

Investor State Dispute Settlement: Institutionalising 'Corporate Exceptionality'

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Abstract

This paper scrutinises the Investor-State Dispute Settlement (ISDS) mechanism, which allows foreign investors to sue host governments for any regulations that might directly or indirectly affect private investments. It gives investors rights over host-states – and local populations – in international arbitration tribunals. The focus of this article is a critical examination of how the ISDS institutionalises a framework of *exceptionality* that is characteristic of neoliberal capitalism; one that centres upon the institutionalisation of subjecting public regulation to the rationality of the market. We argue that this privatised quasi-legal arena is incompatible with the rule of law, human rights and socially emancipatory practices. What this reveals is that the political and economic dynamics that mobilise and shape international investment law are characterised by capitalist class relations. The article concludes with some reflections upon the marketization of public regulation through the ISDS, where profitability and cost-reduction are prioritised over human and environmental rights.

Key words

ISDS; corporate exceptionality; international investment arbitration

Resumen

El artículo examina el mecanismo de Arbitraje de Diferencias Estado-Inversor (ISDS), que permite que inversores extranjeros demanden a los gobiernos anfitriones por cualquier regulación que pueda afectar las inversiones privadas, y que otorga

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derechos a los inversores sobre los estados anfitriones y sobre las poblaciones locales en tribunales internacionales. Se realiza un análisis crítico de cómo el ISDS institucionaliza un marco de *excepcionalidad* característico del capitalismo neoliberal, y que somete la legislación pública a la racionalidad de los mercados. Argumentamos que este ámbito privatizado cuasi-legal es incompatible con el imperio de la ley, con los derechos humanos y con prácticas de desarrollo social. Esto pone de manifiesto que las dinámicas políticas y económicas que modelan el derecho internacional de inversiones se caracterizan por relaciones capitalistas de clase. Se concluye con unas reflexiones sobre la mercantilización de regulaciones públicas a través del ISDS.

Palabras clave

ISDS; excepcionalidad empresarial; arbitraje internacional de inversiones

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1. Introduction

In 2011, the Ecuadorian Provincial Court of Sucumbiós condemned Chevron to pay close to USD 19 billion to a local community of indigenous people to compensate for thirty years of environmental damage in the Amazon rain forest, caused by its subsidiary, Texaco.¹ Chevron has since turned the tables against the Ecuadorian state (even though the state was not party to the original lawsuit) and is suing it at the international arbitration tribunal in The Hague under the Bilateral Investment Treaty (BIT) between the USA and Ecuador. The tribunal decided in favour of Chevron and ordered that the Ecuadorian government suspend the enforcement of the sentence issued by its national court. The BIT that gave jurisdiction to The Hague court included an Investor-State Dispute Settlement (ISDS) clause. The ISDS is a mechanism often included in BITs (but also found in some multilateral trade agreements like NAFTA) that allows foreign investors to sue host governments for any regulations that might directly or indirectly affect its investment. It gives investors rights over host-states – and by extension local populations – in international arbitration tribunals.

In practice, the ISDS allows foreign investors to challenge any host-state's laws, regulations, judicial or administrative rulings or any other government decisions that may impact upon foreign investments. Foreign investors can effectively bypass domestic courts, administrative procedures and other domestic tribunals to sue host-state governments in private, international arbitration tribunals, such as the International Centre for Settlement of Investment Disputes (ICSID). In this way, the ISDS provides foreign investors (and for our discussion here, particularly corporations and shareholders)² with access to a shadow legal system for private capital. The ISDS thus creates exceptional safeguards for corporate investments, particularly those of large trans-national corporations (hereinafter, TNC).³ The focus of this article is a critical examination of how the ISDS subjects public regulation to the rationality of the market at the international level and institutionalises a framework of *corporate exceptionality* that is characteristic of neoliberal capitalism. In this privatised quasi-legal arena, the ISDS creates a space riddled with contradictions in terms of what, we argue, is an incompatibility with the rule of law, human rights and socially emancipatory practices.

The article begins with a brief overview of the ISDS mechanism, locating its emergence historically, at the height of decolonisation. ISDS is illustrative of how former colonial powers maintained exploitative relationships with newly formed nations to protect private capital; and why some states, the USA particularly, supported decolonisation so fervently as a means to develop new markets and expand capital accumulation (Harvey 2004). The initial justification for ISDS clauses

¹ Texaco carried out extraction activities in the Lago Agrio oil fields in Ecuador from 1964 until 1992. These activities, in a region inhabited by over 35,000 indigenous people, led to a major environmental disaster caused by the contamination of soil and rivers with toxic oil sludge. The consequences on the local population have been catastrophic, with rates of cancer up to ten times what they are in the rest of the country (see UDAPT – Unión de Afectados y Afectados por las Operaciones Petroleras de Texaco – 2016, Spanish only). During the trial, the plaintiffs argued (and won) that the contamination was a consequence of a planned business model aimed at reducing costs and bypassing appropriate (and essential) environmental protections and waste treatment. The condemnation was upheld by Ecuador's Supreme Court but the amount of compensation was lowered to just over USD 9.5 million. Chevron acquired Texaco in 2001.

² The corporation has a number of exceptional features that emanate from its legal architecture: it is legally recognised as a separate entity from its shareholders – it is its own person; the ownership of its shares are transferable and unlimitedly divisible; its owners have limited liability; and the corporation has an undefined continuity of existence – it is immortal (Ireland 1984, 2010, Henderson 1986, p. 111; see also Glasbeek 2003, pp. 8-14, 2007). We cannot expand upon how the corporate personality shields both corporations and shareholders here, although this argument has been rigorously developed by Marxist scholars (see for example, Ireland 1999, Tombs and Whyte 2015, Baars 2016, Glasbeek 2017, Whyte 2018, forthcoming).

³ Michalowski and Kramer (1987, fn 1) have pointed out that, as transnational entities, "TNCs exist above and beyond the state in which they operate", locating their activities within an exceptional framework, neither wholly dependent upon national or international law nor home-state or host-state regulations".

in international investment treaties was often predicated on the supposedly weak legal systems of newly independent states and the need to offer protections to foreign investors. It was promoted as guaranteeing the rule of law. The compatibility of the ISDS with the rule of law is scrutinised in Section 3, where we argue that it is a one-sided rule of law that protects the investors, but not local populations. Fundamentally, what this reveals is that the political and economic dynamics that mobilise and shape international investment law are characterised by capitalist class relations. Section 4 analyses how the ISDS aims to politically and legally neutralise local populations. The section examines the class character of these social relations. We also comment upon the recent momentum of struggles that are contesting the ISDS, and corporate power more generally. Underpinning these struggles is a recognition of the role that states play in contributing to and facilitating the creation of optimal conditions for capital and capital accumulation at the expense of the many. Section 5 turns to the *globalisation* of the socially damaging impacts of ISDS, which are no longer concentrated in the Global South. It raises questions about new generation BITs in which the political content of state economic measures and global policies are played out, “not only in the general sense that [they] assist in capital accumulation and exploitation, but also in the sense that [they] are necessarily adapted to the political strategy of the hegemonic fraction” (Poulantzas 2000, p. 169). We comment upon the role of the state in perpetuating class contradictions through these new BITs. The article concludes with some reflections upon the marketization of public regulation through the ISDS, where profitability and cost-reduction are prioritised over human and environmental rights.

2. The Investor State Dispute Settlement Mechanism

The origins of ISDS must be understood within a broader context of large-scale *decolonisation* and shifts in the geo-politics of the 1960s and 1970s; a time when the Global South was consolidating its solidarity against assaults from the industrialised world upon their national resources. Many newly independent states included nationalising resources and introducing protectionist measures as part of their initial economic strategies (Friedan 2006). Where European empires had used the colonies to expand their markets and acquire access to primary resources, a new global economy was developing, one that inspired Global South unity (i.e. the G-77) and gave impetus for a New International Economic Order (NIEO). This new order threatened capitalist relations of production since the protectionist measures of those states had direct impacts upon foreign investors (Miles 2013, pp. 71-100). In response, those foreign investors turned to their home-states for support, since they had historically facilitated trade in the former colonies. Moreover, the heightened political unity amongst Global South nations rattled the traditional, economic powers;⁴ and the ISDS effectively gave former colonial powers a means to undermine challenges to their dominance. The formal mechanisms of empire were replaced by other processes of domination namely, trade and economy: neo-colonialism. Kwame Nkrumah (1965) described the process of neo-colonialism in very simple terms: a neo-colonial state has an economic system (and thus political policies that flow from that system) directed from outside the country. ISDS has a neocolonial rationality because it is not only a mechanism to protect foreign investments, but also a means

⁴ The G-77 identified a new phase in their struggle against imperialism in the challenge to the power of TNCs as part of an overarching dissent from the international legal status quo on colonial plunder or neo-colonialism. The impetus was given by the Chilean President Salvador Allende, who had been elected in 1970 on a Marxist platform despite a sustained attempt by the US corporation ITT and the CIA to undermine the election. The Allende government had been locked into a struggle with the US corporation Kennecott over Chile's copper resources. In 1972, Allende addressed the UN General Assembly and emphasised the solidarity between Chile, a number of African and Soviet bloc states. He framed his argument through a neo-colonial perspective which was picked up by the G-77. They then designed their programme around the momentum for a New International Economic Order in the 1970s that explicitly framed in terms of neo-colonialism and identified TNCs as mechanisms for advancing the colonial power of the industrialised nations.

for states to engage politically outside of the diplomatic sphere.⁵ The role of foreign investment in expanding and bolstering neo-colonialism was summed up by Jagdish Bhagwati in 1977; he commented that “private investments, following the flag in past models, are seen now as precursors of the flag with brazen colonialism replaced by devious neo-colonialism” (quoted in Slobodian 2018, p. 219).⁶

The ISDS mechanism is a clause incorporated into free trade agreements. It provides guarantees to foreign investors that if there is a problem on the return of their investment because of regulations imposed by a host-state, the investors can retaliate. It is a mechanism that exists wholly to benefit and protect capital (Monbiot 2015).⁷ The ISDS was rapidly consolidated with the establishment of the ICSID (International Centre for Settlement of Investment Disputes) in 1966. It was promoted as a “neutral” tribunal and is described as an “independent, depoliticized and effective dispute-settlement institution” designed to encourage “the international flow of investment and mitigate non-commercial risks” (World Bank 2017).⁸ In practice, it is a *corporate court* that was established “in response to postcolonial state challenges to prevailing investor protection rules” (Miles 2013, p. 88). Perhaps more accurately, the establishment of the ICSID, like other arbitration tribunals, was a state response to appeals from foreign investors that did not want to enter into litigation in domestic courts; they argued either that the judicial systems were corrupt or simply too incompetent (Miles 2005, Gantz 2016). The distrust in the domestic court systems of host nations has not changed and “foreign investors [remain] extremely loath to rely on local courts to resolve business disputes” (Ginsburg 2005, p. 119). As the Ecuadorian case at the beginning of this article illustrates, the ISDS provides foreign investors, very often corporations, with not only the possibility to

⁵ Leo Panitch and Sam Gindin (2013, p. 117) note that the ICSID was established following a US Supreme Court ruling in 1964. The Supreme Court stated, “it would not examine the validity of a foreign expropriation of property in the absence of an explicit treaty signed by the states in question”. The context of this ruling was a growing number of disputes over the expropriation of foreign capital in the Global South, which had a significant and direct impact upon the USA and its corporations.

⁶ David Harvey (2004) points out that in 1945, following the Great Depression, the USA led the core capitalist countries to deal collectively with the problem of the over-accumulation of capital that had plagued them in the 1930s. Part of the *solution*, he argues, was a geographical expansion of capitalism (hence the USA’s support for decolonisation). The role of the USA in the new financial institutions, like the IMF and the World Bank, allowed it to “project its economic power outwards (...) to force open markets, particularly for capital and financial flows (...) and impose other neoliberal practices (...) upon much of the rest of the world” (*Idem*, p. 70). At the peak of the Cold War, global capitalism was being led by the USA and its economic allies, all of which were facing problems to absorb their capital surpluses. It was at this point that the IMF, led by the USA, began conditioning its loans upon structural adjustment plans (SAPs) that included opening-up markets to foreign direct investment (FDI). The rationale, according to Harvey (*Id.*), was rooted in the attempt to deal with over-accumulation. Hyperinflation and the debt crisis of the 1980s’ global economic recession backed Global South nations into a corner. In the Global North, there was a shift in the balance of power and interests from production activities to institutions of finance capital (Harvey 2004, p. 78); in the Global South, nations began implementing major programmes of economic restructuring to attract FDI. With the fall of the Soviet Union and changes in the global economic and geo-political landscape, those Global South nations that were not already integrated into the new global economy did so, seemingly consenting to Thatcher’s TINA (*there is no alternative*) mantra. The solidarity and momentum of resistance from the Global South dissipated. A new global economy emerged, one that Balakrishnan Rajagopal (2005, p. 242) points out, was “revealed most clearly by the emergence of foreign direct investment, trade and capital markets”. A new discourse was adopted, centring around the need for FDI and the importance of ensuring the free flow of capital.

⁷ George Monbiot (2015), commenting upon the Transatlantic Trade and Investment Treaty and the inclusion of the ISDS clause, suggests that “... while in the past trade agreements sought to address protectionism, now they seek to address protection. In other words, once they promoted free trade by removing trade taxes (tariffs); now they promote the interests of transnational capital by downgrading the defence of human health, the natural world, labour rights, and the poor and vulnerable from predatory corporate practices”. Capital, although still concentrated in the Global North, perhaps more accurately cumulated both nationally and globally by the “1%” (see Neate 2017). The 1% refers to the slogan made popular during the Occupy Wall Street protests in 2011.

⁸ The Office of the United States Trade Representative (2015) officially notes that the ISDS “resolves disputes between private citizens and foreign governments” through “a *neutral* international forum to resolve investment disputes under international law [in order to] mitigate and protect [US] citizens”.

bypass local courts for business disputes, but even more shockingly to gain financially from human and environmental violations!

The ISDS thus offers exceptional safeguards for ensuring an optimal environment for capital accumulation by equipping foreign investors (and most often these are large TNCs) with a number of advantages: only foreign investors can petition the arbitration tribunal for damages, not states; there is no possibility of appeal; it sets up secretive tribunals composed of corporate lawyers with corporate interests (most are in fact corporate lawyers with strong ties to the corporations seeking compensation, and are not subject to the rules of conflict of interest) and judges; in some cases, the very existence of the case is not made public (Norris and Metzidakis 2010). The effect is that foreign investors can challenge the host-state's domestic regulatory prerogative in a private quasi-legal fora which is inaccessible to the people immediately and most affected by those regulations: the local population. But since the ISDS results from treaties between states, it would seem that ultimately it is the home-state that challenges the sovereignty of the host-state through foreign investments, without necessarily engaging on a formal, political level. In other words, what might ordinarily have been state-state negotiations can be carried out through private-state arbitration with the result of conditioning domestic markets in a forum removed from the people directly impacted by the decisions taken.

Some ISDS arbitrations have had incredible results including government pay outs of millions, even billions, of tax-payers' money to corporations as compensation for regulations that the corporations have argued undermined their profitability. Examples include *Metalclad v United Mexican States* (2001), where the US corporation sued the Mexican federal government over a municipal decision to deny a permit to operate a toxic waste dump that risked contaminating the local water supply. The government was forced to pay over USD 15 million to Metalclad. In the case *Occidental Petroleum (Oxy) v Ecuador* (2012) the state was ordered to pay USD 1.7 billion (plus interest) in 2012 to Oxy for having cancelled its operating contract in 2006.⁹ Another example is the case *Veolia v Egypt* (2015) where a French company sued Egypt over several labour market regulations, including an increase in minimum wage. The threat of litigation by armies of lawyers at corporate disposal is sometimes enough for a proposed law or regulation to be withdrawn (Tienhaara 2011). The ISDS clause has been included in a series of US trade deals that resulted in the contracting state's tax-payers paying out more than USD 440 million to corporations for toxic bans, land-use rules, regulatory permits, water and timber policies, as well as in legal fees when governments defend themselves.¹⁰ In the case *Methanex v US* (2005), a Canadian company sued the US federal government because the state of California prohibited the use of the toxic substance MTBE (methyl tertiary-butyl ether) as an additive in gasoline given the potentially noxious effects on the groundwater. Although the USA won the case, it spent millions of dollars in its defense, money that was either taken away or not being invested from other areas, such as education, healthcare, etc.

Corporations have taken full advantage of the ISDS and the use of the mechanism has increased exponentially since 2000. From the end of the 1950s, when this system was first established, until 2000, only 50 cases were filed. Since 2000, there have been over 500 cases using the ISDS mechanism. Since late 2014, over 600 claims have been filed, of which 356 have been concluded) [United Nations Conference on

⁹ In response to this order, Ecuador called for a binding treaty on the human rights obligations of corporations in 2013 at the UN. Ecuador was joined by South Africa, and over 85 states and 500 civil society organisations. Ecuador's move resulted in the adoption of Resolution A/HRC/RES/26/9 by the UN Human Rights Council on 26th June 2014 that established the Open-ended intergovernmental working group (OEIWG) on transnational corporations and other business enterprises with respect to human rights.

¹⁰ Some examples include Chevron trying to evade liability for its Ecuadorian Amazon toxic contamination; Phillip Morris attacking Australia's cigarette labeling policy; Eli Lilly attacking Canada's drug patent policy; European firms attacking Egypt's post-revolution minimum wage increase; and South Africa's post-Apartheid affirmative action law. Others are discussed below.

Trade and Development, – hereinafter UNCTAD – 2015]. If we look at the results of the claims 37% were decided in favour of the state, 25% in favour of the investor, 28% of cases were settled, and the remaining were discontinued (UNCTAD 2015). A cursory glance at these figures appears to show decisions in favour of the state apparently in the majority. But this is misleading. The combination of results in favour of the investor and cases settled is over half of all cases. Since settled cases often means that there has been some kind of agreement, or concession, the number of cases that benefit foreign investors is clearly in majority. A recent example is *Vattenfall v Germany* (2013) where the company claimed an astonishing €1.4 billion. Vattenfall, a Swedish corporation, used the ISDS clause to sue the German government over its decision to phase out nuclear power. Germany eventually settled the dispute by agreeing to reduce environmental standards that had been imposed upon one of Vattenfall's coal plants (see Günther *et al.* 2012). Olivet and collaborators (2017, p. 17) draw attention to a second set of statistics recently produced by UNCTAD, which only looks at ISDS cases in which arbitrators decide issues, such as whether there really is an investment etc., and for which there was an actual decision taken (rather than a settlement or a discontinuation of a case). In that second set of statistics, investors won 60% of the cases and states only 40%. In other words, as they point out, “when investors do actually have a case and are willing to continue with it to the end, they have a high chance of winning” (*Ibid.*). In any case, regardless of what anyone claims the statistics show, one can only assume that the sheer increase in number cases – necessarily brought forward by corporations – is a relatively clear indication that there must be an advantage in it for them somewhere.

The European Commission (2015) released a statistical overview on the ISDS entitled *Investment State Dispute Settlement (ISDS): Some Facts and Figures in 2015* based on the previous year. It revealed that in 2014, EU investors were responsible for 64% of all new ISDS cases worldwide. In the same year, claimants initiated 42 known treaty-based ISDS cases, of which corporations were awarded upwards of USD 50 billion in three closely related cases, which is the highest known award by far in the history of investment arbitration (European Commission 2015, p. 5). It went on to note that EU investors are the most active users of ISDS accounting for more than 50% of claims. Of these, 72% of all EU based claims and 39% of ISDS cases at a global level have been initiated by investors from the Netherlands, the UK, Germany, France, Spain and Italy, although none against the US. However, EU member states have been challenged by investors from outside the EU in only 5% of all ISDS cases globally (a total of 29 claims from investors from Russia, Norway, Switzerland, India, Israel, Turkey, Lebanon, the US and Canada). A total of 16 ISDS claims have been filed against the USA (15 from Canada, one from Mexico); none have been successful. The ten countries that have historically been most often challenged are Argentina (56 cases), Venezuela (36 cases), the Czech Republic (29 cases), Egypt (24 cases), Mexico and Ecuador (21 cases each), India and Ukraine (16 cases each), Poland and the United States (15 cases each). It is noteworthy that unlike other countries, and despite having 50 ISDS agreements in place, the USA has never lost a case (Office of the United States Trade Representative, March 2015). US corporations, on the other hand, have instigated 127 cases against host nations over the past 15 years; that is roughly 21% of cases, which is the largest individual country share of ISDS claims. Likewise, the UK has over 90 ISDS clauses in its trade agreements and has not yet lost a case (Armitage 2014). According to an extensive study by Gus Van Harten and Pavel Malysheuski (2016), the largest, or “extra-large” multinationals (those with over USD 10 billion in annual revenue) have a success rate using the ISDS of “... 70.8%, measured by simple win-loss outcomes at the jurisdictional and merits stages of an ISDS claim combined”. This favourable outcome rate “... exceeded by a large margin the success rates of other claimants (42.2%)” (*Idem*, p. 2).¹¹ Van

¹¹ The “jurisdictional stage” is a level of division of the arbitration process that refers to the preliminary determination as to the jurisdiction of the tribunal, which will also determine the ground rules between the parties in settling the dispute. The “merits” refers to Arbitration Rule 41(5) ICSID, which is “... an

Harten and Malysheuski point out that “[t]he success rate of extra-large companies at the merits stage in particular (82.9%) stood out compared to that of all other claimants (57.9%)” [*Idem*]. And although small and medium-sized enterprises and wealthy individuals do not fare as well, their data indicates that investors on the whole have a high degree of success within the system.

Many investment treaties grant protections and substantive rights to foreign investors, and many have arbitration mechanisms with which to enforce those rights (for example, the ICC’s International Court of Arbitration). However, no arbitration mechanism offers quite as many advantages for TNCs as ISDS. A crucial function of the ISDS mechanism is to create a state of exception by redefining the legal rights and duties of foreign investors while suspending the host-state’s regulatory power. By doing so, the ISDS enables TNCs to *construct* their claims in contractual terms leaving aside state sovereignty and most importantly the interests of the local population. The ISDS has thus enabled arbitration tribunals to radically reshape the notions of property and expropriation (Perrone 2017, Nichols 2018). Although in several cases the investors’ claims were rejected, the general outcome of the system has been to legally improve the position of investors in detriment of states and the local populations. Moreover, the *expansive* interpretation of property rights and expropriation has created uncertainty among states and investors, which favours corporations in several ways. Firstly, because of this uncertainty, governments tend to self-restrain their use of regulatory powers (i.e. *regulatory chill*) [Tienhaara 2011]. Secondly, as Howse (2017, pp. 58-59) argues, powerful corporations may still threaten states even if they ultimately lose the claim because they can reallocate part of the risk by resorting to third party funding, such as hedge or vulture funds. Lastly, Howse’s (*Idem*, p. 60) recent study shows that in almost all 121 settled investment proceedings he investigated, where public information is available, the investor obtained either significant monetary relief or a significant adjustment of the regulatory framework to its benefit. In light of these elements, one might conclude that rather than evidence of an independent and impartial dispute resolution regime, the statistics illustrate one of the key survival mechanisms of capitalism, which is to concede when necessary to maintain the legitimacy of a system that overwhelmingly favours capitalist interests (see Pearce 1976).¹²

What is exceptional about ISDS is that it provides adjudicative rights to corporations and other foreign investors that allow them to directly stake their claims against sovereign states. However, as in the abovementioned case of *Oxy v Ecuador* (2012), popular resistance may force states to change their policies because they need to maintain internal order and win elections (Perrone 2016, p. 4). In the case of Ecuador, the mobilisation of the local population led by indigenous political movements had a profound impact upon the critical position that the state adopted on regional and international forums regarding the ISDS (Schneiderman 2016, pp. 147-152). That case illustrates how the international investment regime is more than a regime protecting foreign investment from host-states; it also constitutes a site where foreign investors and local populations struggle over local resources (Perrone 2016, p. 5; see also Polanyi 2001, p. 233). Moreover, it is in those cases that we can identify the tensions between foreign investor rights and state regulatory powers. Evidence of the pernicious impacts of ISDS has, however, given currency to critical voices that reject the association of ISDS with the rule of law. The abovementioned

expedited procedure to dispose of unmeritorious claims at the preliminary stage of a proceeding. The rationale for the Rule is to allow claims that manifestly lack legal merit to be dismissed early in the process before they unnecessarily consume the parties’ resources. It applies to objections to jurisdiction as well as objections on the merits” (ICSID 2018). The category “overall” refers to the number of cases overall.

¹² Governments sometimes impose stricter regulations upon industry that might negatively impact upon corporate profits. One explanation is what Pearce (1976) described as state intervention in activities which undermine the (capitalist) social order. The capitalist state intervenes in the market or imposes regulations upon industry not to penalise business (and not even necessarily in the *public interest*) but rather to save capitalism from itself. When the legitimacy of the capitalist state is at risk, the state steps in to safeguard the system (Khoury, 2018 forthcoming).

Oxy v Ecuador case has been particularly powerful in building momentum against ISDS amongst varying social groups. This case is significant because it sparked Ecuador's withdrawal from all BITs and was the tipping point for Ecuador's bold move in 2014 at the UN when it called for a binding treaty on corporations for violations of human.¹³ At its inception, the ISDS was defended as a means to address the need to lower political risks associated with investing in countries with weak institutions. More recently, however, the dominant narrative in support of BITs has shifted towards emphasising the role ISDS has in fostering good governance and the rule of law (Sattorova 2014, pp. 163-166). This narrative is part of the broader neoliberal perspective which sustains the belief that the free market and the rule of law are necessary preconditions for democracy (see Schneiderman 2008, pp. 205-222). The key issue we examine in the next section is to what extent the ISDS suspends, rather than strengthens, the rule of law.

3. ISDS and the Rule of Law: Square Peg, Round Hole

There are ongoing debates on what constitutes the *rule of law* (Tamanaha 2012, Møller and Skaaning 2014, Kriebaum 2015). As far back as Aristotle, there has been some consensus that the most salient characteristic of the rule of law is its contrast with the rule of *man*, i.e. "unrestrained rule by another (...) out of concern for the potential abuse that inheres in the power to rule" (Tamanaha 2004, p. 122). A second, generally agreed-upon, core feature is that the rule of law requires that every citizen has equality under the law and before the courts (Tamanaha 2012, p. 233, Møller and Skaaning 2014, p. 15). Notwithstanding, there is little consensus around the defining elements of the rule of law. There are scholars who support thinner definitions and argue that although well-established democracies are governed by the rule of law, democracy is not a necessary condition for it (Tamanaha 2012, pp. 233-236, Kim 2016, p. 7). Others argue for more substantive or thicker definitions centred upon the principles of democracy and respect for human rights (Ellis 2010). The debate on the compatibility of ISDS with the rule of law is, thus, heavily dependent on the more formal or substantive understanding of the rule of law.

There are those who claim that the ISDS mechanism is fully compatible with the rule of law. To support this position, they argue that ISDS respects the core features of the *rule of law*, which they describe as a system of checks and balances with an independent judiciary that ensures due process, predictability and transparency (Kriebaum 2015, Kim 2016). These authors assert that those features exist in the ISDS's *independent* and *impartial* third-party adjudication system with guarantees that both sides will be heard, that there will be judicial protection of equal rights and procedures, and a judicial reasoning justifying the peaceful, legally binding, settlement of disputes (Petersmann 2009, pp. 9-10, Kriebaum 2015). A different analysis of ISDS's compatibility with the rule of law is that it requires going beyond formalities to assess how these mechanisms work in practice. Miles (2013, p. 332) argues that investor-state arbitration offers a one-sided rule of law which only protects the investor. Other criticisms are mostly related to due process issues and can be summarised as lacking transparency in the arbitration process, suspicions about the independence of the arbitrators, and the absence of any appeal mechanism. These criticisms are based on comparing ISDS procedures with the Western constitutional due process protections.

One of the anti-democratic features of the procedures under investor-state arbitration is the lack of transparency and lack of public participation. In most cases, oral hearings are conducted behind closed doors and court documents are not available to the public (Miles 2013, p. 333). The implications of this closed-door system upon democracy and local populations are dramatic. The argument against ISDS is that public scrutiny is essential in order to ensure that communities affected by those decisions have their voices heard (Van Harten 2008, p. 159). A further

¹³ See above fn 11.

drawback of this process is the contested impartiality of arbitrators since the processes and mechanisms of appointing arbitrators do not offer guarantees that preserve their independence (Miles 2013, p. 333). Arbitrators have no tenure and their selection is made by the same parties involved in the dispute. In order to access arbitral positions, candidates need to show “an affinity with international commerce” (*Idem*, p. 376). The *revolving door* effect of the ICSID process is a serious harbinger for potential conflicts of interests for arbitrators;¹⁴ arbitrators’ role as counsels in other disputes involving similar issues raises suspicions about whether decisions made in their capacity as arbitrator can later be used to influence the interpretation of the law applicable to their own clients (*Idem*, p. 377). Moreover, the lack of an appeal mechanism means there is neither a possibility to review case consistency or appropriate allocation of awards, both of which have been identified as serious problems creating unpredictability and incoherency in the field of international investment arbitration (Butler 2012, p. 5). In response, there have been proposals for a permanent International Investment Court and an appellate body with jurisdiction over investor-state disputes that would centralise the adjudication, most recently during the negotiations of the EU-US Transatlantic Trade and Investment Partnership, TTIP (Oliver and Donnan 2015). The expectation is that this would offer consistency, transparency and accountability (Van Harten 2008, pp. 180-181, Werner 2009, p. 117, Miles 2013, pp. 380-382). Although the arguments for more transparency, ensuring arbitrators impartiality and implementing an appeal mechanism may seem compelling, they are also problematic. They do not fundamentally question the logic that drives international investment law, and the ISDS in particular.

Sornarajah (2016) has pointed out that rather than provide a mechanism of redress, an appellate court might only consolidate the ultra-neoliberal rationality behind ISDS by giving it greater legitimacy. He argues that the records show no difference between arbitral decisions taken by judges from the International Court of Justice and those from arbitrators with corporate or other backgrounds. In other words, these *World Court* judges are as likely as investment lawyers to uphold the right to property of foreign investors over the rights of local populations. Consequently, although transparency may help raise awareness among the local and international public of the specificities of the cases and the decisions by arbitrators, the cases will still be framed by the parties’ lawyers, i.e. investors and states, in a technical, depoliticised language that excludes local populations from the debate. The implementation of appointment mechanisms that protect arbitrators’ independence may enable more ideological diversity in the tribunal’s composition, but ultimately it won’t challenge the hegemonic, neoliberal perspective that dominates the field.

More substantive criticisms against international investment law and ISDS have come from human rights scholars who have highlighted the lack of attention given to concepts developed in other areas of international public law, such as human rights or environmental issues (Miles 2013, pp. 295-296). Petersmann (2009, pp. 11-12) points out that despite legal consensus on the principles of justice that rule international public law, such as the universal respect for human rights, its application in the settlement of disputes under ISDS is virtually non-existent. Hirsch (2013) suggests that this may be due to the sociocultural distance between the communities of arbitrators and human rights lawyers. However, his analysis focuses upon some broad differences between legal concepts and principles and investment and human rights regimes rather than exploring the socio-economic factors behind the different rationalities that guide those regimes. He only passingly refers to different career paths and ideological differences (*Idem*, p. 93). What is lacking in his analysis is a more comprehensive discussion of the economic interests and power asymmetries that shape those cultures. Nonetheless, he recognises that investment tribunals often

¹⁴ The *revolving door* has been described as “... the means by which government officials leave office to become lobbyists, and by which lobbyists become government officials” (Rennie 2016).

refer to principles of other legal regimes, such as state responsibility or treaty law, although they have consistently avoided referring to human rights principles (*Idem*, p. 88). The abstention from principles of human rights has become even more conspicuous since human rights law has become a particularly dominant cultural force with respect to other areas of law; nowadays both domestic and international legislation, including most BITs and the Vienna Convention on the Law of Treaties, which prescribes how international treaties should be interpreted, refer to the universal respect of human rights (Petersmann 2009, p. 4).

The explanation of this divergence from the legal standard cannot be found in the law or in an abstract conception of culture, but in the underpinning economic, political and social factors that have enable legal practitioners, and particularly international arbitrators, to neglect human rights principles in their decisions. In his analysis of the case *CMS v Argentina* (2005), Schneiderman (2016, pp. 46-47) stresses the ideological aspect of arbitrators' preference to favour investors' rights over the human rights of local populations. In support of this, he highlights that investor property rights were also protected by human rights law. This case draws attention to two issues: firstly, it reveals the arbitrators' ideology, and secondly, the neglect of human rights raises questions of legitimacy. Debates around the compatibility of ISDS with the rule of law illustrate the internal contradictions within international investment law. The rule of law, far from being the mere operationalisation of idealistic concerns about equality and the limitation of state power, is the *normal* structural arrangement and a central legitimating narrative of current capitalist states (Jessop 2011, pp. 41-42). ISDS creates an exceptional legal regime that allows foreign economic exploitation in host-states regardless of political and legal developments. But, the opening of such an extraordinary space threatens both the internal cohesion and legitimacy of the host-state's legal framework, and consequently of the whole state narrative. Such threats have triggered the development of the so-called new generation BITs established by central societies (USA, Canada and the EU), which we expand upon in the last section. Scrutiny of the rule of law and the legitimacy of ISDS demonstrates that there are significant political and economic dynamics that mobilise and shape international investment law. These dynamics include struggles between various social actors. Local populations have consistently contested the ISDS; recent public-outcry and protest against the ISDS during negotiations for the TPP, TTIP and Comprehensive Economic and Trade Agreement (CETA) incited the EU trade commissioner Cecilia Malmström to declare that "ISDS is now the most toxic acronym in Europe" (quoted in Ames 2015). It is to an examination of some struggles against ISDS that we now turn.

4. Social Damages of ISDS and Sub-altern Struggles

Legal analyses of ISDS are useful to identify its contradictions with the rule of law, however any real challenge to ISDS as a capitalist apparatus must explore the dynamics of the institution that produce those contradictions: the state. We have already described how the ISDS works within a neo-colonial framework. This section expands upon that point by analysing the role of the state in a selection of notable cases. This section develops the argument that the ISDS is used to prevent local communities from struggling politically against socially damaging practices of corporations.

As we have noted, the ISDS is most beneficial to extra-large TNCs working in the liminal space between national and international. Although the interactions between the state, TNCs and national elites can be characterised by common capitalist objectives, certain tensions exist between them.¹⁵ Poulantzas (2000) argues that the state's primary role was one of "organisation" of the dominant class and the bourgeoisie. He locates the state as the "material condensation of a relationship of

¹⁵ Poulantzas (2000) argues that the state is composed of several bourgeois class fractions embracing dominant classes from a variety of modes of production, i.e. non-bourgeois elites such as big landowners.

forces" and "as a strategic field and process of intersecting power networks" (*Idem*, p. 136). The importance of the state is thus paramount and should not be diminished or ignored. Although the protagonists of the ISDS might appear to be the investors (TNCs), the state must remain central to any challenge mounted by social movements and anti-capitalists. Contrary to some declarations of the "retreat of the state" (Strange 1999), it remains the central player in the global political economy. It is the state that ultimately empowers arbitrators and in so doing enables the perpetuation of neoliberal capitalist hegemony by prioritising the protection of the interests of capital, and thus safeguarding the workings of the system.

Perrone (2017) identifies the role of arbitrators as key in shaping the conflict since both the treaties that provide the general legal framework and the individual contracts that regulate the investment, must be interpreted and in many cases *completed* by them. Miles (2013), following Dezalay and Garth (1996), describes international arbitrators as an epistemic community. She stresses the central role they play in directing and legitimising the development of international investment law (Miles 2013, pp. 342-343). Arbitrators' discretionary power is considerable given the indeterminacy of key legal concepts that condition their decisions, such as indirect expropriation, fair and equitable treatment and legitimate expectations (Perrone 2017, pp. 2-3). Arbitrators have expanded investor rights by legally recognising their "legitimate expectations" (Perrone 2016), which may be founded in public or private conversations with state officials or even related statements by the latter. Since arbitrators are not constrained in their interpretations by previous jurisprudence or legal precedents (Thomas and Dhillon 2014, Bonnitcha *et al.* 2017, p. 28), the legitimacy of the system is not based on consistency with previous decisions, but on the consent given by the host-state and the investor. The *contracting parties* trust and recognise the legitimacy of the arbitration tribunal, but this assumes the interests of the host-state and the local population are the same, which is not always the case. Consequently, the arbitration process is all the more important in the neoliberal project because it defuses popular political momentum in sensitive cases involving socially damaging practices; it does this by enabling investors and the state to isolate themselves by framing the conflict as a contractual negotiation. By framing the dispute as a "contract", the ISDS gives foreign investors a legal means to impede governments from protecting local interests when they clash with their own. The dispute plays out as one between the *rights* of investors and the *regulatory* power of the host-state rather than a means to remove the barriers to capital accumulation.

The ISDS, with the consent of states, has played a determinant role in transforming the legal conditions pertaining to private sector "rights" and "public sector" obligations. In ISDS, the "contract" is governed by an international treaty, so although the investor is given rights to be enforced through "contract", that same contract is in fact a public agreement between two states. The relationship between the state and the corporation is thus mystified by the separation between the public and the private spheres. The intimate relationship between home-states and their TNCs is masked and relations of exploitation reified through the ISDS mechanism, where the corporation is given "life" (corporate personhood) whilst the human being is emptied of rights. The impact of the decisions taken during the arbitration process have immense impacts on human life, and physical persons are bound to the consequences of those decisions despite being excluded, without any legal identity or representation in this process. Structuring the conflict as state-against-TNC is paradoxical since it is the state that creates and maintains the legal and material conditions for a foreign investor to operate in its territory, and indeed of the corporation itself (see Tombs and Whyte 2015). It is also the state that integrates the ISDS clause into its legal system upon ratification of BITs. It is the *state* that not only enables and accepts that a foreign investor can sue it before an international arbitration tribunal but that also regulates investor rights (or legitimate expectations) by modifying the legal conditions of the economic activity in question. Thus, as Poulantzas (2000, p. 127) suggests, the state "represents and organizes the long-

term political interest of a *power bloc*". Consequently, it makes little sense to approach the state as a static monolithic entity; rather, it must be understood as a site of struggle, in constant movement. The state mediates between different forces with different, and in some cases contradictory interests, among them those of the foreign investors. As Poulantzas (2000) describes it, the state is best understood as the material condensation of the correlation of different social forces. From this perspective, the contradictory actions of the state are the result of inter- and intra-class tensions, illustrated in the approval of foreign investor operations, the delegation of state sovereignty through the signing of BITs, and the attempt to regulate against the interests of the foreign investor.

Many cases brought to international arbitration under ISDS clauses result from conflicts produced by socially damaging practices. Some of the cases have, at their origin, a conflict derived from environmental harm produced by the expansion of the extractive industry in peripheral and semi-peripheral societies [e.g. *Metalclad v Mexico* (2001), *Tecmed v Mexico* (2003), *Oxy v Ecuador* (2012), *Chevron and Texaco v Ecuador* (2015), among others]. There are also many cases originating in the privatisation of public services during the 1990s. Under the pretext of required investment to expand and improve the quality of essential services, formerly state-owned companies were privatised, and many were sold to foreign TNCs. Acquiring these companies gave TNCs, as foreign investors, immense powers to set the prices and other, often monopolistic, conditions of service. The social harms caused by these measures led to a series of local resistances. Examples include the infamous *Water War* in Cochabamba, Bolivia, where the local population resisted Bechtel's attempts to raise the water price in 2000; and Argentina's 2001 economic crisis and the subsequent regulatory policies implemented by the government to freeze public service tariffs in response to massive local demonstrations. The Argentine crisis led to multiple legal suits by TNCs with public service concessions [e.g. *Vivendi Universal SA v Argentine Republic* (2000); *Azurix Corp v the Argentine Republic* (2006), among others]. There are also cases based on the conflict of interest between corporations and progressive legislations in favour of local minorities or marginalised sectors of the population (e.g. *Foresti and Conti v South Africa*, 2010).¹⁶ In these cases, the ISDS mechanism provided a means to restructure the conflict from a social perspective to an economic one, privileging property rights over human rights.

The analysis of an ongoing dispute between the mining companies Cosigo Resources (Canada) and Tobie Mining and Energy Inc. (USA) and the Colombian state (2016) exemplifies some of these problems. The dispute centres upon a gold mining concession in the Taraira region near Colombia's border with Brazil. The Colombian National Mining Agency originally granted a mining concession to the companies, but later revoked it in response to the demand for a national park in the zone of the concession by a local Indigenous community (Peterson and Williams 2016a). The mining companies are demanding USD 16.5 billion in compensation; a sum they claim equals the market value of the project (Charlotin and Williams 2017). This case shows that the Colombian state is not monolithic. States comprise different organisations and individuals that sometimes act in contradiction with one another. In this case, the Special Administrative Unit of the Network of National Natural Parks of Colombia actively supported the claim by the majoritarian faction of the indigenous people to grant the protective status of National Park (Bermúdez 2014). Thus, when ISDS reduces the conflict into terms of breach of contract between the corporation and the

¹⁶ In this case, the mining corporation sued South Africa because of legislation seeking to repair historical injustices against the black population. The law required the revocation of previous mining concessions; companies were further required to partner with victims of Apartheid. Foresti and Conti sued the South African government claiming that such measures were equivalent to expropriation. After a long arbitration process, the claimants withdrew and they were ordered by the arbitration tribunal to pay the cost of the procedures. However, they only withdraw after the South African government agreed to compensate them by offering a beneficial deal. According to the representative of the claimants: "No other mining company in South Africa has been treated so generously (...), let alone been afforded an equity offset of this magnitude" (Creamer 2010).

state, they are not only taking the affected communities out of the picture, they are also conveniently constructing a uniform state. The case of mining concessions in the Taraira region illustrates the state's complexity. The tensions between diverse state agencies was only overcome after Colombia's Constitutional Court upheld the decision to create the National Park. The depiction of the state as a monolithic institution allows international arbitrators to determine liability and force populations to compensate the corporations. By ratifying BITs with ISDS clauses, the state basically guarantees that either corporate exploitation of resources will continue or the population will guarantee corporate returns.

The rights given to foreign investors have facilitated the expansion of what Sklair (2002) has called a "transnational capitalist class".¹⁷ These interconnected groups of elites essentially protect corporate interests from the rest of the local population (not from governments). In response to potential resistances from local populations, the arbitration process is delocalised. In effect, one of the defining features of the ISDS's arbitration tribunal is that "the ICSID has been designed as a self-contained and delocalized system with automatic enforcement of arbitral awards" (UNCTAD 2014, p. 70). As we have seen, the delocalisation of the conflict is argued amongst certain circles to provide a "neutral" forum for dispute resolution that can enhance the respect for the rule of law (Franck 2005, fn 49, French 2014). However, delocalising conflict has a less sanguine result: removing the conflict from the local community, and effectively blocking popular participation depoliticises and defuses the struggle by neutralising local resistance and political action. Odumosu (2007, p. 252) has convincingly argued that keeping ISDS litigation away from local populations is important to maintaining the system because local involvement "... threatens the status quo of investor-state arbitration as an institutionalised and depoliticised system that is reserved exclusively to states, foreign investors, and recently, non-disputing parties that are granted *amicus curiae* privileges before tribunals". The physical location of the arbitration thus plays a role in disengaging popular struggle because it captures the challenge to the harmful operations of global capitalism, repackages them as private contract issues and then processes the whole thing as an unbiased legal dispute. Additionally, the delocalisation not only removes the physical jurisdiction of the tribunal, it also creates a *fictional* jurisdiction where only states and foreign investors exist; where local populations are wholly absent, emptied of their rights.¹⁸

It should be noted that international investment law has always promoted some type of local disempowerment. Miles (2013, p. 102) states that "international law has not traditionally accommodated the phenomenon of public mobilisation or extra-institutional resistance movements, these voices within social movements have also remained at the subaltern level in international law". The legal and non-legal mechanisms of resistance used by popular struggles to confront international capital, from media campaigns to public demonstrations to legal suits, often remain locally diffused. The ISDS mechanism weakens local resistance strategies by ensuring that the dispute will not be decided in the local arena. Local populations are thus alienated from struggles for their communities in ways that seek to mask the social and political conflict, resulting in the disempowerment of local communities and reallocation of decision-making power, very often to the Global North.

Arbitration courts are sites of struggle that condense the correlation of forces at the international level. The difference is that the dominant force takes a rather molecular approach that hides its relation to the international capitalist social order (Asteriti 2017). There is thus a neo-colonial logic within the ISDS that distinguishes foreign investors from the local capitalist class (Wissel 2011, pp. 220-223). The case of the

¹⁷ Sklair (2002, p. 144) describes the "transnational capitalist class" as consisting of four interconnected groups: "those who own and control the major corporations and their local affiliates, globalizing bureaucrats and politicians, globalizing professionals, and consumerist elites".

¹⁸ Thank you to the anonymous reviewer for helpful comments on this point.

mining concessions in the Taraira region in Colombia, described above, is a clear example of a neo-colonial logic, but it should be noted that this is not an isolated case. Three more mining companies are using ISDS clauses to sue Colombia: Glencore, Eco Oro and Gran Colombia Gold. While the Glencore case is related to the modification of a system used to calculate royalties, the *Eco Oro* case has similarities with the *Cosigo* case (Investment Arbitration Reporter 2016). In December 2016, Eco Oro filed a case with ICSID against Colombia's decision to limit mining activities in environmentally protected areas (Peterson and Williams 2016b).¹⁹ Gran Colombia Gold is claiming that it has suffered a series of economic setbacks due to civil strikes and demonstrations, as well as incursions in its mining concession zone by informal miners of the region. It also claims the Colombian military did not sufficiently protect it from an attack by the National Liberation Army guerrilla group, which constitutes a violation of the free trade agreement (Williams 2017a). What these cases show is that ISDS creates opportunities for TNCs and financial capital to exploit peripheral countries by granting them exceptional rights in business-friendly arbitration tribunals far from the location of the disputes.

ISDS enables a legalisation of socially harmful exploitation. It plays an integral part in sustaining a global neoliberal regime that guarantees the rights of corporations (and shareholders) but suspends the rights of indigenous communities and local populations. ISDS has played a critical role in setting the conditions for the expansion of TNCs in the extractive industry in the Global South. The case of *Cosigo* and *Tobie* against Colombia illustrates the role that ISDS has in the organisation of the global expansion of a mode of production based upon predation, fraud and violence; a method that David Harvey (2004) has defined as "accumulation by dispossession". This global organisation illustrates the class character of neoliberal capitalism and spreads across geographical zones. There is an increase in ISDS cases between Global North states pointing to the expansion of the *exceptional* regime where social disputes are taken out of the state and played out in the abstract *market*. Although the marketization of social disputes has not gone unchallenged by local populations and there has been a significant amount of protest calling into question ISDS clauses. Faced with these challenges, states have been forced to respond and have done so by renegotiating BITs to include some human rights mentions. But the end-game stays the same: states are adapting BITs to maintain capitalist hegemony in the long run. It is to a discussion of the compromises being made that we now turn.

5. New Generation BITs

In recent years, there has been an increase in ISDS claims between developed nations. UNCTAD has noted that 40% of new cases have been initiated against developed countries; the relative share of cases against developed countries has therefore been on the rise (compared to the historical average of 28%) [UNCTAD 2014]. The European Commission (2015, p. 7) has released statistics that by the end of 2014, the total number of intra-EU investment arbitrations reached 99 known cases, which is almost three-quarters of all cases involving an EU member state as defendant. The rise in cases initiated against Global North nations is not to detract from the imbalance of economic and political power at play in the higher number of cases originating from foreign corporations domiciled in the US or EU against the Global South. However, it is rather to point to the extent that domestic legislation is seen as fettering investment and profit. The internationalisation of free trade in this way – the circumvention of domestic laws – highlights the political regulation of the market. States enter in to BITs as sovereign nations and then, in the words of one UN Independent Expert on the promotion of a Democratic and Equitable International

¹⁹ It is worth highlighting that, in the case of *Eco Oro*, a struggle amongst its shareholders has exposed the financing of its arbitration case against Colombia by New York-based investment fund Tenor Capital (Williams 2017b). In exchange of funding the case, Tenor Capital will get over 78% of the gross proceeds of the arbitration award, valued at USD 250 million. This agreement has been taken to the Supreme Court of British Columbia by dissenting shareholders.

Order, use those trade agreements to “delay, hinder, circumvent, undermine, or make impossible, the implementation and fulfillment of their prior legally binding obligations under (...) human rights treaties” (Alfred-Maurice de Zayas quoted in McKeagney 2015). The framework of the ISDS mechanism, although, rooted in a neo-colonialist architecture, is no longer as markedly expressed along a North/South divide.

So-called “new generation BITs” have been introduced in response to widespread criticisms of the lack of public participation in investment disputes. Recent discussions at the UN in April 2018 addressed the possibility of reforming the ISDS, but sidelined any examination of the social and environmental damages produced by the ISDS – which, to deal with, would require an overhaul of the investment regime. Instead, discussions centred upon efficiency, cost reduction, accessibility, and predictability in investment arbitration.²⁰ The reformist approach is not very surprising given that negotiating states are doing exactly what neoliberal capitalist states do: they are working to produce the most advantageous conditions for capital and the capitalist class (see Jessop 2014). The process of these proposed reforms is not only perpetuating anti-democratic practices, characteristic of the ISDS, but is also evading any discussion of the social harms produced by the ISDS and thus of any real change.

These new generation BITs have been heavily promoted by Canada and the USA in their negotiations for the CETA, the Trans-Pacific Partnership (TTP) and the TTIP. They include references to non-investment issues, but are not incorporated into the operational provisions of the treaty and therefore have little impact on the outcome of the disputes. New generation BITs mask the asymmetries between investor prerogatives and host-state responsibilities (Miles 2013, pp. 305-307). In his analysis of modern capitalist regimes, Poulantzas (2000, p. 134) stated that one of the key functions of state and law was to organise the “unstable equilibrium of compromises” between different social forces. The goal of the state with these compromises is to impose certain concessions and sacrifices on the dominant classes with the aim of reproducing long-term domination (Bieler and Morton 2006, p. 169; see Hoare and Smith 1971, pp. 161, 245, 254-257, Poulantzas 2000, p.184). But, social movements have been fighting back against noxious trade agreements for decades, most infamously in the Battle of Seattle in 1999 against the WTO, and they are growing stronger as we recently saw in the widespread protest against the TTIP, CETA and the TPP.

The challenge to the TTIP in 2016 effectively paralysed the negotiations. The TTIP was not signed at that time and some European governments were forced to reconsider their approaches to the trade agreement. Despite the success of protestors in stopping the immediate signature of the treaty, the TTIP has not been buried. Rather, governments are looking to re-negotiate the trade agreement to make it suitable enough to pass. What this means in practice is that the fundamental structure of the TTIP is not necessarily confronted with any real change, but the state parties are seeking to demonstrate to their constituents that they are *regulating* the agreement. Regulatory processes very often occur after periods of crisis and “are generally formed in order to absorb and dissipate struggles between conflicting social groups, and governments that administer regulatory processes tend to claim they do so to represent the concerns of pro-regulatory groups at the same time as protecting the general interests of society” (Khoury and Whyte 2017, p. 75). The regulation of the TTIP in this context seems to demonstrate what Carson (1980) identified in that regulatory systems in market societies are as much about ensuring a viable market society as about control efforts per se. These re-negotiations are an illustration of how “regulation’ seeks to stabilise capitalist social orders, by subordinating the immediate interests of particular businesses to the long-term interests of capital as a whole” (Khoury and Whyte 2017). Given that the very purpose of ISDS is to protect

²⁰ For details on the discussions at the UN see UNCITRAL 2017.

capital, no amount of reform will change its underlying motive: to weaken regulatory power.

6. Conclusion

This article has argued that dominant discourses promote ISDS as a necessary protection for foreign investors who question the credibility of the rule of law and the biases of courts in host-states. Advocates of ISDS claim that it provides predictability and impartiality with its third-party adjudication, and “guarantees” that both sides will be heard. But rather than offer stability and equality, we have 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. ISDS reduces disputes to a breach of contract and allows for the weakening of state regulatory power by removing the state’s capacity to protect public interest. It offers an exceptional legal and economic regime to foreign investors, particularly TNCs that removes regulatory powers from the state and implicitly suspends the rights of local populations. The legal process is played out far from the local setting in arbitration tribunals located in global financial centres meaning that local populations are excluded and emptied of their rights. Simply put, democracy is undermined. We have argued that this is not unintentional, but rather is a defining objective of the ISDS. Delocalising the conflict provides a smoke-screen that separates the dispute from its social consequences in order to neutralise its political dimensions.

ISDS developed as a neocolonial device that perpetuated asymmetrical relations of power between foreign investors from central societies and their affairs in peripheral and semi-peripheral societies. It plays an essential role in enabling the expansion of the current neoliberal mode of production. The exceptional legal regime created by ISDS institutionalises neoliberal relations of production that exist on a global scale; Harvey (2006) has described this regime as one that commodifies and privatises land, expulses peasant populations, reframes property rights, suppresses alternative forms of production and consumption; it is “a radical means of accumulation by dispossession” (*Idem*, p. 159). Harvey argues that the result is a reliance and promotion of the market as the appropriate and effective means to resolve the contradictions produced by capital. In the case of ISDS, this means that struggles around the inequalities and injustices produced by foreign capital and played out within the state – between private capital and public regulation – are removed from local institutions and relocated to the market. The effect is similar to what Gill (2008) describes in another context as the majority being subject to market forces while protections for the dominant class are preserved. The prioritisation of protecting capital over human dignity underlines that the ISDS is a manifestation of class conflict. Although human rights and regulatory clauses are timidly finding their way into new generation BITs and multilateral treaties, we cannot lose sight of the very purpose of ISDS: to enable and protect capitalist social relations by safeguarding TNCs (and their shareholders) in their predatory economic practices of capital accumulation.

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