



The unsustainable political economy of investor–state dispute settlement mechanisms¹

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Abstract

Investor–state dispute settlement mechanisms were intended to protect companies from the Global North against expropriation by Global South countries. Since 2000, investor–state dispute settlement mechanisms have increasingly been used against Northern countries to obtain compensation for and constrain policy decisions around nationalisation and remunicipalisation, as well as around the environmental or social regulation of service provision that threatens commercial interests. Social movements and governments alike resisted investor–state dispute settlement mechanisms, and despite the power wielded by multinational companies, the global trend is now to exclude investor–state dispute settlement mechanisms from new investment treaties. The purpose of this article is to provide a political-economy analysis of the processes of supporting and contesting the role of investor–state dispute settlement mechanisms in international treaties, processes that include activity at national, sub-national and international levels. The ensuing conflicts are analysed in terms of post-colonial contradictions over sovereignty under globalisation, continued contestation over the role of the public sector and climate change policies.

Points for practitioners

The probability of investor success with investor–state dispute settlement mechanism claims should not be overestimated, and investor assessments of the basis and

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prospects for such cases should be subject to critical scrutiny. Governments should be aware of widespread popular antagonism towards investor–state dispute settlement mechanisms and global trends to remove such clauses from agreements. They should also review all bilateral investment treaties, free trade agreements and the Energy Charter Treaty that the country has ratified to assess the potential relative advantages of retention or leaving.

Keywords

bilateral investment treaties, compensation, Energy Charter Treaty, environmental regulations, globalisation, investor–state dispute settlement mechanism, municipalisation, nationalisation, populism

Introduction

The investor-state dispute settlement (ISDS) clauses of international investment and trade treaties allow international investors to sue states and local governments before an international arbitration tribunal. Originally expected to protect foreign investors against expropriation by countries of the Global South, since the millennium, they have also been increasingly used in countries of the Global North to prevent nationalisation or remunicipalisation (the reversal of privatisation on the municipal level), as well as to obstruct changes to the environmental or social regulation of service provision that threaten commercial interests.

Since the 1980s, privatisation has been a dominant global policy, favouring investors. While privatisation is still increasing worldwide (Wegmann, 2020), since the millennium, there has been a counter-tendency towards public ownership: more than 1400 cases of remunicipalisation or nationalisation involving more than 2400 cities in 58 countries have been identified since the year 2000 (Kishimoto et al., 2020). Yet, these figures are likely to be an understatement, as most remunicipalisations are not publicly recorded and are therefore unknown. Even in the UK, a country famous for its excessive privatisations, at least 222 local government contracts were remunicipalised between 2016 and 2018 (APSE, 2019); furthermore, nationalisation proposals proved to be very popular with voters in the 2019 UK election (Hall, 2020). In this context, investors have been using ISDS claims not only to seek compensation for the ending of concession agreements or for nationalisations, but also as a financial deterrent to prevent such policies. Local governments are particularly vulnerable, as they cannot necessarily rely on the backing of their national government, especially when there are political differences between the local and the national levels. For example, in 2017 in Sheffield, UK, the council voted for an early end to the city's 35-year waste management contract with Veolia, which had started in 2001, because it was no longer perceived to meet the city's waste management needs. However, after Veolia threatened an

ISDS claim for compensation, the decision to remunicipalise the service was revoked (Weghmann, 2020).

ISDS claims have been used not only to deter the termination of privatisations, but also: to challenge public health regulations, for example, as in *Phillip Morris v Australia* with regards to enacting tobacco packaging regulations that required a graphic health warning; to claim compensation for renewable energy policies, for example, in Spain, Italy and Germany; and to challenge changes in labour laws on wages, for example, as in *Veolia v Egypt*, where the French firm sued Egypt over an increase in its minimum wage (Klett, 2016), and the Italian mining investors who sued South Africa for compensation over its black empowerment policies introduced to redress some of the injustices of apartheid in South Africa (Burianski and Parise Kuhnle, 2018). The fact that ISDS mechanisms have enabled foreign investors to privately challenge the legislation, regulations and judicial or administrative rulings of host states has meant that international arbitration tribunals have created a 'regulatory chill', meaning the prevention of regulatory protections and policies for fear that an investor could take states to arbitration (Ciocchini and Khoury, 2018; Kynast, 2019). In the COVID-19 pandemic, companies could use ISDS to claim compensation from governments for measures taken to protect the country from COVID-19, regardless of national laws permitting such public interest policies (CEO, 2020). Hence, attorneys warn that the fact that investors might take advantage of the pandemic by invoking ISDS lawsuits constitutes 'profound threats to the public as well as socio-economic health at a national and global scale' (Schmidt, 2020).

To date, academic discussion around ISDS arbitrations, as well as the policy discussions of civil society organisations, have been quick to point to the power given by ISDS mechanisms to multinational corporations to weaken the state's capacity to protect the public interest (Ciocchini and Khoury, 2018; Eberhardt et al., 2018; Johnson et al., 2015). This is in line with a broader strand of critical scholarship that focuses on the power of elite agencies, overemphasises the coherence of neoliberalism and downplays the agency of those who resist its logic (Morton, 2007). However, these treaties and their ISDS clauses have, in turn, been subjected to powerful public campaigns and increasing resistance by national governments in both the Global South and the Global North, with some treaties being terminated, including the North American Free Trade Agreement (NAFTA), and new treaties exclude ISDS clauses. This is not simply a matter of the technical interpretation of specific treaties in specific cases or mapping the extent to which international laws constrain the public administrative laws of nation states. Rather, it is a highly contested international political process over the political legitimacy and primacy of these legal structures themselves, which involves not only political action by business interests, but also a strong political resistance to the role of such international commercial law (Cutler, 2003, 2016).

The political successes of this resistance poses questions: how is it that some individual cases have been successfully frustrated by this resistance? How has this resistance been able to remove ISDS clauses from key international agreements?

This article challenges the predominant literature around ISDS disputes by noting that the outcomes of contestations over ISDS are not predetermined by the treaties or even the power of multinational companies, but have also been continually shaped by public resistance, the emergence of new political forces and the changing orientation of national governments towards globalisation. This article argues that while ISDS mechanisms have, indeed, provided a powerful tool for multinational companies to claim compensation for lost profits when public services are nationalised/remunicipalised or regulated, they do not operate in a vacuum, but are influenced by post-colonial contradictions over sovereignty under globalisation, by continued political contestation over the resurgent role of the public and by more general factors, such as the rise of nationalist populism and the COVID-19 pandemic.

The article proceeds as follows. The next section sets out data on the use of ISDS mechanisms. It then shows the striking asymmetry of cases between countries and locates this in the previous history of international trade law. The fourth section engages with the opposition to ISDS mechanisms by social movements and governments at national and international levels in both the Global South and the Global North. Subsequently, the article concludes with a discussion on the neo-colonial contradictions and the rise of new protectionism that shape ISDS lawsuits and the way they can and are likely to be used by investors to demand compensation for nationalisations.

ISDS mechanisms and the use of international arbitration over compensation

International treaties that provide mechanisms for ISDS include bilateral investment treaties (BITs) between two countries, multilateral investment treaties – of which the most relevant is the Energy Charter Treaty (ECT) – and free trade agreements (FTAs), covering a particular region or trade between two or more states or groups of states. The ISDS clauses typically enable companies to take claims for compensation against states over expropriation or other actions diminishing expected returns to either the World Bank's arbitration tribunal (the International Centre for Settlement of Investment Disputes (ICSID)) (where over half of investor–state disputes are filed), the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL), the London Court of Arbitration or the Stockholm Chamber of Commerce (Klett, 2016).

To date, over 3000 investment treaties have been signed across the world. These treaties overlap so that multinational companies can 'shop' around for treaties in countries where they have subsidiaries, and also choose from multiple arbitration venues offered by treaties (Peinhardt and Wellhausen, 2016). From the late 1950s (when this system was first established) to 2000, only 50 cases were filed. This increased dramatically from the turn of the millennium onwards, with 500 cases

being recorded between 2000 and 2014 (Ciocchini and Khoury, 2018). As of July 2019, the total number of publicly known ISDS claims had reached 983 (United Nations Conference of Trade and Development [UNCTAD], 2019).

Multinational companies have been relatively successful in claiming compensation through ISDS proceedings. Out of the 983 claims, almost 36% were decided in favour of the state, almost 30% were decided in favour of the investor and almost 22% were settled, while over 11% were discontinued and 2% were decided in favour of neither party (UNCTAD, 2019) (see Supplementary Online Figure 1, available at: <https://journals.sagepub.com/home/ras>). In the settled cases, it can be assumed that some sort of compensation has been paid; hence, the number of cases that benefit foreign investors is clearly in the majority (Ciocchini and Khoury, 2018).

In recent years, increased concerns around the fairness of the ISDS procedures have been voiced. This legal system is purposely designed in a manner that lacks transparency. There is only limited information available of how the investor–state arbitration system works, as there is no systemwide disclosure (OECD, 2018). The nature of ISDS is ad hoc, with arbitrators being appointed on a case-by-case basis. Each case is decided by three judges. The investor and the host state may each appoint one arbitrator and those arbitrators usually appoint a third arbitrator (Kynast, 2019). The impartiality of these judges has been questioned because roles frequently overlap, as the same individual judges can act as lawyers – in other words, prepare investors’ claims – in other ISDS cases, with a potential conflict of interests. Most ISDS arbitrators are commercial arbitrators, men, people from the upper reaches of the top 1% of incomes and individuals from the Global North (Gaukrodger, 2017; Klett, 2016; OECD, 2018). Hence, it has been argued ‘that ISDS presents fundamental contradictions to the rule of law; it has a business bias and a lack of transparency and accountability in its arbitration procedures which is anything but impartial’ (Ciocchini and Khoury, 2018).

Historical asymmetries and the unexpected turn

Although the ISDS mechanism is formally symmetrical, creating the same dispute mechanism for private parties regardless of their nationalities, in practice, the asymmetry is huge. ISDS cases have overwhelmingly been brought by companies from the Global North against Global South countries (see Supplementary Online Table 1, available at: <https://journals.sagepub.com/home/ras>). Whereas investors from the European Union (EU15), US and Canada have initiated over 600 cases, they have been the target of only 109 claims. The great four European imperial countries – France, Germany, the Netherlands and the UK – have together initiated nearly 300 cases yet been the subject of only five. Nearly half of cases targeting Global North countries were brought by investors from the US and Canada against each other under NAFTA, and the great majority of the claims against Spain and Italy under the ECT have also been brought by investors based in other EU15 countries. In total, there have been only 11 cases against the EU15, US and

Canada brought by investors from other countries – none of which have been successful.

This asymmetry can only be understood in the historical context of economic relations between investors from Western Europe and North America, and the countries of Asia, Africa, Latin America and Eastern Europe. In this perspective, BITs and similar agreements can be seen as the latest historical stage of a series of protection mechanisms for investors, and so were always expected to be used by investors of the Global North against countries of the Global South (Miles, 2014; Patel, 2017; Wellhausen, 2016). Up to the mid-20th century, empires were the simplest method for providing this protection but other mechanisms were used to avoid European or North American investors being subject to the rule of law in countries outside empires. These included the ‘capitulations’ agreed by the Ottoman Empire from the 17th century onwards, which exempted European traders from being subject to rulings of Ottoman courts, and ‘gunboat diplomacy’, whereby countries were threatened with naval attacks unless the claims of investors were met, as happened with Egypt, Venezuela and other countries in the late 19th and early 20th centuries (Ahmad, 2000).

The forerunner of ISDS is the system of international law developed in the 19th century, originally to protect US and European investors in the newly independent Latin American countries, which was conceptualised as a universal law superior to the supposedly unreliable and ‘politicised’ legal systems of non-Western countries: ‘only an international setting could be relied upon to apply universal rules and ensure a neutral, depoliticised, and fair hearing for a foreign investor’ (Miles, 2014: 1006). However, already in the 19th century, the legitimacy of this regime was challenged by Latin American countries, who instead advanced the Calvo doctrine, which states simply: ‘Aliens should be afforded no more than the same treatment as nationals, and must limit themselves to filing claims in the local judicial system’ (Miles, 2014: 1000). This doctrine and its assertion of national sovereignty has continued to form the core argument in subsequent political contestations over the system.

BITs and ISDS mechanisms were developed in the 1950s–1970s to provide continued protection for investors within the geopolitical context of decolonialisation, as many newly independent states nationalised their resources and introduced protectionist measures as part of their economic strategies (Friedan, 2006; Rodríguez Goyes and South, 2017). It was again argued that ISDS was a necessary replacement for dysfunctional domestic courts in countries with a weak rule-of-law tradition and therefore a tool to combat corruption (Schill, 2015; Schultz and Dupont, 2014). Further BITs were created in the 1980s and 1990s to protect investors in East European countries in transition from communism. The multi-lateral ECT, covering over 50 countries, was similarly created to protect European investors in the energy sector in Russia in 1998 – signed just weeks before the negotiations for the Multinational Agreement on Investment (MAI) collapsed, at least in part, due to the global public resistance against it (Varney and Martin, 2000). The first ISDS lawsuits under the ECT also mostly hit countries in Central

Asia and Eastern Europe, as intended and expected – though Russia, the original target of the agreement, refused to ratify it. From about 2013, companies began exploiting the formal symmetry of the ECT to make ISDS claims against Western European states, especially against renewable energy schemes. These initially challenged the Southern member states, such as Spain and Italy, but cases were then also brought against Germany (Eberhardt et al., 2018).

ISDS must therefore be seen as a post-colonial mechanism institutionalising and continuing the asymmetrical global power relations developed in the colonial period (Ciocchini and Khoury, 2018; Friedan, 2006). This explains why ISDS cases brought against EU countries from about 2010 created great political consternation. Until then, ‘it was deemed somewhat inconceivable that international investment treaties could be deployed against the very states that championed them’ (Sattorova, 2016: 57). The mechanism was intended to be used by investors from these West European countries, not by other investors against them.

The volume of ISDS cases has been rising to an unprecedented extent since just before the millennium (see Supplementary Online Figure 2, available at: <https://journals.sagepub.com/home/ras>). Many of the cases were brought against Global South countries but an increasing number were brought against EU member states – initially, the Central and East European countries that had joined more recently but then also against West European countries, including Germany. Two such cases, based on intra-EU BITs, claimed compensation for healthcare policy changes by EU member states. In one of them, the Achmea case, a company used a Netherlands–Slovakia BIT to claim compensation from Slovakia for changing the regulation of health insurers. The arbitration tribunal awarded compensation to Achmea but Slovakia referred the judgment to the Court of Justice of the European Union (CJEU), which ruled in March 2018 that the arbitration agreement in article 8 of the BIT has an adverse effect on the autonomy of the EU legal order and so is incompatible with EU law (ECJ, 2018).

There was also a major surge in cases brought under the ECT: only 19 cases were brought in the first 10 years up to 2008 but 75 investor lawsuits were filed between 2013 and 2017. Cases are now being targeted at Western European countries, principally Spain and Italy, with large claims: 16 cases involved claims of over US\$1 billion. The formal symmetry of the treaties was now being exploited against the countries that had created the system, weakening their own sovereignty.

Global South contestation over ISDS mechanisms

This millennial surge in ISDS cases has driven and widened political activity over the ISDS system. This is not simply the contestation of individual cases, but a series of political actions about the legitimacy and functioning of the system itself. Usually, resistance by national and international social movements to ISDS followed on from other struggles, most notably, resistance to the introduction of privatisations under conditionalities set by the World Bank and the

International Monetary Fund (IMF). Successful termination of privatisations triggered ISDS claims by multinational companies to claim compensation and denationalisations.

In particular, conflicts over water privatisation in the 1990s and 2000s involved widespread national and local campaigns by social movements, with active support from international non-governmental organisations (NGOs) and networks. Contrary to the expectations and objectives of the multinational companies, these campaigns successfully achieved the termination of many private concessions and contracts (Brennan et al., 2007). When some of the companies concerned used ISDS to claim compensation, the political process continued and challenged ISDS lawsuits – and, again, the companies did not always win.

For example, in Cochabamba, Bolivia, a broad social movement succeeded in ending water privatisation in March 2000, a victory that rapidly became internationally famous. Under the terms of a US\$138 million IMF loan for Bolivia, a 40-year concession agreement for Cochabamba's water supply was awarded to a consortium of the US company Bechtel and the Spanish company Abengoa – a contract made in secret, with only one bidder. Within weeks, water prices were raised by over 50%, leading to a wave of protests by the *Coordinadora de Defensa del Agua y de la Vida* ('Coalition for the Defence of Water and Life'), a broad alliance of farmers, factory workers, rural and urban water committees, neighbourhood organisations, students, and middle-class professionals against water privatisation. The uprising, which became known as the Cochabamba water war, lasted for several months. Protests erupted not only in Cochabamba, but in the entire country, including strikes, roadblocks, the closing of airports and crowding the central plaza (Norris and Metzidakis 2010). At first, the resistance was met by brutal state repression. Eventually, after continuous and escalating protests that led the government to declare a state of emergency, as well as the refusal of residents to pay their water bills, the government had no choice but to give in and finally terminated the contract with the private provider nearly five months after it took effect (Lobina, 2000; Norris and Metzidakis, 2010). Subsequently, Bechtel and Abengoa filed a US\$25 million ISDS compensation claim to recover its costs and obtain damages for loss of expected profits. This gave rise to an international campaign that not only challenged the nature of ISDS by demanding transparency of the arbitration proceedings, but also damaged Bechtel's reputation considerably (Norris and Metzidakis, 2010). Eventually, the companies gave up and settled for a token payment of 2 bolivianos (around US\$0.25 at the time) to avoid reputational damage. This was the first time that global public pressure had forced a large multinational corporation to drop a case before the ICSID (Shultz, 2009). However, by the time the ICSID dispute was settled, the Bolivian government had spent US\$1.6 million in legal fees for its defence (Norris and Metzidakis, 2010).

Similarly, in Dar es Salaam, Tanzania, water services were privatised in 2003 as part of an IMF and World Bank condition for debt relief. A consortium of the German company Gauff, the British company Biwater and the Tanzanian

company Superdoll won a 10-year contract for delivering water and sewage services in Dar es Salaam. Like in Bolivia, the privatisation process was very secretive, with not even the Tanzanian Parliament being able to see the contract. Soon after the privatisation, problems increased: leakage increased, billing errors occurred, investment targets were not met, employees were badly paid and corruption increased. Due to the failure of the private companies, the Tanzanian government nationalised the service in 2005. Consequently, Biwater used the UK–Tanzania BIT to make a claim to ICSID for compensation of over US\$20 million from the Tanzanian government. The Tanzanian government vigorously resisted the claim and, in the end, the ICSID tribunal refused to grant compensation (Italaw, 2008). Biwater fared even worse in its claim before UNCITRAL for damages, as the tribunal supported Tanzania’s counterclaim and ordered the company to pay US\$3 million compensation for underperformance – which the company avoided by declaring itself bankrupt (International Institutes for Sustainable Development [IISD], 2018a; Pigeon, 2012).

Resistance of Global South states against ISDS claims are as old as the mechanism itself. Yet, there has been increased political efforts to counter the increase of ISDS claims since 2000. A number of countries in the Global South started terminating, renegotiating or rejecting BITs altogether, including Bolivia, Brazil, Ecuador, India, Indonesia and South Africa (Peinhardt and Wellhausen, 2016; Sattorova, 2016). Brazil refused to sign BITs at all and has proposed alternatives involving mediation, possibly backed by state–state dispute settlement processes instead of ISDS (Puig, 2018). India sought to renegotiate all of its 83 BITs to allow protection of sovereignty, and finally terminated 58 BITs (Patel, 2017). The foregoing discussion demonstrates that: (1) individual ISDS cases can and have been won by countries of the Global South; and (2) due to negative experiences with ISDS, several countries in the Global South are abandoning ISDS altogether (see Supplementary Online Table 2, available at: <https://journals.sagepub.com/home/ras>).

Contestation in the EU and new protectionism for the Global North

The governmental resistance in the EU against ISDS is most notable in Germany, largely in response to a case brought against Germany by the Swedish energy company Vattenfall over Germany’s nuclear phase-out. This case marks a turning point in the geopolitical landscape of ISDS. In the aftermath of the Fukushima accident, the German Parliament decided in 2011 to amend the Atomic Energy Act to shut down all nuclear energy facilities by 2022. Even before the Fukushima accident, nuclear energy had been a controversial topic for the German public. Germany’s strong anti-nuclear movement dates back to the 1970s and has profoundly influenced the political scene. While the anti-nuclear moment was strong before, on the backdrop of the 1986 Chernobyl accident, the nuclear phase-out

became mainstream in the public and political debate. Consequently, subsequent governments prepared to leave nuclear energy behind while anti-nuclear protests (especially opposing the final nuclear waste repository site near Gorleben) continued to shape the political landscape. In short, Germany's nuclear phase-out has been in the making decades before the Fukushima accident (Glaser, 2012; Jacur, 2015). When the nuclear phase-out decision was announced, almost 90% of the population supported it (Glaser, 2012). Shortly after Germany made the decision to compel the closure of all nuclear plants, the electricity companies with nuclear generators – E.on, RWE and Vattenfall – sued first in the German Federal Constitutional Court (FCC). However, the process under German law is not expected to yield much compensation; therefore, Vattenfall, as the only foreign company able to use international treaties, filed a parallel claim under the ECT at the ICSID in May 2012, known as Vattenfall II vs Germany. Vattenfall demanded €4.7 billion in compensation (over €6.1 billion including interest rates) for the loss of its profits due to Germany's nuclear phase-out. In other words, the ECT is being used to seek far more generous compensation than the German justice system would ever deliver. It should also be noted that this is the second time Vattenfall claimed compensation from German public authorities: the first (Vattenfall I vs Germany) was over environmental policy restrictions placed by the city of Hamburg on a coal-fired plant. The case resulted in the reduction of these environmental standards (Jacur, 2015).

Vattenfall II vs Germany poses a challenge to the status of the legal systems in the Global North. The German courts are being treated in the same way as Global North countries have treated the legal systems of the Global South. The Vattenfall II vs Germany case became seen by the German government and the general public as an attack on the German legal system and as undermining democratic decision-making (Schill, 2015). Germany's strong response to the ISDS case needs to be understood within the context of the past decades of nuclear resistance in Germany and strong anti-nuclear public opinion. The political contestation of anti-nuclear resistance thus continued by entering a new realm: international legislation via ISDS. The German government has been firm in resisting the case. Extraordinary amounts have been spent on lawyers during this long legal battle. By August 2020, the German government had spent €21.7 million in legal and administrative costs (Deutscher Bundestag, 2020), and by April 2018, Vattenfall has spent €26 million on its lawyers, which it also claims from Germany. After almost nine years, the case is still pending, with no outcome in sight (by the time of writing in January 2021). In 2018, Germany submitted to the ICSID tribunal that Vattenfall could not use the ECT against Germany because of the CJEU ruling on Achmea (see earlier). Next, the German government asked twice (in 2018 and in 2020) for the suspension of all three judges of the ICSID tribunal. All those proposals were rejected by ICSID. Yet, Germany made it as difficult as possible for Vattenfall.

In response to the Vattenfall case, the German government has also taken two strategic initiatives at the EU level. First, it formulated a plan for a new

international court system (ICS) to replace ISDS mechanisms, which has been adopted by the EU as a central part of its reform efforts. Second, in January 2019, the EU member states (including the UK) signed a remarkable declaration that tells courts, investors and tribunals that intra-EU claims under BITs or the ECT should not be considered and that awards should not be enforced (European Commission [EU], 2019). Agreement was reached in May 2020 on a plurilateral treaty for the termination of intra-EU BITs, signed by 23 countries – including Germany, but excluding Sweden, Finland and the UK (European Commission, 2020). This declaration has undoubtedly been influenced by the *Vattenfall II vs Germany* case. Furthermore, the EU has developed a strong narrative for protecting the regulatory powers of countries, as expressed by former European Commissioner for Trade Cecilia Malmstrom: ‘My assessment of the traditional ISDS system has been clear – it is not fit for purpose in the 21st century... I want to ensure fair treatment for EU investors abroad, but not at the expense of governments’ right to regulate’ (Patel, 2017: 275). Also, within the ECT, the EU is calling for the incorporation of a ‘right to regulate’ provision, along with revising its existing terms on expropriation (IISD, 2019b). This trend is remarkable when considering that the EU has criticised countries in the Global South for terminating BITs and continues to negotiate FTAs, some of which include ISDS. This shows that the politics over ISDS need to be understood as a system of post-colonial domination, whereby Germany’s actions rest on its historical expectation that treaties such as the ECT would be used by Germany, not against it.

This is in line with global developments towards more protectionist domestic politics, partly driven by right-wing populist parties and politicians in the US and elsewhere. International negotiations on FTAs have increasingly been removing or weakening ISDS provisions, or avoiding new agreements altogether (see Supplementary Online Table 2, available at: <https://journals.sagepub.com/home/ras>). NAFTA, which was the key reference point for modern ISDS clauses, has been scrapped and replaced with a new treaty – the United States Mexico Canada Agreement (USMCA) – which basically excludes ISDS. Negotiations over the proposed EU–US trade agreement, known as TTIP, came to a standstill due to ISDS mechanisms (Donaubauer and Nunnenkamp, 2018). The new Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) does include ISDS provisions but the US has not signed this agreement. Furthermore, the opposition of the US government to ISDS mechanisms is affecting the proposed post-Brexit UK–US trade deal (IISD, 2019a). New Zealand also signed letters to restrict ISDS with Australia, Brunei Darussalam, Malaysia, Peru and Vietnam (IISD, 2018b). In June 2019, the EU reached a final agreement with Mercosur that does not include ISDS mechanisms (European Commission, 2019). Additionally, the agreement establishing the African Continental Free Trade Area (AfCFTA), which entered into force on 30 May 2019, has no ISDS mechanisms in place (African Union, 2019; IISD, 2019c). Moreover, the China–Australia Free Trade Agreement (ChAFTA) changed the framework for ISDS procedures to

further protect a host state's right to regulate for legitimate public welfare objectives, partly in response to *Phillip Morris vs Australia* (Patel, 2017).

These findings concur with scholars who have identified the growth of a new protectionism. Trade and investment protection have become a much higher-profile policy area for the EU, with a rising concern in the EU regarding the competitive implications of China's industrial policies. The EU aims to prevent investments flowing into Europe, especially from China and Russia (European Society of International Law [ESIL], 2019). Also, the previous Trump administration (2017–2021) pursued a more protectionist trade policy, with the US questioning multilateral cooperation and the World Trade Organization (WTO) (Hoekman and Puccio, 2019).

Conclusions

ISDS procedures are a powerful tool for multinational companies to obtain compensation awards that both offset any commercial losses from policy decisions on issues such as privatisation and environmental standards, and act as a deterrent to the adoption of such policies. However, resistance to the use of ISDS has been growing and has been increasingly successful.

This article examined the historical origins of ISDS treaties, the political resistance to specific cases and the increased political opposition to ISDS systems in general. From Cochabamba's water wars to Germany's resistance to Vattenfall's claims for compensation due to the nuclear phase-out, we see that ISDS cases are resisted in the Global North and Global South alike: governments in the Global South have begun to reject and terminate BITs; North American states have scrapped NAFTA and replaced it with a treaty that is largely without ISDS; ISDS clauses are weakened or dropped in new FTAs; and the EU and its member states are unravelling intra-EU BITs and seeking to replace ISDS with a more credible system.

Understanding these complex interactions requires a wider analysis of the political economy of the system rather than just the individual cases. Drawing on our review of events, we can identify three key dimensions of such an analysis: the historical, post-colonial dimension; embeddedness in other political and economic contestations, notably, over privatisation and environmental politics; and the power of specific nation states to assert their sovereignty.

The colonial origins of legal rights for international investors are invaluable in understanding the reaction of EU governments and the EU itself. When German companies have themselves initiated over 60 ISDS claims against other countries, the furious public and governmental response to the case brought by Vattenfall has to be partly explained by the historical expectation that treaties such as the ECT would be used by Germany, not against it. Now that Spain has been the target of almost as many cases as a defendant as its companies have initiated elsewhere, the treaties have unacceptably infringed on the asymmetrical status of the states that introduced the system.

The analysis also shows that the ISDS cases themselves are rarely the first stage in political contestations. Many of the cases in the Global South stem from the introduction of privatisation under conditionalities set by the World Bank and others: where these privatisations were resisted and terminated, multinational companies used international arbitration to claim compensation, and the political resistance to the privatisations continued, though now focused on the claims. Most cases in Western Europe originate from the success of environmental agendas – against nuclear power in Germany and the commitment to renewable energy in Spain, Italy and elsewhere. The ISDS claims represent a corporate reaction to the prospect of losing profitable business as a result of these policies. Beyond the actual claims, threats of possible ISDS claims have been used by companies to deter nationalisations, remunicipalisations and stricter environmental and social regulations. In essence, ISDS is a tool in contestations over material economic policymaking.

The resistance to ISDS mechanisms is shaped by different, contradictory and overlapping political forces. Social movements, both nationally and internationally, have mobilised against ISDS in advocacy of democratic national independence, and for rejecting the economic effects of neoliberal globalisation – as much in the Global North (such as in Germany) as in the Global South (such as in Bolivia). The resistance by governments of the Global South is a post-colonial phenomenon based on rejection of colonial status and a contradictory relationship with globalisation, especially as regards privatisation. The recent turn of Northern governments, however, is driven not only by social movements in the North, but also by a post-colonial resistance to the ‘symmetrical’ use of ISDS against Global North countries. The former European imperial countries within the institutional setting of the EU are seeking to retain the traditional asymmetrical position of their own companies in relation to other countries – and, at the same time, to preserve the EU’s own status as the rule-maker for international trade, especially in the internal market of the EU itself. Also, the US under the Trump administration (2017–2021) was driven by populist issues of national sovereignty. If ISDS cases are brought against COVID-19 policy measures, it seems certain that they will face great public resistance, both from social movements’ resistance to corporate interventions, and from state resistance to the interference with sovereignty. All these political dynamics favour the withering away of ISDS mechanisms and investors being redirected to national courts. The Calvo doctrine is slowly triumphing.

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Supplemental material

Supplemental material (Figure 1 and Figure 2; Table 1 and Table 2) for this article is available online.

Note

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References

- African Union (2019) Agreement establishing the African Continental Free Trade Area. Available at: https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (accessed 10 February 2021).
- Ahmad F (2000) Ottoman perceptions of the capitulations 1800–1914. *Journal of Islamic Studies* 11(1): 1–20.
- APSE (Association for Public Service Excellence) (2019) Rebuilding capacity. The case for insourcing public contracts. Available at: [https://www.apse.org.uk/apse/assets/File/Insourcing%20\(web\).pdf](https://www.apse.org.uk/apse/assets/File/Insourcing%20(web).pdf) (accessed 10 February 2021).
- Brennan B, Hoedeman O, Terhorst P, et al. (2007) *Reclaiming Public Water Book*. Amsterdam: Transnational Institute.
- Burianski M and Parise Kuhnle F (2018) Dispute resolution in Africa mining assets: Exploring the arbitration route. *Capital Markets in Africa*. Available at: https://www.capitalmarketsinafrica.com/INTOAFRICA/INTOAFRICA_JULY_2018.pdf (accessed 10 February 2021).
- CEO (Corporate Europe Observatory) (2020) Cashing in on the pandemic May 2020. Available at: <https://corporateeurope.org/en/2020/05/cashing-pandemic-how-lawyers-are-preparing-sue-states-over-covid-19-response-measures> (accessed 10 February 2021).
- Ciocchini P and Khoury S (2018) Investor state dispute settlement: Institutionalising ‘corporate exceptionality’. *Oñati Socio-legal Series* 8(6): 976–1000.
- Court of Justice of the European Union (CJEU) (2018) Judgment of the Court, 6 March 2018, in Case C-284/16, *Slowakische Republik (Slovak Republic) v Achmea BV*. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CJ0284> (accessed 10 February 2021).
- Cutler AC (2003) *Private Power and Global Authority*. Cambridge: Cambridge University Press.
- Cutler AC (2016) Transformations in statehood, the investor–state regime, and the new constitutionalism *Indiana Journal of Global Legal Studies* 23(1): 95–125.

- Deutscher Bundestag (2020) Antwort der Bundesregierung. Available at: <https://dip21.bundestag.de/dip21/btd/19/225/1922571.pdf> (accessed 10 February 2021).
- Donaubauer J and Nunnenkamp P (2018) Eu Investros versus Eu States: International Arbitration of Investment Disputes. *Journal of Common Market Studies* 56(6): 1376–1393.
- Eberhardt P, Olivet C and Steinfort L (2018) One treaty to rule them all. Transnational Institute. Available at: https://www.tni.org/files/publication-downloads/one_treaty_to_ruled_them_all.pdf (accessed 10 February 2021).
- European Society of International Law (ESIL) (2019) Report to the Board. Available at: <https://esil-sedi.eu/wp-content/uploads/2019/10/2018-2019-ESIL-IG-International-Economic-Law-Annual-Report.pdf> (accessed 10 February 2021).
- European Commission (2019) Declaration on investment protection in the EU Jan 2019. Available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf (accessed 10 February 2021).
- European Commission (2020) EU member states sign an agreement for the termination of intra-EU bilateral investment treaties Available at: https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en (accessed 10 February 2021).
- Friedan JA (2006) *Global Capitalism: Its Fall and Rise in the Twentieth Century*. New York, NY: W.W. Norton & Company.
- Gaukrodger D (2017) *Adjudicator Compensation Systems and Investor–State Dispute Settlement*. Paris: OECD Working Papers.
- Glaser A (2012) From Brokdorf to Fukushima: The long journey to nuclear phase-out. *Bulletin of the Atomic Scientists* 68(6): 10–21.
- Hall D (2020) The UK 2019 election: Defeat for Labour, but strong support for public ownership. PSIRU. Available at: <https://gala.gre.ac.uk/id/eprint/26848/> (accessed 10 February 2021).
- Hoekman B and Puccio L (2019) *EU Trade Policy: Challenges and Opportunities*. San Domenico di Fiesole (Firenze): Robert Schuman Centre for Advanced Studies, European University Institute.
- International Institutes for Sustainable Development (IISD) (2018a) Biwater v. Tanzania. Available at: https://www.iisd.org/itn/2018/10/18/biwater-v-tanzania/#_ftn3 (accessed 10 February 2021).
- International Institutes for Sustainable Development (IISD) (2018b) Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) signed. Available at: <https://www.iisd.org/itn/2018/04/24/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp-signed/>
- International Institutes for Sustainable Development (IISD) (2019a) U.S. officials raise concerns over proposed MIC in talks with the United Kingdom. Available at: <https://www.iisd.org/itn/2019/12/17/u-s-officials-raise-concerns-over-proposed-mic-in-talks-with-the-united-kingdom-documents-say/> (accessed 10 February 2021).
- International Institutes for Sustainable Development (IISD) (2019b) EU Commission proposes negotiating directives for ECT modernization. Available at: <https://www.iisd.org/itn/2019/06/27/eu-commission-proposes-negotiating-directives-for-ect-modernization/>
- International Institutes for Sustainable Development (IISD) (2019c) AfCFTA enters into force. Available at: <https://www.iisd.org/itn/2019/06/27/afcfta-enters-into-force-phase-ii-on-investment-competition-ipsr-to-last-through-2020-2021/> (accessed 10 February 2021).

- Italaw (2008) *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22. Available at: <https://www.italaw.com/cases/157> (accessed 10 February 2021).
- Jacur FR (2015) The Vattenfall v. Germany disputes: Finding a balance between energy investments and public concerns. In: Levashova Y, Lambooy T and Dekker I (eds) *Bridging the Gap between International Investment Law and the Environment*. Den Haag: Legal Perspectives on Global Challenges Series Eleven Legal Publishing, pp. 339–356.
- Johnson L, Sachs L and Sachs J (2015) Investor–state dispute settlement, public interest and U.S. domestic law. Columbia Center on Sustainable Investment. Available at: <https://academiccommons.columbia.edu/doi/10.7916/D82N52TP> (accessed 10 February 2021).
- Kishimoto S, Steinfort L and Petitjean O (2020) *The Future is Public*. Amsterdam: Transnational Institute.
- Klett J (2016) National interest vs. foreign investment – Protecting parties through ISDS. *Tulane Journal of International and Comparative Law* 25(1): 213–238.
- Kynast B (2019) Legal barriers to remunicipalisation? Trade agreements and investor–state investment protection in water services. *Water Alternatives* 12(2): 334–347.
- Lobina E (2000) Water war in Cochabamba, Bolivia. PSIRU.
- Miles K (2014) International investment law and universality: Histories of shape-shifting. *Cambridge Journal of International and Comparative Law* 3(4): 986–1010.
- Morton A (2007) *Unravelling Gramsci. Hegemony and Passive Revolution in the Global Economy*. London: Pluto Press.
- Norris A and Metzidakis K (2010) Public protests, private contracts: Confidentiality in ICSID arbitration and the Cochabamba water war. *Harvard Negotiation Law Review* 15(1): 31–76.
- OECD (Organisation for Economic Co-operation and Development) (2018) Appointing authorities and the selection of arbitrators in investor–state dispute settlement: An overview. Available at: <https://www.oecd.org/investment/investment-policy/ISDS-Appointing-Authorities-Arbitration-March-2018.pdf> (accessed 10 February 2021).
- Patel N (2017) An emerging trend in international trade: A shift to safeguard against ISDS abuses and protect host-state sovereignty. *Minnesota Journal of International Law* 26(1): 273–302.
- Peinhardt C and Wellhausen R (2016) Withdrawing from investment treaties but protecting investment. *Global Policy* 7(4): 571–576.
- Pigeon M (2012) From Fiasco to DAWASCO. Remunicipalising water systems in Dar es Salaam, Tanzania. In: Pigeon M, McDonald D, Hoedeman O, et al. (eds) *Remunicipalisation: Putting Water Back into Public Hands*. Amsterdam: Transnational Institute, pp. 40–57.
- Puig S (2018) The death of ISDS? Kluwer Arbitration Blog. Available at: <http://arbitration.blog.kluwerarbitration.com/2018/03/16/the-death-of-isds/> (accessed 10 February 2021).
- Rodríguez Goyes D and South N (2017) The injustices of policing, law and multinational monopolisation in the privatisation of natural diversity: Cases from Colombia and Latin America. In: Mol H, Rodríguez Goyes D, Brisman A, et al. (eds) *Environmental Crime in Latin America: The Theft of Nature and the Poisoning of the Land*. London: Palgrave, pp. 187–212.
- Sattorova M (2016) Reassertion of control and contracting parties’ domestic law responses to investment treaty arbitration: Between reform, reticence and resistance. In: Kulick A

- (ed.) *Reassertion of Control over the Investment Treaty Regime*. Cambridge: Cambridge University Press, pp 53–80.
- Schill S (2015) *Reforming Investor–State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.
- Schmidt S (2020) Thoughts on the legitimacy, sustainability and future of ISDS in times of crisis. Available at: <https://www.mondaq.com/austria/operational-impacts-and-strategy/988580/thoughts-on-the-legitimacy-sustainability-and-future-of-isds-in-times-of-crisis> (accessed 10 February 2021).
- Schultz T and Dupont C (2014) Investment arbitration: Promoting the rule of law or over-empowering investors? A quantitative empirical study. *European Journal of International Law* 25(4): 1147–1168.
- Shultz J (2009) The Cochabamba water revolt and its aftermath. In: Shultz J and Draper M (eds) *Dignity and Defiance – Stories from Bolivia’s Challenges to Globalization*. Oakland, CA: University of California Press, pp. 9–42.
- United Nations Conference of Trade and Development (UNCTAD) (2019) World investment report 2019. Available at: https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf (accessed 10 February 2021).
- Varney W and Martin B (2000) Net resistance, net benefits: Opposing MAI. *Social Alternatives* 19(1): 47–51.
- Weghmann V (2020) Taking our public services back in-house. *Public Services International*. Available at: <https://publicservices.international/resources/publications/taking-our-public-services-back-in-house--a-remunicipalisation-guide-for-workers-and-trade-unions?id=11108&lang=en> (accessed 10 February 2021).
- Wellhausen RL (2016) Recent trends in investor–state dispute settlement. *Journal of International Dispute Settlement* 7(1): 117–135.

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