

**The Privatisation of Justice:
International Commercial Arbitration and the
Redefinition of the State**

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The Socio-Legal Dynamics of Disputes
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Introduction

Trends in international trade practices and regimes have for a number of years given rise to increasingly serious misgivings among a wide range of governmental and non-governmental actors about the extent to which multinational enterprises (MNEs) are exercising political power, thereby relegating States to the role of a 'circus roof beneath which the action is played out'.¹ Foreign direct investment (FDI) has taken that phenomenon a step further, into the legal sphere, with MNEs drafting, brokering and concluding international investment contracts in the form of 'bilateral investment treaties' (BITs), an agreement between two States which includes reciprocal obligations for each State as regards the other State's investors. BITs, which cover large-scale projects such as petroleum and mineral exploitation, water and sewerage services and dams, often incorporate provisions which supersede existing national laws and international treaty obligations in the areas of human rights, land tenure, sovereignty over natural resources and environmental protection. The growth of this phenomenon has been extremely rapid: by the end of 1996, 1300 bilateral investment treaties had been signed with developing countries, with two-thirds of these concluded in the 1990s.²

Aimed at 'enhancing [national] legal frameworks for foreign investment',³

BITs generally cover four substantive areas, one of which is the settlement

¹ Strange, S. (1996) *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge, Cambridge UP, p.50

² Salacuse, Jeswald W. (2000) 'Direct Foreign Investment and the Law in Developing Countries', *ICSID Review* 15, Note 17

³ Dolzer, Rudolf and Stevens, Margrete, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff, 1995), p. xi

of disputes.⁴ Typically, their dispute settlement provisions call for international commercial arbitration (ICA) under the World Bank's International Centre for Settlement of Investment Disputes (ICSID) or the International Chamber of Commerce (ICC). Yet ICSID, in particular, may be the perfect example of the concern that '*too little* conflict surfaces in our society, that *too few* wrongs are perceived, perused and remedied'.⁵ International commercial arbitration closes the circle of MNE ascendancy: having already trumped the State both politically and legally in a number of areas with important public policy implications, MNEs go on to impose their 'classification system'⁶ on any resultant dispute. That system assigns the State the role of just another commercial partner, ensures that non-commercial issues will not be aired, and excludes representation and redress for populations affected by the wide-ranging powers granted MNEs under international contracts.⁷ An extreme example of the narrowing of disputes, international commercial arbitration sets economic value as 'the standard through which people, products, and other resources are made commensurable'.⁸ It thereby creates a system of private justice which leads to a 'compartmentalisation of the market that the state judicial system is powerless to control'⁹ and ensures that each holder of economic power is 'fortified with its own custom-made justice'.¹⁰

⁴ *ibid.*, p. xii

⁵ Felstiner, William L.F. et al. (1980-81) 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...', *Law & Society Review* 15, p. 632.

⁶ Mather, Lynn and Yngvesson, Barbara (1980-81), *Law & Society Review* 15, p. 788

⁷ This can include derogations from host State law, international treaty obligations, and regional and local permitting and authorisation requirements.

⁸ Mather and Yngvesson, *op. cit.*, p. 784

⁹ Dezalay, Yves and Garth, Bryant (1996), *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago, University of Chicago Press), p. 210

¹⁰ *ibid.*

The wider society, including the agencies of the State, cannot challenge investment contracts under such conditions of normative vagueness, secrecy and fragmentation. Yet despite these deficiencies, a number of authors consider that the case-law arising from such arbitration is well on the way to evolving into a new ‘transnational legal order’¹¹ governing investment, through a twofold process: ‘investment by investment’, as each contract sets out the norms under which it operates; and as customary law, ‘by sheer repetition’.¹² The international investment regime expected to result from that process essentially replicates the OECD’s draft Multilateral Agreement on Investment, which was never adopted because of the enormous opposition to which it gave rise among national (and the European) parliaments, international organisations, non-governmental organisations (NGOs) and civil society groups.

These investment contracts are not the whole picture, of course. There is undoubtedly FDI which is covered by equitable contracts, although confidentiality requirements make it difficult to know what percentage of the total is represented by BITs. It is also true that investors may need to protect themselves against national laws which deprive them of legal certainty or a sufficiently flexible licensing regime, although this may be at times be the result of legitimate public policy requirements.¹³ Nevertheless, the large number of BITs concluded in recent years indicates that the phenomenon is a serious and growing challenge to both public and private international law, which have allowed such contracts to spring up and prosper in an

¹¹ *ibid.*

¹² Weil, Prosper (2000) ‘The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a *Ménage à Trois*’, ICSID Review 15, p. 412

¹³ For example, mining operations in Indonesia were halted when a new forestry law was applied retroactively to an area being devastated by mining operations. (www.jda-harsono.co.id/news/govnews/mar28)

unregulated and little-studied no-man's land between the public and private spheres.

1. The Narrowing of Public Discourse

If Gusfield¹⁴ is correct in stating that law is 'an official language which legitimises the relative power of individuals and groups in society', then BITs represent the codification of a new hierarchy which places private commercial needs above the protection of the public interest, blurring – seriously, and perhaps fatally – the boundaries between public and private interests.

The impetus for such contracts was not entirely unreasonable. MNEs began insisting on protection and stability clauses in investment contracts when they faced unpredictable and economically disastrous nationalisations and expropriations in the 1960s and 1970s. The international community responded to those demands by adopting legal instruments to protect investors. At the same time, MNEs turned to international arbitration, originally the ICC in particular, in order to 'avoid or channel elsewhere potential threats by states to the needs of multinational businesses'.¹⁵

The current form of such contracts, however, threatens the continued existence of major principles such as fairness, equity and legal certainty, and of participatory government: they in effect set up (private) legal regimes parallel to State (public) regimes, while their dispute settlement provisions

¹⁴ (1997), as cited in Mather and Yngvesson, *op. cit.*, p. 821

ensure that the public will be unable to ‘count on the guiding presence of the judge ... to lessen the impact of distributional inequalities’¹⁶ and open up the process to concerned parties. For investment contracts are not judged on the basis of external criteria, as would be the case for a law whose implementation could be monitored and, if necessary, challenged before the courts. Rather, they are judged by the goals and conditions that each individual contract sets for itself; as Fortier succinctly puts it, ‘Commercial arbitration exists for one purpose only: to serve the commercial man.’¹⁷ The ICA process reinforces that self-referential quality by establishing a closed system of private justice which may specifically exclude local remedy.¹⁸

Many in the wider investment community see this as a natural progression within the process of globalisation. Prosper Weil, a former President of the World Bank Administrative Tribunal, claims that the investment contract is, ‘by its very nature ... an international legal act’ with its roots ‘directly in the international legal order’¹⁹ and that the international arbitration system raises the question of compliance with such contracts ‘to the level of a matter under international law’.²⁰ Salacuse goes further, considering that such contracts will lead developing country governments to ask ‘the extent to which [their national] regulation has contributed to corruption’ and to seek to determine how they can convert to the new principle that ‘every economic activity is permitted unless specifically prohibited’.²¹ Former ICSID Secretary-General and World Bank Senior Vice-President Ibrahim Shihata

¹⁵ Delazay and Bryant, *op.cit.*, p. 313.

¹⁶ Fiss, Owen M. (1984) ‘Against Settlement’, Yale Law Journal 93, p. 1077

¹⁷ Fortier, Yves L. (2001?) ‘New Trends in Governing Law: The New, New *Lex Mercatoria*, or, Back to the Future’, *ICSID Review*, p 10

¹⁸ ICSID Convention, Article 26

¹⁹ Weil, p. 406

²⁰ Weil, *op. cit.*, p. 412

sees ‘the law of State contracts’ as an important component in a ‘new international law of foreign investment’.²²

In more practical terms, Garnett *et al.* point out that international commercial arbitration is a means to accommodate multicultural differences within international contracts by providing ‘the greatest deference to party autonomy’.²³ Yet it is not clear that there is any real autonomy for the often desperately poor States involved in these contracts : in drawing up the contract for the Baku pipeline project,²⁴ for example, a major US law firm representing the oil consortium partners is described as having ‘proposed, cajoled [and] coerced’²⁵ country partners Turkey, Georgia and Azerbaijan into accepting certain contract provisions.

Such procedures are hard to reconcile with Article 1 of the Charter of Economic Rights and Duties of States, which provides that:

‘Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.’²⁶

²¹ Salacuse, Jeswald W. (2000) ‘Direct Foreign Investment and the Law in Developing Countries’, *ICSID Review* 15, p. 392

²² Shihata and Parra, as quoted in Weil, p. 413

²³ Garnett, Richard et al., *A Practical Guide to International Commercial Arbitration* (Dobbs Ferry, NY: Oceana Publications)

²⁴ Host Government Agreement between and among the Government of the Republic of Turkey and the State Oil Company of the Azerbaijan Republic, BP Exploration (Caspian Sea Ltd.), Statoil BTC Caspian AS, Ramco Hazar Energy Ltd, Turkiye Petrolleri AO, Unocal BTC Pipeline Ltd, ITOCHU Oil Exploration (Azerbaijan) Inc, and Delta Hess (BTC) Ltd, 19 October 2000

²⁵ Eviatar, Daphne, ‘Wildcat Lawyering’, *The American Lawyer* November 2002

²⁶ Charter of Economic Rights and Duties of States, Article 1, GA Resolution 3281(XXIX), United Nations General Assembly, 1974.

According to Reisman,²⁷ that public international law principle ‘has a direct relation to private international choice of law’. Yet it is precisely the issues set out in Article 1 that can never be raised under a system of private justice where emerging rights discourses and representatives of the public interest have no place. This is particularly striking since in most cases, mega-projects between MNEs and developing countries have at least some component of public financing or credit, through the World Bank, the International Monetary Fund, the European Bank for Reconstruction and Development, the European Investment Bank or national export credit agencies. Thus, the public may pay but it may not play.

2. Confounded Expectations

A central element in the disjunction between international commercial arbitration and State adjudication is the profoundly different ways in which these processes characterise the State party to a contract. Commercial arbitration is ‘a *private* form of “adjudication”’,²⁸ and it considers the State a private party to a contract. In public courts, on the other hand, the State is the ultimate decision-making entity and, as such, is expected (at least *pro forma*, even in the most corrupt countries) to take the public interest into account in formulating and implementing policy. These differing views lead international commercial arbitration and adjudication to posit widely differing roles for States party to a dispute. That discrepancy is exacerbated

²⁷ Reisman, W. Michael (2000) ‘The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of its Threshold’, *ICSID Review* 15, p. 367

²⁸ Palmer, Michael and Roberts, Simon (1998), *Dispute Processes* (London, Butterworths), p. 212.

by issues of procedure, expertise, access to information and financial resources.

The texts for the contracts governing the Chad Oil Exploration Project (TOTCO), the Cameroon Oil Pipeline Project (COTCO), the Western Mining Corporation Financial & Technical Assistance Agreement (WMC) and the Baku pipeline Host Government Agreement with Turkey (Baku) all specify arbitration under ICSID, in accordance with the Convention for the Settlement of Disputes relating to Investments between States and Nationals of Other States (ICSID Convention), or under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC). Under the ICSID Convention (Article 17), 'The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute.... In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.' In practice, this means that the MNE party, whose legal department or counsel will generally have drafted the contract, has 'the responsibility for establishing the substantive standards of conduct the grievance mechanism will apply'²⁹ – including with regard to State parties.

Procedural standards and practices under ICA accentuate those substantive choices. Dezalay and Garth note that clients of large US law firms, for example, are 'able to pick and choose among laws, rules, institutions and places according to the perceived interests of their clients'.³⁰ In addition, international arbitrators form a small, self-elected and self-propagated

²⁹ Abel, Richard (1982), 'The Contradictions of Informal Justice,' in R. Abel (ed), *The Politics of Informal Justice*, Vol. 1 (London: Academic Press), p. 280.

³⁰ Dezalay and Garth, *op. cit.*, p. 7

group. While Dezalay and Garth see this as ensuring excellence (the ‘virtue’ of their title), it is much more likely that such uniformity of background and status, far from conferring neutrality on ICSID proceedings, simply serves to reinforce the status quo.³¹

Language can also be a problem for some States: for example, the language of arbitration for the Baku pipeline project is English, yet that is not the language of any of the three States involved. Interpretation is at their expense, although they are all extremely poor countries.

ICA also embodies procedural biases against affected populations and other interested parties, since it is subject to business confidentiality, which removes arbitral awards from close scrutiny by ‘too many interested parties’.³² It is difficult for outside groups even to monitor how the ICA process functions. While arbitral awards are published, the vagueness and fragmentation of the applicable norms and procedures for arbitration makes any coherent study of the phenomenon difficult. The net result is that the ‘haves’ must almost inevitably come out ahead, because they can ‘mobilise’ the institutions governing arbitral interactions,³³ with minimal oversight.

This is in sharp contrast to investment contract cases which go to State adjudication: under the US Alien Tort Claims Act of 1792 (ACTA), for instance, a California Superior Court has held that oil multinational Unocal may be liable for human rights abuses by the Government of Myanmar in

³¹ Mulcahy, Linda (2001), ‘The Possibilities and Desirability of Mediator Neutrality – Towards an Ethic of Partiality?’, *Social & Legal Studies* 10, p. 523

³² Dezalay and Garth, *op. cit.*, p. 69.

³³ Galanter, Marc (1974), ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’, *Law and Society*, p. 119

relation to a pipeline project, under the doctrine of vicarious liability,³⁴ while the Philippine Supreme Court has handed down an injunction on mining activities by the Australian firm WMC as the result of a petition filed by an NGO.³⁵ Even when such claims are dismissed as inadmissible, as has happened in other ACTA cases in the US, dispute are widened and public discourse engaged as the result of public airing of the claims involved.

Such an airing is crucial. The powers afforded MNEs (as exemplified by the four, representative contracts referred to above) are enormous, both in area and in scope. Contracts apply to all project assets, and the actual extent of those assets is defined as 'comprising every kind of asset of covered investors, including all forms of property and any contractual rights of such investors'.³⁶ In practice, this means that all areas containing present and future project-related infrastructure, such as roads, clinics, airstrips, warehouses, railways, housing, etc., automatically fall under the contract provisions. The scope generally includes derogations from all laws and permitting requirements adopted during the life of the project (always several decades, giving the capital expenditure required) and blanket security guarantees which would in some cases require the State to use or allow the use of paramilitary forces to quell any public opposition to the project.³⁷

To complicate matters further, the State is at times in the position of being both a party in and of itself and being part of a project consortium – that is, it is part of both parties to the contract and therefore to any possible

³⁴ Waldman, Peter, 'Unocal to Stand Trial', Wall Street Journal, 11 June 2002

³⁵ Legal Rights and National Resources Centre, LRC-KsK Supreme Court Mining Petition

³⁶ Shihata, Ibrahim F.I. and Parra, Antonio R. (1999) 'The Experience of the International Centre for Settlement of Investment Disputes', *ICSID Review* 14, p.307.

³⁷ See Forcese, Craig (1999-2000) 'Deterring "Militarised Commerce": The prospect of liability for "privatised" human rights abuses', 31 *Ottawa Law Review*, pp. 171-211

dispute. MNEs encourage this blurring of regulatory space, which is obviously to their advantage. Thus, in the Baku pipeline project, Azerbaijan was on the companies' side of the table during much of the contract negotiation, represented by the oil consortium's US law firm, while Turkey received 'significant help' from a US law firm paid for by the US Government.³⁸ Such ambiguities of course further undermine the State's role in determining public policy.

The Baku pipeline contract goes a step further yet. Its Article 18 provides that its provisions

'shall be valid and enforceable notwithstanding the illegality, invalidity or unenforceability under the [substantive law of England].'³⁹

This expressly excludes any role for the European Court of Human Rights or the European Court of Justice, despite the fact that the UK is a Member State of the European Union and that 'Turkey' has made an application to join the EU and is already a member of the Council of Europe. Indeed, under the Baku contract, any challenge taken outside ICSID automatically triggers compensation by Turkey to the oil consortium.

There is no question, however, that the respective legal responsibilities of MNEs and States could be clarified if the political will to do so existed. The Permanent Court of Arbitration (PCA), for instance, has recently adopted Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, which were developed to 'reflect the public

³⁸ Eviatar, Daphne, *op. cit.*

international law element' which pertains to such disputes because 'in more than half of the instances this year in which the International Bureau of the PCA has provided information to States concerning arbitration, there has been a need for consideration of issues in these fields.'⁴⁰ The Rules provide for the use of a panel of arbitrators with experience and expertise in environment or conservation issues, together with a panel of environmental scientists; their Article 10 allows arbitrators to be challenged 'if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if he/she does not have the qualifications agreed by the parties in their arbitration agreement'. Article 26 of the Rules empowers the arbitral tribunal (subject to certain constraints) to order interim measures necessary to prevent serious harm to the environment. While the Rules are still far from dealing with the central issue of private incursions into public space inherent in the unfettered scope accorded BITs, they are an important step in demonstrating that private investors can be formally required to defer to the need to protect the public interest.

3. Conclusions

International commercial arbitration is not an unnatural response by corporations to the overwhelming and at times arbitrary dominance of host State national law. Nor is there any reason to assume that a return to host State adjudication would necessarily resolve the problems of how to ensure fairness in international contracts, including for host State populations,

³⁹ Host Government Agreement, *op. cit.*, Article 18 : Dispute Resolution and Applicable Law.

⁴⁰ Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, Foreward

which are not always well served by their governments. Nonetheless, it is clear that the current system is unworkable. The settling of disputes which involve serious issues of public interest in a purely commercial, closed forum, under whatever rules the dominant party wishes to set, with no access to justice for affected populations – who are thereby deprived of any possible remedy – is not merely inequitable but also dangerous. Since those without a voice in the arbitration process are nevertheless ‘locked into’ the conflict, with no possibility of exit,⁴¹ the likelihood is that legitimate grievances will translate into civil disturbance or even violence.⁴² Abel puts it in the clearest possible terms: ‘... just as much conflict would be eliminated if those to whom the demands are addressed would accede – cease discriminating, polluting, exploiting, oppressing.’⁴³

International investment contracts which in effect are ‘nothing less than the new rules that will govern [a] country’s future’⁴⁴ are particularly pernicious in that they allow MNEs to assume the tasks of the State without any of its responsibilities. They fly in the face of a 1929 finding by the Permanent Court of International Justice that ‘a sovereign State ... cannot be presumed to have made ... the validity of its obligations ... subject to any law other than its own’.⁴⁵ Moreover, these contracts codify a hostility to norms ‘consistent with an ideology that elevates the market over political and individual choice over collective decision-making’⁴⁶ and paradoxically, in so

⁴¹ Abel, Richard, *op. cit.*, p. 291

⁴² In Bolivia, for example, a project run by Bechtel which raised water prices for the poor by over 35% led to riots and deaths. Bechtel, which pulled out of the project as a result, is nevertheless seeking \$25 million in compensation from the Bolivian Government under ICSID arbitration (despite the fact that its annual revenues are almost double Bolivia's Gross Domestic Product). (www.citizen.org/cmep/Water/new/articles)

⁴³ Abel, Richard, *op. cit.*, p. 285

⁴⁴ Eviatar, Daphne, *op. cit.*

⁴⁵ *Serbian Loans*, 1929 PCIJ No. 21/21.

⁴⁶ Abel, Richard *op. cit.*, p. 290

doing, establish a customary basis for that hostility itself to become a new norm – 're-regulation' through and consisting of deregulation.

Aubert⁴⁷ assumes a relationship between 'the task of conflict resolution and the structure of law', with the judge providing 'a contribution, not to an individual, but to a dyadic system in conflict'. Under international commercial arbitration, however, that dyadic system is transformed into a simple commercial dispute between two undertakings, one of which happens in reality to be a State. By narrowing disputes in such a way that entire countries are transformed into the equivalent of a private company, ICA reformulates public discourse as between private parties, thereby removing from discussion major public interest issues affected by contracts while at the same time making it impossible for concerned groups, or even legal professionals, to find a 'handle'⁴⁸ to approach the problem of such contracts and to put their arguments forward.⁴⁹

This also leads to serious dissonance between substance and procedure, including by reclassifying what are essentially concession contracts as international treaties without at the same time opening them up to the public consultation a treaty would undergo, at either the negotiating or adjudication stage. This is a highly dubious procedure, particularly since, as Garnet notes, 'certain types of disputes are determined by some countries to be inappropriate for resolution by arbitration [including] labour rights,

⁴⁷ Aubert, Vilhelm, 'Courts and Conflict Resolution', *Conflict Resolution* XI:1, pp. 83,84

⁴⁸ Berger (1980), as cited in Mather and Yngvesson, *op.cit.*, p. 809

⁴⁹ Thus, extensive consultations with legal specialists in the contract field carried out by an NGO coalition trying to challenge the Baku pipeline contract have thus far failed to find a 'handle', despite the contract's blatant violations of human rights law and conditions of access to justice for both the host countries and their citizens.

consumer rights ... and property rights'.⁵⁰ The pervasive use of ICA to resolve disputes involving wide-ranging changes in national law and international obligations has a corrosive effect on legal certainty and the legitimate expectations of the populations who live under such contracts, which they have had no role in negotiating. This is a clear example of Garnet's warning that 'forcing courts to stand by and accept the outcome of all arbitrations, would mean that individuals could bypass principles that are thought to be fundamental to any just outcome.'⁵¹

Do the dispute resolution provisions of investment contracts thus transform disputes to an extent that, in Dalton's words 'require[s] public intrusion on private volition'?⁵² Public volition can only be determined when people's needs and concerns can be articulated in a public forum. Courts, as Fiss notes, provide such a forum, while commercial arbitration does not. This is particularly worrisome since 'often ... judgment is not the end of a lawsuit but only the beginning', changing the terms of a continuing struggle and its balance of power.⁵³ The debate over how much power MNEs should be allowed to wield is just such a continuing struggle: the use of commercial arbitration closes the door to that struggle to the public, while behind that door case-law is accumulating which will serve to establish an international investment regime which requires no external legitimation, which reduces every issue to a commercial transaction and every participant to a commercial entity and under which exclusion of the public interest is a

⁵⁰ Garnet, *op. cit.*, p.6

⁵¹ Garnet, *ibid.*

⁵² Dalton, Clare (1985) 'An Essay in the Deconstruction of Contract Doctrine', 94 *Yale Law Journal*, p. 1019

⁵³ Fiss, Owen, *op. cit.*, p. 1082

norm,⁵⁴ although, as Franck warns, the ‘channeling of authority to the private sector may have important implications for distributive justice’.⁵⁵

According to Salacuse, ‘An effective rule of law means that actions by the governmental authorities are in accordance with rules known to all.’⁵⁶ He understands this to mean that the ‘absence or weakness of the rule of law’ is a major obstacle to investment.⁵⁷ Yet bilateral investment treaties serve precisely to undermine the possibility of strengthening of the law at any level, while the privatisation of the review process through the mechanism of commercial arbitration allows MNE parties to ‘bypass principles that are thought to be fundamental to any just outcome’,⁵⁸ thereby turning international contracts into ‘an autonomous legal system, subject only to its own operational constraints, but still the legal system defining legality for society’.⁵⁹

International commercial arbitration has achieved its current degree of autonomous power at the State’s sufferance.⁶⁰ Yet it would not be enormously difficult in practical terms for the State to reassert its role as final arbitrator, either nationally or through multilateral bodies: the tools lie ready to hand. The top 30 MNE home countries account for around 99% of

⁵⁴ Abel’s ‘tendency to reformalisation’ in action : Abel, Richard (1982), ‘The Contradictions of Informal Justice,’ in R. Abel (ed), *The Politics of Informal Justice*, Vol. 1 (London: Academic Press), p. 268

⁵⁵ Franck, T.M. (1995) *Fairness in International Law and Institutions* (Oxford: Clarendon), p. 356.

⁵⁶ Salacuse, *op. cit.*, p. 388

⁵⁷ *ibid.*, p. 398

⁵⁸ Garnett, R. *et al.*, *A Practical Guide to International Commercial Arbitration* (Dobbs Ferry, NY : Oceana), p. 6

⁵⁹ Sinclair (1992) *Legal Studies Forum* 16, 81, as quoted in *Lloyd’s Jurisprudence* (1994), ed. Freeman (London : Sweet & Maxwell), p. 550

⁶⁰ Abel, Richard, *op. cit.*, p. 275

foreign direct investment.⁶¹ This means, in essence, that the countries responsible for these contracts are the members of the OECD, which has long since developed a set of *Guidelines for Multinational Enterprises*; one requirement of the *Guidelines* is precisely that companies are to respect the national laws and international commitments of the countries in which they work.⁶² At present, the Guidelines are not binding, but adopting them as a binding OECD Decision is merely a matter of political will. The same is true of the World Bank. The Bank is the parent agency for ICSID (and its President is *ex officio* Chairman of ICSID's Administrative Council), and it could therefore easily propose amendments to the ICSID Convention which would either allow public policy interests to be heard or specify that disputes involving contracts with major public policy implications would have to be heard by State courts or – if they are in fact bilateral treaties – by the International Court of Justice. At a less direct but nonetheless highly influential level, national export credit agencies and the Multilateral Investment Guarantee Agency (MIGA) could alter their financing and insurance mechanisms, which favour commercial arbitration over State adjudication.⁶³

MNEs have effectively employed bilateral investment treaties and commercial arbitration to cripple the ability of developing States to improve their compliance with international human rights and environment norms, stabilise their land tenure regimes in order to regularise domestic capital

⁶¹ UNCTAD (2001), *World Investment Report 2001: Promoting Linkages* (Geneva: United Nations)

⁶² *Guidelines for Multinational Enterprises*, Section I, paragraph 7

⁶³ Freshfields Bruckhaus Deringer, *Dispute resolution in the Caspian region: What foreign investors and governments need to know*, London, June 2002

formation,⁶⁴ determine the best use of their natural resources and set basic public policy, and have used their contract rights to deprive already poor populations throughout the developing world of their customary rights to land, environmental protection, safety from private security forces within their own villages and access to justice. Given the enormous disparities in assets and power between the parties to those contracts and the important disadvantages developing countries face in the case of dispute, international investment contracts represent bargaining ‘as much in the shadow of power as in the shadow of the law’.⁶⁵ The result is not, therefore, the neutral procedure praised by the supporters of commercial arbitration, but rather a privatisation of justice, for the benefit of the few who can afford to pay for it. Clearly, public intrusion is indeed required, and urgently, in order to ‘confront the betrayal of our deepest ideals’.⁶⁶

⁶⁴ De Soto, Hernando (2001) *The Mystery of Capital : Why capitalism triumphs in the West and fails everywhere else* (London : Black Swan)

⁶⁵ Dezalay and Garth, *op. cit.*, p.204

⁶⁶ Fiss, Owen, *op. cit.*, p. 1087

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