***Van Harten, Gus*: The Trouble with Foreign Investment Protection.** Oxford: Oxford University Press, 2020. ISBN 978-0-19-886621-3. 224 pp. $ 39.95

Introduction

The regime of international investment law has no fiercer critic than Gus Van Harten. Since the publication of the monograph based on his doctoral dissertation, *Investment Treaty Arbitration and Public Law*,[1] he has consistently advocated for radical reform or a complete destruction of the regime.[2] This advocacy has been documented through an impressive publication record. This monograph is the latest addition to that record.

As he notes in the preface, this might be his last monograph, meaning that it might be the last roar of the leader of the anti-Investor State Dispute Settlement (ISDS) pride. Moreover, he recognises the context in which it has been published. This monograph has been written with one eye towards influencing the ISDS reform process that is being conducted by the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.[3]

Overview of Contents

As the title of 'Fortifying Inequality' suggests, chapter 1 is concerned with introducing his core narrative, that is that the regime of international investment law is an element of the story of global inequality.[4] After outlining some of the defining features of the regime, he turns to the question: in light of its link to global inequality, is there any justification for the regime? The usual justifications are covered here. These justifications include, one, the idea that if a state buys into the regime, then it will have better chances to attract foreign investment to its shores, two, that investors deserve adequate protections for their sunk costs, three, that foreign investors cannot expect fair treatment before domestic courts, meaning that they should have access to international justice, and, four, that the regime promotes the rule of law in states that have bought into it. None of these justifications convince him, although he makes a minor concession to the justification that foreign investors deserve some form of protection from ill-treatment by states towards their investments. He sub-

1 Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press 2007).

2 A theme which is again apparent in this monograph: 'Yet one also finds a simple way to change the law and help countries confront pressing concerns of human welfare and survival by abandoning or completely revamping the treaties by which ISDS was created', see Gus Van Harten, *The Trouble with Foreign Investment Protection* (Oxford: Oxford University Press 2020), 2.

3 Although, at one point, he laments how his work is not given the kind of access to delegations that he would like, see Van Harten (n. 2), 140.

4 Van Harten (n. 2), 3.

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mits, however, that the level of protection that investors currently enjoy amounts to 'over-protection'.[5]

These analyses create a puzzle. If a link can be drawn between the regime of international investment law and global inequality, but there are no convincing justifications for the regime, then how do we account for its rise? One answer is the 'ISDS industry'.[6] In summary, the author's argument is that a powerful legal industry, in concert with deep-pocketed investor claimants, went about quietly and effectively building the legal infrastructure for the regime. The key steps in the building processes are covered in the later chapters.

In chapter 2, he looks at the raw materials that these builders had to build with: the investment treaties. He starts with a history of investment treaties. He notes that most of the earlier treaties were concluded between European states and developing states, particularly between colonial powers and their former colonies. What is most interesting about this historical overview is that it links the conclusion of the first investment treaty with a clause providing for ISDS with 'post-colonial violence'.[7] This was the 1969 Indonesia-Netherlands Bilateral Investment Treaties (BIT). The relevant link that the treaty has to post-colonial violence is that it was signed in the aftermath of a takeover by General Suharto. After conceding that this BIT is the exception, Van Harten goes on to reinforce his point that the early history of investment treaties is linked with the process of decolonisation. The regime was apparently established to protect colonial-era assets from maltreatment by former colonies after they became independent. He then looks at the procedural framework through which investment treaties are enforced,[8] before turning his attention to the 'Great Expansion'.[9] This is the story of the explosion of investment treaties in the 1990s, a process which was brought on by the triumph of neoliberalism. He writes that the result was a patchwork of investment treaties that protected 'assets of ultra wealthy' in the developing world.[10]

Chapter 3 begins to tell the story of how a 'powerful legal industry' went about building the jurisprudence that investors invoke against states when making their claims. He does this by pointing to key jurisprudential moments, such as the case of *AAPL v. Sri Lanka*.[11] What made this case a key jurisprudential moment is that it developed the theory of 'general consent'.[12]

5 Van Harten (n. 2), 9.
6 Van Harten (n. 2), 11.
7 Van Harten (n. 2), 15.
8 Van Harten (n. 2), 21.
9 Van Harten (n. 2), 28.
10 Van Harten (n. 2), 33.
11 Van Harten (n. 2), 35.
12 Somewhat more provocatively, Van Harten refers to the theory of 'general consent' as the theory of 'asymmetrical consent' at various points.

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This is the theory that in clauses providing for ISDS in investment treaties, states make unilateral offers of arbitration to investors (who meet the definition of 'investor' under the applicable investment treaty) in general.[13] Van Harten attacks this theory on doctrinal grounds. After noting how some 'legal wizardry' managed to overcome these doctrine-based objections to the theory of general consent, he comes to a recurring theme throughout the monograph: the jurisprudence created by this case and other cases helped create an ISDS industry from which many people benefited. Other key jurisprudential moments in this story came in *Saar Papier v. Poland* (where the arbitral tribunal decided that the investor did not need to exhaust local remedies),[14] *American Manufacturing v. Zaire* (another case endorsing theory of general consent),[15] *Fedax v. Venezuela* (extension of definition of 'investment' to sovereign bonds),[16] and *Ethyl v. Canada* (investor's complaint concerned parliament-enacted law).[17]

Chapter 4 makes a substantive turn. Van Harten sets the context by explaining that investment treaties are asymmetrical – they contain obligations for states, but not for investors. He then delves into the content of these obligations. He identifies the jurisprudence-shaping cases on them. All of these cases created 'pro-investor' interpretations. He starts with *Metalclad v. Mexico*. After criticising the arbitral tribunal for not holding the investor to account for failing to obtain a permit that it needed, he then examines the arbitral tribunal's interpretation of 'expropriation' and 'fair and equitable treatment'. He concludes that:

> 'Metalclad set the stage for a long line of ISDS rulings – recently called "a stunning example of expansive arbitral lawmaking" by Stone Sweet and Grisel – which have exploded fair and equitable treatment into a series of flexible and compensable entitlements from the state.'[18]

This chapter then pivots back to procedural matters, particularly, one, the definition of 'nationality' adopted by arbitral tribunals to give investor status to certain investors, two, the lack of any requirement to exhaust local remedies, and, three, the system for enforcing awards of compensation. This last point provides a convenient lead-in to chapter 5. It notes that these compensation awards are ultimately funded by taxpayers. This means that investment

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[13] A theory which is most notably elaborated on by Paulsson, see Jan Paulsson, 'Arbitration Without Privity', ICSID Rev 10 (1995), 232-257.

[14] Van Harten (n. 1), 40.

[15] Van Harten (n. 1), 43.

[16] Van Harten (n. 1), 47.

[17] Van Harten (n. 1), 51.

[18] Van Harten (n. 1), 64.

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treaties puts states in a 'fiscal prison made by judges'.[19] Why were judges so willing to put states in this fiscal prison? Van Harten has a theory:

> 'ISDS arbitrators, lawyers, and arbitration houses all do business only if more claims come […] The more narrowly the treaties are applied (to the general benefit of countries), the less it makes sense for investors to fund ISDS litigation. Does this temptation affect the lawyers or arbitrators in fact? No one can know, except the potentially tempted individual, but the fact that it is reasonably possible creates a sound basis to doubt the legitimacy of the whole system.'[20]

After detailing this theory and concluding that many in the ISDS industry are not independent, he turns to how courts have limited opportunities to supervise the players. A particular focus here is on the confidential nature of some investment-treaty arbitrations.

Chapter 6 focuses on the topic of 'regulatory chill' and explains the theory of how investment treaties can induce regulatory chill. He catalogues a number of instances: *Ethyl v. Canada*,[21] *various mining companies v. Indonesia*,[22] *Sanitas v. Colombia*,[23] *Vattenfall v. Germany* (I),[24] *Philip Morris v. various states*,[25] and *Gabriel Resources v. Romania*.[26] The final part of the chapter is dedicated to explaining how some governments have instituted new procedures for identifying how new governmental measures might lead them to breach investment treaties.

Chapter 7 is the concluding chapter. After succinctly summarising his work from the prior chapters, Van Harten turns to press home his core narrative, that the regime of international investment law is an element in the story of global inequality and looks towards the future by asking: could the regime be changed for the better? He is sceptical. He sees that there are two options out of the regime. One involves reform where a new adjudicative institution for investor-state disputes would be created. This institution should not only hear complaints about states' mistreatment of investors' investment, but also investor misconduct. But it is apparent that he prefers the second option: states should withdraw from the regime by terminating their investment treaties. He concludes by warning that if neither of these two options is pursued, then 'a predictable outcome of maintaining ISDS may be the collapse of society'.[27]

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19 Van Harten (n. 1), 83.
20 Van Harten (n. 1), 91.
21 Van Harten (n. 1), 105.
22 Van Harten (n. 1), 107.
23 Van Harten (n. 1), 110.
24 Van Harten (n. 1), 112.
25 Van Harten (n. 1), 116.
26 Van Harten (n. 1), 120.
27 Van Harten (n. 1), 145.

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Comments and Critiques

This warning is an exaggeration. But there are many people who agree with it and, for them, this monograph will strengthen their convictions about ISDS. For those who are camped in the pro-ISDS group, they will read this monograph and probably dispute all of the conclusions that it comes to. Is this monograph a bashing-up exercise on ISDS? Fundamentally, it is, which is interesting because Van Harten criticises academics, who he identifies in the pro-ISDS camp, for using their academic positions to indulge in some ISDS politicking.[28]

But, in his defence, this monograph is not a crude critique of ISDS. Van Harten does engage with the doctrine of international investment law, although I have to disagree with some of his conceptions of it. A case in point is the standard on fair and equitable treatment, particularly that strand of this standard on legitimate expectations. Van Harten holds that the doctrinal core of the legitimate-expectations strand is that it requires 'states to meet an investor's "legitimate expectations"'.[29] This statement, at best, oversimplifies or, at worst, misrepresents the doctrine. It indicates that investors generate their own expectations of the way that states should treat their investments and impose their will on states with the help of ISDS. The truth is that states rather have to act consistent with representations that *they make* regarding their future treatment of investors' investments[30] – something quite different from the idea that an investor can simply devise its own expectations. Additionally, an act that is merely inconsistent with a state-created legitimate expectation will not give rise to international responsibility. There must be more. The act of inconsistency must be either, one, arbitrary or discriminatory in nature or, two, amount to a 'total alteration' of the regulatory regime with reference to how it previously looked.[31]

Another feature of this monograph is its focus on identities in the 'ISDS industry'. As an example, consider the introduction for Federico Orrego Vicuña:

> 'Importantly, Fedax is the first case in which we encounter the leading (Chilean) ISDS hawk Federico Orrego Vicuña as the presiding arbitrator. One might ask, how could this individual, who was a former high-level official in the Augusto Pinochet dictatorship, come to have the power to judge Venezuela as an international arbitrator?'[32]

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[28] See, for example, Van Harten (n. 1), 140.

[29] Van Harten (n. 1), 65.

[30] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd ed., Oxford: Oxford University Press 2017), 157 (para. 7).

[31] McLachlan, Shore and Weiniger (n. 30), 165 (para. 7).

[32] Teerawat Wongkaew, *Protection of Legitimate Expectations in Investment Treaty Arbitration* (Oxford: Oxford University Press 2019), 50.

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Considering the power that they wield, studying the personalities of the regime of international investment law is very worthwhile, but some of Van Harten's appraisals of them are unsavoury. For the record, Orrego Vicuña served as Chile's ambassador to the United Kingdom between 1983 to 1985.[33] He was a very esteemed scholar of international law, a fact that does not find its way into the book. Linking him to Augusto Pinochet (read: human-rights abuser) is unfair and misleading. The same comment can also be applied to the introduction of Stephen Schwebel.[34] Schwebel is introduced in the book as an investor-friendly arbitrator who, since the 1950 s, has sided with corporate interests against states. Although this omission was later corrected in an appendix,[35] the fact that Schwebel served as a judge on the International Court of Justice (including stints as its vice-president and president) for two decades was somehow overlooked in this one-page biography.

Of course, this monograph does have its merits. One merit is that it does not make the reader battle through the trenches. It is a genuine page-turner that keeps the reader engaged. Additionally, and importantly, the reader does not have to be specialised in international investment law to understand its contents.

The highlight of the book is the critiques of some of the foundational jurisprudence that arbitrators laid during the formative stages of the development of international investment law. Drawing from his deep reservoir of knowledge on the case law, Van Harten puts forward some credible alternatives that the arbitrators could have landed on. The critique of *American Manufacturing v. Zaire* offers an example. Van Harten makes a case that, under the applicable investment treaty for this case,[36] the investor and the state had to specifically agree to the arbitration of their dispute; in other words, the states to the applicable investment treaty did not generally consent to arbitration with investors. The relevant treaty text is important and it is extracted in full below:

> 'In the event of an investment dispute between a Party and [an investor] […] the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation. The Parties to the dispute may, upon the initiative of either of them and as a part of their consultation and negotiation agree to rely upon non-binding, third party procedures, such as the factfinding facility available under the rules of the Additional Facility. If the dispute cannot be resolved through consul-

33 Wongkaew (n. 32), 155.
34 Wongkaew (n. 32), 20-21.
35 Wongkaew (n. 32), 158.
36 Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment of 3 August 2014 (US-Zaire BIT).

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tation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which the Parties to the dispute *may have previously agreed*.'[37]

Van Harten asserts that the words 'may have previously agreed' presumes that the investor and state have to specifically agree to 'dispute-settlement procedures' other than consultation and negotiation; for example, arbitration.[38] This is a defeasible interpretation. But if the last sentence of this provision is read in conjunction with the second sentence, another interpretation could be that 'dispute-settlement procedures' refers to any 'non-binding, third party procedures' that parties agree to pursue if consultation and negotiation fails. In consequence, the third sentence of this provision stipulates that if the parties agree to some other mode of dispute settlement, such as the 'fact-finding facility' under the ICSID Additional Facility Rules, then they must commit themselves to that mode of dispute settlement if their consultation and negotiation fails to yield a settlement. Attempting to complete this additional dispute settlement procedure would then be a condition to accessing arbitration, which the states give their consent to in Article VII (2)(a):

'Each Party hereby consents to submit investment disputes to the International Centre for the Settlement of Investment Disputes ("Centre") for settlement by conciliation or binding arbitration.'[39]

In light of this express commitment by the treaty parties to arbitrate investment disputes with investors, it is difficult to see how the words 'applicable dispute-settlement procedures' mentioned in the first-extracted treaty provision could exclude arbitration, as Van Harten suggests. But that is not the point. The point is that Van Harten takes the jurisprudence of international investment law seriously. Much of the monograph is dedicated to challenging its doctrinal correctness. Other critics of the regime of international investment law would do well to take the same approach.

Another highlight is Van Harten's research on 'Reconfiguring of the governing apparatus', which is found in Chapter 6. Under this heading, he details the various institutions that some states have created to manage their exposure under investment treaties. Exactly what role these institutions play in the regime of international investment law is an under-researched question. It is hoped that working from the foundations that Van Harten lays in this monograph, which are particularly insightful, other scholars will be inspired

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37 US-Zaire BIT (n. 36), Art. VII (3), (emphasis added).
38 Van Harten (n. 1), 46.
39 US-Zaire BIT (n. 36), Art. VII(2)(a).

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to continue his work on this question. That hope is grounded in a suspicion that, in the future, much of the practice of international investment law will not take place before arbitral tribunals or adjudicative bodies at the Multilateral Investment Court, but in the corridors of these institutions. If this suspicion turns out to be true, it will not be an event that Van Harten will celebrate. He sees this 'reconfiguration of the governing apparatus' as the institutionalisation of the regime of international investment law – and he is right. Of course, because Van Harten sits in the anti-ISDS camp, this development is detestable. If you sit in the same camp, this will also be your conclusion. But the chances are that there will never be a successful revolution to overthrow the regime. As the regime is most likely here to stay, it only seems reasonable to manage the risks that it gives rise to.

Conclusion

Again, this is a point at which an intervention can be made: the regime creates risks! That it does is undeniable. To justify this risk-taking, there needs to be at least one reward, which, from a state's perspective, is increased foreign-investment flows to its territory. But as Van Harten stresses, the causal relationship between a state's signing-up to the regime and increased foreign investment has not been definitely established,[40] and it probably never will be established. This, of course, does not mean that there is no causal relationship. There is a defeasible argument that there is a causal link.[41] And given the magnitude of the reward that increased foreign investment brings to host states, it can be rationally concluded that signing-up to the regime is more than worth the risk. But because of the lack of certainty regarding whether signing-up to the regime increases foreign-investment flows, people will fall back onto their ideological presuppositions to make their final determinations. This is one reason why there is such a lively ideological battle surrounds the field of international investment law. For those in the anti-ISDS camp, this monograph will become a gospel-like text for their arguments. For that reason alone, this monograph has to be an addition to any serious collection on international investment law.

Martin Jarrett, Heidelberg

40 Van Harten (n. 1), 8.

41 See generally Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' in: Karl P. Sauvant and Lisa E. Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford: Oxford University Press 2009), 225-252.

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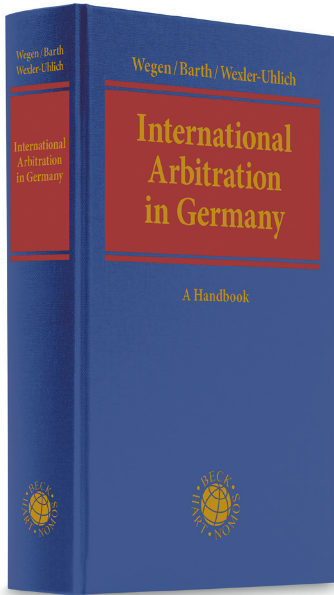

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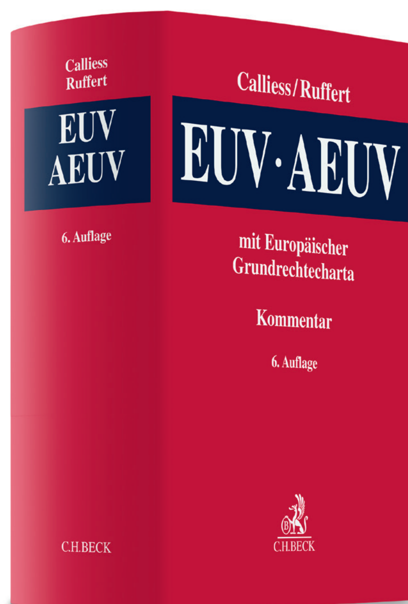

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