

Gus Van Harten, **Investment Treaty Arbitration and Public Law**, 240pp, hb £60.00, Oxford: Oxford University Press, 2007

On 20 August 2007, an arbitral tribunal constituted under a bilateral investment treaty (BIT) between Argentina and France awarded almost US\$100 million to the French multinational Vivendi Universal for Argentina's breach of the BIT. This is one of over 40 investment treaty arbitrations against Argentina that, to date, have resulted in six significant awards against the country totaling US\$775 million.

According to a recent United Nations Conference on Trade and Development report, the international investment treaty regime consists of a network of over 2500 BITs and 241 bilateral or trilateral free trade and investment agreements. By the end of 2006, foreign investors had commenced over 250 investment arbitrations against states claiming to have been unfairly treated in ways that breach investment treaty protection standards.

The continued expansion of the investment treaty regime, an explosion of investor-state arbitration claims since the late 1990s, and a growing body of investment treaty arbitral jurisprudence provide fertile ground for a critical review of this emerging regime. *Investment Treaty Arbitration and Public Law*, based on the Van Harten's PhD thesis, is the first English-language monograph to focus on the development of this specialized field of international law. Thoroughly engaging, the book provides a thoughtful and critical reflection on the use of international arbitration to resolve regulatory disputes between foreign investors and states.

The first five chapters provide a well-researched and comprehensive history of international investment law and the development of the international investment treaty regime. These chapters bring together a wealth of historical materials and commentary, providing one of the best available and current descriptions of the development of the investment treaty regime.

Van Harten begins his historical foray by outlining the long-standing conflict between capital-exporting and capital-importing states over foreign investment protection. He then addresses developments in the early 20th Century through to the exponential growth of BITs since the late 1980s, the demise of the draft Multilateral Agreement on Investment and the growth in investment treaty arbitrations, including the array of claims against Argentina arising from its economic crisis in the early 2000s.

Chapters 3, 4 and 5 elaborate on the regime's basic legal framework. The typical BIT combines high levels of investment protection through specified standards of treatment, including non-discrimination, fair and equitable treatment and the requirement for compensation for expropriation. Standards of treatment are enforced through state-to-state dispute resolution, but more importantly by investor-state arbitration proceedings, through which arbitrators are able to review virtually any governmental conduct that affects foreign investment. The resulting arbitral awards are binding on states, can be enforced under international arbitration treaties and are subject to very limited review.

In these chapters, Van Harten advances three claims. First, the advent of investment treaty arbitration is a revolutionary development in international adjudication. Second, investment treaty arbitration is a form of public law adjudication

designed to resolve regulatory disputes between private parties and sovereign states. Third, the use of investment treaty arbitration to adjudicate regulatory disputes is deeply flawed and in need of reform.

Most academics and practitioners will readily agree with Van Harten's first claim. The investment treaty regime is unique because, rather than relying solely on traditional forms of public international law state-to-state dispute resolution, investment treaties authorize a group of private parties (foreign investors) to make international claims (alleged breaches of an international treaty) directly against a state. Investment treaties are innovative in providing general and prospective state consent to the arbitration of disputes with foreign investors as a group. This differs significantly from traditional forms of international arbitration where a state agrees in a contract with an identified investor to submit specific contractual disputes to international arbitration. Furthermore, most modern investment treaties do not require the foreign investor to exhaust local remedies before commencing arbitration, meaning that the investor can have direct recourse to arbitration without submitting the dispute to domestic courts.

In his second claim, that investment treaty arbitration is a form of regulatory adjudication, Van Harten highlights that investment treaty arbitration engages the regulatory relationship between the state and individual rather than a reciprocal relationship between juridical equals (45). The disputes are regulatory because state conduct is measured against standards of treatment, which Van Harten calls standards of review in keeping with his view that investment treaty arbitration is a form of global administrative law. While arbitration is formally consensual, in investment treaties it essentially functions as a mechanism to provide a form of judicial review. Rather than a form of reciprocal consensual adjudication, investment treaty arbitration is an internationalized form of governing arrangement. In Van Harten's view, the investment regime requires that states comply with specific norms that provide for expansive conceptions of state liability when compared to domestic administrative law.

The crux appears in Van Harten's claim that this system is fundamentally flawed and conflicts with principles of judicial accountability, openness, coherence and independence. According to Van Harten, the system is unaccountable because public judges cannot review investment treaty awards for errors of law. The system, it is argued, does not satisfy standards of transparency because of an endemic lack of public access to information due to the tradition of privacy and confidentiality in international arbitration. The system lacks coherence because it allows for forum-shopping and results in inconsistent decisions. Additionally, it is argued that the inability to review arbitral awards makes it virtually impossible to create a uniform jurisprudence.

Van Harten rightly concedes that many of his concerns with respect to accountability, openness and coherence could be addressed by appropriate changes to the system of investment treaty arbitration. An appeal mechanism for errors of law could be created, as contemplated by recent investment treaties. States could provide for greater public access to the investment treaty arbitration process, as is the case in some recent American and Canadian BITs.

According to Van Harten, investment treaty arbitration is systemically flawed. Arbitrators—however impartial, independent, professional and competent they

may be as individuals—can, it is asserted, as a group be *suspected* of bias. Untenured paid participants in a system where only foreign investors can bring claims, and in which they can only be appointed by foreign investors or states, arbitrators have a financial stake in the maintenance and expansion of this system. Further, the appointment of the president of the tribunal is sometimes made by people that may well themselves aspire to appointment as arbitrators. Significantly, in Van Harten's view, the Western control and domination of the principal appointing authorities such as the International Centre for the Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce (ICC) occurs in a system where the majority of respondent states are also developing states.

Van Harten asks whether the need for investment protection warrants the privatization of the judicial function, given the known regulatory risks inherent in government decision making (94). He answers with a resounding 'no'. In Van Harten's view, only the public courts should have the authority to interpret the law binding the sovereign power (11). He thus argues for the creation of an international court with comprehensive jurisdiction over the adjudication of investor claims staffed by state-appointed judges. Security of tenure isolates the judge from the temptation to further his or her career by interpreting the law in such a way that will appease either government or industry. This lack of security of tenure of arbitrators is presented here as a critical design flaw in the investment treaty arbitration system.

Chapter 6 tackles a different issue—the outlining of four interpretative approaches to investment treaties. The first two approaches emphasize the reciprocal legal framework for investment treaty arbitration by viewing it through the lens of either commercial arbitration or public international law. In contrast, the third and fourth approaches emphasize the regulatory character of the investor-state relationship—one through the lens of human rights protection and the other through a more prudential public law framework that moderates state liability in order to preserve government discretion.

Van Harten is critical of the analogy between investment treaty arbitration and commercial arbitration because he believes it overemphasizes certain principles of private law such as party autonomy, rather than viewing the investment treaty arbitration mechanism as a public law system. It treats the state as a private party in a consensual arbitration process. At the same time Van Harten is also critical of viewing investment treaty arbitration as an inter-state bargain under public international law because, in his view, it fails to address the implications of much broader governmental liability than would occur under domestic administrative law (135). He emphasizes the application of the *in dubio mitius* principle, under which clear language is needed before a state can be found to have exposed itself to claims (133), and argues that 'it is consistent with a public international law approach to characterize investment treaty arbitration as an exceptional remedy and to reserve its use for flagrant treaty violations' (135–136).

Van Harten then turns to what he calls the 'investor rights approach', which emphasizes the legitimacy of resolving uncertainties in interpretation so as to favour the protection of investments and tribunal jurisdiction. He argues that this approach is defensible insofar as it accepts investment treaty arbitration's regulatory character; it is objectionable, however, because it treats investor protection as a rights-based trump card akin to fundamental human rights (139). Van Harten

highlights the selectivity of the legal entitlement to protection and argues that investor protection may be as much an obstacle to human rights as it is a strand in the wider human rights movement (142).

Not surprisingly, Van Harten favours the fourth interpretative approach—a public law framework that adopts a more cautious approach to state liability and that rejects investor protection as a fundamental norm. He calls for the application of common principles of domestic administrative law, including affording a margin of appreciation to discretionary policy choices, deferring to decisions that are not specifically abusive or discriminatory and adopting the *Francovich* doctrine of the European Court of Justice, which restricts state liability to ‘sufficiently serious’ violations of EC law by member states.

The book is avowedly critical of using international arbitration mechanisms to resolve investment treaty disputes. According to the author, states have moved too far and too selectively in favour of international business (120). However, this is no anti-globalist polemic. While favouring international standards and adjudication for investment disputes, Van Harten views the current system as a threat to business regulation ‘that is now foreclosed by investment treaties or from other public initiatives, the cost of which is made too high or uncertain by the threat of investor claims’ (10). With respect to the dispute resolution process, he frames the critique not as an attack on arbitration but as a defence of accountable and independent courts (153). In the last 10 pages of the book, Van Harten outlines options for reform. Given his views on the regime’s structural defects, he advocates a transition from private arbitration to public courts: namely the establishment of an international investment court with comprehensive jurisdiction over the adjudication of investor claims.

*Investment Treaty Arbitration and Public Law* will appeal to both the generalist and the specialist. For the generalist, the book provides a thorough and readable introduction to the phenomenon of investment treaty arbitration and the spectacular rise in investment treaty arbitration since 1990. For the specialist, the final two chapters on interpretative approaches and criteria for public law adjudication provide an analytically rigorous and engaging critique of the investment treaty regime.

While I am sympathetic to many of Van Harten’s concerns about the regime, my general conclusions about the impact of the regime and the need for its reform differ. Since the first investment claims under the North American Free Trade Agreement (NAFTA) investment chapter in the mid-1990s, there has been a continuing debate on the extent to which investment treaties foreclose or constrict business regulation. I remain sceptical of the claims that investment treaties have resulted in a significant regulatory chill, or that they unduly constrain regulation that promotes sustainable development. Nor do I agree that investment treaty arbitration should only apply to ‘flagrant treaty violations’. While the degree of treaty violation may well affect the assessment of damages, state responsibility arises whether the violation is minor or flagrant.

With respect to investor-state arbitration, Van Harten’s proposal for an investment treaty court merits serious attention. However, concerns regarding accountability, openness, coherence and independence may be better addressed by changes to the existing regime and the creation of a standing appellate body with jurisdiction to review awards for errors of law. This model would allow arbitration

panels to engage in the time consuming and arduous task of fact finding, while ensuring accountability, openness, coherence and independence.

*Investment Treaty Arbitration and Public Law* is a significant contribution to the literature on what is an active and developing area of international law. I heartily concur with Professor Vaughan Lowe's statement in the book's preface: 'Readers may not agree with all of his views and conclusions, but as tribunals struggle with these crucial issues they can only be helped by the clarity and insights of this robust and timely study.'

Andrew Newcombe\*

**Gábor Hamza, Wege der Entwicklung des Privatrechts in Europa. Römisch-rechtliche Grundlagen der Privatrechtsentwicklung in den deutschsprachigen Ländern und ihre Ausstrahlung auf Mittel- und Osteuropa**, 264 pp, hb €29.95, Passau: Schenk Verlag.

Professor Hamza's new *magnum opus* is unquestionably an important contribution to the harmonisation of European legal science. Its stated aim is to explore the common historical roots of the private law parts of the legal orders in Europe. Paradoxically but not incomprehensibly, its title suggests more diversities than similarities: the German word *Wege* (ways, directions) evokes the idea of several divergent departures from a common starting point in the reader's mind. It is exactly the effect to which Hamza aspired. His intention is to reiterate the old *locus communis* of legal historians: that Continental private legal orders are almost indistinguishably permeated with remnants of the ancient Roman legal system and that the recently desired *ius commune (privatum) Europaeum* is inconceivable without the conscious undertaking of this historical task. However, the drafting of this 'ghost story' (in Vinogradoff's words) is not a long line of unbroken success. Misunderstandings and misinterpretations have always clouded and distorted the development of the description of private law in Europe. As an example, one only needs to remind oneself of the concept of legal responsibility or the tenacious and unreasonable vitality of the aedilician six months term of rescission in the case of latent defect (see W. Kunkel and M. Schermaier, *Römische Rechtsgeschichte* (2001), 95).

Avoiding these punctilious details, the author offers a genealogy of Central and Eastern European legal orders. Hamza's story is simultaneously based on an intrinsically institutional, political and chronological approach. He carefully guides the reader through the chaotic political relations which are characteristic of the newly formed states of this region. His book also contains a detailed summary of what the Germans, following Leibniz, would call *äußere Rechtsgeschichte* ('external history of law'). The book is essential reading for anyone who would like to analyse, compare or simply become familiar with the almost 'exotic' legal orders referred to within it. With its comprehensive bibliography it serves as an

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