

## ■ BOOK REVIEW

*Christina Knahr*

**Gus van Harten, *Investment Treaty Arbitration and Public Law*, Oxford University Press, 2007, ISBN 978-0-199-21789-2, xxxii + 214 pp.**

Van Harten's book provides a highly critical study of the current system of investor-state dispute settlement. In essence, the author claims that solving disputes, which are to a large majority of public character, through arbitration – a usually private form of dispute settlement – is ill-suited and generally flawed. He argues that the system is fundamentally biased in favor of investors and does not take sufficiently into account the legitimate regulatory interests of host states. Van Harten suggests that only courts, and not arbitral tribunals, should be competent to decide such disputes involving regulatory powers of states. One of the central claims the author makes concerns the position of the arbitrators. Van Harten voices harsh criticism of the system in this regard, arguing that arbitrators would be biased in favor of investors and be "perceptibly dependent on private interests in ways that tenured judges are not" (p. 6). Further, allowing arbitrators to determine the legality of sovereign acts and potentially awarding public funds to an aggrieved investor would "undermin[e] basic hallmarks of judicial accountability, openness and independence" (p. 5).

The book commences by putting investor-state arbitration in context, followed by an overview of the historical background and the development of the current system which, in particular over the last 10 years, saw a significant increase in disputes registered before ICSID as well as under NAFTA Chapter 11 and ad hoc arbitration under the UNCITRAL Rules, leading to a constantly growing body of case law. In Chapter 3 the author then distinguishes public investor-state arbitration from private commercial arbitration, highlighting the specific features that discern them. In the following Chapter van Harten outlines the scope of investment arbitration, focusing in particular on the notion of 'investment' which is crucial for determining jurisdiction of the arbitral tribunals, as well as the standards of treatment that should be accorded to investors in accordance with most bilateral and multilateral investment treaties. The author thereby questions the broad discretion of arbitral tribunals to review domestic regulatory measures and their power to scrutinize various sovereign acts of the host states that in some way affect foreign investors. In Chapter 5 he highlights the distinctive features of international investment arbitration, like e.g. providing the possibility for foreign investors to directly institute arbitral proceedings against states or the efficiency of this system of dispute settlement that is ensured by the mechanism of enforcement of the constantly growing number of arbitral awards rendered by tribunals. Chapter 6 then focuses on the discretion of the arbitrators and their approaches to and interpretation of the numerous investment treaties. Again, the author severely criticizes the arbitrators of a pro-investor bias, arguing that they

"seem to act aggressively when protecting investors while downplaying the implications for the respondent state" (p. 150). In the final Chapter the author elaborates on what he perceives as being the most troubling flaws of the current system of settlement of investment disputes and provides a possible solution to overcome these flaws, i.e. he suggests the creation of an investment court, the specifics of which he also describes in this Chapter.

While van Harten's criticism is to some extent comprehensible, at this point it seems rather unlikely that his suggestion to establish an investment court would in fact catch on and become a reality. While it is certainly not perfect and there are aspects that could be improved, the system does not seem to be in such a bad shape as the author depicts it to be. Among the constantly increasing body of scholarly literature in the field of investment arbitration van Harten's book attracts attention due to its particularly harsh criticism of the system for solving investment disputes. As such the author's views are prone to be controversially discussed in the arbitration community and make his book a valuable contribution to the literature in the field.

- *Christina Knahr is a post-doc researcher at the University of Vienna, Department of European, International and Comparative Law ([christina.knahr@univie.ac.at](mailto:christina.knahr@univie.ac.at))*