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The many faces of sovereignty

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Abstract

Critiques of international economic law have attacked the tendency of transnational legal processes, including investor-state dispute settlement (ISDS), to undermine states' sovereignty. In response to these criticisms, many states have limited the power of investment tribunals by reasserting their sovereignty. There are reasons, however, to be critical of endorsing sovereignty, particularly in the context of global distributive inequalities. This is because assertions of sovereignty are normatively ambivalent in their effects: they can be used to entrench and naturalize the unequal assets held by each state, rather than to empower states to exercise their right to regulate. These potential tensions can be resolved if sovereignty is understood as a term that is used in many different ways. Critics of ISDS often conflate two distinct meanings of sovereignty: sovereignty understood as the right to be free from external influence, and sovereignty understood as states' right to regulate. Because states are constrained by differences in resources and capacity, withdrawing from ISDS cannot always secure the conditions for effective domestic regulation. Sovereignty understood as the right to be free from interference may even stand in the way of states' ability to regulate, by allowing states to gatekeep resources that were accumulated through historical injustice.

Keywords: sovereignty; global inequality; investor-state dispute settlement (ISDS); New International Economic Order (NIEO)

Critiques of international economic law have attacked the tendency of transnational legal processes to undermine states' sovereignty. As the argument goes, tribunals ruling on trade law and investment law have been empowered to challenge and constrain domestic laws concerning health, environmental protection and distributive justice. Investor-state dispute settlement (ISDS) has been a frequent target of such criticisms, in response to which many states have limited the power of investment tribunals by reasserting sovereignty.

There are reasons, however, to be sceptical of assertions of sovereignty. In light of global distributive inequalities, it becomes evident that assertions of sovereignty are normatively ambivalent in their effects. Appeals to sovereignty can be used to

entrench and naturalize inequalities between states, rather than to empower weak states to exercise their right to regulate.

These potential tensions can be resolved if sovereignty is understood as a term with many possible meanings, where the various meanings are not only different from, but also potentially in tension with, one another. Critics of ISDS often conflate two distinct meanings of sovereignty: sovereignty understood as the right to be free from external influence, and sovereignty understood as states' right to regulate. Because states are constrained by differences in resources and capacity, withdrawing from ISDS cannot always secure the conditions for effective domestic regulation. Sovereignty understood as the right to be free from interference may even stand in the way of states' ability to regulate, by allowing states to gatekeep resources that were accumulated through historical injustice. In making this point, this paper draws on the spirit of the 1970s demand for a New International Economic Order (NIEO). The NIEO recognized that global distributive inequalities stood in the way of states' effective exercise of their regulatory powers. It attempted to rectify those inequalities through an international redistributive project. That project, in turn, required states – particularly wealthy ones – to partially limit their external sovereignty in order to create the material conditions under which all states could exercise their powers to regulate in a meaningful and equitable way.

I proceed in four stages. First, I describe the perceived encroachment of international economic law on states' sovereignty and the backlash that it has generated, focusing on investor-state dispute resolution (ISDS). ISDS is a system in which arbitral tribunals resolve disputes between foreign investors and host states, arising from investment treaties between the home country of the investor and the host state. In recent years, ISDS has attracted criticism for its tendency to restrict states' sovereignty, to which some states have responded by limiting the scope of investor-state arbitration or withdrawing from it altogether.

Second, I place the backlash against ISDS in the context of a broader tradition of critiquing the idea of sovereignty. Scholars in this vein have argued against idealizing sovereignty, especially on the grounds that it entrenches inequality between individuals and states. While such criticisms seem to be at odds with the pro-sovereignty backlash against ISDS, I argue that the two positions can be made compatible with one another. That is because both views agree on the normative value of sovereignty insofar as it is understood as the right to regulate – which is what is really at stake in debates about ISDS.

I next develop this analysis by disaggregating the concept of sovereignty into its different possible meanings. ISDS appears to constrain sovereignty as understood in two different ways: it constrains the right to be free from external interference and the right to regulate within a state's borders. Importantly, those two rights are not co-extensive. This is a reality to which, I argue, critics of ISDS have been insufficiently attentive. I make this argument by drawing on the example of South Africa's response to ISDS. In South Africa, economic reforms for restorative justice after apartheid were challenged through ISDS, which led the South African government to decide to not renew its bilateral investment treaties (BITs). However, freedom from interference from international tribunals is not enough to achieve the restorative justice that South Africa aspires to. Instead, restorative justice demands transnational justice and redistribution, which in turn may require wealthier states to relinquish their right to be free from interference.

Finally, I consider the kinds of redistributive interventions that would change the conditions under which states exercise their sovereignty. I draw on the example of the 1970s demand for an NIEO, which is illustrative not only in how states sought to transform the conditions for the exercise of sovereignty, but also in how they leveraged the formal equality of sovereignty that was available to them to demand that transformation. This discussion suggests that, even as the different meanings of sovereignty have been used to subordinate Global South nations, the ambiguity in and multidimensional nature of sovereignty can also be wielded as a tool to provide a path for reform. This means that while securing sovereignty as the right to exclude is not sufficient to securing the ability to regulate, it can be used in conditional support of the ability to regulate.

International economic law: the view from sovereignty

The dominant framing in current critiques of international economic law is that it undermines states' authority to enact democratically authorized laws and regulations in the public interest. I focus on controversies and developments in international investment law to illustrate the logic of this critique and the sovereigntist response that it has sparked. This discussion will serve as the basis for a critical evaluation of sovereignty, and its role in reforming international economic law.

The perceived problem

BITs are typically concluded between countries with the purpose of encouraging foreign direct investment by granting protections to investors in the host state – protections such as national treatment and most-favoured-nation treatment, fair and equitable treatment, protections against expropriation and the right to transfer funds freely into and out of the country.[1] They came into use in the latter half of the twentieth century and proliferated rapidly in the 1990s.[2] BITs were concluded against the backdrop of Global South countries' need for foreign investment, and were seen as a way of improving investor confidence.[3]

One controversial element of BITs is their provisions regarding ISDS (also referred to as investor-state dispute resolution), which allow investors to bring disputes to arbitral tribunals concerning alleged violations of their rights under the BIT. One paradigmatic category of alleged violations is expropriation, for which foreign investors are entitled to compensation.[4] While international law has long

[1]While I refer primarily to bilateral investment treaties (i.e. treaties between two states), there are other kinds of investment treaties, such as *multilateral* investment treaties, which have similar provisions and effects. The North American Free Trade Agreement (NAFTA – now replaced by the U.S.-Mexico-Canada Agreement or USMCA), which is referenced in this essay, is an example of a treaty between multiple states.

[2]United Nations Conference for Trade and Development (UNCTAD) 2000.

[3]Guzman 1998, 669–71.

[4]More specifically, many investment treaties do not prohibit expropriation, but place conditions on it which often include the payment of compensation. See, for example, NAFTA |Article 1110; 2012 U.S. Model Bilateral Investment Treaty, Article 6. Such payment is often required to be 'prompt, adequate, and effective', following the so-called Hull Formula. See OECD 2004, 2.

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recognized the rule that foreigners must be compensated for the expropriation of their property, in recent decades tribunals have awarded compensation for an increasingly wide range of allegedly expropriatory acts.[5] Tribunals grant compensation to investors for 'indirect expropriation' – situations 'in which an investor's legal title is not extinguished but the actions of a state are, in legally significant respects, analogous to direct expropriation'.[6] In such cases, the alleged indirect expropriation may be the result of domestic laws and regulations, such as those concerning health or environmental protection. In one widely publicized case, the tobacco company Philip Morris brought a case against Uruguay before the International Centre for the Settlement of Investment Disputes (ICSID), alleging that its anti-smoking legislation was expropriatory.[7] Other cases that have received scholarly and public attention include *Eli Lilly v. Canada*, in which a pharmaceutical company argued that Canadian courts' interpretation of Canadian intellectual property laws violated NAFTA;[8] and *TransCanada v. USA*, in which an oil company argued that the U.S. government's denial of a permit to construct the Keystone XL Pipeline violated NAFTA.[9]

For reasons of space, I will not be able to survey the vast literature concerning the legal standards that tribunals use to distinguish between legitimate regulations and indirect expropriations. Tribunals often look to the *effects* of the measure in question, such as whether the measure has the effect of substantially depriving the investor of its expected economic benefits, or of its property interests in the investment.[10] Alternatively, tribunals will sometimes consider the legitimacy of the host state's purpose in enacting the measure,[11] including whether the state was validly exercising its police powers in enacting it.[12]

Not all governmental measures that negatively impact investors are struck down. In fact, many of the highly publicized cases were not ultimately decided in favour of the investor, as tribunals often recognize states' rights to enact domestic laws and regulations even if it affects foreign-owned property. Estimates suggest that investors win in about a third of investor-state arbitration cases.[13] In the *Philip Morris* case, the tribunal held that Uruguay's anti-tobacco laws did not substantially deprive Philip Morris of its investment, then went further to hold that Uruguay

[5]OECD 2004, 2.

[6]Bonnitcha 2014, 230.

[7]ICSID is a dispute settlement institution that is a part of the World Bank Group, which provides facilities for investor-state disputes. Despite the widespread criticism that this case provoked, *Philip Morris v. Uruguay* was ultimately concluded in favour of Uruguay. *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016.

[8]*Eli Lilly and Company v. The Government of Canada*, UNCITRAL Case No. UNCT/14/2, Final Award of 16 March 2017. This was in some ways a very exceptional case, as it involved review of Canadian courts' interpretation of their own law. See Pistor 2019, 140–42.

[9]*TransCanada Corporation and TransCanada PipeLines Limited v. The United States of America*, ICSID Case No. ARB/16/21, Order of the Secretary-General Taking Note of the Discontinuance of the Proceeding, 24 March 2017; see Grewal and Adkins 2016.

[10]Bonnitcha 2014, 255; Nikièma 2012, 13.

[11]Bonnitcha 2014, 256.

[12]Kawharu 2011, 352–55; Titi 2018, 334–39.

[13]Mann 2015.

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validly exercised its police powers in enacting the laws.[14] Still, critics have found troubling the very fact that international tribunals could rule on domestic laws and regulations, entailing prolonged litigation and often resulting in expensive settlements or awards.[15] Critics have found problematic the procedural aspects of ISDS, which prioritize the judgement of privately appointed arbitrators shrouded under secrecy over the decision of democratically elected executives and legislatures. They have also criticized the outcomes that these tribunals tend to produce, which can challenge measures that are aimed at protecting the environment, promoting health and safety, and achieving distributive justice.[16]

The response

These critiques have given way to a reform movement in ISDS. Although different countries have opted for different measures, the overarching characteristic of this reform movement is that it makes room for states to exercise their sovereignty.[17] My focus in this section is on states' unilateral responses to the ISDS regime, rather than multilateral negotiations, although the backlash to ISDS has also triggered multilateral negotiations such as those under the auspices of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WG III).[18]

States have changed the rules of arbitrations by negotiating BITs with different terms that limit investors' rights, and correspondingly make more space for domestic regulation.[19] One example of this is India's new Model BIT, which rules out compensation for non-discriminatory regulatory measures.[20] The new United States-Mexico-Canada Agreement (USMCA), a successor to NAFTA, also significantly constrains the right of investors to bring claims against state parties.[21] NAFTA is a notable example of the turn towards sovereignty because it is both the site in which the earliest criticisms of ISDS emerged, and one in which states already had relatively greater power to shape the rules of arbitrations. Early on, contracting states established the ability to issue authoritative interpretations of NAFTA's investor-protection provisions.[22] In recent years, more BITs have explicitly provided for state participation in investor-state arbitration using mechanisms such as those contained in NAFTA.[23]

[14]*Philip Morris v. Uruguay*, Award, paras 286–87.

[15]The literature on regulatory chill is vast; for example, see Tienhaara 2011.

[16]Dimitropoulos 2020a, 2020b; Polanco 2019, 116.

[17]For a comprehensive overview of measures that have already been implemented and proposed, see Dimitropoulos 2020a; Roberts 2018; Alschner 2015.

[18]Arato *et al.*, 2023. The WG III negotiations have been limited to purely procedural issues; one of the most notable areas of progress has been on developing a draft code of conduct for arbitrators. Some have criticized the purely procedural nature of the negotiations. See Gathii and Mbori 2023, 536.

[19]Many of these reforms correspond to the demands of what Anthea Roberts has called 'paradigm shifters', in contrast to 'incrementalists' and 'systemic reformers'. Roberts 2018, 416–17.

[20]Dimitropoulos 2020a, 83–84.

[21]Garcia-Barragan *et al.*, 2019. The ISDS provisions only apply between the United States and Mexico, with additional constraints that did not exist in NAFTA such as resort to local remedies, and investors can no longer bring suits against Canada.

[22]Kawharu 2011, 347; Alschner 2015, 301.

[23]Polanco 2019, chap. 4.

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Other states have established altogether new institutions, such as domestic 'international' courts – courts that are technically domestic courts, but apply foreign law to transnational disputes.[24] Relatedly, they have pushed for the increased role of the state in disputes through the alternative of state-to-state (rather than investor-state) disputes.[25] Finally, some states have withdrawn from ISDS altogether, such as by withdrawing from the ICSID Convention.[26] In South Africa, about which more will be said below, the government decided to withdraw from some BITs, not renew any of its existing commitments, and to apply domestic law to investment disputes.[27]

These measures increase the role of the state, by formally recognizing the state's right to regulate over investors' rights, and allowing the state to actively intervene in dispute resolution procedures when its regulatory interests are perceived to be at stake. The assumption underlying the ISDS reform movement is that withdrawing from investor protection measures will strengthen states' right to regulate – the right to pass laws that benefit the general interest, including laws concerning health, safety, environmental protection and distributive justice.

Sovereignty and its discontents

While states' backlash to ISDS has largely stemmed from a negative reaction to perceived encroachments on their sovereignty, the scholarship on sovereignty – and especially postcolonial critiques of sovereignty – gives us reasons to be sceptical of elevating sovereignty as an ideal. Many of those who express criticisms of the ideal of sovereignty also write from the perspective of the Global South and its citizens, in whose name critics of ISDS also often speak. In contrast to the critics of ISDS who seek to reassert sovereignty, these critics of sovereignty suggest that sovereignty is a hollow ideal that even justifies domination, either of individuals by states, or of states by other more powerful states. These claims raise a serious challenge that must be taken seriously; however, as I ultimately argue, they lead to a conditional defence of a certain conception of sovereignty that privileges states' domestic right to regulate.

Sovereignty in a globalized world

Those who argue for asserting sovereignty in the face of potential encroachments by ISDS are motivated, as I have suggested in the first section above, by the belief that states should be able to regulate markets through domestic laws and regulations, taking into account a wide range of substantive values. However, this belief may be founded on an unrealistic idea of how states function. As theorists of sovereignty have long pointed out, there was no 'golden age of the Westphalian

[24]Dimitropoulos 2020a, 88–91. The European Union has proposed the establishment of a bilateral investment court with permanent judges and an appellate tribunal. Guillaume 2023.

[25]Roberts 2014, 3.

[26]Dimitropoulos 2020a, 79.

[27]Ibid. The South African government has made clear its position that it rejected the international investment regime based on the view that it is 'detrimental to public budgets, regulations in the public interest, democracy and the rule of law'. Government of South Africa 2019, 4.

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state'; it was never the case that states were autonomous, independent and impenetrable.[28]

It may seem like an especially hopeless task to realize that Westphalian model in a world that has already been shaped by globalization.[29] In fact, in today's world, the most serious challenges that arise are likely to be transnational in character, such as addressing climate change, responding to public health crises such as pandemics or managing transnational flows of people and capital. Such challenges demand responses that are also transnational in character, and therefore it may seem that state sovereignty is not the best means of promoting the underlying values of the regulation at stake.

Still, it appears that the sovereignty of the nation-state remains one of the few currently available of protecting values such as democracy, human and environmental health, and distributive justice. Most concretely, domestic democratic processes tend to be mobilized more easily than existing international institutions, which often do not have formal mechanisms of input and accountability. Existing international institutions have been criticized for their tendency to empower a small number of elites, who in turn tend to promote and entrench market values.[30] For these reasons, Martti Koskenniemi has argued that the assertion of sovereignty represents the 'expression of local values and preferences as well as traditions of self-rule, autonomy, and continuous political contestation'.[31] In other words, what is really at stake in protecting sovereignty is protecting self-determination: the powers of political communities to democratically determine their ends. This is both a procedural and substantive argument: sovereignty is valuable because it promotes the procedure of democracy and the substance of the aims that are democratically determined.

As Koskenniemi's focus on 'local values and preferences' alludes to, there are reasons to believe that even as a matter of principle, a world of many sovereign states would be preferable to, for example, one global institution in the form of a 'world state'. This is because of the possibility that institutions that are closer to the people to whom they are accountable would be better able to reflect their demands and preferences. Singular, overarching global institutions risk being unaccountable and even becoming despotic.[32]

In some circumstances, it may appear that local, democratic self-determination comes at the expense of addressing challenges that are global in scope, such as climate change or global pandemics. The procedure of domestic democracy may not align with the substance of (possibly global) values such as human rights, health justice or environmental justice. In response, it is worth noting that the record of some international institutions has been spotty, tending to favour the functioning of the market over other values.[33] More importantly, however, this defence of

[28]Krasner 1995, 115; Srivastava 2022, 12–13.

[29]Ip 2010, 637.

[30]See generally Lang 2011, which discusses international economic law in the context of the trade regime. For a more recent critique of ISDS, see Government of South Africa 2019, 3–4.

[31]Koskenniemi 2011, 68. For those that make similar arguments for taking a state- and sovereignty-centric view, see Laborde and Ronzoni 2016, 285–86; Gumplova 2020, 12–13; Singh 2015, 163.

[32]Laborde and Ronzoni 2016, 285–86.

[33]Lang 2011, chap. 8.

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sovereignty does not rule out the possibility of certain international agreements to coordinate global efforts. It merely strongly conditions those agreements on democratic consent and ongoing democratic authorization. In the ideal scenario, it is even possible that domestic and international institutions could serve a mutually reinforcing function, as states could experiment with different laws that are suited to local contexts, while international institutions could hold states accountable and coordinate efforts.

In what follows, I investigate two further objections to the principle of sovereignty. On the individual level, there is a concern that empowering states will not necessarily benefit the individuals that live within those states, but instead create arbitrary differences between individuals because of the state in which they happen to be born. Second, on the state level, there is a concern that protecting sovereignty might entrench inequalities and arbitrary differences between states. I address both of these concerns in turn, and suggest that both actually lead to a limited and conditional defence of sovereignty, insofar as it is understood as the right of states to regulate within their borders.

The cosmopolitan critique

State sovereignty may not be a good means of promoting substantive values through regulation because each state is both differently motivated and differently positioned in its capacity to regulate. Insofar as individual people are the beneficiaries of such regulation, such critics might worry that the right to enjoy clean, unpolluted air or water or safety regulations at work might be dictated by the state they happen to be born in.

One version of this claim may be rooted in the worry that, because of different countries' internal political organization, some states would be more democratically responsive than others. In light of such institutional differences, allowing states to assert their sovereignty might not correlate with regulation that benefits the relevant people in question. It might even empower the wrong people, such as local elites and even autocrats, who are especially poorly placed to enact domestic regulations that would be in the best interests of the people they claim to represent.[34]

This concern is valid in the abstract, but once it is applied to real, existing regimes, its troubling implications emerge. Charges of authoritarianism and autocracy are often levied against Global South, postcolonial nations, to blame states for their deficiencies when they face severe constraints in resources and state capacity. In the worst case, such charges have been rhetorical tools used to disempower postcolonial nations, and even to justify intervention.[35] It is no coincidence that historically, scepticism about states' ability to guarantee the protection of individuals' rights emerged in a moment of backlash against the most radical claims made by postcolonial nations for intrastate redistribution.[36] On this view, the even-more utopian demand of cosmopolitanism, which dismisses all state boundaries as

[34]Jackson 1991, 21.

[35]Anghie 2006, 750; Orford 1997, 450; Simpson 2004, 281–82; Parfitt 2019, 4–5.

[36]As Samuel Moyn has put it, 'cosmopolitanism came to philosophy as an unfulfillable dream'. Moyn 2018, 159.

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morally irrelevant, may even serve as a means of watering down what can actually be achieved in practice.[37]

It is possible, however, to develop a more nuanced version of this claim that focuses on states' differing *capacities* to regulate and interrogates the sources of those differences. Different states have different capacities to regulate in part because of the legacies of imperial extraction. European colonists not only extracted resources from their colonies, but also weakened the political institutions of their colonies to facilitate extraction.[38] After decolonization, as Vanessa Ogle has written, former colonists swiftly relocated their capital from former colonies to offshore tax havens, depriving newly independent nations of tax revenue.[39] Furthermore, she suggests that when the Europeans left their former colonies, they entrusted power to elites closest to them, contributing to the massive inequality that is pervasive in such countries today.[40] Such events may explain why it is in the formerly colonized countries that people enjoy lower standards of material and civil well-being.[41]

Understood in this way, this critique of sovereignty can even turn into an argument for strengthening a certain kind of sovereignty – the dimension of sovereignty associated with the right to regulate. Sovereignty in its domestic, regulatory dimension offers individuals benefits, including opportunities for democratic expression and the benefits of effective regulation. Insofar as the sovereign state is the channel that most effectively ensures individuals' access to these benefits, differences in state capacity are troubling for cosmopolitans because they also translate to differences in individual entitlements. While equalizing state capacity may not be sufficient for equalizing individual entitlements, it is at least a necessary minimum condition. This line of reasoning leads not to the conclusion that the principle of sovereignty should be rejected, but instead that the conditions of its exercise should be made available to all.

The historical critique

Another related critique of the idea of sovereignty operates at the level of states: that sovereignty has historically been used to disempower states, particularly postcolonial states in the Global South, and to entrench existing inequalities between states. Upon closer inspection, however, it appears that many such postcolonial criticisms of sovereignty do not take issue with the assertion of sovereignty *per se*, but rather the privileging of certain meanings of sovereignty over others – for example, the privileging of states' formal equality and their ability to enter into binding agreements, over their right to regulate within their territory. In this way, these criticisms further support a conditional defence of sovereignty that privileges its domestic, regulatory aspect.

Critics have argued that the principle of sovereignty is tainted by its origins in perpetuating Eurocentrism and imperialism. For example, Antony Anghie has

[37]Ibid., 162.
[38]Acemoglu *et al.*, 2001, 1375.
[39]Ogle 2020, 242.
[40]Ibid.; Al Attar 2012, 1617–18.
[41]Jackson 1991, 20.

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argued that the idea of sovereignty emerged 'out of the attempt to create a legal system that could account for relations between the European and non-European worlds' in the colonial encounter. Non-Europeans were bound by the supposedly universal system of natural law, but they were not recognized as fully sovereign; they were only included as subjects to be disciplined through the law.[42] After decolonization, former colonies were granted formal sovereignty but without the abilities and privileges that had traditionally been associated with sovereignty.[43] What these critics suggest is that as a result of this history, the idea of sovereignty works to the detriment of non-Western nations.[44]

One example of how the idea of sovereignty has been used to the detriment of Global South states is the doctrine of state succession. According to the doctrine of state succession, newly independent states must carry out their obligations to other states despite ruptures in domestic authority, such as independence from colonization. This means that they are obligated to repay debts or to continue concessions for the exploitation of natural resources.[45] Another example is the practice of conditional lending, in which states – often poorer states in the Global South – are presumed to have agreed to often punitive structural adjustment regimes when they agreed to borrow money. In such cases, the idea that a state is 'sovereign' is used to undermine its 'sovereignty'. Meanwhile, Global North nations, many of which have benefited from imperialism and ongoing relations of unequal dependence, use the idea of sovereignty to assert its exclusive entitlements to the wealth that they accumulated.[46]

These claims can be rephrased not as criticisms of sovereignty *per se*, but criticisms of the way in which certain possible meanings of sovereignty are elevated above others. For example, in the case of state succession or conditional lending, a state's ability to enter into binding commitments, formally as equals with other states, is privileged over its ability to regulate its economy. In the case of states asserting exclusive possession of wealth that is the product of transnational processes, some (wealthy, powerful) states' ability to exclude external interference is privileged over other (less wealthy, weaker) states' ability to provide material well-being for their citizens.

This selective interpretation of the meaning of sovereignty weakens states' ability to effectively control their domestic affairs and to be able to provide for their citizens. Practices of conditional lending and structural adjustment, for example, have

[42]Anghie 2005, 3; Parfitt 2019, 9–10, 13.

[43]Jackson 1991, 22.

[44]There is an even deeper problem that arises from the imperial roots of sovereignty: that borders were drawn arbitrarily and to the benefit of European empires, which has led to deep conflicts and crises of legitimacy within the states that emerged after empire. Still, some of the most radical critiques of sovereignty that are made on this basis actually *affirm* the value of sovereignty as self-determination, but argue that the borders and territorial boundaries of the state should change to enable the self-determination of different groups. For example, Makau W. Mutua argues for the illegitimacy of the doctrine of sovereignty as it was imposed on Africa, because existing borders are the result of colonizers' arbitrary line-drawing on the map of Africa. These arbitrary borders have led, on Mutua's view, to a crisis of internal legitimacy within African states that have made it impossible for those states to effectively govern. However, he endorses the principle of self-determination and instead argues for a redrawing of the map of Africa. Mutua 1995, 1118.

[45]Anghie 2005, 213; Lienau 2014, chap. 1; Brunner 2019.

[46]Achiume 2019, 1522.

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imposed market-liberalizing reforms that have increased poverty and inequality, and have made it harder for states to set their own economic policy.[47] What these criticisms demand, then, is similar to what cosmopolitan criticisms of sovereignty demand: a focus on sovereignty specifically understood as the right to regulate domestically. In that sense, these criticisms might be reconcilable with ISDS critics' attempts to reassert sovereignty.

Dimensions of sovereignty

As the preceding discussion suggests, sovereignty has a variety of possible meanings, some of which are in tension with one another. This allows us to reconcile the views of, on the one hand, the defenders of sovereignty against ISDS, and on the other, the critics of sovereignty. Both seem to agree on the importance of bolstering states' regulatory powers. Returning to the implications for ISDS reform, recognition of the different possible meanings of sovereignty also allows us to formulate a more precise conception of sovereignty that can be mobilized in defending states' rights to regulate. Importantly, this conception of sovereignty must distinguish between the right to exclude external interference and the right to regulate, while recognizing when advancing one does not necessarily advance the other.

The faces of sovereignty

Stephen D. Krasner offers a typology of the different meanings of sovereignty, which I draw on and develop in this section. Using this typology of sovereignty, we can see that ISDS (as it currently exists) stands in tension with sovereignty as it is understood in some ways, but not in others. As Krasner has argued, sovereignty is a term that is used in at least four different senses.

> *International legal sovereignty* refers to the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence. *Westphalian sovereignty* refers to political organization based on the exclusion of external actors from authority structures within a given territory. *Domestic sovereignty* refers to the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity. Finally, *interdependence sovereignty* refers to the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state.[48]

For my purposes, I will simplify the typology to collapse interdependence sovereignty and domestic sovereignty. This is first for the sake of simplicity, as my aim is to highlight the potential tension between three aspects of sovereignty: the ability

[47]Orford 1998, 180.

[48]Krasner 1999, 10–11, emphases added. Krasner's typology of the elements of sovereignty broadly aligns with discussions in the international law literature, which tend to highlight the external vs. internal dimension of sovereignty – sovereignty as the power to make commitments *vis-à-vis* other states, and sovereignty as the power to control activity within the state. See, for example, Brownlie 2019, 431.

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to enter into commitments in relation to other states (international legal sovereignty), the ability to exclude external actors from interfering with the internal matters of the state (Westphalian sovereignty) and the ability to exercise effective control over domestic policy and regulation (domestic sovereignty). This simplification is further justified by the fact that domestic sovereignty requires at least a certain degree of interdependence sovereignty.

While Krasner suggests that it is possible for a state to retain domestic authority even when it lacks control over transnational flows, this distinction does not seem to hold up in practice.[49] It is telling that many of the examples that Krasner uses of domestic control necessarily involve control over transnational flows: states may or may not 'be able to maintain order, collect taxes, regulate pornography, repress drug use, prevent abortion, minimize corruption, or control crime'.[50] A state's ability to enact policy can be severely curtailed if it does not have control over transnational flows of goods, people and capital. In this way, (at least some degree of) interdependence sovereignty becomes a necessary condition for domestic sovereignty.

Applying Krasner's disaggregation of the many possible meanings of sovereignty, in what ways does the current ISDS regime restrict sovereignty? The ISDS regime does not restrict sovereignty in one important respect: it is premised on the recognition of states' international legal sovereignty, insofar as it is a product of treaties that are entered into between states that mutually recognize one another's authority. The core of international legal sovereignty, after all, is that states are equal and can enter into binding agreements with other states.[51]

However, ISDS entails potential restrictions on both Westphalian and domestic sovereignty. ISDS potentially restricts Westphalian sovereignty because it allows for the influence of external actors – investors and tribunals – to direct the actions of the government, for example, by requiring the government to compensate investors for expropriation. It potentially restricts the hallmark of Westphalian sovereignty, that 'within [a given] territory, domestic political authorities are the only arbiters of legitimate behavior'.[52] ISDS also potentially violates domestic sovereignty because such influences affect the range of action available to governments. For example, they may decide not to pass certain laws because of the possibility that investors could bring suits. If investors do bring suits against states and win, states' fiscal capacities may be affected by the need to compensate investors.

This disaggregation helps us to identify with precision what exactly is at stake in critiques of ISDS. The backlash against ISDS has largely focused on restoring the right of states to exclude external influence, but in the name of strengthening states' ability to enact domestic regulations. This conflation between the two different meanings of sovereignty is potentially problematic because they are not necessarily aligned with one another. Asserting the right to exclude (what I have called, following Krasner, Westphalian sovereignty) is neither sufficient to promote the right to regulate, and may sometimes need to be violated to promote the right to regulate.

[49]Krasner 1999, 10, 13.
[50]Ibid., 12.
[51]Ibid., 14.
[52]Krasner 1995, 119.

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I will make this point by first making clear the distinction between the two dimensions of sovereignty in theoretical terms, then applying it to the concrete case of South Africa's rejection of ISDS.

Between the right to exclude and the power to regulate

The right to exclude external interference and the right to regulate are not coextensive with one another. This is because the absence of interference from outside does not necessarily entail that a state has control and authority over domestic affairs. Among other reasons, this disjuncture arises because of differences in capacity – differences in the robustness and stability of political institutions or revenue base. Consider, for example, the policy imperative of transitioning from a fossil fuel-based economy to a renewables-based economy in the face of climate change. Even in the absence of external interference (such as through challenges brought by investors in the fossil fuel sector under ISDS), such transitions could be more difficult when a state is not able to subsidize the transition and invest in updated infrastructure.

One possible objection to this framing is that I have assumed that the right to regulate demands more than it actually does. As this objection goes, states are entitled to the right to regulate, but not to an *equal* right or power to regulate *vis-à-vis* other states. Therefore, the right to exclude external interference is largely sufficient to secure the right to regulate within a state's borders. Several responses are possible to this objection: the first, most theoretical response, is that a right is meaningless absent the absolute basic conditions of its exercise. In other words, even if states are not entitled to an equal starting point, they are entitled to a baseline. There is reason to think, based on the evidence about the effect of imperialism and its legacies discussed above, that many states have in fact been deprived of this baseline.

In addition, I have raised some reasons why states should be entitled to a relatively equal starting point. Even if differences in the ability to regulate were entirely the product of chance, those differences should be neutralized because they affect the individuals who live within different states: whether individuals live in a state that effectively enacts regulatory measures for their own benefit should not depend on where they happen to be born. But additionally, differences in the ability to regulate are *not* the product of pure chance; they are instead, at least in part, the product of particular histories of injustice. Such histories may further create a special obligation on the part of beneficiaries of such injustice to rectify the differences that have arisen from them, as between either individuals or states.[53]

This point leads to another point of disjuncture between domestic and Westphalian sovereignty. Selective restrictions of Westphalian sovereignty may even be compatible with, and support, states' right to regulate within their borders. Consider the case of an international agreement that requires wealthier countries to

[53]Philosophers have argued that individuals may have such obligations even if they did not cause or take part in the wrongdoing, and if they benefited involuntarily from injustice. See Butt 2014. The imperative to rectify the harms of imperialism opens up a whole range of questions concerning the appropriate standards of liability and forms of redress, which is likely to vary depending on the precise circumstances – which I cannot adequately address here. Stahn 2020, 828.

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financially support poorer countries' transition to renewable energy by investing in a common fund. Such an agreement would potentially limit the Westphalian sovereignty of the wealthier nations by requiring them to take an action that they would not have otherwise taken. However, it could also strengthen the domestic sovereignty of the beneficiaries. As I will illustrate through the example of South Africa below, there are cases in which such violations of Westphalian sovereignty may be necessary to equalize the capacity of states to regulate.

In highlighting the limits of a conception of sovereignty that highlights its 'negative' features – that is, sovereignty as the right to exclude – I draw on scholarship that has conceptualized freedom as more than negative freedom, or the right to be free from interference. Conceptualizing sovereignty as merely the right to be free from external interference fails to recognize the ways in which states are already embedded in, and even constrained by, existing relations of interconnectedness and dependence – such as the relations created by imperialism and its legacies.[54] Removing external interference merely returns states to the *status quo ex ante*, a baseline in which their capacity to meaningfully act is already limited by those existing relations. The inequities of, and the exigencies created by, the *status quo ex ante* were precisely the reason why many states turned to measures such as BITs to attract foreign investment.

South Africa's sovereigntist turn

The case of South Africa's withdrawal from ISDS serves to illustrate the distinction, and potential tension, between domestic and Westphalian sovereignty. The South African government withdrew from ISDS in part to carry out the mandate of redressing the historical wrong of racial subordination in the apartheid regime. However, while withdrawing from ISDS removed a source of potential interference with domestic policy, it could not fully redress the historical wrong of racial subordination. This is in part because the wealth that was the product of South Africa's history of racial subordination has already been siphoned off to other countries, where it is protected by the sovereignty of those countries.

South Africa's withdrawal from ISDS is important to understand because it not only illustrates the so-called backlash to ISDS, but also because it shows that the stakes of sovereignty are not equal for everyone. As Morosini and Badin have put it, South Africa's withdrawal from ISDS illustrates that whereas Global North countries are concerned about their right to limit negative externalities by making exceptions for market-based logic in the areas of health, safety and environment, Global South countries are often concerned about 'their ability to achieve fundamental constitutional mandates, such as the South African civil rights attempt to redress past legacies of apartheid rule'.[55]

Foresti v. The Republic of South Africa was a case that prompted reconsideration of the bilateral investment regime in South Africa. In this case, the claimants argued that their investments in mines had been directly expropriated as a result of the

[54]Young 2004, 183. Young reaches this point through two different but related directions: feminist critiques and neo-republican critiques of the liberal conception of liberty.

[55]Morosini and Badin 2017, 33; Schneiderman 2009, 248.

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Mineral and Petroleum Resources Development Act of 2002. This law had extinguished the previous system of mineral rights and introduced a new one, in which the state required investors to increase the percentage of historically disadvantaged South Africans in ownership and management positions in mining operations.[56] As a result of *Foresti*, the South African government conducted an internal review of its obligations under BITs, and concluded that they stood in tension with Black Economic Empowerment (BEE) initiatives.[57]

BEE is a form of domestic regulation aimed at achieving distributive justice, but it is also – at least in aspiration – more than that. It represents a constitutional mandate to rectify the distribution of property and wealth in the South African economy, monopolized as it was for decades by the white ruling class.[58] Furthermore, BEE was imagined as a way of achieving economic growth and eradicating poverty by giving greater opportunities to historically disadvantaged South Africans, another fundamental constitutional mandate of the South African government.[59] Citing the historical exclusion of non-white people from the South African economy and the detrimental effect of this exclusion on growth and development in South Africa, the government attempted to increase the percentage of historically disadvantaged groups represented in the ownership and management of private companies.[60] In practice, BEE did not live up to these aspirations: many have criticized it for selectively empowering a Black elite that is close to the African National Congress (ANC), instead of accomplishing its stated aim of redistributing to the historically disadvantaged.[61]

In any case, *Foresti* was concluded by a settlement between the investors and the government of South Africa, in which South Africa granted the investors with new order mineral rights without requiring them to sell 26% of their shares to historically disadvantaged South Africans. The investors would 'be deemed to have complied with the Mining Charter' by processing and adding value to 21% of the stone that they mined in South Africa, and creating a 5% ownership programme for employees.[62]

As a result of such challenges to BEE, the South African government responded by terminating some BITs that included ISDS and rolling out a new system of investment protection and regulation, under the Protection of Investment Act (2015). This law was intended to bring the regime governing foreign investment in line with the South African Constitution, and make room for South Africa's right to address 'historical, social and economic inequalities'.[63] Among other things, this law requires investors to exhaust domestic remedies before they can submit a request for international arbitration, which in turn will take the form of

[56]Forere 2017, 260; Isiksel 2016, 339–40. For a critical analysis of another arbitral decision concerning the historical distribution of land in Southern Africa (in this case Zimbabwe), see Tzouvala 2022.

[57]Forere 2017, 261.

[58]Department of Trade and Industry, Government of South Africa 2004, 7.

[59]Ibid.

[60]Ibid.

[61]Tangri and Southall 2008, 700–701; Pargendler 2023, 23.

[62]*Pietro Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award of 4 Aug. 2010, para. 79.

[63]Forere 2017, 252.

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state-to-state rather than investor-state arbitration.[64] It also prevents investors from seeking compensation for many forms of indirect expropriation.[65] These changes are notable because South African domestic law does not always correspond to standards of protection of property that prevail under international law: for example, as Agnes Forere notes, under South African law, if the government acquires property and passes it to a third party (such as historically disadvantaged persons), the government is said not to have committed an act of expropriation.[66]

The conditions of domestic sovereignty

In South Africa, the backlash against ISDS was prompted by limitations on the exercise of sovereignty that were perceived as unjust, especially limitations on South Africa's attempts to rectify historical injustices committed during the apartheid era. Yet this example also suggests the limits of withdrawing from ISDS. Initiatives such as BEE may be protected from challenges by investors, but even such initiatives do not rectify the international inequalities that have accumulated between states, and the members of states, as a result of historical injustices such as imperialism and apartheid.[67]

In South Africa, for example, the long history of imperialism and apartheid did not only lead to wide gaps between white and Black South Africans, it also led to an extraction of value from South Africa to European nations. British and Dutch colonial rule in South Africa prior to its independence created an extraction-based economy in which infrastructure and institutions were created to serve the needs of mining companies, whose profit was then redirected to financial centres in colonial metropoles.[68] Economic historians have argued that diamond mining in South Africa did not drive inclusive economic progress because political institutions were captured by elites in the mining sector and public spending was heavily concentrated on infrastructure, such as railways, that supported resource extraction.[69] Multinational corporations, including mining companies, continued to extract profits from the depressed wages of Black South Africans during apartheid.[70] After the end of apartheid, many South African corporations transferred their headquarters to London – even corporations that had benefited from state-granted monopolies.[71]

The point here is not to unfairly criticize domestic laws for being powerless to address transnational and international conditions. It is instead to suggest that the absence of interference – as represented by the end of ISDS – is compatible

[64]Ibid., 280.

[65]Ibid., 275.

[66]Ibid., 276.

[67]On the ongoing effects of historical events and their role in legitimating current rights and obligations, see Tzouvala 2022, 234.

[68]Rodney 2012, 152–54. Rodney states that European investors in Southern Africa reaped consistently high profits. In Northern Rhodesia (current-day Zambia), a staggering one half of the total wealth produced in a given year during the colonial period was repatriated to Europe.

[69]Gwaindepi 2019.

[70]Nattrass 1999, 375.

[71]Bond 2014, 26. For a description of how 'retreat from the colonial world' was accompanied by the rise of tax havens, see Ogle 2017, 1438–39.

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with severe limitations on what projects Global South nations can actually carry out in practice. South Africa's BEE policies are, in an important sense, incomplete: even though they aim to redistribute wealth between those who benefited and those who were harmed by apartheid, they cannot access the wealth that was removed through the international transfer of capital from South Africa. As a result, these policies can only give opportunities to historically disadvantaged South Africans within the boundaries of the South African state and economy.

Furthermore, such restrictions on the South African government's policy aims are enabled by the Westphalian sovereignty of other states. The principle of sovereignty, at least its Westphalian dimension, can be used to gatekeep resources and opportunities within the states to which capital has been transferred. Even in an egalitarian welfare state, the tax base that enables redistribution of resources is limited to the borders of the state. Economic opportunities are available only to those who are inside the borders of the country, and restrictive immigration policies make it difficult, even for citizens of former colonies, to enter the metropole.[72]

Ultimately, it is these inequalities that influence states to attract foreign investment through BITs in the first place, restricting the ability of states to decide what kind of foreign investment regime to adopt on their own terms. Even when countries like South Africa do attempt to resist encroachments on sovereignty, the competing need for investment limits the possibility of doing so. Zimbabwe quickly backtracked from its attempt to enact a more radical version of BEE when it became clear that such laws would have negative consequences for investment.[73] More recently, India has faced challenges in operationalizing its Model BIT, which required (among other things) that investors exhaust local remedies, that is, the remedies available to them in domestic courts, before seeking recourse to international tribunals.[74]

A path to reform

Because states differ in their capacity to regulate, securing a meaningful right to regulate is likely to require more than limiting external influence. Instead, it is necessary to address the differences in wealth and resources between nations. In this section, I draw on the spirit of the NIEO to illustrate what such a project of reform might look like – and to illustrate that such a project may not be as far-fetched as it may initially seem.

My reconstruction of the NIEO draws special emphasis to two aspects of the project. The first is that it was an earlier attempt to reconsider the international legal system governing foreign investment, much like today's discussions about ISDS reform. However, unlike in the present moment, the architects of the NIEO recognized that the law of foreign investment was affected by centuries of imperialism and extraction. This history both gave rise to the need for foreign investment and also meant that it was not enough to simply withdraw from a

[72]Amighetti and Nuti 2016; Achiume 2019.

[73]Pargendler 2023, 24. On whether BITs do in fact increase foreign direct investment as intended, see, for example, Neumayer and Spess 2009. See especially their survey of the literature, p. 226.

[74]Mishra 2023.

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regime that protected investors over states. Instead, a project of transnational redistribution was necessary. As Adom Getachew has convincingly argued, anticolonial nationalists in this period were not simply arguing for economic sovereignty, understood as freedom from interference; they were also arguing for an 'expansive internationalism' that sought to address inequality within and between states.[75]

Secondly, my reconstruction of the NIEO focuses on the interplay between different possible meanings of sovereignty. The NIEO used the formal equality of sovereignty that was available to states to build a coalition of nations that demanded substantive equalization in the ability to exercise the right to regulate. It thus illustrates how different dimensions of sovereignty both cut against each other, and, at the same time, might be used strategically in support of each other.

The NIEO and the rights of investors

The demand for an NIEO developed over several decades, as newly independent nations recognized that attaining formal independence did not result in attaining actual equality with Global North nations, including their former colonizers. It emerged from discussions in the United Nations Conference on Trade and Development (UNCTAD), the Group of 77 and the Non-Aligned Movement, where the continuing and even increasing inequality between nations became a subject of increasing concern.[76] It argued for the reorganization of the global economy through such measures as commodity price agreements, trade rules that favoured developing nations, debt renegotiation and technology transfers.[77]

The NIEO is important to consider in the context of current debates about ISDS reform because it represented an early attempt to assert sovereign states' power over foreign investors. It attempted to defend states' rights to expropriate foreign-owned property and investments for public purposes, and even attempted to challenge the principles of compensation demanded by capital-exporting countries. In this way, it was an early precursor of today's demands for the 'right to regulate'.

The first piece in the NIEO's approach to investment was the principle of permanent sovereignty over natural resources (PSNR). PSNR represented the basic claim that states could freely dispose of their natural resources, which was legally and politically significant for newly independent states who were bound by concessions to natural resources that had been granted under foreign rule.[78] As Antony Anghie writes, debates over PSNR implicated fundamental differences in the way Western and Third World lawyers saw the nature of sovereignty itself.[79] On the Third World view, sovereignty entailed that states could repudiate their obligations that were undertaken under colonialism, whereas on the Western view, the doctrine of state succession entailed the opposite conclusion.[80] While Western states did not directly reject states' rights to nationalize property, they insisted on the more

[75]Getachew 2019, 153; Salomon 2013, 34.
[76]Moyn 2018, 113–14.
[77]Salomon 2013, 36.
[78]Ibid., 39; Anghie 2005, 213.
[79]Anghie 2005, 214.
[80]Ibid.

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demanding principles of compensation represented by the Hull Formula – 'prompt, adequate, and effective' compensation.[81]

The formal recognition of PSNR by General Assembly Resolution 1803 of 1962 seemed to vindicate the Third World conception of sovereignty.[82] The preamble to the resolution notes the importance of achieving 'economic independence', beyond the formal independence that many states had attained by that point – and the importance of mobilizing international cooperation to that end.[83] On the matter of compensation for nationalization, the resolution, albeit somewhat ambiguously, required compensation in line with standards of domestic law. It noted that when nationalization, expropriation or requisitioning takes place on grounds of 'public utility, security or the national interest', 'the owner shall be paid appropriate compensation, *in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law*'.[84]

Meanwhile, the demand for structural changes in the international economic system intensified, leading to the passage of the General Assembly's Resolution 3201 on an NIEO. This resolution noted the economic inequalities between states that continued to undermine the 'full emancipation and progress of the developing countries and the peoples involved'.[85] It urged international cooperation to overcome these inequalities, which made developing countries more vulnerable to external economic shocks. The resolution reemphasized the idea of PSNR, and the right of states to nationalize resources or transfer ownership to nationals. In an even more radical step from Resolution 1803, it remained silent on the question of compensation and the standards that were to govern it, and instead demanded 'restitution and full compensation' for the exploitation of resources under foreign rule.[86]

Just four months later, the General Assembly adopted the Charter of Economic Rights and Duties of States – a project that had started from the ambition to create a 'Universal Declaration of the Human Rights of Mankind to Economic Progress'.[87] Like Resolution 3201, the Charter acknowledged the ongoing economic inequalities between states, notwithstanding their formal equality and independence.[88] It again made reference to an overarching programme of reform, in which the principle of PSNR played a key role. In Article 2, the Charter clearly affirmed the principle, then explained that each state has the right to 'regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities'. The Charter also recognized states' rights to nationalize, expropriate or transfer ownership of foreign property as long as 'appropriate compensation' was paid.[89]

[81]Abi-Saab 1992, 611–12.

[82]Anghie 2005, 216.

[83]Permanent Sovereignty over Natural Resources, G.A. Res. 1803, U.N. Doc. A/5217, 15.

[84]Ibid.

[85]Declaration on the Establishment of a New International Economic Order, G. A. Res. 3201, U.N. Doc. A/Res/3201(S-VI), 5, para. 1.

[86]Ibid. at 4(e)–(f); see Abi-Saab 1992, 605–6. Abi-Saab argues that the difference between the two documents is relatively superficial, and 'more in the emphasis than in normative substance'.

[87]Ogle 2014, 219.

[88]Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. Doc. A/Res/3281(XXIX), 51.

[89]Ibid., 52.

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The passage of the Charter represented the high-water mark of states' rights *vis-à-vis* foreign investors, at least in formal proclamation if not in legal and political reality.[90] However, as my analysis has suggested, the NIEO's claims to economic sovereignty – as a precursor to today's discussions about the 'right to regulate' – were part of a broader programme to change the conditions in which states exercised their sovereignty.

The conditions of sovereignty

Most ambitiously, the NIEO represented a claim for international redistribution of resources, through changing the rules of international trade. It is crucial to understand the NIEO's defence of economic sovereignty in this light, as being enabled by broader changes that would enable the meaningful exercise of that economic sovereignty.[91] The proponents of the NIEO strategically used the fact of formal equality of states' sovereignty in the one-country, one-vote system of the United Nations General Assembly to argue for radical changes in the international economic system and even for transfers of wealth between nations.

One of the most central pieces of the NIEO agenda was the demand for commodity price agreements. These were agreements that would intervene in the system of international trade to increase the prices of primary commodities, including agricultural products and raw materials. Commodity price agreements were seen as necessary because developing countries' economies heavily relied on commodity exports, but as those countries argued, the price of primary commodities tended to decline over time compared to the price of manufactured goods.[92] Proposals to stabilize and increase commodity prices usually centred on controlling the supply of those commodities, for example, through export quotas for each country based on the estimated quantity of exports that would maintain prices at a certain level. The most comprehensive proposals involved directly buying commodities from producer nations to maintain an international stock of commodities, which would then be financed through a common fund. In 1974, the UNCTAD Secretariat published a series of studies advocating such an approach.[93]

There was some disagreement even between developing countries about the ultimate end goal of these commodity agreements – particularly regarding whether the aim was to merely stabilize prices for commodities, which had fluctuated dramatically throughout the 1970s, or to increase them in such a way as to promote development.[94] Many insisted that the aim of the commodity agreements went beyond the mere stabilization of prices to 'the international redistribution of income'.[95] This international redistribution required coordination, through cartelization, between commodity-exporting nations – a model whose potential success had been demonstrated through OPEC's raising of oil prices throughout the

[90]Anghie 2005, 221–22.
[91]Salomon 2013, 34.
[92]Kirkpatrick and Nixson 1977, 236.
[93]Ibid., 247–48.
[94]Dell 1986, 25.
[95]Kirkpatrick and Nixson 1977, 246.

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1970s. Commodity-producing nations would have to agree to limit their exports of certain commodities for their mutual benefit.

Another piece of the NIEO agenda concerned the regulation of transnational corporations. By the 1970s, there was an increasing perception in academic and political circles that transnational corporations threatened domestic sovereignty. The Charter of Economic Rights and Duties of States explicitly highlighted the regulation of transnational corporations as an object of international coordination. It stated that full PSNR also entailed the right to 'regulate and supervise the activities of transnational corporations'. It continued, 'Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of [the right to regulate transnational corporations].'[96] These demands led the United Nations Economic and Social Council (ECOSOC) to establish a Commission on Transnational Corporations, which in turn was tasked with drafting a code of conduct for transnational corporations. As Getachew has written, the NIEO's approach to the regulation of transnational corporations reflected a complex, if not contradictory, conception of sovereignty: international law was simultaneously used to affirm states' sovereign rights to regulate corporations, and to demand the direct regulation of corporations in a way that entailed a potential restriction on sovereignty for the states in which corporations were headquartered.[97]

Finally, potentially most radical of the demands that emerged from the NIEO was a system of international taxation and redistribution. In 1975, the United Nations General Assembly endorsed automatic transfers from developed, Global North nations to developing Global South nations, a proposal that was akin to an international tax. This proposal was followed up with the idea to directly tax transnational corporations and the use of international commons, among other things.[98] These demands for international redistribution again exemplify, perhaps most starkly, the NIEO's complex conception of sovereignty: in order for developing nations to be able to exercise sovereignty in a meaningful way, wealthy nations' gatekeeping of resources within their sovereign borders had to be challenged. While it may seem that there was a tension between the ideals of sovereignty and international redistribution, the tension most starkly emerges when one conceives of sovereignty as the absence of external inference, rather than as a right to regulate domestically.

These proposals gained varying levels of traction, but ultimately, even the ones that saw the light of day lost much of their bite in the process of negotiation. For example, the 'common fund' approach to commodity agreements never made much progress, despite years of negotiation, while much less ambitious agreements to stabilize the price of specific commodities were concluded.[99] Negotiations on the UN Code of Conduct on Transnational Corporations continued but fizzled out over the following decades.[100] Ultimately, the end of the NIEO was in large part brought by the economic crisis that befell developing countries in the latter part of the

[96]Charter of Economic Rights and Duties of States, 52, Article 2(b).
[97]Getachew 2019, 170–71.
[98]Meyerowitz 2021, 86.
[99]Quill 1994, 504.
[100]Staggs Kelsall 2021, 463.

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1970s, in the wake of another oil crisis, the skyrocketing of Third World debt and the fracturing of Third World solidarity. The downfall of the NIEO was also, perhaps most importantly, due to the sustained opposition of wealthier Northern nations to the most radical aspects of its platform.[101]

Still, the NIEO is worth our attention because it embodied a nuanced conception of sovereignty that recognized that the absence of interference was not enough. It represented an attempt to negotiate between different dimensions of sovereignty, by using the formal juridical equality of states to demand the conditions that would allow states to exercise their sovereign regulatory powers more effectively.

Conclusion: implications for ISDS reform today

The increasing demand for ISDS reform, among other recent developments, suggests a potential fracturing of the neoliberal consensus. As scholars have noted in other contexts, this fracturing presents both political possibility and risk, particularly the risks of encouraging nationalism and reactionary protectionism.[102] In the face of such risks, the mere right to be free from interference by international tribunals should not be the aim in ISDS reform. Instead, a more far-reaching project is necessary – one that promotes the conditions for the effective exercise of states' domestic regulatory powers. Policy proposals in areas such as international tax reform, debt reform and climate financing might be natural complements to ISDS reform that support states' rights to regulate their economies.

While the ambiguity implicit in the term 'sovereignty' has long been used to subordinate Global South nations, my discussion of the NIEO demonstrates that it is possible to strategically manoeuvre within this ambiguity by using certain possible meanings of sovereignty in service of others. International legal sovereignty is perhaps not as powerful as it once was during the heyday of the NIEO, before the UN General Assembly had lost much of its influence on the global stage. Yet it nonetheless remains useful for states as they negotiate BITs that govern the terms of ISDS.

Another possibility is to frame the discourse around sovereignty to explicitly centre its domestic, regulatory dimension. Westphalian sovereignty could be framed as a project in service of this domestic regulatory authority: while it is invoked to support ISDS reform, it could also be compromised to enable international agreements that would address distributive inequalities. Returning to the possibility of international tax reform, an international tax deal could bolster states' ability to tax economic activity within their borders by *preventing* some states from lowering their taxes, thereby preventing capital flight and tax havens.

All these demands face steep obstacles, just as the demands for an NIEO did in the 1970s. I have argued for their necessity, if not their possibility, in another critical juncture in which the institutions of global economic governance, including the institutions of investor-state dispute resolution, are at a crossroads.

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[101]For diagnoses of the downfall of the NIEO, see Salomon 2013, 46–47; Özsu 2017, 341–42.
[102]Fraser 2017.

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