Arbitration on Trial:

A Verdict on the Use of Arbitration in Investor-State Dispute Settlement

Dissertation Submitted for the Master of Studies Degree in

International Human Rights Law

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By

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Abstract

The use of arbitration in investor-state dispute settlement (ISDS) enables foreign investors to sue host states for alleged breaches of international investment law. But the practise has grown increasingly controversial over the past decade, with respondent states refusing to pay damages, or withdrawing from the system entirely.

ISDS is founded on the principles of commercial arbitration that uphold contract law. When used to resolve disputes between foreign companies it is an exercise in private international law. Arbitration in ISDS, however, operates at the level of public international law, because foreign investors enjoy protection standards under treaties signed between their home state and the host state.

ISDS thus operates as a form of judicial review, adjudicating on the lawfulness of actions taken by the host State's Government, Parliament, or Court that may have violated the property rights of the investor. Its decisions can cost host states billions of dollars of taxpayer's money, and directly impact on rights of citizens protected under International Human Rights Law (IHRL). Yet IHRL is construed as playing little to no role in ISDS arbitration.

Thus, the question this paper seeks to answer is whether the continued use of arbitration in ISDS is justified, or not. To do that, ISDS will be put on 'trial', charged with being incompatible with public law and the obligations of international law as codified in IHRL. Chapter One presents the case *for* arbitration in ISDS, Chapter Two the case *against*, and Chapter 3 reaches a verdict. ISDS is at the frontline of adjudicating globalisation, of striking a balance between profit and people, business and human rights. If it is not justified in law, it can hardly be justified in policy.

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Introduction

Investor-state dispute settlement (ISDS) is an agreement whereby a host state consents to settle disputes with a foreign investor - usually alleged expropriation of the investor's property arising from the state's regulation - through binding arbitration, and to pay the investor compensation if found in breach of standards.

ISDS is founded on the principles of commercial arbitration, a private dispute resolution mechanism popularised by merchants in the Middle Ages to oust the jurisdiction of the Crown,[1] but which today is 'totally dependent on the courts'[2] of states exercising their public powers to enforce its orders. Arbitration upholds contract law in a process often described as 'quasi-judicial',[3] yet major arbitration jurisdictions, like England and Wales (which is the focus of this paper), encourage arbitral tribunals to establish on an *ad hoc* basis, adopting 'procedures suitable to the circumstances of the particular case'.[4] Exercising their power of autonomy, parties to arbitration may choose the substantive law applicable to their dispute,[5] either for expediency, or to avoid perceived unfairness in the operation of either side's national legislation. Confidentiality is crucial,[6] and so ISDS rulings are only made public by consent of the parties,[7] decisions that are known carry no precedent (allowing like for

[1] Derek Roebuck, *A Short History of Arbitration* quoted in David W Rivkin, 'The Impact of International Arbitration on the Rule of Law' (2013) 29(3) *Arbitration International* 327, 330.
[2] Lord Neuberger, 'Arbitration and the Rule of Law', Speech to Chartered Institute of Arbitrators Centenary Celebration, Hong Kong (20 March 2015) 17.
[3] ibid 43; Hong-Lin Yu and Laurence Shore, 'Independence, Impartiality, and Immunity of Arbitrators – US and English legal perspectives' (2003) (52) *International and Comparative Law Quarterly* 951.
[4] Arbitration Act 1997 s 33(1)(b).
[5] London Court of International Arbitration (LCIA), 'Arbitration Rules 2014' [16.4].
[6] Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration': '87% of respondents believe that confidentiality in international commercial arbitration is of importance.'
[7] LCIA (n 5) 30.3.

like cases to be decided differently[8]), facts[9] and points of law[10] can be rightfully misconstrued, and there is almost no right of appeal on any grounds.[11] Yet, arbitration is heralded as 'helping to ensure the rule of law',[12] even as having established its own 'arbitral legal order'.[13] Arbitrators can judge a case while being employed as counsel by the same investor in a parallel case (a practise known as 'double-hatting'[14]) and though they are paid by the parties, they are not 'employed' for the purposes of non-discrimination legislation[15] nor, despite proffering professional services, do they owe the parties a duty of care, as doctors and lawyers do, enjoying the same absolute immunity as judges,[16] yet without the same publically conferred powers.

When used to resolve disputes between two businesses from different countries, commercial arbitration is an exercise in private international law. When used in ISDS it operates at the level of public international law because foreign investors enjoy protections under the Bilateral Investment Treaty (BIT) or Free Trade Agreement (FTA) their home state has signed with the host state. This grants the investor standing, unique in international law, to directly sue the host state for alleged breaches of treaty, without having to use local courts, and without the possibility of being sued themselves. Such empowerment of investors has been described as a 'paradigm

[8] Dame Elizabeth Gloster, 'Symbiosis or Sadomasochism? The relationship between courts and arbitration' (2018) 34 *Arbitration International* 321, 339.
[9] *UMS Holding Ltd and others v Great Station Properties SA and another* [2017] EWHC 2398 (Comm) [28]: 'By choosing to resolve disputes by arbitration the parties clothe the tribunal with jurisdiction to make a "wrong" finding of fact.'
[10] Gloster (n8) 332: 'England is quite possibly the only major arbitral jurisdiction in the world that allows appeals on a point of law.'
[11] Arbitration Act 1997 s 69; ibid 334: 'Courts will only interfere in extreme cases.'
[12] Neuberger (n 2) 43.
[13] Emmanuel Gaillard, 'The Present – Commercial Arbitration as a Transnational System of Justice', in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years* (Kluwer Law International 2012) 66.
[14] Malcolm Langford, Daniel Behn, Runar Lie, 'The Ethics and Empirics of Double Hatting' (2017) 6(7) ESIL Reflection.
[15] *Jivraj v Hashwani* [2011] UKSC 40.
[16] Asif Salahuddin, 'Should arbitrators be immune from liability?' (2017) 33 *Arbitration International* 571.

shift'. [17] International Human Rights Law (IHRL), which focuses on the empowerment of individual rights holders, grants no such procedural rights of direct action.[18]

Every branch of the state may be subject to ISDS arbitration's scrutiny,[19] from the judgement of its Supreme Court,[20] the laws of its Parliament and Constitution,[21] to the emergency measures of its Executive.[22] ISDS judges 'a virtually unlimited range of actions', whether that be tax policy or the licensing of medication. [23] A state attempting to lower spiralling utility costs at the height of its financial crisis may have no defence of necessity if those regulations impact the required 'stable and predictable' business environment for foreign investors.[24]

Meanwhile, those impacted by the issue under arbitration - such as Bolivian citizens caught up in the Cochabamba 'water war' triggered when a subsidiary of US engineering giant Bechtel hiked water prices by 35 per cent[25] - have no right to be heard by the ISDS arbitration,[26] and their human rights under IHRL may likewise be

[17] Pierre-Marie Dupuy, Francesco Francioni, Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 4.
[18] UN and regional treaty monitoring bodies can hear individual complaints against a state, but only after local remedies have been exhausted.
[19] Toby Landau, Interview with London School of Economics, Investment and Human Rights Project (28 March 2014): ' [I]nvestor-state arbitration requires a tribunal to scrutinise all aspects of sovereign discretion' <https://perma.cc/N2FC-4NML>
[20] *White Industries v Republic of India*, Final Award, UNCITRAL (30 November 2011).
[21] *Siemens v Argentina*, ICSID Case No. ARB/02/8, Award, (17 January 2007) [74].
[22] *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005) [65].
[23] Lise Johnson, Lisa Sachs, Jeffrey Sachs, 'Investor-State Dispute Settlement, Public Interest and US Domestic Law' CCSI Policy Paper (May 2015) 2.
[24] *CMS* (n 22) [217].
[25] *Aguas del Tunari v Bolivia*, ICSID Case No. ARB/02/3, in Pierre Thielborger, 'The Human Right to Water Versus Investor Rights' in Petersmann (n 18) 499.
[26] ibid 507.

ignored.[27] ISDS is thus 'a powerful […] instance of state liability in public law',[28] as well as a form of domestic judicial review.[29]

It is also a booming business. From its early cases in the 1990s,[30] the industry has grown from a few dozen disputes at the turn of the millennium, to 390 cases by 2012,[31] and up to nearly 1,000 today.[32] ISDS is thus the principal adjudicator for global foreign direct investment (FDI), which grew from less than $50 billion in 1990 to a peak of nearly $2 trillion in 2007,[33] settling at some $1 trillion every year since.[34] The awards to investors against states can be massive: in 2012, Ecuador was ordered to pay the American oil company Occidental Petroleum $2.3 billion,[35] while, by the end of 2006, Argentina faced more than 40 ISDS claims against it, amounting to an estimated $17 billion, nearly the state's entire annual budget.[36]

The rewards for the small number of arbitrators who adjudicate such disputes (an NGO found just over half of all known ISDS cases have been decided by 15 arbitrators[37]) are equally lucrative: for an institutional ISDS at the World Bank's International Centre for Settlements of Investment Disputes (ICSID) arbitrators are

[27] *Biloune v Ghana*, UNCITRAL, Award (27 October 1989).
[28] Gus Van Harten, 'Perceived Bias in Investment Treaty Arbitration' in Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, Claire Balchin (eds), *The Backlash Against Investment Arbitration* (Kluwer Law International 2010) 433, 436.
[29] ibid 434.
[30] *Asian Agricultural Products v Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 June 1990).
[31] Rivkin (n 1) 342.
[32] UN Conference on Trade and Development (UNCTAD) <https://perma.cc/TU52-M2L>
[33] UNCTAD, 'World Investment Report 2007'.
[34] Bingham Centre for the Rule of Law, 'Risk and Return: Foreign Direct Investment and the Rule of Law' (6 March 2015) 5.
[35] *Occidental Petroleum Corporation v Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012) [824].
[36] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 2.
[37] Transnational Institute, 'Profiting from Injustice' (27 November 2012) 2: 'Just 15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investment-treaty disputes.'

paid some $3,000 per day,[38] while in ad hoc ISDS arbitrations, the panel may set their own fees, without oversight.[39]

There is growing evidence, however, that the heyday of ISDS may be coming to an end, as host states hit by punitive awards withdraw from the system,[40] and academics describe a 'backlash'[41] against the practise, and question its future.[42]

This paper seeks to contribute to the debate by adopting what is a novel, yet hopefully effective, approach: the use of arbitration in ISDS will be put on 'trial'. The charge against ISDS arbitration is that, although founded on private law and authorised by treaty, it is incompatible with public law and the wider obligations of international law as codified in IHRL. Its use to resolve disputes involving huge sums of public money, and engaging state sovereignty and citizens' rights, may thus be a form of injustice, understood in both the substantive sense of the rule of law as 'justice', elaborated by legal scholars from Aristotle[43] through Rawls[44] to Bingham[45], as well as the procedural sense of the rule of law as 'integrity', elaborated by Hart[46] and Dworkin.[47]

Much ink has been spilled on the subject of arbitration, but by drawing together the leading academia, ISDS and court cases, lectures from arbitrators, and the treaties and

[38] Surya Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart 2016) 260.
[39] Toby Landau, 'The Day Before Tomorrow: Future Developments in International Arbitration', Clayton Utz International Arbitration Lecture 2009: '[T]here is no policing of arbitral fees'.
[40] See Chapter 3.
[41] Waibel (n 28).
[42] Subedi (n 38) 21.
[43] Aristotle, *Nicomachean Ethics* (Pearson 1999).
[44] John Rawls, *A Theory of Justice* (HUP 1999).
[45] Tom Bingham, *The Rule of Law* (Penguin 2011).
[46] HLA Hart, *The Concept of Law* (Clarendon 1961).
[47] Ronald Dworkin, *Law's Empire* (HUP 1998).

statutes that govern arbitration and IHRL, this paper will attempt to resolve whether the continued use of arbitration in ISDS is justified, or not.

Chapter One presents the case *for* arbitration in ISDS, arguing arbitration's long history and roots in the contract law practise of holding parties to their freely made promises establishes it as an essential foundation for the rule of law, and thus justifies its *lex lata* as an emerging 'autonomous' branch of international law.[48] Chapter Two argues *against* ISDS, finding the *lex lata* of general international law does not support the marginalisation of IHRL that is the current practise in ISDS. Furthermore, ISDS tribunals do not meet universally recognised rights to a fair trial, and by upholding ISDS awards England's domestic courts may thus arguably act incompatibly with their obligations under the European Convention on Human Rights (ECHR). Chapter Three examines whether controversial ISDS cases may amount to the legal test of 'substantive unfairness', before surveying a range of verdicts on the justification for ISDS from practitioners, states and scholars. Finally, the paper delivers its own verdict, building on the arguments of previous chapters to judge ISDS against the very principles of private and public law upon which it adjudicates.

The paper focuses on questions of law, but proceeds also on the basis that 'the task of legal reasoning is to establish the systemic relationships between law and policy.'[49] The policy context could hardly be more significant. Populist leaders hostile to human rights have swept to power, riding a wave of public anger against the perceived

[48] Julian DM Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 *Arbitration International* 195.
[49] Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate* (Routledge 2018) 3.

injustices of globalisation, [50] which appear unconscionable. [51] Transnational corporations (TNCs) with economies larger than the states they invest in[52] refuse to adhere to the rules citizens must,[53] and are too often involved, to varying degrees of culpability, in egregious violations of human rights around the world.[54]

Yet international law imposes no direct civil or criminal liability on TNCs to respect human rights, nor liability on states to prosecute their TNCs for human rights violations committed abroad.[55] These 'governance gaps' as Ruggie put it, 'provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.' [56] ISDS arbitration is at the frontline of adjudicating globalisation, of striking the right balance between profit and people, business and human rights. In the current global context, if ISDS is not justified in law, it can hardly be justified in policy.

[50] Larry Elliot, 'Is free market capitalism fully compatible with democracy? The UK electorate said no' *Guardian* (14 February 2019).
[51] Oxfam, 'Just 8 men own same wealth as half world' (16 January 2017).
[52] Michael H Posner, US Assistant Secretary of State for Democracy, Human Rights, and Labor, remarks to RFK Compass (26 June 2012): 'Fully half of the 100 biggest economies in the world are not states, but private companies.'
[53] Andrew Davies, 'Why Amazon paid no 2018 US Federal income tax' *CNBC* (3 April 2019) <https://perma.cc/J9XD-MVKN>
[54] Mouyal (n 49) 132-134; Simon Baughen, *Human Rights and Corporate Wrongs* (Edward Elgar 2015).
[55] Andrew Sanger, 'Case and Comment *Jesner v Arab Bank* plc 584 US (2018)'; (2018) 77(3) *Cambridge Law Journal* 441, 444: 'International law does not impose civil liability on either natural or juridicial persons […] while it is true corporations cannot be defendants before international criminal tribunals […] fundamental corporate rights are protected but corporate liability for human rights abuses remains elusive.'
[56] John Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' A/HRC/8/50 (7 April 2008)

Chapter 1: The Case For Arbitration

Advocates for arbitration as it is, the *lex lata* that justifies its use in ISDS, argue on four main grounds: arbitration's long history; its essential private law character; its recognition as a self-contained branch of international law; and the minimal way in which IHRL applies to it.

History's First Law

Arbitration is as old as the hills, existing since records began. In 2100BC the King of Uruk ordered one city to return territory seized by force from another in the seminal state-to-state arbitration *Ur* v. *Lagash.*[57] A millennium and a half later, the Ancient Greeks had an established system of commercial arbitration, distinct from the government-run court system.[58] Homer's *Iliad* tells of two parties to a blood feud submitting their dispute to a man 'versed in law' of their mutual choice.[59] And although arbitrators were in principle expected to follow the law of Ancient Greece, they were not required to do so, the parties being permitted to choose the applicable law, while the award could not be appealed.[60]

'Let the arbitrator's decision be final!' wrote Demosthenes, a Greek statesman of the 4th century BC,[61] words reflected millennia later in Paulsson's 'Idea of Arbitration' as the 'binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers.'[62]

[57] Gary B Born, *International Arbitration Law and Practise* (Kluwer Law International 2012) 1.
[58] Roebuck in Rivkin (n 1) 329.
[59] NGL Hammond, 'Arbitration in Ancient Greece' (1985) 1(2) *Arbitration International* 188.
[60] Roebuck in Rivkin (n 1) 329.
[61] ibid 330.
[62] Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 1.

Arbitration's inherent autonomy from the courts was reflected in the self-policing system of England's trade guilds during the Middle Ages: if a member failed to comply with an arbitrator's award, he would be excluded from the guild and therefore left without the means to continue his trade.[63] Arbitration was always also international. As early as 1419, the Ordinance of King Edward I recognised the need to secure the rights of aliens, willing 'that no foreign merchant shall be delayed by a long series of pleadings' but rather afforded 'speedy redress' from his Wardens and Sheriffs.[64] Arbitration was present at the birth of the international political system, an option to arbitrate over the 'controversy touching Lorain' forming Article V of the 1648 Treaty of Westphalia,[65] and by the century's end arbitration was codified in statute for the first time by the English parliament's 1698 Arbitration Act, drafted by one of the Enlightenment's most influential thinkers, John Locke.[66]

At the dawn of the 20th century, with Great Power rivalry threatening Europe and having observed the success of arbitration in the wake of the US War of Independence[67] and Civil War,[68] the Hague Peace Conference of 1899 established the Permanent Court of Arbitration in the hope of 'extending the empire of law and of strengthening the appreciation of international justice'.[69] Fifty years before the creation of the United Nations (UN) and the edifice of international law that followed, arbitration was the centre of the international community's efforts at peace-making

[63] Rivkin (n 1) 331.
[64] Earl S Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 83 UPaLRev 132, 136.
[65] 'Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies', Art V.
[66] Horwitz H, Oldham J, 'John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century' (1993) 36(1) The Historical Journal 137.
[67] In 1794, after the Revolutionary War, the Jay Treaty between US and UK created three arbitration commissions to settle disputes.
[68] In 1872, the Alabama Claims Arbitration Panel found the UK had violated international law (duty of neutrality) when it permitted British companies to build Confederate ships.
[69] Hague Convention 1899, Preamble.

through an 'empire of law'. Arbitration, then, has stood the test of time, the *a priori* legal system, as argued by Rivkin:

> For literally millennia, international arbitration has contributed to the growth of the rule of law […] holding private parties to their agreements and imposing the requirements of law on them.[70]

A Private Life

If arbitration is a driver of the rule of law, it achieves this not through upholding public law, but rather the opposite: via the near total exclusion of the courts and public interest in deference to freedom of contract. This 'idol', to which judges in England once 'knelt down and worshipped',[71] is a legally binding agreement the common law has recognised for centuries, based on the need for courts to give effect to the intention of parties, and honour freely negotiated obligations. Party autonomy and consent is thus the 'leitmotif'[72] for arbitration, and an agreement to arbitrate is taken as a freely negotiated contract to exclude the court from the dispute, as far as that is possible. It was not always as possible as it is today.

In the early 17th century, inspired, some scholars argue, by 'judicial jealousy',[73] the English courts sought greater control over arbitration, exemplified in Lord Coke's decision in *Vynior's Case*[74] that courts could not uphold the irrevocability of arbitration agreements, as that ousts their own jurisdiction.[75] Locke's 1698 Arbitration Act effectively over-ruled *Vynior's Case* by establishing that 'out-of-court agreements

[70] Rivkin (n 1) 328, 329.
[71] *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1982] EWCA Civ 5 (Denning LJ).
[72] Jonathan Mance, 'Arbitration: a Law unto itself? (2016) 32 *Arbitration International* 223, 224.
[73] Ernest G Lorenzen, 'Commercial Arbitration–International and Interstate Aspects' (1934) 43 Yale LJ.
[74] *Vimar v Wilde (Vynior's Case)* [1609] 77 Eng Rep 595 (KB).
[75] Rivkin (n 1) 332.

to arbitrate […] be made rules of court' i.e. they could not be revoked, and a defaulting party would be subject to 'all the penalties of contemning a Rule of Court'.[76] The struggle between the courts and arbitral tribunals was far from over, however. The Arbitration Act 1889 compelled arbitrators to submit questions of law to the courts, known as the 'stated case procedure'.[77] Parties to arbitrations soon attempted to contract out of this obligation, resulting in Atkin LJ's famous repost to autonomous arbitration: 'There must be no Alsatia in England where the King's writ does not run.'[78]

By the 1970s, however, the stated case procedure had become its own Alsatia, increasingly 'abused' by 'respondents with weak cases' as a means of 'delaying the speedy resolution of commercial disputes'. [79] London was losing money as international investors chose less meddlesome jurisdictions to seat their arbitration,[80] and so parliament took the 'business decision'[81] in the Arbitration Act 1979 to abolish all forms of case stated procedure, and remove the courts' jurisdiction to set aside an award on grounds of error of fact or law.[82] As Conrik notes:

> The radical aspect of the 1979 legislation was its abandonment of the notion that the courts should promote a uniformly applicable system of commercial law in all contracts subject to English arbitration.[83]

[76] Horwitz (n 66) 143.
[77] Arbitration Act 1889, s 19.
[78] *Czarnikow v Roth Schmidt & Co* [1922] 2 KB 478; Alsatia was an area north of London's River Thames once proofed against all but a writ of the Lord Chief Justice.
[79] *Granvias Oceanicas Armadora S.A.* v *Jibsen Trading Co. (The Kavo Peiratis*) [1977] 2 Lloyd's Report 344 [349] (Kerr J).
[80] BJ Conrick, '"Where the Kings Writ Does Not Run" The Origins and Effect of the Arbitration Act 1979' (1985) 1(1) QIT Law Journal 43, 45.
[81] ibid 9.
[82] Arbitration Act 1979, s 21.
[83] Conrik (n 80) 19.

Arbitration was effectively uncoupled from the common law, the courts now barred, except in the rarest of cases, from intervening in its private function, restrictions that were carried over into the Arbitration Act 1996.[84] 'The courts strive to uphold arbitration awards,' said Bingham J, as he then was. 'They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults.'[85]

Today, English courts appear to rule that arbitration is indeed a place where, to a wide degree, the 'King's writ does not run': Court will refuse to order disclosure where that represents, 'an interference by the court in the arbitration process',[86] nor interfere in a situation if an emergency arbitrator can be appointed instead.[87] Where allegations are made of a 'wholesale failure' of an arbitral tribunal to consider 'large chunks of crucial evidence on central points of the case' the Court found no cause to challenge the award on grounds of 'serious irregularity'[88] under s 68 of the 1996 Act, despite s 68(d) offering protection against 'failure by the tribunal to deal with all the issues that were put to it':[89]

> It is clear that the mere fact that the arbitral tribunal has reached the wrong conclusion cannot constitute a serious irregularity within section 68 […] I therefore have difficulty in accepting that the mere fact that the tribunal's reasoning is manifestly illogical or cannot rationally be sustained can amount to a serious irregularity.[90]

[84] Arbitration Act 1996, s 81(2): 'Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award.'
[85] *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14.
[86] *AB International (HK) Holdings v AB Clearing Corp* [2015] EWHC 2196 (Comm) 18.
[87] *Gerald Metals SA v Tims* [2016] EWHC 2327 (Ch).
[88] *UMS Holding Ltd and others v Great Station Properties SA and another* [2017] EWHC 2398 (Comm).
[89] Arbitration Act 1996, s 68(d).
[90] *UMS* (n 88) [38].

After centuries of struggle over its identity, today's UK parliament has empowered arbitration with a degree of autonomy that the courts recognise put even 'manifestly illogical' awards beyond their control. Arbitrators enjoying full immunity, bar 'bad faith',[91] can legally make errors of fact and law, give no reasons for their decisions,[92] and may rule on disputes over jurisdiction.[93] While courts retain the power to refuse an award on grounds of 'public policy'[94] it quite literally took the invasion of another country, Kuwait by Iraq, and the seizure of the spoils of war for the court to exercise such a refusal.[95] As concluded by Brekoulakis and Devaney:

> By the time public entities started to enter into contracts including arbitration clauses in the late twentieth century, the private character of arbitration law was well crystallised.[96]

Arbitration's success at establishing its private-law domestic autonomy is reflected, and amplified, in its extraordinary growth into, arguably, a distinct branch of international law.

Internationally Autonomous

Just as English courts adopt a non-interventionist approach to arbitration, so too are the imperatives of upholding private law reflected internationally.

Attempts in the early 1970s by developing countries to empower their domestic courts to settle disputes with foreign investors under the so-called 'Calvo doctrine' [97]

[91] Arbitration Act 1996, s 74(1).
[92] ibid s 45(1).
[93] ibid s 73(2)(2).
[94] ibid s 81(c).
[95] *Kuwait Airways v Iraqi Airways (No.6)* [2002] UKHL 19.
[96] Stavros Brekoulakis, Margaret Devaney, 'Public-Private Arbitration and the Public Interest under English Law' (2017) 80(1) *Modern Law Review* 30, 37.

culminated in the Charter of Economic Rights and Duties of States, which held that 'No State shall be compelled to grant preferential treatment to foreign investment'.[98] But this was a soft-law instrument, adopted through a resolution of the General Assembly, and swiftly gave way to widespread ratification of the multilateral New York Convention, a treaty by which States Parties agreed to recognise foreign arbitral awards as binding, the only international instrument to succeed in establishing mutual recognition in civil law between foreign courts.[99] The grounds on which a Convention award could be refused by domestic courts were strictly limited to contractual mistakes in the arbitration agreement itself (Article V (1)(a) to (d)), or that the award had already been set aside 'by a competent authority' of the country in which it was made (Article V (1)(e)).[100] Article V (2) further established that subject matter non-arbitral under the law of the seat, and enforcement of the award as being 'contrary to the public policy' of the seat, were grounds for refusal.

In the UK, this 'non-arbitrability doctrine' has largely collapsed,[101] allowing the expansion of arbitration to public-private contracts, while at the international level, a state like Bolivia, under pressure from the World Bank,[102] can sell its water resources to US engineering giant Bechtel,[103] and its actions in doing so were arbitral under the ICSID Convention despite being concurrently illegal under Bolivia's then Constitution.[104] 'Arbitration is really private justice,' acknowledged Jernej Sekolec in

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[97] Subedi (n 38) 30.
[98] UNGA Resolution 3281, 'Charter of Economic Rights and Duties of States', Art 2(2)(a).
[99] There are just three States Parties to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. The 123 States Parties to the Rome Statute agree to accept the jurisdiction of the International Criminal Court in their domestic courts.
[100] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) 'The New York Convention'.
[101] Brekoulakis (n 96) 23.
[102] Petersmann (n 17) 499.
[103] *Aguas* (n 25).
[104] Constitution of Bolivia 1967, Art 24: 'Foreign companies and subjects are subject to Bolivian laws, without in any case invoking exceptional situation or appeal to diplomatic claims.'

2001, then secretary of the UN Commission on International Trade Law (UNCITRAL).[105] Or as the explanatory note to UNCITRAL's Model Arbitration Law (1994) put it:

> Parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular commercial cases, prefer expediency and finality to protracted battles in court.[106]

That preference for expediency is born out in practise. An academic study found 9 out of 10 awards under the New York Convention satisfied without the need for enforcement proceedings. [107] Where enforcement proceedings are brought, the obligation on domestic courts to refuse an award on Article V grounds are discretionary, a 'may' as opposed to a precatory 'shall'.

This discretion was well illustrated in the decision of the US District Court for the District of Columbia to allow enforcement of an arbitral award within the US despite the award being made in Egypt and set aside by the Egyptian courts, thus meeting the Article V (1)(e) test.[108] As the US Supreme Court recognised as early as 1985, with the expansion of international trade, the arbitral tribunal was to 'take a central place in the international legal order.'[109]

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[105] Anthony Depalma, 'Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say' *The New York Times* (11 March 2001) 5.
[106] UNCITRAL, 'Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration', 18 [14].
[107] Queen Mary University of London, School of International Arbitration and PwC Study, 'International Arbitration: Corporate Attitudes and Practices' (2008).
[108] *Matter of Chromalloy Aeroservices (Arab Republic of Egypt*), 939 F Supp 907 DDC (1996).
[109] *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985) 639.

Removed From Rights

Arbitration thus occupies a location in international law where neither courts nor constitutions exercise much jurisdiction. IHRL, too, is manifestly marginal. Both the ICSID, the world's busiest forum for ISDS,[110] and UNCITRAL, the primary instrument for commercial disputes between private parties, allow parties to choose the law applicable to their dispute. In the absence of a choice of law, UNCITRAL empowers the arbitral tribunal to 'apply the law which it determines to be appropriate' while ICSID requires the tribunal to apply the law of the Contracting State party, and 'such rules of international law as may be applicable.'[111]

The tribunal's 'supplementary discretion'[112] on choice of law imposes no obligation to take account of IHRL. Human rights are thus applicable only to the extent to which they are included in the parties' choice of law, or at the tribunal's discretion. The procedural rules for ICSID, UNCITRAL and the London Court of International Arbitration (LCIA) make no mention of IHRL. Major trading nations also make no explicit mention of IHRL in their model BITs.[113]

The inapplicability of IHRL to arbitration is reflected in the domestic jurisdiction. The Human Rights Act 1998, which incorporated the ECHR into UK law, makes it unlawful for a public authority to act in a way incompatible with the ECHR.[114] The

[110] ICSID, 'Annual Report 2017', Foreword: 'Today, ICSID is the acknowledged world leader in investor-State dispute settlement. It has administered more than 70% of all known international investment proceedings.'
[111] UNCITRAL, Art 35(1); ICSID, Art 42(1).
[112] UNCITRAL, 'Model Arbitration Law' Art 35.
[113] Model BITs specifically do not mention human rights: China (2003) France (2006) Germany (2005) and the UK (2005) the US (2004).
[114] HRA 1998, s 6(1).

HRA defines 'public authority' to include a 'court or tribunal',[115] defining tribunal as 'any tribunal in which legal proceedings may be brought'[116] and further defining public authority as 'any person certain of whose functions are functions of a public nature'.[117] While that definition could in *theory* encompass arbitration, in practise it does not. Voluntary arbitral tribunals[118] are not 'public authorities' for the principle domestic legal test of such, the availability of judicial review in the Administrative Court.[119] Nor are they a 'court or tribunal of a member state' for the purposes of Article 177 of the EEC Treaty,[120] nor the recast Brussels I Regulation,[121] while the European Commission of Human Rights ruled over 30 years ago that 'the State cannot be held responsible for the arbitrators' actions unless, and only insofar as, the national courts were required to intervene.'[122] As Schultz summarises: 'An arbitral tribunal is not a state court […] that could engage the state's responsibility or the state's violations of the Convention.'[123]

The *indirect* application of IHRL to arbitration arrives by way of the UK's obligation to uphold the fair trial rights set out in ECHR Article 6(1) being, 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'[124] The European Court of Human Rights (ECtHR) has ruled the indirect duty applies narrowly. In *Deweer v Belgium*, the Court held a voluntary arbitration

[115] ibid s 6(3)(b).
[116] ibid s 21(1).
[117] ibid s 6(3)(c).
[118] Compulsory arbitration engages the direct application of the ECHR: *Lithgow and Others v. United Kingdom* (1986) 8 EHRR 329.
[119] William Robinson, Boris Kasolowsky, 'Will the United Kingdom's Human Rights Act Further Protect Parties to Arbitration Proceedings?' (2002) 18(4) *Arbitration International* 456.
[120] Case 102/81 *Nordsee* [1982] ECR 1095.
[121] Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, Art 1(2)(d).
[122] *R v Switzerland* (1987) 51 DR 83.
[123] Thomas Schultz, 'Human rights: a speed bump for arbitral procedures? (2006) *International Arbitration Law Review* 7.
[124] ECHR, Art 6(1).

agreement is treated as a waiver of Article 6(1) as it amounts to a renunciation of the right to have a dispute dealt with by an ordinary court.[125] That decision was confirmed in *Suovaniemi*, though the Court stressed that for a waiver to be effective there must be 'minimum guarantees commensurate to its importance'.[126] The state thus remains obligated to an irreducible level of procedural safeguards. *Suovaniemi* confirmed, however, that those safeguards do not include a guarantee to parties that individual arbitrators will be impartial:

> '[T]he Court therefore has to decide whether the right to an impartial judge within the meaning of Article 6 could be irreversibly waived […] the applicants' waiver of their right to an impartial judge should be regarded as effective for Convention purposes.' [127]

Section 33 of the Arbitration Act 1996 provides for these irreducible procedural guarantees, requiring the arbitral tribunal 'act fairly and impartially between the parties'. Yet, as per *UMS Holding*, if an arbitration being 'manifestly illogical', does not engage court intervention under section 68, it seems unlikely section 33 would do so on a regular basis.

In international investment law (IIL), BITs offer protection of due process, fair trail, and freedom from discrimination.[128] Likewise, the New York Convention promotes fair hearing guarantees under Article V, as do the UNCITRAL Arbitration Rules, and Model Law, both referring to 'fair and efficient' settlement of disputes. As McDonald argues:

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[125] *Deweer v Belgium* [1980] ECHR 1 [49].
[126] *Osmo Suovaniemi and Others v. Finland*, Decision of 23 February 1999 further to Application No 31737, ECtHR.
[127] ibid.
[128] Mouyal (n 49).

> The sum total of such provisions is sufficient to render Article 6 guarantees essentially irrelevant at the enforcement stage, and thus discussion of their applicability largely academic.[129]

To conclude, then, the *lex lata* of ISDS arbitration is demonstrably a private law system founded on freedom of contract, autonomy from the courts, the non-applicability of IHRL, and with the necessary procedural guarantees built in. As the US Supreme Court ruled in *Jesner*,[130] IHRL imposes no direct liability on corporate activity abroad. Thus it can hardly be the duty of international arbitration to do so. Instead, ISDS arbitration upholds investors' rights in international law not to be arbitrarily deprived of property, [131] and the customary international law that compensation be paid against expropriation.[132] In doing so it satisfies the object and purpose of the New York Convention, which the Hong Kong Court of Final Appeal recognised was to prioritise the 'broad uniformity' of enforcement of arbitral awards over the 'very different outlooks in regard to internal matters' of States Parties.[133]

[129] Neil McDonald, 'More Harm than Good? Human Rights Considerations in International Commercial Arbitration' (2003) 20(6) *Journal of International Arbitration* 523.
[130] *Jesner v Arab Bank*, PLC, 584 US (2018).
[131] UDHR, Art 17; ECHR, Protocol 1 Art 1.
[132] *Case Concerning Certain German Interests in Polish Upper Silesia* (Merits), PCIJ, Series A (1926): 'It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.'
[133] *Hebei Import and Export Corp.* v. *Polytek Engineering Co. Ltd* [1999] 2 HKC 205.

Chapter 2: The Case Against Arbitration

Chapter 1's justification of the *lex lata* of international arbitration, and therefore its application in ISDS, may be challenged on three main grounds.

First, the argument that arbitration is an autonomous branch of international law ignores state obligations established under the *lex lata* of general international law, and the specific responsibilities established by IHRL. Second, the procedural standards operating in ISDS arbitration manifestly do not meet the requirements of the right to a fair trial, a fundamental right in IHRL and principle of the rule of law. Third, in upholding arbitration's waiver to fair trial rights in ISDS, and in enforcing ISDS awards within their jurisdiction with little scrutiny, England's domestic courts may arguably act in a way that is incompatible with their obligations under the ECHR and international law.

Many Branches, One Tree

Article 38 of the International Court of Justice (ICJ) provides 'the authoritative statement' on the material sources of international law,[134] being: international conventions recognised by states; international customary law; the general principles of law; judicial decisions as subsidiary guides to interpretation.[135] The Vienna Convention states treaties must be interpreted not only in light of their 'object and purpose'[136] but also in the context of 'any subsequent agreement between the parties

[134] Christine Chinkin, 'Sources' in Moeckli, Shah, Sivakumaran (eds), *International Human Rights Law* (OUP 2010) 75.
[135] Statute of the International Court of Justice, Art 38(1).
[136] Vienna Convention on the Law of Treaties, Art 31(1).

regarding the interpretation of the treaty', and 'any relevant rules of international law applicable in the relations between the parties'.[137]

General international law is thus the sum of all its constituent parts; one tree made of many branches. Neither the ICJ nor the Vienna Convention authorise a single branch of international law to claim autonomy from the trunk connecting it to all others, including IHRL. ISDS has recognised as much: '[I]nternational law generally applies. It is not just a gap-filling law.'[138] Article 1 of the UN Charter states its purposes include, 'promoting and encouraging respect for human rights and for fundamental freedoms for all',[139] while Article 103 ensures that obligations under the UN Charter prevail over any conflicting obligations under other international agreements.[140]

At the core of the legitimacy, and therefore the general applicability, of international law is the fact that it derives from the consent of the citizens of the state in whose name that state ratifies its treaty agreements.[141] As the Universal Declaration of Human Rights (UDHR) states: 'The will of the people shall be the basis of the authority of government.'[142] The sovereignty of states, then, is an expression of the will of 'we the people',[143] and citizens are not merely the legal subjects of international law, but rather its 'democratic owners'.[144] The right to self-determination is defined in mirror image in both first articles of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) - the treaties that incorporated the

[137] ibid Art 31(3).
[138] *Eastern Sugar v Czech Republic,* UNCITRAL (27 March 2007) 196.
[139] UN Charter, Art 1(3).
[140] ibid Art 103.
[141] Benedict Kingsbury, 'Sovereignty and Inequality' (1998) 9 EJIL 599, 601.
[142] UDHR, Art 21(3).
[143] The Constitution of the United States, Preamble.
[144] Petersmann (n 17) 35.

human rights set out in the UDHR into legally binding IHRL - as the right of all peoples to 'freely determine their political status and freely pursue their economic, social and cultural development.'[145] This right to self determination establishes not only an obligation on states to regulate in order to secure that freedom and development,[146] but, as Subedi argues, may in fact be the very highest form of obligation in international law:

> Both the principles of economic sovereignty and the right of economic self determination of states are serious contenders to qualify as principles of *jus cogens*, which override all other rules, whether treaty-based or otherwise.[147]

The ICJ has long held that the obligation of a state 'towards the international community as a whole' – the obligations under multilateral treaties such as the ICCPR and ICESCR – are obligations '*erga omnes'*, and are of greater importance than the bilateral obligations to another state arising through 'diplomatic protection',[148] which logically includes protection of foreign investors under BITs.

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Almost all states have assumed the legally binding obligations of the ICCPR and ICESCR[149] to resect, protect, and fulfil human rights.[150] The obligation to 'respect' the human rights set out in the ICCPR[151] is the immediate and direct responsibility of

[145] ICCPR, Art 1; ICESCR, Art 1.
[146] UN Office of the High Commissioner for Human Rights (OHCHR), 'Human Rights Trade and Investment' (2 July 2009) 31.
[147] Subedi (n 38) 207.
[148] *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* ICJ (5 February 1970).
[149] ICCPR has 167 States Parties; ICESCR has 169.
[150] OHCHR <https://perma.cc/VMF5-DAWG>
[151] ICCPR, Art 2(1).

states both toward individuals subject to their jurisdiction, and *erga omnes* to all other States Parties,[152] is binding on all branches of government,[153] and may only lawfully be derogated from in circumstances that are 'proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.'[154] The right to a fair trial[155] is a direct, immediate obligation on States Parties to the ICCPR, as is respecting the right to life,[156] being an obligation of outcome.

States also owe the *indirect*, positive obligation in international law to 'protect' human rights by preventing third parties, such as corporations, from violating rights set out in IHRL.[157] Finally, the ICESCR obliges states to 'fulfil' the rights it codifies by taking 'steps' over time, 'including particularly the adoption of legislative measures.'[158]

Although distinctions operate in the nature of states' obligations under IHRL, the rights themselves are, in principle, 'universal, indivisible, and interrelated',[159] or following Donnelly: 'Human rights are thus "universal" rights in the sense that they are held "universally" by all human beings.'[160]

There is thus no assumption in IHRL that property rights take a lower or higher priority compared with other human rights. Indeed, although the right to property is protected under Protocol 1 Article 1 of the ECHR (and is of course protected under

[152] Human Rights Committee, General Comment No 31 (29 March 2004) 2.
[153] ibid Art 4.
[154] ibid Art 6.
[155] ICCPR, Art 14.
[156] ibid Art 6.
[157] HRC (n 152) 8.
[158] ICESCR, Art 2.
[159] World Conference on Human Rights, 'Vienna Declaration' (25 June 1993) Art 5.
[160] Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281, 283.

most state constitutions[161]) neither the ICCPR nor the ICESCR saw fit to codify the UDHR Article 17 right to property[162] into binding treaty law. This raises questions as to whether property is indeed a 'universal' human right, in the way that the widely codified right to life, to non-discrimination, to fair trial, and to self-determination are.

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In addition to general international law and IHRL, states hold obligations under IIL, a branch of International Economic Law (IEL). These obligations, however, are not codified by a single multilateral treaty on IIL, but are rather a 'patchwork' of International Investment Agreements (IIAs), BITs and FTAs,[163] developed from customary international law. Three central customary international law obligations are owed by states to foreign investors under IIL. The first is the guarantee of the 'full protection and security' (FPS) standard, which primarily protects foreigners from physical violence toward their person or property by the host state.[164] The second is the 'fair and equitable treatment' (FET) standard, a standard which, according to 'the most authoritative' book in the field,[165] 2004's *Waste Management* established as breached by action that is 'arbitrary, grossly unfair, unjust […] or involves a lack of due process leading to an outcome which offends judicial propriety.'[166] In 2007

[161] Mouyal (n 49) 105.
[162] UDHR, Art 17.
[163] Surya (n 38) 19.
[164] *Case Concerning United States Diplomatic and Consular Staff in Tehran,* ICJ (24 May 1980).
[165] Matthew Weiniger, Laurence Shore, Campbell McLachlan, *International Investment Arbitration: Substantive Principles* (Oxford International Arbitration Series 2017), 'Series Editor's Preface to the Second Edition'.
[166] *Waste Management v Mexico ('Number 2'*), ICSID Case No ARB(AF)/00/3, Award (30 April 2004) [98].

Micula said the Tribunal would assess the state's FET obligation under three principles: Legitimate expectations; due process; and substantive unfairness.[167]

Mitigating the FPS and FET standards, public international law has for centuries recognised the principle of bona fide, 'good faith', actions by states,[168] while some FTAs, such as NAFTA, recognise bona fide state regulations that are non-compensable.[169] When a state's actions amount to a breach of FPS and FET standards, and there is no bona fide defence, IIL construes that action as 'expropriation' of the foreign investor's property, engaging the state's customary law obligation to pay compensation against the loss.[170]

ISDS arbitrations have developed the 'substantive principles'[171] informing these 'broad' minimum standards,[172] but as Chapter 3 demonstrates, often in a far from coherent manner.

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Proceeding Improperly

The procedural shortcomings inherent to ISDS arise from both the position of the arbitrator herself, and the subsequent operation of the arbitral tribunal itself. Both aspects may be tested against that 'cardinal requirement of the rule of law'[173] that is

[167] *Ioan Micula v Romania*, ICSID Case No. ARB/05/20, Final Award (11 December 2013) [520].
[168] Markus Kotzur, 'Good Faith (Bona fide) *Max Planck Encyclopedia of Public International Law* (OUP January 2009).
[169] NAFTA, Art 1110.
[170] *Silesia* (n 132).
[171] McLachlan (n 165).
[172] Mouyal (n 49) 41.
[173] Bingham (n 45) 90.

the right to a fair trial, a principle rooted in the English law writ of *habeus corpus* which today is recognised as customary international law, included in all major human rights treaties and instruments.[174]

The golden thread running through all definitions of fair trial is the requirement for the court or tribunal, and those who sit in judgement, to be 'independent' and 'impartial'. The established test in English law is not merely absence of actual bias, but whether 'the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'[175]

Lord Hewart's famous maxim, 'Justice should not only be done, but should manifestly and undoubtedly be seen to be done',[176] establishes the high bar - the same 'beyond reasonable doubt' standard used to establish criminal guilt - that is required for courts and judges to be deemed impartial, and thus just.

The UK's Arbitration Act 1996 empowers the court to remove an arbitrator over 'justifiable doubts as to his impartiality',[177] a standard echoed in the LCIA 2014 Rules.[178] The ICSID 2006 Rules do no mention 'impartial' as a standard, only 'independent'.[179]

[174] ICCPR, Art 14; ECHR, Art 6; UDHR, Art 10.
[175] *Magill v Porter* [2001] UKHL 67 [103]
[176] *R v Sussex Justices ex p McCarthy* [1924] 1 KB 256.
[177] Arbitration Act 1996, s 24(1)(a).
[178] LCIA (n 5) [5.5].
[179] ICSID Regulations and Rules (2006), Art 14.

In *Halliburton*, a claim was raised against the impartiality of a London-seated arbitrator after he failed to disclose that he was 'double-hatting'[180] on two overlapping disputes arising from the Deepwater Horizon oil rig explosion. The court held that 'to the fair-minded and informed observer, the circumstance would lead to the conclusion that there was a real possibility of bias' and thus the arbitrator should have disclosed his conflict of interest.[181]

The Arbitration Act test for bias was held as equivalent to the common law test for bias,[182] and it was noted that under common law 'judges should disclose facts or circumstances which would or might provide the basis for a reasonable apprehension of lack of impartiality.'[183]

Yet the decision of the Court was to dismiss the appeal, in part through recognising such 'overlap' was a 'regular feature' of the industry.[184] The Court did not cite *Suovaniemi*, but the outcome is very similar: bias in arbitrators appears held acceptable in a way the common law would surely not accept in judges.

Furthermore, as Harten has convincingly argued, certain structural features of ISDS may amount to 'an apparent bias in favour of claimants against respondent states.'[185] In law, security of tenure has been recognised for centuries as essential to the independence of judges.[186] Ad hoc arbitrators, lacking such security, operate in a

[180] Langford (n 14)
[181] *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817 [70] [71].
[182] *Halliburton* (n 181) [39].
[183] ibid [56].
[184] Ibid [27]
[185] Harten (n 28) 433.
[186] Act of Settlment 1701.

marketplace, giving them a 'financial stake in furthering the system's appeal to claimants',[187] which under ISDS means investors, never states.

In English law, judges are selected by the Judicial Appointments Commission (JAC), a body that advertises itself as 'independent' and selecting candidates 'on merit, through fair and open competition'.[188] Arbitrators, on the other hand, need no qualifications[189] and, in institutional tribunals, are selected by the very organisation they are going to serve. ICSID arbitrators owe their job to the ICSID secretary general, customarily chosen by the US with the concurrence of other major capital-exporting states.[190]

As Harten concludes: 'This arrangement may be desirable for major states, but it is incompatible with notions of procedural fairness and the rule of law.'[191] Again, actual, or risk of, bias appears accepted in arbitration in ways it is not in law.

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The operation of the tribunal itself further undermines the justification for ISDS arbitration, and its claim to uphold the rule of law. The presumption of confidentiality of proceedings,[192] lack of binding precedent, and no right of impacted parties to be heard, violate Lord Bingham's first of eight 'ingredients of the rule of law': 'The law must be accessible and so far as possible intelligible, clear and predictable'.[193]

[187] Harten (n 36) 152.
[188] JAC <https://perma.cc/NB2J-NP3B>
[189] Justin Williams, Hamish Lal, Richard Hornshaw, 'Arbitration procedures and practice in the UK' 10: 'Other than impartiality […] there are no requirements under the Arbitration Act relating to the qualifications and characteristics of arbitrators.'
[190] Harten (n 28) 437.
[191] ibid.
[192] ICSID Regulations and Rules (2006) Art 6; LCIA Arbitration Rules (2014) [5.5].
[193] Bingham (n 45) 37.

Leading arbitrators do not agree whether ISDS produces law that should be followed. Noting the secrecy of arbitration is 'detrimental' to the development of the common law,[194] Rivkin asks: '[W]hat do arbitral awards do? Are they a source of law? If we conclude that they are, are they sufficiently consistent to fulfill this precedent function adequately?'[195] Neither Lords Mance nor Neuberger, both former senior judges and current arbitrators, appear to think so. Arbitration's ad hoc nature, and absence of an appeals process in most circumstances, 'militate against overall consistency', according to Lord Mance,[196] while for Lord Neuberger such arrangements mean: '(M)any arbitrators will feel relatively free to do what they want rather than to give effect to the law.'[197]

As Dame Gloster has also noted, arbitration need not proceed under the constraints of England's civil procedure rules (CPR) and that, 'as long as both parties consent to the arbitral procedure, almost anything goes.'[198] Examples abound. CPR requires parties disclose not only documents on which they rely, but also those that support the other party's case.[199] Arbitration, commonly, requires only the former.[200]

The court may compel a witness to testify before an arbitral tribunal under Arbitration Act 1996 section 34,[201] but there the safeguards end. Operating 'without any clear ethical guidelines' arbitration witnesses are routinely 'proofed' by their lawyers, and even subject to 'rehearsals', according to a leading arbitrator pushing for reform of

[194] Rivkin (n 1) 340.
[195] Rivkin (n1) 345.
[196] Mance (n 72) 229.
[197] Neuberger (n 2) 23.
[198] Gloster (n 8) 336.
[199] CPR, Art 31.
[200] IBA, 'Rules on the Taking of Evidence in International Arbitration' (29 May 2010).
[201] Williams (n 189) 13.

the industry, meaning, 'witness statements are now a vehicle of advocacy not of evidence'.[202] Yet in the Preface to *International Investment Arbitration: Substantive Principles* the Series Editor writes: 'The authors argue for the emergence of, and contribute to, the creation of a common law of investment protection.'[203]

ISDS cannot be both an emerging common law while at the same time being inaccessible, inconsistent, and beyond the bounds of the CPR. As Subedi concludes: (T)he procedures of the ICSID panels do not have to meet the tests of transparency, legitimacy, and accountability.'[204]

If ISDS construes IHRL *de minimis* (as argued in Chapter 1) despite the binding obligations IHRL places on the states that are the respondent parties to ISDS (as argued above), and if its procedures violate fair trial rights, to what extent does an English court upholding an award issued by such a tribunal act compatibly with its obligations under the ECHR?

Domestic Abuse?

As argued above, ISDS arbitration cannot satisfy the right to a fair trial, and so is a breach of ECHR Article 6(1) which guarantees fair trial to 'all natural and legal persons'. As public authorities, it is unlawful for England's courts to 'act in a way which is incompatible' the ECHR.[205] Though restricted by the Arbitration Act 1996, judges still exercise a wide range of powers over arbitration, from injunctive relief

[202] Landau (n 39).
[203] McLachlan (n 165), 'Series Editor's Preface to the First Edition'.
[204] Subedi (n 38) 14.
[205] HRA 1998, s 6(1).

and enforcement of statutory limitations,[206] to, ultimately, 'the state's coercive powers to enforce arbitral awards.'[207] As it exercises such power over arbitration, the Court must necessarily uphold Article 6(1) right of parties to ISDS arbitration occurring within its jurisdiction, including the respondent state as 'legal person'. It may only be released from this obligation if the parties to arbitration have effectively waived their Article 6 rights. As argued above,[208] the ECtHR in *Suovaniemi* held an arbitration agreement was an effective waiver of Article 6(1) rights, even in circumstances of bias in the arbitrator. In *Hakansson*, the Court ruled such a waiver must 'not conflict with an important public interest'[209] English courts must 'take into account' ECtHR rulings when determining Convention rights, but they are not binding.[210]

It is submitted that in the case of ISDS, the respondent state is clearly the representative of 'an important public interest'. It is therefore questionable whether English courts are complying with their HRA s 6(1) obligation in following *Suovaniemi*, particularly given that ICSID institutional awards cannot be challenged by the Court,[211] and the Arbitration Act's 'public policy' grounds for challenging other ISDS awards[212] is applied very narrowly.[213] The Court, as a branch of the State, may arguably also owe an *erga omnes* obligation[214] to a fellow States Party to the ICCPR to uphold its right to a fair trial, as well as its right to regulate on behalf of its citizens' self determination.[215]

[206] Williams (n 189) 5, 16.
[207] Mance (n 72) 241.
[208] (n 126)
[209] *Hakansson and Struresson* v. *Sweden* (1991) 13 EHRR 1.
[210] HRA 1998, s 2(1)(a).
[211] ICSID Convention, Art 53(1).
[212] (n 94)
[213] (n 95)
[214] (n 148)
[215] (n 145)

Chapter 3: Arbitration: The Verdict

Having presented legal arguments for and against the justification for ISDS arbitration, this final chapter delivers a verdict. A selection of controversial cases illustrate that ISDS arbitration can result in outcomes that arguably amount to substantive unfairness. Next, a survey of verdicts on ISDS arbitration from practitioners, states, and scholars, which though ranging across diametric opposites, point strongly towards what has been termed the 'backlash'[216] against ISDS arbitration. Finally, the chapter delivers its own verdict, assessing whether ISDS arbitration practises the very principles of private and public law on which it adjudicates.

ISDS Outcomes: Substantive Unfairness?

UNCTAD report that as of April 2019, 36 percent of treaty-based ISDS cases were concluded in favour of the host state, 29 percent in favour of the investor, and 23 percent were settled 'out of court'.[217] At the UK's Chatham House similar percentages were given and ISDS was thus described as 'quite an even-handed process'.[218] *Substantive Principles*[219] clearly testifies to the efforts of many ISDS tribunals to satisfy the common law test of 'substantive fairness', a minimum standard that is not merely procedural, but is 'fair in all the circumstances'.[220]

Yet if tribunals satisfy the test, it may be *despite* the arbitration process, not because of it, and as John Adams famously stated as defence counsel: 'It is of more

[216] Waibel (n 28).
[217] UNCTAD (n 32).
[218] Chatham House, 'Investment Treaties: A Debate over Sovereignty, Trade, Development and Human Rights' (11 October 2017).
[219] McLachlan (n 165).
[220] *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 [591A].

importance … that innocence should be protected, than it is that guilt should be punished.'[221] Cases that may amount to substantive unfairness, where innocence is not protected, reveal more about a legal system's justification than cases where guilt is rightly punished.

In *CME*[222], a foundational case credited by Rivkin as the main driver for ISDS' subsequent 'staggering' growth,[223] a Swedish tribunal awarded a US investor $353 million against the Czech Republic, a sum at the time equivalent to the country's entire health care budget, equivalent to an award of $19 billion against the UK.[224]

In a Separate Opinion, one of the arbitrators involved asked whether in accepting foreign investment protection under a BIT a state was also 'accepting the risk of national economic disaster'.[225] Another commentator called it 'the most staggering allocation of public funds' by arbitrators 'who are not accountable, not elected and not widely known'.[226]

If substantive fairness requires considerations beyond mere process to be fair 'in all the circumstances', then it appears difficult to argue that awarding a state's entire health budget to an investor over a TV rights wrangle passes the test. Not least because 10 days earlier, a second ISDS tribunal hearing the same case under a different name, dismissed all grounds.[227]

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[221] W Wemms, J Hodgson, *The Trial of the British Soliders, of the 29th Regiment of Foot*, Boston, 1770.
[222] *CME Czech Republic BV v Czech Republic,* UNCITRAL (Partial Award) (13 September 2001).
[223] Rivkin (n1) 342.
[224] Harten (n 36) 7.
[225] McLachlan (n 165) [2.12].
[226] Landau (n 39).
[227] *Lauder v Czech Republic*, UNCITRAL (Final Award) (3 September 2001).

The same absence of consistency coupled to massive damages characterised many of the more than 40 ICSID cases[228] initiated by investors against Argentina following the state's response to its 2001/2002 financial crisis.

The most notorious inconsistency has been in application of the 'elusive'[229] FET standard. The 2005 *CMS Gas* case[230] set the FET standard, which it read as to include the FPS standard,[231] as an 'objective requirement' on the host state in international law to ensure a 'stable and predictable' business environment for foreign investors, regardless of mitigating circumstances, or actions taken bona fide:[232]

> '[T]he Tribunal is persuaded that the state of necessity under domestic law does not offer a valid excuse if the result of the measures in question is to alter the substance or the essence of contractually acquired rights.'[233]

The same absolute standard, with no defence of necessity, was applied again against Argentina in 2007's *Sempra Energy* for $128m,[234] and in *Enron* for a further $106m, with the latter tribunal stating its interpretation was now an 'emerging standard'.[235] Yet a year earlier, in *LG&E Energy*, an ICSID tribunal found Argentina's emergency elimination of conversion of tariffs from US dollars to pesos amounted to a violation of the FET standard, but was 'a legitimate way of protecting its social and economic system', and accepted, as applied to a certain time period, the state's defence of

[228] Petersmann (n 17) 184.
[229] McLachlan (n 165) [7.01].
[230] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Merits (12 May 2005).
[231] ibid [266].
[232] ibid [274-84].
[233] ibid [217].
[234] *Sempra Energy v Argentina*, ICSID Case No. ARB/02/16, Award (28 September 2007).
[235] *Enron Corporation v Argentina*, ICSID Case No ARB/01/3, Award (22 May 2007) [260].

doctrine of necessity.[236] As Subedi notes, the fact that the *Enron* tribunal remained silent on the earlier finding in *LG&E* is all the more troublesome because 'one individual was sitting in both tribunals as an arbitrator'.[237]

Were ICSID arbitration indeed the evolving common law some argue,[238] it would also have been required to give strong reasons for setting aside its 2005 ruling in *Noble Ventures* that FPS for an investor was not to be a 'strict standard', as in *CMS* and *Enron*, 'but one requiring due diligence to be exercised by the State.'[239]

As Wells puts it: 'The conflicting decisions [in *LG&E* and *CMS*] established no precedent that could comfort countries that face catastrophic crises.'[240] The FET standard, per *Micula*,[241] is formulated around the 'legitimate expectations' of investors. But as applied in ISDS it has at times amounted to a moving goalpost, upon which states struggle to formulate their own 'legitimate expectations'.

Widely divergent applications of standards can also be seen operating in factually similar cases, but involving different respondent states. In the 2000 case *Metalclad*[242] and the 2003 case *Tecmed*,[243] breaches of the FET standard were raised against Mexico for its refusal to renew licenses for potentially harmful landfills over disputed environmental impact assessments (EIA). Both tribunals found authorities used their powers improperly in addressing the public health concerns raised, amounting to

[236] *LG&E Energy Corporation v Argentina*, ICSID Case No ARB/02/1, Decision on Liabiliity (3 October 2006) [238-240], [266].
[237] Subedi (n 38) 254.
[238] McLachlan (n 203).
[239] *Noble Ventures v Romania*, ICSID Case No. ARB/01/11ICSID, Award (12 October 2005) [164].
[240] Louis T Wells, 'Backlash to Investment Arbitration: Three Causes' in Waibel (n 28) 344.
[241] (n 167)
[242] *Metalclad Corporation v Mexico*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000).
[243] Tecmed v Mexico, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003).

expropriations in violation of NAFTA obligations, and ordered compensation of some $20 million.[244]

In the 2005 case *Methanex*, however, it was the US 'in the dock'. California's decision to phase out use of Methanex's methanol in petrol on public health grounds was ruled a non-discriminatory regulation for public purpose which, 'as a matter of general international law' is non-compensable to the investor 'unless specific commitments' have been given 'that the government would refrain from such regulation.'[245] Requiring EIAs before licensing landfills, and requiring no methanol in petrol do not appear to be, on the basic facts, very different grounds for regulation. Both would likely fall within the ECtHR 'margin of appreciation' doctrine,[246] which pays particular deference to the 'democratic legitimacy'[247] of state action. Yet the substantive outcome was $20 million different.

The tribunal's award in *Metalclad* was partially set-aside after challenge in the Canadian courts, which found the arbitrators acted outside their jurisdiction.[248] ICSID institutional arbitrations cannot be challenged by courts,[249] but its own Annulment committee overturned a portion of *CMS Gas* after finding 'manifest errors of law.'[250]

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[244] McLachlan (n 165) [7.200].
[245] *Methanex Corporation v America*, UNCITRAL, Final Award (3 August 2005) Part IV Chapter D [7].
[246] *Ireland v UK*, (1978) 2 EHRR 25 [91].
[247] *Karatas v Turkey* [1999] IV ECtHR 81 [120].
[248] *The United Mexican States v Metalclad Corporation*, (2001) BCSC 664 [136].
[249] ICSID Convention, Art 53(1).
[250] *CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8 (Annulment Proceeding) (25 September 2007) [158].

If FET is the goalpost that keeps moving, then the role of human rights in ISDS appears to be the offside rule nobody can agree on. The early case of *Biloune* in 1989 directly involved human rights (the investor had been detained without charge), but the tribunal found it had no jurisdiction to address human rights claims.[251] Likewise in *Santa Elena,* the tribunal dismissed the relevance of international law obligations to the justification for expropriating investor property: 'The international source of the obligation to protect the environment makes no difference.'[252]

In the 2006 case *Azurix* and 2007's *Siemens*, the tribunals 'affirmed the relevance of the non-investment treaty obligations *in abstracto,* but did not recognize them *in concreto*',[253] briefly stating Argentina's human rights obligations had 'not been fully argued'[254] and 'had not been developed'.[255] *Azurix* did introduce a proportionality analysis, borrowed from the ECtHR in *James,*[256] in order to assess the legitimacy of the state's action as it impacted on the investor, and subsequently reduced the compensation due. But Argentina's ICESCR obligation to 'fulfil'[257] the human right to the 'highest attainable standard' of health[258] - which the UN has recognised includes the right to affordable water,[259] and which also, it is submitted, cannot reasonably be excluded from the ICCPR obligation to 'secure' the right to life[260] - was not explicitly made part of the tribunal's reasoning.[261]

[251] *Biloune v Ghana,* Award, UNCITRAL (Award) (27 October 1989).
[252] *Santa Elena v Costa Rica,* ICSID Case ARB/96/1, Award (17 February 2000) [71].
[253] Ioana Knoll-Tudor, 'The Fair and Equitable Treatment Standard and Human Rights Norms' in Petersmann (n 17) 340.
[254] *Azurix v Argentina,* ICSID Case No. ARB/01/12, Award (14 July 2006) [261].
[255] *Siemens v Argentina,* ICSID Case No. ARB/02/8, Award (6 February 2007) [79].
[256] *James v United Kingdom* [1986] ECtHR, App No 8793/79.
[257] (n 158).
[258] ICESCR, Art 12.
[259] ICESCR Committee, 'General Comment 15', Art 12 [a–c].
[260] (n 156).
[261] Thielborger (n 25) 498.

In the 2008 case *Biwater*, the tribunal 'did not really consider' Tanzania's human rights arguments.[262] By 2016, observers noted ICSID's *Urbaser,*[263] as 'the first to accept jurisdiction over a human rights counterclaim',[264] but the Tribunal found no international law obligation of 'immediate application' that could form substantive grounds for Argentina's counter claim.[265]

ISDS has 'faced the first tentative beginnings of the enunciation of human rights arguments', [266] but as Knoll-Tudor notes, 'there is hardly a consensus among arbitrators on how to approach obligations unrelated to the investment as such'.[267]

At common law, substantive unfairness also encompasses principles of legitimate expectation[268] and consistency,[269] while for legal theory Dworkin's 'integrity' of the law[270] requires that it act in a principled and coherent manner towards its subjects, that it 'make sense as a whole',[271] while for Rawls justice is 'fairness'.[272]

This brief survey of controversial cases demonstrates that ISDS arguably amounts, at times, to substantive unfairness, while its approach to FET and IHRL generally fails to meet Dworkin's requirements of 'integrity'.

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[262] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) in Mouyal (n 49) 151.
[263] *Urbaser v Argentina*, ICSID Case No. ARB/07/26, Award (8 December 2016)
[264] Edward Guntrip, 'The Origins of a Host State Human Rights Counter Claim in ICSID Arbitration', *EJIL: Talk!* (10 February 2017) <https://perma.cc/BHZ2-ESEP>
[265] *Urbaser* (n 264) [1210].
[266] ibid 157
[267] Knoll-Tudor (n 253) 340.
[268] *Gokool v Permanent Secretary for the Ministry of Health and Quality of Life* [2009] UKPC 54 [2]
[269] *R (Hussain) v Secretary of State for the Home Department* [2012] EWHC 1952 (Admin) [46]
[270] Dworkin (n 47)
[271] Stefano Bereta, 'The Arguments from Coherence: Anaysis and Evaluation,' (2005) 25(3) *Oxford Journal of Legal Studies* 385.
[272] Rawls (n 44).

The Verdict To Date: A Growing Backlash

The use of arbitration in ISDS has become an issue of widespread, often acute, debate, particularly over the past five years or so.

Ardent supports such as Lew and Gaillard hail it as 'a new regime', a '*suijuris*'[273] or a separate 'arbitral legal order',[274] 'above the direct controls of national laws and courts',[275] justified in ignoring orders, even from the seat of arbitration itself.[276] At the other end of the spectrum, a leading economist from the Global South, has described ISDS as 'the world's most problematic and outrageous judicial system […] riddled with conflicts of interest'.[277] A legal expert appointed by the UN to report on ISDS found it 'incompatible' with the right to fair trial under article 14(1) of the ICCPR, and called the system 'a challenge to democracy and the rule of law'.[278]

Within these irreconcilable verdicts lie a myriad of proposals for reform, often more confusing than enlightening. Lord Neuberger finds the credibility of arbitration points 'firmly in favour of more transparency'[279] yet notes, 'it may be that too much openness will kill off arbitration'.[280] And while he finds arbitration currently 'compatible with the key features of the rule of law', he recognises that it has not yet taken the 'momentous step' to make 'fundamental rights […] part of arbitration's mandatory law', because that involves 'consideration of practicality as well as

[273] Lew (n 48) 181.
[274] Gaillard (n 13).
[275] Lew (n 48) 181.
[276] Gaillard (n 13).
[277] Martin Khor, 'The World's Worst Judicial System?' (30 July 2013) 36 *South Views*.
[278] 'Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas' (14 July 2015) A/HRC/30/44 [15].
[279] Neuberger (n 2) 23.
[280] ibid 22.

principle.'[281] It is submitted that, following Lord Bingham,[282] 'fundamental rights' cannot be excluded from a legal practise claiming compatibility with the rule of law.

Lord Mance rejects calls for arbitration's further autonomy from courts in favour of 'greater coordination and coherence between different legal systems'[283] as required in today's 'increasingly inter-connected world'.[284] But he offers no systemic reform to address ISDS' 'problems in maintaining coherence'.[285] Other leading arbitrators recognise the presumption of confidentiality might need to be reversed,[286] that the industry is 'not catering for core issues of legitimacy'[287] because ISDS is still conducted 'through the prism of commercial arbitration',[288] or that it is 'perceived to be unsympathetic to non-commercial interests'[289] and may be suffering from 'hubris […] an overconfidence extending to a form of excessive arrogance'.[290]

Yet none question whether the use of arbitration in ISDS is actually justified, instead pointing to examples of internal reform - the 2006 ICSID rules on transparency,[291] the 2018 launch by the LCIA of a database of anonymised arbitrator challenge decisions[292] – or ideas for reform, such as an International Investment Court with an Appeals Tribunal,[293] in order to justify the status quo. Leading academics, meanwhile,

[281] ibid 19.
[282] (n 45).
[283] Mance (n 72) 233.
[284] ibid 241.
[285] ibid 241.
[286] Gloster (n 8) 339.
[287] Landau (n 39).
[288] Landau (n 19).
[289] Rivkin (n 1) 129.
[290] Johnny Vedeer, 'Speech to 12th IBA International Arbitration Day, Dubai' (15 February 2009).
[291] 'Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules' (2006).
[292] 'LCIA Releases Challenge Decisions Online' (12 February 2018) <https://perma.cc/R5WJ-N32M>
[293] Subedi (n 38) 21.

remain conflicted over whether IHRL even has a direct role to play in international economic law (IEL).[294]

Many state respondents to ISDS, however, have already given a clear verdict. In 2007, Bolivia became the first country to withdraw from the ICSID,[295] subsequently obliging all investment disputes to be resolved under domestic law. Venezuela and Ecuador also withdrew, the latter attempting to terminate BITs as unconstitutional.[296] After its Black Economic Empowerment policy was challenged as an expropriation of investors' mineral rights,[297] South Africa terminated BITs, citing 'a paradigm shift taking place within international investment law in favour of a more equitable, more just and fairer system.'[298] India, whose Supreme Court rulings were challenged in ISDS,[299] adopted a Model BIT in early 2016 outlining explicit investor and state obligations, and limiting the grounds for ISDS claims.[300] Indonesia is in the process of terminating all its existing BITs.[301] After being sued by Phillip Morris tobacco over its plain packaging laws[302], in 2011 Australia rejected ISDS as conferring 'additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system.'[303]

[294] See Petersmann and Alston in (2002) 13(4) *EJIL*.
[295] Kluwer Arbitration Blog, 'Life After ICSID' (12 August 2017) <https://perma.cc/7C4N-JE5E>
[296] Subedi (n 38) 12.
[297] Linda Ensor, 'South Africa: Court rules against Italian investors' *Business Day* (6 August 2010) <https://perma.cc/89JV-AWML>
[298] Quoted in Subedi (n 38) 17.
[299] *White* (n 20).
[300] Brookings India, 'India's Model Bilateral Investment Treaty' (August 2018) 10.
[301] Lampung Hamza, 'BITs in Indonesia: A Paradigm Shift' (2018) 21(1) *Journal of Legal, Ethical and Regulatory Issues* 1.
[302] *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12, Notice of Claim (22 June 2011).
[303] Subedi (n 38) 237.

And on the campaign trail in 2008, Hillary Clinton pledged to 'take out the ability of foreign companies to sue us because of what we do to protect our workers'.[304] 'One can no longer safely say that investment arbitration continues to inspire general confidence,' notes Waibel. 'Reform is essential.'[305] This paper has scrutinized legal justification for and against ISDS arbitration. The question thus is not whether ISDS *could* be reformed, but whether it *should* be.

ISDS: The Final Verdict

A final verdict on ISDS arbitration can be concluded by examining the practise on its own terms. Does it uphold the principles of private law on which it was founded, and the obligations of public law on which it adjudicates? Does ISDS practise what it preaches?

First, to private law, where a number of established contract law principles appear largely absent from ISDS. Freedom of contract is central to English law, but it is also subject to a range of controls. In *Suez*, the Tribunal rejected Argentina's defence of necessity in part because it was not included as an exception in the terms of the BIT.[306] Yet contract law recognises a doctrine of economic duress, bona fide, whether written into a contract or not.[307]

[304] 'The Democratic Debate in Cleveland' *New York Times* (26 February 2008).
[305] Waibel (n 28) 10.
[306] McLachlan (n 165) [2.26].
[307] *Occidental Worldwide Investment Corp v Skibs A/S Avanti (The Siboen and The Sibotre)* [1976] 1 Lloyd's Rep 293.

The strict application of privity of contract[308] to exclude third-party rights holders, reflected in ICSID's early refusal to admit amicus curiae,[309] has for decades been tempered at common law by a more equitable approach, exemplified in *Jackson*,[310] where family members not party to their father's contract could nevertheless claim compensation. Stablisation clauses, included in many concession contracts,[311] serve to exclude investors from future state regulations affecting their property.[312] English courts would likely subject such broad exclusion clauses to a test of 'reasonableness' under the Unfair Contract Terms Act 1977.[313]

The general theme of party freedom that flows through English contract law[314] is blocked in ISDS. Argentina's attempt to enforce a contract term in *GAMI*[315] (granting Argentine courts exclusive jurisdiction to hear investment disputes) was deemed ineffective under the Vienna Convention[316] because the contract had been elevated to a BIT public international law dispute by an 'umbrella clause',[317] which only the investor can trigger.[318]

Prior to *Aguas Argentinas*, investors renegotiated their concession several times to their favour, but when Argentina faced financial crisis and was under pressure to renegotiate it could only watch as the lead investor filed for arbitration to enforce the

[308] *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847.
[309] Nigel Blackaby, Caroline Richard, 'Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?' in Waibel (n 28) 253.
[310] *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.
[311] International Finance Corporation, 'Stabilization Clauses and Human Rights' (27 May 2009).
[312] Subedi (n 38) 132.
[313] UCTA 1977, s 11(1).
[314] Ryan Murray, *Contract Law* (Sweet & Maxwell 2014).
[315] *GAMI Investments Inc v Mexico* UNCITRAL, Award (15 November 2004) from McLachlan (n 165) [4.87].
[316] Vienna Convention, Art 27.
[317] Subedi (n 38) 133.
[318] McLachlan (n 165) [4.91], [4.92].

most recent version of the contract.[319] As McLachlan argues, use of such umbrella clauses 'distort the synallagmatic nature of the contract, in which both parties assume mutually interdependent rights and duties.'[320]

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As the FET standard, elaborated in *Waste Management*[321] and *Micula*,[322] makes clear, ISDS is a form of judicial review.[323] Its justification may thus be evaluated against the proper exercise of such powers.

As Fordham writes, 'Judicial review is the rule of law in action: a fundamental and inalienable constitutional protection.'[324] The Court's power to rule on the lawfulness of public authority action derives from its position within the constitution of the State itself. Judicial review courts act as 'guardians of the public interest',[325] and public bodies, which includes the Court,[326] must not make a 'material error of law'[327] nor 'fundamental factual errors'.[328] As per Chapter 1, ISDS arbitration fails these tests. Judicial review proceeds on the basis of transparency,[329] due process[330] (including the ECHR Article 6 right to a fair trial)[331] and must observe the rules of precedent.[332] As per Chapter 2, and above, ISDS fails these tests.

[319] Wells (n 240) 345.
[320] McLachlan (n 165) [4.154].
[321] (n 166)
[322] (n 167)
[323] Michael Fordham, *Judicial Review Handbook* (Hart 2012), has chapters on 'Legitimate Expectations' [41]; 'Procedural Unfairness' [60]; and 'Substantive Unfairness' [54].
[324] ibid 5.
[325] *Estate of M Kingsley (dec'd) v Secretary of State for Transport* [1994] COD 358.
[326] (n 205)
[327] Fordham (n 323) 504.
[328] ibid 508.
[329] *R (Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 (Admin) [45].
[330] *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 [591F].
[331] *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 [39].

In assessing the lawfulness of state action, the Court adopts 'primary self restraint'.[333] Judges strive to understand the circumstances in which the public body took its decision, and to defer to that judgement if possible.[334] Where the ECHR is engaged, judges perform a proportionality test, balancing the protected human right against a test of the State's action as 'appropriate and necessary to its legitimate aim.'[335] In *CMS*, *Sempra*, and *Enron*[336] the Tribunal applied an absolute standard, not introducing the proportionality test until *Azurix*.[337] A public body's basic statutory duties are inalienable. 'Bodies are not entitled to […] 'fetter' their discretion by over committing themselves to a particular course.'[338] The Court would likely find a stabilization clause as 'fettering' the State's discretion, and therefore unlawful. Finally, whereas monetary damages are the *only* remedy in ISDS, there is no general right to damages for public law wrongs.[339]

ISDS arbitration is thus demonstrably different from public law judicial review: its power is not legitimised as the Court's is; it does not operate with the same checks and balances; it does not approach questions of law in the same manner; and its remedy is different.

Thus, if judicial review by the Court *is* 'the rule of law in action', then we might safely arrive to the verdict, given the differences highlighted above, that ISDS arbitration *is not* 'the rule of law in action'.

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[332] Fordham (n 323) 129.
[333] ibid 143.
[334] *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536 [58].
[335] *B v Secretary of State for the Home Department* [2000] UKHRR 498 [502C].
[336] (n 230; 234; 235)
[337] (n 254)
[338] Fordham (n 323) 517.
[339] *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529 [96].

Conclusion

This paper has put ISDS arbitration 'on trial' on charges of being incompatible with public and IHRL, and thereby a form of injustice, both substantive and procedural,[340] when used to adjudicate the rights of a state's citizens.

Chapter 1 demonstrated that arbitration can indeed lay claim to a long history of practice, and a wide degree of recognition for its autonomy in domestic and international law. However, Chapter 2 demonstrated that although Chapter 1 may be the case in *practice*, in *principle* general international law, and IHRL in particular, impose obligations upon states which ISDS may not construe, as it currently does, *de minimis*.

Therefore, it can be concluded that ISDS arbitration, as practiced, is incompatible with public international law, and arguably with public law obligations under the ECHR. This is a conclusion that finds support not only from UN expert de Zayas,[341] but also in a statement signed by 76 leading academics in the field.[342]

Furthermore, it is submitted, that in its failure to satisfy the universal human right of fair trial, in its outcomes that likely meet the legal test of 'substantive unfairness', and in its demonstrable failure as a form of judicial review to 'practise what it preaches', ISDS arbitration is indeed a form of injustice, as understood by legal theory.[343]

Thus, although it *could* be reformed, ISDS arbitration *should* not be. Rather, to

[340] (n 43-47)
[341] (n 278)
[342] Osgoode Hall Law School, 'Public Statement on the International Investment Regime' (31 August 2010) < https://perma.cc/2VB9-QMTQ>
[343] (n 43-47)

conclude with Subedi[344] and Harten,[345] future ISDS should be conducted through strengthened domestic courts, while, following Petersmann,[346] Mouyal,[347] Lord Mance,[348] and others, international law should strive *against* fragmentation, as represented by the current practice of ISDS arbitration, and *towards* greater integration, as envisaged by the constitutional treaties of human rights law.

[344] Subedi (n 38) 268.
[345] Harten (n 36) 11.
[346] Petersmann (n 17) 193.
[347] Mouyal (n 49) 157.
[348] Mance (n 72) 233.

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