

AJIL

American Journal of International Law

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The Private Law Critique of International Investment Law *Julian Arato* 1

This Article argues that investment treaties subtly constrain how nations organize their internal systems of private law, including laws of property, contracts, corporations, and intellectual property. Problematically, the treaties do so on a one-size-fits-all basis, disregarding the wide variation in values reflected in these domestic legal institutions. Investor-state dispute settlement exacerbates this tension, further distorting national private law arrangements. This hidden aspect of the system produces inefficiency, unfairness, and distributional inequities that have eluded the regime's critics and apologists alike.

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Scholars have argued that Senate-approved treaties are becoming increasingly irrelevant in the United States, because their role can be fulfilled by their close but less politically costly cousin, the congressional-executive agreement. This study demonstrates that treaties are more durable than congressional-executive agreements, supporting the view that there are qualitative differences between the two instruments. Abandoning the treaty may therefore lead to unintended consequences by decreasing the tools that the executive has available to design optimal agreements.

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