[https://gegen-kapital-und-nation.org/en/isds/]

ISDS — Courts of arbitration within the TTIP treaty

Courts of arbitration are planned as a centrepiece of the Transatlantic Trade and Investment Partnership (TTIP): after TTIP taking effect, foreign investors could take legal action against states when new legislation affects — in a way that breaches the TTIP treaty — the capital they have advanced. In principle, this is nothing new as similar courts of arbitration are already part of various international treaties. However, with TTIP these courts would for the first time play an important role between two powerful, leading state actors: the US and the EU.[1] Both the treaty and the courts of arbitration it introduces signify shifting power: states empower capital in a new way.

Non-governmental organisations and activists criticise the disempowerment of the state. This analysis fails to recognise the task at hand for capitalist states. Through law and policy, states lay the foundations for economic growth, which is another way of saying for the accumulation of capital. While TTIP and ISDS courts of arbitration would introduce new tools to pursue this aim in transatlantic relations, the end itself is not new. The question here is not why capitalist states look after capitalist growth, but rather why these states commit themselves to something they already do.

This piece will first given an account of what courts of arbitration are, how they work, who can turn to them and what they can decide. Then, it will explain the calculations of the US and the EU, what they hope to gain from introducing this new legal instrument and what they are ready to accept in return. In summary, our conclusion is that, while TTIP and ISDS deserve critique, nothing would be won if the whole treaty or the courts of arbitration were to be prevented.

What is an ISDS?

The investor-state dispute settlement (ISDS) aims to provide foreign capital with more security. If foreign capitals see their foreign investments damaged in a way covered by the court, they can sue the foreign state in front of such a court of arbitration for compensation of profits. The set up of these courts of arbitration is different from courts under national law or international law regarding what interests enjoy legal protection, what is decided by the court and the formalities of how decisions are made.

Firstly, ISDS is specific in who can take part in an arbitration: a case can only be filed against states, i.e. only states can be accused of wrongdoing under ISDS. This makes sense insofar as dispute settlement aims to protect investments from arbitrariness. Since the conditions of investments are decided by states (when passing legislation, granting subsidies or introducing new regulations and industrial standards), they are the potential respondents. If such a measure damages a firm in a way covered by TTIP, then an ISDS court can award compensation.

Just as the group of potential respondents is limited — the states taking part in the treaty —, so is the set of potential claimants: only capitals can initiate a case under ISDS because only capitals invest in order to make a profit, profits which ISDS aims to protect.[2] Yet, not every capital, not every investor can file such a case. The right to bring a legal case against a state is reserved for foreign capitalist companies of the respective other state (see second part of this article for the reasons of that limitation). Compared to national law, it is nothing new for companies — domestic or foreign — to be able to take legal action against representatives or institutions of the state. In international law, on the other hand, this is not a given. In this area, states are the only legal entities that can sue.[3] With ISDS, states permit capitalist companies to take legal actions against states in front of an international court of arbitration — simply based on a company's calculations and regardless of those by the involved states.

If the court decides that a company was in fact harmed in a way that breaches the TTIP treaty, the question of compensation arises — which standard is applied to detect damage? Damage is quantified as loss of *expected* profits; sometimes it is also measured as damage to a company's brand. To be compensated for a loss of expected profits reaches further than compensation for already produced commodities that can no longer be sold, e.g. due to a newly introduced industrial standard with which they do not comply. In ISDS rulings (under several other existing treaties), damage is regularly accepted to have taken place if a foreign company can show that it has started investing and if it can demonstrate that expected profits cannot be realised due to a state changing certain conditions in ways prohibited by the treaty.

Compensation for loss of expected profits due to state actions does not exist as such in national law, where current value is usually taken as the basis for compensation.[4] Yet, there are many cases where such a loss of future profits accompanies other damages that are protected by national law. If that is the case, a damaged investor can also file a lawsuit in front of a national court. Three large electric power companies did this in Germany after the country phased out nuclear power: they brought legal proceedings before the Federal Constitutional Court of Germany.[5] In addition to that lawsuit within the German judicial system, one of the companies, the Swedish firm Vattenfall, has also claimed against Germany for lost expected profits in front of an ISDS court agreed upon in another treaty, the international Energy Charter.[6] The outcome is pending. The difference between the two proceedings: the highest German court can decide that a particular decision by the government was unconstitutional or that it lacked a legal basis. Furthermore, it can force the government to revise its decision. In contrast, courts of arbitration only grant compensation. This compensation aims to indemnify the loss of expected profits if the judges see the latter to have been caused by governmental action prohibited by an international treaty. A victory in front of such a court of arbitration can therefore only lead to a recovery of damages. This is the third main difference between ISDS and regular, national court cases: compensation is the only possible victorious outcome for the claimant.

The four legal grounds

Dispute settlement between a state and a foreign investor presupposes the basic conditions of a capitalist economy; these are taken for granted as tasks for the state. Indeed, in the West, these are a given.[7]

ISDS builds on these premises. Under TTIP, the contracting states agree not to treat foreign capitals in certain ways. The ISDS mechanism then allows these foreign transatlantic investors to take legal action against the host state. There are four possible grounds on which a legal action can be brought.[8] In this text, these grounds are called the potential "legal grounds for action".

Protection of Property

The first of the four legal grounds for action protects investors against expropriation. This refers firstly to a direct expropriation, e.g. nationalisation. Thereby, similar to national regulation, expropriation is not simply outlawed. Rather, expropriations are allowed if they are in the national interest, if there are implemented lawfully and if compensation is paid. Those provisions are also known in national laws. However, investment protection clauses also target those state actions that are defined as "indirect expropriations", e.g. devaluation of a company through the introduction of environmental regulations.[9] With ISDS, a company that has undertaken investments may sue if a new, unexpected regulation obstructs its business, say, by obliging it to use more expensive rinsers or to purify sewage to a higher degree.

The case *Moorburg I*, filed under the Energy Charter, is based on this clause.[10] Vattenfall filed a lawsuit against Germany because the political circumstances changed while a coal power station was under construction. After a change to the regional government, the State of Hamburg demanded that Vattenfall fulfil higher standards than were previously required for the purification of the plant's sewage. In response, the company claimed to have had its expected profits indirectly expropriated. Because of increased costs, Vattenfall now expected to realise lower profits than it had anticipated. Both parties settled: the city of Hamburg has revoked the stricter environmental regulations and has possibly paid damages (this part is not on public record).[11]

Ethyl v Canada exemplifies the claim of indirect expropriation as well: the chemical company sued the Canadian State due to a newly introduced ban on Mmt in petrol. Mmt is an additive to fuel which enhances the engine's performance. In most Western states, though, it is classed as a neurotoxin and therefore prohibited as a supplement to petrol. Ethyl filed for compensation on grounds of indirect expropriation due to the ban. The lawsuit was filed under the Nafta framework, the North American Free Trade Agreement of the US, Canada and Mexico. After a positive preliminary decision in favour of Ethyl, the Canadian Government agreed out of court to pay the company US $13m, to annul the ban and to run an ad campaign advocating Mmt as harmless.

In both cases, planned policy changes were revoked out of fear of having to award damages to investors. Yet, it would be a misunderstanding to see these lawsuits as proof of benign states being forced to their knees by evil, greedy international corporations. Far from it. In capitalist countries, environmental policy is always subject to weighing up how much a state wants to burden companies like Vattenfall and Ethyl with costs versus how much damage it wants to tolerate to its natural and human resources. Many environmental policies do not outright ban a product or production method on the grounds of its destructive effects on the environment and people. More commonly, capitalist states decide on a degree to which those damages caused by the pursuit of profit are acceptable. As a consequence, limits are defined which ought to balance the interests of both sides, i.e. do not damage the interests of companies too much and do not ask so much of people and environment that their usefulness is undermined. The state defines when it becomes “too much”, lung cancer included. With ISDS, the US and the EU reinforce a standpoint which is part of the calculations of any capitalist state.

Fair and equitable treatment

Secondly, TTIP demands “fair and equitable treatment”. Said differently, predictability and reliability of the state as a negotiating partner are contracted in the treaty. The paragraph in question demands access to the national legal system for foreign transatlantic capital and that investors must not be blackmailed, treated arbitrarily nor discriminated against. Discrimination here is meant in the classical sense, i.e. with regard to gender, religion or on a racist basis.[12] Overall, this paragraph is no surprising innovation — in contrast to what many critics of TTIP claim. Democratic states consider the predictability of their law as an essential principle.

However, fair and equitable treatment is usually interpreted by courts of arbitration as meaning that the so-called “legitimate expectation of the investor” must not be disappointed. The wording leaves leeway for a variety of interpretations by the respective ISDS court. The case of *Metaclad v Mexico*, also on the basis of the Nafta treaty, is an example of what that practically means.[13] The US waste disposal company Metaclad Corporation had planned to build a landfill in the East of Mexico. The Mexican Government had not only given permission but also reassured the firm that no further permissions were needed. Yet, the local government had to sign off the building licence, which it eventually denied. Thereby, it made commissioning the landfill impossible. In the case, Metaclad argued it had made the decision to invest based on false claims by the government. Metaclad claimed an infringement of fair and equitable treatment and also claimed to have been indirectly expropriated. The company won on both counts and was compensated.[14] If the state does not act as a reliable partner, e.g. because its arms act in contradictory ways and in contradiction with agreed arrangements with an investor, then the damaged foreign capital of the partner state can receive compensation. This second legal ground is seen to be the most far-reaching, offering the most leeway for the claimants.

Non-discrimination

Thirdly, foreign capital must not be discriminated against. That can mean, for example, a ban on those subsidies in which domestic capital is favoured.[15] Any benefit a domestic investor receives must be granted to capital from the other state as well. In national regulation, this kind of discrimination is usually not prohibited (more on that further down). Yet, the issue is covered by other international treaties: in the context of the WTO, all EU states as well as the US have agreed to treat foreign investors no worse than their domestic companies.[16]

Protection and security

Finally, foreign capital must be granted “security and protection”. This provision originated in times when such courts of arbitration were part of treaties between Western and Third World countries. In contrast to the former, the latter generally did not provide for a democratic order watching over a relatively smoothly running capitalist society (which relies on a monopoly on force because it is continuous and universal competition). Today, this part of the treaty still protects foreign investors. After all, even in Western countries, no guarantees exist that the generally comfortable situation for investors will not change one day — temporarily or for longer.

What is new about the four legal grounds?

With these legal grounds, European capital could now invest in the US and sue the state if it sees its interests damaged. This is an additional and powerful means which domestic capital does not have access to. Domestic capital can only take legal action against their government under national law.[17]
Furthermore, ISDS courts of arbitration guard an interest which is not usually part of national laws: the protection from loss of profits. The EU and the US thereby guarantee to each other's capital good conditions for investment, by protecting them from certain changes in policy.

Because ISDS can take lost profits into account, a foreign capital might gain a financial advantage over a domestic company if it is awarded a compensation for damages by an ISDS court that is higher than the compensation awarded a national court. In contrast, the *grounds* for legal action in front of an ISDS court do not constitute advantages for foreign capital over domestic capital. These grounds correspond more or less to legal grounds in national laws or are covered by WTO regulations already. These legal grounds are detailed above because many critics of TTIP paint them as *new* laws for foreign companies, which is not true.

National law in capitalist states is concerned with the protection and promotion of capitalist growth — just as much as ISDS and its foundations in the TTIP treaty will likely be. Capitalist states guarantee the competition of capitals, i.e. they administer this competition and maintain their citizens as subjects of competition.[18] This means that the economy is based on and the sustenance of everybody relies on exploitation: food and shelter exist if and as long as money can be made from producing and providing it. National law is just as little concerned with the well-being of people as international law is. In both forms, people only appear in their formal roles defined by the state and its law. Everyone ought to be useful for the capitalist economy in their specific role — as capitalists, as workers, as teachers, as pupils etc. Only in that capacity do people appear in the state's calculation and in the calculation of capitalist businesses. ISDS presupposes all these conditions provided by the state and then adds additional protection for transatlantic capitals.

Investment protection and the capitalist common good

In some newer treaties — like in the European-Canadian CETA or the Free Trade Agreement between the EU and Singapore — a so-called "right to regulate" is codified.[19] The contracting partners must have seen a necessity to clarify that states can indeed continue to make laws to decide what goes on in their territories. This is remarkable insofar as sovereign states make laws all the time. However, with the introduction of rights for foreign transatlantic capitals beyond the sovereign's judicial system, potential for conflict between these rights and the state's interest to regulate arises. The clarification in those newer treaties reaffirms, above all, that states are not wrong to claim responsibility for their land and people and to shape the conditions for successful accumulation.

At the same time, external courts of arbitration are now asked to decide if a given policy is fit for purpose and falls under the "right to regulate" or not. Does the state outlaw a certain chemical mainly because it considers the costs and damages to its own population too high? Or is this merely a badly concealed, protective measure directed against some foreign capital? ISDS courts would have to consider national interests in two ways to decide these questions: firstly, is a given

policy actually aimed at enhancing the common good? Secondly, is the way in which the state pursues its legitimate aim particularly harmful to foreign, transatlantic capitals, for example, when a policy is not intentionally but effectively discriminating or when foreign capital suffers from indirect expropriation without compensation?[20]
More generally, the central task of such a state — to organise its society as a well-oiled capitalist one — is affirmed with the "right to regulate", yet at the same time, the interests of foreign, transatlantic capital are affirmed in the form of legally protected interests.

The right to regulate is mentioned in newer treaties because many of the measures taken to protect investments can conflict with providing for a modern capitalist society. The introduction of a minimum wage, for example, aims to ensure that sufficiently many workers can be sustained long-term. States calculate that workers should earn enough to sustain themselves so that they are usable by capitalist companies whenever needed. But a minimum wage means more costs for those companies that make profits in sectors with minimum wages; their wage costs rise. The mentioning of the right to regulate simply flags this contradiction; it does not achieve more than that. At the end, it would be up to courts of arbitration to judge whether a particular measure harmful to foreign transatlantic capital was aimed at causing harm to foreign capital or whether this is a permissible side effect of providing for the capitalist society. With ISDS, the partaking states give a licence to institutions other than its own to render verdicts over a state's pursuit of commonwealth. This is new. Contrary to what critics claim, it is not new that judges decide over a government's policy and determine whether it is constitutional or whether it improperly harms the protected interests of subjects.

In the 1,000 and more pages of the treaty, the basis for the court's deliberation is rather minimal. The lack of clarity is easy to explain: on the one hand, it is obvious to every contracting party that itself and the other side will continue to make policy at home in order to shape the foundations of their respective capitalist economies. On the other hand, policy measures taken by *another* sovereign — e.g. by the US, especially if it is in the way of European investors there — can come under suspicion of being introduced to benefit domestic capital under the cloak of serving the common good. Additionally, every policy to facilitate economic growth ends up with some capitals winning, some losing out. Finally, whether a certain policy has the desired effect of bringing about more capitalist growth, is a matter of speculation and hence always subject to scepticism.

In the second part of this article, it will be explained why a capitalist state fostering its common good is something other countries worry about: states indeed want to see their particular domestic capital grow. When necessary, states can be rather inventive in using the tools available to them. Technical norms or health standards can be applied in a way that keeps unwelcome competitors from abroad away and allows some domestic capitals that the state deems important to flourish. Whenever *other* states do this, it is considered as a problem. Hence, the EU (resp. US) monitors how the US (resp. EU) applies its right to regulate for its common good.

ISDS v national law

The ISDS procedures show the particular content at stake in these proceedings. After an action is brought forward in accordance with the ISDS mechanism, both sides, claimant and respondent, each name one lawyer to serve as a judge. Both of these judges then agree on a third judge — and the ad hoc court of arbitration is good to go.[21] This alone is a rather peculiar procedure as there is no fixed court but a list of lawyers who have been named (or registered themselves) as possible judges for such international dispute settlement cases. Investor and state each choose their favourite candidates from such a list. Once formed as an ad hoc court, these three judges analyse the facts of the case which can take years. Whether the procedure takes place in hiding or in public can change. Sometimes it suffices for one party to register their interest in keeping the case from the public for it to be private. Secrecy, though, is not an innovation of ISDS courts: under certain circumstances, the public can also be excluded in national legal proceedings. However, that even the existence of a case can be kept secret under ISDS stands in contrast to national legislation.

The criteria for constituting an ISDS court have more in common with a mediation process than a court of justice. It is called "dispute settlement" for a reason: both sides are involved in defining who the "judges" are. In most national legal systems, by contrast, if a judge were to declare an inclination to deem a defendant guilty in current proceedings, even during a private poker game, then she would be barred from the case on grounds of being biased. For ISDS judges, on the contrary, it is more or less a given that they enter the whole process being partial.

Under ISDS, there is a possibility for the parties involved to reach a settlement before any verdict. If that is not the case, judges agree by majority whether the suing company was in fact damaged in a protected right and if that damage was caused by state action. In case of a recognised damage, a compensation amount will be set and the state as the respondent party will be asked to pay.[22] This decision cannot be challenged except for breaches of the formal rules of the proceedings; there is no right of appeal.

Courts of arbitration make decisions that are completely independent of other awards granted and other judges' arguments under the same treaty. Verdicts can relate to one another and the reasoning for one decision can be argued by relying on another verdict and its supporting arguments. Or two verdicts can be in open contradiction to each other. On the one hand, this means that each decision can be used as a precedent for the future thereby continuously interpreting the text of the treaty.[23] On the other hand, this is not like US case law where courts are obliged to follow verdicts of higher courts. Ultimately, the ISDS mechanism offers little legal certainty because different ad hoc courts can decide differently each time. Therefore, a further progression or binding interpretation of the TTIP treaty text cannot come into being. The treaty cannot develop an authoritative life of its own.

The legal mechanisms of ISDS differ from national law insofar as the state has much less control over who is a judge.[24] In national law, the state wants its judges, who rule over the recurring confrontations of its subjects, to be partial in one sense only: to be above all disciples of the legal regime. They must not be partial in the sense of having sympathy for one side in a legal dispute. The state in the national context institutionalises this demand of impartiality of its judges by a myriad of regulations and by controlling who is fit to serve in such a position. It refrains from doing that in the ISDS framework. Both sides, EU and US, would give up their usual competency in this regard.

The EU is getting cold feet: reform proposals for ISDS

In the EU, some politicians started to have doubts whether the current construction of courts of arbitration in TTIP is indeed fit for purpose. In September 2015, the EU Commission announced that its position on the dispute settlement mechanism had changed: in the negotiations, it would now press for a permanent trade court with the possibility of appeal in a separate court. A similar change was already agreed upon between the EU and Canada who had previously finished their negotiations on CETA. The ad hoc courts of arbitration initially included were replaced by a permanent commercial tribunal including a court of appeal, consisting of 15 judges. These are named by Canada and the EU and three of them will be appointed for each particular case. They appear as judges and as judges only, i.e. they cannot be lawyers in another proceeding. The proceedings are open to the public. Therewith, all formal oddities of the ISDS courts are done away with in CETA.

The EU now seeks the same result in the negotiations with the US.[25] If the US were to agree, the formal differences compared to national law would disappear.[26] The legally protected interests, however, i.e. the grounds on which companies can claim compensation, would not change, only the procedures. Also, the EU is still committed to all other aspects of the treaty. Equally untouched by the proposed changes is the foundation for how external trade policy as a part of imperialist conflicts is dealt with: international legislation and its enforcement stay the same.

Law and trade agreements under imperialism

The purpose of any international economic policy remains to achieve the best conditions for its domestic capital. At home, the capitalist state can decide which laws to make and how to apply them on its territory: it is sovereign. It has full control over its territory. But its full control is restricted to that territory; anywhere else in the world, it is limited by the power of the other sovereigns. Yet, successful capitalist companies seek business beyond national borders to capture markets, to buy supplies and produce wherever deemed advantageous. Therefore, any capitalist state is confronted with a problem that only intensifies with growing international trade: the state cannot provide beneficial conditions for its national capital in the rest of the world despite it being interested in its growth.[27] For this reason, states make international trade policy: states negotiate the conditions for their respective national capital's activity on the other state's territory.

In these negotiations, each side hopes to liberate its own capital from limits imposed by the other state and therefore to make the other state's territory more attractive for its own capitals. But since these limitations are implemented by the other state for its own benefit, conflicts are inevitable. This constellation explains the seed of conflict in bilateral trade agreements as well as during World Trade Organisation (WTO) negotiations.[28]

Treaties are not expressions of peaceful co-existence of states, which depend on and compete with each other. The opposing interests do not disappear by means of a contract, they merely are brought into a form to make productive use of them. This form has a particularity: even with the WTO and its set of rules by which to play on the world market, there is no international authority which would permanently and systematically mediate arising conflicts. There is no monopoly on force over nation-states with an interest only in the rules of international trade and which enforces decisions taken by WTO or ISDS courts. This "lack" of an international monopoly on force is often — not only on the Left — seen as a problem as this monopoly, to them, means the minimisation of violence. This criticism misunderstands what a monopoly on force is. It is not merely the suppression of competing authorities and therefore of violence, but the license of the state to itself to enforce its policies.

In most cases on the international stage, the role of the monopoly on force is fulfilled by the leading world power or, in less important cases, by a regional power. It decides if need be with its superior military force. Thereby, it enforces its *particular* interest, whereas nationally the entity exerting the monopoly on force is not part of the competition but rather orchestrates it.

The dispute settlement mechanism is a way of addressing the problem that states have immediate control only over their own territory but want to provide for their capitals in the rest of the world. In other words, ISDS is an attempt to find a legal form for this problem, hence the unusual legal construction. TTIP changes nothing about the reasons for conflicts amongst capitalist states, i.e. imperialism. Rather, it provides a new form in which states can facilitate the accumulation of their domestic capital while also attracting foreign capital.

The courts of arbitration are an international legal mechanism and therefore part of international law. The subjects of international law are states — and to a growing degree international organisations. Only with the dispute settlement mechanism do companies become legal persons of and in international law. Capitals thereby turn into potential claimants who can sue independently of states and their calculations.

However, this does not entail independence of capitals from their home states. This becomes apparent with the regulations on how to deal with states who have been unsuccessful in defending an action brought against them but are unwilling to pay the required compensation. In that case, the home state of the damaged capital has the right to seize property of the unsuccessful state. Whether the state decides to make use of that right, is down to its own calculations. As rare as this case may be, the ISDS foresees a procedure for dealing with it. There is a necessity for such a regulation, as usual with international law, since there is no global monopolist on force to back up the rules. Any legal arrangement amongst states is based on these states obeying it. In the case of trade agreements, they generally have an interest in following the rules agreed upon — otherwise they would not have signed the contract in the first place or would rescind their membership.

How ISDS changes laws without changing laws

While the sole direct outcome of a dispute settlement is compensation for damages, the indirect result of cases brought under the ISDS mechanism can still be a change to the law. Claimant and respondent can come to an agreement before the court rules. This happened during the case of *Moorburg I*. The initial change in law, against which Vattenfall brought a legal action, was withdrawn as part of a deal between the two parties.

The fear of a lawsuit alone can convince states to not pass certain legislation, the so-called "chilling effect". Philip Morris's lawsuit[29] against the Australian Government's decision to impose larger warning notices on cigarette boxes and to ban almost any possibility for brand distinction had such an effect. The government of New Zealand had planned to introduce a similar provision but put that on the back burner because it wanted to wait for the result of the case against Australia and if need be avoid a similar challenge by dropping the proposed law.[30]

The amount of the damages can be in the billions. These numbers are beyond petty cash even for successful countries. Taking the standpoint of the national budget, i.e. thinking about which expenses a state wants to allow itself, defending an expensive legal action and risking a possible adverse award of damages is something to be avoided. Therefore, there are incentives for states to settle with the claimant before such a judgement is given, which happens in roughly one-third of the cases. This incentive to come to an agreement with the claimant does not only play a role in front of ISDS courts, as the New Zealand example indicates, but already when preparing new legislation. This shows how the dispute settlement mechanism can indeed influence which laws are passed or withdrawn. By introducing this mechanism, states create an instrument for capitalist companies from the other state. This instrument can cause follow-up costs, which now need to be calculated with when passing legislation. This does not make ISDS courts the big bad weapons they are often portrayed to be by critics of TTIP. Rather, the involved states are willing to commit to a new basis for their calculations: to strengthen foreign transatlantic investors as contributors to their ongoing facilitation of capitalist growth. Therewith, they intensify the competition amongst themselves. With TTIP, it would be a matter of which state is seen to be more friendly to foreign investors and which state refrains more from favouring domestic companies. That is, which state shapes its policies most compatibly with TTIP rules or — alternatively — where successful ISDS claims prove that the state is not as committed. If the state complies, it would not need to fear additional strains on its budget caused by claims of compensation.

A brief history of trade imperialism based on ISDS

The increase in security which possible proceedings under the ISDS mechanism aim to offer to foreign capital is mostly agreed upon in treaties concerning the protection and promotion of investments. The first of these was established between Germany and Pakistan in 1959 but it did not include provisions on any dispute settlement. A decade later, an ISDS was part of such a bilateral agreement for the first time (between Italy and Chad). The first treaties were historically important for European capital as these capitalist companies wanted to invest in Third World countries. Until the end of the Cold War, Germany, for instance, had trade agreements almost exclusively with African states. Only since state socialism has been almost completely a thing of the past and since market liberalisation has become a global doctrine in trade policy, have treaties been agreed upon between Western countries. Additionally, multilateral treaties such as the aforementioned Energy Charter were signed. Today, there are over 3,000 such agreements worldwide; Germany negotiated the most (140) and all EU countries taken together have 1,400 treaties with a variety of third countries.[31] Over time, the ISDS mechanism became part of more treaties. With a little delay, the number of lawsuits filed under this legal mechanism also rose: until the turn of the millennium, only a double-digit figure of proceedings were brought; by now, there are hundreds of publicly known cases per year.[32]

This historic development is no accident: countries in the capitalist periphery did not provide the security of investment and political continuity that Western capital wanted. Western capitals had a lot to worry about: a possible change in the political climate so that governments would turn more socialist at the blink of an eye,[33] potentially nationalising the property of foreign investors; insurrections and other disruptions of the course of exploitation. To protect foreign capital against these perils, investment treaties were signed with countries considered at risk. The corresponding proceedings were accordingly one-directional: Western capital filed cases against relatively poor states whereas Western states were usually spared from such hassles. This is not surprising, as the treaties are mostly used by financially strong capitalist companies. In poorer countries, capital flourishes only to a limited degree. Less successful states lack the conditions for capital to be successful enough for it to be invested abroad, let alone in richer regions of the world.

That Western states now negotiate such agreements with one another shows that even in these states investors are left with something to desire. That is, they worry despite an established monopoly on force, a high degree of continuity and security, an interest of these governments in foreign investments, hardly any revolt worth noting or any other form of disruptive dissent by the working class. They worry because a state with such a tight grip on its society cannot only assert the conditions for capital accumulation but can also make decisions which might ruin some business.

That now even the leading players US and EU enter into a mutual obligation to the ISDS rules, shows their dependency on foreign investors from the other contracting party and their accumulation. It will be shown in the following how states want to turn exactly that growth into a means for their own ends.

Other treaties between Western states

Besides the American-European TTIP, Western states are involved in a number of other agreements: Canada and the EU have finished negotiating their trade deal (CETA); its ratification is the next step. Equally, the negotiations for a pacific free trade agreement (TPP) have been finalised. Some leading capitalist countries are part of that project (US, Canada, Australia, Japan, Singapore — yet not China, against whose economic dominance in Asia this treaty is also aimed) as well as states from the second and third tier in the ranking of capitalist states (amongst others, Brunei, Malaysia, Vietnam). Counting all of these important current treaties — CETA, TPP and the envisaged agreements between China and the US as well as China and the EU — 80% of the world trade would be covered. This changes the relevance of the dispute settlement mechanism and who they would affect. The introduction of the mechanism in treaties amongst Western states means that it is much more likely that they find themselves in front of ISDS courts. Therefore, now they factor in the risk of legal actions against them by foreign capital. Why?

Opening up national markets — for what?

TTIP, CETA and TPP all reach far beyond the previous policy of tariff reduction[34] and aim to minimise trade barriers on a large scale. In the WTO, members could not agree on a general lowering of national restrictions to international trade during the Doha round which started in 2001 and which is technically still running.[35] This is part of the reason why other agreements spring up: to reach trade liberalisation on a bilateral level or amongst a group of states.

What does TTIP want?

In their trade and investment treaty, the US and the EU want to make access to their respective markets easier for each other's companies. This ought to be accomplished by reducing any so called non-tariff trade barriers, i.e. anything besides tariffs which makes business crossing borders more expensive or harder than domestic economic activity. Environmental or labour standards shall increasingly be coordinated in some way.[36] For example, such a standard could be a set of requirements which a product must meet to be sold legally. With TTIP, these nationally set standards are planned to be valid also on the other market. If this is realised, TTIP would allow a company meeting US requirements to compete on the European market without re-certifying its products.[37] It would make it easier for companies to invest and to sell on the other side of the Atlantic.

The US and the EU want to avoid some hassles of nationally divergent regulations by cooperating on future legislation: they plan to introduce "regulatory cooperation". It shall ensure the suitability of legislation for a largely barrier-free transatlantic trade. Additionally, public procurement plays a prominent role in the TTIP negotiation talks: if it was up to the EU, companies of the partner state should be free to bid for public contracts and should not be discriminated against. This is a pretty important market especially considering that TTIP will include the service sector — think everything from transportation to infrastructure, from hospitals and prisons to schools and universities.[38] Furthermore, existing import restrictions (such as import ceilings for certain products) are being targeted. Free movement of capital is another issue on the table: both sides want to ensure that any capital invested and augmented can be dealt with absolutely freely, that none of the states will limit its free flow across the borders. There is also an energy chapter aiming to liberalise that sector. All these measures aim at making it easier for companies to produce and to trade across the Atlantic. About 20% of the worldwide trade of commodities and services would be subject to these liberalisations as this share of global trade takes place between EU and US. It would then be easier to compete on both sides of the Atlantic, to have a sales market of 700m people and the corresponding business, to realise the profits they squeeze out of workers here or there.

First estimates of the expected economic growth due to TTIP quickly proved to be way too optimistic. Nowadays, proponents expect less than 1% additional growth. In the public debate this is often considered as too little to be worth it. But even growth of, say, 0.5% spread over several years is nothing to be ignored. It still is growth.[39] Besides, at least the more competitive companies in the EU and the US would become even more competitive through TTIP which is something both states can benefit from. Such businesses are vital particularly with a view towards China which caught up and has outstripped Germany as the world's champion of export. During the last crisis, China's economy not only grew faster than other national economies but its companies also captured market share from European and American companies. The profits thus realised strengthen the Chinese economy, which is a threat to the world power, the US, and to the EU.

If the US and the EU can agree on a trade and investment treaty, it would create new commercial terms between these two powerful economic zones. It can be assumed that the agreement would be a blueprint for what is still to be negotiated in other parts of the world: if the TTIP conditions were to define transatlantic trade, both players hope to set new standards for any future investment agreement.[40] After all, here the world power and another important economic force, the EU, redefine trade amongst themselves. Any other state is likely to see that as a blue print for newly crystallising global trade terms. Not least, TTIP plays a role in the negotiations EU and US each have with China. TTIP affects not only the strongest capitals but also two of the leading powers, which will have its effects on other negotiations to come.

The dispute settlement mechanism ISDS as part of the TTIP agreement aims to contribute its share to spur the accumulation of EU and US capital by providing it with new legal means for its business. It has not become clear in this article yet, though, why this supplementary legal means is provided only to foreign companies of the contracting partners. To answer that question, we need to look at the interest of the modern state in capital on its territory, how and why it treats domestic and foreign capital differently and why states negotiate trade policy in the first place.

What is external trade policy and how does it work?

The capitalist state wants capital to flourish …

A capitalist state concerns itself rather actively with its economy: it establishes the general conditions for the economic activities for profit and maintains them continuously. The state thereby guarantees a capitalist order which asks everyone to participate and materially even forces people to do so. The state's law and the state's actions are one big appeal: if you have sufficient money, then go and multiply it, invest, be active in a capitalist sense — if you do not have that amount, well, then you better get yourself a job. The capitalist state is a beneficiary of this kind of economy as its might is based on how much accumulation happens on its territory. In the form of taxes, it collects its share of all economic activity. The more successful capital accumulates, the better for the treasury. Yet, no exchequer can manage purely with tax revenue. Every state goes into debt in order to finance the far-reaching necessities of maintaining its society. It obtains loans on the financial market where it offers sovereign debt bonds to investors. A state's power depends on these two means — taxes and debts — which enable it to exercise its influence over other states economically, politically or militarily. Therewith, its demand against business life on its territory is defined: capital needs to accumulate, companies are to be successful. This is also a demand against governance which ought to provide the best conditions for this success. TTIP, in line with this purpose, ought to develop a productive pressure. Successful capitalist companies would have more opportunities to outperform less successful ones and hence to grow ever more.

… in particular domestic capital

With its interest in capital flourishing on its territory, the states knows how to distinguish between domestic capital and foreign capital. The domestic or national capital forms the backbone of a state's durable economic activity. National capital is any capital that has its head office in a country and pays taxes on revenues there. If it is successful, it might spread out — yet it would have to go bankrupt for it to disappear from the home market completely. Domestic capital usually has its origin in doing business on the domestic market and — as a net contributor — is listened to by politicians (when it fits in with stately calculations). Whether a state's domestic economy is deemed suitable for long-lasting capital accumulation, is first decided by the success of national capital.

The special significance of national capital to each state is visible in bilateral negations. When a head of state travels to, say, China, the delegation often includes representatives of important companies. They stand for (particularly strong) domestic companies whose success the government wants to foster on a political level. The government wants to improve their conditions for investments abroad and therefore negotiates with other states all over the world. It does so in order to maintain and strengthen its own basis of power.[41]

Foreign capital is more fleeting as it has chosen this location based on the best opportunity for valorisation. Domestic companies by contrast are bound to the territory because they just happen to have started their business there. They use it as their headquarters from which they expand elsewhere. Capitalists invest in successful Western economies when that other territory is economically well developed. That is the case when the country can on its own generate so much growth and set such favourable conditions that it attracts more capital to invest. If however it does not look so rosy, foreign investors might still be interested — due to low wages, for example. Yet, that also means that money earned will usually flow off quickly.

Interlude: the role of the currency

For the strength of its economy, the state is not only interested in powerful capitals on its territory. To secure and widen the basis of its power, the state also watches its currency carefully. In the first step, it is a question of *how strong* that currency is. This strength flows from the purchases and sales that are accounted for in a particular currency. On its territory, trades are typically done in the domestic currency, at least in the West.[42] In the Eurozone, trades are processed in Euro. Therefore, any inner-Eurozone business strengthens the Euro. Next, there is business to and from the Eurozone that is denominated in the same currency. For any cross-border deal, the two sides of the business are free to agree upon the currency. It is the same for financial products, securities or derivatives trading[43] — these are denominated in a particular currency chosen by the contracting parties.

A currency is properly established when business happens in it where neither of the two parties are based in the economic area of that currency — say an Indian and a Tunisian company agree to trade in Pound Sterling. If a currency attracts this kind of business, it is established at least regionally if not globally. By choosing a specific currency, any international deal contributes to passing an economic vote of confidence in, for instance, the Euro. A deal done in Euros certifies that there is successful accumulation to be had in this currency.

Companies additionally seek a money which is easily tradable, which enables them to get rid of the currency at any time. If a currency always finds buyers, because it is accepted and traded worldwide, then it is an attractive currency to do business in. This is true for capitalists from the productive sphere as well as from the financial sphere because the currency itself and financial products denoted in it will likely find a new buyer. Hence, a strong currency supports the demand for accumulation that any sum of money carries. For money to be retained, it needs to be increased — and that is best done in a strong currency. The success of a currency shows that it is a great means to do business in.

A strong currency is of interest to Western states because it expresses a strong domestic economy as well as success beyond the national market. But the interest of states in their currencies goes further because the strength of a currency determines a state’s ability to take on debt. The trust put in the US dollar and the political power backing it made it possible for the US to sell sovereign debts unabatedly. Recently, this enabled the US to finance two wars — Afghanistan and Iraq.[44]

With TTIP, the US and the EU want to boost trade or at least keep transatlantic trade stable compared to the rest of the world. ISDS as part of TTIP shall additionally protect investments in one of the two currencies insofar as trade is done on either of the territories. Moreover, both states hope to have more trade accounted for in their respective currency by attracting more business to do their deals in the “right” money. Despite all that, currency itself hardly plays a role in the treaty itself. There is a good reason for this: both sides hope their currency to gain from the economic outcome of the treaty, which solely rests on their respective trust in the strength of their respective currencies; which money is the strongest is up to the economy to decide. This is premised on the free convertibility of the currency: the fluctuations in the relations of currencies are an expression of the compared economic strength of each money only under that premise and only if the state does not fix an exchange rate.[45]

TTIP refers to the topic explicitly only by guaranteeing that companies are free to dispose over their capital: restrictions by either state on capital export is banned. This is the mutual obligation to leave it completely up to the economy and its actors in which currency they want to hold their monetary assets and if they, for instance, want to exchange any profits made in Euro right into US dollar.

The economic success of a state is ultimately expressed in its currency and can immediately be compared to all other states. It expresses how well capitalist wealth can be accumulated in a currency. A strong, in-demand currency, therefore, has become the central aim of economic and foreign trade policy. Hence, successful Western states continue to have a particular interest in their own domestic capital: The companies' business at home happens in the currency of its state. The same is true for the trade they do with foreign capitalists (in particular with those of countries with weak currencies). The more fit one's own capitalist companies, the more likely it is that their operations will foster the strength of the currency by simply doing their business. The stronger the currency, the better for the state.

Competitive economies: free flow of capital

However, states do not only aim to support domestic capital abroad. Foreign companies can also bring advantages for a state: these companies, too, pay taxes, employ people, and they usually process some intermediate, local product, i.e. create business for suppliers. They also denominate some deals in the national currency and generally stand for successful accumulation in this area as they deem it worthwhile to invest there. National policy making, therefore, looks after foreign investors, too. Western states aim to create conditions that will attract these capitalists, e.g. by providing infrastructure. They maintain and develop their territories as an attractive place to invest.

Improving the attractiveness to foreign investors and advancing domestic capital, these two interests of the state can collide. Some national companies or whole sectors could go bust if they are not competitive on the world market. For that reason and during some periods of world trade, evolving capitalist states used to protect their domestic capital from foreign competitors through tariffs, import restrictions for foreign commodities and technical standards more favourable to national capital etc. Since the second half of the 20th century, in particular, this conflict gets addressed with a rather different approach. Especially since the collapse of state socialism and the end of the East-West conflict — during which international trade was strongly determined by political prices within the blocs[46] — another trend is prevalent: national companies are generally expected to be competitive on the world market. Within the WTO, this type of trade policy is dominant. Even if not all members (immediately) agree to this line, the main thrust now is: far-reaching reduction of tariffs, elimination of other trade barriers, cutback of advantages for national capital (e.g. the ban on discrimination, principle of national treatment and the most-favoured-nation clause).

The disagreements in trade negotiations stem from the fact that it would be best for each state if all the others were to lift their trade barriers, but this state were still able to have any protective measures it deems fit. Yet, the interest of other states to have easy access for their respective companies is the bargaining chip each state holds: how much of this or that do I have to allow for getting what I want for my capital in the other state? The key question for TTIP accordingly is how much of its protective measures the EU must drop — deliberate deterrents like tariffs or product standards that have the same effect — for the US to agree to do the same with regulation standing in the way of EU capital.

Thereby, those states advocating and agreeing to a general liberalisation of national markets make a slightly different calculation: instead of protecting their own capital by practically isolating it, these leading states confidently count on the power of their capitals. They renounce their former protectionism up to a point and thereby might allow some of their domestic companies — or even a whole branch — to go bust.[47] The capitalist state does this in order to reduce the costs for its more competitive industries and companies to spread out into the world and do their exploitation business abroad as well. The EU has mastered this strategy: in order to create the European Single Market, the participating states have giving up their protectionism and have opened up their economies fully to the competition from within Europe. The idea is to establish this bigger market as a player in the world and to create sufficiently big capitals which are among the fittest on the world market. By contrast, poorer countries and their hardly existing domestic capitals only have the choice to comply with the demands of the West — and in return maybe get better market access for their exports (typically food and raw materials) — or else to completely drop out of the cross-border hierarchy of competition.[48] That would entail even more brutal consequences than the ones yielded by the world order already.

How does ISDS contribute to competitiveness?

ISDS is a means for domestic capital investing abroad

The EU and the US want to set new conditions for global trade. They do this with confidence, they are not merely pressured or forced by capital to do so. They both expect to gain from this endeavour, including from the courts of arbitration. From the viewpoint of the EU: the Union firstly thinks about its own companies and how it can support them abroad. If in the future a European capitalist invests in the US and then cannot make its expected profits due to a change in policy that is incompatible with the ISDS regulations, it can sue the US for damages.

This way, foreign capital is to be protected from damages stemming from the other state supporting its own domestic companies. The fear of not being explicitly taken into account by US politics or by the American legal system is not completely irrational. The same is true the other way around, i.e. for US companies investing in the EU. As shown above, in national calculations foreign capital is less of a priority. Capitalist states undertake diverse manoeuvres in order to keep foreign competition at bay whenever deemed necessary. The contracting partners of TTIP would bind themselves and each other to follow the ISDS rules and therefore to look after foreign companies from the other side of the Atlantic just as much as after domestic capital. The idea is to even the playing field for companies from the respective other territory through this new legal process. ISDS is a means against the valid suspicion that foreign capital plays a lesser role when the other state balances competing interests.

This supplementary tool offers something new and different in one regard, as developed above: damages can be granted for loss of expected profits caused by particular actions by the host state. Foreign companies therefore do not only have their own legal forum in the form of ISDS but also a legal basis of their own. This special juridical construction comes about because the contracting states thereby agree that their own capital investing in the territory of the other state can itself take that host state up on its promise to treat it completely equally to its own domestic companies. Neither side trusts the other national legal process, which is why they establish ISDS courts. It is the mutual obligation to the programme that lies at the heart of ISDS: the contracting states make European companies which are active in the US legal persons under international law — just as much as American companies investing in Europe. It is a licence given to those capitals to recover financial compensation for damages in front of external courts.

This is a licence to act juridically, independently of their home state, in the international arena — which is the key difference compared to the settlement dispute embedded in the WTO, where only states can sue other states. There, states think about whether they want to engage in a dispute with another country over some issue. The state might shy away from such a confrontation and accept the damage to its domestic capital because other imperialist calculations are deemed more important than compensation for lost profits for a particular firm. With ISDS, the contracting states grant each other's capitals permission to sue them and their own capitals to independently sue the other state. Companies are thereby empowered by and in the framework of TTIP to sue independently of any calculation of their home state.

ISDS is an invitation to foreign capital

The second positive reason why the US and the EU want courts of arbitration is concerned with foreign capital from the other state investing on their territory. As shown above, states rule over their territory in part to be attractive to foreign investments. The dispute settlement mechanism within TTIP would be part of this strategy for both contracting states. It would not only strengthen capital abroad but would also be an offer to foreign capital that its interests are taken more into account. It is a clear signal to transatlantic foreign capital to come and invest on the other state's territory. The state plans on not getting in the way of that capital more than strictly necessary. This is what the state commits itself to with ISDS.

Thereby, the chances for transatlantic investments being worthwhile are increased, despite that foreign companies cannot count on getting the same attention from the foreign state as its domestic capital. ISDS would be one more positive factor in a long list of aspects that each capitalist investor takes into account when deciding where to invest.[49]

For the state, ISDS is a chance to attract foreign capital — but it is also a threat because these investors can cause domestic companies go bust if the latter are not competitive enough. While a state expects to gain from foreign investments on its territory, it knows the price it might have to pay — foregoing protective measures — all too well. Yet, a successful capitalist country can take losing a domestic capital here and there. The state expects to be able to bear that, because while the provisions to reduce trade barriers take their toll, at the same time they also result in domestic capital being able to expand elsewhere with lesser restrictions.

The costs of ISDS to the state

Both advantages that the EU and the US hope to gain from the ISDS provisions — the empowerment of their domestic capital on the territory of the partner state, as well as increased attractiveness to foreign capital — come at a price. This is what critics take issue with: why on earth would states willingly burden themselves with a deal that can make them respondents in big lawsuits? As much as the same critics ignore the first two arguments laid out here, their question is still standing. The price is obvious indeed: ISDS means the self-commitment to rising costs of some changes in policy. In the future, the state will have to pay for favouring some domestic capital. In these and similar cases damages would have to be paid. All of that is part of the calculation; both parties have the assessment that the trade policy instrument ISDS is worth so much in potential gains that they are ready to pay the price.

Foreign v domestic capital

With the two positive reasons for courts of arbitration, it can be explained why the ISDS mechanism is introduced only for foreign capitals. The contracting states do not trust one another to treat and support foreign, transatlantic capital fully equally to domestic capital. They aim to agree to a superior authority, which is not duty bound to either national politics and therefore should be able to judge neutrally on whether a foreign, transatlantic capital was put in a worse position.

For domestic capital, this mistrust which is the starting point for ISDS does not exist. The superior authority of dispute settlement within a country is the domestic state. It is interested in capitalist companies in as much as they contribute to the economic might of that state. There simply is no-one else who would and could insist that domestic capital can sue its state in front of a third, non-state court. Even the ISDS courts indicate the dependency of capitals on their home state: it is that state which negotiates companies' freedoms towards other states.

Summary

By introducing the dispute settlement mechanism ISDS, foreign investors from the other side of the Atlantic would be provided with a new means against the state in which they invested. The novelty of these courts of arbitration is the offer of better security for foreign investment. Contrary to what many critics claim, the legal grounds for action of the ISDS mechanism, as shown, do not favour foreign capital over domestic capital.

The bigger a foreign investment, the more of an incentive for the state to consider its investor's claims. The larger the investment, the higher the possible compensation claim and the bigger the potential damage to the national budget. This would raise the importance of these aspects compared to other national interests. In order to implement its interests, a foreign capitalist company would not have to rely on the calculation of its home state and what part this particular company and their problems play in it. With ISDS, it would have its own judicial means and be a legal subject in international law. The power of the foreign capital would still be based on the EU and US having an ongoing interest to comply with the TTIP agreement — the same basis as for any treaty between states. If they stick with it, they are likely to accept the decisions taken by the external courts of arbitration and to pay damages whenever they lose a case. If they do not, they will not — there is no power above states that could force them to honour the agreement. The subjects of the TTIP negotiations are states, which grant each other and each other's capitals certain freedoms.

ISDS means a strengthening of the Western capitalist companies that are active on both sides of the Atlantic. Any improvement in the conditions for capital accumulation signifies a cementation of the subordination of the world under the adage of profit maximisation as the highest command of any economic activity.[50]

That is the kernel of a reasonable critique of TTIP and ISDS. The inversion of this argument could not be more wrong. A prevented TTIP or a TTIP without the settlement dispute would not mean a better world, and not even the preservation of a status quo as a lesser of two evils. With or without TTIP, everyone is the material of the accumulation of capital and for the might of the democratic state.

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1. The EU, which is responsible for the external trade policy of all of its 28 member states, is an alliance of states, not a state on its own. Yet, in this area of policy making, the EU acts as *one* actor and will therefore (and for better readability) be referred to as "one state" in this article.↩

2. States also act within the economy: whenever a governmental body commissions the construction of a street, a school or a prison. But the state does not aim to make a profit.↩

3. This right to sue is increasingly being extended to international organisations such as the United Nations and the World Trade Organisation.↩

4. A well-known exception are claims of damages in US civil law which are not just measured by the damage they caused but can entail a punitive element.↩

5. To be exact, the lawsuit was directed against the 13th amendment to the Atomic Energy Act. Additionally, there are pending cases regarding the mandated shutdown of several nuclear power plants triggered by the nuclear catastrophe in Fukushima in 2011.↩

6. The Energy Charter was created in order to enhance investments in the energy sector all over Europe after the collapse of the Soviet Union and the Eastern bloc. The aim was the "integration" of the energy sectors of the former members of the Eastern bloc into the European and the global market. The treaty and the protocol was signed in 1994, the Charter became effective in 1998. There are 51 members states, amongst them all EU countries, Russia, various former Soviet republics as well as Japan and Australia.↩

7. That means all of the following: private property especially of the means of production is a precondition for profits to be made. Freedom granted to citizens by democratic states guarantees that everyone is left to oneself which for most people means a silent compulsion to work for a living. Since capital does not always need all the workers available, the state runs a whole department to deal with that: social policy. With social benefits, people are enabled to survive on a low level and therefore are in principle available for work. Also, the state looks after the infrastructure for transport and communication to happen. The state provides an education system, too, so that for all the different jobs in a capitalist economy, wage labourers with the relevant knowledge are available. Finally, the state guarantees the whole thing with its monopoly on force which means police for domestic affairs and the military for international confrontations.↩

8. What exactly will be included in the TTIP agreement, which is still being negotiated, is still unknown despite the recent leaks made public by Greenpeace (2.5.2016). Most other investment protection treaties include those causes of action in a more basic or a more elaborate form.↩

9. Indirect expropriation is also part of e.g. the German legal system.↩

10. ICSID Case No. ARB/09/6↩

11. This settlement was agreed under the national legal system (in the Hamburg Higher Administrative Court), where Vattenfall had initially filed a lawsuit. In the settlement, the different claims in front of the ISDS court played a decisive role. The settlement lead to a stop of the ISDS proceedings. That was not the end, though. An Ngo filed a claim against the settlement in a national court and won. However, this still was not the end of the saga, albeit it no longer being argued in front of an ISDS court. With the settlement and the less strict regulations, Hamburg possibly contravened the EU's Flora-Fauna-Habitat Directive. The EU Commission now is suing Germany. This case seems to be developing into a test run on which law trumps the others.↩

12. It is the newer investment treaties like CETA or the one between the EU and Singapore that define fair and equitable treatment more clearly than older ones. The EU Commission explains that it wants to prevent unwanted claims of investors that are seen in the past to have exceeded the intent of some agreements. One example: a subsidy paid in an EU member state was ruled unlawful by the EU. Therefore, the foreign company initially foreseen to profit from that subsidy claimed and received damages. That was seen to be like a reintroduction of the subsidy through the backdoor. http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF, p. 5–6.↩

13. ICSID case No. ARB(AF)/97/1.↩

14. Mexico was made to pay US $16m.↩

15. Whether public procurement will become part of the TTIP deal, is highly contested from the US side.↩

16. This is the so-called national treatment: it determines that contracting states of the WTO must treat foreign capital on their territory equally to domestic firms. Additionally, the "most-favoured nation clause" requires that any advantage state A agrees to offer to companies from state B, state A must also offer to any capitals from state C (if and when they invest in state A). Thereby, the current rules of world trade stress more and more that foreign capital cannot be discriminated against, i.e. domestic companies can no longer receive more favourable treatment by its state.↩

17. Under CETA, the European-Canadian equivalent to TTIP, an allegedly damaged investor is prohibited from suing both in front of an ISDS and a national court.↩

18. Beyond the basic conditions, the capitalist state does a lot in order to administer this competition: antitrust laws for instance aim to prevent the formation of monopolies, whereby the law aims to guarantee the competition in each sector. Other examples of the need to regulate include the prohibition of corruption and bribery, avoiding personal gains of state agents as a reason for the advancement of single capitals. Then, there is public procurement law regulating how companies receive often ample contracts from public institutions, in order to avoid nepotism. In order for the total social capital to grow there are various protective standards needed. That aims to limit the permanent ruination of the population and particularly of workers to a degree that avoids widespread deaths and aims to keep the working class intact so that it can be used as wage labourers when needed.↩

19. Critics hold that the right to regulate was nothing important to the signatories because it only appears in the preamble of the agreements. They claim it is not mentioned to enable state's to regulate but that it is simply a sop for the protest movement. These critics overlook the fact that in US case law, for example, the preamble plays an important role: it is used by judges to clarify the intent of the contracting parties — For TTIP, the EU Commission has announced its aim to include the right to regulate in an own article, cf. http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF, p. 6.↩

20. Such an inquiry is also standard procedure in national courts when lawsuits are filed against expropriation, e.g. in front of the Federal Constitutional Court of Germany.↩

21. Some bilateral treaties allow for 5 or 7 judges.↩

22. Dispute settlements under the WTO — which only take place between states as companies are not a legal subject here — allow for verdicts *asking* (i.e. not obliging) for national laws to be changed. But most of the bilateral treaties — where companies are legal persons — are limited to paying compensations as the only possible outcome of arbitration.↩

23. The arguments supporting a certain court's decision are often dozens of or even hundreds of pages long, the legal basis to which they refer is often only a handful of pages specifically on investment protection in the treaty.↩

24. Pointing out how the ISDS mechanism differs from national law should not be mistaken for a praise of the latter. Both regulate and mediate the daily with and against each other of capitalist societies, both approaches structure and maintain the conditions of accumulation for capital. However, they differ in how they accomplish this.↩

25. http://trade.ec.europa.eu/doclib/press/index.cfm?id=1365&chapter=Reading-Guide-Draft-text-on-Investment-Protection-and-Investment-Court-System-in-the-Transatlantic-Trade-and-Investment-Partnership-(TTIP).↩

26. However, thousands of investment protection treaties worldwide still contain ISDS mechanisms and its ad hoc courts of arbitration to provide protection for foreign investments.↩

27. There is no difference here between states like EU and US who define and foster trade and liberalisation and states which are simply confronted by the rules developed this way and have little to say on the matter. All states are confronted with this problem.↩

28. An agreement is bilateral if it is concluded between two states. It is plurilateral if more nations are involved.↩

29. *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012–12↩

30. In December 2015, the lawsuit was dismissed (i.e. the court considered the claims to be invalid) by an ISDS court. According to Philip Morris, this was due to procedural failure (the verdict is still secret, the details therefore unknown to the public). It nevertheless had the effect of stalling legislation elsewhere, since the lawsuit began in 2011. http://www.iareporter.com/articles/breaking-australia-prevails-in-arbitration-with-philip-morris-over-tobacco-plain-packaging-dispute/↩

31. In the Lisbon Treaty (in effect since 2009) the EU has been assigned the competence for external trade policy of all its member states. Hence, the EU now negotiates agreements on foreign trade for the whole of the EU with other states. Before, the EU was already responsible for the tariff policy but not investment treaties.↩

32. Before 2000, just under 80 cases were publicly known; in 2010 alone there were 331 known cases.↩

33. If governments do not say goodbye to the world market altogether but become more particular about which investments they want and under which conditions.↩

34. Tariff reduction is something that has broadly advanced since the WTO's foundation in 1994, as a consequence they are generally quite low.↩

35. This round of negotiations was discontinued, suspended or declared to be dead several times — it is still being negotiated, though. One crucial disagreement concerns agricultural products for which Western states want more liberalised trading but emerging countries and the poorest states object to it.↩

36. Initially, the US and the EU even planned to create common standards. That fell though because neither state wanted to submit itself to the rigour of accord that would have been needed.↩

37. Though some commodities and sectors are either exempted from the treaty or special provisions might apply to them.↩

38. In the negotiations, the EU is arguing for the US to open public procurement not only on the federal level but also on the state level, which awards many public contracts. In some states, the Buy America Act explicitly encourages favouring regional or US companies.↩

39. Sometimes, the total amount of expected monetary gain in the EU is divided by the number of its citizens. That supposedly expresses how much more everyone would have at the end of the month: a three or four digit figure. It is not clear who came up with such a stupid idea first — as if capitalist growth were ever split up and everyone got an equal share of it.↩

40. To state the aims related to TTIP in the language of the EU Commission: "to influence world trade rules [and to] project our values globally." http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/↩

41. Not every single company is supported by its home state. Yet, whereas a state might take its chances to see some domestic capital go bust, it does not care as much for foreign firms to begin with.↩

42. Economic activity in less successful states does not necessarily take place in the national currency.↩

43. These are financial products traded at a stock exchange which might speculate on the value of other financial products or which are compiled from part of other papers.↩

44. There is no question about what the leading currency is these days: the US dollar keeps dominating world trade, it is the world money. This is exemplified by the oil trade, which is dealt with to a large degree in this currency. Many other international business deals are also being processed in US dollar. With the Euro, the EU attempted to set something of their own against this dollar dominance. The initially successful project is not in the best of shapes since the financial crisis of 2008 and following and even more so since the sovereign debt crisis since 2010. Nevertheless, the Euro is still one of the leading currencies and the EU continues to plan for the expansion of the Euro's worldwide importance. Another currency to be counted with is the Chinese Yuan which is gaining attraction.↩

45. In the background of this free availability of the strong currencies are the foreign currency reserves of the central (or reserve) banks. The European Central Bank holds a large supply of US dollar by which it expresses: everyone can deal and trust in the Euro. Any time you

want to get rid of the Euro and exchange it into some other leading currency, I, the central bank with my foreign currency reserves, am happy to provide you with that if there is no other buyer on the market for Euro.↩

46. Both sides, the US and the Soviet Union, made trade deals with other states in order to tie them to their respective bloc. Prices were "political prices", as the priority for both the US and the Soviet Union was to form alliances: the big powers wanted less successful states to align themselves with their respective bloc. The aim of this kind of trade was to score politically rather than economically.↩

47. For instance, the European clothing industry after the WTO agreement (more precisely: after the transitory Multifibre Agreement ran out in 2005).↩

48. Some Latin American states and South Africa have developed a more sceptical evaluation of the ISDS mechanism. Some investment protection treaties have already been cancelled, some others are being reconsidered. Australia has announced that it does not want ISDS to be part of any future treaties (cf. CEO pamphlet "Profiting from injustice" http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf, pp. 9, 16–17 and the World Investment Report "Towards a new generation of investment policies" by UNCTAD, 2012, http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf, pp. 86ff.).↩

49. In as much as this might mean more jobs in times of boom, it is the same boom that flushes money into the accounts of capitals, which is money to buy new, more productive machinery, making workers redundant. Not even in economic prosperity can workers bank on a positive outcome.↩

50. See Karl Marx. *Capital. A Critique of Political Economy, Volumes 1–3*, Penguin Classics 1990–1992.↩