After the Politicization of ISDS

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Introduction

Investor–State dispute settlement has been in a different phase for a while now. What had long been treated as a specialised technique for managing investment disputes has become a recurring object of political conflict: treaties stall, awards trigger public backlash, and the regime itself is increasingly contested. A mechanism that was meant to depoliticise investment disputes at the international level has instead led to its own politicisation at the domestic level. This is more than a bad storm; it requires more than fine-tuning. Something that once held the system together has given way.

Politicisation is a moment of reckoning. It marks the point at which a justificatory story that once stabilised a regime is no longer believed. It takes the form of a rise in political salience and contestation. What could once be deferred to technical management, here in the hands of lawyers, has returned as a question that those forms of expertise could no longer contain.

In earlier days, investor protection could plausibly be framed as a contribution to general welfare; basically sound, with a few quirks and imperfections for legal technicians to argue over. Protect foreign investment, the argument went, growth will follow, and growth will improve lives broadly enough to justify the privileges and the problems that came with it.[1] That story did real work. It allowed distributional consequences, formalistic ideas of justice, constraints on autonomy to be absorbed without deep justification. It made institutional quietness possible.

That quietness has ended. Questions that had long been deferred now insist on being addressed. How the gains and burdens of investment protection are distributed. How just the arrangements are for those who live with them. How secure different actors remain, and how free they really are. Politicisation marks the return of issues that a growth-centred justificatory story once held down, but can no longer contain.

Some institutions can live with politicisation. Not adjudication, not really. Adjudicatory regimes draw their authority from their capacity to bring conflict to an end in a way that is accepted as binding, even by those who lose. When decisions cease to function as closure and instead trigger mobilisation, protest, and refusal, that logic breaks down. An adjudicatory mechanism that no longer settles disputes is no longer doing the work that justified its creation.

The politicisation of ISDS cannot be addressed by tightening procedural screws or even revising institutional designs. What is at stake runs deeper than

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[1] UNCTAD, Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking (UN Doc UNCTAD/ITE/IIA/2006/5, 2007).

that. What is at stake is the mental model through which the regime has long understood its own role: a background assumption about how investor protection improves lives, and therefore about which consequences require justification and which can be treated as collateral. That assumption no longer commands assent. The argument developed in this chapter takes that loss seriously.

The chapter proceeds in 5 steps. It begins by developing a set of conceptual tools for understanding politicisation, focusing on the interaction between salience, contestation, and the dynamics of quiet, loud, and noisy politics. Section 2 then applies these tools to the trajectory of ISDS: how a regime designed to depoliticise investment disputes internationally became the object of intense domestic politicisation. In Section 3, the analysis turns to the difficulties of depoliticising a regime in such conditions, pointing out the limits of institutional reform and technocratic adjustment. Section 4 confronts the limits of growth as a source of legitimacy, tracing how a social acceptability function once capable of absorbing conflict now fuels contestation instead. The final section argues that the limits of technocratic adjustment point to a deeper need to rethink the mental model through which the regime understands its purpose, effects, and claims to legitimacy.

1. Conceptual Groundwork

1.1 Politicization

To talk about what comes after the politicisation of ISDS, we first have to clarify what politicisation is. There are more and less useful definitions of the term. One array can be set aside immediately: definitions that invite debates about whether there is 'too much politics' in ISDS proceedings, whether arbitrators are political, or whether dispute settlement can and should be non-political. It takes a heroic suspension of disbelief to insist that law or adjudication could be apolitical in any meaningful sense of the word; that fantasy expired long ago, with the German pandectists of the 19th century.[2] Let us instead adopt an understanding of politicisation that helps us see where ISDS is, and where it might be heading.

Politicisation can be understood as 'the combination of high salience and high contestation in a particular domain'.[3] Let us unpack these two elements.

First, salience. Its opposite is indifference. Many issues are decided under conditions of public indifference: they may be important in an objective sense, but they attract almost no attention outside a narrow policy community. That is low salience. Salience rises when voters, media and politicians begin to care – when an

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[2] The German pandectists dreamed of law as mathematics, as a purely logical system. It was soon considered so bizarre, to disconnected from reality that it lead to American and Scandinavian legal realism. The *Kieler Schule* was a law school, based in the city of Kiel, in the north of Germany, for the Nazi elite lawyers. Its premise was that these lawyers were to do nothing but apply the law, and not act as any countering political force, and were thus not trained in legal and political philosophy, in legal history, in Roman law, etc. It inspired the line of defense, during the Nuremberg and Eichmann trials that people did nothing but follow orders.

[3] Dirk De Bièvre, Andreas Dür and Scott Hamilton, 'Reacting to the Politicization of Trade Policy: Explaining European and US Responses' (2023) 30 Journal of European Public Policy 1.

issue is seen as consequential for everyday life, or when it becomes symbolically charged. High salience means that people are watching and reacting.

Second, contestation. Its opposite is consensus. Contestation refers to the extent and intensity of disagreement. High contestation means that actors are pulling in different directions and are willing to invest in the struggle.

Salience and contestation are independent of one another. Even highly salient issues can attract consensual attention: consider moments of national or even international unity, where everyone agrees that something must be done and broadly what that something is. Think of South Africa after Mandela's death: it was a moment of cross-political unity around national mourning and symbolic direction. Think of the international coalition against ISIS in 2014–2015: there was broad consensus among otherwise quarrelling factions that the group had to be contained.

But salience and contestation can co-occur. When they do, the legitimacy of any action or decision becomes significantly more fragile. When they do, decisions once treated as technocratic become the object of public contestation, and collectively binding choices are 'made in the shadow of public debate' rather than in insulated arenas.[4]

Simply put, politicisation marks the transition from a situation in which only a few specialists care and mostly agree, to a situation in which many actors care and disagree, noisily and publicly.[5]

1.2 Quiet, loud, noisy politics

The levels of salience and contestation tell us how politicised a matter is. But they do not address the consequences: how political conflict is conducted under these conditions, why some politicisations stabilise while others spiral, or how the balance of influence shifts as more actors enter the arena. The distinction between quiet, loud, and loud-and-noisy politics helps understand that part.

Much policymaking does not take place under the bright lights of electoral competition. It is often 'quiet': the average voter has little idea what is at stake and media attention is thin, which allows organised interests like firms, industry associations, and specialist NGOs to exercise disproportionate influence.[6] Quiet politics is what politics looks like under low salience: conflict, if any, remains contained within a narrow set of actors.

When an issue becomes loud, the public begins to watch (there is high salience) and preferences remain broadly aligned (there is low contestation), so that political signals are still coordinated enough for conflict to stay structured and manageable. 'Policymakers, we want you to do X. Consistently.' Salience forces

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[4] Michael Zürn, 'Politicization Compared: At National, European and Global Levels' (2019) 26 Journal of European Public Policy 977.

[5] On the dynamics of conflict expansion and the movement of political issues from insulated arenas into broader public contestation, see E E Schattschneider, The Semi-Sovereign People: A Realist's View of Democracy in America (Holt, Rinehart and Winston 1960); James Q Wilson, 'The Politics of Regulation' in James Q Wilson (ed), The Politics of Regulation (Basic Books 1980).

[6] Pepper D Culpepper, Quiet Politics and Business Power: Corporate Control in Europe and Japan (Cambridge University Press 2011).

actors into the open, influence rebalances, and the mode of political conflict starts to change.[7] But the underlying architecture of the issue isn't fractured yet.

When politics turns loud and noisy, because salience and contestation are both high, political conflict becomes unstable and unpredictable. The underlying architecture of the issue frays and then fractures. Preferences polarise and signals turn contradictory. Coalitions shift unexpectedly and narratives – the very understanding of the issue – proliferate. Authority becomes fragmented and legitimacy fragile. The situation splinters into camps, each carrying its own reservoir of concerns and convictions.

1.3 Stocks and flows

A third conceptual layer helps refine our understanding of politicisation as a diachronic process, one unfolding over time: the vocabulary of stocks and flows, from system dynamics.

Stocks are accumulations of something: lake volumes, carbon in the atmosphere, trust in an institution.[8] They change only gradually.

Flows are the processes that fill or empty those stocks. A river that replenishes or drains a lake, emissions that increase the stock of carbon and forests and oceans that reduce it by absorption, reforms that gradually replenish trust in an institution.[9] Inflows and outflows change stocks over time.

Politicisation can first be seen as *one large stock*, filled to different degrees with salience and contestation. It fills progressively, and quite rapidly; it empties progressively, and quite slowly. It is raised by inflows like sustained media coverage, NGO mobilisation, parliamentary debates, commission reports, reform processes; it is lowered by outflows like declining attention, credible problem-solving, demobilisation.

More precisely, politicisation can be understood as *two stocks*: one of attention, one of disagreement (in the sense of incompatible convictions). When the stock of attention is high, the issue is salient. When the stock of disagreement is high, the issue is contested. These two stocks, as we have seen, are mostly independent of one another. Flows can move one of them without touching the other: a credible clarification of the facts may reduce disagreement while attention remains high; a media surge may raise attention while convictions stay exactly where they were.

More precisely still, politicisation consists in a *multiplicity of stocks*. Each actor carries its own stock of attention and its own stock of disagreement (now in the sense of a conviction that the situation is not as it should be). When many of these individual stocks of attention are high, the issue becomes politically salient. When

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[7] Marius R Busemeyer and Julian L Garritzmann, 'Loud, Noisy, or Quiet Politics? The Role of Public Opinion, Parties, and Interest Groups in Social Investment Reforms in Western Europe' in Julian L Garritzmann, Silja Häusermann and Bruno Palier (eds), The World Politics of Social Investment, Volume II (OUP 2022); Marius R Busemeyer, Julian L Garritzmann and Erik Neimanns, A Loud but Noisy Signal? Public Opinion and Education Reform in Western Europe (CUP 2020).

[8] Donella H Meadows, Thinking in Systems: A Primer (Chelsea Green 2008).

[9] To be precise beyond the needs of the current argument, 'flow' designates the rate at which the stock increases or decreases, and 'events' are the things that cause the rate to change. So, technically, reforms, for instance, may trigger these flows, but are not flows themselves.

many of the stocks of disagreement are high, and point in incompatible directions, the issue becomes politically contested. Here too, these many stocks may well be independent of one another, as are their inflows and outflows. What reduces one actor's attention may have no effect on another's. What dampens one actor's disagreement may inflame another's. This is especially so under conditions of loud and noisy politics, where preferences are polarised, understandings of the issue are incompatible, one actor's reassurance is another's alarm, one actor's sense of good another's sense of harm, and policymakers receive contradictory, noisy signals.

So, the challenge posed by a situation caught in loud-and-noisy politics is how to drain enough of these stocks of politicisation without, in the same movement, filling others, so that the situation can return from loud and noisy politics back to quiet politics. How can one reduce the various reservoirs of attention and disagreement without inadvertently replenishing them elsewhere?

Adding to the complication, these stocks are often not just cognitive, but also emotional. People typically don't just recall past crises or controversies in a factual manner; they don't just carry forward the memory of a contentious event (say an ISDS award) as an item of cold noted record rather than lived experience. These stocks of politicisation – the attentions and the disagreements – are made up of perceived injustices, fear of loss (of sovereignty, of living standards, of control over one's world), resentment at being excluded from decisions, a sense that something morally important is at stake.[10] These emotions remain stored in memories, routines, party platforms, legal doctrines. You can see them in the scholarship on investment arbitration, in the resentment in NGO reports, in the pride of practitioners convinced that they are contributing, whether real or imagined, to global prosperity. The consequence of this emotional component in the stocks is to harden positions, strengthen path dependencies, and make de-escalation more difficult.

Clearly, then, politicisation doesn't vanish in a puff of logic once a technical problem has been fixed, as though it were a Fermat-style mathematical theorem whose stubborn difficulty evaporates the instant one writes down the missing step.

Beyond that, the difficulty of depoliticization depends on the situation at hand. We have said this already in different words, but let us repeat it here because it is the core point. The comforting assumption that once 'we have dealt with this issue' (by passing a reform for instance) the controversy will disappear and politics can return to quieter routines, to the controlled safety of technocrats, is more or less correct depending on the situation. In a loud *but not noisy* configuration (high salience but relatively coherent public preferences), a commonly accepted reform can open a common flow through which much of the accumulated attention and affect can drain. Voters feel they have been heard; the winning side implements its programme; losers grumble but broadly accept the result; attention shifts elsewhere. Just be patient, the flow has been opened, wait for it to do its work. Even symbolic reforms ('we have constitutionalised this', 'we have created an independent court') can open a flow in such situations. In loud *and noisy* politics, things are more complex. Typically, no common flow, no single valve can be

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[10] Emotions play a central role in moral judgment: Jonathan Haidt, 'The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment' (2001) 108 Psychological Review 814.

found. One group's closure ('the new climate law finally resolves this') may be another group's betrayal ('they have gutted what made it meaningful'), an immediate inflow into that group's emotional stock. What some take as a fix, others interpret as a provocative cosmetic adjustment, an act of disrespect, signalling that their grievances were waved away rather than addressed, increasing their stock of attention and disagreement.

2. The Politicisation of ISDS

2.1 What happened

For much of its existence, the usual habitat of ISDS was the calm waters of quiet politics.[11] The 1965–66 negotiation and entry into force of the ICSID Convention was a low-profile, technocratic process that attracted little public or political controversy. Bilateral investment treaties were signed as a matter of routine, the international equivalent of an *Act Intended To Make Things Better in General*.[12] Cases started to accumulate, and no one cared beyond the experts. Shrugs and political blandness characterized most of it. Unremarkable, unremarked. Boring stuff. Very much unlike the multilateral trade rounds and the creation of the WTO that sparked mass public protests – think of the WTO's 1999 Seattle conference. ISDS was the preserve of a narrow epistemic community of government lawyers, arbitrators, and firms. Its salience was low, its contestation contained, its authority insulated. It lived a discreet, technocratic life.

The situation began to change when the system's reach became visible. Early NAFTA Chapter 11 cases — involving bans on toxic additives or the management of hazardous waste — alerted NGOs, journalists, and academics who hadn't been paying attention that treaties drafted as technical instruments could constrain domestic regulation. In Latin America, the experience was sharper: for Bolivia, Ecuador, and Venezuela, ISDS wasn't an impartial mechanism for depoliticising disputes but a means for foreign companies to bring claims of destabilising magnitude.[13] Their withdrawals from ICSID were the governments' responses to the rise of the stocks of attention and disagreement in those countries. These were the early inflows: flows of attention, flows of grievance, flows of anxiety about the regime's distributive and axiological implications.

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[11] Simon Lester, 'The ISDS Controversy: How We Got Here and Where Next' (Cato Institute, 1 July 2016).

[12] Lauge N Skovgaard Poulsen and Emma Aisbett, 'Diplomats Want Treaties: Diplomatic Agendas and Perks in the Investment Regime' (2016) 7 Journal of International Dispute Settlement 72; Lauge N Skovgaard Poulsen, Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries (CUP 2015); Thomas Schultz and Thomas D Grant, Arbitration: A Very Short Introduction (OUP 2021) 87–88.

[13] Bolivia's Notification of Denunciation of the ICSID Convention, ICSID (effective 3 Nov 2007); Ecuador's Notification of Denunciation, ICSID (effective 7 Jan 2010); Notification of Denunciation, ICSID (effective 15 July 2012). Investment arbitration became an ideological battleground in Latin America, intertwined with broader anti-globalisation and anti-colonial narratives. Although investors continued to file claims under remaining treaties, the symbolic impact of these withdrawals was significant in politicising ISDS discourse internationally.

The change accelerated in the 2010s, when Europe realised what was happening. The proposed TTIP agreement between the EU and the United States — and, to a lesser extent, CETA with Canada — made ISDS suddenly and intensely visible: opposition to TTIP drew one of the largest rallies in decades in Germany.[14] Negotiating mandates were published, draft texts leaked, and soon civil-society actors seized upon ISDS: it was cast as a nearly perfect hinge connecting concerns about globalisation, sovereignty, consumer protection, food and environmental standards, and democratic control. Large demonstrations followed. The European Commission's consultation generated an extraordinary number of submissions, overwhelmingly critical.[15] 'ISDS' became, in political discourse, the 'most toxic acronym in Europe'.[16] Its politics were loud.

But if ISDS was now a kitchen table matter, not everyone at the table was eating from the same plate. Business associations and trade ministries defended ISDS as essential for cross-border investment, while NGOs, unions, and political parties denounced it as an illegitimate 'corporate court'. Signals diverged. Narratives multiplied. Authority fractured – who was to be believed? Politics had become noisy.

The European Commission believed that a significant technical fix could bring the situation back under control. To preserve CETA and future agreements, it proposed the Investment Court System: judicialisation and transparency were meant to open a valve, draining some of the accumulated pressure. But as is typical for such situations, what one group received as a fix, another interpreted as capitulation ('arbitration is essential for cross-border investment, courts are a poor substitute'), provocation ('courts institutionalise the regime more deeply than arbitration'), or cosmetic adjustment ('ISDS with judges'). It shifted pressure instead of draining it. And the pressure was still high: Wallonia's near-veto of CETA illustrated how deeply ISDS had entered the domestic political bloodstream.[17] Far from a quiet technocratic life in calm and remote waters, ISDS was now living a beleaguered existence in the limelight — caught in the crossed spotlights of international economics, national sovereignty, and democratic values.

From a system dynamics perspective, what happened is straightforward. This is archetypical loud and noisy politics. The stocks of attention filled across a wide array of actors — NGOs, journalists, political parties, voters — each with its own inflow dynamics. The stocks of disagreement filled too, and in incompatible directions: different groups carried sharply divergent convictions of harm and injustice. Emotional inflows intensified the effect — not just disapproval, but moral injury, fear of loss, resentment of exclusion. Cases like *Vattenfall v Germany*, in

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[14] Chris Johnston, 'Berlin anti-TTIP trade deal protest attracts hundreds of thousands', *The Guardian*, 10 Oct 2015 (reporting ~250k protesters against TTIP in Berlin).

[15] European Commisson, 'Consultation on Investment Protection in EU-US Trade Talks (Jan. 13, 2015), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1234 ('The vast majority of replies, around 145,000 (or 97%), were submitted through various on-line platforms of interest groups, containing pre-defined, negative answers.')

[16] Paul Ames, 'ISDS: The most toxic acronym in Europe', Politico, 17 September 2015, citing Cecilia Malmström, the EU's trade commissioner.

[17] Jennifer Rankin, 'EU-Canada free trade deal at risk after Belgian regional parliament vote', *The Guardian*, 14 Oct 2016 (on Wallonia's parliament blocking CETA over dispute settlement concerns).

which a foreign investor challenged a democratically enacted nuclear phase-out, became emblematic.[18] Such impressions, once formed, have a long half-life. They stored themselves in public memory, party platforms, and institutional self-understandings. By the time the Court of Justice of the EU decided *Achmea* in 2018, these various stocks were already high, and that decision topped them off.[19] It all hardened positions, deepened path dependencies, made de-escalation more difficult. And no common flow emerged through which the reservoirs could drain.

2.2 The irony: from international depoliticisation to domestic politicisation

It is somewhat ironical. ISDS was created to depoliticise a troubled domain. To drain the heat from diplomatic confrontation over foreign investment, by channelling individual disputes to a place where decisions would be rendered by neutral technicians applying pre-agreed legal standards. To dampen politicisation at the international level. A design of institutional depoliticization.[20] Yet that design eventually *generated* politicisation at the domestic level, where the regime was least prepared to absorb or process it.[21]

To see the point, consider first a nearby example. The European Union's Stability and Growth Pact sought to depoliticise fiscal coordination internationally by replacing political bargaining with rules-based, technocratic oversight. And for a time, this did insulate cross-border fiscal relations from domestic turbulence. But when the implications of those rules entered national political life, the response in many member states was intense. What had been engineered as international depoliticisation became a source of acute domestic politicisation. The very mechanism meant to cool interstate politics ignited national politics instead.

ISDS followed a similar arc. For decades, the system seemed to succeed in its immediate international purpose: it channelled disputes away from diplomatic entanglement and into arbitration.[22] But this insulation came at a cost. Treaties

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[18] *Vattenfall v Germany* (ICSID Case No. ARB/12/12) arose from Germany's post-Fukushima nuclear phase-out, with the Swedish energy firm seeking €4–6 billion in damages under the Energy Charter Treaty. The case became a political flashpoint, symbolising the perceived threat ISDS posed to democratic policymaking and fuelling European opposition to investor–State arbitration.

[19] In Achmea, the CJEU's Grand Chamber held that investor–state arbitration clauses in intra-EU bilateral investment treaties are incompatible with EU law, as they circumvent the EU's judicial system (see Case C 284/16 Achmea, EU:C:2018:158).

[20] Institutional depoliticisation, here, is three-pronged: decisions about liability and compensation would be made by dispute-resolvers (arbitrators) rather than politicians; home States would no longer espouse claims; the process would be framed as legal rather than political.

[21] ISDS was primarily designed to operate through inter-state legal and political channels, such as treaty revision, interpretive statements, or coordinated institutional reform, through which contestation can be translated into system-level adjustment. Domestic political and legal developments can at times affect the regime – *Achmea* being an important example, assuming the CJEU can be considered 'domestic' for the current argument – but such inputs are indirect and uneven, and do not amount to a generalised channel for processing domestic contestation. As a result, politicisation emerging at the domestic level tends to confront the regime as external pressure rather than as an input it is structurally equipped to absorb.

[22] The extent to which ISDS mechanisms reduce state espousal of investor claims (second prong of institutional depoliticisation) appears limited: Geoffrey Gertz, Srividya Jandhyala

were negotiated quietly, ratified with minimal debate, and applied in ways that bypassed national courts. There was no space in which public disagreement could be aired — and thus no mechanism to process it. A reservoir of domestic grievance accumulated.

One factor deepened this inversion. It lay in the sociology of the professional world that grew around the regime. For institutional depoliticisation to function under the regime's original justificatory logic, decisions had to be taken by figures who acted – and were seen to act – as technicians: something close to bureaucratic administrators, applying pre-agreed legal standards with a degree of anonymity and routine.[23] Yet many arbitrators did not understand their role in these terms. They styled themselves not as interchangeable functionaries, but as members of a global legal elite exercising authoritative judgment. Their professional self-conception carried an aspirational dimension. They saw themselves as stewards of the system, entrusted with maintaining its coherence, credibility, and long-term viability.[24] From within the internal logic of transnational adjudication, such principled discretion was intelligible and even virtuous. But it sat uneasily with the functional requirements of depoliticisation. Decisions shaped by purposive interpretation and systemic reasoning are harder to present as the output of neutral rule-application. Once the regime became visible to domestic audiences, this self-styled authority widened the gap between arbitral decisions and the depoliticising expectations fostered by the regime's design – transforming adjudication itself into a potential trigger of domestic politicisation.

In the end, international depoliticization did not restore investment disputes to a stable, quiet configuration. It redistributed politicisation across levels. It probably reduced it internationally, but it certainly allowed it to accumulate domestically — in stocks of attention and disagreement, all largely invisible until suddenly visible. What began as an attempt to remove politics from investment disputes ended by placing ISDS squarely within the contested terrain of domestic political life.

3. The Difficulties in Depoliticizing ISDS

Institutions designed to stabilise conflict depend on their ability to move issues out of the political spotlight.[25] When they lose that capacity, decisions no longer settle disputes but become new occasions for contestation.

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and Lauge N Skovgaard Poulsen, 'Legalization, Diplomacy, and Development: Do Investment Treaties De-politicize Investment Disputes?' (2018) 107 World Development 239.

[23] Max Weber, Economy and Society: An Outline of Interpretive Sociology (Guenther Roth and Claus Wittich trs, University of California Press 1978) vol 2.

[24] On the sociological position of investment arbitrators as authoritative actors embedded in transnational professional networks, see Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law 387. Puig analyses how arbitrators' authority, incentives, and role perceptions are shaped by their position within a relatively closed professional field, in ways that can encourage purposive discretion and system-maintenance reasoning rather than purely bureaucratic rule-application.

[25] Giandomenico Majone, Regulating Europe (Routledge 1996). Majone's account of non-majoritarian institutions emphasises legitimacy grounded in credibility and insulation from

ISDS no longer provides closure through authoritative adjudication. It is no longer widely seen as substituting law for power. Awards no longer settle conflicts; they trigger new ones.

The regime has lost its institutional settling power. If it cannot be depoliticised, it cannot do the job it was created to do.

But depoliticising ISDS has proven far from easy.

Over the past decade, a series of reform efforts has been presented precisely as attempts to restore stability and legitimacy. These efforts have taken different institutional forms, but they share a common ambition: to cool contestation by redesigning the regime. Judicialisation was meant to address concerns about arbitrator independence and consistency. Transparency was meant to counter perceptions of secrecy and capture. Codes of conduct, appellate mechanisms, and interpretive statements were meant to discipline discretion and reassure sceptical audiences that the system was being brought under control. Each of these measures was advanced as a way of restoring a quieter political environment.[26]

None has succeeded in doing so.

Technocratic fixes, in fact, are unlikely to restore depoliticisation under conditions of loud and noisy politics. Such fixes presuppose a shared understanding of what counts as improvement, precisely at the moment when those criteria are themselves contested.

For arbitration technicians, adjustments to procedure, institutional architecture, or professional standards can meaningfully address concerns about coherence, predictability, or integrity. Within that community, such reforms may genuinely reduce qualms about the system's operation. Their emotional stock of concern may empty if reforms address procedural fairness (e.g. stricter arbitrator ethics). Many in this group indeed support *moderate* technocratic adjustments and warn against over-correcting. Partial reforms (like a code of conduct for arbitrators) can satisfy many legal insiders that the system is improving, thus reducing their impulse for further change.

But the same measures often fail to resonate – or actively backfire – with constituencies whose objections are not procedural but normative. For them, a new appellate body or tweaks to arbitrator rules miss the forest for the trees – the fundamental power imbalance of allowing foreign corporations special tribunals, for instance, remains, and what for? Reforms are not evaluated primarily as technical solutions to technical problems. They are read as political moves, understood through narratives about who the regime serves and what values it embodies. For critics concerned with distributive justice, the common good, the

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mass politics rather than democratic responsiveness, and the resulting vulnerability of such institutions once insulation erodes.

[26] See European Commission, Investment in TTIP and Beyond – The Path for Reform (May 2015) (presenting judicialisation, enhanced transparency, and ethical constraints as means of restoring public trust in investor–state dispute settlement); UNCITRAL Working Group III, Possible Reform of Investor–State Dispute Settlement (ISDS): Identified Concerns and Reform Options (A/CN.9/WG.III/WP.149, 2018) (identifying concerns relating to arbitrator independence, consistency, transparency, and legitimacy, and canvassing institutional and procedural reforms aimed at addressing them); UNCTAD, Reforming Investment Dispute Settlement: A Stocktaking (2019) (surveying reform initiatives framed as responses to legitimacy and confidence deficits in ISDS).

plain well-being of people, technocratic refinement can appear beside the point, or as an attempt to entrench a contested regime behind a more respectable institutional façade.

This asymmetry helps explain why reforms so often attract accusations of cosmeticism – the language of 'greenwashing' is telling.[27] Measures intended to signal restraint and normalisation are interpreted, by other audiences, as consolidation or provocation. The result is not depoliticisation but reconfiguration: dissatisfaction is redistributed across actors and arguments rather than dissipated.

Simple attenuation or strategic restraint – relying on time, distraction, or incremental adjustment to quiet contestation without resolving it – is not a reliable route back to calm either. Admittedly, public attention does fluctuate, issue attention cycles often do peak and then decline as media coverage moves on, and periods of reduced visibility have occurred.[28] But politicisation of this kind does not dissipate reliably over time. Repression or exhaustion of conflict is not resolution. Latent tensions can easily flare up again with a single spark (for example, a controversial new claim or treaty negotiation), because the underlying mental models remain unchanged.

Structurally, once awareness is raised, networks mobilised, and symbolic meaning attached to an institution, conflict tends to remain latent rather than resolved. What appears as depoliticisation is, more often, merely a pause. Quietness achieved through fatigue or distraction is fragile by definition; it rests on the temporary absence of triggers, not on restored legitimacy.

Depoliticisation efforts have also been constrained by path dependence. Early controversies shape how later reforms are interpreted, narrowing the space for trust restoration. Once politicisation has mobilised civil-society networks, reframed public narratives, and altered institutional expectations, the baseline political environment shifts. Awareness does not return to zero. Suspicion does not evaporate because procedures improve. Each new reform is received through the memory of prior controversies and prior disappointments. Each unsuccessful attempt to depoliticise ISDS – particularly when reforms are perceived as cosmetic – leaves behind scepticism, hardened narratives, and organised opposition that condition the reception of subsequent initiatives.

In short, today's ISDS politics are a product of yesterday's battles, with each flare-up conditioning how stakeholders react to the next. The system really carries its history with it: attempts to quiet politics are filtered through already-formed mental models about whose interests ISDS serves and whose voices it marginalises.

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[27] See, e.g., ClientEarth, Investor–State Dispute Settlement Must Go to Protect Our Environment (2019); Corporate Europe Observatory, ISDS Reform: A Greenwashing Exercise? (2020); submissions by civil-society organisations to UNCITRAL Working Group III repeatedly characterising proposed reforms as 'cosmetic' or 'window dressing'.

[28] On issue-attention cycles and the tendency of public salience to rise and fall over time, see Anthony Downs, 'Up and Down with Ecology: The 'Issue-Attention Cycle'' (1972) 28 Public Interest 38; Frank R Baumgartner and Bryan D Jones, Agendas and Instability in American Politics (2nd edn, University of Chicago Press 2009) ch 3 (explaining how public and media attention shifts without necessarily resolving underlying policy conflicts).

In sum, there is a structural mismatch between the tools of depoliticisation that have been used and the nature of the problem they confront.[29] Reforms have largely operated at the level of institutional form and procedure, while politicisation has taken root at the level of narratives, values, and distributive expectations. The former can shift pressure within the system; they cannot, on their own, dissipate it. As long as ISDS is widely perceived as misaligned with dominant understandings of what its place in society should be, efforts to depoliticise it through design adjustments are likely to produce, at best, temporary lulls and, at worst, renewed contestation.

This does not mean that depoliticisation is impossible. But it does suggest that, under present conditions, it cannot be achieved by doing more of the same. The difficulty lies not in insufficient refinement, but in the limits of refinement as a depoliticising strategy. Put starkly, a regime that has come to symbolise unjust globalisation will not be returned to calm by marginal procedural refinements. To understand what might be required instead, one must move beyond institutional fixes and confront the deeper expectations that now structure how ISDS is judged. In principle at least, it might be possible for ISDS to be re-embedded in a convincing narrative of fairness and social usefulness. A new source of social acceptance would have to be found – one that resolves some of the root issues that drive contention, one that redefines what the regime is for, and one that could, over time, return it to a stable quiet-politics equilibrium.

As long as ISDS remains in the territory of loud and noisy politics, reforms will struggle to do more than manage instability. The regime will settle into a condition punctuated by recurrent crises, neither depoliticised nor fully governable – not doing its job, and not doing any job well.

4. Rethinking the Growth Narrative

Let us confront the more basic point established by the difficulties in depoliticising: procedural recalibration cannot restore calm if the regime's legitimating story has ceased to persuade. What once read as a technical device for growth now reads as a contested distributive choice.

4.1. The growth narrative as foundational legitimation

From its inception, investor–state dispute settlement has rested on a familiar and powerful story: protect foreign investors' rights, generate economic growth, and allow the benefits of that growth to diffuse through society over time. Growth would take care of its own distribution.

ISDS was meant to be socially acceptable not by direct democratic endorsement, but by an indirect promise of shared material improvement. This growth-based legitimation narrative, deeply rooted in mid-twentieth-century economic thinking, assumed that private accumulation of capital would ultimately translate into collective welfare – that prosperity, once set in motion at the top, for

[29] Put differently, ISDS cannot – and should not – aspire to a form of depoliticisation that depends on insulating expertise from contested values. What may still be possible is a weaker form of depoliticisation: one in which distribution, justice, security, and freedom are internalised into the regime's justificatory logic (discussed below), reducing the likelihood that adjudication itself becomes a recurrent trigger of political crisis.

instance through large corporations investing internationally, would eventually 'trickle down' to all layers of society.[30]

This logic was embedded in the legal architecture of the regime itself. The preamble of the International Centre for Settlement of Investment Disputes Convention explicitly linked the protection of foreign investment to economic development, reflecting a belief that secure capital flows were essential to growth.[31] Bilateral investment treaties likewise proclaimed that safeguarding investors' rights would foster prosperity in host states.[32] ISDS thus became part of a broader developmental promise that people's lives would ultimately be better – realised, it was thought, by depoliticising disputes, stabilising expectations, reassuring investors, and attracting capital in the service of growth. And so ISDS would be socially acceptable. In that sense, growth functioned as the regime's stabilising attractor: the narrative centre that aligned investor protection with the claim to serve the public good.

The underlying assumption was deceptively simple. If security could be ensured – both in the narrow sense of legal security for investors and in the broader sense of stability through international depoliticisation (S) – and if this security generated aggregate wealth (W), social acceptance would follow as a natural by-product. People would approve once they see lives improve. Distributional questions, questions of fairness, and questions of voice could be deferred, absorbed, or ignored. Social legitimacy was expected to emerge automatically from economic expansion – a theory of legitimacy by downstream effects, in which consent would be supplied retroactively, once the benefits arrived.

4.2. Why growth alone no longer secures social acceptance

That assumption has proven increasingly untenable. Growth without redistribution does not bring social legitimacy. It is a driver of contestation rather than social acceptance, of fragility rather than stability.[33] Aggregate growth, taken

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[30] See Simon Kuznets, 'Economic Growth and Income Inequality' (1955) 45 American Economic Review 1; Milton Friedman, Capitalism and Freedom (University of Chicago Press 1962). Both reflect the mid-twentieth-century assumption that private capital accumulation and aggregate economic growth would, over time, translate into broader social welfare, even if distributive effects were deferred.

[31] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), preamble, referring to 'the need for international cooperation for economic development, and the role of private international investment therein,' and emphasising the importance of dispute settlement mechanisms to support that role.

[32] See, e.g., Treaty for the Promotion and Protection of Investments between the Federal Republic of Germany and Pakistan (1959), preamble (recognising that the encouragement and protection of investment are apt to stimulate private business initiative and increase prosperity); see also United States Model Bilateral Investment Treaty (1984), preamble (linking the encouragement and protection of investment to economic cooperation and development).

[33] Joseph E Stiglitz, The Price of Inequality: How Today's Divided Society Endangers Our Future (W W Norton 2012) (arguing that growth without adequate redistribution undermines social cohesion and institutional stability); Noam Gidron and Peter A Hall, Political Cleavages and Social Inequality: A Study of Fifty Democracies, 1948–2020 (Cambridge University Press 2019) (showing how unequal growth fuels political contestation and erodes the social acceptance of governing institutions).

on its own, no longer functions as a source of institutional legitimacy.[34] Rather than dampening contestation, it fuels resentment, distrust, and the sense that the system is rigged against those left behind. As long as ISDS pursues aggregate growth alone, its emotional stocks of discontent will continue to accumulate.

What this means in practice is that societies do not evaluate economic success through abstract indicators such as GDP alone. As Richard Samans and others have argued, legitimacy no longer turns automatically on aggregate output, but on whether economic change is experienced as improving everyday life – and doing so broadly rather than selectively.[35] A social contract, whether with society as a whole or with a specific institution such as ISDS, that tolerates persistent insecurity or indignity, even amid aggregate prosperity, strains its own foundations. In legitimacy terms, growth is not a substitute for fairness; it is politically legible only through the distributional and experiential forms it takes. Brutally simplified, growth is judged differently now, and so are the institutions that live off it.

This shift in how growth is evaluated has predictable social and political consequences. The relevant metric is not how much people have, but where they stand. As Robert Skidelsky has observed, human aspirations are inherently comparative.[36] Individuals measure well-being relationally, against peers and against prior expectations. When growth disproportionately benefits a narrow segment of society, those left behind experience not only material stagnation but symbolic exclusion. 'Why not me' creates real anger. The sense that 'the system is rigged' emerges precisely in contexts where growth coexists with widening inequality.

In many advanced economies, decades of growth accompanied by skewed distribution have produced not only resentment and distrust, but a backlash against technocratic governance itself.[37] Where institutions justify insulation from politics by reference to economic necessity or aggregate welfare, their legitimacy erodes once those claims cease to persuade.

4.3. A richer social acceptability function: from *f*(W, S) to *f*(RW, J, S, F)

If we translate the preceding analysis into functional terms, the traditional legitimation formula underpinning ISDS can be stylised as a narrow function: social acceptability as *f*(W, S), a function of aggregate wealth creation and security. In that formulation, security condensed two closely linked promises: legal predictability for investors and broader stability through the depoliticisation of

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[34] For completeness, it is worth noting that even on its own terms – measured by aggregate economic performance – growth without redistribution performs poorly. Gains concentrated at the top correlate with weaker downstream growth, whereas more broadly shared gains are associated with greater economic resilience. See International Monetary Fund, Causes and Consequences of Income Inequality: A Global Perspective (2015).

[35] Richard Samans, Human-Centred Economics: The New Social Contract for the 21st Century (Polity Press 2022) chs 1–2 (arguing that economic performance is politically evaluated through lived outcomes and distribution, rather than aggregate indicators alone).

[36] Robert Skidelsky, Money and Government: The Past and Future of Economics (Yale University Press 2018) ch 13 (emphasising the inherently comparative nature of economic aspirations and the political consequences of relative deprivation).

[37] See Peter Mair, Ruling the Void: The Hollowing of Western Democracy (Verso 2013) chs 1–3; Dani Rodrik, The Globalization Paradox (OUP 2011) chs 9–10 (documenting how sustained growth combined with skewed distribution has undermined popular trust and fuelled backlash against technocratic governance in advanced economies).

investment disputes. As long as capital was protected and investment conflicts were kept out of overt political confrontation, and this configuration delivered aggregate growth, the regime was assumed to be socially sustainable.

But once growth no longer secures social acceptance and technocratic insulation intensifies contestation – as both have in the case of ISDS – the limits of the traditional legitimation function become visible. A more realistic account of social acceptance must incorporate additional variables – variables that speak not only to growth and stability, but to how economic gains are distributed, how power is exercised, and how collective choices remain possible under conditions of constraint. The social acceptability of investment governance is better understood as *f*(RW, J, S, F).[38]

Redistributed wealth (RW) captures not merely how much value is created, but how it is shared – vertically and horizontally, between social groups, regions, and generations. Justice (J) encompasses both procedural fairness and substantive outcomes: whether decision-making is experienced as impartial and whether results are recognisably just in light of core public values. Security (S) remains relevant, but must be understood symmetrically, as predictability and protection not only for investors, but also for states, affected communities, publics, and regulatory systems. Freedom to choose (F) refers to the effective capacity of a political community to determine its policy priorities and models of development, rather than having that choice-space materially thinned beyond what remains compatible with meaningful self-government. The point is not whether consent once existed, but whether self-government remains real once distributive stakes come into view.

In its classic form, ISDS was built to privilege prosperity and security from the investor's perspective, while relegating distribution, justice, and freedom of choice to the margins. Distribution was treated as an externality, to be addressed later – if at all – by domestic politics (RW). Opacity, inconsistency, and the system's internal incentive structure meant that justice was largely articulated *for* insiders, and legible *to* insiders, rather than designed to command broader social recognition (J). Security was constructed asymmetrically: the regime stabilised expectations for mobile capital and dampened political risk, but offered no comparable predictability for publics and regulators confronting distributive and axiological choices (S).

When politicisation brings those choices to the surface, this inherited legitimation structure reveals its limits. Freedom to choose is treated as already spent, collapsed into a thin pacta *sunt servanda logic* in which past consent is asked to carry the full normative burden, regardless of the ideological framing and historical conditions under which it was produced (F). The result is an imbalance: a regime heavy on prosperity and security – and on a form of prosperity whose distributive profile no longer sustains social acceptance – and too light on justice and freedom to choose.[39]

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[38] Susan Strange famously frames political economy around four core values – wealth, security, justice and freedom – an ordering that helps clarify why legitimacy cannot be exhausted by aggregate growth and investor protection alone: Susan Strange, *States and Markets* (Pinter 1989).

[39] For this diagnosis – of the investment protection regime as structurally skewed towards prosperity and security, at the expense of justice and freedom to choose – and for an earlier account of how such imbalances can drive cycles of contestation and change, see Thomas

So: if f(W, S) once functioned as an attractor that pulled disputes into 'quiet politics,' the politicisation of ISDS is evidence that the attractor has weakened. It is no longer enough for the investment regime to make the world richer in the aggregate, to contribute to growth. Where that added wealth goes, how fair the situation feels to those who live with it, and how free people remain to choose – these now have to be weighed. RW, J and F have become unavoidable variables in the system's stability equation.

5. Shifting into a Different Mental Model

To operationalise this richer social acceptability function — to bring ISDS back into the realm of institutions people can live with, in depoliticised fashion — its actors have to think differently. Not tweak; think differently, and at a deeper level. Once the old shortcut from investor protection to the public good collapses, what comes into question is the frame that has guided the regime all along: the mental model of what investment protection is for, how benefits supposedly arise, and which social costs can be treated as someone else's problem. In a post-growth-legitimacy landscape, the old model can't carry the weight any more. That may sound idealistic ('let's all think differently!'), but most people are trying to do good. They just misjudge, now and then, what 'good' requires.

5.1. Mental models

Regimes, systems, institutions – they are all made of people. And people do not have direct access to reality. Facts, texts, and situations do not offer themselves unmediated to human decision-makers. Any engagement with the world – whether understanding facts, interpreting texts, assessing evidence, weighing competing values – is filtered through prior assumptions and background categories. What individuals experience as 'reality', as 'obvious', or as 'clear' is always already structured by such mediations, a point long established across philosophy, sociology, psychology, and systems thinking.[40]

John Maynard Keynes famously picked up on this point when he observed that 'practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist'.[41] His point was that ideas shape practical decision-making even when their influence goes unrecognised. (He thought that these ideas were mostly those of dead people, but that's another matter.) People rely on implicit orienting frameworks that guide how situations are understood and judged. One term commonly used to designate such frameworks is mental models.[42]

Schultz and Cédric Dupont, Dynamics of Change in International Investment Law (2025) 16(2) Journal of International Dispute Settlement 1.

[40] Donella H Meadows, Thinking in Systems: A Primer (Chelsea Green Publishing 2008) 16–26. For background, Peter L Berger and Thomas Luckmann, The Social Construction of Reality (Penguin 1966) 1–30.

[41] John Maynard Keynes, The General Theory of Employment, Interest and Money (Macmillan 1936) 383

[42] A popular science book offers the apt alternative term 'invisible doctrine' for what is essentially the same idea: George Monbiot and Peter Hutchison, *The Invisible Doctrine: The Secret History of Neoliberalism (& How it Came to Control Your Life)* Penguin 2025, in which

In systems thinking, mental models occupy the deepest level at which change can occur. They are not simply one influence among others, but the background assumptions on which most features of a system rest. This layered relationship is often illustrated through the image of an iceberg: visible events at the surface (1), recurring patterns just below (-1), institutional or structural arrangements beneath them (-2), and, at the deepest level, the mental models that make those arrangements intelligible in the first place (-3).[43] What lies at this level is rarely articulated, yet it tends to infuse everything else, like unseen groundwater feeding everything that grows above it. These mental models tend to operate below the threshold of awareness, as Keynes's pointed out. Decision-makers typically experience themselves as reasoning carefully and professionally, while remaining largely unaware of the background frames that organise what counts as a fact, a harm, or a justification.

The more complex a governance regime, the more work its underlying mental models do. Decisions made at disparate points in the system, rarely coordinated formally, are aligned by shared understandings of the system's *raison d'être* – what makes it worthy of existence in society. These implicit understandings influence how texts are drafted, how mandates are understood, how discretion is exercised. They frame how conflicting rights and duties are to be managed. They draw attention to interests that come to be prioritised. They shape what appears natural, reasonable, or excessive – at junctures throughout the system. They often do all this from the shadows.

5.2. The inherited mental model

When governments designed early bilateral investment treaties, the underlying assumption was straightforward: protect foreign investors, attract capital, and everyday life would, over time, become more secure and prosperous. On that logic, it made sense that investor protection came to occupy centre stage. The broader social benefits were expected to emerge indirectly, as a downstream effect rather than as an object of sustained attention in their own right. Questions of distribution, justice, and freedom were largely bracketed, on the belief that rising material well-being would render such concerns largely moot. That was the bet. The reasoning was coherent on its own terms. It resembled the early confidence of traffic engineers who widened roads on the expectation that more capacity would ease congestion – acting responsibly on the basis of an assumption that appeared sound, yet underestimated the complexity of the system. The mental model was simple and widely shared: secure the primary input, and what follows will take care of itself.

Tribunals, operating within that same inherited frame, frequently internalised an investor-centric model of relevance and reasoning. Broad treaty standards – fair and equitable treatment, indirect expropriation, full protection and security – invited interpretive moves that treated the host state's protective duty as paramount, while presuming that the exercise of that duty would indirectly benefit

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they usefully note, speaking of neoliberalism, that 'Its anonymity is both a *symptom* and a *cause* of its power.'

[43] Meadows, Thinking in Systems, 16–26; Peter Senge, The Fifth Discipline (Century Business 1990) 7–9.

society through growth. The implicit premise was that investor protection did not itself require separate justification, because its social value was assumed to follow from growth. That assumption did a lot of work. It produced a stylised drama with relatively fixed roles: investors as rights-holders with standing and voice; states as respondents whose measures are scrutinised primarily for their impact on investors; and public interests as background context, often articulated in justificatory terms rather than treated as co-equal normative inputs. Questions about whether the promised social benefits would in fact materialise were not central to the tribunal's task.

This inherited model worked, for a time, as a stabilising attractor. It organised expectations, reduced cognitive complexity, and made the regime legible as a technocratic device that seemed to offer a straightforward way of improving people's lives.

5.3. The mental model shift implied by *f*(RW, J, S, F)

The old mental model can no longer function as a stabilising attractor. As long as investor protection could plausibly be understood as an unconditionally positive way of improving people's lives, distributive, justice, and autonomy concerns could remain largely in the background. But when that understanding collapsed, these concerns could not be contained; they forced their way to the foreground of contestation. The question became: 'Why do I, as a citizen, need a mechanism that reinforces corporate rights when it doesn't make my life better?' To be clear, politicisation is not the *cause* of this instability but its *consequence*: the regime's background assumptions have stopped coordinating expectations. So what, now, does it mean to reason about investment protection under a different social acceptability function, *f*(RW, J, S, F)?

The core point, of course, is that distribution, justice, security, and freedom to choose are policy concerns that cannot be externalised anymore. They become internal constraints on legal relevance and justification within the regime. Redistribution (RW) makes the allocation of gains and burdens squarely relevant for critical legal evaluations – that is, how gains and burdens are shared, vertically and horizontally, across social strata, regions, and generations, rather than showing concern for GDP movement alone *(distribution becomes part of the regime's justificatory core)*. Justice (J) means that being legally correct is no longer enough; *dura lex sed lex* can no longer be invoked as a hands-in-the-air abdication of responsibility – not when outcomes cannot plausibly be defended in light of shared societal standards (*technical legality does not by itself exhaust justification*). Security (S) requires that predictability for investors should not be achieved by shifting the social and political risks of change – regulatory, environmental, or distributive – onto workers, communities, or public finances (*security becomes a question of social resilience, not merely of capital confidence*). Freedom to choose (F) seeks to preserve a society's effective capacity to decide on development paths and regulatory priorities, without those choices being silently pre-empted or rendered illusory by the structure of prior commitments and the liability risks attached to them *(future collective choices become a legally relevant limit)*.

In the language of earlier sections, this is the kind of change that can empty stocks of politicisation, by changing how conflicts are framed and argued within the regime. Controversies are channelled through a different interpretive flow:

once distribution, justice, security, and choice are treated as internal to the regime's reasoning, disputes that would previously appear as 'private rights versus public action' can be reframed as disagreements internal to a shared normative order.

At the treaty-drafting stage, investment protection no longer presents itself as an overriding objective to be maximised, but as just one among others within a broader social contract, prompting attention to how treaty clauses shape distributional outcomes, justice claims, systemic security, and the preservation of societal choice space over time. At the adjudicatory stage, where greater power to change entails greater responsibility, the same shift bends interpretation: investor rights are read as conditional means to an unconditional end, and the anticipatory impact of legal reasoning on future regulatory choice is treated as a relevant constraint.

Therein lies the rub of the successive reform cycles struggling to restore durable calm. Technical fixes – greater transparency, judicialisation, refined drafting, more careful balancing – operate downstream of the regime's justificatory logic.[44] If the underlying mental model remains growth-centric, such fixes may correct technical pathologies but leave intact the problem in how relevance and justification are fundamentally structured, deeper down the iceberg. The consequence is that politicisation is not drained but merely relocated. Mental models operationalise the acceptability function: they define what is salient, what counts as evidence, as harm, as justification, as 'reasonable' balance. And without a shift in that underlying interpretive infrastructure, reforms likely remain superficial – tuning the instruments while playing the same music, one that the audience has said it doesn't want. Now of course, a new mental model will not automatically end all controversy (indeed, power imbalances and conflicts won't vanish overnight), but it would ground the regime in a more defensible social contract.

Conclusion

Did ISDS make the world richer? Probably. Did it improve people's lives on average (which is, after all, the point of growth)? Probably not. As that became increasingly clear, interpretive slack collapsed; people gave it less and less benefit of the doubt. This got ISDS politicised. And the conditions that produced that politicisation are also what make depoliticisation so difficult now. Could ISDS

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[44] A reader may be tempted to look here for the immediate articulation of specific legal principles or doctrinal tests. That temptation is understandable — and it is precisely the problem. The argument in this chapter operates at the level of mental models: the background assumptions that structure what legal reasoning treats as relevant, what requires justification, and what can be taken for granted.
If the response to this argument is to ask which doctrinal solutions it recommends, the argument has already been missed. It would be like insisting on agreement over the precise routing of buses as a condition for abandoning private cars in the first place — when the point is that continuing to organise mobility around individual cars is what has to stop. The issue is not which doctrinal routes might be preferable, but whether the regime is still reasoning within a framework capable of carrying the justificatory load placed upon it. That is not a gap in the analysis. It is the analysis. As long as that framework remains unchanged, doctrinal refinements risk reproducing the very technicism whose limits this chapter seeks to explain.

improve people's lives, and could it be depoliticised? Perhaps – if the main actors of the system jointly shifted to a different mental model.

Politicisation, then, marks a moment of reckoning. Legal technologies do not eliminate distributive conflict and political choices; they merely hide them ('it's the law now') and buy time ('there's a promise in the technology — wait until it materialises').[45] Put more technically, institutions designed to stabilise disagreement by displacing it into expertise do not abolish politics; they suspend it ('let us experts do our job; you'll see the results, and you'll like them').

When that suspension wears thin, when it is no longer credible, a long-standing way of making sense of the regime — of justifying it — stops working. The underlying distributive conflicts and political choices resurface, become politically salient, and previously stabilised disagreements dissolve into uncoordinated contestation. That is politicisation. That is the moment of reckoning.

This is what happened with ISDS. For a long time, it relied on a promise of downstream benefit to sustain its authority. As long as investor protection could plausibly be understood as a means to improving people's lives, the regime's distributive effects, its justice profile, narrow understanding of security, and constraints on collective choice could all remain in the background. When that promise ceased to persuade, the very features that once made ISDS appear neutral and expert came to be experienced as distancing and politically loaded. What had functioned as insulation began to read as evasion. Politicisation was the consequence.

Whether ISDS can be re-embedded in a different understanding of its social role remains uncertain. What is clear is that returning to the assumptions that once sustained its quietness is no longer an option.

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[45] Duncan Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 Journal of Legal Education 518.