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Oil, 'Modernity' and Law: Revisiting the *Abu Dhabi* Arbitration in the Age of the Climate Crisis

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On 21 August 1951, some of the most reputed legal minds of the time gathered in a neoclassical building off Trocadero, in Paris's swanky sixteenth arrondissement, to present their arguments in an arbitral proceeding.[2] The events under consideration had taken place in Abu Dhabi, some 5,000 kilometres away. On one side was Petroleum Development (Trucial Coast) Limited, a company registered in the United Kingdom and part of a business controlled by western oil majors. On the other, Sheikh Shakhbut, who then ruled Abu Dhabi under a British protectorate.

The dispute revolved around the scope of an oil contract. In 1939, the two parties had signed a 75-year concession granting the company exclusive oil rights on Abu Dhabi's landmass and 'the islands and sea waters which belong to that area'.[3] At the time, Abu Dhabi claimed a three-mile belt of territorial waters around its coastline. Ten years later, as technological innovation made it possible to drill further and deeper offshore, Sheikh Shakhbut claimed control over the continental shelf – a much larger submarine area – and allocated offshore oil rights to another operator.

With its exploration activities picking up after the end of World War II, the company initiated the arbitration, arguing that the new allocation breached its exclusive contractual rights. The Sheikh, for his part, maintained that the concession did not extend to submarine resources. After a week of proceedings, the adjudicator – an

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[2] *Petroleum Development (Trucial Coast) Ltd v. The Sheikh of Abu Dhabi* (1952) 1:2 *International and Comparative Law Quarterly* 247–261 [Award]. The opposing legal teams included two future judges of the International Court of Justice, Hersch Lauterpacht and Claud Humphrey Meredith Waldock.

[3] English translation of Article 2 of the concession contract, as cited in the Award at 252.

English judge and peer – concluded that the concession covered Abu Dhabi's territorial sea but not its continental shelf, meaning Sheikh Shakhbut was entitled to grant continental shelf rights to third parties.

Revisiting the *Abu Dhabi* arbitration after seven decades connects what may seem a remote past to some of the world's most pressing challenges. The long-term concession contract, which expired in 2014, creates a time bridge between the world that witnessed its signature and the one we live in today. The events underlying the dispute shed light on the formative years of the present oil era and the emergence of the Middle East as a global oil hub. They point to the role of fossil fuels in colonial partition and postcolonial state-building, and to historical continuities in the power of the oil industry and its symbiotic relationship with government.

In the age of the climate crisis, revisiting the dispute offers an opportunity to reflect on the legal foundations of the global oil economy. Such reflection raises timely questions about how law facilitates resource extraction, legitimises a commodity-intensive economic system, and protects oil interests against adverse public action. As the world grapples with phasing out fossil fuels and averting a climate catastrophe, we need to confront these questions to chart an alternative pathway.

Legal Doctrines and the Commodity Frontier

Law has long facilitated appropriating nature to produce commodities. Technological innovation and commodity cycles mean these processes often take the form of 'resource rushes', with rapid shifts in both extractive activities and legal doctrines pushing the commodity frontier into new terrains. The *Abu Dhabi* arbitration captures a key moment in this long-term process, documenting how a thirst for oil instigated a turning point in the gradual enclosure of the seabed, which Ranganathan has called 'ocean floor grabbing'.[4]

From the 1940s, promising geological finds and new technologies enabling deep-sea oil extraction prompted states to claim mineral riches beyond their territorial waters.[5] In 1945, United States President Harry Truman issued a proclamation invoking the notion of the continental shelf to assert US rights over what he considered an underwater extension of his country's landmass. Within a few years, many states across the globe followed suit. In the Middle East, Saudi Arabia and nine

[4] Surabhi Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary' (2019) 30:2 *European Journal of International Law* 573.

[5] Ibid, 580, 591–592.

Sheikhdoms then under British protectorate, including Abu Dhabi, issued their continental shelf proclamations within a period of one month, in mid-1949.[6]

From a legal standpoint, the continental shelf comprises the seabed and subsoil of submarine areas beyond the territorial sea, up to the edge of the continental margin or a specified distance. International rules are now well-established on continental shelf delimitation and states' rights and duties, following decades of treaty-making and adjudication.[7] But at the time of the *Abu Dhabi* arbitration, the rush to claim continental shelf rights was underway, and there was debate about the claims' legal basis and scope. In that debate, the eminent lawyers in the arbitration were protagonists, having written legal opinions for,[8] and against,[9] recognising the continental shelf doctrine as a fully formed rule of international law.

The *Abu Dhabi* ruling was the first that discussed the continental shelf doctrine at length. The award retraces the emergence and contours of this doctrine and identifies President Truman's proclamation as its 'classical enunciation'.[10] It then notes the doctrine 'did not … exist' when the parties signed the concession contract in 1939.[11] Even in 1951, the doctrine still had 'many ragged ends and unfilled blanks' and was yet to crystallise into international law fully.[12] As a result, the oil concession could not have encompassed continental shelf rights,[13] and those rights could legitimately be allocated to another operator.

Developments in subsequent years consolidated the international legal status of the continental shelf doctrine and its foundational role in the fossil fuel economy. In the Emirate, exploration activities in the 1950s delivered commercial discoveries offshore as well as onshore, and the first oil shipments left Abu Dhabi in the early 1960s. Global offshore operations have come to account for roughly one-third of oil production, with a growing share supplied via increasingly deep-water extraction.

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[6] English translations of Saudi Arabia and Bahrain's proclamations are available in (1949) 43 *American Journal of International Law*, at 154–158 and 185–186, respectively.

[7] See particularly Articles 76–85 of the United Nations Convention on the Law of the Sea and the jurisprudence of the International Court of Justice.

[8] Hersch Lauterpacht, 'Sovereignty over Submarine Areas' (1950) 27 *British Year Book of International Law* 376, arguing that the continental shelf doctrine had rapidly become part of customary international law. Lauterpacht appeared in the arbitration for the company.

[9] Claud Humphrey Meredith Waldock, 'The Legal Basis of Claims to the Continental Shelf' (1950) 36 *Transactions of the Grotius Society* 115–148, arguing that the continental shelf doctrine was not yet part of international law, though states could justify their claims based on existing 'effective occupation' principles. In the arbitration, Waldock appeared for Sheikh Shakhbut.

[10] Award, 253.

[11] Ibid 258.

[12] Ibid 256.

[13] Ibid 260.

The continental shelf doctrine exemplifies the role of law in facilitating the appropriation and exploitation of the 'natural resources' on which business activities rest.[14] Even as the climate emergency shakes the oil economy (according to the International Energy Agency, limiting the temperature increase to 1.5ºC above pre-industrial levels requires no new oil fields or exploration), strategies that mobilise law, capital and technology to intensify resource extraction remain the prevalent paradigm. And while climate policies and litigation are creating new momentum for shifting to lower-carbon energy, oil is still the foundation of the global economy. The nascent transition to electric vehicles is itself fostering a new rush for minerals such as cobalt, lithium, copper and nickel.

As technological innovation puts previously inaccessible resources within reach, the search for mineral commodities has expanded to the deep seabed beyond the continental shelf and to outer space.[15] Today, as at the time of the *Abu Dhabi* arbitration, legal constructs sustain the expansion of the commodity frontier: continuing the project initiated with the continental shelf proclamations, the International Seabed Authority is operationalising the legal regime for mining in areas beyond national jurisdiction;[16] while rapid legal developments, both national and international, are facilitating the commercialisation of space.

The Law of Capitalist Modernity

Reflecting on the *Abu Dhabi* dispute illuminates how socio-political hierarchies pervade the law governing fossil fuel extraction – both overtly and through socially produced discourses that influence legal imagination. At the time of the dispute, Abu Dhabi was a British protectorate. From the nineteenth century, Britain imposed its trading interests through punitive raids against 'pirates' and ever more restrictive agreements with local rulers. After the Ottoman empire collapsed, Western powers extended and consolidated their influence, with European and American companies jockeying to sign oil concessions and the colonial administration pressuring the sheikhs to grant the contracts to British interests.[17]

The purported neutrality of the arbitral proceeding belied this history of domination. While the outcome largely favoured Abu Dhabi, parts of the award betray the colonial context. In identifying the norms governing contract interpretation, the

[14] See also Ranganathan (2019).

[15] Commercial activities in outer space are related to diverse sectors including telecommunications and plans for space tourism.

[16] Ranganathan (2019).

[17] On the circumstances that led to the contract underlying the *Abu Dhabi* arbitration see Rosemarie Said Zahlan, *The Origins of the United Arab Emirates: A Political and Social History of the Trucial States* (Macmillan, 1978) at 107–124.

adjudicator ruled out the law of Abu Dhabi – the place where the contract was signed and would be implemented – opining that 'it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments'.[18] Instead, the award would follow principles recognised by 'the generality of civilised nations' – a 'modern law of nature', of which certain rules of English law were, rather handily, considered to be a good reflection.[19]

Arab scholars have noted that Islamic law's rich jurisprudential traditions include principles that would have been relevant to the dispute, and the ruling caused lasting resentment in the Middle East.[20] While the award justified the asserted superiority of English law with its being 'firmly grounded in reason',[21] references to 'modern commercial instruments' echo what Tzouvala has characterised as the capitalist orientation of standards of 'modernity' and 'civilisation'.[22] Notions of modernity, then, reflect a unidirectional vision of history and legitimise the capitalist 'way of seeing and ordering reality' that, over centuries of political and economic transformations, dramatically expanded consumption of raw materials and fostered demand for fossil fuels in the first place.[23]

Within a few years of the award, delegations of Asian and African countries at the Bandung Conference condemned 'colonialism in all its manifestations'.[24] Independence struggles redrew the global political map. A new sheikh secured Abu Dhabi's independence in 1971 as part of the United Arab Emirates and renegotiated the concession to give the government a controlling stake in the national petroleum industry. Oil would make Abu Dhabi a wealthy, highly stratified, and carbon-intensive polity integrated within global capitalism – the city's high-rise skyline a material reflection of the Emirate's claim to modernity. In a stunning instance of both recurrence and reversal, Abu Dhabi went on to establish a dispute settlement hub

[18] Award, 250–251. The award ultimately concluded that a clause in the concession contract requiring the parties to interpret the agreement in a reasonable manner ruled out the application of any domestic rules on contract interpretation.

[19] Ibid, 251. Though the wording is different, the reference to principles recognised by 'civilised nations' resonates with Article 38(1)(c) of the nearly contemporaneous Statute of the International Court of Justice. For a critique of this aspect of the decision, see Antony Anghie, *Imperialism and the Making of International Law* (CUP, 2004), at 226–229.

[20] Khaled Mohammed Al-Jumah, 'Arab State Contract Disputes: Lessons from the Past' (2002) 17:3 *Arab Law Quarterly* 215, at 232–238.

[21] Award, 251.

[22] Ntina Tzouvala, *Capitalism as Civilization: A History of International Law* (CUP, 2020).

[23] Jason W. Moore, 'The Capitalocene, Part I: On the Nature and Origins of Our Ecological Crisis' (2017) 44:3 *Journal of Peasant Studies* 594, at 623.

[24] Para. D.1(a). See also Luis Eslava, Michael Fakhri & Vasuki Nesiah (eds.), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (CUP, 2017).

staffed by common law judges and applying English law, as part of efforts to promote a service-based economy and diversify from fossil fuels.[25]

In the global postcolonial order, juridified concepts of capitalist modernity continue to sustain socio-political hierarchies of resource extraction, including through legal categories that define control over nature – from property to territory. Under many national property regimes, for example, skewed notions of 'public purpose' and 'productive use' facilitate natural resource projects in the name of economic 'modernisation', while dispossessing groups whose resource use systems are considered 'backward' or unproductive, such as small-scale farmers and fishers.[26] In this way, codified narratives of modernity favour fossil fuel-extractive and -intensive activities, underpin the production and consumption of commodities on an industrial scale, and drive climate change.

Protecting Fossil Fuel Assets

Finally, revisiting the *Abu Dhabi* award provides an opportunity to reflect on the symbiosis of commercial interests and political authority that underpins commodity extraction. At that time, large-scale oil developments in the Gulf typically involved foreign investment, and the *Abu Dhabi* concession was signed amid stiff competition among western oil majors searching for lucrative finds. But Sheikh Shakhbut also took a proactive interest in awarding the concession, having observed the economic benefits Saudi Arabia and Bahrain obtained as companies struck oil.[27] Drilling on the continental shelf was the shared premise of the arbitration, accepted by both parties, with disagreement focusing on the allocation of derivative rights.

In international law, rules protecting foreign investment crystallise this symbiotic – if at times conflictual – relationship between businesses and states. While the *Abu Dhabi* case rarely features in conventional genealogies of international investment law (the dispute was not primarily about investment protection standards, and Abu Dhabi's protectorate status limited the 'international' nature of the arbitration), it represents an important antecedent.[28]

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[25] Georgios Dimitropoulos, 'International Commercial Courts in the 'Modern Law of Nature': Adjudicatory Unilateralism in Special Economic Zones' (2021) 24:2 *Journal of International Economic Law* 361, at 365–366, 369–370.

[26] For a discussion of relevant issues, see also Kinnari I. Bhatt, *Concessionaires, Financiers and Communities: Implementing Indigenous Peoples' Rights to Land in Transnational Development Projects* (CUP, 2019); Elisa Morgera and Julia Nakamura, 'Shedding a Light on the Human Rights of Small-scale Fishers: Complementarities and Contrasts between the UN Declaration on Peasants' Rights and the Small-Scale Fisheries Guidelines' in Mariagrazia Alabrese, Adriana Bessa, Margherita Brunori, Pier Filippo Giuggioli (eds.), *The United Nations' Declaration on Peasants' Rights* (Routledge, forthcoming), available at https://ssrn.com/abstract=3850133.

[27] Said Zahlan (1978) 108.

[28] See the discussion of the Award, e.g., in Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (CUP, 2017. 4th Ed.) at 340.

On one level, the current system of international investment law emerged partly in connection with the oil boom. Oil industry lawyers contributed to developing the system, particularly as mineral-rich colonies obtained independence.[29] Up to the 1980s, arbitrations based on oil contracts, of which *Abu Dhabi* was an early example, were the mainstay of the arbitral caseload, and the fossil fuel sector has continued to account for substantial numbers of investor-state arbitrations. Narratives of capitalist modernity are pervasive in investment law, with an absence of 'sophisticated' domestic arrangements for investment protection often invoked to legitimise the system.

In juridical terms, the contract-based *Abu Dhabi* arbitration preceded the development from the late 1950s of the global network of investment treaties – the focus of much current investment law debate. But the binary archetype of the investor-state contract, which the *Abu Dhabi* arbitration exemplifies, left a lasting imprint on the DNA of contemporary investment law. While investment treaties are concluded between states, they place the investor-state relationship at centre stage – setting standards of treatment for foreign investment and enabling investors to initiate arbitrations against states.

This binary framing contrasts with the diverse constellations of interests that typically characterise large investments, including wide-ranging public interests at national and global levels, and the rights of the people who most suffer the impacts of fossil fuel extraction. The divergence between legal framing and social realities has prompted increasingly vocal contestation of investment law, with concerns raised those arrangements favour commercial over other considerations. [30] Climate imperatives have compounded these concerns, particularly as pressures mount for accelerating the transition to lower-carbon energy: with states acting to phase out fossil fuels, businesses are initiating international arbitrations to seek damages for curtailed revenues.

There are fundamental ethical questions about whether energy companies should receive compensation for fossil fuel phase-outs, and to what extent. But investment law affects legal rights and obligations. The broad protections contained in investment treaties and the large amounts many arbitral tribunals have awarded to businesses, particularly in the extractive industries, can make it more costly, and thus more difficult, for governments to keep warming below 1.5°C. The binary investor-state configuration dictates inclusions and exclusions in these processes: skewed legal

[29] Nicolás M. Perrone, *Investment Treaties & the Legal Imagination: How Foreign Investors Play by Their Own Rules* (OUP, 2021) at 51–80.

[30] See, e.g., Anil Yilmaz Vastardis, 'Bubbles of Justice for the Privileged: A Critique of the Investor-State Dispute Settlement Proposals for the EU's Investment Agreements' (2015) 6:2 *London Review of International Law* 279–297.

protections favouring fossil fuel businesses can distort leverage in decision making, and whose voices are heard in hotly contested policy arenas.

Epilogue

Revisiting the *Abu Dhabi* arbitration provides cues on the legal arrangements that sustain the global fossil fuel economy: from techniques for appropriating nature, to juridified narratives of modernity favouring commodity-intensive production and consumption, all the way to protections for assets the value of which depends on continued resource extraction. These arrangements operate not in isolation but as interlinked dimensions that frame the same overarching process.

As public demands intensify for more effective action to confront climate change, prevailing responses rely on familiar legal repertoires: governments and businesses are appropriating new resources to sustain the energy transition, assisted by modernist mythologies of electrified consumption; while investment lawyers seek new legitimacy for the investment treaty regime, claiming the treaties are needed to encourage investments in renewables.

These approaches deepen, rather than question, the legal and economic fundamentals that have brought the world to the brink of a climate catastrophe. Increased mining activities are driving environmental vulnerabilities and social dislocation in new sites of commodity extraction, and there is no evidence that investment treaties promote renewable energy investments.[31] Instead, addressing the climate emergency requires not only phasing out fossil fuels but also 'reimagining the laws … implicated in years of unchecked extraction of natural resources'.[32] It is time we reconsider these arrangements – and the political and economic structures in which they are embedded – to develop new frameworks that can shape a more sustainable future.

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[31] Kyla Tienhaara and Christian Downie, 'Risky Business? The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes' (2018) 24:3 *Global Governance* 451–471.

[32] Nicolás M. Perrone, 'Oil Companies Don't Deserve Reparations for Fossil Fuel Bans. They'll Still Want Them', *The Guardian* (19 April 2021), https://www.theguardian.com/commentisfree/2021/apr/19/oil-companies-dont-deserve-reparations-for-fossil-fuel-bans-theyll-still-want-them (accessed 6 August 2021).