



RE-POLITICIZING INVESTMENT ARBITRATION: RETHINKING STATE RESPONSIBILITY AND INVESTOR RIGHTS

*Azzrah Amaan**

Department of Legal Studies, The Open University of Sri Lanka, Sri Lanka

Globally, investment arbitration has become the predominant form of alternative dispute resolution (ADR) between states and foreign investors. Under the investor–state dispute settlement (ISDS) framework, foreign investors may initiate proceedings against states for alleged breaches of international treaty obligations and failures to fulfill state responsibilities. A substantial proportion of these disputes are administered by the International Centre for Settlement of Investment Disputes (ICSID). One of the foundational principles of ISDS is *depoliticization*, defined as the removal of diplomatic and political considerations from the adjudicatory process in favour of a neutral, rules-based system. However, in practice, tribunals have often failed to incorporate the broader socio-economic context of disputes, particularly in matters concerning environmental protection, public health, or economic emergencies. The findings of this research indicate that this omission can undermine a state’s legitimate regulatory discretion and contribute to disproportionate awards in favour of investors, sometimes amounting to billions of dollars. Such awards, as evidenced in *Copper Mesa Mining Corporation v. Ecuador* and *Tethyan Copper Company v. Pakistan*, have imposed severe financial burdens on developing economies, intensified perceptions of a colonialist bias in arbitration, and neglected the rights of affected local communities. The research further finds that the structural design of ISDS limits participation to the disputing state and the investor, thereby excluding claims by local populations who may be directly impacted by the investment. Consequently, investment arbitration has evolved beyond a private contractual dispute into a process with significant geopolitical and public policy implications. These dynamics have led several states to repudiate or renegotiate bilateral investment treaties (BITs) and multilateral agreements. Methodologically, this research adopts a qualitative approach, analyzing legislative frameworks and selected case law to examine the relationship between investor rights, state sovereignty, and third-parties participation. The study concludes that *re-politicization* in the sense of recognizing and integrating political, social, and economic realities into arbitral decision-making is essential to ensure fairness, justice, and financial sustainability in investor–state disputes. It further recommends expanding opportunities for directly affected local stakeholders as third-party to participate as *amicus curiae*, thereby enhancing transparency and ensuring that the interests of impacted communities are meaningfully represented in the arbitration process.

Keywords: ICSID, ISDS, alternative dispute resolution, Copper Mesa, arbitration

**Corresponding Author: azeeaza71@gmail.com*



RE-POLITICIZING INVESTMENT ARBITRATION: RETHINKING STATE RESPONSIBILITY AND INVESTOR RIGHTS

*Azzrah Amaan**

Department of Legal Studies, The Open University of Sri Lanka, Sri Lanka

INTRODUCTION

Investment arbitration has become a widely used form of alternative dispute resolution (ADR) between investors and states. The Investor-State Dispute Settlement (ISDS) mechanism was originally founded on the principle of *depoliticization*, aiming to establish an apolitical adjudicative model. However, the rapid increase in ISDS cases has coincided with growing criticisms regarding its legitimacy. As Susan Franck observes in *The Legitimacy Crisis in Investment Treaty Arbitration*, the absence of determinacy and coherence in treaty arbitration has raised concerns about transparency, representation, and potential bias, leading to a “chilling effect” on local legislation and a subsequent impact on state sovereignty.²³ Despite these criticisms, complete depoliticization was never the intended or realistic goal of ISDS. Investment protection standards themselves act as safeguards against political risks.²⁴ Nevertheless, arbitral awards issued under the depoliticized framework have sometimes resulted in adverse effects on local communities, including inflation and violations of the human rights of indigenous peoples and local stakeholders.

Confidentiality in ISDS primarily aims to protect sensitive information and reduce time and costs, as third-party participation may prolong proceedings. In practice, the voices of local stakeholders are rarely meaningfully integrated into the dispute resolution process, which principally involves the disputing state and investor as formal parties.²⁵ Nonetheless, commentators widely acknowledge the need for greater transparency in ISDS, given that investment disputes often affect a broad spectrum of international and domestic actors.²⁶ While some proceedings allow limited third-

23 Susan D Franck, 'the legitimacy crisis in Investment Treaty Arbitration; privatization Public International Law through Inconsistent Decisions' (2004) 73 Fordham L.Rev 1521 at 1586-7

24 Mohanty, G., Bakos, A. (2023). The Depoliticization of Investment Disputes: How Deep Does the “Rabbit Hole” Go?. In: de Amstalden, M., Moran, N., Asmelash, H. (eds) International Economic Law. PEPA-SIEL 2022. European Yearbook of International Economic Law(). Springer, Cham. https://doi.org/10.1007/978-3-031-41996-6_1

25 Mabel I Egonu, “Investor-State Arbitration under ICSID: A case for presumption against confidentiality ?” (2007) 24; 5 Journal of International Arbitration 479-89 at 482; Andrea K. Bjorklund, 'The Participation of Sub-national Government Units as Amici Curiae in International Investment Disputes' in Chester Brown & Kate Miles, eds, *Evolution in investment treaty law and arbitration* (Cambridge : Cambridge University Press, 2011) 298 at 306.

26 Joao Riberio & Mmicheal Douglas, 'transparency in Investor-States Arbitration: The Way Forward' (2015) 11; 1 Asian International Arbitration Journal 49-67 at 54 . See also Lucas



party participation through mechanisms such as *amicus curiae* submissions, these opportunities are infrequent, procedurally limited, and seldom influence substantive outcomes. The current framework excludes direct obligations towards local stakeholders affected by investment treaties. Although the publication of arbitral awards has contributed to the development of a more coherent jurisprudence, and transparency rules in arbitral practice have improved considerably, meaningful inclusion of local stakeholders in the dispute resolution process remains limited.

OBJECTIVE

This article examines investment arbitration with a view to re-politicizing the process. It explores the balance between state responsibility and investor rights while explicitly considering the responsibilities that investors owe to local communities and broader socio-political contexts. The procedural framework of investor–state arbitration closely resembles commercial arbitration, where party autonomy significantly influences the selection of arbitrators and the design of arbitral proceedings. ²⁷This article aims to reimagine the investor–state arbitration process by critically examining its nature and advocating for a shift away from the commercial arbitration model toward a re-politicized framework. The discussion is structured around two central questions:

1. What are the current effects of depoliticization in investment arbitration?
2. Why is re-politicization necessary in this context?

The article highlights that depoliticization has contributed to adverse economic consequences and human rights violations. Developing countries facing economic crises often struggle to comply with substantial arbitration awards. For instance, in *Copper Mesa Mining Corporation v. Ecuador*²⁸ the arbitral award favored a mining company despite evidence of human rights infringements and without adequately considering the perspectives of indigenous communities affected by the investment. Similarly, the award in *Tethyan Copper Company v. Pakistan*²⁹ was comparable to Pakistan’s 2019 IMF loan and approximately 10% of the country’s annual budget,

Bastin, ‘The Amicus Curiae in Investor-State Arbitration’ (2012) 1 Cambridge J Intl & CompL 208 (emphasizing that the inclusion of amicus curiae should be done gradually and should first allow the norm to be a familiar part of the system); ‘Submission Regarding Amendments to the ICSID Arbitration Rules–Colombia Center on sustainable investment’

²⁷ For Example, the ICSID Convention Article 37(2)(b)”...one arbitrator appointed by each party and the third..appointed by agreement of the parties “similar to UNCITRAL Arbitration Rules, Article 9”...each party appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal’

²⁸ Copper Mesa V Ecuador (ISDS impacts)<Copper Mesa vs. Ecuador - ISDS America Latina > Accessed 15.06.2025

²⁹ Tethyan Copper Company PTY LTD V Islamic republic of Pakistan (FOTIS Law firm, 18.10.2022)<The Reko Diq Arbitration: Tethyan Copper Company v. Islamic Republic of Pakistan >Accessed 15.06.2025



exacerbating inflation and eroding public trust in international law. The case of *Bernhard von Pezold v. Zimbabwe*³⁰ further exemplifies how depoliticization neglects underlying contextual issues, thereby demonstrating the ineffectiveness of the current depoliticized approach. Given these outcomes, the article argues that re-politicization is essential. As evidenced by the analysis of the first question, investor–state arbitration is inherently intertwined with geopolitical and diplomatic considerations, necessitating an arbitration process that recognizes and integrates these broader realities.

METHODOLOGY

This study employs a qualitative doctrinal legal research approach, analyzing relevant legal frameworks and landmark case studies to explore the dynamics of investment arbitration. Specifically, it examines the ICSID statutes, ICSID case law, bilateral and multilateral treaties, and legal standards across multiple jurisdictions to understand how they address key issues in investor–state arbitration. The research involves interpreting existing laws, identifying gaps and inconsistencies, and offering recommendations for reform and clarification based on this analysis. The procedural rules most frequently applied in investment arbitration are those established by the ICSID Convention and the UNCITRAL Arbitration Rules.³¹ Section 3 of the ICSID Convention, often criticized for blending public international law with a largely private dispute settlement mechanism, is examined through the lenses of sovereign immunity and public interest.³² When parties do not agree on procedural matters, the role of the United Nations Commission on International Trade Law (UNCITRAL)³³ becomes crucial, as outlined in Section 22, with Section 5 addressing jurisdictional issues arising from disagreement between parties. Furthermore, the enforcement of arbitral awards is analyzed, focusing on the ability of investors to seek recognition and enforcement in local courts or third-party jurisdictions under ICSID statutes and the New York Convention³⁴. The study also incorporates an analysis of international legal principles, using landmark cases such as *Copper Mesa Mining Corporation v. Ecuador*³⁵ and *Bernhard von Pezold v. Zimbabwe*³⁶ to illustrate legal precedents and their broader implications.

30 **Bernhard von Pezold and others v. Zimbabwe**, ICSID Case No. ARB/10/15 (IISD investment Treaty News, 16.05.2016) <ICSID tribunal orders Zimbabwe to return expropriated farms – Investment Treaty News > Accessed 15.06.2025

31 Gus Van Harten “A case for an international Investment Court” (2008) Society of International Economic Law (SEIL) Inaugural Conference.

32 Anthea Roberts, “clash of Paradigms ; Actors and Analogies Shaping the Investment Treaty System” (2013) 107; 1 AJIL 45 at 63-65

33 United Nations Commission on International Trade Law (United Nations) <United Nations Commission on International Trade Law | > Accessed 15.06.2025

34 Convention on the recognition and Enforcement of Foreign Arbitral Awards, 6 October 1958, 330 UNTS 3 (entered into force 7 June 1959) (New York Convention).



RESULTS AND DISCUSSION

(1) What are the current effects of depoliticization in investment arbitration?

The inclusion of Investor–State Dispute Settlement (ISDS) clauses in investment treaties marked a milestone in the development of international investment law by providing foreign investors with a relatively depoliticized alternative to traditional dispute resolution mechanisms such as domestic courts.³⁵ Depoliticization broadly refers to the removal or significant reduction of political and diplomatic considerations from the arbitration process, aiming for a neutral, rule-based adjudication. This concept involves downgrading the political nature of decision-making and limiting diplomatic protections traditionally available to states.³⁶ Investment tribunals generally enjoy broad discretion in interpreting vague treaty obligations and applying relevant international legal norms. However, as demonstrated by several ICSID cases, this depoliticized framework can lead to substantive shortcomings and inefficiencies in delivering justice.³⁷

For example, in *Copper Mesa Mining Corporation v. Ecuador*³⁸ Copper Mesa was granted three concessions to conduct open-pit copper mining in a valley, resulting in severe ecological damage and forced evictions. The company's hiring of paramilitary forces to suppress local protests further escalated tensions, leading the Ecuadorian government to revoke the concessions.⁴ Copper Mesa subsequently initiated arbitration under the Canada–Ecuador BIT and was awarded approximately \$19.4 million, albeit reduced due to the investor's conduct. Despite the award, the tribunal failed to adequately consider the impact on indigenous communities, leaving lasting scars and unaddressed grievances. This case highlights notable blind spots within the arbitration process, which rarely revisits the social and environmental aftermath of its awards. In *Bernhard von Pezold v. Zimbabwe*³⁹, the tribunal recognized that Zimbabwe's expropriation was lawful and aimed at public purposes despite disadvantaging indigenous populations. However, the rejection of four *amicus curiae* applications from affected indigenous communities effectively excluded critical

35 Gabrielle Kauffman-Kohler & Michele Potesta, 'Why investment Arbitration and not Domestic Courts? The Origins of the Modern Investment Dispute Resolution System, Criticism, and future outlook' in Gabrielle Kauffman -Kohler & Michele Potesta, eds., *Investor-state Dispute Settlement and national Courts ;Current Framework and Reform Options* (Cham: Springer International Publishing ,2020)

36 Fabio de Nardis, 'The Concept of De-Politicization and Its Consequences' (2017) 10(2) **Partecipazione e Conflitto** 340 <http://sibaese.unisalento.it/index.php/paco/article/view/1732> accessed 11 August 2025.

37 Won-Mog Choi, 'The present and future of the Investor-State Dispute Settlement Paradigm' (2007) 10;3 *J int Econ Law* 725 at 735 -36. The Disadvantages of diplomatic protection will be discussed below.

38 *Copper Mesa V Ecuador (ISDS impacts)* <Copper Mesa vs. Ecuador - ISDS America Latina > Accessed 15.06.2025

39 **Bernhard von Pezold and others v. Zimbabwe**, **ICSID Case No. ARB/10/15** (IISD investment Treaty News, 16.05.2016) <ICSID tribunal orders Zimbabwe to return expropriated farms – Investment Treaty News > Accessed 15.06.2025



socio-political context, illustrating how depoliticization hinders substantive justice by ignoring historical inequities. A similar procedural limitation was observed in *Foresti v. South Africa*⁴⁰, where the tribunal's failure to incorporate socio-economic realities impaired a comprehensive evaluation of the dispute. In *Tethyan Copper Company v. Pakistan*⁴¹, a mining investment in the Balochistan province was met with mass protests and legal challenges due to complex geopolitical tensions. The arbitral award against Pakistan was roughly equivalent to the country's 2019 IMF loan and 10% of its annual budget, despite the project never advancing beyond planning. The financial burden contributed to Pakistan's decision to terminate several bilateral and multilateral investment treaties.

These cases collectively demonstrate that ignoring political, social, and environmental contexts, key aspects of depoliticization, can lead to unfair awards, economic hardship, and denial of justice, particularly in developing countries facing crises. Regarding procedural rights, ISDS permits legal entities with nationality recognized under the treaty, typically determined by incorporation or substantial business activity, to bring claims.⁴² States cannot initiate claims against investors but may challenge tribunal jurisdiction or dispute admissibility, often through bifurcation, which separates jurisdictional questions from the merits to reduce costs. States may also raise counterclaims for investor breaches, although these are infrequent and must relate directly to the investment and involve the same parties. Overall, the depoliticized approach, by excluding historical and contextual factors, risks undermining the equitable resolution of investor-state disputes.

(2) Why is re-politicization of investment arbitration necessary?

Investment arbitration tribunals were created to shield investor-state disputes from politics and diplomacy, establishing an objective, rules-based system. This *depoliticization* removes political discretion, including diplomatic protection by home states. However, this approach faces two main issues: (1) theoretically, global challenges like climate change demand political judgment beyond legal rules; (2) practically, cases like *Copper Mesa v. Ecuador* show that depoliticized awards can cause economic harm and injustice to local communities. Re-politicization is necessary to restore fairness and trust, as states may abandon treaties if socio-political realities are ignored. The commercial arbitration model is inadequate for public-interest disputes, especially since local stakeholders often lack access. ISA must present procedural reform. Expanding third-party participation through *amicus curiae*

40 *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01 (ISLG)<Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01 | italaw > Accessed 15.06.2025

41 *Tethyan Copper Company PTY LTD V Islamic republic of Pakistan* (FOTIS Law firm, 18.10.2022)<The Reko Diq Arbitration: Tethyan Copper Company v. Islamic Republic of Pakistan >Accessed 15.06.2025

42 Singapore National Arbitration Centre, **A Handbook on Investor-State Dispute Settlement** (Singapore National Dispute Resolution Academy, 2020) https://www.singaporeconvention.org/sites/singaporeconvention.org/files/flipbooks/ISDSHandbook/ISDS_Handbook.pdf accessed 11 August 2025.



submissions is crucial to incorporate broader contexts into arbitration. While depoliticization aims for neutrality, ignoring political factors weakens the legitimacy and effectiveness of investor–state arbitration.

CONCLUSION/ RECOMMENDATION

This article advocates for the re-politicization of investment arbitration, urging a reconceptualization of state responsibility and investor rights within the broader geopolitical and diplomatic context. It emphasizes the need to carefully balance state sovereignty, direct expropriation, and principles of justice.

REFERENCES

Primary Sources

Legislature

ICSID Convention (1965)

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

UNCITRAL Arbitration Rules (1976)

Case Laws

Copper Mesa Mining Corporation v Ecuador (ICSID Case No. ARB/14/44)

Bernhard von Pezold v Zimbabwe (ICSID Case No. ARB/10/15)

Foresti v South Africa (ICSID Case No. ARB(AF)/07/01)

Tethyan Copper Company v Pakistan (ICSID Case No. ARB/12/1)

Secondary Sources

Journal Articles

Andrea K. Bjorklund, ‘The Participation of Sub-national Government Units as Amici Curiae in International Investment Disputes’ in Chester Brown & Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 298 at 306

Gabrielle Kauffman-Kohler & Michele Potesta, ‘Why Investment Arbitration and Not Domestic Courts? The Origins of the Modern Investment Dispute Resolution System, Criticism, and Future Outlook’ in Gabrielle Kauffman-Kohler & Michele Potesta (eds), *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Springer International Publishing 2020) 7 at 20

Mabel I. Egonu, ‘Investor-State Arbitration under ICSID: A Case for Presumption Against Confidentiality?’ (2007) 24(5) *Journal of International Arbitration* 479-89 at 482



- Mohanty G. & Bakos A., 'The Depoliticization of Investment Disputes: How Deep Does the "Rabbit Hole" Go?' in de Amstalden M., Moran N., Asmelash H. (eds), *International Economic Law. PEPA-SIEL 2022. European Yearbook of International Economic Law* (Springer 2023) https://doi.org/10.1007/978-3-031-41996-6_1 accessed 11 August 2025
- Joao Ribeiro & Michael Douglas, 'Transparency in Investor-State Arbitration: The Way Forward' (2015) 11(1) *Asian International Arbitration Journal* 49-67 at 54
- Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01 (ISLG) <Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01 | italaw > Accessed 15.06.2025
- Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatization of Public International Law through Inconsistent Decisions' (2004) 73 *Fordham Law Review* 1521 at 1586-87
- Won-Mog Choi, 'The Present and Future of the Investor-State Dispute Settlement Paradigm' (2007) 10(3) *Journal of International Economic Law* 725 at 735-36
- Fabio de Nardis, 'The Concept of De-Politicization and Its Consequences' (2017) 10(2) *Partecipazione e Conflitto* 340 <http://sibase.unisalento.it/index.php/paco/article/view/1732> accessed 11 August 2025
- Lucas Bastin, 'The Amicus Curiae in Investor-State Arbitration' (2012) 1 *Cambridge Journal of International and Comparative Law* 208
- Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107(1) *American Journal of International Law* 45 at 63-65
- Gus Van Harten, 'A Case for an International Investment Court' (2008) Society of International Economic Law (SIEL) Inaugural Conference

Websites / Reports

- Singapore National Arbitration Centre, *A Handbook on Investor-State Dispute Settlement* (Singapore National Dispute Resolution Academy, 2020) <https://www.singaporeconvention.org/sites/singaporeconvention.org/files/flipbooks/ISDSHandbook/ISDS_Handbook.pdf> accessed 11 August 2025

ACKNOWLEDGMENTS

The researcher would like to express her gratitude to the lecturers, the Open University of Sri Lanka and colleagues who helped to complete the extended abstract.