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Article

‘Authority Shifts’ in Global Governance: Intersecting Politicizations and the Reform of Investor–State Arbitration

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Abstract
The global investment regime is a prime example of the so-called ‘politicization beyond the state.’ Investment agreements with an Investor–State Dispute Settlement (ISDS) mechanism have become contested in several corners of the globe, triggering a widespread reform process encompassing national, regional and multilateral levels. This article examines the consequences of this confluence of politicization processes, focusing on the European Union (EU) and two key venues of ISDS reform: the United Nations Commission on International Trade Law (UNCITRAL) and the Energy Charter Treaty (ECT). Combining different strands of politicization literature in International Relations and Political Science, the article advances a nuanced conceptualisation of the institutional consequences of politicization that goes beyond a deepening/decline dichotomy. Instead, the article examines whether and how politicization generates ‘authority shifts,’ either through a vertical move between international and national levels; and/or through a horizontal recalibration between public and private forms of governance. The article argues that although the EU’s initiative for global ISDS reform intended to rebalance public and private authority while strengthening its international character, the on-going reform processes at the UNCITRAL and the ECT may eventually lead to a (partial) dismantling of international authority.

Keywords
authority; Energy Charter Treaty; European Union; global governance; investment; Investor–State Dispute Settlement; politicization; United Nations Commission on International Trade Law

Issue
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1. Introduction

Foreign investment is typically considered a key driver of economic growth, job creation, development and lasting peace. Consequently, governments and international institutions regularly insist on the importance of boosting investments through an open and rules-based regime (G20, 2019, p. 2). However, at no other time had investment governance raised so widespread controversy as over the past decade. Several countries around the world have cancelled or withdrawn from bilateral and multilateral investment treaties, and mega-trade agreements, such as the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP), derailed in big part due to disagreements over investment provisions. The Investor–State Dispute Settlement (ISDS), a standard mechanism included in investment agreements allowing foreign companies to bring claims against states in ad hoc arbitration tribunals, has become the object of popular outcry in many developing and developed countries alike. In Europe, mobilization against investor–state arbitration has been particularly high, to the point that the European Union (EU) Trade Commissioner dubbed ISDS “the most toxic acronym in Europe” (Cecilia Malmström, as cited in Ames, 2015). The widespread contention regarding the international investment regime is thus a prime example of what International Relations and European inte-

gration scholars have diagnosed as the politicization of global and regional governance, understood as "growing public awareness of international institutions and increased public mobilization of competing political preferences regarding institutions' policies or procedures" (Zürn, Binder, & Ecker-Ehrhardt, 2012, p. 71).

The simultaneous politicization of ISDS in several parts of the world and at different levels, from states' investment protection policies, to bilateral and regional agreements and global arbitration rules, raises the question of what the consequences are of this confluence of politicization processes? While there has been a growing scholarly interest in the patterns and drivers of the politicization of ISDS (see below), the institutional consequences of this surge in public and political mobilization have been more scantly researched. Examining the consequences of politicization is not straightforward, given that contestation of ISDS has come from different quarters. For example, ISDS has been resisted on sovereigntist grounds, particularly in developing countries, which arguably signed investment agreements with investor–state arbitration without being fully aware of their consequences (Poulsen & Aisbett, 2013). ISDS has also been criticised as a quintessential illustration of neoliberal economic discipline. This is the case of the early scholarly criticism of ISDS as an example of 'new economic constitutionalism' or 'lex mercatoria,' to denounce the privatization of authority in international public law (Cutler, 1995; Schneiderman, 2008; Van Harten, 2005). Relatedly, civil society organisations have increasingly branded their opposition campaigns in terms of democracy and justice, encapsulated in the moto 'right to regulate' to improve social and environmental protection (Siles-Brügge, 2017). Less sympathetically, mobilisation against international courts, including arbitration tribunals, is also seen as part of the populist backlash to globalisation (Voeten, 2019). Therefore, ISDS constitutes a suitable empirical case where to examine the effects of complex and multilevel politicization processes.

Focusing on the consequences of politicization is also analytically relevant, given that the emerging literature on this phenomenon has also tended to focus on its drivers (cf. Zürn, 2018, p. 159). In some of the most comprehensive theorizations, the consequences of politicization are defined in terms of institutional deepening/decline (Zürn, 2018, pp. 13–14) or integration/renationalisation (de Wilde, Leupold, & Schmidtke, 2016, pp. 12–13). While taking these approaches as a point of departure, this article suggests a more nuanced way to assess the consequences of politicization, focusing on whether it leads to actual 'authority shifts.' To that aim, it brings different strands of politicization literature in International Relations and Political Science closer together, by examining whether widespread societal contestation of international institutions leads to a vertical displacement of authority between international and national levels; and/or a horizontal recalibration between public and private forms of governance. It is argued here that such a conceptualisation can offer a more fine-grained diagnosis of global governance changes without prejudging their normative implications.

This conceptualisation of the consequences of politicization is applied to the study of three crucial venues of ISDS reform: the EU—the world's largest source of foreign investment; the United Nations Commission on International Trade Law (UNCITRAL)—the UN body providing one of the most widely applied arbitral rules; and the Energy Charter Treaty (ECT)—the world's most litigated international treaty. In all these settings, crucial actors have expressed their commitment to ISDS reform as a response to the domestic and/or transitional mobilisation. However, given the different degrees and sources of politicization of ISDS across venues, we can also expect different demands for authority recalibration across institutions, from their mere fine-tuning to full dismantling. The study of this variation can therefore enrich the discussion on when and how politicization translates into international institutional change.

The argument unfolds in six sections. The first one outlines the conceptual and theoretical discussion. The second presents a brief background on the origins and patterns of politicization of ISDS. The following three sections examine the reform processes in the EU, the UNCITRAL and the ECT. The analysis is based on the official proposals, country submissions and debates on ISDS reform in the three venues, mostly between 2016 and 2019 and using different techniques of qualitative content analysis. The last section concludes, summarizing the findings and discussing the implications of the politicization of ISDS for the future shape of investment governance and beyond.

2. Consequences of Politicization beyond the State: Tracing Authority Shifts

Compared to the abundant literature examining the patterns and drivers of politicization, particularly in the EU (cf. Kauppi & Wiesner, 2018), the study of its consequences is a less well-chartered research territory. The discussion on the consequences of politicization has addressed two main questions, one empirical and one normative. Empirically, the main question is whether politicization contributes to boost or hinder regional integration and global governance. The answer has so far been rather inconclusive. On the one hand, in the context of the EU, politicization is often identified as the missing link for a well-functioning polity, and hence a precondition for further integration (for a debate, see Hix & Bartolini, 2006). On the other, the so-called end of the 'permissive consensus' in both European integration and multilateral institutions may also multiply resistance to cooperation beyond the state (Hooghe & Marks, 2009; Zürn et al., 2012, p. 99). On the normative dimension, there is also no agreement on whether politicization reinforces or weakens democracy. While politicization can be

a democracy-enhancing process, given that it fosters participation and parliamentary involvement (Zürn, 2014, p. 59), it can also deepen the sense of legitimacy crisis or sometimes even work against stronger parliamentary control (de Wilde et al., 2016, p. 14; Herranz-Surrallés, 2019, p. 32).

The theory of global governance advanced by Michael Zürn (2018) tries to close the politicization loop by examining its causes, possible consequences, as well as empirical and normative implications. The model identifies the delegation of authority and the related legitimacy problems as the driving forces for politicization. In other words, institutions that gain authority are more likely to suffer from legitimacy problems, since their procedures and performance will become more strictly scrutinised and subject to higher expectations (Tallberg & Zürn, 2019, p. 12; Zürn, 2018, p. 98). The model then assigns a central role to the responses within those institutions as the key determinant for the consequences of politicization: Depending on how the legitimacy gap is dealt with by the authority holders, politicization will lead to institutional deepening or decline (Zürn, 2018, pp. 13–14, 143–144). While this model has motivated highly interesting research on the institutional responses to politicization (see, e.g., contributions discussed in Tallberg & Zürn, 2019), it comes also with analytical drawbacks.

On the empirical dimension (the impact of politicization on the extent of global governance), conceptualising the effects of politicization in dichotomist terms (deepening or decline) does not allow for grasping the nuances of international reform processes. It is also unclear what happens to the authority of international institutions, which was at the origin of the politicization process. To be sure, institutional deepening and decline might be interpreted, respectively, as an increase or a roll-back of authority of international institutions, measured in terms of their formal or informal powers. Yet, this still comes with the limitation that it implicitly focuses only on vertical authority moves (delegation from states to international institutions and back), neglecting another important dynamic of delegation of authority that is central to the debates on (de)politicization in Political Science. In this strand of literature, politicization is defined in terms of 'arena shifts' or how issues migrate from the private to the public/governmental spheres (politicization) and vice-versa (depoliticization) (Flinders & Buller, 2006; Hay, 2007). This dimension of politicization is thus also concerned with horizontal transfers of authority between public and private actors. In this literature, the horizontal delegation of authority is also at the roots of politicization. The argument is that politicization can be the reaction to long periods of depoliticization, understood as the displacement of decision-making authority from elected representatives to private actors and non-majoritarian institutions. In the words of Flinders and Wood (2015, p. 379), "attempts at depoliticization will, almost inevitably, come back to haunt the politicians who enact them in the hope of ending political contestation once and for all." Therefore, given that many areas of international governance also imply depoliticization via delegation to private actors and independent expert bodies, it is important to consider both the vertical and horizontal dimensions in which authority can become contested and recalibrated.

On the normative dimension (the impact of politicization on the democratic quality of global governance), the deepening/decline approach somehow conflates the institutional effects of politicization with their success or failure in addressing the legitimacy gaps. In that regard, deepening is conceptualised as the result of successful re-legitimation through substantive reforms, whereas decline is the result of an enduring legitimacy gap due to the lack (or symbolic character) of reforms (Zürn, 2018, p. 168; see also Dietz, Dotzauer, & Cohen, 2019, pp. 751–755). This link is problematic, first, in empirical terms, since sometimes the re-legitimation of an international institution might come precisely from a downscaling of its authority. In that sense, re-legitimation does not always imply the deepening of global governance. Secondly, conflating institutional change with its legitimation also presents some analytical challenges, as it forces the analyst to take a stance on whether the reforms undertaken by the institution are symbolic or substantial, something that is difficult to objectify and is part of the politicization game itself. Finally, and more normatively, the terms deepening/decline risk being too value-loaded, in the sense that the former appears positively related to a well-functioning global governance and the latter echoes more negative processes such as populist backlash or de-globalisation. Therefore, the suggestion advanced here is to analytically separate the institutional consequences of politicization (i.e., the tracing of authority shifts) from the assessment of the perceptions and normative consequences of those shifts for the legitimacy of global governance.

In sum, while taking authority and legitimacy gaps as a point of departure, the approach advanced in this article proposes: (i) a more nuanced and value-neutral conceptualisation of the institutional consequences of politicization (authority shifts rather than decline/deepening); and (ii) the analytical separation of these institutional consequences from their social legitimacy (rather than premising deepening/decline on the success of legitimation).

Since the focus of this article is on the institutional consequences of politicization, the analysis that follows offers only a succinct introduction to the drivers and patterns of politicization of ISDS, relying mostly on secondary literature. The subsequent analysis focuses on examining the institutional responses in the three selected cases (EU, UNCITRAL and ECT). Through qualitative content analysis of official documents, the article traces the proposed recalibrations of authority along the national/international and public/private continuums. The analysis is presented in a qualitative form, giving argu-

ments and quotes to illustrate the proposed authority shifts. Finally, given the different stages of ISDS reforms, a full assessment of the degree to which the authority shifts lead to higher political and public acceptability is only feasible to a limited extent in the scope of this article. Yet, the analysis takes the responses by political elites, civil society and commentators as a 'first cut' indication of the possibility of authority shifts to close the legitimacy gap in global investment governance.

3. The Politicization of ISDS: Authority Delegation and Its Backlash

The origins of modern treaty-based ISDS date back to the decolonization period, in a context where the nationalization of assets by host states often escalated into diplomatic and military crises (the so-called 'gunboat diplomacy'). In that sense, the creation of ISDS has often been described as a well-intended mechanism to depoliticize investment disputes. For example, studies on the establishment of the International Centre for Settlement of Investment Disputes (ICSID) in 1966 recount how the drafters in the World Bank were driven by the idea of transferring investment conflicts from the political arena of diplomatic protection to judicial remedy (Kriebaum, 2018, p. 14). Similarly, St. John (2018, p. 66) describes how the World Bank's experience with failed mediation in politically-charged disputes during the decolonization period provided the breeding ground in which the Bank decided to advocate for a new dispute settlement machinery. Following the 1966 ICSID convention, the idea of investor–state arbitration was gradually inserted in the dense network of Bilateral Investment Treaties (BITs) that proliferated particularly since the 1990s. Accordingly, disputes were entrusted to ad hoc tribunals, operating under commonly agreed arbitral rules such as that of the ICSID or the UNCITRAL's. Therefore, ISDS implied a simultaneous transfer of state authority upwards and laterally, given that resolution of disputes was delegated to hybrid bodies: international private tribunals with a public function.

However, since the early 2000s, the system started to show signs of a 'legitimacy crisis' (Franck, 2005), which reached its full extent in terms of public salience in the mid-2010s (Langford & Behn, 2018, pp. 554–558). Criticism towards ISDS has ranged from principled concerns against conferring foreign companies with special rights to bring claims against states and the implications of this for national sovereignty, democracy and public policy, to a wide array of procedural concerns. These include, among others, the lack of transparency, doubts regarding the neutrality of arbitrators, their lack of diversity and expertise in international public law, the ad hoc nature of the tribunals, leading to high discretion and inconsistencies, the lack of appeal mechanisms, or the ample possibilities for companies to abuse the system (cf. UNCITRAL, 2018). Therefore, the evolution of ISDS illustrates well the argument by Flinders and Wood (2015) that depoliticization efforts via the insulation of sensitive issues form majoritarian institutions might sooner or later come back to haunt the decision-makers.

In line with the authority hypothesis discussed in the previous section, the rise in public attention particularly since the early 2010s coincided with the surge in ISDS court cases—in 2011 the number of yearly new claims climbed from 35 to above 50 and oscillated between 50 and 80 since then until 2018 (see Figure 1). Moreover, this increase affected developed countries as much as developing ones—between 2013 and 2015, the share of cases where OECD countries were respondent states was close to 50%. Highly controversial ISDS court cases also served as powerful illustrations of the authority gained by the international arbitration system, its potential abuse by companies and the high discretion of arbitrators. Some of the most well-known cases in that regard are the *Philip Morris v. Uruguay* (2010) and *Philip Morris v. Australia* (2012) cases, which showcased the potential encroachment of ISDS on the right of states to regulate to the benefit of public health; similarly, the high-profile *Vattenfall v. Germany* cases (2009, 2012) in the framework of the ECT were also widely discussed as examples where investment protection clashed with environmental and safety regulations.

Patterns of politicization have varied widely across countries, depending not only on their experience with ISDS litigation, but also political opportunity structures. In some countries, societal opposition has been mostly top-down, driven by political elites' reaction to unfavourable arbitration cases. For example, the decision of the South African parliament in 2009 to start terminating BITs can be linked to the *Piero Foresti v. South Africa* (2007). In this case, investors from Luxembourg and Italy challenged South Africa's petroleum and mining law on the requirement of minimum ownership by "historically disadvantaged persons" in mining companies (Mellersh, 2015). The 'resistance' to ISDS by countries such as Brazil, India or Indonesia has also been mostly elite-driven, related to sovereignty and developmental concerns (Sornarajah, 2015, pp. 300–346). In Latin America, high-profile cases, affecting mostly extractive industries, in countries like Ecuador, Bolivia, Argentina or Venezuela, prompted the mobilization of both civil society and left-leaning governments (Calvert, 2018). In OECD countries, the pattern of politicization was more clearly bottom-up, through the mobilisation of NGOs (Bilaterals, 2013; Eberhardt, Redlin, Olivet, & Lora, 2016) and the scholarly community (Boyd et al., 2016; Public Citizen, 2016). Given their significance and scope, the negotiation of the TTIP and the TPP provided an ideal window of opportunity for anti-ISDS mobilisation, as widely discussed in the literature (among others, Eliasson & Garcia-Duran Huet, 2018; Kay & Evans, 2018, pp. 139–162).

Despite the diversity in the origins and degree of politicization, the wide-spread criticism of investor–state arbitration led the UNCTAD to acknowledge already in 2014 that "the questions are not about whether to re-

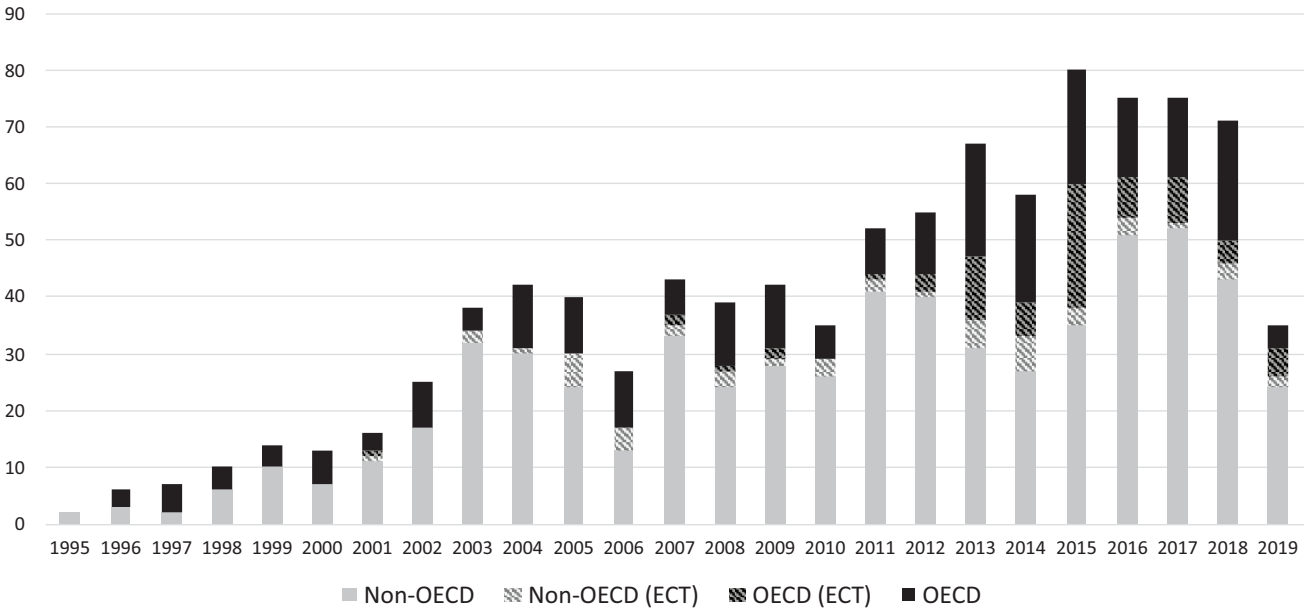

Figure 1. Evolution of arbitration cases by type of respondent state and treaty (1995–2019). Source: Own calculation from UNCTAD Investment Hub and ECT dispute settlement database.

form the international investment regime but how to do so" and that this was not a matter of a "change to one aspect in a particular agreement but about the comprehensive reorientation" (UNCTAD, 2014, p. 128). The following sections examine the reform proposals discussed in the EU, the UNCITRAL and the ECT, the direction and extent to which they aim to rebalance or relocate authority, as well as their initial reception by the wider public.

4. EU Approach to ISDS Reform: A Horizontal Recalibration of International Authority

The EU's change of approach to investor–state arbitration has been strongly marked by the unprecedented, and largely unexpected, public opposition to ISDS that surfaced during the TTIP negotiations (De Ville & Gheyle, 2019). Until then, the Commission had been a strong defendant of investor–state arbitration (cf. European Commission, 2013). However, in view of the mounting opposition, including thousands of critical responses to a public consultation by the European Commission on ISDS in 2014, the EU Trade Commissioner, Cecilia Malmström, recognised that there was "a huge scepticism against the ISDS instrument" and committed to develop new proposals addressing those concerns (European Commission, 2015a). The first occasion to materialise this new approach was the Comprehensive Economic and Trade Agreement (CETA), where the EU and Canada proposed a reformed ISDS that was labelled Investment Court System (ICS; section F of the CETA agreement, European Union, 2017; see also Council of the European Union, 2016). As discussed below, while the ICS keeps some of the defining features of ISDS, it entails a significant horizontal recalibration towards strengthening the public law elements of investor–state arbitration.

One of the first examples of public–private recalibration concerns the appointment of the arbitrators. Instead of the usual procedure, where the investors are involved in selecting the arbitration panel on a case-by-case basis, the ICS introduced a system of permanent judges appointed by the parties to the agreement. The ICS also envisaged a binding code of conduct for the judges, including a sanctions mechanism, and the requirement of judges to have expertise in 'public' international law. A second group of reforms focused on the investors, mainly provisions limiting their possibility to abuse arbitration via, for example, parallel arbitration procedures (so-called 'forum shopping') or the use of 'mailbox companies.' The ICS also reviewed the distribution of the costs of arbitration following the 'loser pays principle,' to discourage unfounded cases. Finally, a third group of measures that bring ICS closer to a public system of justice concerns the interpretation and revision of investment provisions and arbitral decisions, the main change being the introduction of an Appellate Tribunal, aimed at ensuring correctness and consistency of the decisions. Significantly also, the ICS includes the possibility that the parties of the agreement issue binding interpretations on investment provisions, even with respect to ongoing cases. As argued by the Commission, "we have given governments, not arbitrators, ultimate control over the interpretation of the rules" (European Commission, 2015b).

In parallel to the CETA revision, the Commission also started to develop the idea of a Multilateral Investment Court (MIC), which would entail the multilateralization of the ICS concept. The MIC proposal thus follows the same idea of recalibrating public–private authority. In a joint article presented at the 2017 World Economic Forum, the European Commission and the Canadian government justified the MIC option arguing that the princi-

ples of commercial arbitration that have dominated traditional ISDS were inadequate for matters that concern public policies (European Commission & Government of Canada, 2017, p. 2). Next to the horizontal authority shift, from private to public, the MIC would also mean a vertical move towards higher international authority, since the current ad hoc and fragmented system of arbitration would be replaced by a permanent and stand-alone institution, modelled on existing international courts, such as the International Court of Justice or the International Criminal Court. Another sign of high international authority is the EU preference for excluding the requirement of exhaustion of local remedies, meaning that the MIC would not observe the principles of subsidiarity and non-interference that are common in other systems of international justice (Puccio & Harte, 2017, p. 26).

Although the EU member states' governments have backed the Commission's effort to advance the MIC concept at the UNCITRAL (Council of the European Union, 2018), the reception among the wider political and public spheres has been rather critical. NGOs and scholars deemed reforms as superficial and not complying with minimum normative standards of legitimacy (among others, Diependaele, De Ville, & Sterckx, 2019; Dietz et al., 2019; Eberhardt, 2016). Even more tellingly, support among political representatives also remains low. The debates at the European Parliament offer a good testing ground in that regard. As Figure 2 shows, the idea of investor–state arbitration continues to elicit very limited positive connotations, even after the discussion moved to the new ICS/MIC proposals in 2016. Only the Socialists (S&D) came to be more supportive of the idea as a "new model of public arbitration" (Silva Pereira, as cited in European Parliament, 2017). Moreover, as Figure 2 also illustrates, concerns remained high on the crucial aspects that the MIC was meant to solve, namely fairness, right to regulate, democracy or legitimacy. Particularly remarkable is the fact that most groups raised concerns regarding the importance of domestic courts, arguing in favour of the exhaustion of local remedies or in many cases, denying the need for an international arbitration mechanism. This means that most European political groups are pushing also for a recalibration of authority on the vertical dimension, from international to national, in line with the ideas of subsidiarity and non-interference.

5. UNCITRAL Debates on ISDS Reform: Between Horizontal and Vertical Recalibration

In view of the widespread criticism of investor–state arbitration and the growing number of countries revising (or terminating) their investment agreements since the early 2010s, the momentum built up for a global ISDS reform (Schill, 2018). However, the choice of venue for such a reform was not uncontroversial. On the one hand, several countries, among them the US, preferred a technical reform process within the ICSID framework, the World Bank investment arbitration centre. On the other, another group of countries, including the EU, advocated for UNCITRAL, which would give reforms a more political character. The choice of UNCITRAL as well as the negotiation procedure are an indication of a generalised sentiment in favour of a comprehensive reform. For example, negotiations were entrusted to Working Group III (not Working Group II on arbitration) and UNCITRAL's secretariat encouraged member states to send government representatives instead of the common practice of states delegating such negotiations to arbitration practi-

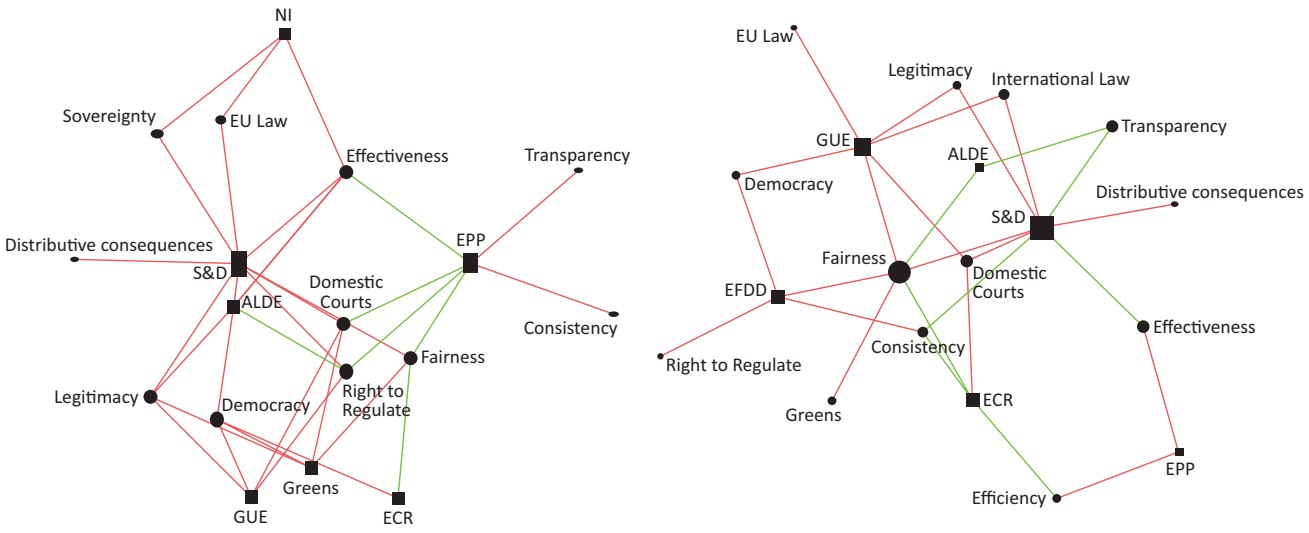

Figure 2. Actor-concept network of European Parliamentary debates on ISDS (2014, 2017). Source: Own elaboration from European Parliament (2014) (left) and European Parliament (2017) (right). The analysis is performed with Discourse Network Analyser (Leifeld, 2017), used here as a mapping tool to synthesise the degree to which each party relates positively or negatively to ISDS in the proposed reform. Squares represent political groups and circles concepts. Red links depict negative associations to ISDS and green links positive ones. The size represents the relative frequency of statements involving an actor or concept.

tioners (Roberts, 2018, pp. 18–19). The negotiating mandate was also very broad, signalling high political discretion: identifying problems of ISDS, assessing whether problems require reform and, if so, propose reform options. Negotiations started in November 2017 and by April 2019 they entered the last phase (discussion of reform options). However, given the different patterns of politicization in different parts of the world, delegations remained split regarding the reform options proposed and the type of authority recalibration needed.

The first pattern that stands out by examining the country submissions to UNCITRAL (see Figure 3) is the limited support for the partial horizontal recalibration proposed by the EU. The idea of a standing court, in line with the MIC proposal, garnered very limited explicit support. The only country submission that explicitly backed the idea was that of Ecuador, a country that terminated all its BITs in 2017 in a context of high domestic opposition to ISDS.

The second pattern is the significant number of country submissions advocating for a more limited horizontal move towards public authority. These country submissions come mostly from countries where societal politicization of ISDS was moderate. The joint contribution by Mexico, Japan, Peru, Chile and Israel exemplifies this position, by advancing a menu of solutions encompassing free-standing codes, sharing of best practices, reform of UNCITRAL rules or treaty-specific measures, rather than creation of new institutions. The idea of a code of conduct for arbitrators, mentioned in the contributions of China, Turkey, Costa Rica, Bahrain or Thailand also fits this idea of a modest horizontal recalibration. Noticeable is also the contribution by Bahrain, which makes clear its opposition to a standing court and any major reforms in the direction of a more publically-controlled appointment of arbitrators, as this "would undo one of the hallmarks of the existing ISDS regime, which has so far been rather successful in depoliticizing the appointment process" (United Nations General Assembly, 2019a). Similarly, while supporting a modest horizontal move with the creation of an Appellate Mechanism, China and Russia also argued in favour of retaining the principle that arbitrators should be appointed by the disputing parties. Therefore, both countries argued explicitly against a standing mechanism with permanent judges.

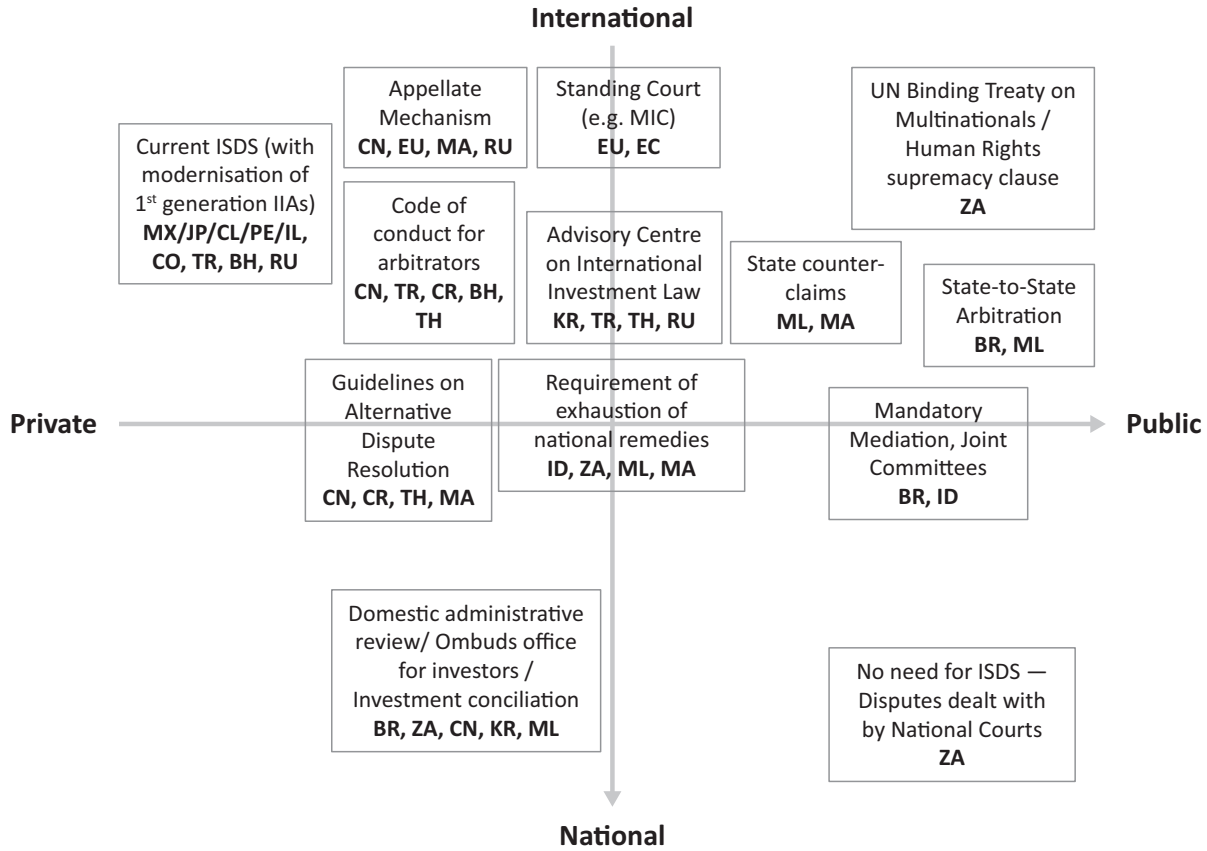

Figure 3. Mapping of the reform proposals submitted to UNCITRAL. Source: Own elaboration from the party submissions to the 39th session of the UNCITRAL working group III (20–24 January 2020; UNCITRAL, 2020). All countries submitting a position appear in the table but their reform options are not exhaustive (Figure 3 includes a selection of the main ideas advanced in the submissions). Country abbreviations follow UN/LOCODE codes: BH: Bahrain; BR: Brazil; CL: Chile; CN: China; CO: Colombia; CR: Costa Rica; EC: Ecuador; EU: European Union; ID: Indonesia; IL: Israel; JP: Japan; KR: Republic of Korea; MA: Morocco; ML: Mali; MX: Mexico; PE: Peru; RU: Russia; TH: Thailand; TR: Turkey; ZA: South Africa.

The third trend is that of countries advocating a more radical horizontal move towards public authority and/or a vertical displacement towards the national level. This group corresponds mostly to the countries where politicization has been largely elite-driven, such as South Africa, Brazil or Indonesia, and which had already opted for alternative models to ISDS in their investment agreements. Proposals entailing a vertical recalibration include the development of Alternative Dispute Resolution mechanisms or the requirement of exhaustion of local remedies. Further into the national direction, we find ideas such as Joint Committees to interpret investment law, involving state representatives or a shift to state-to-state dispute settlement, as advanced by Brazil. South Africa was the country advocating a more drastic vertical relocation of authority, considering that any form of investor–state arbitration "brings the public interest and the people's rights into the arena of private law" (United Nations General Assembly, 2019b). According to South Africa, companies should have their own risk management mechanisms. At the most, in case ISDS would continue to exist, South Africa proposed to balance it with other international instruments, such as a 'supremacy clause' that would guarantee the precedence of human rights and environmental treaties in case of clash with investment protection provisions.

The analysis is certainly not exhaustive, as it examines only the formal country submissions. Other countries, while not submitting proposals, have also been active in UNCITRAL negotiations. For example, the US has sided mostly with the second group, arguing that there is enough scope for countries to reform their investment treaties within the current ISDS regime. This is the approach followed by the government of Donald Trump, most notably with a significant limitation of the geographical and substantive scope of ISDS within the new US–Mexico–Canada Agreement. While politicization of ISDS in the US has remained high, the government's opposition to far-reaching ISDS reform at a global level can be explained by the fact that anti-ISDS positions have growingly focused on national sovereignty considerations (Phillips, 2019). This domestic politicization structure is therefore a strong deterrent to support the idea of a permanent court, as proposed by the EU, where contrary to the US, anti-ISDS mobilization focused mostly on justice frames (Siles-Brügge, 2017).

Given the multi-national setting and variety of politicization paths, assessing the social legitimacy of the reforms under discussion is a risky endeavour. What is noticeable, however, is that the most active civil society organisations following UNCITRAL's negotiations have sided with the third group, namely those advocating the full dismantling of investor–state arbitration (e.g., Centre for Research on Multinational Corporations, 2018). This contrasts with the most likely path of ISDS reform at the global level, namely a modest and gradual horizontal rebalancing of authority.

6. ECT Reform Options: Towards Dismantling International Authority?

Despite being the world's most litigated international treaty, with around 125 court cases, the ECT has remained notoriously under the public radar. Contestation of the ECT is certainly not new—e.g., Russia abandoned the regime in 2009 following the high-profile *Yukos v. Russia* (2005) case—but, until recently, it was not explicitly targeted by anti-ISDS campaigns. One of the reasons for this might be that most of the ECT arbitration cases since 2013 were filed by renewable energy companies against governments that unexpectedly cut their support schemes for solar and wind energy. Therefore, those cases did not fit well the anti-ISDS narrative that arbitration empowers big multinationals to challenge environmental regulations. However, the politicization of ISDS eventually also reached the ECT and civil society organisations recently targeted it as "the world's most dangerous investment treaty" (Corporate Europe Observatory, 2018). Building on the growing societal mobilization on climate change issues, the ECT has also been growingly targeted as a treaty that protects fossil-fuel industries (Keay-Bright & Defilla, 2019). Recent cases such as the *Rockhopper v. Italy* (2017), whereby the UK-based gas and oil company sued Italy for the withdrawal of a drilling concession in the Adriatic Sea, have served as powerful illustrations in that regard (Corporate Europe Observatory, 2018, p. 14). In this context, the ECT launched a modernisation process in late 2018 tackling ISDS. However, the more limited public salience of the ECT, as compared to debates on ISDS in the context of the TTIP, has led the reform process to be more driven by the parties' political preferences than by wider societal concerns.

The country submissions to the ECT Secretariat, including responses from the EU and eight other contracting parties (Energy Charter Secretariat, 2019), indicate a general preference for a horizontal shift towards more public authority. However, although most parties strongly supported the inclusion of specific provisions to safeguard governments' 'right to regulate,' they referred to it in different ways. On the one hand, the EU emphasized public goods and the inclusion of other international rights and obligations, such as the protection of climate change, sustainable development goals or corporate social responsibility. The most specific proposal in that sense was suggested by Luxembourg, with the introduction of a non-stabilisation clause, which would prevent companies from challenging regulatory measures aimed at facilitating the energy transition and the fulfilment of the Paris Agreement (Energy Charter Secretariat, 2019, p. 16). On the other hand, when referring to the right of states to regulate, Azerbaijan, Georgia and Albania emphasized the protection of sovereignty in a more classical sense, namely the principle of 'sovereignty over energy resources' or the possibility to exclude certain types of assets from ISDS upon considerations of

'essential security.' Therefore, in this second sense, the recalibration would also include a vertical dimension, namely the strengthening of national authority in determining when ISDS applies.

At the same time, the ECT reform process has also exposed the EU's interest in a vertical recalibration of authority, from the international to the EU level, for reasons apparently unrelated to the societal politicization of ISDS. Since the Lisbon Treaty's extension of the EU trade competence to foreign direct investment, the Commission has strived for eliminating intra-EU investment treaties, which imply that EU companies can bring claims against EU member states in international arbitration courts, thus bypassing the Court of Justice of the EU (CJEU). The CJEU judgment in the *Slovak Republic v. Achmea B.V.* (2018) supported the Commission's view that international arbitral courts have no jurisdiction in intra-EU disputes. A more complex discussion has been, therefore, whether the ban of intra-EU BITs also extends to the ECT cases. More broadly, the Commission has long feared that the ECT could eventually be used by both European and non-European companies to challenge EU regulatory measures affecting their business, for example EU anti-state aid or unbundling requirements. The unprecedented arbitration case against the EU, filed in October 2019 by the Russian-owned Nord Stream 2 company, materialized these fears. Therefore, the EU's growingly ambitious demands for the ECT reform are also led by an attempt to vertically recalibrate international authority to reassure the primacy of EU law.

In sum, the reform process in the ECT brings yet another dimension to the discussion on the effects of politicization. While the start of the latest reform process was prompted by the wider politicization of ISDS in the EU, other legal and (geo)political concerns are also strongly influencing reform discussions. In view of the legal imbroglio over the intra-EU BITs and concerns with overlapping legal systems, some commentators have argued that, rather than reforming the ECT, the EU might eventually advocate for its withdrawal (Simon, 2019), which would mean a virtual dismantling of the ECT. Quite paradoxically, therefore, the disempowering of the ECT could be one of the main successes for anti-ISDS groups (Corporate Europe Observatory, 2018) even if this is the venue where reforms seem least determined by societal mobilization concerns.

7. Conclusion

The changes underway in the governance of foreign investment are a clear illustration that "the politicization of international institutions is a consequential development" (Zürn, 2014, p. 157). Due to public and political mobilization against ISDS in several parts of the world, the international investment regime is undergoing far-reaching reforms which might lead to a significant recalibration or even relocation of authority. With a focus on 'authority shifts' in inter-linked arenas of ISDS reform this article has sought to contribute to politicization literature in three ways.

First, in an attempt to better grasp the extent and quality of institutional changes beyond deepening and decline, this article advanced the idea of tracing authority shifts both on vertical (national/international) and horizontal (public–private) dimensions. The picture that emerges from the analysis of authority shifts is a nuanced one, showing that while most states agree on the need for reforming investor–state arbitration, there are still competing options of authority recalibration. While the EU has been one of the key supporters of a horizontal recalibration of ISDS, from private to public authority without altering (or even reasserting) its international character, the reform process in other settings goes in different directions. At the UNCITRAL, reform options are polarised between those actors that pursue a very modest horizontal recalibration and those who aspire to a significant dismantling of international authority. At the ECT, it is precisely the EU that seems to be pressing for a vertical recalibration of authority due to concerns over the autonomy and primacy of its legal system, a move that could eventually mean the disempowerment of an institution it helped create. The study of horizontal authority shifts would also be relevant for many other areas of global governance characterised by dis-embedding and re-embedding struggles between market and society (Scholte, 2016, p. 721), such as trade, finances, labour standards or climate change; as well as by public–private forms of regulation, from sustainable forestry to war diamonds (Lipschutz & Fogel, 2002, pp. 125).

Secondly, the analysis suggests that politicization of global affairs cannot be fully understood by looking only at certain countries or institutions in isolation. In a globalized world, different processes of politicization can intersect and become an important factor mediating the consequences of politicization. For example, the EU's new approach to investor–state arbitration in its bilateral agreements and the MIC proposal was only possible thanks to parallel politicization dynamics in other international arenas. There is also some 'contagion effect' of politicization, as shown by the ECT, initially very resistant to politicization due to its sectoral nature, but finally pulled into the wider reform process. In that sense, international and domestic politicization patterns can reinforce each other (cf. Costa, 2019). This intersection, however, also means that establishing a direct causal link between politicization and the substance of reforms in international institution is a difficult undertaking, given the different degrees and drivers of politicization in different countries (as shown by the UNCITRAL case) and the impact of other intervening factors (as the ECT case illustrated).

Finally, one of the added values of the proposed approach is also the decoupling of the empirical analysis of the institutional consequences of politicization from its normative assessment. In the ISDS case, politicization might affect the global regime in a seemingly contradic-

tory way. On the one hand, the multilateral regime will most probably experience a gradual evolution, with some horizontal recalibration in favour of greater public authority. On the other, it will continue leaving states the flexibility to choose how much to empower or constrain international arbitration through their investment agreements. While this might lead to an overall downsizing in the international authority of the investment regime (as the drop of arbitration cases in 2019 seems to indicate), it might also be the most viable path for its re-legitimation. Therefore, and more broadly, rather than thinking of international institutions in terms of deepening or decline, this article invites a reflection on which horizontal and vertical recalibrations of authority can ensure the legitimacy and sustainability of global governance.

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Conflict of Interests

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