

The Subtle Revolution:  
TTIP, CETA and the  
Sovereignty of  
Parliament

# The Academy

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# THE SUBTLE REVOLUTION: TTIP, CETA AND THE SOVEREIGNTY OF PARLIAMENT

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## EXECUTIVE SUMMARY

### The Mishcon Academy Grant

This research was funded by the first Mishcon Academy Grant. The theme of the 2014/15 grant was “Threats to the Rule of Law”. My project focused on the threat to the sovereignty of the UK posed by The Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA).

### TTIP and CETA

TTIP and CETA are trade and investment treaties between (respectively) the EU and the USA, and the EU and Canada. Both aim to substantially reduce barriers to trade including “non-tariff barriers” (regulations). The UK will be a party to both treaties as a result of its membership of the EU.

### Research Objectives

My research aimed to answer the overarching question: *Will the ratification of TTIP and CETA be compatible with the constitutional principle of parliamentary sovereignty?*

Answering this question required the resolution of a number of sub-questions:

1. How is parliamentary sovereignty currently construed in law?
2. Does the domestic law conception of sovereignty have the same components as the international law conception?
3. How will the UK be bound by TTIP and CETA?
4. Which aspects of TTIP and CETA are particularly problematic for the UK’s sovereignty?
5. What are the consequences of ratification for our understanding of the UK’s sovereignty?

### Results

A. Although the investment protection provisions of TTIP and CETA would undermine general or political conceptions of state sovereignty, based on the notion that “only the citizens of a state should determine the limitations on its government”, this is unexceptional as the UK is a signatory to many treaties that restrain Parliament and the government’s freedom of action. Nevertheless it is important to note that, unlike rules that regulate commerce between private parties, TTIP and CETA impose restrictions that impact on public policy and public law.

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B. The concept of sovereignty is used differently in international and domestic law. As such the ratification of TTIP or CETA would not trouble the international law understanding of sovereignty.

C. However, in domestic law, parliamentary sovereignty is fundamentally tied to democracy. Parliament is sovereign because it represents the expressed will of the electorate. This is ensured by the doctrine of continuing sovereignty (recently reaffirmed in *R(HS2 Action Alliance Ltd) v Secretary of State for Transport*), which states that Parliament can make or unmake any law it desires, save one that binds itself or future parliaments.

D. TTIP and CETA contain investment protection clauses that provide for compensation to be paid should an action of the UK state compromise the interests of investors. These provisions will be enforced by a system of Investor State Dispute Settlement (ISDS) in which arbitrators adjudicate on disputes between states and investors, applying principles of international law. UK courts would have no role in such disputes. These measures are guaranteed by a stabilisation clause<sup>1</sup> which mandates that they will remain in force, with regards to investments made under the treaty, for 20 years after a state elects to leave the agreement.

E. As such if Parliament was to ratify TTIP or CETA, it would effectively be binding future parliaments for a period of at least 20 years. As mixed agreements, TTIP and CETA would bind state parties both jointly and severally so the UK would not be able to avoid its obligations by leaving the EU. As such, unlike other comparable treaties (which can be left or renegotiated according to the will of Parliament), ratifying TTIP or CETA would be incompatible with a doctrine fundamental to the sovereignty of Parliament.

F. I have considered whether the suggested benefits of TTIP and CETA to the principle of the rule of law, in terms of increasing legal certainty in commercial transactions, provide an argument in their favour that outweighs their incompatibility with the UK Constitution. I conclude that TTIP and CETA would, in fact, have a negative impact in terms of the rule of law because they would put arbitrators in the place of judges when the latter are structurally better placed to rule consistently, accessibly and fairly on the legal questions TTIP and CETA could raise.

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<sup>1</sup> Art. X. 08, Consolidated CETA Text, p. 490, found at <http://ec.europa.eu/trade/policy/in-focus/ceta/>

### Conclusions

I draw three possible conclusions from this investigation:

1. We must re-evaluate our understanding of continuing sovereignty. If Parliament can bind itself in relation to TTIP and CETA then it must be able to bind itself in relation to other issues. However, to accept such an understanding would be deeply undemocratic and contrary to the spirit, if not the form, of parliamentary sovereignty.
2. A ratification of TTIP or CETA would be susceptible to judicial review on the grounds that Parliament has gone beyond the scope of its powers. However, this would have little effect on the UK's obligations under TTIP or CETA because a state is not able to rely on domestic law to avoid obligations under an international treaty.
3. The UK must derogate from the stabilisation clause before it ratifies TTIP or CETA. This is the preferable option from a purely legal standpoint. Investors would still be able to protect their investment with insurance or the price mechanism<sup>2</sup> and future parliaments would be free to leave TTIP or CETA should they wish to do so. However, from a democratic perspective this option is far from ideal. While other treaties that impose similar constraints on Parliament (such as the Lisbon Treaty or the European Convention on Human Rights) do so in the spirit of democracy, TTIP and CETA impose obligations that allow a small sector of society to subvert the democratic process. A response more in keeping with the spirit of parliamentary sovereignty would be to derogate from the investment protection provisions in TTIP and CETA altogether.

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<sup>2</sup> An investor can effectively insure themselves against risk by accounting for the risk in the price of an asset. In essence, the greater the potential risk the higher the price of the asset. See Stephen Dobson and Susan Palfreman, *Introduction to Economics*, (London; OUP, 1999), Ch. 2

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## INTRODUCTION

*To none will we sell... right or justice*

Magna Carta, 1215

The UK faces the prospect of ratifying the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA). To do so would represent a fundamental departure from the established understanding of the UK Constitution. Ratifying TTIP or CETA would undermine the constitutional principle of parliamentary sovereignty by allowing one parliament to bind its successors. This is undemocratic, unconstitutional and, arguably, beyond the legal power of either the government or Parliament.

TTIP and CETA are wide ranging trade and investment agreements negotiated between the EU and, respectively, the USA and Canada. As a member of the EU, the UK would be bound by both treaties. Although neither treaty would have a significant impact on tariff barriers, they are expected to appreciably reduce so-called "non-tariff barriers" to investment (regulations). Both treaties are also expected to contain investment protection provisions. These provisions would require governments to pay compensation should their policies or actions illegitimately compromise investments made under TTIP or CETA. Disputes under the treaties would be resolved, not by national courts, but by Investor State Dispute Settlement (ISDS): A form of arbitration in which states and investors appear as equal parties. While TTIP remains under negotiation, the EU and Canada have released the final text of CETA.

Although largely acclaimed by commercial lawyers<sup>3</sup>, TTIP and CETA have been criticised as an unacceptable compromise of the state sovereignty. It has been argued that they represent a transfer of power from elected governments to unaccountable corporations, another step on the path away from democracy made inevitable by globalisation. However, from a legal perspective, this position is problematic. The UK is already bound by treaties which enforce rules that limit the exercise of sovereignty. Two prominent examples are the European Convention on Human Rights (ECHR) and the Lisbon Treaty.

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<sup>3</sup> See, for example, Loukas Mistelis and Gloria Alvarez, "TTIP Consultation Submission on behalf of the European Federation for Investment Law and Arbitration", available at [http://efila.org/wp-content/uploads/2014/07/EFILA\\_TTIP\\_final\\_submission.pdf](http://efila.org/wp-content/uploads/2014/07/EFILA_TTIP_final_submission.pdf)

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I will argue that should Parliament to ratify either TTIP or CETA, this would be incompatible with the established understanding of the UK Constitution. Specifically it will require that the parliament which ratifies either TTIP or CETA will have bound future parliaments, regardless of the will of those parliaments. This is incompatible with the doctrine of parliamentary sovereignty, which requires that Parliament may make any law that it wishes save one that binds itself. As such the ratification of TTIP or CETA, as they currently stand, would require a fundamental change to the established understanding of parliamentary sovereignty.

TTIP and CETA are normatively different from other, comparable, treaties such as the Lisbon Treaty or another Bilateral Investment Treaty (BIT) in two principal ways:

- a. Once the UK has ratified TTIP or CETA, the investment protection provisions will bind for a minimum of 20 years for all investments made under the treaty.
- b. The UK could not leave the treaty or renegotiate its terms in the same way as other treaties because it would have to convince the other EU member states to agree to the same terms of renegotiation.

My argument will comprise five sections:

1. The current debate regarding globalisation, sovereignty and TTIP and CETA.
2. The understanding of sovereignty in the international and domestic law contexts.
3. The coherence of TTIP and CETA with the doctrine of parliamentary sovereignty as it is understood in the UK's domestic law.
4. The case for and against ISDS from the perspective of the rule of law.
5. Conclusions on the impact of the ratification of TTIP or CETA for our understanding of the Constitution.



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### A note on methodology

This project faced a *prima facie* challenge in that some of its principal subject matter is, at present, under negotiation and thus a final version of TTIP is not available. I have based this project on the assumption that TTIP will involve investment protection provisions (including ISDS and a 20 year stabilisation clause) similar to those in CETA. This assumption rests on three facts. The first is that the EU points to CETA as a potential model for TTIP in its public consultation on TTIP<sup>4</sup>. The second is that American lobbyists are determined to include similar provisions<sup>5</sup>. The third is that these provisions are popular with the parties and similar provisions are found in the model BITs of the USA, the UK, France and Germany<sup>6</sup>.

Writing this report involved balancing a complex array of perspectives. While constitutional scholars have thoroughly discussed the implications of international agreements between states, such as the Lisbon Treaty or European Convention on Human Rights, on parliamentary sovereignty, the impact of international agreements with a more commercial focus has been largely ignored. This is a mistake. In the 21st Century, constitutional scholars must add a third point to the traditional balance between individual and state. Multinational corporations (MNCs) and commercial law in general is already regarded as fundamental to the study of public international law. If constitutional lawyers and scholars wish to truly understand the DNA of our society we must conceive our subject matter in a way that treats MNCs as equally as significant constitutional agents as we currently treat individuals and the state.

In my search for this balance of perspectives I have canvassed opinions from a variety of different legal systems. This report has been written in Australia, the United States and the UK. Through this I have been able to develop a truly international perspective. I believe such a perspective is vital. The study of the Constitution is the study of the distribution of power within a polity. As such, the implications of international politics and commerce can no longer be ignored in constitutional study.

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<sup>4</sup> European Commission, "Online consultation on investment protection and investor-to-state dispute settlement in the Transatlantic Trade and Investment Partnership", completed 13th July 2014, [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179)

<sup>5</sup> For example at a public event at UCL the Vice-President of the US Chamber of Commerce stated that his organisation would prefer to have no treaty than a treaty that does not include ISDS. <http://www.ucl.ac.uk/global-governance/news/ttipcorinacampian>

<sup>6</sup> Andrea Carska-Sheppard, "Issues Relevant to the Termination of Bilateral Investment Treaties", 26 *Journal of International Arbitration* 6 (2009), pp. 755-771

### 1. Globalisation, sovereignty and investment protection

Globalisation has led to a transfer of power away from sovereign governments and towards multinational actors, significantly multinational corporations<sup>7</sup>. Investment protection, enforced by ISDS, is an important element in this transfer of power because it can allow investors to have an elevated impact on the public policy of host states<sup>8</sup>.

#### 1(a). The impact of globalisation on sovereignty

That globalisation limits the sovereignty of states has become something of a self-fulfilling prophecy. States pursue policies aimed at attracting foreign direct investment (FDI). The effect of these policies is to transfer power away from the governments of sovereign states and towards foreign investors. Investors can then use this power to demand further "business friendly" policies which, in turn, has the effect of further increasing their power in relation to the government<sup>9</sup>.

The logic of globalisation is simple. By attracting foreign capital, a state can increase the size of its economy. Foreign capital supplements domestic capital causing GDP to increase. This model has become the "common sense" of public policy<sup>10</sup>. The benefits of FDI are so widely accepted that they appear uncontroversial in the UK amongst almost all mainstream political parties<sup>11</sup>.

Governments attract FDI by removing so called "barriers to investment" (regulations), expanding the number of participants in particular markets and the areas of society over which those markets extend. In the UK, FDI has extended from areas of the economy that have traditionally been the preserve of the private sector (such as finance and fashion), to areas that, in the post war economic settlement, were administered by the public sector (such as energy, transport and health)<sup>12</sup>.

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<sup>7</sup> David Harvey, *A Brief History of Neoliberalism*, (London: Oxford University Press, 2007), pp. 76-78

<sup>8</sup> Kyla Tienhaara, "Once BITen, twice shy? The Uncertain future of 'shared sovereignty' in investment arbitration", 30 *Policy and Society* (2011), pp. 185-196

<sup>9</sup> Harvey, *Neoliberalism*, pp. 88-97

<sup>10</sup> Harvey, p. 39, cf. Vicki Birchfield, "Contesting the Hegemony of Market Ideology: Gramsci's 'Good Sense' and Polanyi's 'Double Movement'", 6 *Review of International Political Economy* 1, (1999), 27 - 54

<sup>11</sup> Harvey, pp. 39 - 63, (According to manifestos published in advance of the 2015 general election, the Green Party is the only major political party not to implicitly accept the inevitability of globalisation. See <https://www.greenparty.org.uk/we-stand-for/2015-manifesto.html>)

<sup>12</sup> Harvey, pp. 88-97

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It is arguable that these reforms have had the intended effect. The UK is considered one of the most desirable states in Europe for investors<sup>13</sup>. But they have also had an additional effect: The ambit of state authority has decreased. When a state reduces regulations or the portfolios of regulatory bodies (or abolishes them altogether), it reduces its own ability to have an effect on that area of society. When a government pursues a policy of extending the market to cover "public goods" like energy or health, it inevitably reduces its own capacity to determine the provision of those goods.

This comes with both advantages and disadvantages. The libertarian argument demands a "night watchman state"<sup>14</sup> with authority over the bare minimum of society. Libertarians argue that state control limits the freedom of the individual<sup>15</sup>. However this ignores the reality that, when a state surrenders its hegemony in a particular section of society (such as the provision of a significant public service), it does not mean that there is no longer a hegemon in that sector. The hegemonic power is not removed but transferred to another actor. The individual remains bound, with regard to their interaction with that public service, by the power of the hegemon; it is simply a different hegemon. Unlike the state, private actors are not democratically accountable. The individual may express her displeasure with a publicly provided service at the ballot box. There is little she may do to express displeasure with a privately provided service, save take her business elsewhere. This is often not an option when public service contracts are awarded to a single provider for an extended period<sup>16</sup>.

Nevertheless, policies of deregulation are pursued by a large number of states. As such, investors have a wide choice of locations for their investment. This gives investors significant market power. States must effectively compete with each other to attract investors. Effectively this means that each state must remove "barriers to investment" - in effect making further concessions of power - in order to be more attractive than their "rivals". As most states are attempting to make themselves the most attractive for investment, investors are able to exercise significant influence with the threat of leaving. It is effective to say "if you increase my cost of doing business by imposing X regulation, then I will simply move my business to a more amenable state". The larger the investor, the greater damage their loss will do to a

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<sup>13</sup> Ernst and Young, UK Attractiveness Survey 2014, <http://www.ey.com/UK/en/Issues/Business-environment/2014-UK-attractiveness-survey>

<sup>14</sup> Cf. F. A. Hayek, *The Road To Serfdom*, (Chicago; University of Chicago Press, 1944); Milton Friedman, *Capitalism and Freedom*, (Chicago; University of Chicago Press, 1962) and Robert Nozick, *Anarchy, State and Utopia*, (New York; Basic Books, 1974)

<sup>15</sup> See, for example, F. A. Hayek, *The Road To Serfdom*, (Chicago; University of Chicago Press, 1944) and Milton Friedman, *Capitalism and Freedom*, (Chicago; University of Chicago Press, 1962)

<sup>16</sup> For a more extensive discussion of this argument see Harvey ch. 2 and Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism*, (London; Picador, 2008)

state's economy, so the more concessions a state will be prepared to make in order to retain their investment<sup>17</sup>.

In this way globalisation has the effect of altering the balance of power between investors and states. Policies designed to attract FDI both decrease the power of the state over investors themselves (and the areas of society in which they invest), and increase the power of investors by forcing states to compete to retain their investment.

### 1(b). The impact of investment protection provisions

Investor protection provisions began as another means of attracting FDI<sup>18</sup>. Typical provisions (such as those found in CETA and proposed for TTIP) offer protection against expropriation of the investment and guarantee that investors will be treated equally regardless of their nationality ("most favoured nation treatment") and that their treatment will be "fair and equitable"<sup>19</sup>.

Investment protection provisions were first widely used in BITs in the mid 20th century in order to protect investors from the effects of policies of nationalisation. If investors believe that the risk of losing their investment without compensation is too great then they will refuse to invest in a state. Investment protection provisions were added to BITs in order to facilitate FDI in states that did not have a reputation as a stable commercial environment<sup>20</sup>. Investment protection provisions ensured that, should an investor lose their property as a result of government action, they would be adequately compensated.

ISDS was included in BITs in order to mitigate the risks associated with underdeveloped legal systems. In states without a strong rule of law tradition or independent judiciary, foreign investors could be at a disadvantage if they attempted to enforce protections (guaranteed to them by a BIT) in national courts<sup>21</sup>. ISDS allowed investors to have their claims tried by an international tribunal, thus mitigating the risks of litigating in domestic courts. ISDS also had the advantage of allowing claims to be tried according to rules of procedure found in international law. So an investor with interests in multiple states could enforce their

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<sup>17</sup> Harvey, pp. 39-63

<sup>18</sup> Julian Lew and Loukas Mistellis, "Arbitration of Investment Disputes", in *Comparative International Commercial Arbitration*, (London: Kluwer Law International, 2003), pp. 761-804

<sup>19</sup> Lew and Mistellis, *Arbitration of Investment Disputes*, pp. 761-804

<sup>20</sup> Kyla Tienhaara, "What you don't know can hurt you: Investor state disputes and the protection of the environment in developing countries", 6 *Global Environmental Politics* 4 (2006), pp. 73-100

<sup>21</sup> Tienhaara, "What you don't know can hurt you", pp. 73-100

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rights in each according to the same rules. Both investors and states embraced ISDS because it was seen as de-politicising investment disputes<sup>22</sup>. Where previously, only states could enforce claims against other states, ISDS took investment disputes out of the arena of international politics and made the settlement of the dispute comparable to a dispute between two private parties<sup>23</sup>.

However, what began as investment protection has evolved from a mechanism for ensuring just the resolution of investment disagreements to a means of policing public policy<sup>24</sup>.

ISDS tribunals are able to decide their own ambit of competence<sup>25</sup>. It has been argued that arbitrators have a structural interest in construing the ambit of their competence as widely as possible. There is a financial incentive for an expansive construction of investment protection provisions<sup>26</sup> because arbitration is a form of legal service, not a judicial position. As such the volume of cases impacts on the profits of the provider. By comparison, a judge receives the same salary regardless of how many cases she adjudicates<sup>27</sup>.

Even if this argument is not accepted it is undeniable that ISDS is used in disputes that go well beyond instances of unreasonable nationalisation. In *Ethyl v Canada* a tribunal held that a Canadian ban on the transport of a dangerous additive (as a result of a government commissioned report) amounted to an expropriation of the claimant's investment<sup>28</sup>. Canada was required to pay \$19 million in compensation, remove the ban and make a public statement maintaining that (despite the report) the additive was not harmful. In *Foresti et al v South Africa*<sup>29</sup> a non-discrimination clause (aimed at redressing the economic imbalance caused by apartheid), which forced the claimant to sell shares in a company to historically disadvantaged South Africans, was held to be equivalent to expropriation and the claimant was awarded \$350 million in damages. In *Deutsche Bank v Sri Lanka*<sup>30</sup> an interim suspension of payments by the Sri Lankan Supreme Court (pursuant to a case brought by a third party) was construed as expropriation and damages were awarded.

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<sup>22</sup> Won-Mog Choi, "The Present and Future of The Investor-State Dispute Settlement Paradigm", 10 J. Int. Econ. L. 3 (2007), pp. 725-747

<sup>23</sup> Choi, "Present and Future", pp. 725-747

<sup>24</sup> Tienhaara, pp. 73-100

<sup>25</sup> Lew and Mistelis, "Arbitrating Investment Disputes", pp. 761-804

<sup>26</sup> Tienhaara, "Once BITen Twice Shy", pp. 185-196

<sup>27</sup> Tienhaara, pp. 185-196

<sup>28</sup> 78 International Legal Materials (1999), pp. 708-31

<sup>29</sup> *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01

<sup>30</sup> *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2

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Whether or not this is the result of structural interests or simply coincidence it is undeniable that ISDS tribunals now construe investment protection provisions far more widely than mere protections against nationalisation. In practice ISDS has become a mechanism that allows investors to seek compensation in situations in which public policy in some way compromises their interests<sup>31</sup>. While ISDS tribunals may consider a defence of "public policy necessity", it is not considered in the same way that it would be by a domestic court<sup>32</sup>. In common law states, the courts will show a high degree of deference to the primary legislation of an elected government. By contrast an ISDS tribunal will include this as a consideration but only as one factor among many<sup>33</sup>.

This represents a significant step in the transfer of power from states to investors. It goes beyond the structural bargaining power gained by investors when states are required to compete for investment. ISDS gives international investors an additional power in the form of a legal system built specifically to safeguard their interests.

One effect of this is "regulatory chill"<sup>34</sup>, two forms of which have been identified. "External regulatory chill" refers to a situation in which an investor uses ISDS to force a government to reconsider a policy that may compromise her interests<sup>35</sup>. A good example of this is *Vattenfell v Germany (I)*<sup>36</sup>. In that case, the claimant argued that the decision of the newly elected coalition government (which included the Green Party), to raise the emission standards required from a new power plant, amounted to expropriation. The claim was settled when the newly elected German Federal government agreed to lower the relevant emission standards to the previous level.

"Internal regulatory chill" is more difficult to prove. It refers to situations in which no legal action is taken, but a government nevertheless elects not to implement a policy because it is concerned about the prospect of claims under investment protection provisions should that policy become law<sup>37</sup>. Reports have

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<sup>31</sup> William Scheuerman, "Economic Globalisation and the Rule of Law", 6 *Constellations* 1 (1999), 3

<sup>32</sup> Kent Law School (and assorted signatories), "Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)", (2014), [http://www.kent.ac.uk/law/isds\\_treaty\\_consultation.html](http://www.kent.ac.uk/law/isds_treaty_consultation.html)

<sup>33</sup> Gus Van Harten, *Investment Treaty Arbitration and Public Law*, (Oxford; OUP, 2007), p. 156

<sup>34</sup> Cf. Tienhaara, "What you don't know can hurt you", pp. 73-100

<sup>35</sup> Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis*, (London; Cambridge University Press, 2014), p. 12

<sup>36</sup> *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6

<sup>37</sup> Bonnitcha, *Substantive Protection*, p. 13

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suggested that the threat of claims under NAFTA Chapter 11 (which includes provisions for investment protection and ISDS) contributed to Canada's decision to drop policies to mandate plain packaging for tobacco products in 1994 and 2001<sup>38</sup>.

### 1(c). Investment protection provisions in TTIP and CETA

The consultation on TTIP claimed that states' right to regulate would be protected by the treaty. However the draft of the treaty contains references to such protections only in the preamble. It is unlikely that this will be enough to provide any significant protections for the right to regulate<sup>39</sup>.

### 1(d). The limitations of the sovereignty argument

The argument that investment protection agreements limit sovereignty makes an important point. Such agreements represent a significant surrender of power by states and a significant gain in power by investors. But the root of the argument is that, in ratifying agreements like TTIP (which include investment protection provisions), states consent to have their legislative competence bound by a set of rules that will be enforced, not by national courts, but international tribunals<sup>40</sup>. This is important because it raises the question "what can my government do?" If elected governments are constrained by external legal structures, then so is the democratic will of the electorate.

This is the heart of the constitutional issue. Investment protection provisions attempt to resolve disputes between investors and states in a similar manner to that used to resolve disputes between private parties. But states are fundamentally different from private parties. The actions of states considered by ISDS tribunals are acts of public policy; in the case of democracies, they are actions that have the implicit blessing of the majority of the electorate. In addition, a state is already responsible for its actions in courts of public and administrative law. Investment

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<sup>38</sup> Kyla Tienhaara, "Regulatory Chill and the Threat of Arbitration: A View from Political Science" in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration*, (London, Cambridge University Press, 2011), p. 617

<sup>39</sup> Kent Law School (and assorted signatories), "Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)", (2014), [http://www.kent.ac.uk/law/isds\\_treaty\\_consultation.html](http://www.kent.ac.uk/law/isds_treaty_consultation.html)

<sup>40</sup> ISDS tribunals cannot offer the remedy of specific performance but they can impose a fine so large that it makes it prohibitively expensive for a government to continue with an offending policy. In *Ethyl v Canada* (78 International Legal Materials (1999), pp. 708-31) the Canadian government changed its policy as part of the negotiations of compensation.

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protection provisions create an additional legal system, accessible only to investors, and use it to challenge the actions of democratically elected governments. As such, investment protection provisions and the decisions of the tribunals that enforce them have an impact that is considerably wider than in the case of a dispute between private parties. In essence they allow investors to enforce limits on the agency of the electorate.

The problem with this argument is that investment protection treaties are by no means the only international instruments by which states consent to be constrained in this way. In the case of the UK, both the Lisbon Treaty and the European Convention on Human Rights have a similar effect. Both constrain the legislative competence of the UK government according to a set of rules agreed at the international, rather than the domestic level. Both provide for these rules to be enforced by international courts directly accessible by claimants.

Opponents of TTIP and CETA (and ISDS in general) have yet to make clear how investment protection agreements like TTIP differ from European human rights agreements or European Union law in any legally significant way. If the critique of ISDS from the perspective of sovereignty is to have real weight it must amount to more than simply "but that's the sort of loss of sovereignty that I don't like". The argument that ISDS is used to constrain the actions of democratic states is a strong one but it becomes weaker when asked to explain why this is problematic considering that so many other agreements also have this effect. A truly strong argument must show that TTIP and CETA compromise something fundamental to the UK's sovereignty (in a way that other comparable agreements do not), not simply that it is merely repugnant to those of a certain political preference. This will be the focus of the following two sections.

### 2. What is sovereignty?

If one is to argue that the ratification of TTIP or CETA will represent a surrender of sovereignty that is constitutionally unacceptable one first needs to establish what is meant by "sovereignty".

The concept of sovereignty is different in UK domestic law and international law. While the latter is concerned purely with freedom of action the former necessarily includes issues of legitimacy.



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Domestically, our understanding of sovereignty has moved on from the Hobbesian "leviathan"<sup>41</sup>, exercising undisputed power, towards a more nuanced understanding based on the democratic legitimacy of the sovereign, embodied in a representative parliament. A fundamental aspect of this is the doctrine of continuing sovereignty. If Parliament is to maintain its democratic legitimacy then it cannot simply be sovereign once. Parliament is only sovereign *at all* if it is sovereign *always*. Thus Parliament may make or unmake any law *save one that binds itself or future parliaments*.

### 2(a). The international law view of sovereignty

Under the principles of public international law, entering into binding agreements is interpreted as an exercise of sovereignty, not its surrender<sup>42</sup>. In the case of the *SS Wimbledon*<sup>43</sup> the tribunal held that the ratification of a treaty in which a state agrees not to perform certain acts is not an abandonment, but an expression of sovereignty.

In *Texaco v Libya*<sup>44</sup> the sole arbitrator stated:

"There is no need to dwell at any great length on the existence and value of the principle under which a State may within the framework of its sovereignty, undertake international commitments with respect to a private party. This results from the discretionary competency of the State in this area... The result is that a State cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty, and cannot through measures belonging to its internal order make null and void the rights of a contracting party which has performed its various obligations under the contract."<sup>45</sup>

Similarly the tribunal in *Revere Copper*<sup>46</sup> held that "in order to meet the aspirations of its people, the Government may for certain periods of time impose limits on the sovereign powers of the state..."<sup>47</sup>

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<sup>41</sup> Thomas Hobbes, *Leviathan*, Jennifer Popiel (ed), (First published 1652, Republished in New York, Barnes and Noble Publishing, 2004)

<sup>42</sup> Ivar Alvik, "Contractual Restriction of Public Powers", in Alvik, *Contracting With Sovereignty*, (Oxford: Hart, 2011) p. 240

<sup>43</sup> Case of *SS Wimbledon* (1923) PCIJ Series A No 1, 25

<sup>44</sup> *Texaco v Libya* (Award (Merits) 1977) 53 ILR 389, paras 66-7

<sup>45</sup> *Texaco v Libya* (Award (Merits) 1977) 53 ILR 389, paras 66-7

<sup>46</sup> *Revere Copper and Brass Inc v Overseas Private Investment Corporation*, Award and Dissenting Opinion of Mr Francis Bergan, 24 August 1978, American Arbitration Association Yearbook Commercial Arbitration (1980), Vol. 5

<sup>47</sup> *Revere Copper and Brass Inc v Overseas Private Investment Corporation*, Award and Dissenting Opinion of Mr Francis Bergan, 24 August 1978, American Arbitration Association Yearbook Commercial Arbitration (1980), Vol. 5

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As such, in international law, the ratification of an agreement like TTIP or CETA does not represent an unacceptable surrender of sovereignty. Furthermore, once such an agreement has been ratified, a government will not be able to rely on its domestic law conception of sovereignty in order to avoid its obligations under that agreement<sup>48</sup>.

### 2(b). Sovereignty and democracy

Sovereignty is construed differently in the domestic law of the UK. Under international law, sovereignty is the quality of an agent with full legal personality: an agent with "no external superior"<sup>49</sup>. In domestic law, a sovereign is the ultimate legal power: an agent with "no internal equal"<sup>50</sup>. In the UK, the sovereign agent is the Queen in Parliament. But to say that an agent or institution is sovereign is to say that it legitimately exercises supreme power and legitimacy cannot, by definition, be inherent to an agent or institution<sup>51</sup>. Therefore to make the statement "Parliament is sovereign" is to imply that there is some element that gives Parliament ultimate legal power. In the UK this factor is the democratic mandate<sup>52</sup>.

Parliament is sovereign because it embodies the democratically expressed will of the electorate<sup>53</sup>.

Therefore, by implication, if Parliament lacked a democratic mandate it would no longer be sovereign. Fundamentally, representative democracy requires that the electorate has a choice and is able to make this choice on a regular basis. Parliament is only representative of the electorate if the electorate is able to change its mind and thus alter the composition of Parliament accordingly. So while Parliament's legal authority is ultimate, it is not infinite. If Parliament is sovereign then it is a matter of reason that it should have the power to make or unmake any law. But when the composition of Parliament changes, the new Parliament will still also be able to make or unmake any law, including one made by its predecessors. If

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<sup>48</sup> Art. 27 Vienna Convention on the Law of Treaties Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, vol. II (United Nations publication, Sales No. E.94.V.5).

<sup>49</sup> Roland R. Foulke, "Definition and Nature of International Law, 19 Columbia Law Review 6 (1919), pp. 429-466

<sup>50</sup> John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law*, edited by Robert Campbell, (London: John Murray, 2012, first published 1869), p. 2

<sup>51</sup> Jeffrey Goldsworthy, "Abdicating and Limiting Parliament's Sovereignty", 17 KCLJ 255 (2006)

<sup>52</sup> Cf. A. V. Dicey, *A Fools Paradise Being A Constitutionalist's Criticism of the Hume Rule Bill 1912*, (New York: HardPress Publishing, 2012, first published 1913), p. 114; Goldsworthy, "Abdicating and Limiting", Jennings, *The Law and the Constitution*, p. 13

<sup>53</sup> Cf. Sir Ivor Jennings, "The Law and the Constitution", (London University Press, 1933) pp. 309-310 and 13 - 4 and John Locke, *The Two Treatises of the Government*, (first published 1689, reprinted in London: BN Publishing, 2008), 2nd Tr. Sec 132

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Parliament could not make or unmake any law then it would no longer be able to fully represent the democratically expressed will of the electorate. If it could not represent the will of the electorate then the factor that makes Parliament legitimately sovereign would no longer exist. Therefore Parliament cannot do anything that would fetter the choice of future electorates because to do so would compromise the basis for its own legitimacy and power.

### 2(c). Dicey's doctrine of continuing sovereignty

Dicey argued that the only law that Parliament lacked the power to make was one that bound either itself or future parliaments. The practical expression of this is that, in any situation of conflict, the latter statute would prevail regardless of its perceived importance<sup>54</sup>. For Dicey, if the Act of the Union 1707 was to conflict with the Dentist's Act 1878 then the matter must be resolved in favour of the latter. Any other result would mean that the Parliament of 1707 had bound the Parliament of 1878 and it lacked the power to do this. Dicey argued that this was the case even if the latter statute was only to conflict with the former implicitly (i.e. in the absence of a specific clause stating that it was intended to repeal any part of the former). This is the doctrine of "implied repeal".

Dicey's formulation of parliamentary sovereignty is, in the words of Jeffrey Jowell, "the stone on which our Constitution is not writ"<sup>55</sup>. Dicey's formulation was approved by the House of Lords in *Vauxhall Estates v Liverpool Corporation*<sup>56</sup> and in *Ellen St Estates v Minister of Health*<sup>57</sup>. In the former, Avory J held (at first instance):

"It must be admitted that such a suggestion as that is inconsistent with the principle of the Constitution of this country. Speaking for myself, I should certainly hold, until the contrary were decided, that no Act of Parliament can effectively provide that no future Act shall interfere with its provisions."<sup>58</sup>

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<sup>54</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th Revised Edition, (New York: Liberty Fund Inc, 1982, First published 1889), p. 20

<sup>55</sup> Jeffrey Jowell, "Parliamentary Sovereignty Under the New Constitutional Hypothesis" *Public Law*, (Autumn 2006), pp. 562-579

<sup>56</sup> [1932] 1 K. B. 733

<sup>57</sup> [1934] All ER Rep 385

<sup>58</sup> [1932] 1 K. B. 733 at 743

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In the latter *Maugham L.J.* held (on appeal):

"The legislature cannot, according to our Constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislature."<sup>59</sup>

It is important to distinguish Dicey's doctrine from more radical views of unfettered democracy<sup>60</sup>. Dicey does not argue that any law that lasts beyond the life of a parliament becomes void or should automatically be considered dictatorial. Dicey simply argues that the current generation may overrule the laws of the previous generation if it elects to do so. It should also be noted that this does not mean that there are no controls on the legislative power of Parliament. Parliament is controlled and limited by its responsibility to the electorate<sup>61</sup>. It is prevented from making laws that are absurd or contradictory by the prospect of punishment at the ballot box<sup>62</sup>. This has been effective in ensuring Parliament remains generally consistent and respectful of longstanding traditions (and often its predecessor's legislative decisions) despite being controlled by different parties<sup>63</sup>.

### 2(d). Challenges to Dicey's doctrine

Dicey's doctrine is not universally approved. In Australia, the High Court has embraced a contrary doctrine of "self-embracing sovereignty", which suggests that the binding of future parliaments actually represents the ultimate expression of sovereignty<sup>64</sup>, but this has not been followed by courts in the UK. Subsequent events have presented a challenge to Dicey's doctrine. Principally the Parliament Acts of 1911 and 1949 and the European Communities Act 1972.

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<sup>59</sup> [1934] All ER Rep 385 at 597

<sup>60</sup> See, for example, Thomas Paine, *Rights of Man, Common Sense and other political writings*, (Mark Philip ed), (London: Oxford Paperbacks, 2008)

<sup>61</sup> J.A.G. Griffith, "The Political Constitution", 42 M.L.R. 1 (1979), pp. 1-21

<sup>62</sup> Griffith, "The Political Constitution", pp. 1-21

<sup>63</sup> Griffith, pp. 1-21

<sup>64</sup> Cf. *Attorney General for New South Wales v Trethowan* (1931) 44 C. L. R. 395

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It has been suggested that the Parliament Acts of 1911 and 1949 show that, while Parliament may not have the power to bind itself in terms of the substance of an act, it does have the power to bind itself with regards to the "manner and form" by which that act is passed<sup>65</sup>. In essence, Parliament may lay down obligations as to the conduct of the legislative process that will be effective in binding future parliaments.

The Parliament Acts changed the legislative process by limiting the power of the Upper House to refuse to pass bills sent to it by the Lower House. In *Jackson v Attorney General*, Lady Hale suggested (albeit obiter) that in 1911 and 1949, Parliament had "revised itself down", in that it had lowered the bar that a bill must clear in order to become an Act of Parliament. Therefore it may also have the power to "revise itself up" by imposing higher standards, such as the requirement that bills regarding certain issues must be approved by a majority of a certain size in order to become Acts<sup>66</sup>.

The second principal challenge comes from the European Communities Act 1972. In *R v Secretary of State for Transport ex. p. Factortame*<sup>67</sup>, The House of Lords effectively dis-applied provisions of the Merchant Shipping Act 1988 because they were incompatible with European Community (as it then was) law. Wade famously described this as a "judicial revolution"<sup>68</sup>. He argued that, in recognising the supremacy of EU law, the House of Lords had effectively allowed the Parliament of 1972 (which passed the ECA 1972 and originally endorsed the principle of supremacy) to bind the Parliament of 1988<sup>69</sup>.

In *Factortame*, Lord Bridge denied that there was a question of continuing sovereignty. Lord Bridge held that the ECA 1972 did not create a conflict with the principle of parliamentary sovereignty because Parliament had voluntarily entered the European Communities, he argued that a voluntary act couldn't compromise sovereignty<sup>70</sup>. Vernon Bogdanor has countered this argument. He draws an analogy with voluntary slavery:

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<sup>65</sup> Cf. Sir Ivor Jennings, *The Law and the Constitution*, (London; University of London Press, 1963), pp. 145-6 (although it should be noted that Jennings accepts that there was (at the time) little or no authoritative dicta in support of his construction), Alison Young "Parliamentary Sovereignty and the Human Rights Act" (London; Hart, 2009), p. 194

<sup>66</sup> [2005] UKHL 56 at 163

<sup>67</sup> [1990] UKHL 7

<sup>68</sup> H. W. R. Wade, "Sovereignty: Revolution or Evolution?", 112 L.Q.R. 568 (1996), pp. 568 – 574

<sup>69</sup> Wade, "Revolution or Evolution", pp. 568-574

<sup>70</sup> [1990] UKHL 7 para 96

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"If I volunteer to surrender my freedom on the proviso that I can at any time break free of my chains, it would be odd to say that my freedom has not really been curtailed during the period in which it is surrendered."<sup>71</sup>

In the case of the ECA 1972, the parallel with slavery is somewhat dramatic. A better (or at least less pejorative) analogy would be with a private members club. If an indentured servant was to leave his position before the end of his indenture, he would be in breach of his contract and liable to sanction. If I join a private members' club, then I agree to be bound by its rules. If I break those rules then I have agreed to accept the appropriate penalty according to the processes set down in the club's rules up to, and including, expulsion. However I am perfectly at liberty to terminate my membership at any time. At this point I shall no longer be entitled to the benefits that come with membership but I will also no longer be bound by the rules of the club.

This is an important point and was recognised by both Wade and Lord Hoffmann (then Hoffmann J) in *Matadeen v Pointu and the Minister of Education and Science*<sup>72</sup>. Although the ECA 1972 may represent a surrender of sovereignty it is a surrender that is both temporary and, crucially, revocable.

### 2(e). Restating the doctrine of continuing sovereignty

In 2014 the Supreme Court made a clear statement reaffirming the doctrine of continuing sovereignty, albeit in an adapted form.

In *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*<sup>73</sup> the Supreme Court considered whether Art. 9 of the Bill of Rights 1689 would prevent it from deciding whether the legislative procedure used to pass the High Speed Rail (Preparation) Act 2013 adequately fulfilled the requirements set down in the EU's Environmental Impact Directive. Although the court held that it was competent to address the question, it also made an authoritative statement regarding the weighing of statutes of constitutional importance.

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<sup>71</sup> Vernon Bogdanor, "Imprisoned By Doctrine: The Modern Defence of Parliamentary Sovereignty", 32 Oxford Journal of Legal Studies 1 (2012), p. 186

<sup>72</sup> [1998] 3 W.L.R. 18 PC at 9

<sup>73</sup> [2014] UKSC 3, [2014] 1 WLR 324

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In a joint judgment, with which the five other members of the court agreed, Lord Neuberger and Lord Mance adopted, with alterations, Laws LJ's concept of "constitutional statutes". In *Thoburn v Sunderland City Council*<sup>74</sup> Laws held that certain statutes which define "the legal relationship between citizen and state in some general overarching matter" or a statute that "enlarges or diminishes the scope of [...] fundamental constitutional rights" should be considered to be "constitutional statutes". Laws held that these could be repealed by the ordinary legislative procedure but Parliament must be "specific" about its intention to do so<sup>75</sup>.

Lords Neuberger and Mance adopted the essential elements of Laws LJ's dicta but adapted it conceptually. They held that in certain statutes (but also in the common law) lie "constitutional principles". These are principles of such fundamental importance that a court should presume that the intention of Parliament is not to conflict with them. As such, all other statutes should be read in a way that conforms to constitutional principles. However they also accepted that, if Parliament was to expressly state its intention to pass legislation that conflicted with a constitutional principle, then the courts must respect and apply this.

This is an important clarification of the doctrine of continuing sovereignty. It means that Dicey's doctrine of implied repeal is limited to "non-constitutional" principles. However it effectively reaffirms the principle that underlies the doctrine of continuing sovereignty<sup>76</sup>. Each parliament is itself sovereign. Therefore, while it may implicitly consent to the laws passed by previous parliaments (by simply not repealing them) it does not have to do so. Although the courts may regard the ECA 1972 or the Parliament Acts as containing "constitutional principles", if Parliament was to expressly state that it no longer wished to be bound by EU law or that the Upper Chamber would now have full power of veto over all legislation, to do so is within Parliament's power. In the light of this decision, Dicey's doctrine may be restated with only a small clarification: Parliament has the power to make or unmake any law it desires save one that binds itself or a future parliament *when the latter expressly does not desire to be bound*.

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<sup>74</sup> [2002] EWHC 195 (Admin)

<sup>75</sup> [2002] EWHC 195 (Admin) at 63

<sup>76</sup> Mark Elliot, "Constitutional legislation, European Union Law and the nature of the United Kingdom's Contemporary Constitution", 10 European Constitutional Law Review 2014

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Stated like this it is easy to reconcile *Factortame* with the doctrine of continuing sovereignty. The 1988 Parliament must have intended its legislation to be construed in a manner acceptable to European Community law because, if it had not, then it could have made its intention clear. This possibility was noted by Lord Denning M. R. as early as 1979 when he held, in *Macarthy v Smith*<sup>77</sup>, that the primacy of European law is limited (in terms of English law) by the possibility of explicit legislative derogation<sup>78</sup>.

### 3. Will TTIP and CETA conflict with the domestic view of sovereignty?

The rule in *HS2* is crucial to the discussion of TTIP and CETA. Parliament cannot ratify TTIP or CETA (as they currently stand) without binding a future parliament regardless of whether that parliament wishes to remain bound. It is clear from *HS2* that, *prima facie*, for Parliament to bind itself would not be considered problematic for either parliamentary sovereignty or the rule of law. However it is fundamental that, having consented to be bound, *Parliament is able to unbind itself at any time*. If TTIP or CETA are ratified this power will be compromised. Parliament will be bound for a minimum of 20 years in relation to any investment made under the treaty. The will of the electorate could only be legally exercised within the terms of treaty.

#### 3(a). How will TTIP and CETA bind Parliament?

CETA contains a stabilisation clause (and therefore it is likely that TTIP will contain a similar clause) which provides that, if a party were to withdraw from the treaty, the investment protection provisions would remain in place for a further 20 years for all investments made under the provisions of that treaty while it was extant<sup>79</sup>. *Prima facie* it seems that this means that ratification of TTIP or CETA would bind Parliament well beyond a single term with regards to any investments made under either treaty.

A simple remedy might be to leave the EU<sup>80</sup>. The UK is not a named party to CETA and will not be a named party to TTIP. Both of those agreements are made between the EU and the US/Canada because, in the Lisbon Treaty, member states ceded competence for FDI to the EU. With this being the case could the UK free itself from its obligations under TTIP or CETA by simply leaving the EU?

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<sup>77</sup> [1979] 3 All E.R. 325 at 329

<sup>78</sup> [1979] 3 All E.R. 325 at 329

<sup>79</sup> CETA Art. X. 08 on p.490 [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

<sup>80</sup> While this may incur certain continuing liabilities (A. D. McNair, *The Law of Treaties*, (London; Oxford University Press, 1986) p. 532) it's not clear where these could be enforced other than in domestic law



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It is unlikely that such an action would have the desired effect. Although Art. 207 TFEU gives the EU competence for FDI this should be construed narrowly. *Bundesverfassungsgericht* (the German Federal Constitutional Court or BVerfG) is the only court to have considered the extent of the competence granted by Art. 207 TEU. In 2009 it held that the EU's competence only extends to investments of a sufficient size to take control of a company. It therefore excludes "portfolio investments" (the buying of a smaller - non controlling - number of shares in a company<sup>81</sup>). CETA covers a much wider range of issues than simply controlling investments (including portfolio investments) and the negotiating mandate and consultation documents suggest that TTIP will do so as well.

As such, TTIP and CETA should be construed as "mixed agreements". Both the EU and individual member must ratify agreements of this nature. This means that the UK will be bound by TTIP and CETA, not just as a member of the EU, but in its own right<sup>82</sup>. The Vienna Convention 1986 provides that a state may not rely on a provision of domestic law to allow it to avoid its obligations under a treaty<sup>83</sup>. It further provides that, in a dispute in which one party seeks to rely on its obligations under one treaty in order to avoid its obligations under another, the treaty that binds both parties to the dispute will prevail<sup>84</sup>. This means that, whether the EU competence rules are construed as domestic law or a treaty obligation, the UK will not be able to rely on them to avoid responsibility for its obligations under TTIP or CETA. In effect, EU states are bound both jointly and severally<sup>85</sup>. Unless each agreement was to include a specific division of competencies clause (which CETA does not and TTIP is unlikely to), TTIP and CETA will bind the UK both as a member of the EU and in its own right. As such, simply leaving the EU will not be effective to free the UK from its obligations under TTIP, including the stabilisation clause.

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<sup>81</sup> ECLI:DE:BVerfG:2009:es20090630.2bve000208 30<sup>th</sup> June 2009

[http://www.bverfg.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630\\_2bve000208en.html](http://www.bverfg.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html)

<sup>82</sup> Eva Steinberger, "The WTO Treaty as a Mixed Agreement: Problems with the ES's and the EC Member States' membership of the WTO", 17 *European Journal of International Law* 4 (2006), pp. 837-868

<sup>83</sup> Art 27. Vienna Convention on the Law of Treaties, Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, vol. II (United Nations publication, Sales No. E.94.V.5), Although this is not yet in force it provides a useful guide to this question.

<sup>84</sup> Arts 30 and 34b Vienna Convention 1986,

<sup>85</sup> Elfteria Neframi, "International Responsibility of the European Community and Member States Under Mixed Agreements", in Enxo Cannizzaro (ed), *The European Union as an Actor in International Relations*, (London; Kluwer, 2002), pp. 193-205

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### 3(b). How will TTIP and CETA differ from other treaties and agreements?

The UK has negotiated 94 BITs since 1975, almost all include some form of ISDS<sup>86</sup>, and agrees hundreds, if not thousands, of individual contracts with private investors under English law every year, many of which include stabilisation clauses<sup>87</sup>. To argue that a government couldn't enter into contracts would be absurd. Without the ability to make contracts, the day-to-day business of government would be impossible. Private investors are unlikely to make agreements with the government if Parliament does not consider itself bound by those contracts. If it is the case that contracts and BITs may bind Parliament, why are TTIP and CETA any different?

The difference between contracts made with the government, and agreements like TTIP or CETA is a difference of legal regime. Contracts made between private parties and the government have force as a result of laws made by the UK Parliament. TTIP and CETA would create an entirely new legal regime. When the UK government makes a contract, that contract is governed by English contract law<sup>88</sup>. The government is bound by the contract but only because Parliament has approved a regime of law that says agreements that fulfill certain criteria have legal force as contracts.

By contrast when the UK ratifies an agreement like CETA or TTIP it accepts that the UK will be bound by an entirely different legal regime. While Parliament can elect to change the domestic law of contract<sup>89</sup> it cannot change the investment protection provisions of CETA or TTIP without renegotiating the agreement.

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<sup>86</sup> Department for Business Innovation and Skills, "ISDS in Numbers", [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/311247/bis-14-695-investor-state-dispute-settlement-faqs.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311247/bis-14-695-investor-state-dispute-settlement-faqs.pdf)

<sup>87</sup> Herbert Smith newsletter of June 2010 (No 36), 'Stabilisation Clauses, Issues and Trends'

<sup>88</sup> It is not inconceivable that a UK government could make a contract that included a "choice of law" clause selecting the law of another jurisdiction. However this is unlikely as English law is considered a common and legitimate choice for contracts between parties from different jurisdictions (around 40% of contracts are governed by English law, making it by far the most popular choice of governing law - the second most popular jurisdiction is New York, which governs under 20% of contracts) In the unlikely event that a UK government was to make a contract governed by the law of a foreign jurisdiction, this too may represent an action that is incoherent with the doctrine of continuing sovereignty. See White and Case LLP, "2012 Arbitration Survey: Current and Preferred Practices in the Arbitral Process", "Choice of law governing the substance of the dispute", (2012), found at <http://arbitrationpractices.whitecase.com/news/newsdetail.aspx?news=3786>

<sup>89</sup> Even with respect to existing contracts if it can show that it does so for a sufficiently important reason to overcome the rule of law presumption against retroactive laws or, alternatively according to HS2, explicitly derogates from it.

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The distinction between TTIP and CETA and the other 94 BITs signed by the UK is less clear-cut. Like TTIP and CETA, many of the BITs ratified by the UK include 20-year stabilisation clauses. However, while the form may be similar, the substance of that which is agreed is different. Any BIT may be renegotiated<sup>90</sup>. In theory TTIP and CETA can also be renegotiated *but not by the UK*. This is an important difference. If Parliament wishes to change the nature of its obligations under a BIT then it can instruct the government to negotiate directly with the treaty partner. If Parliament wishes to change the nature of its obligations under TTIP or CETA then it must instruct the government to ask the EU to negotiate on its behalf. The EU is responsive, not just to the interests of the UK, but those of all 28 member states. As such the practical difficulty of renegotiating TTIP or CETA would be considerably greater than renegotiating a BIT agreed directly by the UK<sup>91</sup>. This same distinction applies to other agreements. Even if the UK was to face legal sanction for leaving the Lisbon Treaty or the ECHR then this could be avoided by negotiating an exit package. But the UK could not renegotiate an exit package from TTIP or CETA by its own volition because the party that negotiated both of those treaties was the EU. Parliament's decision to leave TTIP or CETA would be subject to the approval of at least 28 other parliaments.

In addition, it is important to consider the scale of the burden undertaken by the ratification of TTIP or CETA. The UK's current BIT obligations are all owed to states that represent a relatively minimal proportion of the total FDI in the UK. Indeed the UK does not currently owe obligations under a BIT to any of the five largest providers of FDI in the UK<sup>92</sup>. By contrast the USA is consistently the largest (by a significant margin) provider of FDI in the UK and Canada is regularly ranked amongst the top five<sup>93</sup>. TTIP and CETA will increase the ISDS coverage of international FDI flows by an estimated 300%<sup>94</sup>. In ratifying TTIP or CETA the UK may be taking on an obligation that is similar in form to that which it already owes under existing BITs. But in reality that obligation will be significantly greater in substance than in the case of comparable treaties.

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<sup>90</sup> The Vienna Convention accepts this as a legitimate means of varying a treaty even if that treaty has not yet expired. See Andrea Carska-Sheppard, "Issues Relevant to the Termination of Bilateral Investment Treaties", 26 *Journal of International Arbitration* 6 (2009), pp. 755-771

<sup>91</sup> This distinction also applies to the Energy Charter Treaty. This differs from TTIP and CETA in that it is a multilateral agreement, rather than a BIT that binds jointly and severally. However it contains a stabilisation clause that is similar to that found in CETA. This could potentially raise issues of coherence with the principle of continuing sovereignty. However this would require an extensive study in itself because the ECT provides for an "Energy Conference" which gives greater agency to states. Further research is required to determine whether this provision gives Parliament the requisite agency to avoid a conflict with continuing sovereignty.

<sup>92</sup> See Ernst and Young, UK Attractiveness Survey 2014, <http://www.ey.com/UK/en/Issues/Business-environment/2014-UK-attractiveness-survey>

<sup>93</sup> Ernst and Young, UK Attractiveness Survey 2014, <http://www.ey.com/UK/en/Issues/Business-environment/2014-UK-attractiveness-survey>

<sup>94</sup> Gus Van Harten, "Why Arbitrators Not Judges? Comments on the European Commission's Approach to Investor-State Arbitration in TTIP and CETA", 2014

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TTIP and CETA will bind the UK in a way that is substantively different from any other international commitment. The nature of this obligation directly conflicts with the doctrine of continuing sovereignty affirmed in *HS2*, which requires that Parliament be able to explicitly reject an obligation by which it no longer wishes to be bound. The Parliament that ratifies TTIP and CETA will have taken action that binds at least four parliaments<sup>95</sup>. This is a fundamental departure from the settled understanding of parliamentary sovereignty.

This is not to say that any treaty that the UK negotiates that is intended to last beyond the life of a single parliament is incoherent with parliamentary sovereignty. Although Parliament must be able to leave or renegotiate a treaty by its own will in order for that treaty to cohere with the legal definition of parliamentary sovereignty, this is not to say that Parliament is completely unconstrained. In the same way as it is in the case of any domestic policy, Parliament is constrained by its responsibility to the electorate<sup>96</sup>. A government that negotiates a treaty has a responsibility to convince the electorate that the treaty is a good thing in the same way it would have a responsibility to convince the electorate that a domestic policy it implements is a good thing. If it succeeds, then support of the treaty (as with the domestic policy) will be popular electorally and probably adopted by other parties and thus the UK will remain a party to the treaty. This works in exactly the same way as when a popular domestic policy is adopted by rival parties and so is implemented by successive parliaments. Political controls are effective in producing commitments from governments that last beyond the life of a single parliament<sup>97</sup>. But TTIP and CETA will remove the political controls on government action and replace them with legal controls which, as will be argued below, are accessible only to a small section of society.

### 4. TTIP, CETA and the rule of law

#### 4(a). The rule of law argument in favour of ISDS

If the sovereignty of Parliament is the first principle of the UK Constitution, then the rule of law is the second<sup>98</sup>. It is arguable that investment protections, enforced by ISDS, are coherent with and even beneficial in terms of the rule of law. In his authoritative discussion of the rule of law, Lord Bingham<sup>99</sup> defined the concept using eight criteria. The first was that the law should be "intelligible, clear and

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<sup>95</sup> Assuming that the life of Parliament continues to be defined by 1 Fixed Term Parliament Act 2011

<sup>96</sup> Griffith, pp. 1-21

<sup>97</sup> Griffith, pp. 1-21

<sup>98</sup> A V Dicey, *Introduction to the study of the Law of the Constitution*, 10<sup>th</sup> ed, (New York: Elibron Classics, 2000), pp 39-40

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predictable"<sup>100</sup>. *Prima facie* it is not difficult to understand how investment protection provisions add to the clarity and predictability of the law. The notion that Parliament can effectively do anything it wishes may be democratic in theory, but it makes it difficult for investors to think in the long term. If the law can change within five years, there is little predictable about it<sup>101</sup>.

However, on closer analysis, investment protection provisions are far from an unqualified boon to the cause of predictability in the law. Furthermore they present significant issues in terms of other essential aspects of the rule of law including access to justice and independent adjudication.

### 4(b). Predictability

The impact of investment protection provisions and ISDS on the predictability of the law has been overstated. While it may *prima facie* offer increased certainty for investors with regards to the security of their investments, this advantage is limited. Arbitration tribunals are not bound by precedent but may choose to follow the decisions of other tribunals (if they publish their decisions at all)<sup>102</sup>. In addition, a tribunal may effectively choose to inform itself according to authorities from any distinction it chooses<sup>103</sup>.

This means, from a public law perspective, that ISDS is effectively the worst of both worlds in terms of predictability. In a (common law) domestic court, the judge is bound by the decisions of his predecessors. This adds predictability to the law because legal advisors can predict the possible outcomes of a particular question by studying the outcomes of similar questions that have been adjudicated in the past. By contrast, arbitration tribunals may choose to follow the decisions of their predecessors or they may choose to follow none at all. Legal advisors can't discount the decisions of previous tribunals because they may be relevant. At the same time it is difficult to make an authoritative prediction of the outcome of a certain question because there is always the possibility that the tribunal will elect to depart from the

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<sup>99</sup> Although Bingham's conception of the rule of law has provoked criticism (for example Anthony Julius, "The Rule of Law", *The Times*, (30<sup>th</sup> January 2010)), the ideas that I take for this project are not the source of that controversy and, indeed, cohere with Joseph Raz's (very different) interpretation of the rule of law in "The Rule of Law and Its Virtue", *The Authority of Law: Essays on Law and Morality*, (London: OUP, 1979), pp. 211-230 and F. A. Hayek's elucidation in *The Road to Serfdom*, (Chicago: University of Chicago Press, 1944), p. 54

<sup>100</sup> Tom Bingham, "The Rule of Law", 66 C.L.J. 1 (2007), pp. 67-85, This criterion also forms the cornerstone of the construction of the rule of law advanced by Joseph Raz in *The Authority of Law*, 2nd(London: OUP,

<sup>101</sup> I am grateful to Sir Bernard Rix QC for expressing this argument so cogently when first drawing my attention to it.

<sup>102</sup> Lew and Mistellis, "Arbitration of Investment Proceedings", pp. 761-804, arbitral tribunals are not obliged to publish their reasoning.

<sup>103</sup> A tribunal can only rule based on the law presented to it by the parties but it may ask the parties to address it on any authority it believes to be relevant. Lew and Mistellis, pp. 761-804

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decisions of its predecessors<sup>104</sup>. This has led William Scheuerman to argue that, far from increasing the predictability of the law, ISDS is based "overwhelmingly on *ad hoc*, discretionary, closed and non-transparent legal forms fundamentally inconsistent with a minimally defensible conception of the rule of law"<sup>105</sup>.

In addition, it is a logical fallacy to suggest that the rule of law, as a whole, is strengthened by creating greater certainty in one area of the law at the expense of another. If, as I have argued above, ratifying TTIP and CETA represents a fundamental departure from the established principle of parliamentary sovereignty, then this has created a significant degree of uncertainty at the heart of the UK's public law.

There can be little advantage to the rule of law as a whole in sacrificing constitutional principle for commercial convenience.

### 4(c). Access to justice

Bingham states that the rule of law requires equal access to justice<sup>106</sup>. ISDS often, by nature, addresses questions of public interest. In domestic law, the administrative courts normally consider such questions through judicial review. In a judicial review, civil society organisations (representing those who are not party to the dispute but may be affected by the result) can submit *amicus curia* briefs to the court. These can be accepted or rejected at the discretion of the court.

Arbitral tribunals are not prevented from accepting *amicus curia* briefs and, like in the administrative court, they may be accepted or rejected at the discretion of the adjudicator<sup>107</sup>. However when the judge in an administrative court exercises his discretion, he does so according to established dicta on the

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<sup>104</sup> It is likely that the impact of this is not evenly distributed. Commercial lawyers, who conduct all of their work in accordance with the norms and customs of international commerce may find the lack of precedent to be less of a barrier to predicting the outcome of legal questions because they may have a greater understanding of particular arbitrators or current custom. But this should not be considered an argument in favour of ISDS. Because ISDS is used to settle questions relating public policy, commercial lawyers will not be the only parties involved. ISDS tribunals arbitrate disputes involving national governments and delivery agencies as well as local authorities and QUANGOs. These parties will not have the same personal understanding of particular arbitrators of customs in vogue that corporate lawyers will have, which means that ISDS will be asymmetrically predictable.

<sup>105</sup> William Scheuerman, "Economic Globalisation and the Rule of Law", 6 *Constellations* 1 (1999), 3

<sup>106</sup> Bingham, "The Rule of Law", pp. 75-78

<sup>107</sup> For example in *Methanex Corp v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345, 1410-12pt. III ch, A, 1-2

question at hand. Although a matter is technically "discretionary", in reality the scope for the exercise of discretion is very narrow<sup>108</sup>. If those who submitted the brief disagree (on a point of law), with the decision of the administrative court not to accept it, then they have the option to lodge an interlocutory appeal (which may go to the Supreme Court or the European Court of Human Rights) or to apply for a judicial review of the decision to reject their brief.

By contrast, the discretion of an arbitral tribunal is both unconstrained by precedent and final. An arbitral tribunal that refuses an *amicus curia* brief cannot be held to account on matters of either fact or law.

From the perspective of civil society, the principle of equal access to justice is far better represented in the administrative courts than an arbitral tribunal.

#### 4(d). The selection of adjudicators

Adjudication by a qualified, fair and impartial panel is essential to the rule of law<sup>109</sup>. Arbitrators are selected by the parties or, in the case of ICSID arbitrations, by the Secretary General of the organisation. They are required to attest that they will adjudicate the dispute fairly and impartially and have no interest that may impair their ability to do so. Almost all arbitrators are trained lawyers and many also have an academic background<sup>110</sup>.

*Prima facie* arbitrators appear well qualified. However it is also worth noting that ISDS arbitrators are almost entirely corporate lawyers<sup>111</sup>. Few work purely as arbitrators so, while they are prevented from working for either of the parties while responsible for adjudicating their dispute, they may do so in future.

In addition, the Secretary General of ICSID is in no way publicly accountable and it is not clear from where that office gains the legitimacy necessary to play such an important role<sup>112</sup>.

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<sup>108</sup> Bingham, pp. 72-3

<sup>109</sup> Robert S. Summers, "A Formal Theory of the Rule of Law, 6 Ratio Juris 2 (1993), pp. 127-142

<sup>110</sup> Gus Van Harten, "Arbitrator Behaviour in Assymetrical Adjudication: An Empirical Study of Investment Treaty Arbitration" 50 Osgoode Hall Law Journal 1 (2012), pp. 211-268

<sup>111</sup> Jose Costa, "Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields", 1 Onati Socio-Legal Series 4 (2011), pp. 1-24

<sup>112</sup> Kent Law School (and assorted signatories), "Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)", (2014), [http://www.kent.ac.uk/law/isds\\_treaty\\_consultation.html](http://www.kent.ac.uk/law/isds_treaty_consultation.html)

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The conduct of arbitrators cannot be restrained save by application for annulment of proceedings. But this is only available on limited grounds<sup>113</sup>. This is a high bar for success. Arbitration proceedings are held in private and only published at the discretion of the parties<sup>114</sup>.

By contrast, judges of the administrative court are appointed by a 15-member panel, comprising a barrister, solicitor, five judges, a tribunal member, a magistrate and six lay members, one of whom serves as chair<sup>115</sup>. Judges conduct all proceedings in public save for in exceptional circumstances. Judges are bound by precedent and, if they depart from this, vulnerable to appeal or judicial review. They are prohibited from accepting other work and, as their decisions form part of the common law (and the criteria on which they are judged for promotion), have a personal vested interest in making well-reasoned and impartial decisions<sup>116</sup>. Their independence from government is guaranteed by statute<sup>117</sup> and even a perceived conflict of interest can lead to a retrial and throw doubt on their other judgments. When it was revealed that Lord Hoffmann was a patron of Amnesty International (an organisation that promotes human rights) the decision in the Pinochet trial, to which he contributed, was overturned and a retrial ordered<sup>118</sup>.

Arbitral tribunals may, in practice, be equally fair and impartial as domestic administrative courts. But it is significant that the administrative courts benefit from a far higher standard of structural guarantees. Whether or not arbitral tribunals have always ruled fairly and impartially in the past is controversial<sup>119</sup> but actually irrelevant to the question at hand. The rule of law requires not that we simply trust adjudicators to rule fairly and impartially, but that adequate measures are in place to ensure that society has confidence that they *cannot do anything but* rule as such. Legitimacy in terms of the rule of law is the product of accountability, not merely subjective analysis of previous experience. By this measure, the administrative courts merit a much higher degree of confidence in their ability to adjudicate fairly and impartially, as demanded by the rule of law, than arbitral tribunals.

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<sup>113</sup> Lise Johnson, "Annulment of ICSID Awards: Recent Developments", IV Annual Forum for Developing Country Investment Negotiators Background Papers, New Delhi, October 27-29, 2010, p. 3

<sup>114</sup> Lew and Mistelis, 761-804

<sup>115</sup> Judicial Appointments Commission, <https://jac.judiciary.gov.uk>

<sup>116</sup> Bingham, p. 93

<sup>117</sup> 3 Constitutional Reform Act 2011

<sup>118</sup> Joshua Rozenberg, "How Pinochet Tainted Hoffmann's Brilliant Career", *Law Society Gazette*, (23rd April 2009), <http://www.lawgazette.co.uk/analysis/how-pinochet-tainted-hoffmanns-brilliant-career/50436.fullarticle>

<sup>119</sup> Cf. Jose Costa, "Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields", 1 Onati Socio-Legal Series 4 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1832382](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832382)



In terms of the rule of law, it is not problematic for a state to appear before adjudicators on equal terms as a private party. But the manner in which the proceedings are conducted is important. In any proceedings it is essential, for the maintenance of the rule of law, that they are conducted according to predictable rules, by qualified and independent adjudicators and with all interested parties having equal opportunity to be heard. To compromise these factors when one party is a nation state is particularly problematic because (democratic) nation states represent the combined, expressed wills of their electorates. While it may be possible to defend ISDS based on anecdotal evidence of good practice, the fact remains that it lacks the structural guarantees of justice that are structurally essential in the UK's administrative courts. As such, the rule of law is best served by adjudicating disputes between international investors and the UK in domestic courts, not through ISDS.

### 5. Conclusions

If the ratification of TTIP or CETA will represent a binding of future parliaments beyond what has hitherto been considered coherent with the doctrine of continuing sovereignty, what does this mean for TTIP, CETA and the UK Constitution? I suggest three possible conclusions:

1. We must look for a different understanding of the UK Constitution.
2. Parliament lacks the power *ab initio* to ratify TTIP and CETA.
3. The UK must derogate from the stabilisation clauses in TTIP and CETA.

#### 5(a). A new constitutional understanding

To paraphrase Griffith's (somewhat fatalistic) words, the UK Constitution may be "simply what's done"<sup>120</sup>. In this construction, the Constitution bends to fit the reality of policy rather than policy adapting to cohere to the requirements of the Constitution. This idea might be better expressed as "the UK Constitution is simply *what no one prevents happening*".

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<sup>120</sup> J.A.G. Griffith, "The Political Constitution", 42 M.L.R. 1 (1979), pp. 1-21

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If this is the case then TTIP and CETA require that we adjust our understanding of the Constitution. If Parliament can consent to bind itself, without the option of repeal at a time of its own choosing, for an amount of time determined by external international law, then why can't it do the same in domestic law? TTIP and CETA will impose penalties for certain actions. These penalties will be enforced in international law. So could Parliament pass legislation that would impose penalties for other actions, to be enforced in domestic law, and embed that legislation against repeal by future parliaments for 20 years? For example, could Parliament pass legislation that mandates a regime of compensation for trade unions, should government policy lead to job losses? This seems to be roughly equivalent to TTIP and CETA's investment protections against expropriation (which require that the state compensate an investor if its policy should lead to the loss of that investor's property). Alternatively, to revive an old question, could Parliament pass a law requiring a "super majority" in order to pass legislation on certain issues, and embed it against repeal for a further 20 years?

If Parliament can't embed legislation in domestic law, yet it can consent to, the equivalent of, embedded rules that take effect in international law, then it would appear that foreign investors have greater rights under the UK Constitution than citizens of the UK. An investor from the United States could rely on TTIP, safe in the knowledge that her investment rights are protected against repeal for 20 years. By contrast a British citizen relying on, for example, the Human Rights Act, must do so in the knowledge that her rights under that statute could be repealed at any time. Such a state of affairs would fail to adhere to the most basic requirements of the rule of law.

Equality before the law requires that, if Parliament can bind itself in relation to the rights of foreign investors then it must be able to bind itself in relation to the rights of British citizens.

However, to accept this interpretation would be profoundly undemocratic. The doctrine of continuing sovereignty does not exist as a rule for its own sake. It exists because the foundational principle of the UK Constitution is democracy. Parliament is sovereign because it represents the expressed will of the electorate. Binding in any way, even merely in terms of manner and form, would mean that Parliament will represent the will of the electorate, in any complete way, only once. Any parliament that is bound by its predecessors can only partially represent the will of the electorate because there will be areas of law that it had no say in making, and that it cannot change regardless of what the electorate desires.

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This is true even when the matter on which Parliament is bound is supposedly "uncontroversial" or "non-political". The received wisdom of one generation is the great controversy of the next. To bind in terms of manner and form may seem like a politically neutral choice because all parties will be bound in the same way. But that which one binds is an intensely political question. To require a super-majority to pass environmental legislation would be repugnant to supporters of that legislation because it would make it harder for them to achieve their goal than for someone who supports, for example, the building of further coal power plants (the approval of which would only require a simple majority), to achieve theirs.

For the same reason, to require a super-majority to pass a bill privatising the NHS would, no doubt, excite equal ire amongst those who favour a free-market approach to healthcare provision.

TTIP and CETA themselves apparently contain an uncontroversial principle: "Free trade is good". Yet as recently as the 20th Century, the official policy of the Conservative party maintained the diametrically opposite position<sup>121</sup>. Indeed, support for unlimited free markets is not even a position shared by all political parties in 2015<sup>122</sup>. On both the left and the right, parties were represented in the 2010-2015

Parliament that supported rolling back the frontiers of globalisation. While such "minority parties" may be unlikely to win a majority in future parliaments, one cannot make decisions on the Constitution based on the assumption that only particular parties will ever be in power. Both the Labour and Conservative parties (which between them have formed the majority in Parliament since the 1930s) were once minority parties with little apparent hope of electoral dominance.

If democracy is the underlying principle of the UK Constitution then it must be applied universally and without restriction. Democracy applied selectively is not democracy at all, but a fig leaf for autocracy. We should consider this before we simply revise our understanding of parliamentary sovereignty to keep up with changing times.

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<sup>121</sup> Robert Blake, *The Conservative Party From Peel to Major*, (London: Faber and Faber, 2012), ch. VII

<sup>122</sup> Cf. The Green Party, *Real Change: Manifesto for the 2014 European Elections*, (2014), pp. 4-5, available at <https://www.greenparty.org.uk/.../European%20Manifesto%202014.pdf> and UKIP, *Policies for People* (policy announcements made after the party conference, held at Doncaster in 2014), available at [http://www.ukip.org/policies\\_for\\_people](http://www.ukip.org/policies_for_people)

### 5(b). Parliament does not have the power to ratify TTIP or CETA

Perhaps then, Parliament lacks the power, *ab initio*, to ratify TTIP. In domestic law, when Parliament passes legislation that goes beyond the limits of its power, the courts will simply dis-apply that legislation or apply it in a manner consistent with the factors that Parliament should have considered when writing it<sup>123</sup>.

This is not an option in the case of TTIP and CETA because British courts will not enforce the legal regime they impose. For the tribunals that will enforce TTIP and CETA the question of sovereignty is narrowly construed and easily answered. Domestic courts in the UK could refuse to enforce arbitral decisions made under TTIP or CETA but this would only be relevant in a handful of cases.

Another option would be to consider a judicial review of the ratification of TTIP or CETA. However this would have little practical effect. Once Parliament has ratified TTIP or CETA, it is bound by them in international law. It can't rely on a provision of domestic law to then go back on its obligations. Thus there is little that a judicial review of the initial decision could achieve.

The best hope for the judicial review route may be as a response to decisions that the Executive takes in order to comply with TTIP or CETA. Arbitration tribunals have previously considered suits based on the acts of local government and held the national government liable to pay compensation based on those acts<sup>124</sup>. It is not unreasonable to suggest that a national government, seeking to protect itself from such suits, would consider placing restrictions on local authorities or other public organisations. In this situation, judicial review may be a useful avenue if a local authority or public body wished to argue that the restrictions placed on it are unreasonable because they are based on obligations under an international agreement that should never have been ratified.

But judicial review in such limited circumstances is akin to applying a Band-Aid to a cancer when it comes to a question of such broad constitutional importance.

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<sup>123</sup> See, for example, *Factortame*

<sup>124</sup> See, for example, *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1

### 5(c). Derogation from any stabilisation clause

The preferable course of action would be to avoid the constitutional question altogether. The aspect of TTIP and CETA that makes ratification incoherent with continuing sovereignty is the stabilisation clause. To agree to a system of rules that constrains Parliament's legislative sovereignty for a period of time would be unproblematic as long as that period of time could end at Parliament's discretion. Without a stabilisation clause, TTIP and CETA would be no more repugnant to the UK Constitution than the ECHR or the Lisbon Treaty.

The obvious solution is to derogate from the stabilisation clause. This is not an unreasonable course of action. As I have argued above, British courts are more than adequate to offer legal protection for investors. Indeed American and Canadian companies regularly litigate disputes in British courts, as do investors the world over.

This would not be a case of allowing Parliament to act free of all constraint. That Parliament is not legally constrained does not mean it is not constrained at all. Parliament is constrained by its democratic responsibility to the electorate. Parliament's inability to bind itself does not, in practice, lead to pendulum swings of policy. Foreign investors will be protected by the same method as British citizens. They can make political statements, campaign in elections and support political parties. This is the mechanism that the UK Constitution provides for ensuring the longevity of policy. Foreign investors are as free to avail themselves of it as British citizens.

In addition, there are other protections available to investors. It is possible to take out insurance against a change in public policy. An investor who is concerned about adverse political conditions is free to protect themselves in the same way as if they were concerned about adverse weather conditions. Alternatively it would not be beyond the logic of market principles to account for any political risk in the prices charged. The advantage of the free market is that it allows an investor to include the price of risk and discount accordingly. A domestic investor must do this in relation to public policy so it is not unreasonable to hold a foreign investor to the same standard.

Investors would only be disadvantaged by the lack of a stabilisation clause in the sense that they will no longer be able to claim an advantage over others. In other words, they will be treated the same as everyone else. This is not an unreasonable position to adopt.

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A common justification for the inclusion of a stabilisation clause in TTIP and CETA is that the UK is not the only party to these treaties. The EU includes states that do not have legal systems that are as established or democracies that are as secure as is the case in the UK. But to justify an action that will have a significant impact on the fundamentals of British democracy because other states are less democratic is contrary to logic. In the first instance, to derogate rather than demand the complete removal of the clause, would mean that the protections would apply where investors are uncertain of the legal structures (in other states) but the UK Constitution would remain protected. Even if this option wasn't available, to suggest that the UK should make itself less democratic because investors are concerned that other states are not democratic enough requires a peculiar toleration for contradiction.

This is not to say that the simple act of derogation from the stabilisation clause would solve every problem with TTIP and CETA. While the investment protection provisions in TTIP and CETA are in force, international investors will have a more direct influence on the government of the UK than British citizens. To create a separate legal system for foreign investors is a problematic act in terms of both perception and practice. It creates the perception that certain classes of individual are more important in the eyes of the state than others. International investors can rely on TTIP and CETA to protect their interests but trade unions, environmentalists, teachers, healthcare professionals, domestic small businesses and every other sector of society must make do with the existing system (the decisions of which may be overruled if they conflict with the interests of international investors<sup>125</sup>). It is difficult to expect individuals to engage with a democracy in which they are treated as a lower class before the law.

TTIP and CETA would be similarly problematic in practice. While it is true that the ECA 1972 and the HRA 1998 impose similar obligations, both of these statutes prioritise democratic principles. The ECA may require judges to dis-apply provisions of domestic law in favour of conflicting provisions of EU law, but it also gives citizens of the UK a voice in the making of EU law. Without the ECA, British citizens would be bound by EU law if they wanted to trade with, travel to or study in European states but would have no say in the making of that law. Similarly, the HRA seeks to guarantee rights necessary for a functioning democracy. Although the rights contained in the ECHR are rarely called upon by members of the majority in society, the essence of democracy is that majority opinion is able to change. Human Rights are necessary in a democracy even when they conflict with the will of the majority because the minority must enjoy sufficient protections to allow it to, through democratic processes, have the opportunity to change the mind of the majority.

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<sup>125</sup> As happened in *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2

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By contrast, the protections contained in TTIP and CETA run counter to the principle of democracy. They provide that, if one is rich enough to invest internationally, one should have access to a legal system that can overrule the democratically expressed wishes of a national electorate. This is more akin to oligarchy than democracy.

Derogating from the stabilisation clause of TTIP or CETA would satisfy the formal requirements of parliamentary sovereignty but it would do little to advance the ideal of democratic governance.

Derogating from the investment protection provisions in their entirety and requiring international investors to bring their disputes to the administrative courts (in the same way that British citizens must) would be more satisfactory in terms of the spirit of the UK's constitutional law.

### 6. In summary

TTIP and CETA would bind the UK Parliament for a period of at least 20 years. This would represent a significant constitutional change because the doctrine of permanent sovereignty requires that, while Parliament may consent to be bound for a certain period of time, it must be possible for *any* future parliament to terminate that relationship at will. This may represent the natural evolution of the UK Constitution in the age of globalisation. But, in a supposedly democratic state, it is unacceptable that such an evolution should pass without debate. It is essential that lawyers, legislators and investors understand that TTIP and CETA represent more than a mere trade agreement. Neither can they be compared with other temporary surrenders of sovereignty such as the Lisbon Treaty or the ECHR. They represent a substantive challenge to the British constitutional order and one that would make it less democratic. Most crucially it must be understood that this does not have to be the case. TTIP and CETA could exist without a stabilisation clause or without the UK being party to such a clause, or indeed, being party to the investment protection provisions in their entirety. This is not a matter of the inevitable tide of globalisation but a conscious choice to fundamentally compromise the nature of British democracy. It must not be made lightly.

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