

IN DEFENSE OF THE INTERNATIONAL TREATY ARBITRATION SYSTEM

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I. INTRODUCTION

The past two decades have witnessed an explosion of bilateral and multilateral investment treaties and arbitration claims brought by individuals and private entities against states pursuant to such treaties.¹ Indeed, it is fair to characterize the investment treaty arbitration system (ITA system) as one of the most rapidly developing phenomena in international law. And, as occurs in response to every significant development in international law (or law more generally), the growth of the ITA system has been met with a chorus of scholarly criticism and calls for reform.² While such critiques can be integral to the healthy development of any new legal advancement, the sheer volume of the indictments of the structure and function of the ITA system can lead a casual observer to overlook the value of that system and the concerns in response to which the system emerged. There is thus not only the danger that valuable recommendations for improvement will be lost in the sea of overzealous indictments, but also that an ultimately beneficial system will be destroyed in a death by 1,000 paper cuts.

1. See GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 26, 30 (2007).

2. See, e.g., *id.*; Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1523 (2005).

Accordingly, it is necessary to closely scrutinize each critique of the ITA system in order to, on the one hand, belie unwarranted denunciations, and, on the other, identify those calls for improvements that are justified (even when the justified improvements are relatively modest, and yet, are mischaracterized by their proponents as vital to the defensibility or survival of the system).

This Article examines the critique of the ITA system presented by Dr. Gus Van Harten in *Investment Treaty Arbitration and Public Law*.³ Van Harten's indictment of the ITA system proceeds on three basic premises. First, insofar as governmental regulations are often the target of claims brought in investment treaty arbitrations, the ITA system is fundamentally a system of "public law adjudication."⁴ Second, any system of public law adjudication must satisfy four basic requirements: accountability, openness, coherence, and independence.⁵ Third, the structure and function of the ITA system fails to satisfy each of these four requirements.⁶ In particular, Van Harten argues that the ITA system fails to meet the standard of independence because arbitrators within the system are ultimately "merchants of adjudicative services [who] have a financial stake in furthering the system's appeal to claimants and, as a result, the system is tainted by an apprehension of bias in favour of allowing claims and awarding damages against governments."⁷ Therefore, Van Harten reasons, the ITA system is an untenable system of public law adjudication.⁸

To his credit, Van Harten does not explicitly call for the abandonment of the ITA system. Rather, he characterizes his argument as only "incorporat[ing] an edge of criticism of the system."⁹ Thus, he advocates maintaining the current system

3. VAN HARTEN, *supra* note 1.

4. *Id.*

5. *Id.* at 152.

6. *Id.* at 152–53.

7. *Id.*

8. *See id.* at 10 ("The system fails to satisfy basic standards of judging in public law . . .").

9. *Id.*

but with two fundamental alterations: (1) increased domestic scrutiny of arbitral awards issued from within the system and (2) the creation of a permanent international investment court to adjudicate ITA claims.¹⁰ Despite the fact that Van Harten characterizes his criticism of the ITA system as tempered, the conviction with which he impugns both the structure and function of the system—and the passion with which he champions his proposed changes—demonstrates that *Investment Treaty Arbitration and Public Law* is much more than an “edge of criticism.”¹¹ Rather, readers are left with the distinct impression that, ultimately, Van Harten believes that the current structure of the ITA system is indefensible, and thus, in the absence of his proposed reforms, the system should be abandoned altogether.¹²

This Article argues that while certain aspects of Van Harten’s critique of the ITA system are warranted, his conclusions, both explicit and implicit, are overdramatic. The ITA system is by no means perfect. A modest infusion of accountability, openness, coherence, and independence would be welcomed, and Van Harten’s proposed changes could provide such an infusion. But the need for such improvements is not so great that without them the system should be dismantled. Moreover, the improvements can be accomplished gradually and from within the current structure of the system. Therefore, Van Harten’s critique falls into that category of objections that warrant relatively modest improvements and, yet, are mischaracterized by their proponents as vital to the defensibility and/or survival of the system.

Part II of this Article examines the history of the ITA system and the concerns that led to its emergence and development. Part III presents Van Harten’s indictment of the ITA system, the three premises upon which his indictment relies, and the changes that he advocates to remedy the system’s supposed shortcomings. Part IV more closely scrutinizes Van Harten’s

10. *Id.* at 175, 180.

11. *Id.* at 10.

12. See, e.g., Andrew Newcombe, *Gus Van Harten’s Investment Treaty Arbitration and Public Law*, 71 MOD. L. REV. 147, 148 (2008) (book review) (describing the “crux” of Van Harten’s argument as claiming “that [the] system is fundamentally flawed”).

argument, identifies areas where Van Harten overstates his case, and contends that, even without Van Harten's proposed changes, the ITA system is not so lacking in accountability, openness, coherence, or independence as to warrant fundamentally changing the system or deserting it altogether. Finally, Part V concludes that while Van Harten's criticisms should be taken seriously by anyone seeking to push the ITA system to realize its full potential, those criticisms may be accounted for from within the current structure of the system.

II. HISTORICAL BACKGROUND AND PURPOSE OF THE ITA SYSTEM

Before one evaluates the structure and function of the ITA system, it is important to understand the background from which the system arose. Indeed, if one is not familiar with the concerns that initially motivated states to embrace the system—and thus, with the very purpose of the system—one cannot effectively assess the system or confidently offer suggestions on how to improve the system.

A. *Foreign Investment Disputes Before the ITA System*

Foreign investment has existed since “the days of the pharaohs in Egypt with investment being made by the state itself or by merchants from Egypt, Phoenicia and Greece in other countries.”¹³ And for as long as there has been foreign investment, there have been foreign investment disputes—i.e. allegations by a foreign investor that its investment has been harmed by the host state.¹⁴ Traditionally, such a complaining investor lacked standing under international law to bring a direct claim against the host state.¹⁵ Thus, such an investor had two available avenues for recourse. First, the investor could

13. R. DOAK BISHOP ET AL., *FOREIGN INVESTMENT DISPUTES* 2 (2005).

14. *See generally id.* at 2–4 (providing a brief historical overview of foreign investment disputes).

15. *Id.* at 1.

assert a claim before the domestic courts of the host state.¹⁶ Such courts, however, “were often unsympathetic to the foreign investors.”¹⁷

Second, the investor could appeal to its own government to assert a claim, on the investor’s behalf, against the host state as a matter of “diplomatic protection.”¹⁸ The assertion of diplomatic protection could take many forms. Most frequently, the investor’s state would protest the challenged conduct through the exchange of diplomatic letters.¹⁹ Alternatively, and particularly in the nineteenth century, the investor’s state would confront the host state through “gunboat diplomacy,” wherein the injured investor’s state would threaten military force against the host state.²⁰ Claims of diplomatic protection also could be presented through formal state-to-state dispute resolution proceedings, such as ad hoc arbitrations or proceedings before the International Court of Justice.²¹

Diplomatic protection, however, was not a confidence-inspiring dispute resolution mechanism for investors.²² Whether an investor’s state even acceded to a request for diplomatic protection depended on a number of factors outside the investor’s control.²³ Most importantly, such requests required that the government of the investor be willing to expend the political capital necessary to challenge the actions of the host state.²⁴ Moreover, claims for diplomatic protection could remain unresolved for many years. For example, in the early twentieth century, the Mexican government, as part of a larger agrarian reform initiative, carried out a series of measures expropriating land owned, inter alia, by investors from the United States.²⁵

16. *See id.* at 3.

17. *Id.*

18. *Id.* at 1–3.

19. *Id.* at 3.

20. *Id.* at 2–3.

21. *Id.* at 3.

22. *Id.*

23. *Id.*

24. *See id.* at 3–4 (describing the problems created through the intervention of an investor’s government).

25. ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 397 (2002).

The U.S. government asserted claims of diplomatic protection, which initially resulted in an agreement with Mexico in 1927 to establish a binational claims commission.²⁶ By 1938, however, no claims had been resolved.²⁷ Thus, the U.S. Secretary of State “began a series of diplomatic exchanges with the government of Mexico.”²⁸ Three years after these exchanges began, and more than fourteen years after the United States first invoked diplomatic protection, a settlement agreement was arrived at between the United States and Mexico.²⁹

Thus, historically, prospective foreign investors knew prior to investing abroad that if their investments were subsequently injured by host states, there would be no reliable or efficient mechanism to obtain compensation.

B. The Need for a Reliable System to Resolve Foreign Investment Disputes

In the absence of a reliable and efficient mechanism for the resolution of foreign investment disputes, the international community feared that prospective investors would be discouraged from investing abroad.³⁰ Indeed, “[p]rudent investors will not risk substantial capital in a foreign enterprise unless the . . . legal structure is sufficient to protect the investment.”³¹ And if prospective investors are discouraged from investing abroad, then foreign direct investment would not fully satisfy its perceived role as a mechanism to increase economic development in less developed nations.³² As explained by Bishop, Crawford, and Reisman:

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 401–02.

30. See BISHOP ET AL., *supra* note 13, at 8.

31. *Id.*; see also Franck, *supra* note 2, at 1525 (“Investment treaties play an increasingly prominent role in the initial decision to invest in a developing nation.”).

32. See BISHOP ET AL., *supra* note 13, at 8 (noting that the international community has recognized the importance of increasing foreign investment); Franck, *supra* note 2, at 1524 (“Foreign investment is a vital tool for economic development and global prosperity.”).

Foreign investment . . . can provide a way to jump start some economies, a short cut to higher wages, an improved infrastructure, and better schools and hospitals. Psychologically, it can provide economic role models, generate financial incentives and create hope. In short, it can be a motivational force. At a minimum, it can build, maintain and operate important parts of a country's infrastructure or introduce complex technology to a country lacking it.³³

Thus, the absence of a reliable legal structure to protect foreign investments was viewed not only as an impediment to foreign investment itself, but also to economic development and the multitude of benefits associated therewith.³⁴ To overcome this impediment, the international community established what has today become the ITA system.³⁵ Accordingly, it is fair to say that the very purpose of the ITA system is to encourage foreign investment and thereby to further economic development in host states.³⁶ Indeed, this purpose is recited in the preambulatory provisions of most bilateral investment treaties (BIT).³⁷

C. *The Creation of the ITA System*

The first BIT was executed in 1959 between the Federal Republic of Germany and Pakistan.³⁸ Shortly thereafter, in 1966, approximately twenty states ratified the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), which established the International Centre for the Settlement of Investment Disputes (ICSID).³⁹

33. BISHOP ET AL., *supra* note 13, at 7–8.

34. *See id.*

35. *See id.* at 8 (identifying the various investment treaties which, together, comprise the ITA system).

36. *See infra* Part II.D.

37. *See* LOWENFELD, *supra* note 25, at 474 (“BITs generally start with a preamble that recites the desire to promote greater economic cooperation between the parties, and to encourage the flow of private capital and create conditions conducive to such flow.”).

38. *Id.* at 473.

39. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter

For the following thirty to forty years, however, BITs and investment treaty arbitrations spread slowly. In fact, “[i]n the first 30 years of its existence, ICSID handled an average of only one case per year.”⁴⁰ Thus, as noted by Van Harten, in 1999, the United National Conference on Trade and Development could accurately report that:

There is very little known on the use that countries and investors have made of BITs: they have been invoked in a few international arbitrations, and presumably in diplomatic correspondence and investor demands. Their most significant function appears to be that of providing signals of an attitude favouring [foreign direct investment].⁴¹

Despite this slow initial proliferation, the ITA system has grown rapidly since the beginning of the twenty-first century. The ICSID Convention now has over 140 State Parties.⁴² Dozens of cases are filed each year with ICSID.⁴³ And perhaps most tellingly, “the international investment treaty regime [now] consists of a network of over 2500 BITs and 241 bilateral or trilateral free trade and investment agreements.”⁴⁴ It is this expansive network of treaties (and the claims brought by investors pursuant to such treaties) that Van Harten targets in *Investment Treaty Arbitration and Public Law*.

D. The Benefits of the ITA System

As noted above, the ITA system was created because the international community believed that the absence of a reliable and efficient mechanism to resolve foreign investment disputes discouraged prospective investors from investing abroad and, thus, was an impediment to economic development in less

ICSID Convention]; Int’l Centre for Settlement of Inv. Disputes [ICSID], *ICSID Convention, Regulations, and Rules*, at 5, ICSID Doc. ICSID/15/Rev. 1 (Jan. 1, 2003).

40. BISHOP ET AL., *supra* note 13, at 1.

41. VAN HARTEN, *supra* note 1, at 4 n.11 (quoting United Nat’l Conference on Trade and Dev., *Trends in International Investment Agreements: An Overview*, at 47, UNCTAD/ITE/IIT/13 (1999), available at http://www.unctad.org/en/docs/iteiit13_en.pdf).

42. BISHOP ET AL., *supra* note 13, at 8.

43. *See id.* at 1.

44. Newcombe, *supra* note 12, at 147.

developed nations.⁴⁵ In this way, the creation of the ITA system was based on two fundamental premises: first, increasing the legal protections for foreign investments would increase the volume of foreign investments⁴⁶ and, second, increasing the volume of foreign investments would increase economic development.⁴⁷ Before turning to Van Harten's critique of the ITA system, it is worth considering whether these premises are sound and, thus, whether the ITA system adequately serves the purposes for which it was created.

There is an ongoing and lively debate in academic literature concerning whether increasing legal protections for foreign investments actually increases the volume of such investments.⁴⁸ Various empirical studies have been conducted in the past decade attempting to compare the proliferation of investment protection treaties to the cross-border flow of capital.⁴⁹ These studies have reached mixed results. Some have found only a "weak positive correlation" between the spread of investment treaties and increased foreign investment, while others have found a more substantial positive correlation, including at least one study that concluded that "a one standard deviation increase in the BIT variable was predicted to increase foreign direct investment inflows by 43.7 to 93.2%."⁵⁰

Despite the inconsistencies between these empirical studies, it is notable that no such study has found that the spread of investment treaties has *decreased* foreign investments.⁵¹ Indeed, it would be difficult to imagine how increasing the protection afforded a contemplated transaction would discourage the

45. See *supra* Part II.B.

46. See BISHOP ET AL., *supra* note 13, at 8 (noting that without sufficient legal structure, investors will be unwilling to risk substantial capital).

47. See *id.* at 7 (noting some benefits of increased foreign investment).

48. See, e.g., Kenneth J. Vandavelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 184 (2005) ("To the extent that the purpose of the agreements is to protect foreign investment, one is almost forced to concede their effectiveness To the extent that the purpose of the agreements is to promote investment flows, the evidence is less clear.").

49. See *id.* at 185–86 (comparing and summarizing the findings of at least five such studies).

50. *Id.*

51. See *id.*

transaction from occurring. So, at the very worst, it appears that the proliferation of the ITA system has a neutral or a marginally positive effect on the overall volume of foreign direct investment. And, of course, in light of the fact that the proliferation of the ITA system has occurred only recently, it is quite possible that it is simply too early to measure the extent of its impact on the volume of foreign investments. An investor considering a long-term investment today may not be confident that if the investment is harmed by the host state ten years from now, the ITA system will provide effective recourse.⁵² But, if the ITA system is able to sustain a track record of reliability for the next decade, we can expect that investors will begin to view the system as a long-term avenue for recourse which inspires a level of confidence beyond today's level (and certainly beyond the level of the pre-ITA system world).

Assuming that the ITA system does increase the volume of foreign investments, it remains to be considered whether increasing the volume of foreign investments increases economic development. This is a far more complicated question of macroeconomic theory that cannot be answered with empirical studies alone.⁵³ It is also a question over which economists and scholars disagree.⁵⁴ This Author is not an economist and is not otherwise qualified to opine on the effect of foreign investments on the domestic economies of less developed states. It is sufficient to say for the purposes of this Article, that, as noted above, the belief that foreign investment triggers economic development was a central tenet of the creation and spread of

52. See generally Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite* (World Bank Dev. Research Group Inv. Climate, Policy Research Working Paper No. 3121, 2003), available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/09/23/000094946_03091104060047/Rendered/PDF/multi0page.pdf (discussing the impact of bilateral investment treaties on foreign direct investment); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment in Developing Countries?*, 33 *WORLD DEV.* 1567, 1567 (2005) (arguing that BITs guarantee certain standards of legal treatment which consequently promote foreign investment).

53. See Kenneth J. Vandeveld, *The Economics of Bilateral Investment Treaties*, 41 *HARV. INT'L L.J.* 469, 471 (2000) ("The question of the effects of foreign investment on the economies of the home and host states has been generally analyzed as an issue of macroeconomic theory.")

54. See generally *id.* at 478–87 (summarizing the relevant literature).

the ITA system over the past forty to fifty years.⁵⁵ And in that time, while scholars have questioned the validity of this tenet, nobody has definitively proven it to be wrong.⁵⁶ Thus, this Article assumes—as Van Harten apparently does—that foreign investment is a catalyst to increased economic development and the benefits associated therewith.

III. VAN HARTEN'S CRITIQUE OF THE ITA SYSTEM

As noted in the Introduction, Van Harten's critique of the ITA system is based on three premises: first, the ITA system is a system of public law adjudication; second, any system of public law adjudication must satisfy the four basic requirements of accountability, openness, coherence, and independence; third, the ITA system fails to satisfy each of these four requirements, and in particular, the standard of independence. Therefore, Van Harten reasons, the ITA system is untenable. This Part reviews each of these premises and the bases upon which Van Harten indicts the current structure of the ITA system. This Part then addresses the changes to that system that Van Harten proffers to remedy the system's supposed flaws.

A. *The ITA System as a System of Public Law Adjudication*

Van Harten argues that part of the "essential character" of the ITA system is that, "unlike any other form of international arbitration[,] it is a method of public law adjudication, meaning that it is used to resolve *regulatory* disputes between individuals and the state as opposed to reciprocal disputes between private parties or between states."⁵⁷ For example, Van Harten notes, "Under bilateral investment treaties, tribunals have been established to resolve disputes involving the issuance of radio

55. See *supra* Part II.B.

56. Indra de Soysa & John R. Oneal, *Boon or Bane? Reassessing the Productivity of Foreign Direct Investment*, 64 AM. SOC. REV. 766, 766 (1999).

57. VAN HARTEN, *supra* note 1, at 4; see also *id.* at 45 ("[I]nvestment treaty arbitration engages the regulatory relationship between state and individual, rather than a reciprocal relationship between juridical equals.").

broadcasting licenses in the Ukraine, the annulment of permits for an industrial plant in Peru, and the denial of VAT refunds in the oil sector in Ecuador.”⁵⁸

The significance that Van Harten assigns to the public law character of the ITA system lies in the relationship between public law adjudication and sovereignty. As described by Van Harten, “sovereignty implies external autonomy and internal control on the part of the state.”⁵⁹ The sovereign state is “the repository of the collective authority to make governmental decisions.”⁶⁰ Thus, disputes concerning domestic governmental regulations (e.g., public law disputes) have traditionally been “presumed to fall within the exclusive domain of the state’s legal system.”⁶¹ Put otherwise, “the courts *and only the courts* should have the final authority to interpret the law that binds sovereign power and to stipulate the appropriate remedies for sovereign wrongs that lead to business loss.”⁶²

The ITA system, of course, radically changes this dynamic by empowering foreign investors to challenge a state’s regulatory measures not before the state’s domestic legal system (or any other court) but before a panel of private arbitrators.⁶³ Thus, Van Harten laments that “the system is flawed, above all because it submits the sovereign authority and budgets of states to formal control by [private] adjudicators.”⁶⁴

In order to fully understand why Van Harten believes that the assignment of public law adjudication to private arbitrators is flawed, one must first understand what Van Harten expects—and indeed, requires—of any system of public law adjudication.

58. *Id.* at 4.

59. *Id.* at 48.

60. *Id.*

61. *Id.* at 49.

62. *Id.* at 11. It is worth noting that this quote refers not only to domestic courts but also, in theory, to international courts. *Id.*

63. *See id.* at vii (“[The ITA system] uses the model of private arbitration rather than that of a tenured judiciary.”).

64. *Id.*

*B. Minimum Standards of Public Law Adjudication
and the Purported Inadequacies of the ITA System*

Van Harten argues that the “four criteria of public law adjudication [are] accountability, openness, coherence, and independence.”⁶⁵ These criteria are the benchmark against which Van Harten measures—and indicts—the ITA system. Van Harten argues that the ITA system fails to satisfy each of these standards and, thus, is an untenable system of public law adjudication.

1. Accountability

According to Van Harten, “accountability” means, in its broadest sense, “checks and restraints on judicial power, from the general approbation of the legislature or the general public to specific legal controls such as the duty to give reasons or disciplinary processes for serious misconduct by individual judges.”⁶⁶ Van Harten recognizes, however, that condemning the ITA system for failing to satisfy this broad standard would not be altogether meaningful because “virtually any form of adjudication including the courts” could be indicted on these grounds.⁶⁷ Thus, for the purpose of his critique of the ITA system, Van Harten “limit[s] the notion of accountability to the narrower point that an adjudicator can be made accountable to the public for the interpretation of a public law, as in domestic legal systems, simply by allowing for the appeal of awards to the courts in matters of legal interpretation.”⁶⁸

In measuring the ITA system against this standard, Van Harten recognizes that the system does permit some level of review of arbitral awards. When an award is rendered by an ICSID tribunal, for example, the ICSID Convention provides for an annulment procedure pursuant to which a new panel of arbitrators will be constituted to hear a challenge to the

65. *Id.* at 152; *see id.* at 5 (describing the basic hallmarks of public law adjudication as “accountability, openness, and independence”).

66. *Id.* at 153.

67. *Id.*

68. *Id.* at 154.

award.⁶⁹ Van Harten argues that this procedure, however, fails to “allow[] for the appeal of awards . . . in matters of legal interpretation” because the grounds upon which awards may be annulled are expressly limited and prohibit an annulment on the basis that the arbitrators made an error of law.⁷⁰

For non-ICSID awards, judicial review may be undertaken either in the courts of a state in which a party seeks to enforce the award or in an action to vacate the award in the courts of the state in which the award was rendered.⁷¹ In the former circumstance, Van Harten argues that most State Parties to the ICSID Convention and New York Convention on the Recognition and Enforcement of Foreign Arbitral Award (New York Convention) have enacted legislation to prevent enforcement of those awards on specifically enumerated grounds which, again, exclude “errors of law.”⁷² Similarly, in the latter circumstance, Van Harten notes that the grounds for vacating an award are governed by the domestic law of the state in which the award was rendered, but, “[i]n general, domestic courts will overturn an award only where they find a jurisdictional error, procedural impropriety, or serious violation of public policy, and . . . the courts are typically not authorized to correct errors of law”⁷³

Thus, Van Harten concludes that in the ITA system, “arbitrators autonomously review core question of public law . . . without adequate supervision by public judges.”⁷⁴ “This lack of judicial supervision renders the arbitrator’s interpretation of public law . . . unaccountable in the conventional sense.”⁷⁵

69. ICSID Convention, *supra* note 39, art. 52.

70. VAN HARTEN, *supra* note 1, at 154; ICSID Convention, *supra* note 39, art. 52(1).

71. *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. 2, 5, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. It is noteworthy that, under Articles 53 and 54 of the ICSID Convention, awards rendered by ICSID tribunals may not be challenged or reviewed by the domestic courts of any state Party to the ICSID Convention. ICSID Convention, *supra* note 39, arts. 53–54.

72. VAN HARTEN, *supra* note 1, at 154–55.

73. *Id.* at 155.

74. *Id.* at 156.

75. *Id.*

2. *Openness*

According to Van Harten, “openness” incorporates two requirements. First, “the public should have access to information about adjudicative decision making.”⁷⁶ That is, the public law adjudication process must be transparent (both the ultimate decisions and the documents upon which those decisions are based).⁷⁷ The importance of this aspect of openness is that without such transparency, public law adjudication would “be immune from public scrutiny and matters affecting the community at large could be routinely decided in secret.”⁷⁸ And public scrutiny is essential so that:

the parties and the adjudicator know[] that their views and arguments can be read and picked apart by anyone, so that they will more assuredly consider the implications of what they do or decide for their reputation and for that of the system. This knowledge is integral to the accountability and independence of judges, especially where they are deciding questions of sovereign authority and the allocation of taxpayer funds.⁷⁹

Second, the adjudicators of a public law dispute should hear the views of nonparties to the dispute (e.g. third parties who have an interest in the dispute should have the ability to present their views because the resolution of the dispute affects their rights and the public budget).⁸⁰

Van Harten appears conflicted when measuring the ITA system against these dual standards of openness. He recounts, at length, the “notable improvements [that] have been made”

76. *Id.* at 159.

77. *Id.*

78. *Id.*

79. *Id.* at 161.

80. *See id.* at 159 (noting that the United States’ practice of courts appointing *amicus curiae* “to assist in the consideration of outside interests that are affected by a dispute” has spread to other jurisdictions).

regarding public access to the system⁸¹ and he warns that “[o]ne should not overstate the level of secrecy that exists in the system at present.”⁸² As examples, he notes that:

- under the ICSID system, a wide variety of information about pending proceedings is published and, indeed, many ICSID awards are available on the internet;⁸³
- the NAFTA states have not only announced that they will “publish all documents submitted to, or issued by, NAFTA tribunals,” but have also recommended “procedures for how tribunals should respond to submissions by nonparticipating parties”;⁸⁴
- at least two ICSID tribunals have allowed written submissions by nonparties;⁸⁵ and
- recent investment treaties signed by the United States with Singapore, Morocco, Peru, and Central American countries “mandate the disclosure of documents, open the hearings to the public, and affirm the power of tribunals to allow nonparty submissions.”⁸⁶

Van Harten, however, stresses that, despite these improvements, “[c]onfidentiality is still the dominant principle” contained in the relevant arbitration rules and in most investment treaties.⁸⁷ Put otherwise, the current ITA system sets a default rule against public access and public participation. Openness is dependent upon the relevant state parties intervening on a case-by-case basis (or by amending the default rules, as in the case of NAFTA). Van Harten thus concludes that in the ITA system, “[t]he norm of public access is . . . subordinated to rules of confidentiality that are alien to public law” and that “investment treaty arbitration is alone

81. *Id.* at 160.

82. *Id.*

83. *Id.* at 160–61.

84. *Id.* at 162.

85. *Id.* at 163.

86. *Id.* at 163–64.

87. *Id.* at 164; *see also id.* at 160–61 (arguing that “investment treaties do not provide for the compulsory publication of all relevant information in investment treaty arbitration”).

among all international bodies that adjudicate regulatory disputes in its blanket suppression of essential information about the process.”⁸⁸

3. *Coherence*

Van Harten defines the standard of coherence as “the capability of an adjudicative system to resolve inconsistencies that arise from different decisions, and to ensure that the law is interpreted in a uniform and relatively predictable manner to allow those affected by the rules to plan their conduct.”⁸⁹ Van Harten argues that “[a]t the international level, the challenge of coherence confronts all treaty-based adjudication” because there is no hierarchical structure of appellate review to resolve inconsistent legal analysis.⁹⁰ Thus, he notes that while the ITA system suffers from a lack of coherence because the ITA system likewise has no appellate review system to address errors of law, this flaw is not unique to the system.⁹¹

Nevertheless, Van Harten argues that the lack of coherence is particularly troublesome in the context of a system of public law adjudication because “governmental decision making depends to a degree on the ability of legislatures and administrations to know the boundaries of sovereign power and the consequences of the unlawful use of that power.”⁹² The absence of ITA system coherence thus makes it impossible for governmental decision makers to accurately predict the consequences of their policies. Accordingly, governments, which are almost exclusively the respondents in investment treaty arbitrations, bear the “special burden” of the absence of coherence within the ITA system.⁹³

88. *Id.* at 161, 164.

89. *Id.*

90. *Id.* at 165.

91. *See id.* (“[C]oherence is a live issue in all forms of adjudication [subject to] internationalized enforcement and review.”); *supra* Part III.B.1.

92. VAN HARTEN, *supra* note 1, at 166.

93. *Id.*

4. *Independence*

For Van Harten, the “most troubling” shortcoming of the ITA system is its lack of judicial independence.⁹⁴ According to Van Harten, judges are relatively independent from “branches of the state, . . . powerful nonstate interests, [and other] inappropriate influences.”⁹⁵ Judicial independence is achieved by “a set term of office and . . . a secure income regardless of how [judges] perform in individual cases” which insulates the judge from “the temptation to further his or her career by interpreting the law in ways that will appease powerful forces in government and industry.”⁹⁶

In the ITA system, on the other hand, arbitrators lack independence because they are not tenured but instead are appointed on a case-by-case basis.⁹⁷ As a result, Van Harten argues, arbitrators depend upon two groups of people for future work: appointing authorities under investment treaties and prospective claimants.⁹⁸ With respect to the former, Van Harten argues that “arbitrators who wish to win future appointments to tribunals have an interest in safeguarding their reputation among those who select arbitrators at the designated organization.”⁹⁹ Whether the individuals with the power to select arbitrators are political appointees (such as at ICSID)¹⁰⁰ or private authorities (such as at the International Chamber of Commerce and the Stockholm Chamber of Commerce),¹⁰¹ Van Harten argues that empowering such public or private representatives to “choose directly those who will decide the legality of sovereign acts and order states to compensate private investors . . . is an affront to judicial independence.”¹⁰²

94. *Id.* at 167.

95. *Id.*

96. *Id.* at 168.

97. *Id.* at 168–69 (“[T]his method of appointment seriously undermines judicial independence by foreclosing security of tenure.”).

98. *Id.* at 169.

99. *Id.*

100. *See id.* at 169–70 (describing the ICSID appointment process).

101. *Id.* at 171.

102. *Id.*

Van Harten is even more concerned with the dependence of arbitrators upon prospective claimants. Van Harten argues that the ITA system is unique because “only investors bring the claims that trigger . . . appointments.”¹⁰³ Thus, “the size of the pool of opportunities that is open to *all* arbitrators—regardless of who appoints them—will always reflect the system’s attractiveness to international business.”¹⁰⁴ Put otherwise, “[t]he more investors see the system delivering benefits for them, the more claims will be brought, and the more contracts will be available for arbitrators.”¹⁰⁵ Accordingly, arbitrators have an incentive to “adopt a broad reading of their jurisdiction and of the standards of review, thus expanding the system’s compensatory promise for investors.”¹⁰⁶

C. Van Harten’s Proposals To Reform the ITA System to Provide Accountability, Openness, Coherence, and Independence

While Van Harten disclaims an intention to offer a “comprehensive proposal for reform of the [ITA] system,” he does offer “a framework for reform of the system.”¹⁰⁷ And his framework consists of two possible options (which “are not mutually exclusive”).¹⁰⁸ First, “domestic courts [should] assert greater control over investment treaty arbitration.”¹⁰⁹ In particular, Van Harten recommends that domestic courts, either on their own or through amendments to relevant domestic statutes, should be empowered to overrule errors of law, in addition to their current powers to correct errors of jurisdiction and procedure.¹¹⁰ While Van Harten recognizes that such a modification to the current structure of the ITA system will not “address all of the system’s flaws,” he believes that it constitutes

103. *Id.* at 169.

104. *Id.* at 172.

105. *Id.*

106. *Id.* at 174–75 (footnote omitted).

107. *Id.* at 175.

108. *Id.*

109. *Id.*

110. *Id.*

“a minimum that is required to ensure independence and accountability in the interpretation of public law and the award of public funds to private business.”¹¹¹

Second, Van Harten proposes that states “establish an international court with comprehensive jurisdiction over the adjudication of investor claims.”¹¹² While Van Harten goes into some detail as to how such a court would be established and organized, this Article only presents the broad outlines.¹¹³ The international court would be established through a multilateral code and would have jurisdiction over all claims filed pursuant to investment treaties between State Parties to the code.¹¹⁴ The judges on the court would have set terms, thereby increasing independence, and would be appointed by states, thereby increasing accountability.¹¹⁵ Accountability would be further safeguarded because the court would have an appellate review system with the power to review errors of law.¹¹⁶ Such review would also advance coherence within the system. Finally, “the judges [would have the power to] adopt the rules of the court,” including rules concerning confidentiality and public access, which would improve the system’s openness.¹¹⁷

IV. EVALUATING VAN HARTEN’S CRITIQUE OF THE ITA SYSTEM

Investment Treaty Arbitration and Public Law is a well-researched and thoughtful critique of the ITA system. Van Harten has identified areas in which the ITA system could be improved and has offered proposals on how to effect such improvements.¹¹⁸ As such, *Investment Treaty Arbitration and Public Law* has the potential to push the ITA system to realize

111. *Id.*

112. *Id.* at 180.

113. *See id.* at 180–84 (explaining generally the features of the court).

114. *Id.* at 180.

115. *Id.* at 180, 182.

116. *See id.* at 181.

117. *See id.*

118. *See id.* at 152–53 (noting areas of improvement for the current system); *supra* Part III.B–C. *See generally* VAN HARTEN, *supra* note 1, at 175–84 (describing two proposals for reform to the system).

its full potential. Nevertheless, Van Harten's suggestion that in the absence of his proposed reforms the ITA system is untenable is both overzealous and dangerous.

Van Harten's argument is overzealous because it sets the minimum standards of a system of public law adjudication unreasonably high and then indicts the ITA system for falling short.¹¹⁹ Van Harten's argument is dangerous because it suggests that, insofar as the ITA system fails to satisfy the high standards that Van Harten champions, the system should either be reformed fundamentally or dismantled altogether. As demonstrated below, however, the ITA system already incorporates acceptable levels of accountability, openness, coherence, and independence.¹²⁰ And to the extent that the ITA system would benefit from a supplemental infusion of such elements, more modest reforms within the current structure of the ITA system are available.¹²¹ Moreover, it is not obvious that Van Harten's proposed reforms are practically achievable. And if the system is dismantled altogether, the resolution of foreign investment disputes will return to the pre-ITA system world, wherein injured investors had only two possible methods of obtaining compensation: seeking relief in the domestic courts of host states or soliciting diplomatic protection from their own governments.¹²² These options have historically proven to be unsatisfactory.¹²³ Indeed, their inadequacies motivated states to move towards the ITA system in the first place.

119. Indeed, Van Harten appears to hold the ITA system to the standard of an ideal public law adjudication system. But the ITA system is often triggered precisely where the public law system of the host state is inadequate. *See, e.g.*, VAN HARTEN, *supra* note 1, at 2–3 (discussing the awarding of damages to international investors under the ITA system against Argentina). Thus, the standards that Van Harten demands of the ITA system appear particularly troublesome.

120. *See infra* Part IV.A.

121. *See* VAN HARTEN, *supra* note 1, at 49 (noting that “the state acts in a sovereign capacity when it consents to the adjudication and . . . the relevant dispute arises from the exercise of sovereign authority by the state”).

122. *See supra* Part II.A.

123. *See supra* Part II.

A. *The ITA System Incorporates Acceptable Levels of Accountability, Openness, Coherence, and Independence*

Van Harten places heightened minimum standards on systems of public law adjudication because of the impact that the resolution of a public law dispute has on the sovereignty of the state whose regulations are being challenged.¹²⁴ In particular, whenever a claimant seeks monetary damages for injuries allegedly resulting from governmental actions, the adjudicatory body must not only evaluate the challenged executive and legislative conduct (i.e., second-guess governmental decision making), but also allocate national budgets (through an award of monetary damages issued against the state-respondent).¹²⁵ Van Harten believes that when private arbitrators perform such second-guessing and allocating, such as in the ITA system, it is an affront to the sovereignty of the state-respondent.¹²⁶

While this argument is, on its face, reasoned, it overlooks a fundamental aspect of the ITA system: the ITA system is itself a manifestation of state sovereignty.¹²⁷ The ITA system does not, and indeed cannot, exist independent of the multilateral and bilateral conventions and treaties by which it was established.¹²⁸ And states' decisions to create and embrace this system, and to reciprocally submit to the authority of private arbitrators, are themselves sovereign decisions.¹²⁹ Thus, Van Harten's argument amounts to a contention that arbitrators, by exercising the very powers that states, in an exercise of their sovereign authority, knowingly and intentionally granted to

124. See *supra* Part III.A.

125. See VAN HARTEN, *supra* note 1, at vii.

126. See VAN HARTEN, *supra* note 1, at vii (“[T]he system is flawed, above all because it submits the sovereign authority and budgets of states to formal control by adjudicators . . .”).

127. See *supra* note 62 and accompanying text.

128. See VAN HARTEN, *supra* note 1, at 63–65 (noting that states had to ratify the ICSID convention).

129. See VAN HARTEN, *supra* note 1, at 49 (noting that “the state acts in a sovereign capacity when it consents to the adjudication and . . . the relevant dispute arises from the exercise of sovereign authority by the state”).

them, are somehow undermining sovereignty. Put otherwise, Van Harten appears to be arguing that states are undermining their own sovereignty.¹³⁰

The difficulty with this argument is not limited to its circularity. Rather, it is because of Van Harten's narrow perception of the ITA system as a potential affront to state sovereignty (and not as a manifestation of state sovereignty) that Van Harten is so cynical in his assessment of whether the ITA system satisfies the standards of accountability, openness, coherence, and independence. This cynicism saturates Van Harten's evaluation of the ITA system and leaves the reader with the impression either that the minimum standards of a system of public law adjudication are unreasonably high, or that the standards are reasonable, but the ITA system nevertheless is woefully inadequate. As discussed below, however, the ITA system is not inadequate. While in certain respects, the ITA system would benefit from modest improvements in these areas, the system is not so deficient in any one area to justify fundamentally reforming the system or moving away from the system entirely.

1. *Accountability*

Van Harten recognizes that the ITA system provides for limited review of arbitral awards. In particular, Van Harten recognizes that awards issued through the ITA system are potentially subject to three types of review: (1) ICSID awards are subject to review, pursuant to article 52 of the ICSID Convention, under five specifically enumerated grounds by a three person ad hoc annulment committee; (2) non-ICSID awards are subject to proceedings under domestic law to vacate or confirm the award in the courts of the state in which the award was issued; and (3) non-ICSID awards are also reviewable in any state where enforcement of the award is

130. Van Harten appears to recognize this when he states, "the submission of sovereign decisions to review by an adjudicative process amounts to a policy choice by the state to use that particular method of adjudication as part of its governing apparatus." VAN HARTEN, *supra* note 1, at 49.

sought (in which case, article V of the New York Convention governs, assuming that the state in which enforcement is sought is a Party to that convention).¹³¹

For Van Harten, however, these three options for review of arbitral awards are unsatisfactory because none permit the reviewing body to address errors of law on the merits of the dispute.¹³² Van Harten is technically correct in this observation. Neither article 52 of the ICSID Convention nor article V of the New York Convention permits the reviewing body to revisit the arbitral tribunal's legal analysis on the merits of the dispute (nor to correct errors of law found therein).¹³³ Nevertheless, there are a number of aspects of the ITA system that do provide a measure of accountability that should temper Van Harten's concern.

First, both article 52 of the ICSID Convention and article V of the New York Convention contemplate the review of arbitral awards on the grounds that the arbitral body did not have jurisdiction over the dispute.¹³⁴ This is itself a legal question. Thus, there are some errors of law that are reviewable. Moreover, these conventions permit review on the ground of arbitrator bias.¹³⁵ Thus, while most good faith errors of law may

131. See ICSID Convention, *supra* note 39, art. 52 (stating grounds for annulment of an award by a tribunal); VAN HARTEN, *supra* note 1, at 154–57 (discussing review of awards under the New York Convention).

132. See VAN HARTEN, *supra* note 1, at 155 (“[D]omestic courts . . . are typically not authorized to correct errors of law.”).

133. See ICSID Convention, *supra* note 39, art. 52 (stating the grounds for which annulment of an award may be requested); New York Convention, *supra* note 71, art. V (noting the conditions for which recognition and enforcement of the award may be refused).

134. See ICSID Convention, *supra* note 39, art. 52 (stating that either party may request an annulment of the award if the Tribunal acts outside of its powers); New York Convention, *supra* note 71, art. V.

135. See ICSID Convention, *supra* note 39, art. 52 (stating that either party may request an annulment of the award if there was corruption by the Tribunal or if the award was unjustified); New York Convention, *supra* note 71, art. V (stating that recognition and enforcement of the award may be refused when a party is unable to fairly present its case); May Lu, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England*, 23 ARIZ. J. INT'L & COMP. L. 747, 762–63 (2006) (explaining that an enforcing court can ensure a dispute was fairly resolved by an impartial arbitration panel).

not be reviewed, the system guards against errors of law that are associated with arbitrator bias or corruption.

Second, the potential for errors of law is, to a certain degree, minimized by the special concern that arbitrators in the ITA system—as opposed to tenured judges—have over their own reputation. Despite the recent explosion of claims brought within the ITA system, the number of such proceedings remains relatively small.¹³⁶ Thus, prospective arbitrators cannot reliably predict when their next appointment will occur.¹³⁷ As a result, the vast majority of arbitrators in the ITA system rely on alternative means of income.¹³⁸ Because arbitrators within the ITA system typically depend on such alternative employment as private practitioners and as academics, there is a special need for such arbitrators to maintain their reputations as objective and unbiased professionals.¹³⁹

Moreover, it is worth noting that, to the extent that the accountability of the ITA system should be improved by providing for a review of errors of law, such accountability can be achieved without fundamentally altering the current structure of the ITA system.¹⁴⁰ In particular, such accountability can be provided by creating a standing appellate body to review arbitral awards.¹⁴¹ Such a standing body could either obtain jurisdiction through amendments to investment treaties or on a case-by-case basis through party consent at the commencement of an ITA arbitration.

136. *See supra* Part II.C (noting that despite relatively rapid growth, the number of cases filed each year numbers only in the dozens).

137. *Cf. id.* (noting that arbitrators can depend on hearing relatively few cases).

138. *See* VAN HARTEN, *supra* note 1, at 172.

139. *See id.* at 173 (noting the importance of “professional credibility” and word-of-mouth recommendations).

140. *See* Newcombe, *supra* note 12, at 150–51 (“[C]oncerns 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.”).

141. *Id.*

2. *Openness*

Van Harten's criticism of the ITA system for a lack of openness is tempered.¹⁴² Van Harten begins by examining the various ways in which the system, in recent years, has embraced the principle of transparency.¹⁴³ Despite these developments, however, Van Harten concludes that the dominant principle of the system is confidentiality because the treaties and conventions upon which the system is based establish a default rule of confidentiality.¹⁴⁴ Van Harten's focus, however, is misplaced. As Van Harten notes, the NAFTA states have adopted an interpretation of its founding document that requires public disclosure of all documents submitted to or issued by NAFTA tribunals.¹⁴⁵ More recently, the government of Norway released a draft model bilateral investment treaty that "require[s] that all arbitrations be publicly disclosed, and that all relevant documentation, arbitral awards, and oral hearings be open to public scrutiny."¹⁴⁶ These are but two examples that make it clear that today the practice of states is to prioritize transparency over confidentiality.

Indeed, Bart Legum, former Chief of the NAFTA Arbitration Division of the U.S. Department of State, Office of the Legal Adviser, describes transparency as the "norm" of the ITA system:

[T]he notion that secrecy and treaty arbitration are incompatible has become so well accepted in arbitration circles as to be almost trite. And, in recognition of this new paradigm, it is now commonplace for awards and even orders in treaty cases to be made available on the Internet within a matter of days or hours after they are

142. *See supra* Part III.B.2.

143. *See id.*

144. *Id.*

145. VAN HARTEN, *supra* note 1, at 162.

146. Int'l Inst. For Sustainable Dev., Investment Treaty News, (Mar. 27, 2008), http://www.iisd.org/pdf/2008/itn_mar27_2008.pdf.

rendered. Transparency, to use a much-misunderstood word, has become the norm in investment treaty cases.¹⁴⁷

Accordingly, today there is as much cause to describe the ITA system as a transparent, open system as there is to describe it as a closed, confidential system. And what is perhaps most impressive is that the progress has occurred organically, through the voluntary decisions of states responding to unforeseen problems.¹⁴⁸ Thus, this is an issue upon which the ITA system should be commended, not indicted. And it surely does not justify fundamentally altering the structure of the system (or worse yet, dismantling the system altogether).

3. *Coherence*

Van Harten's focus on the lack of coherence in the ITA system is well-deserved. Arbitral tribunals frequently interpret the same treaty language in fundamentally different ways.¹⁴⁹ And more recently, tribunals have even reached contrary conclusions of law while applying the same BIT provisions in the same factual circumstances.¹⁵⁰ For these reasons, the lack of coherence within the ITA system likely has become the ground upon which the system is most frequently criticized by scholars and commentators.

147. Barton Legum, *Investment Treaty Arbitration's Contribution to International Commercial Arbitration*, DISP. RESOL. J., Aug.–Oct. 2005, at 71, 73.

148. See, e.g., VAN HARTEN, *supra* note 1, at 162 (noting that the release of NAFTA arbitration documents led to allowing participation by nonparties); Investment Treaty News, *supra* note 146 (explaining that, because of constitutionality concerns, Norway adopted a new model BIT that requires arbitrations to “be conducted with a high degree of transparency”).

149. Compare, e.g., *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, ¶ 154 (May 29, 2003) (defining the requirement of “fair and equitable treatment” under article 1105 of NAFTA as requiring that the reasonable expectations of the foreign investor be satisfied), with *S.D. Myers, Inc. v. Gov't of Can.*, UNCITRAL, Partial Award, ¶ 263 (Nov. 13, 2000) (defining that same provision as requiring only that a foreign investment not be treated unjustly or arbitrarily).

150. See *infra* notes 178–81 and accompanying text.

It should be noted, however, that arbitrators hearing investment treaty claims have identified this problem and have developed creative mechanisms in response. For example, some arbitrators, while recognizing that the principle of *stare decisis* does not apply to the ITA system, have begun to check their legal conclusions against prior decisions of other tribunals.¹⁵¹ This is yet another example of the actors within the ITA system recognizing the problems that have developed therein and proactively seeking organic solutions.

And even if such organic remedies to the lack of coherence are inadequate (and a more comprehensive response is thus necessary), it does not mean that the drastic alternative advocated by Van Harten (cutting arbitrators out of the picture) is necessary. Rather, adequate responses can be identified by working within the structure of the current system. For example, as mentioned above, an alternate option is to establish a standing appellate body to which states may consent through amendments to investment treaties or individual parties to an arbitration may consent at the commencement of an arbitral proceeding.¹⁵² Such a standing body would not only fill the accountability gap discussed above but also remedy the absence of coherence.¹⁵³ Van Harten does not adequately consider such mechanisms to provide coherence from *within* the structure of the current system before advocating a move away from arbitration altogether.

4. *Independence*

Van Harten describes the purported lack of independence of arbitrators as the “most troubling” aspect of the ITA system.¹⁵⁴ At times, it appears that this concern is the primary reason that Van Harten argues that arbitrators should altogether be

151. *E.g.*, Gas Natural SDG SA v. Argentina, ICSID Case No. ARB/03/10, ¶¶ 36–52 (Jun. 17, 2005).

152. *See supra* note 141 and accompanying text.

153. *See* Newcombe, *supra* note 12, at 150.

154. VAN HARTEN, *supra* note 1, at 167.

removed from the system and replaced with judges sitting on a permanent international investment court.¹⁵⁵ But Van Harten's rationale is unconvincing.

Van Harten believes that arbitrators in the ITA system are inherently biased in favor of claimants because the more appealing the ITA system is to prospective claimants, the more claims will be asserted, and in turn, the more work there will be in the future for the arbitrator community.¹⁵⁶ Put otherwise, Van Harten asserts that arbitrators are self-interested actors and that their interests are best served by interpreting investment treaty provisions broadly. There are two essential problems with this argument.

First, Van Harten relies upon a short-sighted psychological analysis. Even assuming that the decisions of arbitrators are dictated by their own self interest (and not by a good faith, objective application of law to facts), such interests are not furthered by adopting an exclusively pro-investor agenda.¹⁵⁷ The ITA system is ultimately a state-driven system.¹⁵⁸ States had a monopoly on the power to create the system and states have a monopoly on the power to dismantle the system.¹⁵⁹ If states perceive arbitrators within the system to be biased in favor of investors—and believe that arbitral awards manifest this bias—then states will slowly, but inevitably, move away from the system altogether. In fact, recent history shows that states are

155. *See generally id.* at 167–75, 180 (detailing Van Harten's criticisms of arbitrator dependence).

156. *See id.* at 172.

157. *See* Emily A. Alexander, *Taking Account of Reality: Adopting Contextual Standards for Developing Countries in International Investment Law*, 48 VA. J. INT'L L. 817, 828–29 (2008) (explaining that consistent awards in favor of investors and against developing countries lead to withdrawal from the proceedings and hostility toward the enforcement of awards).

158. *See generally* ICSID Convention, *supra* note 39, arts. 70–71. (“Any Contracting State may denounce this Convention by written notice . . .”).

159. *Id.*

more than willing to disengage from the ITA system at times when the system appears to depart from its intended function.¹⁶⁰

For example, in recent years a flurry of investment treaty claims have been asserted against the government of Argentina challenging certain emergency measures that Argentina adopted to respond to an economic crisis the country faced at the end of 2001.¹⁶¹ Many of the claims were brought pursuant to the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments, a bilateral investment treaty.¹⁶² Article XI of the Treaty provides that it “shall not preclude the application by either Party of measures necessary for the maintenance of public order . . . or the protection of its own essential security interests.”¹⁶³ Pursuant to this article, Argentina argued that, even if the challenged measures violated the treaty, liability was precluded.¹⁶⁴ At least two arbitral tribunals rejected that defense, holding, *inter alia*, that article XI was not self-judging and that the 2001 economic crisis was not sufficiently severe to trigger the protection of that article.¹⁶⁵

The government of Argentina, believing that article XI is self-judging and that, in any event, the 2001 economic crisis was sufficiently severe to trigger the protections of that provision, responded to these awards by questioning the reliability of

160. *See, e.g.*, Emily A. Alexander, *supra* note 157, at 828–29 (noting that “countries such as Russia, Ukraine, The Republic of Congo, Indonesia, and Pakistan are gradually becoming more hostile to the enforcement of arbitration awards.”).

161. *See, e.g.*, CMS Gas. Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8 (May 12, 2005) [hereinafter CMS Gas]; Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16 (Sept. 28, 2007) [hereinafter Sempra].

162. Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1994).

163. *Id.*

164. *See* Sempra, *supra* note 161, ¶ 368 (noting Argentina’s assertion that the Treaty “allows the two states Parties to take measures that would otherwise be inconsistent with their treaty obligations when public order or national security is threatened”); CMS Gas, *supra* note 161, ¶ 389 (“[Argentina] contends . . . that no compensation is due if the measures . . . were taken in a state of necessity . . .”).

165. *See, e.g.*, CMS Gas, *supra* note 161, ¶¶ 354–358, 373; Sempra, *supra* note 161, ¶ 388.

ICSID.¹⁶⁶ Thus, Osvaldo Guglielmino, the Chief Counsel for the Argentine Treasury, has publicly stated that Argentina was “promised (that the ICSID would be) a system of law and they haven’t provided it.”¹⁶⁷ It is not a stretch to believe that if the government of Argentina comes to the conclusion that arbitrators within the ITA system are inherently biased in favor of claimants, Argentina will actively disengage from the system altogether. Indeed, the government of Ecuador has itself recently announced that it will withdraw from nine bilateral investment treaties “[a]midst growing discontent amongst South American Governments with the system of international investment protection.”¹⁶⁸

In summary, while the short-term interests of arbitrators may favor decisions that interpret investment treaties broadly and thus placate investors, such pro-investor bias would conspire to jeopardize the long-term survival of the ITA system. Accordingly, even assuming that arbitrators are self-serving actors, their interests are best served by maintaining their objectivity and resolving investment disputes in a neutral manner.

The second problem with Van Harten’s argument that arbitrators in the ITA system are inherently biased in favor of investors is that it is not supported by empirical evidence.¹⁶⁹ If the arbitrator community as a whole held this bias, it would be evidenced by a consistent trend in arbitral awards in favor of claimants. But in fact, as Van Harten readily notes and as this Author agrees, awards rendered in the ITA system are *not* remarkable for their consistency but rather for their lack of

166. See Shane Romig, *Interview: Argentina Seeks Diplomatic Exit From ICSID Suits*, DOW JONES NEWSWIRES, Oct. 12, 2007, http://www.bilaterals.org/article.php3?id_article=9950&var_recherche=shane+romig (noting that the Argentine government characterizes the arbitration court as “inefficient, costly, and rife with conflicts of interests”).

167. *Id.*

168. Luke Eric Peterson, *Ecuador Will Denounce at Least Nine Bilateral Investment Treaties*, INT’L INST. FOR SUSTAINABLE DEV., Feb. 5, 2008, http://www.iisd.org/pdf/2008/itn_feb5_2008.pdf.

169. Scott J. Shackelford, Book Note, 44 STAN. J. INT’L L. 205, 218–19 (2008) (reviewing VAN HARTEN, *supra* note 1).

coherence.¹⁷⁰ The very examples that Van Harten offers to demonstrate the lack of coherence in the ITA system are themselves the best evidence that arbitrators within the system do not, as a general principle, carry a pro-investor bias.

For example, the arbitral tribunals in *CMS Gas*, *Sempra*, and *LG&E* each addressed Argentina's invocation of the customary international law defense of necessity in the same factual circumstances and under the same investment treaties, and yet reached contrary conclusions.¹⁷¹ In *LG&E*, the tribunal ruled that while the claimants had successfully established that Argentina violated the relevant investment treaty and that the claimants suffered losses as a result of those violations, Argentina was exonerated from liability under the customary international law defense of necessity.¹⁷² By contrast, the tribunals in *CMS Gas* and *Sempra* determined that the customary international law defense of necessity did not protect Argentina.¹⁷³ These tribunals thus awarded substantial monetary damages to the *CMS Gas* and *Sempra* claimants.¹⁷⁴

Such directly conflicting results strongly suggest that, rather than being generally biased in favor of investors, arbitrators are objective, good faith adjudicators who simply disagree on how certain legal principles should be applied in similar circumstances.

170. See *supra* Part III.B.3.

171. See *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, ¶ 267(d) (Oct. 3, 2006); *CMS Gas*, *supra* note 161, ¶¶ 354–358; *Sempra*, *supra* note 161, ¶¶ 388.

172. *LG&E Energy Corp.*, *supra* note 171, ¶ 267(d).

173. See *supra* notes 164–65 and accompanying text.

174. *CMS Gas*, *supra* note 161, ¶¶ 468–472; *Sempra*, *supra* note 161, ¶¶ 482–486. There are additional examples of arbitral tribunals reaching contrary results in precisely the same factual circumstances. Compare *CME Czech Republic BV v. Czech Republic*, 14(3) Arb. Mat'l 109, ¶ 624 (2001) (deciding that claimant should pay respondent \$750,000 and two thirds of the arbitral tribunal fees because respondent violated its treaty obligations), with *Lauder v. Czech Republic*, 14(3) Arb. Mat'l 35, ¶¶ 318–319 (2001) (deciding that each party should pay one half of the arbitral tribunal fees because respondent did not violate its treaty obligations, yet claimant was justified in bringing the arbitration proceedings).

It is worth noting at this point that, ultimately, Van Harten himself appears hesitant to rely on the argument that arbitrators within the ITA system are actually biased. Thus, he states:

[T]he problem here is one of perceived bias, not actual impartiality. Even the most reputable arbitrator is open to the reproach that he will favour claimants, one way or another, so as to encourage claims. However well a tribunal does its job, its interpretations of the law will carry an inherent perception of bias against the interests of host states because of the objective link between interpreting the treaty and furthering the industry.¹⁷⁵

But if the real concern here is not over actual bias, it begs the question of whether a system that is a substantial improvement over the status quo ante should be fundamentally altered—or even altogether discarded—over a fear of perceived bias.

V. CONCLUSION

The ITA system is a relatively new development in international law and public law adjudication. The recent proliferation of BITs and, as a result, international investment arbitration claims has forced this young system to mature by leaps and bounds. It is not surprising that, in response, there has been a flurry of critiques of the system. Such critiques should be applauded to the extent that they identify structural deficiencies in the system and push the system (and its architects) to seek, identify, and implement improvements. Nevertheless, such critiques are also dangerous when they lose sight of the historical background from which the system arose and the progress that has been made through the system. No longer are foreign investors seeking compensation left to flap in the winds of diplomatic protection. Such investors no longer need be concerned that if the host state injures their investment, there will be no realistic avenue for recourse.

175. VAN HARTEN, *supra* note 1, at 173 (footnote omitted).

Van Harten's critique of the ITA system is much more than "an edge of criticism."¹⁷⁶ In a telling passage, Van Harten writes:

the problems with the present system are structural and they cannot be solved by appointing different people . . . as arbitrators. The failings go beyond that of the rogue tribunal or the cowboy arbitrator Regardless of how prudently a tribunal acts in an individual case, the system as a whole lacks accountability and openness in fundamental ways This can only be remedied [by] moving away from private arbitration and back to the model of public courts.¹⁷⁷

And elsewhere, while concluding that the ITA system lacks adequate independence, Van Harten asserts "[t]here can be no rule of law without an independent judiciary."¹⁷⁸ Thus, *Investment Treaty Arbitration and Public Law* demands a foundational change to the structure and function of the ITA system.

But while certain aspects of Van Harten's critique of the ITA system are warranted, his conclusions—both explicit and implicit—are overdramatic. The ITA system is by no means perfect. A modest infusion of accountability, openness, coherence, and independence is called for. And Van Harten's proposed changes could provide such an infusion. But the need for such improvements is not so great that without them, the system should be discarded. Discarding the ITA system would not merely terminate an institution designed to protect those with the resources and wherewithal to invest abroad. It would also terminate a catalyst for economic development and the benefits associated therewith. Thus, it is preferable to seek improvements gradually and from within the current structure of the system. Therefore, Van Harten's critique falls into that category of objections that warrant relatively modest improvements and, yet, are mischaracterized by their authors as vital to the defensibility and/or survival of the system.

176. *Id.* at 10.

177. *Id.* at 175.

178. *Id.* at 174.