Gus van Harten. ***The Trouble with Foreign Investor Protection***. Oxford: Oxford University Press, 2020. Pp. 224. £30.00. ISBN: 9780198866213.

The cover art sets the agenda of *The Trouble with Foreign Investor Protection*: three faceless businessmen, clad in suits and Trump-esque red ties, tower over individuals slouching in front of ramshackle buildings. The message is clear: foreign investor protection benefits the strong and wealthy to the detriment of the weak and poor. Over roughly 150 pages, comprising six chapters and an appendix, Gus van Harten, Professor of Law at Osgoode Hall Law School and prominent critic of investor–state dispute settlement (ISDS), delivers his fiercest indictment of the practice to date.

The Trouble with Foreign Investor Protection is a sweeping critique of international investment law and the legal community that supports it. The book is strongest when van Harten points out in accessible language the deficiencies of what he considers a deeply flawed system. From the first page, he criticizes investment law's premises (foreign investment is promoted by ISDS and deserves special protection), its substantive standards (which he claims unduly limit state sovereignty) and its consequences (including regulatory chill and unduly large compensation). For these reasons, he argues that ISDS is unfair and should be abolished. Van Harten's main contribution to scholarship lies in demonstrating how expansive interpretations of investment treaty provisions in early decisions laid the foundation for the subsequent boom of the discipline. He manages to bring these cases, which frequently only figure as names in awards today, to life by contextualizing them in vivid prose. Readers learn about communities affected by ISDS, as well as functionaries and arbitrators, with whose biographical details the book is interspersed. For example, van Harten's analysis and contextualization of *American Manufacturing & Trading, Inc. v. Republic of Zaire*[1] painfully reveal the demands that an investment arbitration put on a state at the brink of collapse (at 43–47).

Van Harten first unpacks the 'trouble', which gives the book its name, in chapter 1 ('Fortifying Inequality'). He claims that ISDS perpetuates and exacerbates global inequality by providing international investors with powers unparalleled in international or domestic law to sue states for their regulatory choices. It is here that he also addresses what he considers the 'weaknesses of common arguments for ISDS' (at 7–11) and introduces arbitral institutions, lawyers and arbitrators working in and benefitting from ISDS as the 'ISDS industry'.

Following the narrative set out by van Harten in chapter 2 ('Origins of ISDS Treaties'), ISDS was never able to shake off its colonial heritage. Relying on early investment treaty practice from the 1960s and 1970s, van Harten argues that bilateral investment treaties were originally developed by ex-colonizing powers to protect

[1] ICSID, *American Manufacturing & Trading, Inc. v. Republic of Zaire – Award*, 21 February 1997, ICSID Case no. ARB/93/1.

companies from newly independent state governments. In short, the treaties were invented as 'a means to constrain self-determination' (at 33) and today remain an instrument to suppress weak states by subordinating the needs of the local population to those of international corporations and wealthy individuals. Against this backdrop, van Harten recounts the establishment of the International Centre for the Settlement of Investment Disputes (ICSID) in 1965 and traces the rapid growth in investment treaties since the 1990s.

Having described this institutional and legal architecture, van Harten turns to a legal-historical analysis of investment arbitration decisions from the 1990s, which laid the foundation for the 'boom' of investment claims from the 2000s onwards (chapter 3, 'Activation of Treaties'). His depiction of the early decisions from the 1990s is critical throughout. In his words, '[t]he purpose in each case is to show how arbitrators made dubious interpretations of the treaties, reflecting a consistent disrespect for sovereignty' (at 35). From van Harten's point of view, the 'legal wizardry' of lawyers and arbitrators (at 39) characterizing early cases, like *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*,[2] was legally unsound and devastating from a policy perspective. By establishing the idea of unilateral, open-ended consent in investment treaties (*AAPL v. Sri Lanka*), broad interpretations of 'investment' (*Fedax v. Venezuela*[3]) and a general bias for investors' positions (*American Manufacturing & Trading, Inc. v. Republic of Zaire*), these early arbitrations set the scene for the surge in investment arbitrations in the 2000s.

After the first three chapters, van Harten provides introductions to the standards of investor protection, the imbalance underlying ISDS and regulatory chill from a perspective deeply critical about the alleged benefits of the discipline. Persuasively, he points out the paradox, which already featured in his earlier work, that the strongest mechanism in international law to enforce individual rights does not protect the weakest members of society (e.g. victims of torture[4]) but international corporations and wealthy individuals (at 9, 56). In substance, the critiques levelled by van Harten are familiar. Issues such as the vagueness of fair and equitable treatment, the limited rights of third parties in proceedings, nationality shopping and regulatory chill have been on the agenda of international scholarship for a while.[5] What makes van Harten's approach to these issues appealing is the poignancy and clear thrust of his argument (ISDS unfairly advantages investors and entrenches inequality) and that he concentrates his analysis on a select number of decisions which he considers foundational for the development of ISDS (at 12). As a result, van Harten's book makes for

[2] ICSID, *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka – Award*, 27 June 1990, ICSID Case no. ARB/87/3.

[3] ICSID, *Fedax N.V. v. Republic of Venezuela – Award*, 11 July 1997, ICSID Case no. ARB/96/3.

[4] The Convention against Torture only provides for an optional individual complaint mechanism, which can result in non-binding communications, see Article 22, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85.

[5] See e.g. M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (2015) 173ff, 246ff; Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science', in C. Brown and K. Miles (eds), *Evolution in Investment Law and Arbitration* (2011) 606.

a uniquely accessible and even entertaining read but cannot compete in depth with other recent pieces of scholarship that sought to provide a more comprehensive picture of the development of ISDS's legal standards, such as Federico Ortino's *The Origin and Evolution of Investment Treaty Standards*.[6]

In chapter 4 on 'The Most Powerful Protections', van Harten elaborates on how expansive, pro-investor interpretations of vague provisions provided investors with an asymmetrical advantage compared to states, which do not enjoy the right to sue investors under investment treaties. Again, he does not hold back with his criticism of leading cases. He considers the decision in *Metalclad v. Mexico*,[7] which developed the concept of indirect expropriation, to be unsound, both methodologically and legally. At the methodological level, van Harten highlights the apodictic manner in which the *Metalclad* tribunal created an expansive standard of indirect expropriation without relying on the rules of treaty interpretation transparently. On the legal front, he criticizes that the tribunal accepted the reliance of the investor on a contentious oral assurance by Mexican federal officials on which the case turned. In sum, he describes the decision as a 'remarkable example of inept legal reasoning' (at 62). Similarly disapprovingly, he argues that when the arbitrators allowed *Aguas del Tunari v Bolivia*[8] to go forward, in spite of the claimants' corporate restructuring, they permitted a 'manipulated claim' to 'attack' a state (at 69, 74).

Due to these broad protections, van Harten reasons, investors gain 'Special Access to Public Funds' (chapter 5). The key point is that international investors enjoy wide-ranging protections under substantive law which are backed by the threat of theoretically unlimited compensation under the law of state responsibility. These benefits for investors 'would be impossibly expensive to provide to all' (at 80). Accordingly, it is the general public, van Harten claims, which has to reimburse the special privileges of 'the wealthy'.

It is this public that also suffers from the 'regulatory chill' that ISDS entails, according to van Harten. In chapter 6 ('Intimidating Sovereigns'), he submits that ISDS provides the 'legal infrastructure' to undermine good faith regulatory efforts by states. He seeks to substantiate this disputed claim with several examples. Among others, he refers to the arbitration *Ethyl v. Canada*[9] and the proceedings brought by cigarette manufacturers against Uruguay (*Philip Morris Brands SÀRL et al. v. Uruguay*[10]) and Australia (*Philip Morris Asia Ltd. v. Australia*[11]). Taking up advertising material from 'big law', van Harten makes an argument that ISDS is instrumentalized as one element of investors' concerted efforts to fight unwanted regulation and gain leverage in negotiations with states.

6 F. Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value and Reasonableness* (2019).
7 ICSID, *Metalclad Corp. v. United Mexican States – Award*, 30 August 2000, ICSID Case no. ARB(AF)/97/1.
8 ICSID, *Aguas del Tunari S.A. v. Republic of Bolivia – Award*, 21 October 2005, ICSID Case no. ARB/02/3.
9 NAFTA (UNCITRAL), *Ethyl Corp. v. Canada – Award*, 24 June 1998, 38 ILM 708.
10 ICISD, *Philip Morris Brands SÀRL et al. v. Uruguay – Award*, 8 July 2016, ICSID Case no. ARB/10/7.

In 'Fault Lines and the Future of ISDS' (chapter 7), van Harten goes on (in the words of the online blurb) to 'propos[e] a way forward to address and overcome inequality in dispute settlement'. Readers will at this point not be surprised that the author considers the best way forward to abolish ISDS as we know it, because 'the edifice is rotten and will not be fixed by a rounding of edges' (at 136). While van Harten is comparatively positive about the reforms pursued by the European Union (at 140), he seems more sceptical of UNCITRAL Working Group III's process (at 139–140), which appears influenced by the 'ISDS industry's' interests. The 'grander alternative' for van Harten would be the establishment of an 'international forum to adjudicate major disputes arising from the international ownership of assets' (at 144). However, this idea is only sketched briefly on half a page, teasing the reader's imagination.[12]

After the conclusion of his argument, van Harten has added an appendix titled 'Leading Hawks of ISDS'. In this last section, he summarizes previous empirical work on expansive interpretations by a small but influential number of arbitrators,[13] and briefly recounts their professional development. To provide an example of the 'misinformation' by 'promoters of ISDS' (at 163), van Harten ends with describing two lectures by Yves Fortier in 2009 and Francisco Orrego Vicuña in 2002 respectively.[14] As both lectures display a rather positive attitude towards investment arbitration, van Harten considers them symptomatic of how '[m]embers of the ISDS industry often advocate for ISDS in misleading ways' (at 160).

When situating van Harten's work within the existing scholarship, readers will notice that the study builds on previous books of the author, notably, *Investment Treaty Arbitration and Public Law* as well as *Sovereign Choices and Sovereign Constraints*, in which van Harten already voiced his concerns about ISDS.[15] While both were similarly critical of ISDS, they were more sober in their language[16] and style. Readers of *The Trouble with Foreign Investor Protection* may sometimes feel as if van Harten had sought to move into another genre altogether.[17] This may have been to appeal to more readers with a non-legal background. As a result, the new book is also more challenging to categorize than its predecessors, which are rather clear examples of

[11] PCA, *Philip Morris Asia Limited v. Commonwealth of Australia – Award*, 17 December 2015, PCA Case no. 2012-12.

[12] This stands in contrast to van Harten's more detailed push for a multilateral investment court, with which he concluded his first book, G. van Harten, *Investment Treaty Arbitration and Public Law* (2007) 180–184.

[13] Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010', 29 *European Journal of International Law* (2018) 507.

[14] The lectures were published as Fortier, 'Investment Protection and the Rule of Law: Change or Decline?', in R. McCorquodale (ed.), *The Rule of Law in International and Comparative Context* (2010) 119; and Orrego Vicuña, 'Carlos Calvo, Honorary NAFTA Citizen', 11 *N.Y.U. Environmental Law Journal* (2002) 19.

[15] Van Harten, supra note 12; G. van Harten, *Sovereign Choices and Sovereign Constraints* (2013).

[16] An aspect that José E. Alvarez praised in his review of *Investment Treaty Arbitration and Public Law* compared to van Harten's 'intellectual forebears' of the 'New International Economic Order', Alvarez, 'Investment Arbitration and Public Law', 102 *American Journal of International Law* (2008) 909.

academic monographs. Some elements resemble a critical legal history of ISDS,[18] some contribute to the general debate on the deficiencies and the reform of ISDS, other parts are more similar in style and content to briefings published by non-governmental organizations (NGOs) like Greenpeace and Friends of the Earth (to which van Harten regularly refers as sources in his book).

At times, one is left wishing to hear him engage further with his more controversial premises. For example, van Harten seems to adopt an almost exclusively 'positive', and in a way traditionalist, view of sovereignty. Several times throughout the book, van Harten criticizes arbitrators for not sufficiently engaging with counterarguments and for espousing interpretations without 'respect for sovereignty'. Specifically, he argues that, when in doubt, tribunals should adopt a restrictive interpretation of jurisdictional clauses (at 35–36 n.10). At this point, he himself relies on the rather isolated jurisprudence under the World Trade Organization and does not address rulings of the International Court of Justice and other tribunals to the contrary.[19] One would also have been curious to learn more about his argument on the 'asymmetry' of investment treaties. Van Harten repeatedly criticizes the fact that states are not permitted to bring claims against investors under these treaties. One way to explain this unequal distribution of rights may lie in the fact that investors are subject to the regular powers of the state to enforce legal obligations within its territory by means of its laws, executive and courts. While this surely would not address all of the concerns van Harten raises, it would have been interesting to learn more about his view on it.

At a more general level, van Harten draws a clear line throughout his book dividing the 'ISDS industry' and the '(ultra-)wealthy' in favour of ISDS to enrich themselves on the one hand and states as well as their citizens suffering from these endeavours on the other. While he acknowledges some good faith efforts of individuals to make balanced rulings, he definitely considers them the exception. This rather negative view of individuals and their motivations is one of the aspects distinguishing van Harten's work from other approaches depicting the development of ISDS. For example, in *The Rise of Investor–State Arbitration*,[20] Taylor St John considers the development of ISDS the result of well-meaning officials, making questionable decisions with unintended consequences. On the other end of the spectrum lies Antonio Parra's inside account, *The History of ICSID*, avoiding almost all critical judgment on the development of ISDS and the role of individuals therein.[21]

A standalone feature of van Harten's book is its language, which strikes the reader from the very first page. On the one hand, it is accessible, passionate and free of

[17] *The Trouble with Foreign Investor Protection* is more reminiscent in style of G. van Harten, *Sold Down the Yangtze: Canada's Lopsided Investment Deal with China* (2015) than of his first two books.

[18] Similar to K. Miles, *The Origins of International Investment Law* (2013).

[19] See, e.g., *Dispute regarding Navigational and Related Rights Case (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009, ICJ Reports (2009) 213, para. 48. See generally Crema, 'In Dubio Mitius', in H. Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (2019), paras. 3, 30ff., available at https://opil.ouplaw.com/view/10.1093/law-mpeipro/e2678.013.2678/law-mpeipro-e2678.

[20] T. St John, *The Rise of Investor–State Arbitration* (2018).

academic jargon. On the other hand, it frequently lacks nuance, is sometimes martial (e.g. when referring to lawsuits as 'attacks') and verges on arguing *ad hominem* when describing opinions other than the author's. Awards are 'ridiculous', expansive interpretations are 'misleading' and 'pro-investor hawkish arbitrators' allow 'manipulated' claims by 'tycoons' to go forward. The author may contend that he is merely calling a spade a spade. However, there is a difference between 'being clear about the crux of the problem' (at v) and being polemic. Some of van Harten's points are strong enough to speak for themselves and would not require such polarizing language.

It is when the book lapses into generalizations concomitant with this language that it is least convincing. The blanket critique of the 'ISDS industry', consisting in van Harten's view of lawyers, arbitrators and arbitral institutions, extends to 'pro-ISDS' academics. Especially the latter label, sometimes tagged to other authors' names in footnotes, suggests a mentality of 'you are either with us, or against us', which would make substantive discourse almost impossible, if it were adopted generally. The appendix seems to have been written in a similar spirit. In one section, it describes the lives and careers of some prominent arbitrators, whom the author considers 'leading hawks of ISDS'. Surely, the lives of arbitrators are an object worthy of academic study, especially because they may, as van Harten points out, wield considerable influence. However, in light of the brevity of the engagement and the language used ('hawks'; 'ISDS industry'; 'source of misinformation'), the section seems to shift focus rather uncomfortably from criticism of the arbitrators' substantive positions to their personality.

For readers it may have been worthwhile to learn more about van Harten's envisaged 'international forum' as an alternative to current ISDS reform proposals, which he very briefly mentions in the last chapter (at 144). It remains especially vague what would distinguish this forum from the concept of a multilateral investment court. But in this regard, one should not be too demanding, as the purpose of van Harten's book is evidently to offer a critique of the ISDS system, not a path to its reform.

Who is the target audience of this book? Van Harten's goal may have been to attract an audience beyond the pale of academic discourse. Construed this way, the book can be considered an effort to carve a niche between a strictly 'academic' critical approach to investment law and 'activist' contributions often delivered by NGOs. The ambition to present legal research to the public in accessible terms is laudable, especially in the contentious area of investment law. However, the *Trouble with Foreign Investor Protection* does not seem ideally placed to serve as a first introduction to the subject. The biggest difficulty in this regard is that readers without previous knowledge of investment law are presented with the harmful character of ISDS almost as a premise since arguments in favour of ISDS are dismissed in five pages (at 7–11). An introduction to ISDS should give the opportunity to understand in more depth what arguments continue to convince so many governments of the benefit of ISDS, even if they may then be rejected.

[21] A. Parra, *The History of ICSID* (2nd ed., 2018).

If not the interested public, who should then ideally be the audience? The book seems best placed in the hands of readers who do not share van Harten's views but possess the knowledge to contextualize his claims: members of what van Harten calls the 'ISDS industry' who may be shaken up by his vivid recounting of the effects of some arbitrations more than by a 'regular' critical engagement with ISDS. Yet those who stand to benefit most from this book will probably be the most difficult to convince to read it due to its polarizing style. Nonetheless, they should. For one, a readership beyond the established group of ISDS critics would counter the rather pessimistic assumption that one has to be either 'pro-' or 'anti-' ISDS without space for debate, reflection, criticism and hope in between. Secondly, while one does not need to agree with van Harten's arguments, choice of vocabulary and conclusions, the problems he addresses demand a solution and anyone who argues in favour of ISDS should critically engage with them.

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