

The Depoliticization of Investment Disputes – How Deep Does the “Rabbit Hole” Go?

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I. Introduction³

One of the founding narratives of international investment law and arbitration is the depoliticization of the contemporary investor-state dispute settlement system (ISDS).⁴ Essentially, investors who are aggrieved by host state measures (or the lack of such measures in certain cases) would benefit from a third-party dispute settlement mechanism, normally *via* arbitration (pinning that investor, as a claimant, against the host state, as a respondent).⁵

From a theoretical standpoint, this arbitration mechanism supposedly removes the influence of politics from the disputes between the foreign investor and the host state of the investment.⁶ From a historical perspective, the transition to a “(quasi-)judicialized” form of settlement of disputes between foreign investors and host states was almost revolutionary (although explainable in the context of multilateral reforms in the 20th century, especially since the end of the Cold War).⁷ This is why commentators argue that the mechanism is a depoliticized one,⁸ seeing how initially investor-state disputes would be settled politically in most cases.

Traditionally, the foreign investor would be under the protection of its home state.⁹ If the host state adopted measures that aggrieved that investor, there was a risk that the home state of the foreign investor would intervene.¹⁰ In fact, intervention by the home state would normally be the only way in which an aggrieved investor could safeguard its interests, once a conflict with

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⁴ On depoliticization, as one of the founding narratives of international investment law and arbitration, *see*, generally, Shihata (1986), pp.1-25, Kozawa and Bjorklund (2010), p. 211, Papaninskis (2012), p. 271, Titi (2015), p. 261, Kriebaum (2019), pp 23-40, Mehranavar and Johnson (2022), p. 264.

⁵ Mehranavar and Johnson, *supra* n 4, pp. 265-6.

⁶ *Ibid.*

⁷ Cutler (2018), pp. 73-8; Alter et al. (2019), pp. 453, 458; Basedow (2022), p. 1374; Voeten (2022), p. 14.

⁸ *Supra* n 4.

⁹ Cutler, *supra* n 7, pp. 73-4.

¹⁰ Kriebaum, *supra* n 4, pp. 24-5.

the host state of the investment occurred. This intervention would sometimes be diplomatic,¹¹ and sometimes even forceful or threatening the use of force.¹² It was one of the most common examples of one state exercising its political might and influence over another – in order for the former to allegedly protect the interests of its nationals.¹³

This would come to be known as *gunboat diplomacy*,¹⁴ something which clearly made it very difficult for smaller (or weaker), capital-importing (or which held resources desirable to foreign powers), states to exercise their sovereignty when this exercise of sovereignty conflicted with the economic interests of foreign investors, and/or those of their home state. Perhaps one of the most relevant examples refers to the Opium Wars occurring in the 19th century, where Great Britain used force against China in order to, among others, engage in opium-based trade activities from Chinese territory (and while investment and trade are distinct, great power politics such as this dominated international relations in that period, irrespective of whether commercial activities involved investment or trade).¹⁵

In present-day international economic affairs, outright force-based triggers to commerce might not constitute the norm anymore. However, what in the past stood for *gunboat diplomacy* got replaced by *economic statecraft* or “*economic gunboat diplomacy*”, especially with state-controlled enterprises investing in foreign territories.¹⁶

Seen in this light, politicization has over the time become synonymous with a host of negative aspects revolving around ISDS and foreign investor-state relations, in general. The negative aspects, *inter alia*, include the geopolitical influence exercised by the home state of the foreign investor, unpredictability of outcome for the investor (the investor would never know how its dispute would be settled in a specific context, owing to its lack of control over the politically-charged issues), decrease in investment that would further prevent development (it is well-known that political risk is one of the major obstacles to foreign investment).¹⁷

All these effects of politicization run counter to the major premises of, and promises that, ISDS set out to deliver. For starters, ISDS was conceived as a neutral, objective, and predictable dispute resolution system.¹⁸ Furthermore, removing (great power) politics – to the extent possible, at least from an institutional point of view when it comes to settlement of disputes – from the ambit of ISDS meant that the investor, the actor around which the whole mechanism was built, takes centre stage.¹⁹

¹¹ Diplomatic protection meant that the home state could protect its nationals since their property were also part of the former's. For more details, see Dolzer et al. (2022), p. 2. See also *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30), p. 12.

¹² Dolzer et al. (2022), *supra* n 11, p. 2. See also, Bjorklund (2010), *supra* n 4, p. 239.

¹³ Shihata (1986), *supra* n 4, p. 19.

¹⁴ Dautaj (2021), pp. 288-93.

¹⁵ Philips (2012), p. 20.

¹⁶ See, generally, Duanmu (2014), p. 1044. See, also Boute (2019), p. 383, especially at pp. 398-415.

¹⁷ See Kriebaum (2019) *supra* n 4, pp. 24-30.

¹⁸ Vicuña (2010), p. 67. See, also Peters (2016), p. 291.

¹⁹ *Idem*, pp. 63-4.

But this goes far beyond the pure interests of the investor. It actually enables economic globalisation – with private initiative percolating through the entire investor-state relation,²⁰ even at the eventual dispute settlement stage (further enabling private initiative by raising the individual to an almost independent actor in international relations,²¹ eventually equipping him with a remedy to obtain redress to alleged wrongs of the host state).

Against this backdrop, this chapter sets out to explore the depoliticization narrative, while also demonstrating that ISDS has never completely removed politics from the system. As already mentioned, depoliticization has been seen as an enabler of ISDS and of its success so far. Basically, removing the political influence (either from the home state, or from the host state, mostly) enables judicialization of investment disputes.²²

In other words, international investment arbitration can exist precisely because it is an alternative to the political settlement of disputes. The latter characterises great power politics and not an independent, neutral, and objective dispute settlement mechanism. While far from perfect, ISDS offers a solution to the immediate interests, and fears, of the investors. And even acts as a key in the multilateral, rules-based, economic order characterising the 20th century (and still – at least somewhat – characterising present times).²³

However, we suggest a different understanding of this depoliticization narrative. The article proposes that we should conceive of depoliticization as existing, and manifesting itself, in two different realms. One realm characterizes the procedural and, to a certain extent, institutional aspect of ISDS (procedural rules and guarantees, such as those ensuring independence and impartiality of arbitrators, the dispute settlement mechanism etc.). Here, depoliticization should be understood as the decluttering of political interference of host, and home, state institutions within the governance of arbitral proceedings.

When it comes to the substantive sphere (which characterises the merits of the dispute, including the actual relationship between the investor and the host state), this chapter will go beyond and demonstrate that not only has depoliticization never completely occurred in this realm, but that a certain degree of politicization is, actually, beneficial to ISDS (or to international investment law, in general).

Other authors have expressly acknowledged the existence of politicisation existing in investor-state relations to a certain extent.²⁴ But this article goes further and brings forward a model to actually explain why depoliticisation should be conceived as having occurred to different degrees based on the realms in which it manifested itself – procedurally, or substantively. Moreover, we also apply John Rawls' theory concerning procedural justice to explain how procedural depoliticization (establishing the right procedures), as a *systemic good*, is enough

²⁰ Slobodian (2018), pp. 93, 129-31.

²¹ Peters (2016), *supra* n 18, pp. 289-93. However, for the theory that any procedural rights accruing to an individual in international (investment) law are a by-product of rights that are originally those of the home state's (also known as "*delegated rights*"), see Paparinskis (2013), pp. 625, 627.

²² *Supra* n 7.

²³ *Supra* n 20.

²⁴ For instance, see generally, Titi (2015), *supra* n 4, p.261; Mehranavar and Johnson (2022), *supra* n 4, pp. 293, 296, 299.

to address most concerns existing with regards to the fairness of the final outcome in what would otherwise be an unpredictable, politically-charged, environment in which the foreign investor would find itself.

As such, the analysis proceeds as follows. Part I explores the depoliticization narrative in ISDS and how it has become widely accepted that depoliticization is desirable. This part also introduces a distinction between procedural depoliticization and substantive depoliticization. Here, we argue that international investment arbitration, in its procedural (and institutional) dimension, indeed leads to depoliticization. But this is only a partial form of depoliticization, when looking at investor-state relations globally. Substantively, however, as already mentioned, investment disputes have never been completely depoliticized.

Thus, we posit a paradigm shift that avoids evaluating investment disputes in terms of being politicized or not. We suggest, instead, a two-pronged approach that assumes (1) a (almost) complete procedural, and institutional, depoliticization and (2) a partial substantive depoliticization. That means that the questions and mechanisms used to assess those two dimensions will, of course, be different. More specifically, while procedurally one should expect depoliticization, substantively one should examine it in terms of degrees of (de)politicization, with a degree of political influence when it comes to the substance of investment disputes being acceptable – and also realistic.

Part II, then, explores in depth the parameters of procedural depoliticization, in order to highlight tools used for this purpose, and to clarify where ISDS has attained the strongest form of depoliticization. Finally, Part III explains how, substantively, there has never been a complete depoliticization – and why that is not even desirable and also not practicable.

Part I: What Do We Talk About When We Talk About “Depoliticization”?

Perhaps the strongest catalyst to depoliticization was the negotiation and ratification of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) in 1965,²⁵ which has acquired an almost *quasi-constitutional-like* status in international investment law.²⁶ Almost all treaties providing for ISDS refer to ICSID as a go-to forum for the settlement of investment disputes.²⁷ A bare reading of the *travaux préparatoires* of the ICSID Convention highlights that the Convention was introduced with an aim to insulate “*disputes from the realm of politics and diplomacy*”.²⁸ This can be seen as a form of institutional and procedural depoliticisation.

²⁵ 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.

²⁶ If one conceives of the ICSID dispute settlement system (seen together with the substantive provisions of applicable investment treaties in any given dispute), then functionally this framework replaced domestic, and even constitutional, rules that foreign investors distrusted when it came to committing their capital to the territory of the host state. Seen in this light, the ICSID Convention holds central stage in this *de facto* quasi-constitutional framework. See, for instance, Kleinheisterkamp (2015), p. 811.

²⁷ Dolzer et al. (2022), *supra* n 11, p. 12.

²⁸ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formulation of the Convention (History of the Convention), Vol. II, Part 1, 464.

Notably, the ICSID Convention only focused on the institutional and procedural aspects of dispute settlement. Nonetheless, it represented great progress. It is believed that investment protection treaties, containing substantial standards of protection, complement the procedural role played by international instruments such as the ICSID Convention in terms of depoliticization of investment disputes.²⁹ However, this complementarity is not necessarily as straightforward as it may seem at first, as will be further illustrated in Parts II and III of this article.

The term “*depoliticization*” in the context of investment arbitration is often understood as “autonomous”,³⁰ “immune from political considerations”,³¹ and “detaching politics from law”.³² Aron Broches, the principal architect of the ICSID Convention, has stressed that the Convention aimed to “*remove investment disputes from the intergovernmental political sphere*”³³ and that the Convention offered “*a means of settling directly, on the legal plane, investment disputes between the State and foreign investor, which would insulate such disputes from the realm of politics and diplomacy.*”³⁴

Another widespread understanding of “*depoliticization*” is the focus on the removal of the home state’s political influence in the affairs between the host state and the foreign investor.³⁵ This was ensured by removing the possibility of the home state in exercising diplomatic protection as regards the foreign investor.³⁶ The transition from diplomatic protection to investment arbitration has invariably ensured the removal of two major disadvantages of diplomatic protection: (1) removal of the discretion of the home state to pursue the claim,³⁷ and (2) removal of the obligation addressed to the investor to exhaust all local remedies before diplomatic protection can be pursued.³⁸

However, not even in this case was there a complete removal of that political influence. For example, Article 27 of the ICSID Convention, which prohibits the diplomatic espousal of the investor’s claim by its home state, removes this barrier if, following an eventual award, the host state fails to comply with it.³⁹ In a way, this may be technically seen as an instance of

²⁹ Dolzer et al. (2022), *supra* n 11, p. 30.

³⁰ Ginsburg (2013), p. 484.

³¹ *Ibid.*

³² Odumosu, (2007), pp. 271-2.

³³ Broches (1995), p. 163.

³⁴ International Centre for Settlement of Investment Disputes, History of the ICSID Convention. Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Vol II-1 (ICSID Publication 1968), p.242 & p.303, Available at: <https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf> (last accessed: 10 February 2023).

³⁵ Dolzer et al (2022), *supra* n 11, 30.

³⁶ See Kriebaum (2019), *supra* n 4, p. 25.

³⁷ Barcelona Traction, Light and Power Company Limited (Belgium v. Spain), Judgment, I.C.J. Reports 1970, para. 79.

³⁸ Article 14, para. 1 of the International Law Commission (2006), Draft Articles on Diplomatic Protection, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10, UN Doc A/61/10.

³⁹ Article 27 of the ICSID Convention:

“(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

repoliticization. After all, it allows the home state to intervene in the dispute, post-award, through diplomatic espousal of the investor's claim.

However, from an effectiveness and rule of law perspective, the investor's potential lack of recourse to any mechanism that could safeguard its interests and ensure the payment of a legally rendered arbitral award makes it necessary for this type of intervention by the home state. Nonetheless, Article 27 only applies if there is a failure to enforce an ICSID Award under the normal procedure provided by Article 54 of the Convention. This provision encompasses the obligation on any state party to the treaty to enforce an ICSID Award as if such an arbitral award was a final domestic judgment of that state's own courts.⁴⁰

Paradoxically, this form of repoliticization, tolerated through Article 27 of the ICSID Convention, is necessary to ensure that the legal-arbitral mechanism which was introduced to replace the influence of great power politics functions smoothly – essentially, allowing recourse to diplomatic protection as an alternative to traditional ways of enforcement and also seen as a recourse against the violation of the ICSID Convention by the state which failed to comply with the award.⁴¹ Repoliticization is permitted so that, in the future, *too much politicization* is prevented.⁴²

Furthermore, rules governing non-ICSID arbitration proceedings (and eventual recognition and enforcement proceedings) seem to not contain any prohibition concerning diplomatic protection at all – thus making it even more likely that a complete depoliticization in this regard has never occurred.

However, the influence of politics in investment arbitration is not limited to the role that the home state of the investor plays whenever a dispute between the host state and the foreign investor occurs. In fact, such a skewed view risks perpetuating a myth that only serves to create an illusion: that the influence of politics is limited only to the relations between the home state and the host state. Relations between the foreign investor and the host state can also have a political element, just like those between the host state and the home state.

After all, politicization is, in a way, a form of decision-making that is taken by a political (collective in nature) body, including the government (administration).⁴³ Seen in this light, investor-state relations always have the potential to be politicized, as they are based mainly on the investor's relations with the public administration.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.”

⁴⁰ Reinisch (2022), pp. 1498-1506

⁴¹ Malintoppi (2022), pp. 649-50.

⁴² More specifically, as mentioned earlier, diplomatic protection here serves as an alternative to enforcement. If proper enforcement of an eventual award cannot be pursued in this situation, then diplomatic protection becomes the only solution. Removing it even in this case may have negative systemic consequences, rendering the arbitration mechanism ineffective. Long term, this creates the risk that the users and the stakeholders of ISDS will perceive it as unsuitable for its purpose and would, eventually, resort to what existed before it – settlement of disputes *via* political means. Plainly speaking, less politicisation at this point, within a controlled (quasi-)judicialized framework, prevents the chaos and unpredictability of a complete influence of politics on the settlement of disputes between foreign investors and host states.

⁴³ Landwehr (2017), p. 51.

It is also pertinent to add that Ibrahim Shihata, former Secretary-General of ICSID, wrote one of the most famous articles on the depoliticization of investment disputes through ICSID, wherein he admitted that one of the aims of ICSID was to “depoliticize” the settlement of investment disputes. Importantly, he observed that

[t]he International Centre for the Settlement of Investment Disputes (...) was created by the Convention on the Settlement of Investment Disputes (...) to provide a forum for conflict resolution in a framework which carefully balances the interests and requirements of all the parties involved, and attempts in particular to ‘depoliticize’ the settlement of investment disputes.⁴⁴

Nowhere was it mentioned that this attempt at depoliticization was limited only to removing the political influence of the home state in the dispute.⁴⁵ Of course, if it is the *settlement* of investment disputes that is to be depoliticized, then what Shihata (and, more to the point, ICSID’s drafters) had in mind must have been the arbitral process itself. *That* should be depoliticized.

However, Shihata also mentions that the aim is the depoliticization of *disputes*.⁴⁶ It is doubtful if this has been achieved in its entirety, especially if one looks at an investment dispute from the point of view of the very facts that occur between the investor and the host state on the latter’s territory – all the way to the enforcement of an eventual award.

For instance, one commentator refers to sovereign immunity as a barrier to the enforcement of investor-state arbitral awards.⁴⁷ In this context, she refers to *depoliticization* not simply as an attempt to remove the great powers politics that may arise between the home state of the investor and the host state.⁴⁸ But also to “*rein in untoward political pressures stemming both from states hosting investment and from the investors’ home states*” (both through the drafting of the ICSID Convention, but also through the vast network of investment protection treaties).⁴⁹

Nonetheless, while she does admit that ISDS has never been completely depoliticized, there is no detailed explanation about the degree to which this depoliticization actually occurred.⁵⁰ There is mention, however, of the fact that doing away with diplomatic protection is only one side of the story.⁵¹ Even the practice of major players in investment arbitration, such as the United States of America, seems to confirm that ISDS was concerned with a general depoliticization of the dispute settlement system and not simply an avoidance of diplomatic espousal that could lead to great power politics.⁵²

⁴⁴ Shihata (1986), *supra* n 4, p. 4.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, p. 25.

⁴⁷ *See generally*, Bjorklund (2010), *supra* n 4.

⁴⁸ For such a view, *see for example*, Kriebaum (2019), *supra* n 4, pp. 24-7. For a different, broader view, of depoliticization, *see generally*, Titi, (2015), *supra* n 4, pp. 261-288.

⁴⁹ Bjorklund (2010), *supra* n 4, p. 214 (fn 20).

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, p. 214 (fn 20), p. 240.

⁵² *Republic of Ecuador v. United States of America*, UNCITRAL, PCA Case No 2012-5, Award (29 September 2012), para. 201.

It is also interesting to note that most of the literature on depoliticization of investment disputes focuses on how this benefits the investor and/or how this avoids great power politics/conflicts (occasionally, commentators might also focus on the benefits to the system itself).⁵³ However, a perusal of the existing literature indicates that there is little to no focus on how arbitral tribunals, for example, after assuming jurisdiction over certain investment disputes are actually entering into the political realm,⁵⁴ and whether this constitutes a politicization of the arbitral process itself⁵⁵ – something that would run contrary to the interests of host states and would raise questions of legitimacy of arbitral decision-making.⁵⁶

In this case, depoliticization does not only mean (*quasi-)*judicialization of investment disputes.⁵⁷ Ideally, this would also mean the existence of certain limits to this *judicialization*; with arbitral tribunals refraining from acting in a certain way if, and when, certain disputes are brought to their consideration.

Unfortunately, as already pointed out,⁵⁸ it is difficult to clearly separate, substantively, the types of disputes that exceed the “*politicization threshold*” and those over which an arbitral tribunal should assume jurisdiction. Thus, the best way to ensure desired, and realistic, levels of depoliticization, as it will be shown below,⁵⁹ is through guarantees of procedural fairness, such

⁵³ For instance, see Shihata (1986), *supra* n 4, p. 31; Kriebaum (2019), *supra* n 4, pp. 26-30; Mehranavar and Johnson (2022), *supra* n 4, pp. 265-6.

⁵⁴ This could be the case in most instances where a tribunal questions policy decisions of home states, especially those in areas of high importance to the home state (e.g. health matters, macroeconomic decisions, security and military aspects) [see Titi (2015), *supra* n 4, p. 265]. As such, tribunals have developed a doctrine of restraint, or deference, but there seems to be no consensus as to the exact scope of this doctrine (see, generally Henckels (2015)). Moreover, it is not only in investment arbitration that tribunals assuming jurisdiction over certain disputes might antagonise states which accepted the jurisdiction of an international court or tribunal. The European Court of Human Rights has faced this issue with the United Kingdom, for example [see, generally, Graham, (2020)].

⁵⁵ One of the difficulties with limiting the involvement of an international (arbitral) tribunal with certain types of disputes because they might turn out to be too politically charged is that it is exceedingly onerous to measure, in the abstract, which dispute (or which state measure leading to a dispute) is *too* politically charged and goes beyond any acceptable threshold. After all, what has a major political impact in a specific situation depends on the factual nexus and also on the context of the dispute (both historical and geographical). To give an example, a dispute concerning sovereignty over maritime features in international law might seem to demand that the adjudicator conducts a technical, clear, and predictable exercise in most cases. However, when it comes, for instance, to the South China Sea and Chinese demands, this is often seen as the highest form of lawfare (using the law, and legal means and institutions, for purely political purposes) [see generally, Guilfoyle (2019)]. Furthermore, simply applying an abstract model to evaluate a dispute for its level of politicisation might actually end up being a useless exercise. Simply put, theory only states that politicisation occurs when a collective body engages in decision-making (see, *supra*, n 43). Applying this without further consideration would lead to an absurd result – all ISDS disputes are virtually politicised. If one applies a simple narrative that ISDS should be completely depoliticised then a paradoxical outcome is reached – ISDS cannot exist anymore because it contradicts itself, with tribunals assuming competence over politicized (or politicizable) disputes. This is another reason why the main argument made in this article turns on procedural depoliticization as the way to achieve what the founders of investment arbitration envisioned in the first place. As it will be explained in Parts II and III, a fair and just outcome is reached by focusing on procedural depoliticization. This accepts the reality that, to an extent, the substance of investment disputes will always entertain a degree of politicization and that it is impossible to pinpoint exactly where the line should be drawn between permissible politicization in ISDS and impermissible politicization. As such, there is an institutional-procedural mechanism which leads to fair results without having to undertake a surgically precise transformation when it comes to the substance of foreign investment disputes.

⁵⁶ On how depoliticisation can contribute to the legitimacy of ISDS, see Haljan (2019), pp. 252-3.

⁵⁷ *Supra* n 7.

⁵⁸ *Supra* n 55.

⁵⁹ See, *infra*, Part II.

as impartiality, independence, and a clear adherence to rule of law principles in terms of the dispute resolution process. This could partially explain why, within UNCITRAL's Working Group III,⁶⁰ discussions concerning the reform of ISDS mostly revolve around procedural issues (notwithstanding the difficulty in reaching consensus on substantive ones).⁶¹

Notwithstanding the above, the benefits of depoliticization (broadly speaking) are somewhat intuitive, as they are desirable. Firstly, this process removes the rather arbitrary and, perhaps, unfair influence of powerful states in international economic affairs. In other words, ISDS was aimed at ensuring a transition from great power politics in the international investment arena to a (partial⁶²) judicialization of this area.

It is only partial because ISDS relies on a series of factors, including an arbitration mechanism and a legal trigger for this mechanism (normally an investment protection treaty whereby the host state extends an offer to arbitrate in case of future disputes with a foreign investor, with the latter taking up that offer by initiating investment proceedings)⁶³. Lack of such mechanisms may mean that the aforementioned judicialization cannot take place.

Also, most treaties dealing with international investment do not regulate the admission of investments,⁶⁴ which could, and sometimes even is, heavily influenced by (geo)political considerations. For instance, screening of foreign investment for security reasons can be heavily influenced by geopolitical considerations, as is the case with some Western states that are adamant to admit Chinese investments because of certain geopolitical considerations.⁶⁵ For instance, foreign ownership of critical infrastructure, core technologies, or elements of the defence sector.⁶⁶

Moreover, as already mentioned,⁶⁷ depoliticization of investment disputes also entails the (partial) empowerment of the investor in the international legal arena. Initially, the investor was subject to political opportunism, as the home state would not always escalate and challenge the host state – again, for political reasons – if the foreign investor felt aggrieved in its relations with the capital-importing state.⁶⁸ In ISDS, however, the investor takes centre stage: it can exercise certain procedural rights (whether those rights belong to them or were simply

⁶⁰ United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Fifty-first session, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November – 1 December 2017), A/CN.9/930/Rev.1, para.20.

⁶¹ See, *infra*, Part II.

⁶² Partial in the sense that ISDS must be provided for *via* different mechanisms (usually treaties). Unless they exist, there can be no judicialization of foreign investment disputes.

⁶³ See generally, Paulsson (1995).

⁶⁴ There is a number of treaties which limit the discretion of the host state when it comes to the establishment of a foreign investment by prohibiting discriminatory treatment when it comes to this phase: host states must treat potential foreign investors, when it comes to the pre-establishment phase, in the same way they would treat another foreign, or domestic investor, finding itself in like circumstances (basically, extending most-favoured-nation and national treatment to the pre-establishment phase). For instance, see Article II of the Agreement between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments (signed 29 May 1996, entered into force 17 January 1997). See also, Joubin-Bret (2008).

⁶⁵ For instance, see Lampo (2021), pp. 434-5.

⁶⁶ Bian (2021), pp. 56-4, 587.

⁶⁷ *Supra* n 19 and 21 and the accompanying text.

⁶⁸ Kriebaum (2019), *supra* n 4, pp. 27-8.

exercised in the name of the home state⁶⁹ is of far lesser importance here) to vindicate its substantial rights. This is another major effect of depoliticization and the subsequent judicialization of investment disputes.

In this context, the complexity and nuances of depoliticization become clearer. This occurs to varying degrees and it is not always the same, depending on the angle one uses to look at the issue. Based on this complexity, the existing nuances, and the multitude of involved stakeholders, together with the nature of ISDS and investment disputes, we propose a different model to approach the depoliticization goal. One that looks at the differences and the potential of depoliticization depending on the realm in which it occurs: institutional/procedural and substantial. The suggested model assumes that only procedural depoliticization tends towards somewhat of a complete form of depoliticization. This is further explained in Part II. In terms of the substantive aspect of disputes, Part III will explain how depoliticization here is very difficult to achieve and also how identifying the exact scope of depoliticization here can be highly onerous.

Part II: The Elements of Procedural Depoliticization

Arbitral tribunals are recurrently posited with questions and issues relating to public policy measures adopted by States. Such public policy measures, *inter alia*, include regulating public services, economic and financial measures, and environmental measures.⁷⁰

The first tool that is used to ensure that ISDS benefits from an independent and objective dispute settlement mechanism (thus preventing, for instance, the exercise of political preferences by arbitrators) is the set of rules ensuring the arbitrators' independence and impartiality.⁷¹ Independence and impartiality are invariably two fundamental aspects of procedural integrity of any dispute resolution process.⁷² The perception of bias of arbitrators in ISDS is directly linked with their independence and impartiality.⁷³ As ISDS disputes generally involve a political perspective, arbitrators appointed by disputing parties may end up in certain cases vigorously representing the interests of the party that appointed them in the first place.⁷⁴ This potential bias of arbitrators is often attributed to the vested interest of the arbitrators seeking repeat or future appointments.⁷⁵

As argued by Gus van Harten, the tenets of arbitral independence and impartiality are particularly challenged when the perception is of the presence of inherent bias:

The dependence of arbitrators on government and business bellies the claim that investment treaty arbitration removes sensitive disputes from the political realm and subjects them to the rule of law...The problem with this claim is that adjudication is neither independent nor impartial

⁶⁹ Papaniskis (2013), *supra* n 21.

⁷⁰ Papaniskis (2012), pp. 271-289.

⁷¹ Giorgetti et al. (2020), p. 441.

⁷² Park (2010), pp.189-251; Sobota (2015), pp. 293-319.

⁷³ Giorgetti et al. (2020), *supra* n 71, p. 441.

⁷⁴ Puig and Strezhnev (2017), pp. 371-398. *See, also*, Langford and Behn (2018), pp.551-580.

⁷⁵ Langford and Behn, *supra* n 74, pp. 551-580.

where the adjudicator is appointed by a political or corporate entity on a case-by-case basis...It is precisely because they are not appointed and assured tenure by the state that arbitrators are exposed to undue political pressure. There can be no rule of law without an independent judiciary.⁷⁶

In light of the above, it is not surprising to note that States have been actively incorporating provisions in their investment treaties regarding the qualifications and experience of arbitrators, ethic rules and codes of conduct of arbitrators.⁷⁷ Consequently, given the significance of ensuring independence and impartiality in ISDS, the UNCITRAL Working Group III has been focusing on reform measures countering the connections between parties and arbitrators, double hatting, issue conflict, the inherent issues pertaining to appointment of arbitrators and the alleged systemic pro-investor or pro-investment bias.⁷⁸ More precisely, the Working Group III in its November 2018 report states:

Independence and impartiality were described as key elements of any system of justice, including arbitration. The concerns relating to the possible lack of independence and impartiality of decision makers, or of the perception thereof, were said to be particularly acute in the field of ISDS, as ISDS cases usually involved public policy issues and involved a State. It was re-affirmed that, in order to be considered effective, the ISDS framework should not only ensure actual impartiality and independence of decision makers, but also the appearance thereof. Therefore, it was said that any reform in that respect should aim at addressing both actual and perceived lack of independence and impartiality.⁷⁹

The process of appointing arbitrators by parties and the jurisdiction of the tribunal is often perceived as a window for political interference.⁸⁰ Moreover, the legitimacy of the entire process is called into question when the party-appointed arbitrators are seen as potentially exacerbating the political divide between the investor and the host state.⁸¹

The reform process currently being undertaken by the UNCITRAL Working Group III has been considering a range of options to address the issue of political interference via the arbitrator appointment process. The possibilities range from creating a list of arbitrators from one end to establishing a standing mechanism with a permanent adjudicatory body.⁸² All options considered, the creation of the permanent investment court wherein arbitrators would be employed full time subject to strict ethical requirements appears to be a feasible option to

⁷⁶ Van Harten (2008), p. 173.

⁷⁷ Korzun (2021), pp. 355-414.

⁷⁸ United Nations Commission on International Trade Law (2018) Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS Note by the Secretariat. A/CN.9/WG.III/WP.151, available at: <http://undocs.org/en/A/CN.9/WG.III/WP.151> (last accessed: 8 February 2023).

⁷⁹ United Nations Commission on International Trade Law (2018) Report of the Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty/Sixth Session. UN Doc. A/CN.9/964, p. 67.

⁸⁰ Pauwelyn and Elsig (2013), pp. 463-4. See also, Bjorklund et al. (2019), available at:

<https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/11-bjorklund-et-al-selection-and-appointment-isds-af-11-2019.pdf> (last accessed: 8 February 2023).

⁸¹ Pauwelyn and Elsig, *supra* n 80, pp. 445, 463. See also, Bjorklund et al. (2019), available at:

<https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/11-bjorklund-et-al-selection-and-appointment-isds-af-11-2019.pdf> (last accessed: 2 July 2022).

⁸² See Secretariat of the U.N. Comm'n on Int'l Trade Law, Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS): Selection and Appointment of ISDS Tribunal Members, Note by the Secretariat, 19-11, U.N. Doc. A/CN.9/WG.III/WP.169 (July 31, 2019).

counter the alleged biasness of party-appointed arbitrators.⁸³ This permanent investment court would ensure to a great extent breaking the link⁸⁴ between the parties and arbitrators which is the main criticism levelled against party-appointed arbitrators.⁸⁵

From a procedural standpoint, politicization in the arbitrator appointment process can be countered through specific transparency measures such as advertisement of openings, public hearings, publication of candidates' resumes, promotion of direct applications by potential candidates and a robust screening mechanism of potential arbitrators.⁸⁶ Notably, the procedural aspects of investment arbitration proceedings include within its ambit rules concerning *inter alia*, jurisdiction, evidence, pleading requirements, execution of awards, costs and other related matters that ensure a roadway for enforcing rights of the parties involved therein. Additionally, an important facet of procedural depoliticization is procedural fairness which implies an objective and pre-formulated dispute resolution mechanism based on agreed standards that ensures predictability and fairness in the outcome of the dispute resolution mechanism.

The focus of this chapter is only on procedural fairness, of which the conduct of arbitrators, particularly the independence and impartiality thereof, forms the essence. As observed by one author, "*the ability of a State to have recourse to an impartial and independent judicial tribunal openly applying known legal rules in order to determine what the law is and so resolve its legal disputes with another State is fundamental to the existence of the international rule of law.*"⁸⁷

More generally, the notion of independence in ISDS connotes the absence of any relationship (either based on power or influence) between the arbitrator and the disputing parties. Similarly, impartiality denotes the lack of pre-judgment of the arbitrator in relation to the case.⁸⁸

Currently, the ISDS regime comprises of disclosure requirements and challenge procedures governing the independence and impartiality of arbitrators.⁸⁹ The existing regime under the

⁸³ Ibid.

⁸⁴ Schacherer (2018), p. 22.

⁸⁵ Bungenberg and Reinisch (2018), p. 17, Bjorklund (2021), p. 433; Lee (2021), p. 484.

⁸⁶ Kaufmann-Kohler and Potesta (2017), pp. 74-87.

⁸⁷ Watts (1993), p. 28.

⁸⁸ *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic* (Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007) ICSID Case No. ARB/03/17, para. 28; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic* (Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007) ICSID Case No. ARB/03/19, para. 29; *Tidewater Investment SRL and Tidewater Caribe, C.A. v Bolivarian Republic of Venezuela* (Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 23 December 2010) ICSID Case No. ARB/10/5, para. 37; *ConocoPhillips Petrozuata B.V. ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela* (Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. Arbitrator, 27 February 2012) ICSID Case No. ARB/07/30, para 54; *Blue Bank International & Trust (Barbados) Ltd. V. Bolivarian Republic of Venezuela* (Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013) ICSID Case No. ARB 12/20, para. 59; *Burlington Resources Inc. v Republic of Ecuador* (Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013) ICSID Case No. ARB/08/5, para 66; *Abaclat and Others v Argentine Republic* (Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014) ICSID Case No. ARB/07/5, para. 75.

⁸⁹ Giorgetti et al. (2020), *supra* n 71, p. 447.

UNCITRAL Arbitration Rules⁹⁰ and the ICSID Convention do contemplate measures to ensure the independence and impartiality of arbitrators. The ICSID Convention provides that arbitrators shall be “*persons of high moral character*”, possess “*recognized competence in the fields of law, commerce, industry or finance*” and are “*capable of being relied upon to exercise independent judgment*”.⁹¹ Arbitral institutions such as the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and Stockholm Chamber of Commerce (SCC) require arbitrators to maintain high standards of independence and impartiality.⁹² However, systemic concerns remain prevalent, especially given the varied roles played by a handful of arbitrators.⁹³

Against this backdrop, disclosure obligations envisaged under various Rules become pivotal. The ICSID Arbitration Rules mandate disclosure of any circumstance that might lead to questions being raised regarding the independence of the arbitrator.⁹⁴ Similarly, the UNCITRAL Arbitration Rules and the ICC Rules require disclosure of all circumstances that might give rise to justifiable doubts regarding the independence and impartiality of arbitrators.⁹⁵

Additionally, soft law instruments such as the Guidelines on Conflicts of Interest in International Arbitration (“*IBA Guidelines*”) also provide guidance with regard to the independence and impartiality of arbitrators.⁹⁶ The IBA Guidelines postulate non-binding general principles applicable to the independence and impartiality of arbitrators and provide guidance by way of prescribing specific situations and circumstances (Red, Orange and Green lists) that might result in the disqualification of arbitrators.⁹⁷

⁹⁰ UNCITRAL Arbitration Rules, art 6(7), UNGA Res 65/22 (10 January 2011) UN Doc A/RES/65/22. Available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf> (last accessed: 7 January 2023) (UNCITRAL Arbitration Rules).

⁹¹ Article 14 and Article 40 of the ICSID Convention. See also, Giorgetti et al. (2020), *supra* n 71, pp. 441-474.

⁹² International Chamber of Commerce Rules of Arbitration, (Jan. 1, 2021). Available at: <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> (last accessed: 10 February 2023) (“ICC Arbitration Rules 2021”); London Court of International Arbitration, (Oct. 1, 2014). Available at: http://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx (last accessed: 10 February 2023) (“LCIA Arbitration Rules 2014”); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, (Jan 1, 2023). Available at: https://sccarbitrationinstitute.se/sites/default/files/2023-01/scc_arbitration_rules_2023_eng.pdf (last accessed: 10 February 2023) (“SCC Arbitration Rules 2023”).

⁹³ Dunoff and Giorgetti (2019), p. 279.

⁹⁴ Rule 19 of the ICSID, Rules of Procedure for Arbitration Proceedings (21 March 2022) (ICSID Rules).

⁹⁵ Article 11 of UNCITRAL Arbitration Rules (as adopted in 2013). Available at:

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf (last accessed: 7 January 2023). Article 11 of UNCITRAL Arbitration rules states that: When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances. See also, Article 11 of ICC Rules, available at: <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#block-accordion-11> (last accessed: 7 January 2023).

⁹⁶ Council of the International Bar Association, “IBA Guidelines on Conflict of Interest in International Arbitration, 2014” (“IBA Guidelines”). Available at: <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918> (last accessed: 8 February 2023).

⁹⁷ *Ibid.*

The manifestation of the rule of law in asymmetrical ISDS is noteworthy at this juncture. The traditional understanding of the rule of law comprising of tenets such as (1) to be ruled by law and not by discretion; (2) to be equal before law and (3) to be governed by the jurisdiction of ordinary courts⁹⁸ were designed in the context of governing the actions and relationships of States. As international institutions increase in influence, it is imperative to understand and assess the significance of the rule of law within the ISDS regime, as dispute settlement mechanisms play a pivotal role. At an international level, the rule of law, for all purposes, formalizes the consensual character of law amongst States through treaties in the absence of an international authority.⁹⁹

Notwithstanding the above, there have been three different meanings attributed to international rule of law: (1) international rule of law denotes the application of rule of law principles to relations between States and other subjects of international law, (2) international rule of law implies “*rule of international law*” thereby essentially implying the precedence of international norms over domestic law, and (3) international rule of law is nothing but a “*global rule of law*”.¹⁰⁰

In light of the above, evaluating the ISDS regime from the lens of an international rule of law aids in highlighting its shortcomings and possible measures that can be adopted to address the legitimacy crisis of ISDS. The issue of legitimacy plays a pivotal role in investment arbitration which has increasingly come under great scrutiny *inter alia*, on the grounds of appearance of bias,¹⁰¹ increase in costs and length of arbitration proceedings, inconsistencies in decision making and interpretations of investment treaties by arbitral tribunals which invariably impacts the policy space of states to the benefit of foreign investors.¹⁰² As noted by one author, the emergence of the legitimacy issue in ISDS can be understood as:

a reaction to the metamorphosis of international arbitration from a dyadic dispute settlement mechanism into a stable institution of transnational governance. It contributes not only to settling disputes, but to stabilizing and generating normative expectations in transborder social relations and therefore exercises transnational authority that demands justification in order to be considered as legitimate. Finally, it is critical to note that the framework in which criticism and legitimacy concerns regarding international arbitration are formulated stems from a constitutional legal analysis. In fact, constitutional arguments set out the contours of the concept of legitimacy used by critics of international arbitration.¹⁰³

More prudently, the compatibility of ISDS with the rule of law is often questioned in the context of (i) legal certainty, (ii) procedural fairness and (iii) transparency.¹⁰⁴

The criticism leveled against the ISDS regime in the context of independence and impartiality of arbitrators is both systemic and individual, with concerns ranging from party appointment,

⁹⁸ Beaulac (2007), p.4.

⁹⁹ Pavel (2019), p. 332.

¹⁰⁰ Chesterman (2008), p. 331.

¹⁰¹ Van Harten (2010), p. 453.

¹⁰² Brower et al. (2003), p. 415.

¹⁰³ Schill (2016), pp.106-124.

¹⁰⁴ Reinisch (2016), pp. 291-308.

multiple appointments, double-hatting, issue conflict and implicit pro-investor bias.¹⁰⁵ Party appointment of arbitrators is considered to be one of the major concerns by critics who observe that the practice constitutes a “*moral hazard*”, is unsatisfactory, and problematic.¹⁰⁶ The problem, according to critics, is twofold: (i) parties tend to choose arbitrators who are sympathetic and of a similar view to the appointing party,¹⁰⁷ and (ii) party appointment of arbitrators results in creeping unconscious bias and cognitive bias thereby resulting in arbitrators advocating for reduced awards of damages or costs and inaccurate decisions and interpretations.¹⁰⁸

However, it can be argued that given that each disputing party appoints its arbitrator, there is a counterbalance. Further, the professionalism and self-policing nature of arbitrators act as the most significant incentives for delivering an unbiased award.

Commentators arguing for the status quo of the independence and impartiality standards in ISDS state that the current procedural safeguards are sufficient in tackling any possible issue that might arise, and the practice of party appointment should not be wholly done away with for the lack of a better alternative.¹⁰⁹ More importantly, those commentators also argue that party autonomy forms an essential aspect of arbitration *per se* and any alterations to it might change the very fundamentals of ISDS.¹¹⁰

The issue of independence and impartiality has to be considered vis-à-vis the issue of arbitrators exercising their jurisdiction to assert public law implications in investment arbitration proceedings. In a domestic legal system, the presence of certain safeguards such as security of tenure and security of income ensures that the judiciary is independent and impartial at the same time.¹¹¹ However, the absence of security of tenure and security of payments project a real possibility of bias in investment arbitration. After all, perception of bias as compared to actual bias is inherently essential to ensure the legitimacy of any method of dispute resolution.¹¹² Consequently, the above discussion leads to an incisive analysis of the structural defects present in the ISDS mechanism that propagate such perception of bias that merit greater attention since “[n]ot only must justice be done; it must also be seen to be done”.¹¹³

It is stated that concerns pertaining to perception of bias are manifested in ISDS in the form of party appointment, connections between arbitrators and parties, the issue of multiple appointments, double hatting, issue conflicts, and implicit pro-investor bias which are systemic concerns that are pivotal to the overall legitimacy of ISDS.¹¹⁴

¹⁰⁵ Giorgetti et al. (2020), *supra* n 71, p. 447.

¹⁰⁶ Paulsson (2010), p. 339. *See*, also Paulsson (2009).

¹⁰⁷ Branson (2010), p. 367.

¹⁰⁸ Brekoulakis (2013), p. 553.

¹⁰⁹ Giorgetti et al. (2020), *supra* n 71, p. 447.

¹¹⁰ *Ibid.*

¹¹¹ Grant and Kieff, (2022), p. 171.

¹¹² Behn et al. (2020), p. 240.

¹¹³ *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256. Giorgetti et al. (2020), *supra* n 71, p. 445.

¹¹⁴ Giorgetti et al., *supra* n 71, p. 445.

For example, in ICSID arbitrations, the presiding arbitrator in a three-member tribunal in case of any conflict between the two appointed arbitrators is either appointed by the Chairman of the ICSID Administrative Council or by the ICSID Secretary General.¹¹⁵ Notably, the ICSID Administrative Council is chaired by the President of the World Bank, who is nominated by the US Government and confirmed by the Bank's Board of Directors.¹¹⁶ The present appointing authority is former under the secretary of the US Treasury for International Affairs, currently David Malpass.¹¹⁷ Thus, the underlying implication emanating from the above is that arbitrators are dependent upon a handful of capital exporting countries for their appointment¹¹⁸. In spite of the integrity and high ethical standards set by some arbitrators, it has been suggested that repeated appointments tend to propagate the *idea* of bias irrespective of the *existence* of actual bias.¹¹⁹

In order to combat this alleged bias of arbitrators, the UNCITRAL Working Group III has formulated the Draft Code of Conduct, which in Article A11(6) imposes a continuous duty of disclosure on arbitrators.¹²⁰ Article A11(2) enumerates a list of non-exhaustive matters that must be disclosed by the arbitrator while accepting the appointment.¹²¹ The Draft Code of Conduct in Article A4 also addresses the issue of multiple appointments and double hatting by stipulating three different options that could be possibly adopted.¹²² It is to be noted that Article A4 pertains to adjudicators only, who act as legal counsels and expert witnesses. Overall, the Draft Code of Conduct provides for broad standards of disclosures intending to

¹¹⁵ Rule 18 of ICSID Arbitration Rules. Available at:

https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf (last accessed: 14 January 2023).

¹¹⁶ Article 5 of the ICSID Convention states that "The President of the Bank shall be ex officio Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council." See also, Van Harten (2008) p 170.

¹¹⁷ World Bank Group (2023) About David R. Malpass. Available at <https://president.worldbankgroup.org/en/president> (last accessed: 14 January 2023).

¹¹⁸ Puig (2016), p. 659.

¹¹⁹ Van Harten (2008), p.173.

¹²⁰ UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) Forty-fourth session, Possible reform of investor-State dispute settlement (ISDS), Draft Codes of Conduct and Commentary A/CN.9/WG.III/WP.223. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V22/183/01/PDF/V2218301.pdf?OpenElement> (last accessed: 10 February 2023).

¹²¹ UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) Forty-fourth session, Possible reform of investor-State dispute settlement (ISDS), Draft Codes of Conduct and Commentary A/CN.9/WG.III/WP.223. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V22/183/01/PDF/V2218301.pdf?OpenElement> (last accessed: 10 February 2023).

Article 10(2) of the Draft Code of Conduct states that: "[T]he following information shall be included in the disclosure: (a) Any financial, business, professional, or personal relationship in the past five years with: (i) Any disputing party or an entity identified by a disputing party; (ii) The legal representative(s) of a disputing party in the IID proceeding; (iii) Other Arbitrators and expert witnesses in the IID proceeding; and (iv) [Any entity identified by a disputing party as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder]; (b) Any financial or personal interest in: (i) The outcome of the IID proceeding; (ii) Any other IID proceeding involving the same measure(s); and (iii) Any other proceeding involving a disputing party or an entity identified by a disputing party; (c) All IID and related proceedings in which the Candidate or the Arbitrator is currently or has been involved in the past five years as an Arbitrator, a legal representative or an expert witness; and (d) Any appointment as an Arbitrator, a legal representative, or an expert witness by a disputing party or its legal representative(s) in an IID or any other proceeding in the past five years."

¹²² Article 4 of the Draft Code of Conduct (*supra* n 121).

enhance the transparency of the process and allow disputing parties to assess any potential conflict of interest.

Additional reforms currently being deliberated upon by the UNCITRAL Working Group III, such as the proposed Multilateral Investment Court (MIC),¹²³ could potentially tackle the issue of biased arbitrators and double hatting. As adjudicators in the MIC are appointed on a long-term tenure thereby preventing them from occupying multiple positions.¹²⁴ Further, appointing adjudicators on a long-term basis would eliminate the motivation of any biasness towards the appointing party, since permanent judges would not be dependent upon the parties for re-appointments. The establishment of the MIC would ensure a clear-cut demarcation between ICSID and other institutions, thereby directly countering the perception of bias that is often leveled against ISDS mechanisms.

The current trajectory of the reform process being undertaken by the UNCITRAL Working Group III makes it difficult to predict whether systemic issues pertaining to independence and impartiality will be successfully addressed. The Draft Code of Conduct is a bright start as it addresses various issues such as double hatting, and repeat appointments. However, there remains a lot to be desired in the reform process as the EU and its member states push for significant changes while other states opt for nuanced changes in the current existing mechanism of appointing arbitrators in ISDS.

The importance of pushing forward the procedural depoliticization endeavour to the highest extent possible becomes clearer when looking at the extent to which substantive depoliticization can occur. This is why the next Part of this article elaborates upon the impact of politicization when it comes to the substance of a dispute, demonstrating how complete substantive depoliticization has never occurred so far. And, while also looking at future prospects, the following sections explain why such a change (complete substantive depoliticization) is improbable in the future and also why it is even undesirable.

Part III: Why Complete Substantive Depoliticization Never Occurred and Is Not Even Desirable

It is counter-intuitive to approach the topic of (de)politicization of investment disputes in purely black-or-white terms. For instance, it is unproductive to ascertain as to whether there should be complete depoliticization or none at all. Otherwise, the existing nuances, owing to the nature of the dispute settlement system – including its history – in investment arbitration, are ignored. Or one cannot explain, if the politicization/depoliticization dynamic is seen exclusively as a choice between black-or-white alternatives, why even the ICSID Convention permits recourse

¹²³ UNCITRAL Secretariat, ‘Appellate and Multilateral Court Mechanisms’ (29 November 2019) UN Doc A/CN.9/WG.III/WP.185.

¹²⁴ Giorgetti et al. (2020), *supra* n 71, p. 470.

to diplomatic protection when a losing respondent state fails to comply with an ICSID arbitral award.¹²⁵

Instead, it is pivotal to understand that depoliticization (at least substantively), *per se*, is multifaceted in nature. Through this lens it is easier to suggest a different approach, namely that politicization is not necessarily an unwelcome development and/or feature of the system, as long as it is restricted by certain parameters, with different degrees of depoliticization existing.¹²⁶

As aptly pointed out by one author, politicization has many layers to it:

the investment arbitration process is in several aspects very much a political one. On the one hand, subject matters of disputes adjudicated by arbitral tribunals inevitably raise political questions. The evaluation of public policies by tribunals, such as the treatment of economic and financial crises, including sovereign debt restructuring, or those regarding environmental and health measures, lead to a certain degree of indirect control of state policies by the investment arbitration process. On the other hand, new forms of ‘diplomatic’ protection are employed in order to interfere with or influence investment arbitrations, such as, for instance negative votes concerning the renewal of international bank loans vis-à-vis a country involved in an investment dispute or the use of the WTO dispute settlement body to ‘circumvent’ investment arbitration.¹²⁷

In the context of ISDS, which can be analogized to domestic administrative law in terms of structure and types of measures that are reviewed by arbitral tribunals,¹²⁸ a parallel may be drawn to domestic systems, such as the United Kingdom (UK).¹²⁹ There judicial review of administrative acts is limited in scope.¹³⁰ For example, it is a fundamental principle in UK administrative law that judicial review cannot touch upon the merits of an administrative decision.¹³¹

And while we do not advocate for a complete transposition of this system in ISDS (a system of international law, after all), there is evidence of some movement towards arbitral tribunal restraint when it comes to review of measures that contain a public policy element.¹³² In other words, there is a conscious attempt to prevent arbitral tribunals from exceeding their ambit of their powers and indulging in reviewing decisions that should, finally, be settled by other bodies. Primarily the ones performing an executive function.

In domestic law (the UK, for example), this is perceived as a form of separation of powers.¹³³ It is generally accepted that the judiciary should not review measures that involve a public policy component. Otherwise, the separation of powers between the judiciary (in the present

¹²⁵ *Supra* n 39.

¹²⁶ Kriebaum (2019), *supra* n 4, p. 38.

¹²⁷ Titi (2015), *supra* n 4, p. 265.

¹²⁸ Schill (2010), p. 4.

¹²⁹ Any parallels to domestic systems are made for illustrative, and explanatory, purposes. Otherwise, this article focuses exclusively on the aspects concerning the potential politicization of arbitral tribunals, and in particular politicization to an unjustified extent.

¹³⁰ Daly (2012), p. 269.

¹³¹ Harris (2003), p. 654.

¹³² Henckels (2015), *supra* n 54, pp. 130-133.

¹³³ Masterman (2011), pp. 113-4.

case, the arbitral tribunal) and other powers, such as the executive, or even the legislative in certain instances, would be blurred and the distinction between such powers would dissipate.¹³⁴

Arbitral tribunals review measures that can be seen to have a highly political element and can be best understood by reference to a few examples from ISDS jurisprudence – for instance, arbitrators reviewing measures taken by Argentina during the 2001 economic crisis.¹³⁵ Notably, the authority of arbitral tribunals to adjudicate sovereign acts can be attributed to the influence of neoliberal economic theory on the drafting of investment treaties (although only partially, since a complete impact would have also included liberalization when it came to establishment of foreign investment).¹³⁶ This is quite apparent in the earliest treaties that entered into force, as most States struck a bargain between sacrificing a portion of their policy space and attracting foreign investments.¹³⁷

The political nature of investment treaty disputes often hinges on the issue of national sovereignty involving challenges to public acts¹³⁸ and often to the public regulatory actions¹³⁹ of host states. A cursory glance over the claims usually raised in ISDS fora highlights that the cases typically cluster around an array of government measures that are politically sensitive,¹⁴⁰ such as, *inter alia*, energy, environmental regulation, public procurement, communication services, corruption, hazardous waste disposal, preservation of cultural heritage and tobacco control.¹⁴¹

In other words, investor-state disputes, followed by their adjudication, occur in “*highly politicized contexts*”,¹⁴² which can be viewed as a challenge to the normal functioning of the political processes of host states.¹⁴³ This compromise of national sovereignty has led to much skepticism of the ISDS framework.¹⁴⁴ Arguably, the most well-known instance of politics

¹³⁴ Banfield and Flynn (2018), p.141.

¹³⁵ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8 (Decision on Objections to Jurisdiction of July 17, 2003); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 (Decision on Jurisdiction of Dec. 8, 2003); *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Decision on Jurisdiction (Main Claim) of Jan. 14, 2004); *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Decision on Jurisdiction (Ancillary Claim) of Aug. 2, 2004); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8 (Decision on Jurisdiction of Aug. 3, 2004); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1 (Decision on Jurisdiction of Apr. 30), para. 20.

¹³⁶ Slobodian (2021), pp. 51-2. See also, Kentikelenis and Babb (2019), pp. 1745-6. On the freedom of states to regulate admission of foreign investment, see Dolzer et al. (2022), *supra* n 11, p. 132.

¹³⁷ Spears (2010), p. 1041.

¹³⁸ Brower II (2009), pp. 348–56.

¹³⁹ Zamir and Barker (2017), p. 210. See also, Born (2012), pp. 839–40 and Schill (2011), p. 895:

“The cases relating to the Argentine economic crisis, [and] also several NAFTA disputes in which investors challenged what the respondent state argued to be legitimate regulatory action to protect the public interest, such as the protection of public health, the environment, or labour standards, raised the concern about how much ‘regulatory space’ investment treaties left.”

¹⁴⁰ Laird (2016), p. 108.

¹⁴¹ Brower II (2017), p. 286.

¹⁴² Brower (2009), p. 183.

¹⁴³ Salacuse (2007), p. 156. See also, Van Harten and Loughlin (2006), p. 146.

¹⁴⁴ Titi (2015), *supra* n 4, p. 261.

being involved in ISDS is the economic and political crisis in Argentina in 2001 and the stream of cases emanating therefrom.¹⁴⁵

The underlying allegations advanced by several Claimants were that Argentina had violated various substantive protections such as fair and equitable treatment, non-discrimination and the expropriation standard afforded to foreign investors under bilateral investment treaties (BITs).¹⁴⁶ In reply, Argentina, in addition to relying on an essential security interest clause in its BITs, also raised admissibility objections to the claims advanced against it. According to the respondent, the investors' claims raised against its economic measures infringed its sovereign right to legislate for public welfare.¹⁴⁷ Consequently, there were several awards delivered by tribunals hearing similar disputes arising out the economic measures adopted by Argentina which were annulled on grounds of manifest errors of law and failure of tribunals to apply the correct applicable law.¹⁴⁸

Similarly, the politicization of the ISDS regime was recently highlighted in the case of *Philip Morris v. Uruguay*,¹⁴⁹ a dispute regarding packing requirements of tobacco products in Uruguay. At its core, Philip Morris International challenged the tobacco control measures concerning branding and warning levels of tobacco products introduced by the Government of Uruguay.¹⁵⁰ The Claimants argued that the challenged measures breached Respondent's obligations under a BIT entitling the Claimants to compensation under the relevant Treaty and international law.¹⁵¹ *Per Contra*, Respondent averred that the challenged measures were in consonance with its international obligations of protecting public health.¹⁵² Ultimately, the tribunal observed that Uruguay had complied with its national and international legal obligations for protecting public health and had not acted in bad faith and in a discriminatory manner.¹⁵³

These examples demonstrate that the very nature of investment disputes rotates around a political axis. In other words, politics percolate through the very fabric of international investment law, when it comes to the substance of investment disputes. Failure to see this entails negative systemic consequences. For example, this is why simply arguing for complete substantive depoliticization, as already mentioned earlier,¹⁵⁴ risks challenging the very existence of international investment law. The paradox pins the depoliticization narrative and objectives against the nature of investment disputes.

It is in this context that this article suggests a demarcation between procedural and substantive depoliticization. To reach the desired aims, one does not need to make major adjustments

¹⁴⁵ *Supra* n 135.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7.

¹⁵⁰ Mohanty (2022), pp. 103-125.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *See supra* n 55.

when it comes to the substance of investment disputes. It only needs to ensure that the proper institutional framework and the proper procedures are in place.

Another way to examine the difference between procedural depoliticization and substantive depoliticization – and to explain the added benefit of tweaks made from the procedural angle – is to employ John Rawls’s distinction between procedural and substantive justice (the latter referring to justice in terms of the outcome). Essentially, Rawls’s argument posits that, in order to reach certain substantive outcomes, one must seek a fair procedure that leads to those desired outcomes. More precisely, he theorises that “*the essential thing is that there is an independent standard for deciding which outcome is just and a procedure guaranteed to lead to it*”.¹⁵⁵

There is clear flexibility in this approach. Firstly, the precise outcome must not be known before one, or more parties, enter a process. It is enough for two elements to exist. One is to be able to evaluate the outcome (again, unpredictable before the fact) in terms of justice. The second is to have a proper procedure in place that properly ensures that whatever outcome ensues, the result is just. In other words, the result itself is not important. What matters is whether one can characterise that result as just or not.

This brings about an added benefit to processes which tend to reach a high degree of complexity. To stick to the depoliticization example, while identifying a substantive outcome (in the present case, reaching a certain level of depoliticization, although not entirely clear what that level should be) occurs by necessity in this process, the exact outcome (with every detail set out – that precise level of depoliticization) must not necessarily be established from the beginning.

It is enough to enact a fair procedure and follow it to reach a beneficial outcome – this can be as abstract as justice for the claimant, as long as the procedure guides the decision-makers to a result that settles the dispute. In fact, if one thinks about the outcomes of investment arbitration proceedings (taking any dispute as an example can work in this case), the end result in the majority of cases is not the same with the one envisioned by either party. Neither do arbitrators know (and nor should they) what the end result will be. But they follow the procedure, nonetheless, trusting that the eventual award will bring an end to the dispute.

Of course, in Rawls’s example, there is a clear, desirable, outcome – the equal division of a cake between certain persons.¹⁵⁶ This is as specific and detailed as possible. However, as already mentioned, procedural justice works equally well even if we cannot exactly pinpoint the precise desired substantive outcome. In fact, it might make more sense in this case, if the approximate parameters of the desired outcome are identified and demarcated. Or if there is a tool that can evaluate the substantive outcome in terms of justice – and lead it there (procedurally).

Applying this theory to the present example even further, the complexity of substantive (de)politicization prevents us from knowing exactly to what extent depoliticization is desirable without hindering the functioning of the ISDS mechanism. This is also similar to the

¹⁵⁵ Rawls (1999), p. 74.

¹⁵⁶ Ibid.

proposition advanced by Rawls of a *quasi-pure procedural justice*.¹⁵⁷ In certain complex areas, it is impossible to pinpoint exactly when the result is just or not – so we assume that it is just as long as it conforms to certain parameters.¹⁵⁸ Thus, we allow a quasi-impersonal mechanism,¹⁵⁹ a predetermined procedure, to dictate the exact outcome, just like market forces in a market economy.¹⁶⁰

Applying this principle, or mechanism, to ISDS leads to certain benefits which can certainly aid in avoiding undesirable outcomes. If complete substantive depoliticization is impossible and, in any case, unwanted, then the question arises: to what extent can substantive politicization be permitted in ISDS?

Realistically speaking, it is difficult to definitively answer the above raised query. And this is precisely why Rawls's theory is suitable here: we do not know the exact degree to which substantive depoliticization in ISDS is desirable. But we understand that with proper procedures in place, the outcome will be satisfactory. The complexity of ISDS, and of the factual matrixes underpinning investor-state disputes, prevent a clear answer about the degree to which substantive depoliticization should be achieved.

In some cases, the disputes themselves are highly politicized in their nature. In such scenarios, the pertinent question that needs to be addressed seems to be whether such disputes could be removed from the competence of a tribunal (either as a matter of jurisdiction or as a form of inadmissibility). If the above question is answered in the affirmative, then the subsequent question which merits attention is: what would be the consequences of preventing the tribunal's competence? Prohibiting tribunals from adjudicating such disputes could jeopardize foreign investments as foreign investors are left without any international (legal) form of protection.¹⁶¹ There are no clear-cut answers, and forcing them may cause more harm than benefits. Our examination shows that ensuring proper mechanisms are in place to guarantee depoliticization, at least in its procedural form, will lead to beneficial outcomes.

Part IV: Conclusion

One of the central tenets of this chapter is that depoliticization should not be understood as a simple phenomenon. It is incongruous to assume that investment disputes can ever be fully

¹⁵⁷ *Idem*, p. 176.

¹⁵⁸ *Ibid*, p. 176.

¹⁵⁹ Quasi-impersonal in the sense that procedures, and procedural guaranteed, are still applied/enforced by decision-makers, but they apply, in an abstract way, to all arbitral proceedings.

¹⁶⁰ Although Rawls himself argues that market forces should not be compared to procedures that are to lead to just outcomes (he is referring, more specifically, to legislative procedures that lead to just legislation), since the former seek efficiency, while the latter seek that just outcome that was mentioned earlier. *See Rawls, supra* n 155, p. 316.

¹⁶¹ At least geared towards foreign investment as a discipline. This is not to say that other legal areas may partially overlap with international investment (law and) relations – thus, offering partial protection. For instance, the European Convention of Human Rights or European Union law may offer protection and remedy to breaches of applicable rules and principles – at least to an extent. *See Giupponi (2017)*, pp. 141-51 and *Moskvan (2022)*, pp. 9-12 and 14-15.

depoliticized. To this end, the chapter attempted to explain the complexity of (de)politicization in the settlement of foreign investment disputes.

It also highlighted that there are many layers to depoliticization, and that the ideal way to approach this process is to make a distinction between procedural and substantive depoliticization. While the former can be considered to be a real example of complete depoliticization (or, at least, something resembling it), the latter is not. Further, it is not even desirable, in certain circumstances, to reach perfect substantive depoliticization – including for the functioning of the system, which by design is set up to deal with politically-charged disputes. As a result, we suggest an emphasis on procedural depoliticization, as a *systemic good*, that will also have consequences upon depoliticization in the substantive area.

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