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DISPUTE-RESOLUTION MECHANISMS
IN INTERNATIONAL BUSINESS

by

DETLEV F. VAGTS

VAGTS

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Transnational Business Problems (1986).
Restatement, Third, Foreign Relations Law (1987) (Co-Reporter).

Articles

- "Free Speech in the Armed Forces", 57 *Columbia L. Rev.*, 187 (1957).
 "The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise", 74 *Harvard L. Rev.*, 1489 (1961).
 "Reforming the 'Modern' Corporation: Reflections from the German", 80 *Harvard L. Rev.*, 23 (1966).
 "The Multinational Enterprise: A New Challenge for Transnational Law", 83 *Harvard L. Rev.*, 739 (1970).
 "Law and Accounting in Business Associations", in *International Encyclopedia of Comparative Law*, Vol. XIII, Chap. 12A (1970).
 "Coercion and Foreign Investment Rearrangements", 72 *Am. J. Int'l L.*, 17 (1978).
 "The Balance of Power in International Law: A History of An Idea", 73 *Am. J. Int'l L.*, 555 (1979) (with Alfred Vagts).
 "Disclosure and the Multinational Enterprise: The Costs of Illumination", in *Legal Problems of Codes of Conduct for Multinational Enterprises*, 315 (N. Horn ed., 1980).
 "Challenges to Executive Compensation: For the Markets or the Courts?", 8 *J. Corporation L.*, 232 (1983).
 "The Scope of Application and Enforcement of U.S. Laws", 35 *Wirtschaft und Recht*, 72 (1983).
 "The Pipeline Controversy: An American Viewpoint", 27 *German Y.B. Int'l L.*, 38 (1984).
 "Company Law Harmonization in the European Community", in *Emerging Standards of International Trade and Investment* (S. Rubin and G. Hufbauer eds., 1984).
 "Foreign Investment Risk Reconsidered: The View from the 1980's", 2 *ICSID Review*, 1 (1987).

CHAPTER I
AN INTRODUCTION

For centuries it has been recognized that international business adds an important new dimension to the normal processes of dispute resolution. At least as early as the Middle Ages we find special merchants' courts sitting at the fairs to give swift and knowledgeable resolution to disputes between traders from different States¹. Fears of bias and ignorance on the part of local judges, among other things, lead business managers to seek some more reliable and predictable means of resolution for the controversies inevitably arising out of commercial dealings.

In this last quarter of the twentieth century new developments are causing scholars to take a fresh look at the intersection of dispute resolution and international business. On the one hand there is a new sensitivity to the burdensomeness of dispute resolution as now practised by national legal systems. This scholarship to a large extent has its origins in the United States where the problems are most keenly felt². In part due to a predilection for resorting more freely to courts and laws than do other societies, in part due to the high earnings — and therefore high costs — of attorneys and in part due to the complex and formal methods of adjudication that prevail in United States courts, there is a sense of crisis in the United States.

In preparing these notes I have tried to be conscious of the audience I am addressing. Thus I have avoided some of the fine points of US citation systems — denials of *certiorari* seemed useless as information for non-Americans and some of the abbreviations used in the United States would be unfamiliar. I have kept a few obvious ones — "L." for "Law", "Rev." for "Review" (or "Revue"), "J." for "Journal". Where possible I have attempted to provide French counterparts for US authority — thus slighting the German, Japanese, and other systems. I here express my appreciation of the work done by my research assistants, Esmeralda deGuzman Yu, Brian Ganson and Frederick Knowlton.

1. See for a history of this "Law Merchant", S.W. Holdsworth, *A History of English Law*, 60-154 (London, 7th ed., 1982). For the continent see J.J. Hamel, G. Lagarde, A. Jauffret, *Droit commercial*, 24-53 (Paris, 2nd ed., 1980), and the older classic L. Goldschmidt, *Universalgeschichte des Handelsrechts* (Stuttgart, 1891).

2. See for a discussion of the study of disputes J. Fitzgerald and R. Dickens, "Disputing in Legal and Nonlegal Context: Some Questions for Sociologists of Law", *15 Law and Society Rev.*, 681 (1980-1981).

Some who look at the situation cast their eyes on other legal systems which they see as possibly more efficient and economical. They wonder if other countries have answers to the United States problems³. Other writers explore what has come to be known as "alternative dispute resolution" or "ADR", that is, devices for mediation, arbitration or conciliation that might be more satisfactory than what is offered by the courts⁴.

The other branch of study seeks to get a better grip on what is happening in the world of international business. Statistics confirm what is obvious to the intelligent observer — that the proportion of each country's economic life that is bound up with international aspects is growing steadily⁵. Even in nations such as the United States, which have traditionally been to a large extent self-contained, the ratio between exports or imports and gross national product has been rising to the 6 per cent level. In other countries, such as those in the European Economic Community, that proportion has been even higher — up to 50 per cent. The threat of a crisis arising from the overhang of an enormous indebtedness owed by the developing world to institutions in the industrialized world is an ominous one⁶. Memories of what a breakdown in the international economic system can do to the populations of individual countries live on from 1929 — perhaps they will restrain States from repeating the acts of heedlessness that brought on that crisis and its consequences.

Some economists have pursued the study of this international economic activity in aggregative terms, using statistical analysis of national exports, imports, balance of payments, and other movements⁷. These operate from general laws which they try to make applicable in ways that will provide better views of what is happening now and better predictions of what is likely to happen in the

3. See sources cited notes 50-53, *infra*.

4. See Part III, *infra*.

5. Thus exports as a percentage of the gross national product of the United States rose from 3.9 in 1967 to 6.1 in 1983. The equivalent percentage in 1983 for Germany was 25.8 and for the Netherlands 49.6. Jackson and W. Davey, *Legal Problems of International Economic Relations*, 10 (St. Paul, Minn., 2nd ed., 1986).

6. See *A Dance Along the Precipice: The Political and Economic Dimensions of the International Debt Problem* (W. Eskridge ed., Lexington, Mass., 1985).

7. A standard American international economic text is P. Lindert and C. Kindleberger, *International Economics* (Homewood, Ill., 8th ed., 1986).

future. Others take a more institutional approach. They examine what sorts of organizations take part in international economic life, what their decision-making structures look like and what purposes they are trying to achieve when they make decisions about the location and direction of their profit-making activities. On the whole it is the latter approach that more closely relates to what we are trying to investigate in this study. We are interested in motivations of business managers when they decide whether or not to enter into a given line of activity in a given place. More specifically, we are interested in the relationship between those decisions and their judgments as to the likelihood that their activity will produce disputes and the further judgment as to whether the disputes will be settled in a way that is not unacceptable to them. It has been generally understood that, at least in a general way, the rule of law is a prerequisite to the establishment of a modern capitalist economy. In particular, the writings of Max Weber are taken to show the linkage between capitalist rationality and a legal system that provides stability and predictability. Such a system is contrasted with a "kadi" system in which decisions are handed down under a shade tree according to the momentary impulses of the kadi⁸. More sophisticated modern analysis suggests that total legal certainty is not possible or desirable — even if the mainstream of legal thought rejects the more radical view that the outcome of every legal dispute is entirely in doubt⁹. Analysts would say that all business endeavours are surrounded by risk and that the danger of something going wrong legally simply heightens that risk by some roughly quantifiable degree¹⁰. Since all business calculations are in essence balancings of the necessary investment versus the likely gain, accounting for the possibilities of loss by multiplying the likelihood of their occurrence times the loss if they do occur, legal risks can

8. See, e.g., M. Weber, *General Economic History*, 277 et seq. (F. Knight trans., Glencoe, Ill., 1966) ("The fourth characteristic [of modern capitalism] is that of calculable law. The capitalistic form of industrial organization, if it is to operate rationally, must depend upon calculable adjudication and administration"). For a review of later debates on Weber's views see S. Ewing, "Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law", 21 *L. and Society Rev.*, 487 (1987).

9. For a review of the arguments about the "indeterminacy" of law and the possibilities of predicting legal outcomes, see J. Stick, "Can Nihilism be Pragmatic", 100 *Harvard L. Rev.*, 332 (1986).

10. D. Vagts, "Foreign Investment Risk Reconsidered — The View from the 1980's", 2 *ICSID Rev.*, 1 (1987).

be fed into the calculus. It follows that quite substantial legal risks will be incurred if the expected gain is large enough. A country can enjoy a rather bad reputation among lawyers and still attract investors if it possesses, for example, a large and easily accessible deposit of a rare and useful mineral. On the other hand, if there are close competitors among countries, the possession by one of them of a highly regarded legal system might make a crucial difference in a foreign investor's location decision. This might be the case if several States desire to attract a labour-intensive factory to help with their unemployment problems. In describing decisions thus, one should not exaggerate the degree of mathematical precision that is possible in such calculations. Lawyers are hesitant to make predictions in terms of mathematical percentages¹¹. This is true even in cultures such as that prevailing at the top levels of American corporate management where computers, printouts and mathematical models are at the centre. The cultures of different nations produce different attitudes towards the basically subjective problems of litigation risk. A Japanese firm with a corporate culture based on *wa* or harmony will assign a higher cost to the disruptions and psychological drains that inhere in a passionate and protracted lawsuit than will an American or German. Whatever their sense of the costs and outcomes of litigating in their own court system, business managers will find it hard to think intelligently and coolly about the likely consequences of litigating in some other country's courts. There is always the hope, of course, that things will turn out for the best. The enterprise will be so successful that nobody quarrels, or the quarrels that do arise will be satisfactorily handled by negotiating, with perhaps a little help from a mediator.

Most of our discussion will be devoted to the legal side. However, we start with a review of the business aspects of international transactions. It will take us through a review of the different ways in which transnational business is done, ranging from simple sales contracts through joint ventures. The review will focus on the choices that must be made as between different methods of doing business and on the types of legal risk that are built into each of

11. Compare M. Victor, "The Proper Use of Decision Analysis to Assist Litigation Strategy", 40 *Business Lawyer*, 617 (1985), and R. Greenberg, "The Lawyer's Use of Quantitative Analysis in Settlement Negotiations", 38 *id.*, 1557 (1983), with D. Vagts, "Legal Opinions in Quantitative Terms", 34 *id.*, 421 (1979).

them. A third chapter considers the general character of dispute resolution theory and the problems it addresses. We then review the way in which litigation involving foreign parties is carried on in the ordinary national tribunals, with particular attention to those ways in which international litigation differs from its strictly local counterpart. We then look at the alternatives which private parties have constructed for themselves rather than face what is offered in the national courts. This will include consideration of the Conventions that assure national support to international arbitration. We then take up the special problems that are built into contests between a foreign private party and a national government, including both those that find their way into national courts and those that wind up in some specially designed tribunal. Finally we terminate this brisk survey of an enormous field with a conclusion looking at the whole complex from a private and then a public point of view.

Clearly some contracts are commercial but are they all? Suppose, for example, that a foreign government Y agrees to buy super-secret air-to-ship guided missiles from a manufacturer in Country X. Can Country X's courts take jurisdiction over any litigation against Y that results? It is a contract case, indeed it is a purchase of goods. But the likelihood is great that litigating the matter in a public forum in X will exacerbate and embarrass relations between X and Y.

C. Arbitration between States and Individuals

Differences in bargaining power in negotiations between States and private corporations or individuals produce differences in the dispute resolution clauses of the contracts they make. As we have seen, States in a strong bargaining position may get specific Calvo Clauses that inhibit resort to any procedure other than national courts in the State party to the contract¹⁸⁷. In other cases such a clause is regarded as not necessary. The advent of restrictive sovereign immunity, by providing a new alternative – suit in a foreign State's courts – provided some impetus to spelling out the sole resort idea in explicit contractual terms. Particularly in sales contracts where the United States or the United Kingdom, as well as other jurisdictions that came to limiting sovereign immunity through non-statutory approaches, would take jurisdiction over suits against foreign States, State planners must consider this problem. The Soviet Union, for example, has long had a strong preference for what it terms arbitration before its own special set of international trade tribunals¹⁸⁸. Sometimes the desire to induce agreement on the part of the other party has led Soviet officials to accept arbitration in some neutral point, characteristically Sweden. Some other States have been willing to accept arbitration clauses in foreign-trade matters, although it is by no means clear that such countries as the United States would be willing ever to make such concessions¹⁸⁹.

Where arbitration faces severe strains has been in connection with

187. See notes 167-170, *supra*.

188. S. Lebedev, "International Commercial Arbitration in the Socialist Countries", 158 *Collected Courses*, 87 (1977); Note, "The Soviet Position on International Arbitration", 26 *Virginia J. Int'l L.*, 417 (1986).

189. Thus a court held in *BV Bureau Wijsmuller v. United States*, [1976] Am. Maritime Cases, 2514 (SDNY 1976), that a submission to arbitration of a salvage claim as to a United States naval vessel was not authorized.

those long-term important contracts referred to as development or, particularly in former times, concession agreements¹⁹⁰. These usually involve the extraction of natural resources, although some major industrial arrangements could raise similar problems. They usually involve governments without the money or technical resources to do the job for themselves. When States such as the United States or Great Britain have natural resources to exploit they do not enter into contracts like these but into simple leases rather like those of private owners. Development agreements usually have to last for a long period – 20 to 30-year terms are not uncommon – if the concessionaire is to complete the task of getting access to the minerals and producing enough to recover its investment. It may involve establishing ports, railways, power plants and other items of infrastructure usually provided by governments, but not present in the area in question.

The tensions between the parties that inhere in all long-term contracts are exacerbated in these arrangements. Particularly, they are subject to special pressures resulting from the characteristic way in which the bargaining positions of the parties change¹⁹¹. They usually start with a foreign concessionaire in a position of considerable power. It has the funds, the technology and the will to exploit the resource. The State on the other hand, is quite unprepared to undertake or even to supervise the project. It is unable to take the financial risk of exploiting the project, the financial success of which is still quite uncertain. If the project turns out to be successful, the bargaining stances of the two parties reverse. The foreign concessionaire, previously able to reject this project and turn to others in more co-operative States, is now caught. It has sunk costs which it is loathe to abandon. It may be committed to arrangements that require delivery of the fruits of this enterprise. The State, however, is now much more confident. The work of exploring and developing has been done; the routine operation of getting out the

190. See, e.g., J. F. Lalive, "Contrats entre états ou entreprises étatiques et personnes privées: Développements récents", 181 *Recueil des cours*, 9 (1983), for an excellent survey of these contracts and disputes arising from them. More concentrated on disputes are G. Delaume, "State Contracts and Transnational Arbitration", 75 *Am. J. Int'l L.*, 784 (1981); W. Peter, *Arbitration and Renegotiation of International Investment Agreements* (Dordrecht-Boston, 1986).

191. D. Smith and L. Wells, "Mineral Agreements in Developing Countries: Structures and Substance", 69 *Am. J. Int'l L.*, 560 (1975); D. Vagts, "Coercion and Foreign Investment Rearrangements", 72 *Am. J. Int'l L.* (1978).

oil or the ore seems easy and well within the capacities of the local personnel who have, in the meantime, been trained by the entrepreneur. Why should that outside party get so extravagant a reward for doing what is easy? Why not either take over the project in its entirety or at least make the concessionaire adjust to a smaller stake in the profits and a smaller part of the control?

Faced with the fear that threats of this type will ultimately develop, prospective concessionaires have long sought arbitration clauses¹⁹². They have feared that the local courts could not withstand the pressures of their government and would co-operate in dispossessing the foreign party. To some degree this is simply the result of the fact that local courts are generally bound by whatever is now the local law. By changing its statutes the local government can make its courts enforce its designs upon the foreign concessionaire, any contract to the contrary notwithstanding. For one thing, there simply may have been little or no relevant local law for the courts to rely upon and there may have been no comparable local enterprises to serve as a base for an equal (national) treatment analysis. So foreign concessionaires will ask for clauses that not only displace local courts but will also, at least to some degree, displace the local law. Not infrequently they have achieved these results. They have not always succeeded, since, particularly in times of high oil prices, States with petroleum under their soil have been able to set their terms. But they have prevailed often enough so that we now have quite a repertory of cases decided by arbitrators under such agreements¹⁹³.

192. See, e.g., the clauses included in the model agreements in D. Smith and L. Wells, *Negotiating Third World Mineral Agreements*, 203 (Cambridge, Mass., 1975), and in the various agreements reprinted in M. Al Otaiba, *The Petroleum Concession Agreements of the United Arab Emirates* (London, 1982). The awards listed in note 193, *infra*, are also illustrative, though often they raised problems by their draftsmanship.

193. *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, 1951, 18 *Int'l L. Rep.*, 144 (1953); *Sapphire Int'l Petroleum Ltd. v. National Iranian Oil Co.*, 1963, 35 *Int'l L. Rep.*, 136 (1967); *Saudi Arabia v. Arabian American Oil Co.*, 1958, 27 *Int'l L. Rep.*, 117 (1963); *Kuwait and the American Independent Oil Co. (AMINOIL)*, 1982, 21 *Int'l Legal Materials*, 976 (1982). Three arbitrations arose from the cancellation of oil concession agreements by Libya: *Texas Overseas Petroleum Co. v. Libyan Arab Republic*, 1977, 17 *Int'l Leg. Mat.*, 1 (1978); *BP Exploration Co. v. Libyan Arab Republic*, 1974, 53 *Int'l L. Rep.*, 297 (1979); *Libyan American Oil Co. v. Libyan Arab Republic*, 1977, 20 *Int'l Leg. Mat.*, 1 (1981). See, generally, R. von Mehren and P. Kourides, "International Arbitrations Between States and Foreign Private Parties: the Libyan Nationalization Cases", 75 *Am. J. Int'l L.*, 476 (1981).

In some cases the arrangements are strictly *ad hoc*. The dispute settlement provisions of the contract set forth an autonomous mechanism for taking disputes to arbitration, deciding who the arbitrators are to be and defining what procedural rules are to govern the decisional process¹⁹⁴. There is a wide variety in these arrangements on all of these points; some aspects are modelled after State-to-State arbitration and others after private commercial arrangements. States do seem to feel there is an element of added dignity in following a State-to-State model.

An attempt to regularize and popularize such arrangements was sponsored by the World Bank in the form of the International Centre for the Settlement of Investment Disputes¹⁹⁵. By acceding to the Convention creating the Centre and then referring to it in an arrangement with the foreign investor, a State can offer an assurance that disputes can be sent to an impartial and experienced panel of outsiders under regular and predictable procedures. There have been as of 1987 a total of 21 proceedings filed with the ICSID of which a total of 7 have gone to a final award stage¹⁹⁶. In two cases a special review panel has set aside awards of the primary board of arbitrators¹⁹⁷. One does observe that decisions tend to go against the host State in a very high proportion of the cases and that the panels typically consist of international lawyers whose training and experience tends to make them inattentive to the concerns of developing countries. The Centre also offers mediation services although these have been drawn upon only on two occasions¹⁹⁸.

Issues between host States and foreign concessionaires can also come in an indirect way before arbitrators in the concessionaire's home State. The United States, like most other capital-exporting

194. On drafting *ad hoc* clauses see M. Dubisson, "La négociation d'une clause de règlement des litiges", 7 *Droit et pratique comm. int'l*, 77 (1981).

195. The treaty creating the Center is found at 575 *UNTS*, 159. Official data concerning it is published in *News from ICSID* and in a recently established *ICSID Review*. For an earlier review see A. Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", 136 *Collected Courses*, 331 (1972).

196. 4 *News from ICSID*, No. 1, pp. 6-7 (Winter, 1987).

197. The texts of the opinions appear as follows: *Amco Asia Corp. and Indonesia*, 25 *Int'l Legal Materials*, 1439 (1986); *Klockner and Republique du Camerun*, 1 *ICSID Review*, 89 (1986). For comments see E. Gaillard, "Chronique des sentences arbitrales", [1987] *J. du droit int'l*, 135; M. Feldman, "The Annulment Proceedings and the Finality of ICSID Arbitral Awards", 2 *ICSID Rev.*, 85 (1987).

198. 4 *News from ICSID*, No. 1, p. 6.

States maintains a programme for insuring its nationals' investments in approved countries¹⁹⁹. If the investor makes a claim against the insuring entity (the Overseas Private Investment Corporation) and the OPIC rejects the claim, the matter is referred to arbitration²⁰⁰. Technically the issues before such arbitrators are all matters of contract law, depending on the special formulation in the insurance contract governed by United States law. In a broader sense, however, the arbitrators have had to look to international law for guidance as to the meaning of provisions designed to parallel that international disposition. Several opinions have had to decide such matters as "what is an expropriation" or what is a "repudiation of a contract"²⁰¹.

Thus private party/national government dispute resolution has become a specialized but important part of the overall field of international dispute resolution. States are always reluctant to consent to such treatment but from time to time most of them are willing to consent if it is the price for profitable investment or trade relationships. Special talents on the part of the arbitrators are required if these delicate adjudications are not to become explosive, but the record indicates that in the great majority of cases national governments have bowed to adverse determinations by these panels. Thus they make a distinct contribution to a sense of legal security that in turn makes easier the flow of international investment and other economic activity.

199. For a survey of investment guarantee programmes, see T. Meron, *Investment Insurance in International Law* (Dobbs Ferry, N.Y., 1976).

200. Arbitration of disputes with OPIC is authorized by 22 U.S. Code, § 2197 (j).

201. V. Koven, "Expropriation and the 'Jurisprudence' of OPIC", 22 *Harv. Int'l L.J.*, 269 (1981).

CHAPTER VII

CONCLUSION

One can recapitulate the preceding discussion of dispute resolution from two different, but overlapping perspectives. One is that of the private party making decisions in the transnational business environment. The other is that of States trying to establish a just and efficient order in that environment.

The private perspective is most clearly perceived as a sequence of choices to be faced by the business managers and their counsel. At the first stage they must decide whether to engage in the enterprise or not; in this decision their estimate of the likelihood of a dispute with their counterpart arising and of the resulting costs may play a significant role. Once past this point to an affirmative decision, they confront a second issue — should they include a dispute resolution provision in their agreement? To decide this question they need to understand what remedies they would have in the courts in the absence of such a clause. They must also evaluate the possibility that the other party will be upset by their insistence on having such a provision. Subsidiarily, they must make up their mind about the details of the clause. They now confront a veritable market with different arbitral institutions hawking their wares²⁰². Where, by whom and under what rules is the dispute to be resolved? Do they want a written award or not?²⁰³ Do they want mediation or an *amiable compositeur*? Finally, there are decisions to be made when the dispute does arise. To a large extent these are predeter-

202. A. Remiro Brontons, "La Reconnaissance et l'exécution des Sentences Arbitrales Etrangères", 184 *Recueil des cours*, 170, 179-181 (1984), finds this competition distasteful. An American economic analysis of law is less surprised.

203. Contrary to the American Arbitration Association position reflected in note 47, *supra*, some contractors may want written opinions. Interestingly the American practice in arbitration under agreements between business managements and unions does ordinarily require written opinions. These are collected by Commerce Clearing House in its *Labor Arbitration Reports*. See generally F. Elkouri and E. Elkouri, *How Arbitration Works* (Washington, 4th ed., 1985). This series, now at two volumes a year, contains vastly more substantive law than the arbitral awards that emerge in print in the *Journal du droit international*, the *Yearbook of Commercial Arbitration* and Appendix IV to 2 W. Craig, W. Park and J. Paulsson, note 152, *supra*.

mined—if there has been a prior decision to include a dispute resolution clause. If it is valid, the procedures set forth in it are exclusive and the choice is one between following them or doing nothing. If there has been no such provision the field of choice is wider, offering various judicial solutions as well as the possibility of negotiating an *ex post* arbitration clause. All of these choices demand knowledge, good judgment and lack of prejudice on the part of the deciders.

The perspective of States involves different considerations.

Ever since States have existed as such they have guarded fiercely their most elemental internal function — the making and administering of laws. This prerogative was often hard won, as by the founding rulers of the European monarchies, Edward the Law Giver or Philip Augustus. Even those who have sought to reduce the State's functions to those carried on by what is called the "nightwatchman State" have conceded that law-making, like defence, diplomacy and police protection, should not be handed over to private functionaries. Recognizing that private parties, such as guilds, churches, etc., always did some legislating and that not every dispute ever came to government adjudication, the observer would have thought that these two prerogatives were in essence safely in governmental hands. Now that position is under siege. Alternative forms of dispute resolution are being pressed as solvents for the congestion and sloth of the courts. Particularly, on the international commercial scene, national adjudication is on the defensive. Potential disputants are, in substantial numbers, opting out of the formal governmental judiciary processes²⁰⁴. The courts, far from defending their jurisdiction, welcome the relief that private alternatives bring to their heavy workloads.

I am suggesting here that this process needs to be closely monitored. Behind all the cheerful talk of party autonomy, peaceful resolution of disputes and private ordering of transactions, lurk questions and dangers. Will it be possible to maintain an international legal order if State systems do not enforce it? How will the

204. The best evidence available as to the incidence of transnational arbitration is that in I W. Craig, W. Park and J. Paulsson, note 152, *supra*, at § 1.02. It indicates that the International Chamber of Commerce averages some 240 cases per year, that the American Arbitration Association has about 120 international cases (i.e., cases with a foreign party) annually and that the London and Stockholm centres average about 50 and 10 a year respectively.

bargaining of parties be affected by their lack of knowledge of what the law means, an ignorance caused by the fact that courts are not getting chances to apply the rules for lack of jurisdiction and arbitrators are not revealing what they think the rules are? Can even businesses live comfortably with the sort of anarchy that would entail if more or less everybody resorts to private, extra-judicial means of settlement? Will the raw economic power that goes with superior market positions and longer purses reign on the international front unhampered by governmental attempts to countervail it?²⁰⁵

The challenge to national legal systems, then, is two-fold. First, to what extent can they, and should they, drive back the forces that are arrayed in the name of party autonomy and alternative dispute resolution? Should they follow the lead of *Mitsubishi v. Soler*²⁰⁶ and allow a large measure of enforcement of the most critical national policies, including those aimed at controlling private economic power, to be assigned to private parties' agencies? Or should they widen the scope of non-arbitrable subject-matter, as the New York Convention permits? Should they assert supervisory jurisdiction over arbitrators, examining their awards for major errors and violations of public policy? This would entail insisting that arbitrators give reasoned judgments in support of their awards. Second, can national courts compete with these non-national bodies and make judicial settlement sufficiently attractive to draw even foreign disputants into their wake? Would such steps, as being more generous in the recognition of foreign judicial judgments, as well as the awards of arbitrators bring trade back to the courts? Can judicial procedures be made less burdensome and repellent, as perhaps by a more general resort to specialized commercial courts? Can special assurances of unbiased treatment be given to foreign litigants?²⁰⁷ National courts do have competitive advantages: they can provide their services without charge and they have judges who spend years — often lifetimes — perfecting the difficult skills of judging. They alone can compel third parties to produce evidence

205. See notes 143-146, *supra*.

206. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985), discussed at notes 141-143, *supra*.

207. From the beginning the United States Constitution in Article III has provided a so-called "diversity jurisdiction" for suits involving aliens, thus giving them access to the presumably more cosmopolitan federal courts.

and ultimately only they can enforce judgments or awards. As yet the 200-300 cases brought before international arbitration institutions do not in any general way threaten the hegemony of national courts even in this field. Thus the present relationship may be optimal — courts decide the bulk of the cases while private parties settle disputes or arbitrators dispose of them with reference to that law. Finally, one wonders about the possibilities of an intermediate institution, State supported and regulated, but international in character, that would handle transnational commercial disputes in much the same way as the ICSID handles investment controversies²⁰⁸.

208. See the suggestion in H. Smit, "The Future of International Commercial Arbitration: a Single Transnational Institution?", 25 *Columbia J. Transnational L.*, 9 (1986).

BIBLIOGRAPHY

- Auby, J. and R. Drago, *Traité de Contentieux Administratifs* (Paris, 2nd ed., 1984).
- Audit, B., "Le Tribunal des Différends Irano-Américains (1981-1984)", [1985] *J. du droit int'l*, 791.
- Barton, J., "Behind the Legal Explosion", 27 *Stanford L. Rev.*, 567 (1975).
- Batiffol, H. and P. Lagarde, *Droit international privé* (Paris, 7th ed., 1981).
- Baumbach, A., W. Lauterbach, J. Albers and P. Hartmann, *Zivilprozessordnung* (Munich, 43rd ed., 1985).
- Berman, H., "Excuse for Nonperformance in the Light of Contract Provisions in International Trade", 63 *Columbia L. Rev.*, 1413 (1963).
- Branson, D. and W. M. Tupman, "Selecting an Arbitral Forum: a Guide to Cost-Effective International Arbitration", 24 *Virginia J. of Int'l L.*, 917 (1984).
- Broches, A., "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", 136 *Collected Courses*, 331 (1972).
- Burkard, P., "Attorney-Client Privilege in the EEC: the Perspective of Multi-national Corporate Counsel", 20 *Int'l Lawyer*, 677 (Spring, 1986).
- Capatina, O., "L'entraide judiciaire internationale en matière civile et commerciale", 179 *Collected Courses*, 305 (1983).
- Carbonneau, T., "Mitsubishi: the Folly of Quixotic Internationalism", 2 *Arbitration Int'l*, 116 (1986).
- , "Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions", 23 *Columbia J. Transnational L.*, 579 (1985). "Etude Historique et comparée de l'arbitrage. Vers un droit matériel de l'arbitrage commercial international fondé sur la motivation des sentences", 36 *Rev. int'l de droit comparé*, 727 (1984).
- Caves, R., *Multinational Enterprise and Economic Analysis* (Cambridge, England, 1982).
- Craig, W., W. Park and J. Paulsson, *International Chamber of Commerce Arbitration* (New York-London-Rome, 1986).
- Dalhuisen, J., *Dalhuisen on International Insolvency and Bankruptcy* (New York, 1980).
- Dashwood, A., R. Hacon and R. White, *A Guide to the Civil Jurisdiction and Judgments Convention* (Deventer-London-Boston, 1987).
- David, R., *Arbitration in International Trade* (Kluwer, 1985). French version: *L'Arbitrage dans le commerce international* (1981).
- , "The Use of Tripartite Boards in Labor, Commercial and International Arbitration", 68 *Harvard L. Rev.*, 293 (1954).
- Delaume, G., "State Contracts and Transnational Arbitration", 75 *Am. J. Int'l L.*, 784 (1981).
- Dubisson, M., "La négociation d'une clause de règlement des litiges", 7 *Droit et pratique comm. int'l*, 77 (1981).
- Eckstrom, J., *Licensing in Foreign and Domestic Operations* (New York, 1986).
- Edwards, H., "Alternative Dispute Resolution: Panacea or Anathema?", 99 *Harvard L. Rev.*, 668 (1986).
- Elkouri, F. and E. Elkoun, *How Arbitration Works* (Washington, 4th ed., 1985).
- Feldman, M., "Amending the Foreign Sovereign Immunities Act: the ABA Position", 20 *Int'l Lawyer*, 1289 (1986).
- , "Ted L. Stein on the Iran-U.S. Claims Tribunal — Scholarship Par Excellence", 61 *Wash. L. Rev.*, 997 (1986).

- , "The Annulment Proceedings and the Finality of ICSID Arbitral Awards", 2 *ICSID Rev.* (1987).
- Felstiner, W., R. Abel and A. Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .", 15 *Law and Society Rev.*, 631 (1981).
- Fisher, R. and W. Ury, *Getting to Yes* (New York, 1983).
- Fiss, O., "Against Settlement", 93 *Yale L.J.*, 1073 (1984).
- Fitzgerald, J. and R. Dickins, "Disputing in Legal and Nonlegal Context: Some Questions for Sociologists of Law", 15 *Law & Society Rev.*, 681 (1980-1981).
- Franciscakis, Ph., "Le contrôle de la compétence du juge étranger après l'arrêt 'Simitch' de la Cour de Cassation", 74 *Rev. crit. droit int'l privé*, 243, 260-262 (1985).
- Freeman, A., *Responsibility of States for the Denial of Justice* (London and New York, 1938).
- Gaillard, E., "Chronique des sentences arbitrales", [1987] *J. du droit int'l*, 135.
- Galanter, M., "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society", 31 *Univ. of Calif. (L.A.) L. Rev.*, 4 (1983).
- Germer, "Interpretation of Plurilingual Treaties: a Study of Article 33 of the Vienna Convention on the Law of Treaties", 11 *Harvard J. Int'l L.*, 400 (1970).
- Goldberg, S., E. Green and F. Sander, *Dispute Resolution* (Boston, 1985).
- Goldman, B., "La *lex mercatoria* dans les contrats et l'arbitrage internationaux: réalité et perspective, [1979] *J. du droit int'l*, 475.
- Goldscheide, P. and M. de Haas, *Arbitration and the Licensing Process* (New York, 1981).
- Graupner, R., "Sole Distribution Agreements — a Comparative View", 18 *Int'l and Comparative L.Q.*, 879 (1969).
- Hadari, Y., "The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises", [1974] *Duke L.J.*, 1.
- Haley, J., "The Myth of the Reluctant Litigant", 4 *J. of Japanese Studies*, 359 (1978).
- Hamel, J., G. Lagarde, Z. Jauffret, *Droit Commercial* (Paris, 2nd ed., 1980).
- Higgins, F., W. Brown and P. Roach, "Pitfalls in International Commercial Arbitration", 35 *Business Lawyer*, 1035 (1980).
- Holdsworth, W., *A History of English Law* (London, 7th ed., 1982).
- Honnold, J., *Uniform Law for International Sales under the 1980 United Nations Convention* (Deventer-Boston, 1982).
- James, F. and G. Hazard, *Civil Procedure* (Boston and Toronto, 3rd ed., 1985).
- Kennedy, L., "Enforcing International Commercial Arbitration Agreements and Awards Not Subject to the New York Convention", 23 *Virginia J. Int'l L.*, 75 (Fall, 1982).
- Kerameus, "A Civilian Lawyer Looks at Common Law Procedure", 47 *Louisiana L. Rev.*, 493 (1987).
- Köhler, C., "The Case Law of the European Court on the Judgments Convention — Part I", 7 *European L. Rev.*, 3 (1982); Part II, *id.*, at 103.
- Koven, V., "Expropriation and the 'Jurisprudence' of OPIC", 22 *Harv. Int'l L.J.*, 269 (1981).
- Kreis, H., "The AM & S Judgment of the European Court of Justice and its Consequences within and outside the Community", 20 *Swiss Rev. Int'l Antitrust L.*, 3 (February 1984).
- Lalive, J. F., "Contrats entre états ou entreprises étatiques et personnes privées: Développements récents, 181 *Collected Courses*, 9 (1983).
- Langbein, J., "Comparative Civil Procedure and the Style of Complex Contracts", 35 *Am. J. Comparative L.*, 381 (1987).

- , "The German Advantage in Civil Procedure", 52 *Univ. of Chicago L. Rev.*, 823 (1985).
- Lando, O., "The *Lex Mercatoria* in International Commercial Arbitration", 34 *Int'l and Comp. L.Q.*, 747 (1985).
- Latty, E., "Pseudo-Foreign Corporations", 65 *Yale L.J.*, 137 (1955).
- Lebedev, S., "International Commercial Arbitration in the Socialist Countries", 158 *Collected Courses*, 87 (1977); Note, "The Soviet Position on International Arbitration", 26 *Virginia J. Int'l L.*, 417 (1986).
- Lindert, P. and C. Kindleberger, *International Economics* (8th ed., 1986, Homewood, Ill.).
- Lionnet, K., "Arbitration and Mediation — Alternatives or Opposites", 4 *J. Int'l Arbitration*, 69 (1987).
- Loewe, R., "Remarques sur la collaboration internationale en matière de procédure civile", in *Unification and Comparative Law in Theory and Practice: Contributions in Honour of Jean-Georges Sauveplanne*, 141 (Deventer-Boston, 1984).
- Loquin, E., "Les pouvoirs des arbitres internationaux à la lumière de l'évolution récente de droit de l'arbitrage international", [1983] *J. droit int'l*, 293, 306-308.
- Lorenz, W., "Die *Lex Mercatoria*: Eine internationale Rechtsquelle?", in *Festschrift fuer Karl H. Neumeyer*, 407 (Baden/Baden, 1985).
- Lowe, A. V., "Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980", 75 *American J. of Int'l L.*, 257 (1981).
- Lowenfeld, A., "Some Reflections on Transnational Discovery", 8 *J. Comp. Business and Capital Market L.*, 419, 427 (1986).
- , "Sovereignty, Jurisdiction and Reasonableness: A Reply to A. V. Lowe", *id.*, at 629.
- , "The *Mitsubishi* case: Another View", 2 *id.*, 178 (1986).
- , "The Two Way Mirror: International Arbitration As Comparative Procedure", in *Issues of Transnational Legal Practice (Michigan Y.B. Int'l Legal Studies*, Ann Arbor, Michigan, 1985).
- , *Trade Controls for Political Ends* (2nd ed., New York, 1983).
- Makoff, J., "Attorney-Client Privilege in the European Communities After *AM & S v. Commission: the Secret is Out*", 7 *Hastings Int'l and Comparative L. Rev.*, 459 (Winter, 1984).
- Mann, F., "The Doctrine of International Jurisdiction Revisited After Twenty Years", 186 *Collected Courses*, 9, 70-72 (1984).
- Manning, B., "Hyperlexis: Our National Disease", 71 *Northwestern Univ. L. Rev.*, 767 (1977).
- McClendon, J. and R. Goodman, *International Commercial Arbitration in New York*, 86 (New York, 1986).
- de Mello, X., "Arbitrage et droit communautaire", [1982] *J. de l'arbitrage*, 349.
- Meron, T., *Investment Insurance in International Law* (Dobbs Ferry, N.Y., 1976).
- Névoit, M., "La communication des renseignements économiques à l'étranger", 70 *Rev. critique droit int'l privé*, 421 (1981).
- North, P., "The Draft U.K./U.S. Judgments Convention: a British Viewpoint", 1 *Northwestern J. Int'l L. and Business*, 219 (1979).
- Park, W., "Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration", 12 *Brooklyn J. Int'l L.*, 629 (1987).
- Perlman, L. and S. Nelson, "New Approaches to the Resolution of International Commercial Disputes", 17 *Int'l Lawyer*, 215 (1983).
- Puelinckx, A., "Frustration, Hardship, Force Majeure, Imprevison, Wegfall der Gerschaeftsgrundlage, Unmoeglichkeit, Changed Circumstances", 3 *J. Int'l Arbitration* (No. 2), 47 (1986).
- Ramsayer, J., "Lawyers, Foreign Lawyers and Lawyer-Substitutes: the Market for Regulation in Japan", 27 *Harvard Int'l L.J.*, 499 (1986).

- Reese, W., "The Status in This Country of Judgments Rendered Abroad", 50 *Columbia L. Rev.*, 783 (1950).
- Restatement, Third, Foreign Relations Law (American Law Institute, 1987) (previous drafts were captioned "Restatement (Revised)").
- Ristau, B., *International Judicial Assistance (Civil and Commercial)* (Washington, 1984, with supplements).
- Robert, J., "Une date dans l'extension de l'arbitrage international: L'arrêt Mitsubishi c/Soler", [1986] *Rev. de l'arbitrage*, 173.
- Saltoun, A. and B. Spudis, "International Distribution and Sales Agency Agreements", 39 *Business Lawyer*, 883 (1983).
- Sander, F., "Varieties of Dispute Processing", 70 *Federal Rules Decisions*, 111 (1976).
- Schmitthoff, C. M., *Schmitthoff's Export Trade* (London, 8th ed., 1986).
- Shavell, S., "Suit, Settlement, and Trial: a Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs", 11 *J. Legal Studies*, 55 (1982).
- Shea, *The Calvo Clause* (Minneapolis, Minn., 1955).
- Singer, M., "The Act of State Doctrine of the United Kingdom: an Analysis with Comparisons to United States Practice", 75 *Am. J. Int'l L.*, 283 (1981).
- , "Abandoning Restrictive Sovereign Immunity: an Analysis in Terms of Jurisdiction to Prescribe", 26 *Harv. Int'l L.J.*, 1 (1985).
- Smit, H., "The Future of International Commercial Arbitration: a Single Transnational Institution?", 25 *Columbia J. Transnational L.*, 9 (1986).
- Smith, D. and L. Wells, *Negotiating Third World Mineral Agreements* (Cambridge, Mass., 1975).
- Stein, S. and D. Wotman, "International Commercial Arbitration in the 1980s: a Comparison of the Major Arbitral Systems and Rules", 38 *Business Lawyer*, 1685 (1983).
- Stein, T., "Jurisprudence and Jurists' Prudence: the Iranian Forum Clause Decisions of the Iran-U.S. Claims Tribunal", 78 *Am. J. Int'l L.*, 1 (1984).
- Steiner, H. and D. Vagts, *Transnational Legal Problems* (3rd ed., Mineola, N.Y., 1986).
- Stick, J., "Can Nihilism be Pragmatic", 100 *Harvard L. Rev.*, 332 (1986).
- Steadman, J., D. Schwartz and S. Jacoby, *Litigation with the Federal Government* (Philadelphia, 2nd ed., 1983).
- Street, H., *Governmental Liability: a Comparative Study* (Cambridge, England, 1953).
- Symposium, "Default by Foreign Government Debtors", 1982, *Univ. Illinois L. Rev.*, 1.
- Thieffry, P., "La compétence juridictionnelle en France et aux Etats-Unis en matière civile et commerciale: esquisse d'un rapprochement", 10 *Droit et pratique commerciale int'l*, 581 (1984).
- Thompson, R. and Y. Derains, "Cour d'Arbitrage de la Chambre de Commerce Internationale", [1974] *J. du droit int'l*, 878.
- Trubek, D., J. Grossman, W. Felstiner, H. Kritzer and A. Sarat, *Civil Litigation Research Project: Final Report: Civil Litigation as the Investment of Lawyer Time*, 5-23 (Madison, Wisc., 1983) (of the cases in ten courts studied by the Civil Litigation Research Project, only 9 per cent went to trial).
- Upham, F., *Law and Social Change in Postwar Japan* (Cambridge, Mass. and London, 1987).
- Vagts, D., "Coercion and Foreign Investment Rearrangements", 72 *Am. J. Int'l L.*, 17 (1978).
- , "Foreign Investment Risk Reconsidered - The View from the 1980's", 2 *ICSID Rev.*, 1 (1987).
- , "The Multinational Enterprise: a New Challenge for Transnational Law", 83 *Harvard L. Rev.* (1970).
- , *Transnational Business Problems* (1986).

- van den Berg, A. J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Boston, 1981).
- van Hecke, G., "A Civilian Looks at the Common-Law Lawyers", in *International Law and International Contracts: Choice of Law and Language* (New York, 1962).
- Vernon, R. and L. Wells, *Manager in the International Economy* (Englewood Cliffs, N.J.).
- von Dryander, "Jurisdiction in Civil and Commercial Matters under the German Code of Civil Procedure", 16 *Int'l Lawyer*, 671 (Fall, 1982).
- von Mehren, A., "Adjudicatory Jurisdiction: General Theories Compared and Evaluated", 63 *Boston Univ. L. Rev.*, 279 (1983).
- , "Recognition and Enforcement of Foreign Judgments - General Theory and the Role of Jurisdictional Requirements", 167 *Collected Courses*, 9 (1980).
- von Mehren, A. and D. Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis", 79 *Harvard L. Rev.*, 1121 (1966).
- , "Recognition of Foreign Adjudications: A Survey and a Suggested Approach", 81 *Harvard L. Rev.*, 1601 (1968).
- von Mehren, R., "From *Vynior's* Case to Mitsubishi: the Future of Arbitration and Public Law", 12 *Brooklyn J. Int'l L.*, 583 (1986).
- von Mehren and Kourides, "International Arbitration Between States and Foreign Private Parties: the Libyan Nationalization Cases", 75 *Am. J. Int'l L.*, 476 (1981).
- Weintraub, R., *Commentary on the Conflicts of Laws* (Mineola, N.Y., 3rd ed., 1986).
- Wood, P., *Law and Practice of International Finance* (London, 1980).