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ISDS and Nazis or History Without Context: A Reply to Gary Born

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Gary Born's article 'The 1933 Directives on Arbitration of the German Reich: Echoes of the Past?' fascinates for good and not so good reasons in almost equal measure. The author skillfully illuminated a rarely-discussed episode of arbitral legal history and aimed to apply its lessons to current debates surrounding investor-state dispute settlement (ISDS) reform. The overarching argument is that criticism and/or reform of investor-state arbitration is reckless and reminiscent of National Socialist efforts to curb private-public arbitration – risking undermining the rule of law and even allowing 'history to repeat itself'. As much as the legal history part is a worthy contribution, this later part is laden with problematic claims and unfortunate parallels. The criticisms and potential (fairly limited) reforms of ISDS are portrayed as missteps towards a totalitarian abyss. Yet as much as investor-state arbitration can sometimes help promote the rule of law, it is not an indispensable 'bulwark' against state oppression. ISDS is a historically recent invention, with an even more recent case law. It deals with wide-reaching and objectively often controversial substantive rules, making reform proposals unsurprising. Crucially, even if investor-state arbitration disappeared completely, the history of Nazi horrors would not repeat itself.

1 INTRODUCTION

There occasionally comes a piece of scholarship which fascinates for good and not so good reasons in almost equal measure. One such is Gary Born's recent piece 'The 1933 Directives on Arbitration of the German Reich: Echoes of the Past?' (1) In it, the author skillfully illuminates a rarely-discussed episode of arbitral legal history and ambitiously aims to apply the lessons of that episode to current criticisms and reform of investor-state arbitration. The overarching argument of the latter part of Born's article is that
P 576 criticism and/or reform of investor-state arbitration as a ● dispute resolution mechanism is reckless and reminiscent of National Socialist regime efforts in curbing private-public arbitration. As a result, even a well-meaning reform of investor-state dispute settlement (ISDS) towards a multilateral court could imperil holding states to account when it comes to the rule of law and risks allowing 'history to repeat itself'. (2)

As much as the legal history part is a remarkably worthy contribution to the history of arbitration, the polemical normative part is laden with (often highly) problematic claims and unfortunate parallels. These strain to portray criticism and reform of investor-state dispute settlement (ISDS) as a misstep towards an abyss, with a hint of totalitarianism being around the corner if investment arbitration is no more. As these claims come from such a pre-eminent figure in the practice and literature of international arbitration, they require careful evaluation and rebuttal lest they unnecessarily add to the toxicity of an already turbulent debate. (3) As much as investor-state arbitration can, *under the right circumstances*, help promote certain rule of law values, it cannot be lumped together under an all-encompassing and somewhat mythical umbrella of arbitration that serves as a 'bulwark' against state oppression and has as such existed since time immemorial. (4) Investor-state arbitration is a recent invention, with an even more recent track record of actually being relevant, and functionally remains just one tool in a state's toolbox for attracting foreign direct investment. It is also a venue for applying a newly developed, wide-reaching and objectively often controversial set of substantive rules, making reform proposals more than expected. Most importantly, even if ISDS disappeared completely overnight, the history of Nazi horrors would not repeat itself. In a world of immense challenges for the future, at least this is not an issue worth losing sleep over.

This article will address Born's arguments by borrowing the structure from the title of Sergio Leone's classic 'The Good, the Bad and the Ugly' and tweaking it into the sections of the Good (section 2), the Problematic (section 3) and the Highly Problematic (section 4), before concluding in section 4. The author's hope remains, as always, that the conversation on ISDS reform and narratives surrounding the field can be deepened further. This reply should be seen in that light and further interventions on these topics
P 577 would be most welcome. ●

2 THE GOOD

To start with the positives, Born's illumination of the fate of arbitration during the early years of the National Socialist regime is a fascinating read. Born analyses the 1933 Directives in considerable detail, drawing useful comparisons with what came before and after them, and supplementing the discussion with pictures of the original documents. (5) One does not have to have a special interest in arbitration, legal history and/or interwar

European history to appreciate these insights. For students and academics specifically interested in the history of arbitration, this is an important episode regarding Germany and continental Europe. For those interested in the links between the political philosophy of National Socialism and the law, this is a remarkably illuminating piece of the puzzle. With the recent passing of such figures as Professor Derek Roebuck and Johnny Veeder, arbitral history field surely welcomes new quality research more than ever.

On another topic, the links between (investment) arbitration on one hand, and the rule of law and fundamental rights on the other, are not in themselves misplaced. On the contrary, as the author of these lines has argued elsewhere, international investment tribunals applying standards such as the fair and equitable treatment (FET) standard can hold host states accountable in accordance with the rule of law principles, and potentially help promote the rule of law at the national level. (6) Similarly, investment tribunals might sometimes be the only forum in which individuals can effectively sanction infringements of specific human rights. To take one example, the *Al Warraq v. Indonesia* case (7) exemplifies the situation in which the tribunal found a breach of the FET standard due to, in essence, breach of the right to fair trial of the individual claimant under Article 14 of the International Covenant on Civil and Political Rights. As the claimant was a Saudi national, and the host state was Indonesia, there were no regional or other mechanisms through which the individual claimant could effectuate such protection. Going even further, the tribunal in its award explicitly noted that its task was to hold a host state to its human rights obligations even if recourse to the implementing agency (the UN Human Rights Commission) was not possible, (8) and that tribunals should be enforcers for the civil society in making sure states uphold their obligations in good
P 578 faith. (9)

Yet, verbs such as 'can', 'might' and 'should' do a lot of heavy lifting when it comes to the interplay of investment tribunals, the rule of law, and human rights. There is a plethora of caveats, ifs and buts involved in assessing how investment tribunals interact with and potentially promote these aspects of the law. The relationship between tribunals and human rights remains famously tense, and the vast number of awards produces outliers in all directions. (10) Ultimately, whether or not states can receive any rule of law benefits from investment awards may depend on the quality of reasoning and readiness to engage with other legal obligations of the host state, (11) and on factors that do not actually have anything to do with investment tribunals themselves, such as domestic administrative capacities. (12)

As will be touched upon below, such caveats are largely missing from Born's account which takes it for a fact that investment tribunals always protect uncontroversial fundamental rights. Leaving that aside for the moment, the key issue with the article that manifests itself early is the lack of distinction between what justifications were offered for a particular policy by the Nazi regime, and what was the actual goal of these policies. Born correctly and importantly concludes:

> The Reich Directives concerning arbitration and related legislation regarding the judiciary and legal profession were elements of the National Socialists' broader, and tragically successful, effort to assert its control over all aspects of German life. Controlling the administration of justice and adjudication of disputes was central to those totalitarian efforts. (13)

Keeping in mind the distinction between the true aims of the Nazi regime on one hand – totalitarian control of the state allowing for the pursuit of genocidal policies – and whatever justification was offered by the regime for its legislative changes (legal uncertainty of arbitration, lack of appellate review, undermining confidence in courts) (14) on the other will serve the reader well as we proceed into the problematic and highly problematic parts of Born's argument.

3 THE PROBLEMATIC

Gary Born's discussion of the past and present of (investment) arbitration and current reform efforts contains a number of factual, legal and normative assertions and parallels
P 579 that do not seem to pass scrutiny. These can be broadly grouped into the discussion of the ancient roots and illustrious present of arbitration more generally, and investment arbitration more specifically (3.1); and the discussion of ongoing criticisms and reform proposals (3.2).

3.1 Arbitration as an unmitigated good since time immemorial

On the historical side of things, the first problem is the description of 'arbitration' as a catch-all mechanism for protection against state oppression since time immemorial. Born asserts that:

> [Bismarck] correctly observed that 'the need for arbitral resolution of disputes has existed under every procedural system so far'. That observation was accurate: arbitration has been used, not just in Germany, *but in virtually all historical epochs, and every legal culture and setting, as a source of commercial efficiency and expertise, a safeguard of individual autonomy, and a protection*

> *against state oppression.* Indeed, it was for exactly that reason that the Reich Directives condemned arbitration and that the 1963 German Labor Court underscored its legitimacy. (15)

The emphasized statement is quite a far-reaching one, coming somewhat close to origin myths of nations and religions. To begin with, the (comparative) history of arbitration is far too underexplored to corroborate such sweeping statements. (16) Writing on the topic in his well-known treatise on arbitration, Gary Born himself starts with the statement that:

> A thorough treatment of the history of international commercial arbitration is beyond the scope of this Treatise. Indeed, such a history remains to be recorded by legal historians, even insofar as the comparatively limited subjects of arbitration in individual jurisdictions or commercial sectors are concerned. (17)

But the history that we do know still does not allow for simply lumping together everything resembling arbitration into one coherent, tyranny-resisting tool. To start with, there is obviously something rather different between a mechanism to promote commercial efficiency (i.e., commercial, business to business arbitration) and a tool against state oppression (presumably some form of individual-state arbitration). As Born's own account illustrates, the history of arbitration proper – i.e., non-court, third party adjudication with binding awards – is heavily skewed towards Western countries
P 580 and Western sources. (18) The evidence in many ● regions and countries is far too limited for any sweeping conclusions, unless one is ready for narrative purposes to lump absolutely everything, from family mediation led by village elders to inter-state arbitration, under the same umbrella. On the contrary, as indicated by authors such as Kun Fan, historically, in a jurisdiction as important as China neither 'arbitration' nor 'mediation' really corresponded to Western counterparts, (19) which has consequences up to the present day. (20) It is not possible nor desirable to equate arbitration with alternative dispute resolution more generally, and even less to ascribe it the role of anti-state oppression tool when discussing societies and time periods where 'the state' in the modern (or rather Western) sense did not even exist yet.

Overly romantic representations of arbitration are not new. In a wonderful piece introducing a symposium on arbitration, published a mere year after the 1933 Directives, Philip Phillips wittily notes:

> Currently, the trade magazines, and scientific, philosophical or just-read-for-fun periodicals are all too crammed with material on the magic arbitration process. A controversy over arbitration - the very word belies the possibility! … Paradoxically, it is because of the supposed ancientness of the subject, the overabundance of the literature, and the seeming lack of controversy, and because arbitration has been so indiscriminately accepted as an infallible cure for all commercial disputes, that this symposium is presented. (21)

Even the types and forms of arbitration that we know of changed substantially over time and states allowed more or less of it depending on many different factors. Based on Born's account in the article here discussed, a less informed reader might be forgiven for imagining medieval arbitrators huddling in the woods in Robin Hoodesque fashion, waiting for a good king to come back and curb judicial tyranny. But that is not how things were. States allowed, prohibited, shaped, and supported arbitration in a plethora of ways and in plenty of forms. (22) As with so many other fields, change was the only constant. Arbitration simply is not a single (almost supranatural) phenomenon shining from the past into the future.

Why is there a need to present it as such? Probably because this allows for adding a much more dramatic tone to the ongoing debates concerning investor-state arbitration and the potential consequences of reform. It is a simple, yet deeply problematic analogy – arbitration is (and always was) an unmitigated, anti-oppression good; investor-
P 581 state arbitration is arbitration, ergo an unmitigated good; ● criticizing or 'curtailing' investor-state arbitration is thus bad and, even, Nazi-like. (23) But such reasoning is derailed on at least three accounts. Firstly, arbitration was never uncontroversial; secondly, investor-state arbitration is a recent and peculiar phenomenon that would not benefit from arbitration's mythical umbrella even if such an umbrella existed; and thirdly, some of the proposed reforms are presented by Born in quite a misleading way. The first two points can be addressed here whilst the last one will be dealt with in the following section.

Firstly, one of the more striking aspects of Born's piece is the appearance it gives of arbitration in general being uncontroversial up until the National Socialist regime, enjoying another spell of triumph afterwards, and then suddenly only being criticized again in the (anti-)ISDS context. (24) As Born notes:

> It is no surprise that the National Socialists would have sought to forbid the use of arbitration, as a threat to the state's pervasive control. What is more surprising, and ought to be more troubling, would be for the Directives'

critiques and prescriptions to be *resurrected* today. (25)

But there is nothing to truly 'resurrect', as similar criticisms of arbitration did not originate nor end with 1933 Directives. The very first sentence of Bismarck's speech on which Born heavily relies tells us that '[t]he views on the value of arbitral tribunals are very divided'. (26) Even if Bismarck does ascribe the problems of arbitration to bad (and rectifiable) regulation, it simply shows that controversy was never far from arbitral resolution of disputes. As Phillips notes, 'throughout all history arbitration seems to have been used and eschewed, damned and praised'. (27) Nor is the dissatisfaction with the arbitral regulatory framework in the 1920s and 1930s somehow confined to Germany. As Phillips again notes, 'the laws before 1920 in the United States have clearly proven unsatisfactory; but despite professional panegyrics the modern laws passed since 1920 have contributed to even greater unsolved difficulties and perplexities'. (28)

Secondly, investor-state arbitration should not somehow 'piggyback' its way into this ancient grandeur of arbitration (assuming there is one) as its credentials for doing so seem somewhat thin. Investment arbitration is a phenomenon very much of time memorial, and of a very recent (in historical terms) vintage when it comes to practical relevance. Leaving aside analogies with pre-war mixed claims commissions, investment arbitration was well and truly created only with the International Centre for Settlement of
P 582 Investment Disputes (ICSID) and the Washington ● Convention in 1965, and the first investment agreements to incorporate investor-state arbitration clauses did not appear until 1969. (29) Equally importantly, bilateral investment treaty (BIT)-based arbitration enjoyed a peaceful slumber essentially until the *AAPL v. Sri Lanka* award in 1991. (30) It was not until 1995 that Jan Paulsson offered a famous theoretical backing for investors' right to sue host states, (31) and it took another half a decade for the number of cases to become significant and further landmark awards to appear. (32)

Novelty, of course, is no obstacle to importance. What if, as Born argues:

> Bilateral and multilateral investment treaties protect only a limited range of rights, but those rights are fundamentally important protections which are almost universally shared – protections against national, ethnic, and religious discrimination; protections against denials of justice; protections against arbitrary governmental oppression; and protections against expropriation of private property without compensation. The use of arbitration, allowing the objective application of guarantees of these rights by independent tribunals, is fundamental to the rule of law and the protection of basic civil rights. (33)

As rhetorically powerful as this sounds, investment arbitration was not conceived for this purpose; the protections 'almost universally shared' are very much not universally interpreted in a uniform way; and 'independent tribunals' protecting fundamental rights otherwise primarily exist in the form of courts with judges appointed by states. As is made clear in the Preamble to the ICSID Convention, investment arbitration was not envisioned as a new framework of fundamental rights protection, but as a tool to help attract investment, foster economic development and only 'appropriate in certain cases'. (34) This is further supported by another founding father of investor-state arbitration, Ibrahim Shihata, when he notes that the fundamental objectives of the ICSID system are depoliticization, mutual confidence of investors and states, and the increase of flow of resources to developing countries. (35) As much as investor-state arbitration has a happy side-effect of sometimes punishing, for example, obvious racial, ethnic or religious discrimination, (36) it is and remains at its core a tool for *potentially* attracting foreign
P 583 direct investment. ●

It is certainly true that the broad rule of law principles and fundamental rights embodied in investment agreements are widely shared among most jurisdictions globally, at least when it comes to 'law in the books'. (37) Leaving aside the fact that investment arbitration enforces these protections for only a minuscule number of entities – eligible foreign investors with eligible investments and sufficient funds to launch the claim – these grand proclamations hide a much more contentious reality. Presenting the process of interpretation and application of these fundamental rights and principles as uncontroversial is at best puzzling. There is not enough room within the confines of this article to even begin discussing all the ways in which protections against discrimination, expropriation or securing due process have been interpreted and applied differently not only among different jurisdictions, but different international courts and tribunals, and, crucially, investor-state arbitral tribunals themselves. (38)

It is simply not the case that investment tribunals merely 'objectively' apply important yet uncontroversial precepts in a run-of-the-mill way. ISDS is a veritable factory of new and often inconsistent developments in international law, with potential consequences for host states running into billions of US dollars. This is what makes it an exciting area for research, but it surely does not make it an uncontroversial mechanism that is somehow being unfairly tarnished. As with any relatively new and evolving area of the law, rethinking and reforms are to be expected – such as copying international courts with state-appointed judges. The proposed reforms are another area where Born's discussion leaves a lot to be desired, and a lot to be rectified.

3.2 Ongoing ISDS reform efforts

As a general point, arbitration and arbitral law get reformed as much as any other area of the law. Domestic arbitration laws are regularly reformed and updated, (39) as are rules
P 584 of international arbitration institutions, (40) including ICSID which is ● currently also undergoing a major amendment to its rules. (41) Investment arbitration itself was an innovation to improve (at least for its proponents) a previously existing unsatisfactory situation, and it is nothing peculiar that it might also find itself on the receiving end of the reform stick. Panta rhei, after all. Coming yet again to Philip Phillips in 1934, in the US context, '[w]e should examine the process and the arbitration laws impartially, ferret out their weaknesses, praise where praise is due, reform where reform is necessary'. (42)

The problem, of course, might be that some particular reforms are bad. In that vein, Born argues:

> Moreover, just as the Reich Directives replaced consensual arbitration with recourse to state courts, some current discussions of 'reform' of investment dispute resolution procedures have proposed a multilateral investment court. Those proposals have taken a variety of forms, but *all appear to involve a standing panel of judges selected, re-selected, supervised, and compensated by state authorities*. The replacement of arbitrators with standing courts has been justified, both in 1933 and today, as *more* likely to produce independent decision-makers. That was obviously not the case under the Reich Directives in 1933, which in fact sought the exact opposite. *Similarly, that justification is very difficult to reconcile with a mechanism in which one side to a dispute (host states) unilaterally selects, compensates, supervises, and sometimes renews the terms of all of the members of tribunals*; that is particularly true of tribunals whose mandate is to only decide a narrow and defined set of issues involving those states as parties. The choice of that selection mechanism, rather than a mechanism that provides both parties equivalent rights, as well as safeguards against the selection of individuals predisposed in favour of those appointing them, suggests an underlying desire … *for state control over the conduct and outcome of future disputes*, rather than a desire for independent tribunals applying the rule of law. (43)

An insufficiently careful reader might be misled into believing that proposals for the court involve the host state being sued being able to choose all of the judges, and practically get as close as possible to the 'judge in its own cause' situation. But this is not what the existing proposals contain. Although they differ, a common strand is that different states would nominate a number of individuals for the role of judges, a selection process would be multi-layered, and that in individual cases the majority of the tribunal would be constituted by those *not* chosen by the host state in question. (44) Born seems to imply that all states participating in the future multilateral court are some sort of a
P 585 monolithic block, and that it makes no ● difference who is nominated by whom – the pro-state outcome is almost guaranteed. Each state has the other's back. But this reasoning is clearly problematic.

For one, many of the participating states (although the North/South divide certainly still matters here) are usually both home and host states for investors, and they can rationally expect that their own investors will sometimes be claimants against other states. Rigging a mechanism against all claimants does not make much sense. Relatedly, if states were really interested in getting a positive outcome for themselves, the best remedy would be *not* to join a multilateral court at all and simply abandon ISDS altogether. You cannot lose if you do not play the game. And yet, as we will also see below, the vast majority of states do not opt for this. They stay engaged with the system and aim at reforms, not least through the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.

Finally, it is rather odd to see such passionate criticism of a mechanism where states nominate and in some form choose judges for an international court that can also hear claims against those very states. This exact selection mechanism is a long-standing feature of the regime which some consider the closest analogy to ISDS – individual protection of human rights. The European Court of Human Rights, (45) Inter-American Court of Human Rights, (46) and African Court on Human and People's Rights (47) – all involve procedures where judges are nominated and selected in some way by states parties. Born warns us that:

> [what] the 1933 Directives should make one ask, if nothing else, is whether states should take unilateral control of the dispute resolution process, *replacing a mechanism designed to ensure independent and impartial adjudication with standing courts that are chosen, supervised, and maintained in order to make similar proposals more likely that states prevail: does this advance, or does it undermine, the rule of law*? The Directives' introduction of unilateral state control over dispute resolution did not advance the rule of law in 1933 and there are *serious grounds to question whether it would do so today*. (48)

It remains unclear why standing courts with state-elected judges, which are legitimate and have functioned for decades to protect those same fundamental rights that Born mentions, are not a good enough mechanism for ISDS. This is not, of course, to say that the multilateral court option will eventually be adopted, nor that it would be some sort
P 586 of panacea. It is simply to point out that this ● particular aspect of the proposed court is in comparative terms rather uncontroversial.

It is, however, the lack of almost any appreciation of the differences in context between Nazi criticism of arbitration and of modern critiques of investment arbitration that produces some of the most problematic statements in Born's article. These include insinuations about the actual motives at play and dubious warnings to those criticizing ISDS that they risk allowing 'history to repeat itself'.

4 THE HIGHLY PROBLEMATIC

The most problematic part of Born's arguments are thinly veiled suggestions that those criticizing investor-state arbitration and/or suggesting standing courts, even if not Nazis themselves, are wittingly or unwittingly following in the footsteps of the 1933 Third Reich. According to Born, these critics will be judged (presumably harshly) by history, and might even allow that same history to repeat itself. Such claims are, at best, very unfortunately phrased and call for explanation and rectification; at worst, they are breathtakingly misguided accusations against a very broad cross-section of states, academics and non-governmental organizations.

The questioning of motives and motivations of those discussing ISDS reform is raised at various points. As a sweeping example, Born argues:

> Returning to the 1933 Reich Directives, *these various contemporary criticisms of investment arbitration closely track many aspects of the Directives' critiques of the arbitral process.* More fundamentally, there are also *parallels between the underlying conceptions of the respective roles of individuals and the state, of the importance of independent adjudication, and of the rule of law*, in the Reich Directives and in current critiques of the investment arbitration process. Those parallels *raise serious questions about the objectives* and merits of current criticisms of investment arbitration and critics' associated proposals for alleged reform. (49)

Just in case these implied accusations are not getting through, the arguments then proceed in the direction of current critics being *worse* than the creators of the 1933 Directives. So the 'the current criticisms of investment arbitration from the extremes of the political spectrum *are even more troubling than those of the 1933 Directives*' because, in essence, whilst the Directives were aimed against arbitration more generally, 'current criticisms of investment arbitration are directed specifically to the application of international protections of basic civil rights – thus more directly targeted at, and affecting, both those rights and the rule of law than the National Socialists' decrees'. (50)
P 587 What is more, 'proposals for an investment court ● whose judges would be selected unilaterally by states … gives rise to even greater possibilities of governmental control over the dispute resolution process than under the Directives'. (51)

Whilst this already might sound the alarm bell of false analogies, two further paragraphs bring together apparent magnanimity to critics, arbitral history myths, dubious rejections of any other way than the arbitral way, and an ominous sounding warning:

> Current critics of investment arbitration are in no way National Socialists and those individuals are not comparable to National Socialists. There is no reason to doubt the good intentions of much contemporary criticism of investment arbitration. But where criticisms of a time-honoured and almost universal means of dispute resolution, designed to ensure independent application of the rule of law, parallel so closely a political philosophy that celebrated the state above all else and that denied the rights and liberties of individuals, one should at least pause and reflect.
>
> That pause should be all the more reflective when contemporary criticisms would abandon a means of adjudication regarded in countless historical settings as essential to individual freedoms and necessary as a protection against governmental oppression. And even greater care should be exercised where the criticisms are of the use of arbitration as a means to safeguard fundamentally important human rights – including protections against the crudest abuses of state power. *In these circumstances, one should again at least ask what those criticisms really seek to accomplish, what the costs of accepting those criticisms would be, and how history will one day judge those critics.* (52)

The concluding paragraph of the article offers a final rhetorical *coup de grâce*, ramping up the ominous warning to the highest degree:

> In addition to their value as a historical document, however, the criticisms of arbitration in the 1933 Directives have striking parallels to modern criticisms

> of international investment and other types of arbitration. Those criticisms are not necessarily wrong, merely because of their original source and ideology. Nonetheless, the underlying mistrust of party autonomy, individual liberty, adjudicative independence, and the rule of law reflected in the Directives should, at a minimum, counsel in favour of considering contemporary criticisms, adopting much the same logic, with care and reflection, *lest history repeat itself.* (53)

One should indeed follow Born's advice of pausing, reflecting and thinking through these arguments with care. Leaving aside the problematic assumptions about arbitration, standing courts, and the uncontroversial nature of fundamental rights protection that were discussed in the previous section, the overarching argument comes to this – critics of current investment arbitration, most of them (but not all!) well-meaning, resurrect Nazi
P 588 criticisms of arbitration and if ● unchecked will wreck ISDS to such an extent that posterity will judge them harshly – primarily as this may allow 'history' to repeat itself.

The first question is what exact 'history' is being discussed here? Assuming this is not a rhetorical flourish, is the suggestion that reform of ISDS will lead to the rise of totalitarianism that will result in Holocaust-like atrocities? (54) If so, the claim deserves very little comment as it seems utterly detached from reality. Giving it the benefit of the doubt, it would be highly desirable to explain this cryptic claim as it might be much more innocuous. The alternative would be to urgently appeal to the international community to pre-emptively act against the states that reformed their approach, abandoned, or never even participated in the ISDS regime.

One of the key reasons why such claims seem outlandish is that Born almost completely omits the distinction between *what* National Socialist said and *why* they said it; and in the process fails to take their justifications with no less than a truckload of salt. With almost 90 years of hindsight, it is perfectly clear why the Nazis wanted arbitration curtailed. It was but one strand in accumulating total power over society in order to pursue racially-inspired genocidal policies. In that sense, it is not that criticisms in 1933 are 'not necessarily wrong, merely because of their original source and ideology' as Born states. (55) It is that these criticisms are worthless and serve no useful purpose in any modern ISDS context. They are placeholders that sound remotely plausible. The fact that in 1933 the Nazis still bothered to provide potentially believable reasons for why they were dismantling previous legal frameworks does not detract from the fact that they could have as easily said that ancient Aryan runes commanded them to do so, *and the policies would still have passed.* A discerning and critical approach when examining the documents from the past is crucial for quality historical research. (56) This is even more so to avoid the perils of trying to 'learn' from something that offers no real lessons at all in this area, even if it might in others.

And speaking of controversial policies, the final point is to query whether it is ever a good idea to invoke National Socialists to criticize legislative proposals. Leaving aside for the moment the need to distinguish what the Nazi regime actually *wanted* and what it *said* to justify its policies, a different problem is that not everything that the Nazi regime enacted is per se problematic. Whilst so much of the key legislative output – not to
P 589 mention its application in practice – is ● repulsive, in some areas the legislation was surprisingly progressive. (57) Even if in the grand scheme of things this matters little, one well-known example is the field of animal welfare, where a series of legislative and other acts implemented an yet unprecedent level of animal protection. (58) Another is the area of environmental conservation, where the Nazi legislation was most comprehensive and progressive in the world. (59) Does this mean that those campaigning for animal rights or the environment are in fact 'resurrecting' Nazi ideas and risk being judged harshly by posterity? Highly unlikely. As always, context is everything. Humane treatment of animals and care for the environment in the Nazi regime were a peculiarity, as much as their ostensibly plausible criticisms of private-public arbitration were fig leaves.

Zooming back to the present day, it is of course theoretically possible to say, as Born insinuates, that critics also use valid criticisms of arbitration to pursue hidden agendas that somehow illegitimately increase state power. But on at least two accounts, this seems very half-baked. For one, per Born's article, the worst-case scenario is that we might end up with a multilateral investment court with judges nominated and selected by states. So investment protection standards remain; investor-state arbitration based on individual contracts remains; the whole universe of commercial arbitration remains untouched. But, apparently, this one change towards a mechanism well-known in other areas of international law is going to have dire consequences. So dire, in fact, that advocates of reform should ask themselves if they want to be the villains of future history books. Even with best efforts, as in the cinema, one's suspension of disbelief can only go so far.

The second reason to be highly skeptical is to take a closer look at who is actually criticizing ISDS and proposing reforms. Reading Born's article, a reader might be excused to believe that those criticizing unpredictability, lack of a mechanism for consistency, procedural problems, issues with arbitrator impartiality and their fees, are fringe, even extremist groups that might indeed be better off ignored. Born notes that current criticisms of investment arbitration come from 'the extremes of the political spectrum', (60) and it seems that both 'extreme' Left and Right come into play. (61) But even if one

completely puts aside all the historical criticisms of arbitration, and even ignores the insinuation that all academics criticizing ISDS are doing so because they are on a
P 590 particular (extreme, no less) ● political spectrum, (62) simply taking the example of the UNCITRAL Working Group III suggests that something is very off about such an argument.

UNCITRAL Working Group III discussed the very issues at the core of criticisms during its thirty-sixth session, with forty-nine state member parties of the Working Group attending – a virtual Who-is-Who in world economy and (geo)politics (63) – and with observation and participation of a plethora of other states, international organizations and NGOs. As indicated in its report, it unanimously agreed that there are sufficiently serious concerns that warrant reform when it comes to inconsistent interpretations of the law (64) ; limits of the current mechanisms to address inconsistency and incorrectness of arbitral decisions (65) ; lack or apparent lack of independence and impartiality of decision-makers in ISDS (66) ; limitations in existing challenge mechanisms (67) ; lack of diversity of decision-makers (68) ; their qualifications (69) ; and the cost and length of ISDS proceedings. (70)

This would seem to leave us with two alternatives. Either criticisms and reform proposals concerning ISDS are not extreme positions of fringe groups with hidden agendas, or forty-nine of arguably the most powerful countries in the world are currently led by members of fringe groups with hidden agendas. Allowing the readers, of course, to draw their own conclusions, I find the former explanation more likely. If the latter one is true, ISDS reform is the least of the world's problems.

5 CONCLUSION: ALL QUIET ON THE HISTORY FRONT

There is much to be gained by furthering research into the history of arbitration, particularly beyond the 'usual suspects' of mostly common law systems, and mostly between the seventeenth and twentieth centuries. Gary Born's choice to address the 1933 Reich Directives and in such a thorough, elucidating manner is commendable. For those of us teaching arbitration, Born's historical analysis is a great addition to the syllabus.

But for those researching, practicing or simply thinking about investment arbitration and its reform, the insights or 'lessons' allegedly offered by this episode ring hollow.
P 591 Arbitration was controversial, heterogeneous and ever-changing both ● before and after the 1933 Reich Directives. Criticisms of certain aspects did not appear with the Nazis, nor is anyone 'resurrecting' them specifically for the purposes of promoting a multilateral investment court. Perhaps most crucially, even those Nazi criticisms should be recognized for what they are – convenient placeholders for a sinister totalitarian agenda. No one believes the Third Reich's claims that Poland attacked Germany first in 1939 – why then should their explanations of why private-public arbitration was curtailed be granted any particular deference for contemporary purposes?

It makes even less sense to analogize these explanatory fig leaves to the motivations of ISDS reformers today, or warn that somehow history might repeat itself if a recent and objectively controversial mode of settling investment disputes is amended. To quote Carl Sagan: extraordinary claims require extraordinary evidence. Claims of historically dire consequences if a relatively modest reform of ISDS is effectuated certainly fit the extraordinary bill. Born's evidence, on the other hand, does not seem even to reach the ordinary bracket. Perhaps next time a more achievable burden of proof should be set out. It might be one recognizing that, as much as in making legal and factual arguments in
P 591 arbitration, context is everything in historical research too. ●

References

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1) Gary Born, *The 1933 Directives on Arbitration of the German Reich: Echoes of the Past?*, 38 J. Int'l Arb 417 (2021).
2) *Ibid.*, at 456.
3) On the other side of the spectrum *see* Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom* (Corporate Europe Observatory and the Transnational Institute 2012) for claims that investment arbitration is maintained by a self-interested, mafia-like group of arbitrators.
4) Born, *supra* n. 1, at 418.
5) *Ibid.*, at 418–442.
6) Velimir Živković, *Fair and Equitable Treatment Between International and National Rule of Law*, 20 J. World Inv. & Trade 513 (2019).
7) *Hesham TM Al Warraq v. Republic of Indonesia*, Final Award, Ad Hoc (UNCITRAL Arbitration Rules 15 Dec. 1976, 2014).

8) *Ibid.*, para. 561.
9) *Ibid.*, para. 560.
10) *See generally* Silvia Steininger, *What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration*, 31 Leiden J. Int'l L. 33 (2018).
11) *See* Živković, *supra* n. 6, at 540–546 and materials cited therein.
12) *See* Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart 2018).
13) Born, *supra* n. 1, at 420.
14) *Ibid.*, at 425.
15) *Ibid.*, at 442 (emphasis added).
16) As famously observed by (then) Lord Mustill, 'Arbitration has a long past, but scarcely any History' (M. J. Mustill, *Sources for the History of Arbitration*, 14 Arb. Int'l 235 (1998)).
17) Gary Born, *International Commercial Arbitration*, Volume 1, 7 (3rd ed., Kluwer Law International 2021).
18) *Ibid.*, para. 1.01 [B]. The disproportion between the amount of discussion dedicated to Western countries and sources and non-Western ones is striking – e.g., the whole of East and South-East Asia is addressed in about half a page (*ibid.*, para. 1.01 [B][8][c]).
19) Fan Kun, *Glocalization of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China*, 18 Harv. Negot. L. Rev. 175, 205–207 (2013).
20) *Ibid.*, at 211–215.
21) Philip G. Phillips, *A General Introduction*, 83(2) U. Pa. L. Rev. & Am. L. Reg. 119, 119 (1934).
22) *See* for an excellent recent summary in this sense Stavros Brekoulakis, *The 2019 Roebuck Lecture: 14 June 2019: The Unwavering Policy Favouring Arbitration Under English Law*, 86 Arb. 97; and similarly much closer to the 1933 Directives, Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, U. Pa. L. Rev. & Am. L. Reg. 132 (1934).
23) Born, *supra* n. 1, at 455–456.
24) *Ibid.*, at 453–455.
25) *Ibid.*, at 418 (emphasis added).
26) *Ibid.*, at 423.
27) Phillips, *supra* n. 21, at 119.
28) *Ibid.*, at 127.
29) Antonio R Parra, *The History of ICSID* 12–27 (Oxford U. Press 2012).
30) Teresa Cheng, *The Search for Order Within Chaos in the Evolution of ISDS*, 35 ICSID Rev. 1, 2–4 (2020).
31) Jan Paulsson, *Arbitration Without Privity*, 10(2) ICSID Rev. 232 (1995).
32) *See generally* Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 UC Davis J. Int'l L. & Pol. 157.
33) Born, *supra* n. 1, at 454–455 (references omitted).
34) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Preamble (18 Mar. 1965), 575 UNTS 159.
35) Ibrahim F.I. Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA*, 1(1) Am. U. Int'l L. Rev. 97, 103 (1986).
36) As in the *Siag v. Egypt* case, where the government, before the local courts, justified its behaviour in shockingly antisemitic and anti-Israeli terms. *See Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, Award, ICSID Case No. ARB/05/15, para. 73 (1 Jun. 2009) ('protecting the lands of our country from the filth of the Jews and the greed of the Zionist movement and Israel's expansionist dream') and similarly, paras 68–69.
37) *See* on the globally shared common core of principles and rules Velimir Živković, *Pursuing and Reimagining the International Rule of Law Through International Investment Law*, 12 Hague J. Rule L. 1, 5–6 (2020) and materials cited therein.
38) For just a glimpse of the problems *see* recently Ursula Kriebaum, *Human Rights and International Investment Arbitration*, in *The Oxford Handbook of International Arbitration* 151 (Thomas Schultz & Federico Ortino eds, Oxford University Press 2020).
39) As one example among many, the Law Commission of England and Wales very recently started the process of updating the Arbitration Act 1996, on which *see*www.lawcom.gov.uk/law-commission-to-review-the-arbitration-act-1996/ (accessed 4 Jan. 2022).
40) Such as the 2021 ICC Arbitration Rules, on which *see*https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/ (accessed 4 Jan. 2022).
41) ICSID, *Proposals for Amendment of the ICSID Rules* (ICSID, Working Paper #6, Nov. 2021), https://icsid.worldbank.org/sites/default/files/documents/ICSID_WP_Six.pdf (accessed 4 Jan. 2022).
42) Phillips, *supra* n. 21, at 125–126.
43) Born, *supra* n. 1, at 446–447 (emphasis added).

44) UNCITRAL, Possible reform of investor-state dispute settlement (ISDS) – Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters – Note by the Secretariat, UN Doc. A/CN.9/WG.III/WP.213, paras 29–47 (2021).
45) Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 22 (4 Nov. 1950), ETS No. 5.
46) Statute of the Inter-American Court of Human Rights, Arts 4–10 (1 Oct. 1979) OAS Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1, 88.
47) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Arts 11–14 (10 Jun. 1998), www.refworld.org/docid/3f4b19c14.html (accessed 5 Jan. 2022).
48) Born, *supra* n. 1, at 450 (emphasis added).
49) *Ibid.*, at 445.
50) *Ibid.*, at 454–455 (emphasis added). Of course, it is possible to immediately think of basic civil rights of local communities affected by investment protection, with far less than a stellar record of being recognized in arbitration.
51) *Ibid.*
52) *Ibid.*, at 455 (emphasis added).
53) *Ibid.* (emphasis added).
54) Another problematic aspect of such claims is that overuse of comparisons with Nazi policies and atrocities can have an effect of distorting just how severe those atrocities were, and to an extent inadvertently trivialize them. I am thankful to the anonymous reviewer for pointing out this issue.
55) *Ibid.*, at 456.
56) W. H. McDowell, *Historical Research: A Guide* 110–114 (Taylor & Francis 2002).
57) A similar argument is made in the famous work on Hitler, Sebastian Haffner, *The Meaning of Hitler*, Ch. 3 (Harvard University Press 1983). I am again thankful to the anonymous reviewer for pointing me towards this book.
58) Boria Sax, *Animals in the Third Reich: Pets, Scapegoats, and the Holocaust* 110–124 (Continuum 2000).
59) Raymond H. Dominick III, *The Nazis and the Nature Conservationists*, 49(4) Historian 508, 508 (1987).
60) *Ibid.*, at 455.
61) *Ibid.*, at 443.
62) *Ibid.*
63) *See* for the full list UNCITRAL, Draft report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session, UN Doc. A/CN.9/964, paras 6–9 (2018).
64) *Ibid.*, paras 39–40.
65) *Ibid.*, para. 63.
66) *Ibid.*, para. 83.
67) *Ibid.*, para. 90.
68) *Ibid.*, para. 98.
69) *Ibid.*, para. 108.
70) *Ibid.*, para. 123.