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An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege

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I. The Case against ISDS in CETA and TTIP: Hysteria or Genuine Concern?

Among those familiar with the field of investment arbitration, the strong political reaction against the investor state dispute settlement provisions (ISDS) included in the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) and originally planned to be included in Transatlantic Trade and Investment Partnership between the EU and the US (TTIP) comes as a surprise. After all, European states have concluded more than 1400 BITS in the past. A general indictment of the investment arbitration practices as biased in favor of investors, they claim, is misguided and lacks plausible evidence. It is misguided because in terms of tribunal composition states and investors have an equal role to play in the constitution of the tribunal. Furthermore the substantive norms of this agreement, like other agreements, articulate basic investor related requirements of justice: They require nondiscrimination, fair treatment or prohibiting expropriation without compensation or ensuring the possibility to repatriate investments and the like. As far as arbitration outcomes are concerned there is also no evidence of bias. Individual award decisions that hold in favor of investors on contestable grounds may exist, but there is no dispute settlement procedure that will not occasionally produce results that will leave many unconvinced, as public lawyers familiar with the adjudication of rights cases by domestic or international courts will attest. More importantly, as a statistical matter more than half of the cases brought to arbitration are effectively decided in favor of the state. Finally, to the extent there are residual concerns relating to past practices, they can be addressed. The CETA and potentially the TTIP too would include progressive provisions on transparency and participation, for example. And investor-protecting general norms that have in the past occasionally been interpreted in a way that has precluded taking into account legitimate

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government purposes can be specified to prevent that from happening in the future. So the argument goes.[2]
In the following I will seek to briefly sketch a broader historical context for the debate on investor-state arbitration provisions in TTIP and CETA. Within such a broader context the wholesale rejection of ISDS provisions in these treaties will, I think, appear in a different light. The field of investor state arbitration is historically connected to purposes and contexts, which are strikingly different from the contemporary world of trade and investment relations between liberal constitutional democracies. What might conceivably have been a mutually useful policy instrument in the relationship between developing and developed countries – and there is much that can be contested even in that context - has no plausible role to play in the relationship between developed liberal constitutional democracies. The idea of investment arbitration as a field with its own separate dispute resolution infrastructure should be seen as an inherently dubious transitional phenomenon – perhaps comparable to the League of Nations Mandate System or the UN Trusteeship System - that deserves to wither away over time, rather than being reformed.

II. BITs and ISDS provisions: Between Justice and Investor Privilege

The great majority of BITS negotiated in the last four decades of the 20th century concern the relationship between a developed and a developing country. In that respect the first modern BIT, concluded between Germany and Pakistan in 1959 was typical. Developed countries were exporting capital, developing countries imported capital. Within that context BITS were supposed to help solve two quite distinct problems: The first was to secure justice for foreign investors. The second was to create incentives for foreign investors to invest in the developing country. Neither is a plausible concern for the relationship between developed liberal constitutional democracies. Yet these two concerns, and the tension between them, account for the present structure and culture of investment arbitration.
The first problem is straightforward: Many developing countries had instable, corrupt or dysfunctional political and legal systems. Additionally, developing countries, just released from colonial tutelage, were often a battle-ground for warring Cold War ideologies and interests. There was the fear of socialist revolution, leading to expropriation without compensation as well as the fear of unfair treatment, when a new government would renege on guarantees provided by the previous government. Foreign investors are never a favored constituency in the context of national mass movements or populist uprisings; all the more so, when these movements subscribe to socialist ideologies. In that context the idea that foreign investors could rely on domestic processes for fair and non-discriminatory protection of their investment appeared to be fanciful.

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[2] For a recent general defense of investor state arbitration generally see Charles N. Brower and Sadie Blanchard, 'From "Dealing in Virtue" to "Profiting from Injustice: The Case against the "Re-Statification" of Investment Dispute Settlement' (2014) 55 Harv. J. Int´L. Studies 45. For a complex endorsement of such a practice with reference to TTIP see Joseph H.H. Weiler, European Hypocrisy: TTIP and ISDS' (*EJIL Talk*, 21 January 2015) http://www.ejiltalk.org/european-hypocrisy-ttip-and-isds/ accessed 25 May 2015.

Of course this rationale for BITS has very little purchase when it comes to investments among developed liberal constitutional democracies committed to an independent and impartial judiciary implementing the rule of law. Yet it is the primary rationale cited in favor of ISDS provisions in CETA and TTIP. Due process, protection against discrimination and expropriation are standard fare for domestic courts protecting constitutional or human rights in these contexts. Foreign investors from Europe might plausibly be skeptical about the rule of law infrastructure and political background conditions in some US States, but can they plausibly be concerned about US Federal Courts not being duly attentive to their interests? Conversely US investors may have their doubts about the domestic legal and political infrastructure in one or the other European Union state – can Romanian or Bulgarian courts really be trusted? - but could they plausibly be concerned about the practices of the CJEU or the ECtHR? In the US Federal Courts and in Europe European judicial institutions supported by a strong general constitutional infrastructure committed to the rule of law, provide all the guarantees one could plausibly ask for, if the concern is non-discrimination and justice for foreign investors. Not surprisingly, those who lobby for the ISDS provisions in CETA and TTIP are unable to come up with any plausible examples of judicial bias that might indicate that there is in fact a problem that an ISDS mechanism needs to remedy. Therefore the suspicion that something else must going on is not fanciful.

The original point of BITs was not just to ensure that injustice would not be perpetrated on foreign investors. That justification alone would not explain why developing countries would accede to such treaties. Why should they engage in such an altruistic act in favor of foreigners? Instead there were two additional reasons in play, one relating to plausible policy reasons, the other pointing to something darker, more problematic. Seen in the most generous light, the point of BITS and ISDS provisions was to establish credible commitments by the capital-importing state to attract foreign investors from the capital exporting state. Attracting foreign investment was believed by many, including the World Bank and the IMF, to be central for successful development. Attracting foreign capital and the foreign know-how that would come with it would help the country on its own path to progress and prosperity.

But there is also a darker story to tell: Interpreted in a less generous light, many of the BITs can also be understood as an act of collusion between often corrupt and despotic governments in developing countries and western states serving the interests of their corporate constituencies. Capital importing countries were sometimes run by corrupt and authoritarian regimes that, to put it carefully, did not prioritize development. But such regimes still had a reason to sign on to investment protecting BITs and the respective ISDS provisions: foreign investments generate revenue in the form of taxes, licensing fees etc., revenue that would flow in government coffers to be used by those in power to secure their position, be it to enrich themselves or to buy off relevant constituencies. In such a context BITs helped ensure that western investors would gain safe access for investments to exploit natural resources, thereby effectively helping to prop up authoritarian and kleptocratic regimes.

These in part legitimate and in part dubious reasons for establishing BITs and ISDS in the postcolonial setting provide rationales for *pushing beyond fairness for investors*. They push towards the *establishment of a privileged status for investors as an incentive to invest*. If I want to attract you to invest here, either because I believe this is necessary

for development or because it helps me to secure my power, I don´t just promise that you will be treated fairly and will enjoy adequate protection against injustice. I promise to offer you the most favorable level of protection of your investment I can. Historically BITs did not just restate basic principles of fair treatment and non-discrimination and established procedures for their protection. BITs have traditionally been drafted in a way that signals the prioritization of protecting the value of the investment, generally not susceptible to ordinary trade-offs that might reasonably be made in light of legitimate public purposes. Even when the provisions of a particular BIT is not itself textually biased against legitimate countervailing considerations, many BITs contain most favored nation clauses that allow arbitrators to draw on other more specifically investor friendly provisions of other BITs a capital importing state has entered into. And even when such a clause does not apply, there is still a general background understanding within the investment arbitration community of what the purposes of these agreements are and that these purposes are generally best served by stronger, rather than weaker investor protection.[3] How can this not affect the way arbitrators interpret the general clauses of such agreements? The bias in favor of investors often cited as a ground for suspicion against these arrangements today has historically been supported by rational motivations of the relevant treaty-making actors and were thus in line with the treaties' purposes.

Clearly neither of these purposes has any plausible role to play for the justification of ISDS provisions in CETA or TTIP. Privileging foreign investors among economically developed mature liberal constitutional democracies to attract capital by seeking to immunize them from financial implications of regulatory change merely supports a (de-)regulatory race to the bottom. There might be some who embrace such an idea as politically attractive and welfare-enhancing, but that would be a highly contested political proposition, doomed to failure in most arenas where democratic endorsement matters. Indeed, the proponents of ISDS provisions in CETA and TTIP insist that they are not about privileging investors. So what about the arguments that there is in fact no bias, at least not anymore, today?

The arguments surrounding claims about bias raise complex methodological questions, either way. Here it must suffice to point out the obvious[4]: Imagine, counterfactually, we

[3] In a cutting edge edited volume on the relationship between International Investment Law and Comparative Public Law, the relevance of public law as a relevant standard for the restriction of investors rights and the usefulness of comparative public law in this regard was something that was argued for in specific chapters, not something that was taken for granted, see Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (OUP 2010) . Furthermore the idea that in investment arbitration, like in other areas of rights-based public law, proportionality plays a central role to accommodate legitimate public interests as a limitation on rights has been advocated by outsiders of the field (see Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2010) 4 Law and Ethics of Human Rights 47. but resisted vehemently by insiders (see, José E. Alvarez & Katheryn Khamsi, 'The Argentina Crisis and Foreign Investors: A Glimpse into the Heart of the International Investment Regime' (2009) 332 The Yearbook on International Investment Law and Policy 379, 441. See more generally José E. Alvarez & Tegan Brink, 'Revisiting the Necessity Defense: Continental Casualty v. Argentina' (2012) 9 Transnat'l Disp.Mgmt. 319, available at www.transnational-dispute-management.com/article.asp?key=1828 accessed 25 May 2015.

[4] For a classical account of the interests of relevant actors in the arbitration process see Yves Dezelay & Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction*

had individual rights issues relating to national security decided by tribunals staffed with arbitrators drawn from individuals with distinguished careers in the military, the police or national intelligence services, complemented by leading academics focused on security studies. Conversely, imagine we had those same rights issues decided by tribunals staffed by leading individuals drawn from human rights organizations such as Amnesty International, Human Rights Watch, Greenpeace etc., supported by leading academics in the field of human rights. Does anybody doubt that the pattern of outcomes would differ considerably? The claim that there is no reason to worry about bias when we are dealing with an epistemic community of investment experts drawn from large law firms, generally specialized in providing services for MNC´s complemented by academic experts closely aligned with them, is not convincing. Add to this a morally deeply ambivalent history of structurally privileging investments for the reasons outlined above, and the claim that there is no bias becomes a hard sell. Furthermore the fact that only 40 to 50% of the cases brought by investors against states lead to (at least partial) victories for the private investor is hardly evidence against bias. Is there any other procedure where private actors have anything close to a 40-50% success rate going up against public authorities before an impartial and independent tribunal in first instance? It is not obvious that there are any.[5] This does not prove anything much - there may be a host of explanations for differences of success rates - but it certainly does not strengthen the case against bias of investment tribunals. Finally, whereas it is not sufficient to prove bias to cite individual examples of arbitral awards that appear to be inappropriately investor-friendly, the dearth of countervailing examples of obvious overzealous protection of state interests against investors by investment arbitration tribunals is striking. Whereas in other fields – think of constitutional rights protection – it is generally easy for anyone to come up with a list of constitutional court decisions erring on the side of rights protection as well as erring on the side of failing to protect a right (those lists will be different, of course, depending on political background assumptions), it appears to be less obvious that there is such a symmetry in the investment field.

III. Towards an Empire of Capital for the 21st Century?

It is illuminating analytically and thus not inappropriate, even if one-sided and incomplete, to analyze BITS and the ISDS as a project of empire. In the postcolonial context of the second half of the 20th century investment protection regimes could be described as continuation of western imperialism under modern conditions: the protection of investments was claimed to serve justice or development aims (the 20th century capitalist version of the late 19th century racialist "white man's burden") while

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of the Transnational Legal Order (University of Chicago Press 1998). For a more recent account, see Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) EJIL 387.

[5] In Germany the quota for at least a partial success in front of the public law courts by private litigants in the first instance is generally below 25%, see for example the 2013 Report by the President of the Lower Saxony Public law Court of Appeals of 15 April 2014. Whether this is universalizable across jurisdictions is a point that would require further comparative empirical research.

much of the actual practice amounted to collusion between western corporate interests and authoritarian and/or despotic kleptocratic national regimes for the benefit of western interests. What is new in the 1990s after the end of the Cold War is that the empire is no longer geographically circumscribed. Since NAFTA and the European Energy Charter, further expanded by CETA and TTIP, the privileges of foreign investors can increasingly be invoked against western developed liberal constitutional democracies. Investors are immunized not only from the vagaries of underdeveloped and corrupt national legal processes of the empires underdeveloped provinces, but also from the laws and democratic processes of the traditional metropolitan heartlands. Investors and the professional class of those that serve them increasingly create for themselves a special law that insulates them from the ordinary conditions of democratic politics.
There is a striking parallel between ISDS regimes and a well-known institution from the tradition of colonialism: “Extraterritoriality” or “consular jurisdiction”. Even though the details varied across time and colonial context, the basic idea of consular jurisdiction – specified in unequal bilateral treaties - was that certain nationals were exempted from the legal processes of the host country in favor of trial by officials more attuned to their interests. These were often consular officials of their home state, but may also have included mixed tribunals including officials from the host state.[6] The basic idea was that you could not trust “barbarian” states and you could not plausibly tolerate that your nationals would be subject to their jurisdiction. One difference between traditional consular jurisdiction and the postcolonial context of BITS was that in the latter case the requirement of reciprocity was formally recognized: If Germany and Pakistan concluded such a bilateral investment treaty it would mean that Pakistani investors in Germany would profit from its guarantees in the same way as German investors in Pakistan. But of course this recognition was mostly a formality. In a world where there is a clear division between capital-importing and capital exporting states, the formal recognition of reciprocity merely covered up the reality of privileging investors from capital exporting countries.
What is new about ISDS in the context of the 21st century is that the problem of geographic bias disappears. Liberal constitutional democracies themselves are subjected to claims by foreign investors making use of ISDS mechanisms, be it investors based in other liberal constitutional democracies or investors from developing countries that, as “emerging markets”, have morphed into exporters of investment capital themselves. If we think of ISDS, like consular jurisdiction, as an institution of Empire, today’s Empire would not be the Empire of France, Britain, the US or even “the West”. It would be the global Empire of capital. In that Empire those enjoying special protection would not be nationals of any country, but foreign investors. And among the colonized would be the citizens of the traditional western heartlands, who find themselves confronted with the unintended consequences of their own hypocrisy.

IV. The Future of Investment Protection among Liberal Constitutional Democracies

None of the arguments presented here suggest that there is no place for international investor protection, even though it is easy to come up with a long list of more pressing

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6 See Stephen C. Neff, *Justice among Nations* (Harvard University Press 2014), 315-317.

concerns. But any regime that protects investors should respect three core points, that current provisions in the CETA do not (and no currently envisaged TTIP provisions are likely to) fulfill. First, the idea of subsidiarity implies that international remedies are open to individuals only after national remedies have been exhausted (or, in the case of undue delays, reasonable efforts have been made to exhaust them). There is, after all, no other situation in international law where a private party can sue a state without showing that the state's domestic courts are not independent or reliable. Second, the structure of the international dispute settlement system must meet basic constitutional standards for impartiality and independence. The current ISDS mechanisms, even in their revamped CETA versions, do not meet those requirements. If individuals are to be provided with remedies against public authorities, the tribunal making such awards must meet constitutionalist requirements. There must be a properly constituted court of impartial and independent judges as a default requirement. Judges must meet the requirements for judicial appointments to highest courts. That means that senior partners of major law firms without additional judicial experience or serious academic reputations do not make the cut. The skills they have may be first rate, but those skills are related to serving their clients as part of private practice. That may be a stepping stone for a career in adjudication, but it is not enough to make them plausible candidates for high-level adjudication. Arbitration procedures by private actors against public authorities are to be permitted, if at all, only against the backdrop of default judicial procedures that meet constitutionalist requirements. Finally, there is no specific problem of investment protection that justifies having a special investment protection regime. Besides arbitrary facts related to the path dependent evolution of special investment orientated tribunals, what justifies singling out the interests of foreign investors as a particularly protection-worthy group? What about other traders, who face significant losses when confronted with customs barriers or other equivalent barriers?[7] So let this be the choice: Either the EU and its American partners agree to subject the rules they agree on to an independent and impartial tribunal and require as a precondition for the admissibility that investors have exhausted local remedies. Or the enforcement of investors rights under TTIP and CETA proceeds along the same lines as other interests: Through domestic processes, flanked, as a last resort, by inter-state diplomatic processes and the possibility of inter-state arbitration. An Empire of capital along the lines encouraged by ISDS rules in CETA and TTIP will only be the cause of justified backlash, undermining the credibility of liberal constitutional democracy and its aspirations of global and regional legal integration in the long term.

[7] Traditionally FDI was seen to be worth more than national investment because of the technological transfer and positive spillover to the host country this has often implied. But of course this special function of foreign investments does not generally exist in developed liberal constitutional democracies (I thank Anne van Aaken for this point). Furthermore it is not true that investors, once they have invested are more vulnerable than traders who only have their merchandise to lose. If your factory in state A produces for a specific market in state B, then the denial of access to that market may have a similar effect as an expropriation of such a factory in state B.