In Defense of the International Treaty Arbitration System

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ABSTRACT

The past two decades have witnessed an explosion of bilateral and multilateral investment treaties, and of arbitration claims brought by private individuals and entities against sovereign States pursuant to such treaties. Indeed, it is fair to characterize the investment treaty arbitration system (the "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 recent maturation of the ITA system has been met with a chorus of scholarly criticism and calls for reform. 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." Accordingly, it is necessary to closely scrutinize each scholarly objection to 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 improvements justified are relatively modest, and yet, are mischaracterized by their authors as vital to the defensibility and/or survival of the system).

This article examines the scholarly critique of the ITA system by Dr. Gus Van Harten in *Investment Treaty Arbitration and Public Law*. 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." Second, any system of public law adjudication must satisfy four basic requirements: accountability, openness, coherence and independence. Finally, the structure and function of the ITA system fails to satisfy each of these four requirements. 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." Therefore, Van Harten reasons, the ITA system is an untenable system of public law adjudication.

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

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 authors 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 argument, identifies areas that 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.
I. Introduction

The past two decades have witnessed an explosion of bilateral and multilateral investment treaties, and of arbitration claims brought by private individuals and entities against sovereign States pursuant to such treaties. Indeed, it is fair to characterize the investment treaty arbitration system (the "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 recent maturation of the ITA system has been met with a chorus of scholarly criticism and calls for reform. 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." Accordingly, it is necessary to closely scrutinize each scholarly objection to 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 improvements justified are relatively modest, and yet, are mischaracterized by their authors as vital to the defensibility and/or survival of the system).

This article examines the scholarly critique of the ITA system by Dr. Gus Van Harten in Investment Treaty Arbitration and Public Law. 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." Second, any system of public law adjudication must satisfy four basic requirements: accountability, openness, coherence and independence. Finally, the structure and function of the ITA system fails to satisfy each of these four requirements. 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." Therefore, Van Harten reasons, the ITA system is an untenable system of public law adjudication.

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." Thus, he advocates maintaining the current system, 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. 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." 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.  

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 authors 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 argument, identifies areas that 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 investments have been occurring since “the days of the pharaohs in Egypt with investments being made by the state itself or by merchants from Egypt, Phoenicia and Greece in other countries.” And for as long as there have been foreign investments, there have been foreign investment disputes – i.e., allegations by a foreign investor that its investment has been harmed by the host State. Traditionally, such a complaining investor lacked standing under international law to bring a direct claim against the host State. Thus, such an investor had two available avenues for recourse. First, the investor could assert a claim before the domestic courts of the host State. Such courts, however, “were often unsympathetic to the foreign investors.”

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. 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. Alternatively, and in
particular in the nineteenth century, the investor’s State would confront the host State through “gunboat diplomacy” (pursuant to which the State of the injured investor would threaten military force against the host State). Finally, claims of diplomatic protection could be presented through formal State-State dispute resolution proceedings (such as ad hoc arbitrations or proceedings before the International Court of Justice).

For a variety of reasons, however, diplomatic protection was not a confidence-inspiring dispute resolution mechanism for investors. Whether the investor's State even acceded a request for diplomatic protection depended on a number of factors outside the investor’s control. Most important, 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. Moreover, claims for diplomatic protection could remain unresolved for many years. For example, in the early twentieth century, the Government of Mexico carried out a series of measures, as part of a larger agrarian reform initiative, expropriating land owned, *inter alia*, by investors from the United States. The United States Government asserted claims of diplomatic protection, which initially resulted in an agreement with Mexico in 1927 to establish a bi-national claims commission. By 1938, however, no claims had been resolved. Thus, the United States Secretary of State "began a series of diplomatic exchanges with the government of Mexico[.]

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 for such injuries.

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. Indeed, “[p]rudent investors will not risk substantial capital in a foreign enterprise unless the . . . legal structure is sufficient to protect the investment.” And if prospective investors are discouraged from investing abroad, then foreign direct investment would not fully satisfy its perceived beneficial role as a mechanism to increase economic development in less developed nations. As explained by Bishop, Crawford and Reisman:

[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.

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. To overcome this impediment, the international
community established what has today become the ITA system. 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.¹⁸ Indeed, this purpose is recited in the preambulary
provisions of nearly every bilateral investment treaty (“BIT”).

C. The Creation of the ITA System

The first BIT was executed in 1959 by the Federal Republic of Germany and Pakistan.¹⁹
Shortly thereafter, in 1966, approximately twenty States ratified the Convention on the
Settlement of Investment Disputes between States and Nationals of other States, which
established the International Centre for the Settlement of Investment Disputes (respectively, the
"ICSID Convention" and “ICSID”). For the following thirty-to-forty years, however, BITs and
investment treaty arbitrations spread slowly. Indeed, “[i]n the first 30 years of its existence,
ICSID handled an average of only one case per year.”²⁰ 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].²¹

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.²²
Dozens of cases are filed each year with ICSID.²³ And perhaps most telling, "the investment
treaty regime [now] consists of a network of over 2,500 BITs and 241 bilateral or trilateral free
trade and investment agreements.”²⁴ 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 effective mechanism to resolve foreign investment
disputes discouraged prospective investors from investing abroad and thus, was an impediment
to economic development in less developing nations.²⁵ In this way, the creation of the ITA
system was based on two fundamental premises. First, that increasing the legal protections for
foreign investments would increase the volume of foreign investments. And second, that
increasing the volume of foreign investments would increase economic development. 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. 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.²⁶
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 predicated to increase foreign direct investment inflows by 43.7 to 93.2%.”

Despite the inconsistencies between these empirical studies, it is worth noting that no such study has found that the spread of investment treaties has decreased foreign investments. Indeed, it would be difficult to imagine how increasing the protection afforded to a contemplated transaction would discourage the 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 still be around to provide recourse. 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, in turn, increases economic development. This is a far more complicated question of macroeconomic theory that cannot be answered with empirical studies alone. It is also a question upon which economists and scholars disagree. This author is not an economist and is not otherwise qualified to opine on the manner by which foreign investments affect the domestic economies of less developed States. Suffice it 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 the ITA system over the past forty-to-fifty years. And in that time, while scholars have questioned the validity of this tenet, nobody has definitively proven it to be wrong. 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. In this Part, I review each of these premises and thus the bases upon which Van Harten indicted the current structure of the ITA system. I then address the changes to that system that Van Harten proffers to remedy its 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."\textsuperscript{31} For example, Van Harten notes, "[u]nder bilateral investment treaties, tribunals have been established to resolve disputes involving the issuance of radio 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."\textsuperscript{32}

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, "[s]overeignty implies external autonomy and internal control on the part of the state[.]

The sovereign state is "the repository of the collective authority to make governmental decisions."\textsuperscript{34} Thus, disputes concerning domestic governmental regulations (i.e. public law disputes) have traditionally been "presumed to fall within the exclusive domain of the state's legal system[.]

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."\textsuperscript{36}

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 rather before a panel of private arbitrators. 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[.]

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.

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."\textsuperscript{38} 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 balances 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."\textsuperscript{39} Van Harten recognizes, however, that condemning the ITA system for failing to satisfy this broad standard would not be altogether meaningful since "virtually any form of adjudication including the courts" could be indicted on these grounds.\textsuperscript{40} Thus, for the purposes 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 systems, simply by allowing for the appeal of awards to the courts in matters of legal interpretation.\textsuperscript{41}

In measuring the ITA system against this standard, Van Harten recognizes that the system does permit for 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 award.\textsuperscript{42} 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.\textsuperscript{43}

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.\textsuperscript{44} In the former circumstance, Van Harten argues, Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards only permits State Parties to that convention to refuse enforcement of the award on specifically-enumerated grounds which, again, exclude "errors of law."\textsuperscript{45} 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 . . . the courts are typically not authorized to correct errors of law."\textsuperscript{46}

Thus, Van Harten concludes that in the ITA system, "arbitrators autonomously review core question of public law . . . without adequate supervision by public judges."\textsuperscript{47} "This lack of judicial supervision renders the arbitrator's interpretation of public law . . . unaccountable in the conventional sense."\textsuperscript{48}

2. Openness

According to Van Harten, "openness" incorporates two requirements. First, "the public should have access to information about adjudicative decision-making."\textsuperscript{49} That is, the public law adjudication process must be transparent (both the ultimate decisions and the documents upon which those decisions are based).\textsuperscript{50} 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."\textsuperscript{51} 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 re deciding questions of sovereign authority and the allocation of taxpayer funds.\textsuperscript{52}
Second, the adjudicators of a public law dispute should hear the views of non-parties to the dispute (i.e. 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). 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" as regards public access to the system and he warns that "[o]ne should not overstate the level of secrecy that exists in the system at present." 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;
- 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 non-participating parties:";
- at least two ICSID tribunals have allowed written submissions by non-parties; and
- recent investment treaties signed by the U.S., 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 non-party submissions."

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. 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, "the norm of public access is . . . subordinated to rules of confidentiality that are alien to public law" and that "investment treaty arbitration is alone among all international bodies that adjudicate regulatory disputes in its blanket suppression of essential information about the process."

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." Van Harten argues that "[a]t the international level, the challenge of coherence confronting all treaty-based adjudication" because there is no hierarchical structure of appellate review to resolve inconsistent legal analysis. Thus, Van Harten 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 this system.
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." The absence of coherence of the ITA system 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.

4. Independence

For Van Harten, the "most troubling" shortcoming of the ITA system is its lack of independence. According to Van Harten, judges are relatively independent from "branches of the state," "powerful non-state interests" and other "inappropriate influences." 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."

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. As a result, Van Harten argues, arbitrators depend upon two groups of people for future work: appointing authorities under investment treaties and prospective claimants. 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." Whether the individuals with the power to select arbitrators are political appointees (such as at ICSID) or private authorities (such as at the International Chamber of Commerce and the Stockholm Chamber of Commerce), 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."

And Van Harten is even more concerned with the dependence of arbitrators upon prospective claimants. The ITA system is unique, Van Harten argues, because "only investors bring the claims that trigger appointments[.]" 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." 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." 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."

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[.]" And his
framework consists of two possible options (which are not mutually exclusive). First, "domestic courts [should] assert greater control over investment treaty arbitration[.]." 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). 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 "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." 

Second, Van Harten proposes that States "establish an international court with comprehensive jurisdiction over the adjudication of investor claims." 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. 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. The judges on the court would have set terms, thereby increasing independence, and would be appointed by states, thereby increasing accountability. Accountability would be further safeguarded because the court would have an appellate review system with the power to review errors of law. Such review would also advance the 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, of course, improve the system's openness.

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. As such, Investment Treaty Arbitration and Public Law has the potential to push the ITA system to realize 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. 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. And to the extent that the ITA system would benefit from an supplemental infusion of such elements, more modest reforms within the current structure of the ITA system are available. Moreover, it is not obvious that Van Harten’s proposed reforms are themselves practically achievable. And if the system is dismantled altogether, the resolution of foreign investment disputes will return to the pre-ITA system world in which 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. But as discussed in Section II, supra, these options have historically proven to be unsatisfactory. Indeed, their inadequacies motivated States to move towards the ITA system in the first place.
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. In particular, whenever a claimant seeks monetary damages for injuries alleged to have resulted 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, in effect, allocate national budgets (through an award of monetary damages issued against the State-respondent). Van Harten believes that when such second-guessing and allocating is performed by private arbitrators, such as in the ITA system, it is an affront to the sovereignty of the State-respondent.

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. The ITA system does not – and indeed, cannot – exist independent of the multilateral and bilateral conventions and treaties through which it was established. And the decisions of States to create and embrace this system, and to reciprocally submit to the authority of private arbitrators, are themselves sovereign decisions. 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 them, are somehow undermining sovereignty. Put otherwise, Van Harten appears to be arguing that States are undermining their own sovereignty.

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 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).
For Van Harten, however, these three options for review of arbitral awards are unsatisfactory because none permits the reviewing body to address errors of law on the merits of the dispute. 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 (or to correct errors of law found therein). 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. This, of course, 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. Thus, while most good faith errors of law may 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, in absolute terms, the number of such proceedings remains relatively small. Thus, prospective arbitrators cannot reliably predict when their next appointment will occur. As a result, the vast majority of arbitrators in the ITA system rely on alternative means of income. Because arbitrators within the ITA system typically depend on such alternative employment – typically as private practitioners and as academics – there is a special need for such arbitrators to maintain their reputations as objective and unbiased professionals.

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. In particular, such accountability can be provided by creating a standing appellate body to review arbitral awards. 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.

2. **Openness**

As noted in Section III(B)(2), *supra*, Van Harten’s criticism of the ITA system for a lack of openness is tempered. Van Harten begins by examining the various ways by which the system, in recent years, has embraced the principle of transparency. 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. 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. More recently, the Government of Norway released a draft model bilateral investment treaty that “require[es] that all arbitrations be publicly disclosed, and that all relevant documentation, arbitral awards, and oral hearings be open to public scrutiny[.]” 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 award and even orders in treaty cases to be made available on the Internet within a matter of days or hours after they are rendered. Transparency, to use a much-misunderstood word, has become the norm in investment treaty cases.\footnote{96}

Accordingly, today there is as much cause to describe the ITA system as a transparent, open system than 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. 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 yes, dismantling the system altogether).

3. \textit{Coherence}

Van Harten’s focus on the lack of coherence in the ITA system is well-deserved. Arbitral tribunals frequently interpret the very same treaty language in fundamentally different ways.\footnote{97} And more recently, tribunals have even reached contrary conclusions of law while applying the very same BIT provisions in the very same factual circumstances.\footnote{98} 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.

It should be noted, however, that arbitrators hearing investment treaty claims have themselves identified this problem and have developed creative mechanisms in response. For example, some arbitrators, while recognizing that the principle of \textit{stare decisis} does not apply to the ITA system, have begun to “check” their legal conclusions against prior decisions of other tribunals.\footnote{99} 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 not adequate (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 that States may consent to through amendments to investment treaties or that individual parties to an arbitration may consent to at the commencement of an arbitral proceeding. Such a standing body would not only fill the accountability gap discussed above, but also remedy the absence of coherence. Van Harten does not adequately consider such mechanisms to provide coherence from \textit{within} the structure of the current system before advocating a move away from arbitration altogether.

4. \textit{Independence}

Van Harten describes the purported lack of independence of arbitrators as the “most
troubling” aspect of the ITA system. At times, it appears that this concern is the primary reason that Van Harten argues that arbitrators should altogether be removed from the system and replaced with judges sitting on a permanent international investment court. 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 that 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. 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. The ITA system is ultimately a State-driven system. States had a monopoly on the power to create the system and States have a monopoly on the power to dismantle the system. 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 more than willing to disengage from the ITA system at times when the system appears to depart from its intended function.

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 that the country faced at the end of 2001. Many of the claims were brought pursuant to the Bilateral Investment Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments (November 14, 1991). Article XI of that treaty provides that the treaty “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.” Pursuant to that article, Argentina argued that, even if the challenged measures violated the treaty, liability was precluded. 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.

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 ICSID. 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.” 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[.]”
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. 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 coherence. 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 precisely the same factual circumstances and under the very same investment treaties, and yet, reached contrary conclusions. 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. By contrast, the tribunals in CMS Gas and Sempra determined that the customary international law defense of necessity did not protect Argentina. These tribunals thus awarded substantial monetary damages to the CMS Gas and Sempra claimants.

Directly conflicting results such as these 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.

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 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.

But if the real concern here is not over actual bias, it begs the questions 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 in 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 the whims of diplomatic protection and the strong-arm tactics of gun-boat diplomacy. Such investors no longer need be concerned that if the host State injures their investment, there will be no realistic avenue for recourse.

Van Harten's critique of the ITA system is much more than "an edge of criticism[.]"\textsuperscript{109} In a telling passage, Van Harten writes:

\begin{quote}
[T]he 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 be [sic] moving away from private arbitration and back to the model of public courts.\textsuperscript{110}
\end{quote}

And elsewhere, while concluding that the ITA system lacks adequate independence, Van Harten asserts that "[t]here can be no rule of law without an independent judiciary."\textsuperscript{111} Thus, it is clear that \textit{Investment Treaty Arbitration and Public Law} demands a foundational change to the structure and practice 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 all of 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.

\begin{footnotesize}
\begin{enumerate}
\item Van Harten, \textit{supra} note 1, at 152-53.
\item \textit{Id.} at 10.
\end{enumerate}
\end{footnotesize}
See e.g., Andrew Newcombe, Gus Van Harten's Investment Treaty Arbitration and Public Law, 71 Modern Law Review 145, 148 (2008) (book review) (describing the "crux" of Van Harten's argument as claiming "that this system is fundamentally flawed[].").

R. DOAK BISHOP, JAMES CRAWFORD, AND MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES 2 (2005).

Id. at 1.

Id. at 3.

Id. at 3.

Id. at 2.

ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 397 (2003)

Id. at 397.

Id.

Id.

Lowenfeld, supra note __, at 401.

Foreign Investment Disputes, supra note 5, at 7-8; see generally Susan D. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 Fordham L. Rev. 1521, 1525 ("Investment treaties play an increasingly prominent role in the initial decision to invest in a developing nation[].").

Foreign Investment Disputes, supra note 5, at 8; Franck, supra note 15, at 1524 ("Foreign investment is a vital tool for economic development and global prosperity.").

Foreign Investment Disputes, supra note 5, at 8.

See infra Section II(D) for a discussion of whether the ITA system has, in fact, adequately fulfilled this purpose.

Lowenfeld, supra note 10, at 473.

Foreign Investment Disputes, supra note 5, at 1.


See Foreign Investment Disputes, supra note 5, at 8.

Id. at 1.

Newcombe, supra note 4, at 147.

See supra, Section II(B).

See Kenneth J. Vandevelde, A Brief History of International Investment Agreements, 12 U.C. Davis J. Int’l L. & Pol’y 157, 184-86 (comparing and summarizing the findings of at least 7 such studies).

Id at 185-86.


See Kenneth J. Vandevelde, 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 the host states has been generally analyzed as an issue of macroeconomic theory.”).
Van Harten, supra note 1, at 4 (summarizing the relevant literature); id at 45 ("[I]nvestment treaty arbitration engages the regulatory relationship between state and individuals, rather than a reciprocal relationship between juridical equals.").

Id. at 4 (citing arbitral proceedings).

Id. at 48.

Id.

Id. at 49.

Id. at 11 (emphasis in original) (it is worth noting that this quote refers not only to domestic courts, but also, in theory, to international courts).

Id. at vii.

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

Id. at 153.

Id.

Id. at 154.

ICSID Convention, Article 52.

Id., Article 52(1).

It is worth noting 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.

Van Harten, supra note 1, at 154-55.

Id. at 155.

Id. at 156.

Id.

Id. at 159.

Id.

Id.

Id. at 161.

Id. at 159.

Id. at 160.

Id.

Id. at 160-61.

Id. at 162.

Id. at 163.

Id. at 163-64.

Id. at 164; id. at 160; id at 161 (arguing that "investment treaties do not provide for the compulsory publication of all relevant information in investment treaty arbitration").

Id. at 161.

Id. at 164.

Id.

Id. at 165.

See supra Section III(B)(1).

Van Harten, supra note 1, at 166.

Id. at 166.
Indeed, Van Harten appears to hold the ITA system up 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. Thus, the standards that Van Harten demands of the ITA system appear particularly troublesome.

*See supra* Section III(A).

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.

*See supra* Section III(B)(1).

*See* Newcombe, *supra* note 4, 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.").

Van Harten, *supra* note 1, at 162.


*Compare, e.g.*, Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2 (May 29, 2003) ¶ 154 (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. Government of Canada*, UNCITRAL, Partial Award ¶ 263 (Nov. 13, 2000) (defining that same provision as requiring only that a foreign investment not be treated unjustly or arbitrarily).
See infra Section IV(A)(4).


100 Van Harten, supra note 1, at 167.


102 Dow Jones International News, Argentina Seeks Diplomatic Exit From ICSID Suits (Oct. 12, 2007) (describing the view of the Argentine Government as perceiving “the arbitration court as inefficient, costly, and rife with conflicts of interests”).

103 Id.


105 See supra Sections III(B)(3), IV(A)(3).


107 Additional examples of arbitral tribunals reaching contrary results in precisely the same factual circumstances can be found by comparing the awards in CME Czech Republic BV v. Czech Republic, 14(3) World Trade & Arb. Mat. 109 (September 13, 2001), with Lauder v. Czech Republic, 4 Worlds Trade & Arb. Mat. 35 (Sept. 3, 2001).

108 Van Harten, supra note 1, at 173.

109 Van Harten, supra note 1, at 10.

110 Id. at 175.

111 Id. at 174.