correct but, again, it places the vicissitudes of the transitional process in the narrow light of the terms of a BIT or those, even narrower, of the necessity defence under general international law. The tribunal rejected, in one single paragraph of six lines,⁷⁸ the argument of necessity under general international law. It merely stated that Zimbabwe 'never explain[ed] why such a state of necessity prevented it from calculating and paying the compensation due to the farmers in conformity with the BIT'.

Zimbabwe may have failed to provide any detail in its memorials before the IAT, but when placed in the broader context of a transitional justice process of daunting complexity, such swift assertions, even when they reflect poor argumentation from the respondent, strike an external observer – and even more so those who have suffered from a history of inequality and abuse – as totally detached from the realities on the ground. This is in no way a justification of the possible abuses committed by the government in pursuit of its political strategy. It is precisely because, as noted earlier, the situation raises a complex configuration of historical inequality, international donor pressure and political strategizing, that the involvement of an IAT composed of private individuals, who see their task (as they are expected under the BIT) as detaching a small piece of the puzzle and solving it in isolation, that investment arbitration may operate as an irritant in transitional justice processes.

The *von Pezold* case arises from a similar context.⁷⁹ It offers, however, a much more detailed discussion by the tribunal of the triangular configuration mentioned earlier in a context where the extension and value of the lands was also more

⁷⁷ Ibid., para. 103.

⁷⁸ Ibid., para. 106.

⁷⁹ The information on the legal aspects of this case is available at: <https://www.italaw.com/cases/1472> (accessed 13 June 2020).

substantial (the claim was for USD 350 million plus semi-annual compound interest of 21.5%). The main claims were broadly similar to those in *Funnekotter*, namely that the emboldening of the land acquisition programme conducted by the Zimbabwean government and its condoning and even encouragement of land occupations by war veterans (the lands of the claimants remained occupied for the duration of the entire proceedings) were in breach of the investment protection standards in the Germany-South Africa BIT and the Switzerland-South Africa BIT.⁸⁰ But the argument ventured into a broader set of considerations, including the importance of the norm prohibiting racial discrimination (invoked by the white claimants against the challenged measures) and the potential availability of several defence arguments. It is not necessary, for present purposes, to enter into the discussion of the technical aspects of all these arguments under international law. The focus must remain on how the tribunal handled the difficult tension between the violent grass roots claims from 'land-hungry masses' expressly raised by the government in the proceedings and the investment standards laid out in the applicable BITs.

At the outset, it must be noted that the tribunal did not see the need to lend much importance to external voices. Unlike the tribunal in *Foresti et al v. South Africa*, the tribunal in *von Pezold* rejected an application from an NGO and four indigenous communities of Zimbabwe (the Chikukwa, Ngorima, Chinyai and Nyaruwa peoples) to file an amicus curiae brief.⁸¹ It did so on the debatable grounds that the submission sought would concern 'legal and factual issues that are unrelated to the matters before' the tribunal.⁸² This was because, according to

⁸⁰ The texts of the BITs are available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/233/zimbabwe> (no 30 and 32).

⁸¹ *Von Pezold et al v. Zimbabwe*, supra n 15, Procedural Order No. 2, 26 June 2012 [von Pezold, PO 2].

⁸² Ibid., para. 57.

the tribunal the parties to the dispute had not put questions of indigenous peoples and human rights on the record,⁸³ as if the disputing parties could simply decide not to pay attention to such broader implications. This determination conveys the deliberate approach of the tribunal to keep the transitional justice context of the dispute out of the picture, thus illustrating what was noted in Section 2. The tribunal also expressed doubts as to the independence of the petitioners with respect to the respondent, which is a more solid ground for rejecting the application.⁸⁴ Yet, the contrast with the *Foresti* tribunal is noteworthy, as it recalls that even in extreme cases of historical inequality and racial discrimination, once the question is brought before an IAT, a dilemma between taking an illegitimate stance on ‘thick’ aspects of transitional justice or artificially filtering them arises. Thus, the problem is ‘upstream’, in the very involvement of ill-suited IATs in matters they are not equipped to handle.

The *von Pezold* case clearly illustrates the artificiality of the filtering approach. The reluctance to even consider arguments based on human rights also permeates the tribunal’s reasoning regarding Zimbabwe’s argument that it had acted under the ‘margin of appreciation’ doctrine.⁸⁵ This doctrine, which was initially developed by the European Court of Human Rights,⁸⁶ amounts to giving States substantial deference in deciding what course of action to follow in situations of civil strife or other emergencies. The tribunal swept the doctrine away merely stating that, although established in human rights, ‘the Tribunal is not aware that the concept has found much support in international investment law’.⁸⁷ The facts of the case may have led to the conclusion that, under the circumstances, Zimbabwe could not

⁸³ Ibid., para. 57.

⁸⁴ Ibid., para. 56.

⁸⁵ *Von Pezold et al v. Zimbabwe*, supra n 15, Award, para. 465-467.

⁸⁶ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Cambridge: Intersentia, 2002).

⁸⁷ *Von Pezold et al v. Zimbabwe*, supra n 15, Award, para. 465.

reasonably claim that its action was not shielded by such a margin of appreciation, but what we see in the tribunal's reasoning is, first, an artificially stark contrast between 'human rights law' and 'international investment law' (which in fact it itself blurs by later relying on the principle non-discrimination⁸⁸); secondly, an artificial exclusion of the former (even by means of excluding an *amicus curiae* submission) leading to an exclusive focus on the latter; and, thirdly, a conflation of different concepts under the narrow concept of 'necessity' under customary international law,⁸⁹ which, as noted earlier, is extremely demanding. Reasonable minds may – and do – disagree as to the scope of operation of such concepts in investment proceedings, but, even if the tribunal had been entirely correct in its understanding of such concepts, that could only emphasise the limitation of investment proceedings to address claims arising in transitional justice contexts.

However, even a proactive attempt at excluding the wider context of a dispute has limits. The tribunal was led to take a position on it as a result of the Respondent's raising of the necessity defence. The tribunal rejected the defence because three of its requirements, i.e. an essential interest of the State, a grave and imminent peril, and the absence of alternative ways to respond, were lacking.⁹⁰ According to the tribunal, the massive land occupations which took place in February 2000, following the rejection of the new draft constitution, had been performed by the political basis of the government in power, settlers and war veterans. The government could have controlled them but, due to its political connection, it decided not to do it. Yet, according to the tribunal, a threat to the ruling party could not be equated with a threat to a State for the purpose of the necessity defence.⁹¹ Without taking a position on the factual correctness of this

⁸⁸ Ibid., para. 467.

⁸⁹ Ibid., para. 460-464.

⁹⁰ Ibid., paras. 624-646.

⁹¹ Ibid., para 631.

assessment on the evidence submitted in the case, it is the very fact that a private tribunal is drawn to conduct such assessments in such a transitional context, which is problematic. There is no mention of the historical context of inequalities which mobilised the war veterans and the settlers, and even if there was such mention, the tribunal could claim no legitimacy to make pronouncements on it. Hence the dilemma mentioned earlier between the lack of legitimacy (and, perhaps, of sufficient familiarity and understanding) to take position on the broader context of the dispute and the artificiality of removing such context from the assessment. In both cases, the problem is the involvement of an IAT in the first place.

The tribunal pursued by stating that there was no imminent peril because the situation only aggravated after the government introduced a fast-track land acquisition programme to respond to the claims of its political base. It noted that 'this response [had been] poorly received internationally, and had a detrimental impact on the State's ability to obtain foreign direct investment'⁹² and that the measure 'implemented to appease disgruntled political supporters [...] had the exact opposite effect on the economy to that which was necessary to avoid its collapse'.⁹³ Again, whereas this may be true, no consideration is given in this analysis to the historical roots of what motivated the 'disgruntled political supporters' to act in such a way.

That is only provided later, when the tribunal discusses the argument, raised by the investors, that the conduct of the Zimbabwean government had been racially discriminatory. At this stage, the tribunal signalled clearly that the issue was not the goal of BEE policies but certain specific policies (the fast track land acquisition programme) and their implementation. The relevant paragraphs read much as those of a commission of inquiry or other transitional justice mechanism. In

⁹² Ibid., para. 636.

⁹³ Ibid., para. 637.

essence, it concluded that the need to redress past inequalities was not without bounds.⁹⁴ Whereas one can only 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 position of what is acceptable and what is not acceptable as a redress measure for past wrongs in a transitional justice process. The complexity is compounded by the circumstances of the case. One cannot reasonably defend the Mugabe government's abusive practices either with respect to foreigners or to Zimbabwe's own population.

The dilemma is again laid bare: whether the tribunal excludes or includes in its reasoning the background of historical inequality, its 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. The *von Pezold* case is, as the *Foresti* case, more than just illustrative. In an attempt to lure back investment in the country and improve relations with foreign countries, which are seen as key objectives of Zimbabwe's economic recovery plan, President Mnangagwa struck a deal in late July 2020 promising to pay USD 3.5 billion in compensation to some 4800 farmers, including those involved in the *von Pezold* case.⁹⁵ It is unclear whether this will happen but, as for South Africa, it highlights the importance of integrating the investment arbitration dimension in the analysis of transitional justice processes.

4. Concluding observations: intruders in a balancing act?

The cases discussed in the previous section provide illustrations of a broader insight derived from the political science literature on democratic transitions: the need for incoming regimes to satisfy demands for redistribution of resources and

⁹⁴ Ibid., paras. 652-653, 656.

⁹⁵ See 'Zimbabwe's white farmers are promised a speck of compensation', *The Economist* (7 August 2020).

to reduce the dominance of previous elites.⁹⁶ This is necessary for the incoming regime to sustain itself, as it needs the support from a sufficiently broad coalition of actors to constitute a viable government and stabilise the situation. It is in many ways a 'balancing act' between correcting past wrongs to keep sufficient support from its political basis and not moving too fast, which may deprive the incoming regime from its international support or radicalise some previous constituencies (e.g. the armed forces).

As noted by Bonnitcho, in such a context, 'investment treaties preclude various options for redistribution and reform'.⁹⁷ The *Funnekotter* and, even more, the *von Pezold* cases show specifically how part of the political manoeuvring observed in such volatile transitional contexts, i.e. the Zimbabwean government attempts to accelerate the land acquisition program to retain the support of settlers and war veterans, may be deemed to be a breach of a BIT by a private tribunal, with sometimes substantial economic consequences (as in *von Pezold*). The authoritarian character of the Mugabe government possibly played a role in delegitimizing the actions of the Zimbabwean government. The difference between that authoritarian context and the democratic nature of the transition in South Africa could partly explain the more cautious approach of the tribunal in *Foresti v. South Africa*. Bonnitcho notes that it is important not to overstate the risk that BITs may limit the manoeuvring space of incoming regimes,⁹⁸ but for both South Africa and Zimbabwe the impact of the cases analysed in this article has been significant. Indeed, after *Foresti*, South Africa decided to terminate all its BITs with European

⁹⁶ The seminal contribution on this argument is Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore/London: John Hopkins University Press 1986), at 45-47. See also Jess Benhabib and Adam Przeworski, 'The Political Economy of Redistribution under Democracy' 29 *Economic Theory* 271 (2006): at 272. For an overview of the more recent literature see Thomas Apolte, *A theory of autocratic transition: Prerequisites to self-enforcing democracy*, CIW Discussion Paper, No. 1/2018.

⁹⁷ Bonnitcho, *supra* n 25, at 980.

⁹⁸ Bonnitcho, *supra* n 25, at 981.

countries. As for Zimbabwe, the lack of payment of the awards has been an important irritant in the efforts of the new government to improve relations with foreign investors, multilateral agencies and other States. More fundamentally, aside for this empirical impact, there is a matter of inherent unsuitability of investment arbitration to decide disputes arising from transitional justice processes. Whether IATs engage with the 'thick' historical context or artificially filter it and focus on a narrow economic dispute, their involvement is an intrusion.

The assessment of the risk mentioned by Bonnitcho is necessarily contextual, and that is the main problem. Whereas transitional justice mechanisms are, of necessity, specifically designed to fit the circumstances of each country and process, BITs and IATs can only provide a truncated prism. First, as noted in Section 2, BITs only protect 'foreign' investors who, in post-colonial or post-authoritarian context, will often be companies or individuals from the former colonial power or close to the previous regime. This is, of course, not always the case, but by its very definition, BITs offer special protection to foreigners.

Secondly, the prism overemphasises the protection of foreign 'investments', i.e. property or assets of a commercial nature, and downplays the broader historical dimension of inequality and abuse. Such dimension is seen as somewhat external to the narrow focus on a specific dispute which is detached from its wider context.

Thirdly, BITs and investment tribunals are not part of the wider body of arrangements specifically designed to manage the transition. They are separate, indeed entirely unrelated, and there is no requirement for proceedings to even give voice to affected groups and stakeholders. Tribunals have discretion to take into account external accounts and, as illustrated by the *Foresti* and *von Pezold* cases, they can take contrasting views.

Finally, even when they may be open to hear the broader context of a dispute, ephemeral tribunals consisting of private individuals lack legitimacy to take a stance on such context, which they nevertheless do when applying broadly formulated standards and legal concepts. Their structural inadequacy makes their intervention at best a marginal nuisance but, possibly, a significant interference with transitional process. From the standpoint of transitional justice efforts, they are intruders in a perilous balancing act, without any accountability for the potential consequences of their intrusion.