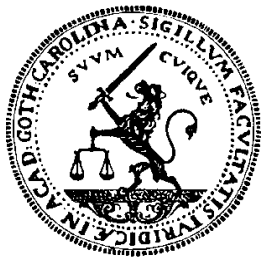

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Is the critique against the current system of Investment Treaty Arbitration legitimate?

A study focusing on the financial crisis in Argentina

JURM02 Graduate Thesis

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Contents

Summary

This thesis deals with various aspects of international investment law. Bilateral or regional investment treaties together with international customary law mostly govern international investment law. The area of customary law is not harmonized leaving it uncertain and unsafe for investors. Countries therefore started to negotiate bilateral investment treaties, BITs, in the late 1950´s as a way of promoting investments and making them more secure.Through the BITs it has become possible for investors to directly file a claim against the government of a host state for a breach of a BIT. The dispute will in many cases be settled though arbitration, e.g. by ICSID. Arbitration through any other institute than ICSID will most likely be confidential.

There has been a lot of critique against the system of investment treaty arbitration. Gus van Harten is one of the most criticising authors within the area of law. He claims that courts, not arbitrators, should solve regulatory disputes that may affect the public. The arbitration process under BITs cannot fulfil core features of dispute settlement since it lacks in accountability, openness, coherence and independence. The way of settling disputes through investment treaty arbitration is unlike any other system of international law, since it gives a private actor a lot of power. Van Harten further claims that there is a bias in favour of the investors. This due to the arbitrator's lack of tenure, which makes them dependent on prospective claims, claims that only the investors can bring. He also means that the system can put a strain on the host state economies due to its high awards and strong enforceability. It is also open for forum shopping according to van Harten.

There are many authors and legal practitioners that are in favour of the system. Some of them claim that van Harten is lacking evidence for what he is claiming. They mean that the system functions well, at least if you compare it to the previous system of diplomatic protection. When using diplomatic protection the investors where dependent on the home state to raise a claim against a host state for committing misconduct against the investor. The claimed bias in favour of investor by van Harten does not show in arbitral awards according to his critics.

To be able to evaluate whose arguments are the correct ones a case study on the country involved in most investment treaty arbitration, Argentina was conducted. The study shows that van Harten has got a point in a lot of his critique; however what he claims is exaggerated. The system of investment treaty arbitration is still young and developing with numerous flaws. Nonetheless it is better then the last one, and functions too well to be removed. Removing it would risk a decrease in foreign investments due to an uncertainty regarding the protection.

Sammanfattning

Detta examensarbete behandlar olika aspekter av internationell investeringsrätt. Bilaterala eller regionala investeringsavtal tillsammans med internationell sedvanerätt reglerar mestadels rättsområdet. Sedvanerätten är inte harmoniserad på området vilket gör den osäker för investerare. För att främja investeringar och göra investeringar säkrare började länder förhandla bilaterala investeringsavtal, BITs, i slutet av 1950-talet. Genom BITs har det blivit möjligt för investerare att väcka talan direkt mot en stat för avtalsbrott. Tvisten kommer i många fall att avgöras genom skiljedom, t.ex. av ICSID. Skiljedom av annan institution än ICSID kommer sannolikt att vara konfidentiell.

Det har riktats en hel del kritik mot skiljedomsförfarandet i investeringsavtalen. Gus Van Harten är en av de mest kritiserande författarna. Han hävdar att domstolar, inte skiljedomare, ska lösa tvister som kan påverka allmänheten. Skiljedomsförfarandet i BIT uppfyller inte grundläggande funktioner för tvistlösning, eftersom den brister i ansvarstagande, öppenhet, samstämmighet och oberoende enligt van Harten. Sättet att lösa investeringstvister genom skiljedom är olikt något annat system inom internationell rätt mycket på grund av att systemet ger privata aktörer mycket makt. Van Harten hävdar vidare att det finns en partiskhet till förmån för investerarna. Detta på grund av skiljemännens brist på ämbetsinnehav, vilket gör dem beroende av framtida fall. Då det enbart är investeraren som kan stämma värdlandet dömer skiljedomare till fördel för investeraren för att säkra framtida uppdrag. Han säger också att systemet kan innebära påfrestningar på ekonomin i värdländerna på grund av systemets höga skadestånd och starka verkställbarhet. Systemet möjliggör även för forum shopping enligt van Harten.

Det finns många författare och jurister som är positiva till systemet som hävdar att van Harten saknar bevis för vad han påstår. De menar att det fungerar bra, åtminstone om man jämför med det tidigare systemet med diplomatiskt skydd. Vid användning av diplomatiskt skydd är investerarna beroende av hemlandet för att väcka talan mot ett värdland om detta begår brott mot det bilaterala investeringsavtalet. Partiskheten till förmån för investerare som van Harten påstår visas inte genom existerande skiljedomar enligt hans kritiker.

För att kunna utvärdera vems argument som är korrekt har en fallstudie av det land med flest skiljedomar emot sig, Argentina, genomförts. Studien visar att van Harten har rätt i mycket av sin kritik, det han påstår är dock överdrivet. Systemet med skiljedomar inom investeringsrätten är fortfarande ungt och utvecklas ständigt. Det har många brister, men är bättre än de förra. Systemet fungerar för bra för att ersättas med ett nytt, ett byte skulle riskera en minskning av utländska investeringar då skyddet skulle vara osäkert.

Preface

I would like to thank everyone who has been a support to me during my law degree and especially this fall.

The subject I have chosen to write about, international investment law, is not very well know nor established within the Swedish law education and it has therefore been a challenge to write about this. However I feel that I have found a lot of good material that has made this thesis possible.

It has been interesting and fun meeting well-established legal practitioners both academic and lawyers who have no idea what I am talking about when I say that my thesis is about international investment law with focus on its arbitration system. In many cases I have been the one with the most knowledge, a position that is new to me within my legal studies.

However, I am very glad that I chose the area of law that I did, because I am sure that it will be an area that is going to be very big within the next years since it regulates a lot that affects our everyday life, especially now with the financial crisis happening all over the world.

Thanks to all of you who have helped and supported me and a special thanks to Suffolk summer program 2011 who opened my eyes to international investment law.

Cornelia Tornakull

Abbreviations

BIT	Bilateral Investment Treaty
ECT	Energy Charter Treaty
EU	European Union
ICSID	International Centre for Settlement of Investment Disputes
ITA	Investment Treaty Arbitration
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law

1 Introduction

1.1 Theme and purpose

The theme of this thesis will be international investment law and investment treaty arbitration. The purpose is to face criticism made against the area of law by Gus van Harten, by looking at cases involving Argentina as well as texts written my persons with a lot of knowledge in the subject area. Argentina had a severe financial crisis in the late 1990s and early 2000s resulting in a high number as submitted cases under the ICSID Convention for arbitration. Therefore Argentina will be an ideal country as a case study. The objective of this thesis is to be able to evaluate if the critique made is legitimate or if the author of the critique has missed out on core facts.

1.2 Methodology and material

This thesis will mainly be based on traditional legal methods. However, since the area is a bit unique, so will the thesis. There will be a case study on Argentina where empirical facts will be analysed and gathered in statistics to draw new conclusions. So the method will be both traditional legal method and empirical research with statistics.

The material used is case law mainly from arbitral tribunals under the ICSID Convention and treaties – both bilateral and global ones. Literature and articles written by persons skilled in the subject will also be a source of information and help in interpreting cases, treaties and the system as a whole. Another source of information comes from reports written by the United Nations Conference on Trade and Development, focusing on the issues and development of foreign investment.

Transparency in the way the data has been collected is important when performing statistical analysis; therefore this thesis will strive to disclose every step of the procedure so that it is clear where all the numbers and statistics derive from. Most information gathered is found on either ICSIDs own webpage, icsid.worldbank.org or on a database webpage for investment treaty cases, italaw.com. These two web pages contain all public information relating to investment treaty arbitration. On the ICSID webpage one can find lists of all pending and concluded cases with information on the proceedings and on the tribunals, including the arbitrators name and origin. On italaw.com one can read most investment treaty awards, however one may also read decision made by the tribunals such as on jurisdiction and on liability.

1.3 Disposition

The first chapter of the thesis will explain the basics of the legal area of international investment law. To understand the rest of the thesis it is necessary to elaborate on the system of bilateral investments treaties, BITs, and the way arbitration has become a core section in each BIT as the way of settling upcoming investment disputes. Following this chapter will be a section that criticises the system of investment treaty arbitration. The third chapter will discuss articles that critique van Harten and the fourth chapter will respond to this critique. To evaluate if the two aspects of critique are legitimate or lacks support in theory the fifth chapter will look at arbitral cases concerning Argentina as well as litterateur and articles on the subject. As the last part of the thesis there will be a conclusion on whether the critique was legitimate or not.

1.4 Delimitations

This thesis will not process all areas of international investment law. There will initially be a general introduction on the area however after the introduction the thesis will solely focus on investment treaty arbitration. The second chapter will centre on critique made by Gus van Harten, the scope of this thesis would become too wide and not fit within the time frames if it also discussed critique made by others. The decision on why van Harten has been selected is based on the fact that he is one of the most criticising authors within this subject of law. In the fifth chapter the critique will be faced with case law and literature with the spotlight on Argentina. It would not be possible, during the limited time at hand, to discuss all cases brought in the area of investment treaties, therefore the focus will be on Argentina. The reason that Argentina will be the case study is that Argentina is the one country since the start of investment treaty arbitration involved in most arbitral proceedings relating to foreign investments and investment treaties, this due to a financial crisis in the late 1990s and early 2000. It will not be possible to highlight all of the cases that Argentina has been involved in, therefore only some will be discussed in more detail. There are some cases that stand out from the rest, e.g. the once with awards, and these are the awards that are more discussed.

2 International Investment Law

2.1 Introduction to Investment Law

To fully understand the scope of this thesis, it is required to go thought the basics of how international investment law is structured and implemented in today's global world. International investment law is an area of law that protects investments made in another country than the home country of the investor, e.g. when a British company builds a factory in Kenya. The area of investment law differs from many other areas of international law since it is mostly based on investment agreements, such as bilateral investment treaties, BITs, or regional investment treaties instead of international customary law. Global treaties govern most other areas of international law in combination with international customary law. Besides the BITs and regional treaties there is also other kinds of bilateral treaties governing investments, these contain a chapter on investments, the most important is the free trade agreements used primarily by the US and the economic partnership and cooperation treaties most commonly used by Japan.[1]

2.2 Bilateral Investment Treaties, BITs

2.2.1 General information

The BITs are the dominating form of investment agreement in today's globalized world. BITs govern the investment relations between two states and are concluded as a way of protecting and promoting foreign investment.[2] At the beginning of 2010 there were 5939 investment agreements in force in the world, including 2750 BITs. Some countries, for example Germany with 135 signed BITs, have a high number of BITs, while other, like Ireland, have none.[3]

2.2.2 History of BITs

In the beginning of the 20th century and end of the 19th a dispute started regarding which obligations a host state owed towards a foreign national and its properties within the host states territories. On one side were the investment exporting states that argued that a minimum standard of treatment had developed in the international customary law, meaning a minimum level of treatment that a foreign national can not fall below, and on the other side was the investment importing countries that disputed the minimum standard of treatment and claimed that it was the national law of the host country that was effective, not a general rule.[4] The disagreement

[1] Salacuse, 2010, p 2.
[2] Salacuse, 2010, p. 1.
[3] UNCTAD, *World Investment Report 2010*, p. 82.
[4] Romson, 2012, p. 58.

originated mainly from the different ideas regarding whether a host state was obliged to compensate for expropriation. The dispute resulted in several failed attempts in codifying treatment of foreign nationals and their property. And it is still not established in international customary law whether there is a minimum standard of treatment.[5]

2.2.3 Minimum standards of treatment

The development of BITs derive from the fact that there was a persistent disagreement on the form and content of international customary law standards relating to the treatment of aliens and their property. This had lead to bilateral treaties being concluded as a way of promoting and protecting foreign investments.[6] BITs have become a regime designed to restate international minimum standards of treatment of foreign investors in treaty form. It is expected by investment-exporting states that the host states oblige to certain levels of treatment such as the most-favoured nation standard, the national treatment standard and the fair and equitable treatment standard while being a party to a BIT.[7] The most favoured nation treatment ensures that investors and their investments from one country are treated in the same way, or at least not less favourable, as investors and investments from another country. The national treatment standard says that investors or investments from another state are to be treated in the same manner as, or at least not less favourable than, the investors or investments from inside the country. Fair and equitable treatment has been interpreted in various ways and has protected investors and investments where other standards have failed. The three standards of treatment are included in most BITs and has become a norm under investment agreements.[8] There is one provision in most BITs that says that only investments that has been established and admitted in the territory of the host state in accordance with the host countries domestic legislation will be protected under the BIT, this to limit the application.[9]

A last provision contained in most BITs is the protection against unlawful expropriations. A nationalization or expropriation is only lawful when it is done for a public purpose, in a non-discriminatory way, following the due process of law against compensation. The criterion of compensation is the most disputed of all standards. Some states mean that the compensation ought to be *appropriate and just*, while others, mainly investment exporting countries, considers the compensation standard a lot higher, they believe that is should be *prompt, adequate and effective* based on the market value of the expropriated investment.[10] The US and some other European countries that traditionally has been investment exporting countries has not fully succeeded with making the standard of *prompt, adequate and effective*

[5] Hjälmroth C, 2011, p.10.
[6] Hildelang S, 2004, p. 789.
[7] UNCTAD, 2007, p. XII.
[8] Muchlinski P, 2008, p. 22.
[9] Yannaca-Small, 2010, p. 7.
[10] UNCTAD, *Taking of Property*, 2000, p 5.

a generally accepted standard within the international customary law. However, it becomes more and more common for the market value to be the amount for compensation internationally, so the term adequate is roughly incorporated in international customary law, but it is not accepted that the compensation is to be prompt and effective.[11]Another core feature of BITs are the dispute settlement provision, more about this further on in this thesis.

2.2.4 Investor and investments

Each BIT also contains provisions regulating the definitions of the two concepts "investor" and "investment". BITs have different definitions on what equals an investment; some are generous in its extent while others have a narrow application.[12] In a BIT with a broad scope it is not only foreign direct investment that is protected, also indirect investments, such as shareholding, rests under the protection of the BIT in force.[13]

2.2.5 The evolution of BITs

The creation of BITs as an investment regime took off after the World War II, this due to governmental failure in codifying the subject area during the ongoing decolonization. The first initiative was the Havana Charter on Trade and Employment in 1948 and was intended on creating the International Trade Organisation. Several governments in developing countries were hostile to certain provision, this slowed down the negotiation and after a while the driving force of the charter, the U.S., lost interest and the charter was never adopted.[14] Non-governmental initiatives were started in the 1950's, which signalled a number of shifts in investment protection with the aim of increasing economic development. Private actors such as German business men and lawyers, under the leadership of Hermann Abs, Chairman of Deutsche Bank and Lord Shawcross, former attorney general of Great Brittan created two drafts on protection of investments abroad in the 1960´s, however they never got adopted by the OECD[15]. By the time OECD adopted a resolution on the protection of foreign property, countries in Europe had already started to negotiate BITs. Germany was the first country to conclude an agreement, with Pakistan in 1959. They did it as a way of entering the world trade again after World War II while other countries did it to protect themselves during the cold war. Today many developing countries negotiate BITs as a way of showing that it is safe to invest there.[16] Many BITs have similar purposes and content since they are often designed after looking at one of the above named drafts.[17]

[11] Dolzer & Schreuer, 2008, p. 91.
[12] US- Honduras BIT, North American Free Trade Agreement - NAFTA and Energy Charter Treaty.
[13] ECT Art 1(6); ASEAN Agreement for Promotion and Protection of Investment Art 1(3); UNCTAD *Scope and definition*, 1999, p. 18ff.
[14] Dugan and others, 2008, p. 48.
[15] Wong, 2006, p. 145f.
[16] Hjälmroth, 2011, p. 11.
[17] McLachlan QC and others, 2007, p. 26.

There was an enormous increase in BITs during the 1990's and the number of BITs is still growing. Historically BITs have been concluded between one developed and one developing country. However, today the number of BITs between two developing countries is increasing since also developing countries have expanded their foreign investments.[18] Foreign investment today is, due to the very high number of BIT's, most likely protected primarily by a treaty and not by international customary law alone.

The obligations that a state owes according to international customary law are not necessarily the same as the obligation undertaken by a treaty and vice versa.[19] However, when interpreting a treaty you need to look at the customary law according to Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969.[20] International law is a legal system, and investment treaties are governed by it.[21]

International investment treaties are not just expressions of good will by states; they are binding instruments of international law capable of imposing enforceable legal obligations on governments in host countries. It is therefore important for executives, bankers and lawyer to be aware of which investment agreement is in force when dealing with foreign investment.[22] BITs prevail over domestic law, however the agreements usually allow for exceptions from the investment protection when it is in the interest of national security.[23]

2.3 Foreign investment disputes

2.3.1 History

When foreign investments first took off, the legal rules governing it assumed a tripartite set of actors, the home state, the host state and the investor. However, it was only the two states that had legal standing. Traditionally it has been states that are the principal subjects of international law. The issues rising out of foreign investments was settled by diplomatic protection, leaving the investor unrecognized as a subject of international law.[24] In case of a dispute, it was needed that the domestic remedies of the host state had been exhausted and that the investor did posses the nationality of the home state for diplomatic protection to occur. States were very active in exercising diplomatic protection around the 19th century in various ways, such as diplomatic settlement of claims, gun-point diplomacy and ad hoc tribunals. The justification was that an injury against a national company in another country was an injury to the home country itself.[25]

[18] UNCTAD, 2007, p. 15.
[19] McLachlan, 2008, p.364.
[20] McLachlan, 2008, p.371.
[21] McLachlan, 2008, p.365.
[22] Salacuse, 2010, p. 3f.
[23] Folsom, Gordon and Spangole, 2000, p. 204.
[24] Muchlinski, 2008, p. 6.
[25] McLachlan, 2008, p.365f.

Diplomatic Protection is often one of the primary choices of dispute settlement today, before resorting to the main dispute settlement body, arbitration.[26] The order of the dispute settlement is often addressed as to treat negotiation first, then arbitration, and finally, judicial settlement, without paying much need to conciliation. Diplomatic protection is still used since it can be enough that the government of the home state notes in a phone call to the host state that its actions regarding a particular investment goes against a BIT for a change to occur. This saves a lot of time and money for all parties involved.[27]

Disputes between states and private actors may rise out of many different contexts and be of different size and importance. However, primarily disputes will rise when an investor considers the home country to be lacking in the protection on investments established in a treaty.[28] The way disputes are settled under international investment law has changed after the adoption of the ICSID convention[29] in 1965.[30] Through the system created by the convention, host states have allowed investors through BIT's the possibility to bring claims under direct dispute settlement procedures. An investor may bring a host state to arbitration for misconduct, either at an ICSID tribunal or other arbitral institution. Host states have therefore accepted to grant investors a certain standard of treatment.[31] It may be said that the host state by agreement has replaced the diplomatic protection by investor-held rights of action against the host state. The home state has no residual interest in these new rights and obligations.[32] The system created by the ICSID convention has reached huge success, particularity in the 21st century. It is likely that it will grow even bigger due to the amount of new BITs coming into force continuously.[33] The development from diplomatic protection to investment treaty arbitration derives mainly from the lack of security that the diplomatic protection gave. If the home country did not have an interest in raising a claim, the investor had no chance at receiving damages. This uncertainty was a big issue, not only for the investors, since foreign direct investments are a way of increasing economic development. If the investors did not have a safeguard against misconduct by the host state there was a risk that they would end their foreign investments, which would risk the economic development. Therefore there was a need for a safer system, so that investors would feel secure enough to invest in foreign states, helping the economic development.[34]

[26] Salacuse, 2010, p 360.
[27] Sornarajah, 2000, p. 18.
[28] Salacuse, 2010, p 354.
[29] Convention on the Settlement of Investment Disputes between States and Nationals of other States -ICSID Convention.
[30] Reinisch and Malintoppi, 2008, p. 692.
[31] Muchlinski , 2008, p. 6f.
[32] Zachary, 2003, p. 282.
[33] Reinisch and Malintoppi, 2008, p. 692.
[34] Meyer, 2008, p 51f.

There are other forms of dispute settlement than arbitration under the ICSID Convention and diplomatic protection, such as national and international courts, other arbitration or conciliation.[35] However, it is negotiation (as a form of diplomatic protection or between the investor and host state), arbitration and judicial settlement that stand out as significant in the settlement of disputes.[36]

2.3.2 Arbitration

Arbitration became a well-used method of dispute settlement after the World War II with the increase of international business activity. In 1958 came the New York Convention[37] and 1966 the UNCITRAL arbitration rules, two conventions governing arbitrational rules. The former is ratified by 142 countries as of 2008. Member states commit their courts to enforce international arbitration agreements and awards in accordance with specific rules and conditions. The UNCITRAL Arbitration rules is a set of rules on arbitration not tied to a specific arbitral institution. The two sets of legal rules were intended for commercial arbitration, but have become applicable on investment treaties and investor-state arbitration.[38] However, one problem arising out of this was the difficulties of initiating arbitration against a sovereign state with immunity. Private actors were not considered to hold legal personality under international law, which made it very hard to resort to arbitration in investor-state disputes. Enabling investor-state dispute under the ICSID Convention, adopted in 1965, solved this problem.[39]

2.3.3 National courts

If a BIT or other investment agreement does not contain any regulations governing dispute settlement, the arising dispute will normally fall under the jurisdiction of national courts, most likely in the host state. The ICSID Convention does not rule out national jurisdiction per se, therefore it is possible for the disputing parties to agree on jurisdiction in a national court even when the ICSID Convention is the primary method of dispute settlement under a BIT. However, when the parties have agreed to ICSID arbitration it is not possible to resort to domestic courts. A contracting party may require that domestic remedies have been exhausted before consenting to arbitration under ICSID.[40] However, it is only a very small amount of BITs that contain a provision on exhausted remedies.[41]

[35] Reinisch and Malintoppi, 2008, p. 692.
[36] Sornarajah, 2000, p. 18.
[37] The New York Convention, 1958.
[38] Salacuse, 2010, p 370.
[39] Salacuse, 2010, p 372.
[40] ICSID Convention 2006, preamble.
[41] Schreuer, 2001, Art 26, para 99.

2.3.4 Overlap between national courts and arbitration

The different systems sometimes overlap in its jurisdiction making it possible for the dispute to be settled by different forums. The existents of various dispute settlement procedures can sometimes confuse in practise. It is common that BITs contain a selection of procedures, leaving it up to the disputing parties to decide on a particular one.[42] The possibility of overlap became apparent with two cases involving SGS, a Swiss company. The disputes arose from similar pre-inspection agreements with Pakistan and the Philippines. SGS, the investor, alleged that these agreements had been unlawfully terminated or breached by both of the host states involved, so they initiated ICSID arbitration. The primary question for the tribunal was whether and to what extent contractual claims may be adjudicated by an ICSID tribunal, it was therefore important to differentiate between contractual claims and treaty claims.[43] In SGS v. Pakistan an ICSID tribunal held that they lacked jurisdiction to adjudicate over contractual claims even if the BIT[44] stipulated a broad interpretation regarding investments and disputes.[45] This view was rejected in SGS v. Philippines where the ICSID tribunal said that they were able to adjudicate both in contractual claims and treaty claims in relation to a similar approach in the BIT regarding investments and disputes.[46] The case of SGS v. Pakistan was however more complicated, SGS had already initiated domestic proceeding when resorting to the ICSID arbitration. The Swiss proceedings failed due to the sovereign immunity of Pakistan.[47] Thus the Supreme Court of Pakistan issued an order restraining SGS to pursue ICSID arbitration and meant that the dispute was to be settled in accordance with the Pakistani Arbitrations Act as was provided for in the pre-shipment inspection agreement.[48] This case is complicated and complex; it is a good example of the system as a whole since it shows both the possibility of resorting to different dispute settlement forums and the issues tribunals face when interpreting a BIT.

It is likely that a dispute will have its closest connection to the host state since that is where the investment is made. Thus, it is likely that the domestic courts of the host state with its jurisdictional rules will be the appropriate forum for the dispute settlement of arisen investment disputes. This might lead to a number of consequences for the disputing parties. The courts of host countries may be avoided by express choice of forum in the agreements, either to a court in the home country or of a third state. However, there is always a risk that the court of a third state will dismiss the case due to sovereign immunity.[49]

[42] Reinisch and Malintoppi, 2008, p. 692.
[43] Alexandrow, 2004, p. 556.
[44] Switzerland- Pakistan BIT.
[45] SGS v. Pakistan
[46] SGS v. Philippines under the Switzerland- Philippines BIT
[47] SGS v. Pakistan, Swiss federal Court.
[48] Pakistan v SGS, Supreme Court of Pakistan.
[49] Reinisch and Malintoppi, 2008, p. 696.

2.3.5 Consultations and Negotiations

In most disputes that rise between a state and an investor the parties are obliged to start off with negotiations or consultations for a specified period of time before they can seek another remedy like arbitration.[50] There is most often a confidentiality surrounding these kinds of consultations or negotiations and there is therefore not any good statistics concerning these settlements.[51] It is possible to settle a case through negotiation even if arbitration has been initiated, and it is estimated that approximately 30% of all ICSID cases are settled through negotiation instead of arbitral awards.[52] In the International Chamber of Commerce Court of Arbitration about two thirds of all arbitration cases were settled through negotiation in 1995.[53]

2.3.6 ICSID Convention

2.3.6.1 ICSID Arbitration

Due to the above shown issues with adjudication many BITs have evolved clear provisions on how disputes are to be settled. The ICSID convention is a common system to incorporate, as a way of settling disputes. To be able to use it both home and host states needs to be members of the convention. The ICSID convention provides a fixed set of rules with the support of an experienced arbitral institution, together with this it provides an autonomous and flexible system that is typically associated with the advantages of arbitration. However, ICSID does not consist of various arbitral tribunals, in fact what they do is to provide facilities for arbitration including keeping lists of possible arbitrators, assisting in the constitution of arbitral tribunals and the conduct of proceedings, screening and registering arbitral requests, adopting rules and regulations and drafting model clauses for investment agreements. Arbitration under the ICSID convention is not compulsory due to the fact that both disputing parties (home and host state) are contracting parties to the convention. Arbitration under ICSID only becomes binding after the written consent of both parties, either host state and home state or host state and investor.[54] Once written consent has been given, either in an investment agreement or otherwise, it is not possible to unilaterally withdraw. The arbitral tribunals then have the exclusive competence to decide on its jurisdiction. After given consent the awards are binding and enforceable, and they may not be disregarded or challenged due to nullity unless it is under the convention's own annulment rules. The possibility for unilateral impediments during proceedings is also foreclosed by the convention. It is safe to say that the convention does its very best to assure that the proceedings will continue even if co-operation from one party is lacking.[55]

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[50] Dugan an others, 2008, p.117.
[51] Salacuse, 2010, p. 364.
[52] Coe, 2005, p. 12f.
[53] Schwartz, 1995, p. 98f.
[54] The ICSID Convention, art 1, 6, 12, 18, 36 and 38.
[55] The ICSID Convention, art 1, 25, 38, 41, 45, 52, 53 and 54.

2.3.6.2 Requirements

Not all disputes may exploit the benefits of the ICSID Convention. There are two requirements established in art 25 of the convention relating both to the nature of the dispute and to the parties of the dispute. The jurisdiction of the ICSID tribunals is limited to legal disputes arising directly out of an investment. The jurisdiction further covers contracting states and nationals of a contracting state.[56] It is due to these requirements not possible for parties to utilise the ICSID arbitration if the dispute does not fulfil the entire requirements even if they expressly consent to it.[57] To solve this issue an additional facility was created as a way of granting access under the Conventions arbitration even if the requirements are not fully met, explained in more detail in 2.3.6.5.[58]

2.3.6.3 Final awards

Article 54 of the Convention states that ICSID awards are final awards that are binding for the contracting States; therefore they have to be recognized in all contracting states as if they were final judgements of the domestic courts. In this way the ICSID arbitration is relatively secluded from interference and review by national courts.[59] There are often big amounts of money at stake in an investor-state dispute, amounts that can put a strain on the host countries budgets or finances if they are to pay an award settled by arbitration. The highest award that has been settled was against the Czech Republic in 2003 and was for US$353 million.[60] The risk of high awards makes host countries more reluctant at break provisions in investment agreements, making investing in the state more secure.[61] ICSID provides for a special annulment procedure for their awards. An ICSID award may be set aside by an ad hoc committee if the tribunal was not properly constituted, the tribunal manifestly exceeded its powers, there was corruption on the part of a member of the tribunal, there was a serious departure from a fundamental rule of procedure, or the award failed to state the reasons on which it was based.[62] There were discussions in 2004 and 2005 on introducing a true appellate system within ICSID, however today it appears unlikely that these plans will be made reality.[63]

2.3.6.4 Conciliation

It is not only arbitration that is available under the ICSID Convention, also conciliation is at hand, however not as frequently utilised. This is shown by the fact that by 2006 ICSID had received 192 requests for arbitration, but only four for conciliation.[64] The two methods are not differentiated in the convention but only one at the time can be used in a dispute. It is therefore important that contracting parties specify whether arbitration or conciliation

[56] The ICDID Convention, art 25.
[57] Schlemmer, 2008, p.
[58] Reinisch and Malintoppi, 2008, p. 700.
[59] Reinisch and Malintoppi, 2008, p. 700.
[60] CME v Czech Republic, 2003.
[61] Salacuse, 2010, p 355f.
[62] ICSID Convention art 52.
[63] Reinisch and Malintoppi, 2008, p. 701.
[64] ICSID webpage.

is the method applicable to upcoming disputes. It is however possible to resort to arbitration after failed attempts of conciliation.[65] Conciliation is the lowest in the hierarchy of dispute settlement through the involvements of a third party, mostly because the settlement is not enforceable.[66]

2.3.6.5 Additional Facility

The last form of dispute settlement under the ICSID Convention is the previously mentioned additional facility. The additional facility was established in 1978 as a way of opening up the access to dispute settlement under the ICSID Convention. The following disputes that do not qualify for arbitration or conciliation may use the additional facility; firstly when only one side of the dispute is a party to or national to a party of the ICSID Convention, secondly when there is a dispute that does not directly arise out of an investment provided that at least one side of the dispute is a party to the convention, or a national to a party. Thirdly, fact-finding proceeding between a contracting state and a national of another state may be brought under the additional facility.[67] If neither side of the dispute is a party to the ICSID Convention, then the additional facility is not applicable and the dispute needs to be settled by another institution, like UNCITRAL.[68] However, just like commercial disputes, it is possible to settle disputes both by institutional arbitration or ad hoc tribunals.[69]

2.3.7 Advantages and disadvantages

Arbitration under the ICSID Convention provides several advantages to investors and can be summarised as follows. Firstly is gives the investors the possibility of direct access to a form of dispute settlement in case of a dispute with a host state. It also extends the possibility of dispute settlement beyond the national courts. Another advantage for an investor is that they do not have to rely on diplomatic protection from their home state. Also the enforcement provisions in the ICSID Convention provide an advantage since it is likely that the awards will be effectively enforced. Nonetheless the ICSID Convention is not only advantageous for the investor, it is also positive for the host state to adopt the ICSID convention. The legal security that ICSID provides for an investor attracts investments and creates a favourable investment climate in the host state. Using arbitration under the ICSID Convention also excludes the harassment potential of diplomatic protection that a home state of an investor might exercise against a host state.[70]

When looking at diplomatic protection the advantages are not as many for the investor as with ICSID, instead there are several disadvantages. One disadvantage is that the investor relies entirely on the home states interest in

[65] Reinisch and Malintoppi, 2008, p. 702.
[66] Sornarajah, 2000, p. 18.
[67] Reinisch and Malintoppi, 2008, p. 704.
[68] Reinisch and Malintoppi, 2008, p. 705.
[69] Reinisch and Malintoppi, 2008, p. 707.
[70] Reinisch and Malintoppi, 2008, p. 701.

helping out in the situation. If a home state decides to bring the claim, then they own it and the investor has nothing to say when it comes to the settlement. Another big disadvantage for investors when it comes to diplomatic protection is the home states lack of ability to extend its diplomatic protection to nationals who are shareholders in a foreign company.[71] This was decided in the famous and criticised case of Barcelona Traction. The case, settled in the international court of justice stated that Belgium was not able to bring claims under diplomatic protection for Belgian shareholders in a Canadian company whose activities were prevented in Spain after an expropriation by the Spanish government. The court meant that the primary part injured was the Canadian company, not the Belgian shareholders.[72] The decisions made through diplomatic protection are not as enforceable as ICSID arbitration. The decisions of diplomatic protection had yielded little concrete results in history and the injured party has not received monetary compensation. With diplomatic protection the investor is dependent on the home state to bring forward claims, and the home state may not find it necessary, leaving the investor incapable of receiving damages. The disadvantages with diplomatic protection for an investor versus the advantages of ICSID arbitration are one of the reasons that the making of BITs has increased enormously in the past 20 years.[73]

[71] Salacuse, 2010, p 359.
[72] Barcelona Traction, 1970.
[73] Salacuse, 2010, p 359.

3 Critisism on Investment Treaty Arbitration

3.1 Introduction

The system of investment treaty arbitration has been highly criticised by e.g. authors, professors and practitioners. The critique differs and is aimed at different aspects of the system. However, a lot of the criticism is raised due to the fact that the system of law differs in many ways, as explained above, from other areas of international law. It is unique that a private actor has the possibility to initiate arbitration against the government of a foreign state, and that the awards are highly enforceable. The next chapter of this thesis will elaborate on the criticism against the system. The focus of the criticism will be a book written by Gus van Harten in 2007 named *Investment Treaty Arbitration and Public Law*.

3.2 Information about the author

The book *Investment Treaty Arbitration and Public Law* by Gus van Harten derives from his PhD thesis written between 2002 and 2006 at the London School of Economics. It is an analytical and institutional study of the system of investment treaty arbitration. The book contains a lot of critique, critique that I will elaborate on in this chapter.

3.3 Overall attitude

The last section of the first chapter van Harten states the following;

> "In this last regard, it should be emphasized that the target of criticism in this book is neither the global economy nor foreign investors nor the employment of international law and adjudication to strengthen the confidence of international business or resolve regulatory disputes involving the state. Rather, the target of criticism is the particular way in which states have used a private method of international adjudication to resolve claims that should be finally determined by courts, whether domestic or international. Consensual arbitration is broadly suitable as a means to settle disputes between companies or between states, but it is fundamentally inadequate as a substitute for the public courts in the regulatory domain. As I shall argue, 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."[74]

[74] Van Harten, 2007, p. 10.

This quote shows van Harten's attitude against the whole system of investment treaty arbitration.

Van Harten means that host governments and investors has chosen to use the model of private arbitration instead of that of a tenured judiciary, leaving it up to an arbitral tribunal to decide what legislature, public administration and courts may lawfully do in the exercise of regulatory powers. This way of settling disputes makes the system unlike any other within international law. The system is unique in the way that it is a method of public law adjudication, meaning that it is used to resolve regulatory disputes between individuals and states, as opposed to reciprocal disputes between equals, such as between states or between private actors. Investment treaty arbitration submits sovereign authority and budgets of state to formal control by adjudicators. Van Harten says that since the arbitrators are not tenured and only one class of parties can bring claims, they are suspected of interpreting investment treaties broadly as a way of expanding the systems appeal to potential claimants and, in a way, their own prospect of future appointment.[75] This makes the system dependant on the fact that investors are pleased with the results of arbitration, making other investors interested in utilizing the system.[76]

3.3.1 Summary of the critique

The main issues that van Harten sees with the system today is:

1. The courts should solve regulatory disputes that may affect the public. The arbitration process cannot fulfil core features of dispute settlement since it lacks in accountability, openness, coherence and independence.
2. The way of settling disputes through investment treaty arbitration is unlike any other system of international law, the system gives a private actor a lot of power.
3. Van Harten claims that there is a bias in favour of the investors. This due to the arbitrator's lack of tenure, which makes them dependent on prospective claims, claims that only the investors can bring.
4. The system can put a strain on host state economies due to its high awards and strong enforceability. It is also open for forum shopping.

3.4 Essential characteristics

The system of investment treaty arbitration has several essential characteristics according to van Harten. The first one is that the arbitrators have a wide-ranging jurisdiction to review sovereign acts by interpreting investment treaties making them empowered to resolve core matters of public law. Secondly, investment treaties use the enforcement structure of

[75] Van Harten, 2007, preface.
[76] Van Harten, 2007, p. 4.

the ICSID convention and the New York convention making the awards of arbitrators more widely enforceable than other adjudicative decisions in public law. The third characteristic is that the laws of many investment-exporting countries were revised in the 1980s and 1990s to direct domestic courts to defer to foreign arbitration awards. The result of this according to van Harten is that arbitrators can interpret and apply public law with limited court supervision. The last and fourth is that the arbitrators have the power to award damages as a public law remedy without applying various limitations on state liability that has evolved in domestic legal systems as a way of balancing the objectives of deterrence and compensation against the opposite principles of democratic choice and governmental discretion. All of the four characteristics enable arbitrators to settle on the legality of sovereign acts and to award public funds to businesses that has sustained a loss as a result of governmental regulations. Van Harten says that this undermines the basic hallmarks of judicial accountability, openness and independence. Van Harten means that it is a step backwards using arbitrators to settle investment disputes instead of tenured judges in national courts.[77]

3.5 Forum shopping and high awards

It is further argued in the book that the awards from investment treaty arbitration can put an enormous strain on the host states economy. Van Harten highlights the case of CME v. Czech Republic where the Czech Republic was ordered to pay US$353 million to an investor that owned a Czech broadcasting business, a sum roughly equal to the whole health-care budget of the country. The effected investor was a Dutch company, CME Czech Republic, which was in turn owned by Ralph Lauder, an American billionaire. The tribunal ordered the Czech Republic to pay damaged to CME for violating the Czech Republic- Netherlands BIT by issuing regulatory advice that prompted CME to divest itself of a popular TV station.[78] Van Harten argues that this case is important for two reasons, first is the huge amount of money putting a strain on the Czech Republic. The second issue with the case is that just ten days before the award was issued a parallel claim by Mr Lauder based on the same case against the Czech Republic was dismissed by a separate tribunal. The dismissed case was initiated six months earlier under the Czech-United states BIT. The tribunal in the dismissed case found that no violation had been done since they:

> "did not see any inconsistent conduct on the part of the Media Counsel which would amount to an unfair and inequitable treatment."[79]

[77] Van Harten, 2007, p. 4f.
[78] CME v. Czech Republic, 2001.
[79] Lauder (Ronald S) v Czech Republic.

Thus, two conflicting decisions were issued under the same dispute under similarly worded BITs. Mr Lauder lost his personal claim based on the argument that the breach by the Czech Republic was:

> "too remote to qualify as a relevant cause for the harm."[80]

However, Mr Lauder through his Dutch holding company could collect damages. Van Harten argues that this opens up for forum shopping and shows the systems lack of coherence. Investors can now trigger the compulsory investment treaty arbitration, leaving them stronger than any other private actor in dispute settlement under international law.[81] Van Harten means that the system only protects one class of individuals by constraining the government that continue to represent everyone else.

> "Designed this way, the system disadvantages those individuals who stand to benefit from business regulations that is now foreclosed by investment treaties or from other public initiatives, the cost of which is made too high or uncertain by threat of investor claims."[82]

3.6 Ambiguity and uncertainty

There in an ambiguity to several terms incorporated into BITs, such as investment, discrimination, fair treatment and expropriations, the ambiguity gives them a wide authority in public law. Because of this ambiguity investment treaties authorize arbitrators to scrutinize virtually any sovereign act of the state that may affect a foreign investors asset according to van Harten. It is uncertain if investors by filing claims can compel states to pay compensation for regulatory measures that do not specifically target a foreign investment for abuse or discrimination.[83]

In the current system individuals are awarded damages for sovereign wrongs, which raises tricky issues about the scope and purpose of state liability and the appropriate role of government. The question that van Harten raises due to this fact is whether damages should be awarded to compensate individuals, or to deter inappropriate state conduct. He also wonders if liability should be limited by requirements of malice or fault on the part of the state or even in light of the need to uphold flexibility and predictability in government? Another question raised is if legislative or judicial acts should be exempt from liability. Van Harten explains that these questions previously have been resolved by domestic public law. Today under the system of investment treaty arbitration these questions are brought within the discretion of arbitrators and therefore kept confidential in many

[80] Lauder (Ronald S) v Czech Republic.
[81] Van Harten, 2007, p. 7f.
[82] Van Harten, 2007, p. 10.
[83] Van Harten, 2007, p. 93f.

cases. Thus, approaches to state liability has become more relevant to international adjudication.[84]

Van Harten further criticises that many investment treaty arbitrators approach the system as a slightly modified form of commercial arbitration. He argues that investors and states are treated as equal disputing parties in a reciprocally consensual adjudication. By doing this, interpretation should be based on the intent of the disputing parties, not of the state parties. This system changes investment treaty arbitration into a regime governing the public sphere by private law rules or rights-based norm; this results in a skewed system in favour of business and against other individuals and the community as a whole.[85]

3.7 Key aspects

There are four key aspects of public law adjudication according to van Harten, accountability, openness, coherence and independence. Since investment treaty arbitration not only affects the parties involved but also the public and since the awards are highly enforceable the system of investment treaty arbitration is a form of public law adjudication. Investment treaty arbitration lacks in all four key aspects according to van Harten.

3.7.1 Accountability

With accountability the system is lacking due to the fact that arbitrators can interpret public law without the possibility of a judge reviewing their decisions for errors of law. Accountability is a broad concept that can include different checks and restraints on judicial powers. Is has been criticised that many arbitrators lack in their competence when it comes to investment treaty arbitration since their background is in commercial law. It is hard in the current system to appeal an award even if it is considered to be wrong, therefore the accountability is lacking. Van Harten argues:

> "this lack of judicial supervision renders the arbitrator's interpretation of public law- itself a fundamentally sovereign act- unaccountable in the conventional sense."[86]

To be able to understand this fully it is helpful to look at how arbitration awards are enforced by domestic courts pursuant to the New York convention according to van Harten. It is important to distinguish the jurisdictional seat of arbitration from the place of enforcement, since courts in both locations can review the arbitrational awards. The seat of arbitration is the place where the arbitral tribunal is located for purposes of domestic jurisdiction. According to the New York convention, arbitration is subject to

[84] Van Harten, 2007, p. 107. (with further information in van Hartens footnotes)
[85] Van Harten, 2007, p. 124f.
[86] Van Harten, 2007, p. 154.

supervision by domestic courts at the seat of arbitration. A respondent state may only apply to set aside an award in the courts of the arbitrational seat based on its domestic law. It is therefore the domestic law of the arbitrational seat that determines the level of supervision available for a court to exercise over an arbitration tribunal. Hence, by selecting the seat of arbitration, arbitrators ultimately decides whether investment treaty arbitration constitutes an extra-territorial arrangement by which sovereign behaviour of one state is subject to review by a tribunal established in the jurisdiction of a foreign state, a state that can be the home state of the investor.[87]

The place of enforcement is the location where the investor seeks to enforce an award against the assets of the respondent state.[88] It is possible for a court at the place of enforcement to refuse to enforce an award based on the limited grounds established in the New York Convention. It is also possible to enforce an award even where the award has been set aside in the seat of arbitration, then again that is not very likely.[89] However, it is feasible for an investor to seek enforcement of an award against the assets of the respondent in any court of a state party to the New York Convention, regardless of whether the courts of either the respondent state itself or the place of arbitration has upheld the awards. This makes the awards highly enforceable for an investor.[90]

The wide prospects of seeking enforcement restrict judicial supervision of arbitrators according to van Harten. This due to the possibility for investors to pursue the enforcement of awards in any state that is party to the New York convention, dividing supervisory responsibility among the courts of many different countries. He means that:

> "judicial supervision is restricted because the enforcement structure limits the setting aside or non-recognition of awards to the narrow grounds enumerated in the New York convention and relevant domestic legislation. In international commercial arbitration, this restriction on judicial supervision is justifiable on the basis that the courts should not interfere with the choices of private parties to resolve commercial disputed in a forum of their choosing. Under investment treaties, though, the structure operates to insulate the authority of arbitrators to interpret public law."[91]

The possibility to choose jurisdiction gives the investors possibilities to pick the one most likely to defer to and enforce the award. There are states that have adopted liberal enforcement rules for foreign investments as a way of

[87] Van Harten, 2007, p. 155f.
[88] Van Harten, 2007, p. 156f.
[89] The New York Convention.
[90] Van Harten, 2007, p. 157.
[91] Van Harten, 2007, p. 158.

attracting arbitration in the state; one result of this is reduced court supervision.[92]

3.7.2 Coherence

When it comes to coherence van Harten argues that the lack of an appellate body who can review awards, makes it difficult to unify the jurisprudence into a secure system of state liability. The issues arise from the systems fragmented and individualised structure, and especially from the non-existence of an appellate institution. To get coherence it needs to exist an appellate body with jurisdiction to review awards issued by different tribunals under divers BITs and to correct errors of law made in the first instance. Since there are so many different BITs interpreted by various tribunals it is inevitable that core standards and concepts will be interpreted in distinct ways. Supervision of tribunals is made by domestic courts or by the ICSID annulment process. This is a way of increasing coherence, however, different courts in various states, makes it hard to attain more complete coherence as one does with one single appellate institution performing the supervision. Coherence is not only an issue for investment treaty arbitration; it is also a problem for commercial arbitration. One of the greatest challenges for domestic and national courts is to interpret the law in flexible yet predictable ways; thus, coherence is an issue at both court and in arbitration. Then again, the courts have had many years of practise in the area. However, coherence is not a unique issue for investment treaty arbitration.[93]

3.7.3 Openness

The aspect of openness if not fulfilled since a big amount of cases is settled without public knowledge and observation. The general editor of van Hartens book sets in the preface that the criterion of transparency and openness within dispute settlement is not sufficient in the system of investment treaty arbitration, this due to the fact that tribunals are deciding on questions of great importance to the public order of states. The issues with transparency can be shown by the fact that ICSID is the only international forum settling investment claims that is required to publicise them. Other arbitral tribunals established under e.g. the UNCITRAL rules allow for claims to be kept confidential, unless both parties agree otherwise, in the tradition of commercial arbitration. Transparency is a fundamental cornerstone in the rule of law and the lack of it is therefore a problem. Because of the confidentiality in claims, it is not possible to know for certain the extent of investment treaty arbitration. However, the increase in ICSID claims is a strong indicator of the system as a whole.[94]

The investors and the disputing governments appoint the members of the arbitral tribunals. This makes the proceedings, or even the existence of the

[92] Van Harten, 2007, p. 158.
[93] Van Harten, 2007, p. 164f.
[94] Van Harten, 2007, p. 30f.

tribunals, private, giving little or no opportunity for public comment upon or scrutiny of the proceedings.[95] It is not possible for the arbitrators to hear the views of non-parties that might get affected by the dispute. Public access to information relating to judicial decision-making in domestic and international courts is a fundamental principle of law. It is essential that adjudication takes place in the public eye, subject to certain exceptions, and that judicial decisions together with relevant documents filed in litigation be placed in the public record, so that the public can access it. This is essential due to the fact that if the information was not public there would be no possibility for public scrutiny and matters affecting the society could be decided in secret. Openness is therefore a precondition for both accountability and independence in adjudication.[96]

Openness is a fundamental principle for decisions in courts; however, confidentiality is one of the selling points for commercial arbitration. Van Harten finds the confidentiality in commercial arbitration very different from confidentiality within investment treaty arbitration. In commercial arbitration it is only the parties or overwhelmingly only the parties that will be affected by the award. However with investment treaty arbitration the award might affect the state as a whole, i.e. the population of the state. Investment treaty arbitration allows the meaning of public law to be determined in secret by arbitral tribunals.[97] The New York Times has reported on NAFTA arbitration stating the following:

> "Their meetings are secret. Their members are generally unknown. The decisions they reach need not fully be disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors…"[98]

A large proportion of awards are settled under ICSID, making them publicly available. However, there is a possibility for investors and respondent states to initiate a completely confidential arbitration, maybe even confidential enough that no one even knows about the arbitration at all.[99] In 2002 the NAFTA states intervened and stated that they will publish all documents submitted to, or issued by NAFTA tribunals. They also said that they interpreted the treaty such that it does not prevent them from publishing material relating to claims involving them. By doing this the states put openness ahead of party autonomy regarding rules of arbitration. NAFTA is developing in the right direction, opening up for public scrutiny making the principle of openness more present. The US has incorporated more openness by allowing publication of documents relating to investment treaty

[95] Van Harten, 2007, General editors preface.
[96] Van Harten, 2007, p. 159f.
[97] Van Harten, 2007, p. 159f.
[98] De Palma, 2001.
[99] Van Harten, 2007, p. 160f.

arbitration in new BITS. However, confidentiality still dominates within investment treaty arbitration, and the European countries have a lot to learn from the US.[100]

3.7.4 Independence

Van Harten finds the lack of independence in the system the most troubling of them all. He means that the lack of independence is reflected in all of the above-discussed key aspect of investment treaty arbitration. As mentioned, it is argued that arbitrators have a financial stake in arbitration making the system of investment treaty arbitration dependant on investors bringing claims. Since the arbitrators are not tenured judges they lack the security it brings, making them dependent on prospective claims. Judges are independent in the way that they are appointed for a set term of office and assured a fixed income regardless of how they perform and decide in different cases. The longer a judge's term of tenure is, the less anxiety he or she will have concerning future employment. No judge or court is entirely independent; society and things surrounding it will always influence. However, the courts are the closest things we have to independence according to van Harten.[101] Arbitrators lack the security that judges possess due to tenure since they are appointed on a case-by-case basis. Arbitrators are appointed by either the disputing parties or by an external authority, e.g. ICSID.

Van Harten says that it is okay to use a dependent system in commercial disputes since both parties agree to this on equal basis. However, in investment treaty arbitration it is only the investor that can bring a claim. This undermines the judicial independence by foreclosing security of tenure. Consequently arbitrators are made dependent on prospective claimants and executive officials for their future appointment. The dependence on prospective claimants is pretty clear. Van Harten asserts that since it is only the investor that can bring claims, it is tempting for arbitrators to decide in their favour, making the system of investment treaty arbitration more appealing for other investors, increasing the likelihood of future appointment for the arbitrator. When it comes to executive officials van Harten argues that the dependence arises when organisations designed to appoint arbitrators in disputes are utilised by the disputing parties. Then it is essential for arbitrators to be of interest for the executive official appointed to elect arbitrators. The leading organisation in appointing arbitrators is ICSID, established under the World Bank. The president of the Word Bank is nominated by the US government and confirmed by the Bank's Board of Directors, who is by convention a US national. Van Harten argues that this will make the appointed arbitrators more akin to decide in favour of the investors, who is typically from an investment exporting country, since they do not want to upset the states that directly and indirectly is involved in their appointment.[102] The system is tainted by an apprehension of bias in favour

[100] Van Harten, 2007, p. 162f.
[101] Van Harten, 2007, p. 168.
[102] Van Harten, 2007, p. 170f.

of allowing claims and awarding damages against governments according to van Harten.[103]

3.8 Options for reform

Van Harten argues that it is the system as a whole that is inadequate in solving investment treaty disputes. It cannot be fixed by appointing different persons through ICSID or other institutions. Restructuring the whole concept of investment treaty arbitration can only solve the issues. There is a need to reinstate the model of public courts into investment treaty dispute settlement. Van Harten suggests both a solution with domestic courts and one with an international court. He suggests that strong investment exporting countries, many of them in Europe follow the path that the US has taken with more openness creating more coherence and accountability.[104] This thesis will not elaborate further on van Harten's options for reforms since they are mere ideas not currently effective.

3.9 Later critique

Van Harten has kept criticising the system of investment treaties. This thesis will look at some of his critique written after the publication of his book.

In 2008, one year after the book was released he wrote a short commentary on the establishment of an international investment court. Here he highlights many of the issues raised in the book, however with more focus on the lack of need to exhaust local remedies before bringing investment arbitration claim. He suggests that an international investment court is the best way for solving the current issues with investment treaty arbitration. [105]

[103] Van Harten, 2007, p. 152f.
[104] Van Harten, 2007, p. 175ff.
[105] Van Harten, 2008.

4 In defence of the system of investment treaty arbitration

4.1 Introduction

Not everyone criticises investment treaty arbitration, there are a lot of people in favour of the system. There is also book reviews on van Harten's book criticising parts of it. This chapter will elaborate on three articles.

4.2 Defence by Daniel Meyer

Daniel Meyers wrote an article in 2008 in defence of the investment treaty arbitration system. The article is especially focused on justification against the critique made by Gus van Harten in the above-described book.[106] Meyers means that certain aspects of Van Harten's critique are warranted; however his conclusions, both implicit and explicit are overdramatic. He further says that a modest infusion of accountability, openness, coherence and independence would ameliorate the system. Van Harten's suggestions on a new system would help with this. Nonetheless the system would work fine without these changes. Meyers means that the necessary changes can be accomplished gradually over time into the current system.[107]

To fully understand today's system Meyer means that it is important to know the history of it. ITA, as he abbreviates investment treaty arbitration, developed as a more secure way for investors to settle disputes than diplomatic protection. It was considered that foreign investments would increase the economic development in the world, making investment-importing states stronger economically. With diplomatic protection the investors were not certain that they would be able to receive compensation in case of host-state misconduct harming the investment. The uncertainty might scare off investors, resulting in less economic development, therefore there was a need for a safer investment protection.

Today it is not shown that the ITA has had the result of increased economic development in investment-importing states. However it is shown that it has not decreased it.[108] He also highlights that it might not be possible to see the full effects of the system since it was only in the late 90´s that it really bloomed. He means that it is important to keep in mind why the system was created in the first place when looking at what it has developed into. [109]

[106] Meyers, 2008, p.49f.
[107] Meyers, 2008, p.50f.
[108] Vandevelde, 2005, p 185f.
[109] Meyers, 2008, p.52f.

4.2.1 The ITA system as a system of Public Law Adjudication

Van Harten means that the ITA system is a public law system since the awards can regulate governmental conduct. Public law has traditionally been settled in the states legal system. ITA has radically changed this by allowing investors to bring claims directly against a state under arbitration, not at court. Since ITA has taken the role that domestic legal systems had before, they need to fulfil the four key aspects of public law adjudication according to van Harten, accountability, openness, coherence and independence.[110]

Meyer states that it would not be smart for arbitrators to favour decisions that interpret BITs broadly and thus conciliate investors, since it would jeopardize the long-term survival of the system. In this way it is in the arbitrators best interest to maintain objective and resolve upcoming disputes in a neutral manner. Meyer also contests the critique made by van Harten of that arbitrators are biased in favour of investors since there is no empirical evidence of this. If arbitrators were overall biased it would show as a trend in the arbitral awards. Van Harten criticises the lack of coherence in ITA, something that Mayer see as evidence of the fact that arbitrators are not biased, if there is no coherence between arbitrators, how can there then be a common bias in favour of investors? Meyer claims that it is very questionable of van Harten to want to fundamentally alter a system that works a whole lot better than the previous one, based on a fear of perceived bias.[111]

In his conclusion Meyer states that the ITA system is a very young one that was developed in a short period of time. Because of this it consists of several flaws. It is therefore important with critique so that the system can ameliorate. However, the critique can be dangerous if it has lost sight of the historical background. Today investors are independent from the interests of their home state and have the possibility to bring their own claims against a state that has injured its investments. The ITA system is not perfect, but Meyer argues that the system is not flawed to such an extent that it has to be changed fundamentally. To remove the ITA system would make investors more vulnerable, making them less inclined to invest in foreign states. This would ultimately put a strain on the economic development that foreign investments have created. Conclusively Meyer means the ITA system is flawed, however it fulfils the needs it was developed for, nevertheless it need improvement to achieve its full potential.[112]

4.2.2 Conclusion

Meyers meets van Hartens critique mainly by referring to the historical background of the system. He does agree with van Harten that the system is not perfect, however he means that van Hartens critique is exaggerated and

[110] Meyers, 2008, p.58f.
[111] Meyers, 2008, p.65ff.
[112] Mayers, 2008, p.80f.

lacks empirical support, however he does not provide any empirical support for his own opinions. Meyers means that the system is very young and that it is still developing.

4.3 Book reveiws

José Alvarez wrote a book review on van Hartens book in October 2008. He both compliments and criticises van Harten. Alvarez means that van Hartens book suffers from numerous flaws. He argues that van Harten's divide of critique between what he calls investors-state arbitration and investment treaty arbitration is illegitimate. Van Harten means that arbitration that rises out of a contractual relationship where the state can decide on a case-by-case basis if it agrees to arbitration is acceptable. However, ITA is not acceptable since it makes the states obliged to utilise arbitration in any dispute that may rise between a state and an investor, making it more feasible for disputes affecting the public to be resolved by arbitration. Alvarez argues that van Harten does not provide enough argument for this divide in arbitration. He means that it is very possible that the disputes that have been settled under ITA would also be settled thought arbitration in a more contractual relationship.[113] Alvarez critiques van Hartens lack of explanation when it comes to the two forms of arbitration, he argues that van Harten give little explanation as to why these forms are so different to him.[114]

Alvarez, just as Meyer, critiques van Harten's lack of evidence in support of his alleged bias in favour of investors under arbitration. The author means that van Harten has no support in awards that show the claimed bias.[115]

Alvarez further considers van Harten to be failing in his reasoning over why states have resisted proposals for an appellate investment mechanism. According to Alvarez the majority of states appear to fear that a permanent group of appellate judges would cost more than arbitration and cause delay, many also fear that the judges would feel more empowered than ad hoc arbitrators to evolve principles of international investment law. The judges might prove more capable of developing more constant jurisprudence. Conclusively Alvarez means that van Harten has focused on a very narrow scope of the system and in doing so:

> "he may be barking up the wrong tree, ignoring a huge forest behind."[116]

Also Scott Shackelford wrote a book review on van Harten's book in 2008. His reasoning regarding it is similar to Meyer and Alvarez, and he both compliments it and gives it critique.[117]

[113] Alvarez, 2008, p. 911f.
[114] Alvarez, 2008, p. 912.
[115] Alvarez, 2008, p. 913.
[116] Alvarez, 2008, p. 915.
[117] Shackelford, 2008, p. 216.

4.3.1 Conclusion

Alvarez argues that van Harten does not provide enough evidence and arguments for many of his conclusions. He means that van Harten might be focusing on the wrong thing missing out on other core facts. Nor Alvarez has provided for empirical fact as a basis for his arguments, therefore it is word against word and it is up to the reader to form an opinion of their own regarding the system and its flaws.

4.4 Empirical evaluation of the system

Meyers, Alvarez and Shackelford has criticised van Harten for not providing enough evidence in support of his claimed bias in favour of investors. They mean that van Harten should have demonstrated support of this claim in arbitral awards.

4.4.1 Empirically evaluating claims about Investment Treaty Arbitration

Susan Franck has performed empirical studies of awards as a way of evaluating investment treaty arbitration claims. Franck means that empirical studies can offer valuable insight on issues of international importance, such as investment treaty dispute settlement. In her study, Franck has explored in each award (1) who is involved in arbitration and what is arbitrated, (2) increase in awards, (3) win/loss rates, (4) amounts claimed and awarded, (5) arbitration cost, (6) use of other dispute resolution processes, and (7) nationality and gender of the arbitrators. Franck considers that the answers of these questions will contribute to future research and provide her with enough information to evaluate claims made about the investment treaty arbitration.[118] Franck argues that empirical analysis can provide critical information to aid effective conflict management, reduce investment risk and promote international development. She means that an increased emphasis on empirical dimensions in this area will not solve the problems; nonetheless it may offer an opportunity to make more informed policy choices.[119]

Franck's study starts of with a quote, a quote in support of her work, it states:

> "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."[120]

Through her empirical study Franck found that some of the claims made against investment treaty arbitration was correct and some were erroneous. It was correct that the number of awards have increased in the past years, it

[118] Franck, 2007, preface.
[119] Franck, 2007, p. 6.
[120] Wendel Holmes, 1897.

was also right that arbitration can be very costly, that there where a small number of settlements and that only a small number of arbitrators were women. However, several claims made against the system where flawed according to Franck's study. Developing countries were not the only respondents; there were a large portion of claims against OECD countries and barely any claims against the least developed countries. Another conclusion that Franck could make out of the study is that investors did not win more disputes than governments and the tribunals did not generally award large damages. She also concluded that there were a relatively large number of active arbitrators, but only a few of them had repeat appointments.[121]

4.4.2 Development and outcome of Investment Treaty Arbitration

In 2009 Franck published another article based on empirical study of ITA awards. This time she wanted to answer three questions by statistical analysis. If (1) the arbitration process inappropriately favours the developed or the developing world, (2) arbitrators from the developed or the developing world exert undue influence on the process, or (3) these factors apply in combination.

Franck found that presiding arbitrators[122] came from both developed and developing countries, however most were from developing countries. She also found that there is a lack of a statistically significant relationship between development status and the ultimate winners of investment arbitration. There is also a lack of statistically significant relationship between the amounts awarded and development status of the respondent, the development status of presiding arbitrators, or even an interaction between those two variables. In general, development variables do not inappropriately affect the outcome of investment arbitration.[123]

4.4.3 Conclusion

Some of the conclusions that Franck has been able to draw from her empirical analysis deny critique made by van Harten. According to the studies van Harten was correct when he claimed that the arbitration could be very costly for the parties. However, Franck also found that the tribunals rarely award large damages. So the fear of putting an enormous strain on prospective respondents economy is somewhat drastic since most tribunal's awards smaller amounts of damages, amounts that does not put a huge strain on states. Furthermore, the fact that it is not only developing countries that are respondents makes van Harten's arguments less sustainable. A lot of his critique is against a system where the investors comes from strong capital exporting countries whereas the respondents are developing countries with

[121] Franck, 2007, p. 6.
[122] A Presiding arbitrator is the third arbitrator who is elected by both parties, the other two arbitrators or a third party.
[123] Franck, 2009, Introduction.

weak economies where a obligation to pay damages can put a strain on the economy of the state. Since a lot of the respondents are OECD countries with strong economies his generalized critique looses some support. All states can be subject to investment treaty arbitration as a respondent.

One of van Harten's most conspicuous claims where that arbitrators are biased in favour of investors when settling an award. The fact that investors did not win more awards than governments makes this claim rather weak. As Alvarez argues above, if the claimed bias where such a threat to the system then it would show in the awards. By looking at Franck's study one can see that such bias is not particularity likely since the governments has won an equal amount of awards as the investors.

5 Van Hartens critique on the defence and empirical study

5.1 Critique on the defence

Gus van Harten has written articles criticising the results of the empirical studies in 2010 and 2011. In the 2010 article published in Investment treaty news, professor van Harten comments on Franck's study from 2009.

Van Harten argues that many empirical studies do not examine specific hypothesis of bias or position the study in terms of literature on institutional aspects of adjudicative independence. He considers the studies to face serious methodological constraints and depend on assumptions that heavily qualify results. He means that the study does not take into account diversity of fact situations, varying experience levels and incentives among arbitrators and altering political influences of states and private actors.

Van Harten means that Franck has made exaggerated or misplaced assumptions in the study. He also argues that Franck has misclassified several countries as developing when they should have been classified as developed-to-transition countries. He means that her results would become significantly different with the alternative classification. He further states that Franck lacks data to be able to draw the conclusions that she has made. The fact that the investment treaty arbitration system is highly confidential, with the exception of ICSID, makes it hard to collect the needed data for statistical analyses, resulting in difficulties in performing such studies.[124]

Van Harten considers empirical studies to be great contributors to scholarly understanding of investment arbitration, however he means that it has important limitations in its ability to demonstrate the presence of absence of actual bias, even at a systemic level, thus reinforcing the need for institutional safeguards.[125]

5.2 Conclusion

Both van Harten and the other authors criticising him, all claim that the counterpart lacks support in their assumptions. Their standpoints are from two completely different directions, which makes them very defensive of their own view. They are almost as distant in their opinions as a vegetarian and a carnivore. It is hard at this stage to say who is wrong and who is right, it is mostly arguments that has to be seen though the eyes of the beholder.

[124] Van Harten, 2010.
[125] Van Harten, 2011, Abstract.

6 Argentina – A Case Study

6.1 Introduction

To be able to evaluate the differing critique made by the various authors above, this thesis will conduct a case study. The case study will look at and analyse publicly available cases involving Argentina. Argentina is the one country involved in most investment treaty arbitration cases due to its severe financial crisis in the late 1990s. As a way of managing the crisis Argentina restructured the public utility system, eliminated the parity between the US dollar and the Argentine peso, and stopped the pegging of tariffs in government contracts to inflation-adjusted dollars. The pegging of the peso to the dollar had crippled the argentine exporters against their foreign competitors. When removing the pegged parity it disadvantaged foreign investors who had mostly invested in the public service sector in the early1990's when Argentina privatized extensively.[126] Many of the investors held US dollar denominated debts and were forced to collect tariffs from customers in a devalued Argentine peso.

From mid 2001, US$20 billion was moved out of Argentina due to speculations of a devaluation of the peso. The speculations were right, in late November the reserves of the central bank in Argentina fell by US$2 billion in one single day amidst massive capital flight. In a response to this, the Argentinean government froze bank accounts and imposed wage and capital controls. This in turn led to a blocked release of US$2 billion to Argentina from the International Monetary Fund, since they meant that the government had failed to impose austerity measures and other reforms. All this sent the Argentinean economy into a free-fall. A lot of jobs disappeared since huge amount of businesses went bankrupt. The wages of government workers were cut by 40% and US$3 billion in private pensions were redirected to service the national debt. The inhabitants of Argentina were furious and lots of street protests occurred at the time. During two weeks in December five presidents were forced from office.[127]

The governments actions during the crisis also enraged many investors who considered certain acts to be a breach by Argentina of their treaty obligations and initiated dispute settlement through arbitration. Argentina claims that they did what they did as an emergency in a state of necessity due to the belief that the very existence of the Argentine Republic was threatened by the financial crisis. Argentina argues that emergency or necessity should exclude them from state liability due to both treaty regulations and international customary law. Over 50 cases have been initiated and a lot of them are still pending.[128]

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[126] Petersson, 2004, p. 18.
[127] Barrow and others, 2001.
[128] Information found in several cases named in the appedix.

By studying Argentina, hopefully one can look at the critique and appraise against the investment treaty arbitration system with new objective eyes. Analysing a country in financial crisis will give indications on how well the system will work when the world economics is not functioning very well. Hopefully it will give an insight in how it may look in a few years time, when the global financial crisis is over, especially with focus on countries such as Greece.

A lot of the critique made by van Harten can be evaluated by empirical facts. This thesis will conduct a study, both statistically and with focus on certain cases and analyse this as a response to the above-discussed critique and praise.

6.2 Forum shopping

One of the issues raised by van Harten is that there is a problem with forum shopping. This thesis will examine if the problem has occurred in any of the cases concerning Argentina.

There is no case of forum shopping regarding Argentina as obvious as the CME case against the Czech republic discussed by van Harten. Regarding Argentina there are a few corporations that are involved in more than one case. One is Suez, Sociedad General de Aguas de Barcelona (Suez), they are involved in two cases together with other enterprises that they co-own shares with in Argentinean companies. Both of the cases are based on the Spain-Argentina bit when relying on consent for arbitration. Since it is the same bit in both cases there is no issue with forum shopping. Both cases involving Suez are still pending.[129]

Another company involved in two cases are Camuzzi International S.A. Camuzzi is a company incorporated under the Belgium-Luxemburg bit and both cases uses the Belgium-Luxemburg –Argentina BIT. Therefore neither here is there an issue with forum shopping. One of the cases is suspended at the request of the parties and still pending, the other one is concluded after that a settlement by the parties has been agreed and the proceeding has been discontinued at their request.[130]

A third company involved in two cases is Vivendi Universal S.A. Both of the cases is basing its jurisdiction on the France-Argentina BIT, so nor here is there forum shopping.[131] Lastly Azurix is involved in two cases, and also

[129] Suez, Sociedad General de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic. Suez, Sociedad General de Barcelona S.A. and Vivendi Universal S.A. v Argentine Republic.
[130] Camuzzi International S.A. v. Argentine Republic.
[131] Suez, Sociedad General de Barcelona S.A. and Vivendi Universal S.A. v Argentine Republic, Compania de Aguas del Aconquija and Vivendi Universal v. Argentine Republic.

here the jurisdiction is based on the same BIT, the US-Argentina one, leaving it free from forum shopping.[132]

The scope of this thesis is not wide enough to examine the ownership of all companies involved in investment treaty arbitration with Argentina. It is therefore hard to say for certain that no forum shopping has occurred, however, the indication is that forum shopping is not a big issue. So by looking at Argentina one cannot find any proof of forum shopping, however, one must always remember that looking at Argentina may only give an indication of how the system works as a whole. Nonetheless, it is a hint of the fact that forum shopping might not be highly widespread when it comes to investment treaty arbitration.

6.3 High awards

High awards are another issue raised by van Harten. To examine this statement three questions will be discussed. (1) What are the highest and the lowest award rendered? (2) How many awards have been rendered and how many cases are there in total? (3) What is the average amount received in damages for investors.

(1) The highest award that has been rendered against Argentina, at least the highest public one is in the case of Siemens A.G. v. Argentine Republic and it awarded Siemens with damages for US$208.4 million. It was an ICSID case on an informatic services contract with the German-Argentina BIT as the ground for jurisdiction. The case is now concluded, but both annulment- and revision proceedings have taken place after the rendered award in February 2007 by the original arbitral tribunal.[133]

The lowest award rendered was in the case Continental Casualty Company v. Argentine Republic and it was for $2.8 million. This case is also concluded after annulment proceedings that dismissed the application on annulment by Argentina. Continental Casualty Company is an insurance company with its owners in the U.S.. Continental Casualty Company claimed that Argentina had enacted a series of decrees and resolutions that destroyed the legal security of the assets held by the company. These measures frustrated its ability to hedge against the risk of the devaluation of the peso. They claimed US$ 46.4 million in damages. The tribunal rejected all but one of the claims, therefore the rendered damages was a lot lower than claimed.[134]

(2) All in all thirteen official awards rewarding damages have been rendered in cases against Argentina.

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[132] Azurix v. Argentine Republic; Azurix Corp v. Argentine Republic.
[133] Siemens A.G. v Argentine republic.
Germany-Argentina BIT.
[134] Continental Casualty Company v. Argentine Republic.
US-Argentina BIT.

1. CMS Gas Transmission Company v. Argentine Republic ICSID Case No Arb/01/8, concluded. Award in favour of the claimant for $133.2m was rendered on 12 May 2005. Annulment proceedings rejecting the application were concluded 25 September 2007.

2. Azurix v. Argentine Republic ICSID Case No Arb/01/12, concluded. Award in favour of the claimant for $165.2m was rendered on 14 July 2006. Annulment proceedings rejecting the application were concluded 1 September 2009.

3. Siemens A.G. v. Argentine Republic, ICSID Case No Arb/02/8, concluded. Award in favour of the claimant for $208.7m was rendered on 6 February 2007. Annulment proceeding initiated. Settlement agreed by the parties and proceedings discontinued at their request 9 September 2009.

4. LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No Arb/02/1, pending. Award in favour of the claimant for $57.4m was rendered on 25 July 2007. Request for supplementary decision was denied on 8 July 2008. The claimants request for annulment of the "necessity" defence section of the award is pending on the parties agreement 12 June 2009.

5. Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic ICSID Case No Arb/01/3, pending. Award in favour of the claimant for $106.2m was rendered on 22 May 2007. Award rectification proceedings were concluded on 25 October 2007. Annulment proceedings are pending.

6. Sempra Energy International v. Argentine Republic, ICSID Case No Arb/02/16, pending. Award in favour of the claimant for $128.2m was rendered on 28 September 2007. Annulment proceedings were concluded 7 August 2009. Resubmission proceedings are pending.

7. British Gas Group Plc v. Argentine Republic, UNCITRAL 2003, pending. Award in favour of the claimant for $185.2m was rendered on 24 December 2007. Challenge of the award is pending before the Washington D.C. Courts.

8. Continental Casualty Company v Argentine Republic, ICSID Case No Arb/03/9, concluded. Award in favour of the claimant for $2.8m was rendered on 5 September 2008. Claimants' request for annulment of the "necessity" defence section of the award dismissing the request was concluded 16 September 2011.

9. National Grid plc v. Argentine Republic, UNCITRAL 2003, concluded. Award was rendered in favour of the claimant for $54m on 3 November 2008.

10. Compania de Aguas del Aconcuija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No Arb/97/3, concluded. Award in favour

of the respondent was rendered 21 November 2000. Original award was annulled 3 July 2003. Award in favour of the claimant for $105 million was rendered 28 August 2007.

11. El Paso Energy International Company v. Argentine Republic, ICSID Case No Arb/03/15, pending. Award was rendered in favour of the claimant for $43 million on 31 October 2011. Case is pending due to Annulment proceedings.

12. EDF International, SAUR International and León Participaciones Argentinas v. Argentine Republic, ICSID Case No Arb/03/23, pending. Award in favour of the claimant for $136 million was rendered 11 June 2012. Case is pending due to annulment proceedings.

13. Impregilo S.p.A v. Argentine Republic, ICSID Case No Arb/07/17, pending. Award in favour of the claimant for $21.3 million was rendered 21 June 2011. Case is pending due to annulment proceedings.

Six of them are concluded and seven are still pending, five of the pending ones are in the middle of annulment proceedings, one is appealed to the Washington D.C. court and one is pending due to resubmission proceedings. An ICSID annulment tribunal has annulled two of the concluded cases. It was the case with Compania de Aguas del Aconquija and Vivendi Universal where the original tribunal first dismissed the claim in favour of Argentina. Another tribunal then annulled the first award. Then a third tribunal found that Argentina had breached its treaty obligation owing US$105 million in damages to the claimants. Also this award went under annulment proceedings, however the tribunal found that the decision was correct.[135] Also the Sempra v. Argentina case has been annulled and resubmission proceedings are now pending.[136]

There are 52 publicly known cases against Argentina, 49 under ICSID and three under UNCITRAL. Half of these cases are concluded and half are still pending.[137] As mentioned above some of the pending cases have been settled, however there are annulment proceedings that keeps them pending. Seven of the pending cases have been suspended on request of the parties. 14 of the concluded cases has been discontinues, some due to lack of jurisdiction and some due to settlement agreement between the parties. Unfortunately these settlements are rarely public; therefore it is not possible to know what kind of settlement has been reached. Out of the concluded cases there is three that has been dismissed.[138] The dismissed cases are Metalpar S.A. and Buen Aire S.A. v. Argentine Republic, ICSID Case No Arb/03/5, Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No Arb/04/14 and TSA Spectrum de Argentina, S.A. v. Argentine Republic, ICSID Case No Arb/05/5.

[135] Compania de Aguas del Aconquija and Vivendi Universal v. Argentine Republic.
[136] Sempra v Argentine republic.
[137] See appendix.
[138] Facts collected by the author on icsid.worldbank.org and italaw.com, see appendix.

(3) The total amount of money that Argentina has been condemned to pay is US$1344.7 million. Since there has been 13 awards the average amount of damaged rendered is US$103.4 million per case.[139]

There have been several awards with high amounts of damages and the average amount rewarded is about US$100 million per case. If Argentina were to pay this in all 52 cases there would be an enormous burden on the state. However, only six out of the twenty-six concluded cases has rendered awards, 23%. Even if the other seven pending cases with awards will stay enforceable when concluded the percentage would be 13 out of 32 (26+7) cases, 40.6%. Nonetheless one has to keep in mind that only three cases has been dismissed by ICSID tribunals, so there is a risk that several of the other pending cases will render awards. So van Harten might very well be correct when he claims that the high awards can put a strain on the host state economy. One can not forget that it is not only the awards that is costly for Argentina and other host states, the whole arbitration proceeding also costs a lot of money. The reason why Argentina is respondent in all of these cases is a severe financial crisis, however eight years has passes since they started recovering. Nonetheless it is important to remember that their economy might not be on top.[140]

Van Harten criticises that the tribunals are able to award public funds to businesses. He means that only courts should be able to do this. On this point the author finds that Meyers has a point when looking at the historical perspective. Historically it has been diplomatic protection that has settled these disputes, however, the protections was not sufficient enough to promote foreign investments and therefore economic development. The former system did not function in the appropriate manner therefore the arbitral tribunals developed. National courts has also settled disputes historically and not fulfilled the demanded need from investors. The fact that there has been a resistance against an international appellate court shows that the international community is not interested in this solution. So it may not be the ideal method of settling claims that private tribunals awards public funds to private actors, but it seems to be the desired way in today's international relationship between states and investors.

6.4 Private method

Van Harten claims that investment treaty arbitrators treat the system in the same way as commercial arbitration. He means that it is a private method used on public affairs, which is wrong since the parties are not equals. Van Harten differentiates investor-state arbitration and investment treaty arbitration. He says that in an investor-state arbitration the host state has the possibility to accept arbitration on a case-by case basis and in investment

[139] See appendix and list of cases above.
[140] The authors own calculations and conclusions bases on information from icsid.worldbank.org and italaw.com.

treaty arbitration the host state gives one consent in the treaty and that consent is applicable on future investment disputes between the state and investors in the state.[141] Like Alvarez above, this author finds no need to differentiate these two since it is the arbitration form in itself that van Harten critiques. The confidentiality is the same in both forms and the tribunals are constituted in the same manner. The use of a private method of dispute settlement has evolved due to the insufficiency of the former system of diplomatic protection. In investment treaty arbitration the states have given consent in the treaty that is applicable on all prospective disputes. This consent makes foreign investments more secure since the investors knows that they will be able to pursue arbitration in case of a wrong doing by the host state. Since the arbitration costs are high it is unlikely that an investor will bring a claim unless they are quite sure that they will gain something. Therefore there will most likely not be a huge amount of cases raised under arbitration where the host state has not committed a wrongdoing. Thus, investment treaty arbitration will most likely not be initiated unless the host state has done something that breaches the investment treaty and the investor is quite certain that they will receive damages. This gives an indication that the system of a general consent in a treaty will not be abused.

6.5 Accountability

The lack of accountability is based on several aspects according to van Harten. He argues that since there is no review by judges, it is hard to appeal and the awards are highly enforceable there is not enough accountability to the system. It is further argued in his book that it is wrong that the place of arbitration and the place of enforcement can be two different places.[142]

There is no review by judges when it comes to the system of investment treaty arbitration and van Harten argues that it is very difficult to appeal under ICSID to get a second opinion on the case.[143] This thesis will therefore look at the statistics when is comes to appeals through ICSID's annulment proceedings regarding the Argentina cases.

Out of the eleven ICSID awards rendering damages to the claimant, eleven of them have been submitted to annulment proceedings and one out of the two UNCITRAL cases has been appealed.[144] A different tribunal than the one who decided the award handles the annulment proceeding. This shows that it is possible under ICSID to use a form of appellate body. If one is not satisfied with the result of the original arbitration one has the opportunity to make a request for annulment proceedings. This increases the accountability of the system since a wrong by one tribunal can be fixed by an annulment proceeding. In the case of Compañia de aguas del Aconquija and Vivendi

[141] Van Harten, 2007, p. 124f.
[142] Van Harten, 2007, p. 153ff.
[143] Van Harten, 2007, p. 153ff.
[144] See appedix.

Universal S.A. v Argentina, an annulment tribunal annulled the original award, then a third tribunal decided on a second award.[145] Also in the Sempra case the award was annulled.[146] With the three awards that dismissed the claim made by an investor none was filed for annulment. The only dismissed case that was filed for annulment is the one mentioned above where an award was rendered by a third tribunal. So this shows that Argentina applied for an annulment in all cases decided against them, but only one of the investors filed for annulment on the awards that dismissed their claims.[147]

Other sources than the ICSID and italaw WebPages show that Argentina has refused to pay the rendered awards making headline in the last few years. Despite the strong enforcement rules of ICSID, Argentine is putting it all to a test. As a way of making Argentina pay, the international community has barred them from international finance, making it harder and harder for Argentina not to pay since they need international finance. However Argentina can survive quite some time without the international finance since its economy is a lot stronger now. Nonetheless since ICSID is so closely linked to the World Bank, it is easy to exclude a country from international finance from the World Bank if they do not pay their awards. Many countries with weaker economies would not make it without the international finance and are therefore inclined to pay.[148]

The author finds the strong enforcement of awards as a positive thing, like many others. Referring to Meyers again, it is important to look at the historical aspect of this. Foreign investment is a way of increasing global economic development, and if the investors cannot get damages for wrongs that are made by a host country, they will probably feel less secure when investing, which would be a negative thing for the global economy. It is possible for both the host state and the investor to seek annulment under ICSID. When annulment proceedings are pending the awards are not enforceable. The high number of annulment proceedings involving Argentina indicates that it is not as hard to appeal as van Harten argues. The enforcement is therefore not as absolute as van Harten states when he critiques that it is wrong with the strong enforcement when it is hard to appeal. It is possible to appeal and the issue is therefore not as imminent as van Harten might argue.

6.6 Coherence

Coherence is a central cornerstone within legal systems. It is important that different courts and tribunals reach similar decisions when facing comparable issues. In many legal systems this is addressed by using

[145] Compania de Aguas del Aconquija and Vivendi Universal v. Argentine Republic.
[146] Sempra v. Argentine Republique.
[147] Metalpar S.A. and Buen Aire S.A. v. Argentine Republic; Wintershall Aktiengesellschaft v. Argentine Republic; DaimlerChrysler Services AG v. Argentine Republic.
[148] Khayat, 2001.

appellate bodies. Since there does not exist one single appellate body within investment treaty arbitration and similar fact situation have got largely differing results van Harten means that the system is lacking in coherence.[149] One case that van Harten highlights to prove his point is the CME case against the Czech Republic, the same case used to prove high awards. This case shows inconsistency in the decision process between the two tribunals, however, by looking at Argentina one may get an indication on if this is one out of many cases or if it is just one unique situation.

To get an indication over the coherence within the cases involving Argentina one has examined if the tribunals, when taking decisions and rendering awards, have considered and looked at previous cases within the same area. Is it common that arbitrators take into account what other arbitrators have found in previous decisions?

All awards in public cases have been examined to establish if there is coherence between the different tribunals. All of the awards do look at previous cases. Some rely on other decisions as a base for their own decision and some look at other cases more as a guideline.[150] However, the tribunals are not bound by stare decisis but they do look at and respect precedence, resulting in increased coherence between the different tribunals.

There is one common ground for all cases raised against Argentina after the financial crisis; Argentina has claimed that they are not liable for any breach of treaties since they mean that Argentina was in a state of necessity or emergency. By looking at how different tribunals have approached the necessity defence one may get an indication of how coherent the system really is.

The first five awards that where rendered against Argentina after the financial crisis was CMS v. Argentina, LG&E v. Argentina, Sempra v. Argentina, Enron v. Argentina and BG v. Argentina. The tribunals approached the necessity defence in diverging ways. The different view on treaty stability and derogation from treaty obligations in economic crisis is shown by the diverging decision against Argentina. Out of the above named cases only the tribunal in LG&E v. Argentina accepted the necessity defence by basing it's decision on the treaty exception found in the US-Argentina BIT and legitimizing the decision through the international customary law. The CMS, Sempra and Enron tribunals relied on international customary law alone when settling the claim (article 25 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, ILC Articles) and found Argentina guilty of breaching the BIT. A third way of solving the dispute was conducted by the BG tribunal and the annulment committee in the CMS case. The two tribunals used a two-step approach where the necessity defence under customary law was only considered when a breach

[149] Van Harten, 2007, p. 164f.
[150] See appendix.

of a BIT had occurred.[151] These different approaches to the necessity defence indicates that the coherence might be lacking in the system just as van Harten has claimed, however, these cases are settled around the same time making it hard to refer to other similar cases. The coherence is not complete in the system; however, the fact that tribunals refer to previous cases indicates an attempt at coherence.

6.7 Openness

Openness is another of the core aspects of public law according to van Harten. One of the main features of arbitration is however confidentiality. Investment treaty arbitration is a mixture of both of these legal systems. The disputes are settled by arbitration and it affects the economy of states making it public law pursuant to van Harten. He further means that dispute settlement involving states should not be confidential; it should be open to public scrutiny.[152] The question is then how confidential the system really is?

ICSID awards are available for the public. It is easy to find and read cases online, making it possible for more persons to access them. However, it is in principle almost exclusively the ICSID cases that are available for the public to read. Out of the 52 cases that the author of this thesis has been able to access, only three[153] of them were not ICSID cases, they were decided under UNCITRAL. The fact that most other cases than the ICSID once are confidential makes it somewhat hard to meet this critique in any other way than saying that some cases are made public, however, it is not possible to say how many that are not. Van Harten might thus be correct when claiming that the investment treaty arbitration systems lacks in openness.

Van Harten states that the US is going in the right direction when incorporating more openness in new BITs making the arbitration process more publicly available. Also the fact that NAFTA arbitration is not confidential anymore is a step in the right direction. As one will be able to see further on in this thesis, the U.S. is the one country where most arbitrators come from in the Argentina cases. The fact that the U.S. is going in the right direction and that many of the arbitrators comes from the U.S. and also the fact that the U.S. raises most cases, also shown below, may influence the arbitration outside of NAFTA and under older BITs to become more open in the process of arbitration. However, it is hard to say for certain anything other then the fact that a lot of investment treaty arbitration is confidential today, resulting in a lack of openness as van Harten argues.

[151] CMS v. Argentina, LG&E v. Argentina, Sempra v. Argentina, Enron v. Argentina and BG v. Argentina. See more information in the appendix.
[152] Van Harten, 2007, p. 159f.
[153] National Grid plc v. Argentine Republic; Anglian Water Group (AWG) ltd v. Argentine Republic, British Gas Group v. Argentine Republic.

6.8 Independence

Independence is the fourth core feature of public law adjudication according to van Harten. It is important that judges and arbitrators are independent. To create independence at court judges are often tenured. Being tenured involves a fixed period of time that a judge will be a judge; the person cannot get fired when having tenure. Having a safe position creates independence since the judge will still have a job no matter how he or she decides in a case. Arbitrators lack this tenure and are appointed on a case-by-case basis. Van Harten argues that this makes the arbitrators dependent on investors bringing claim, which in turn might make them inclined at deciding in the investors favour. Hence if the investors are happy with the outcome of arbitration then it is more likely that they will bring another claim or that new investors will see an opportunity at wining its case based on previous case outcome.[154] This view was criticised by Meyers, Alvarez and Franck above. They all said that van Harten lacked support of this in awards and it was also said that deciding in favour of investors as a way of attracting new claims would be for the pot calling the kettle black since a biased system will eventually get abandoned leaving the arbitrators with no new disputes to settle through arbitration. If there is a bias, Alvarez, Meyers and Franck argues that it would show in the awards, therefore a study of the 52 cases involving Argentina will be examined.

6.8.1 Win-Loss rate

To detect a bias the most apparent way of conduct would be to look at win-loss rates. If disregarding the fact that annulment proceedings are pending in several cases where an award has been established there are 13 awards in favour of the claimant, where Argentina is to pay damages. In only three of the rendered awards the decision has been in favour of Argentina, and the claim has been dismisses. The win-loss rate is therefore 13-3. Only 18.7% of the awards have been dismisses by arbitral tribunals, making the win rate 81.3%. This statistic indicates that most cases have been in favour of the investors. However, one must keep in mind that the arbitration costs alone are high, so it is likely that a company will only bring a claim if they are quite certain to win.[155]

6.8.2 Number of appointments

Another way of examining if there is a bias is to look at how many tribunals each arbitrator has been part of. If most arbitrators were only selected once or twice it would seem less advantageous for them to decide in favour of the investors since it may not have an affect on their future appointments.

[154] Van Harten, 2007, p. 168.
[155] Look at appendix, 7.1.1, cases where an award has been issued.

Appointments	1	2	3	4	5	6	7
President	17	7	5	4	-	-	-
Arbitrator	37	13	2	5	2	3	1
Total	54	20	7	9	2	3	1

[156]

By looking at the table above one sees that a majority of both presidents and arbitrators have only been appointed once. There are 93 presidents and arbitrators all together and only three of them have been both president and arbitrator.[157] 51.5% of the presidents have only been appointed once. 58.7% of ordinary arbitrators have only been appointed once. In total the result is 56.8%. This shows that the majority of all arbitrators involved in settling an investment dispute through investment treaty arbitration have only been appointed once. If you expand the rate to arbitrators that has been appointed once or twice the result for presidents are 72.7%, for ordinary arbitrators 79.3% and the total of both presidents and ordinary arbitrators are 77.8%. This shows that most of the arbitrators have only been appointed once or twice. For an arbitrator that is not a frequent name in the investment treaty arbitration process the gains for deciding in favour of the investor as a way of increasing potential appointments seem rather unlikely.

6.8.3 Arbitrators origin

Van Harten also argues that arbitrators are citizens of the same countries, investment-exporting countries.[158] Below is therefore a table of how many arbitrators there are from the same countries.

ARBITRATORS FROM THE SAME STATE	1	2	3	4	5	6	7	8	9	10	11
Amount of countries	15	6	6	3	1	2	-	1	-	-	1

[159]

All in all there were arbitrators from 35 different countries. Fifteen of these countries had 1 arbitrator as a citizen. The U.S. was the country with most appointed arbitrators as their citizens, eleven and Spain with the second most, eight. However, one may see by examining the table that the majority of countries represented only have 1-3 appointed arbitrators as their citizens.

[156] Based on information gathered by the auther from italaw.com and icsid.wordbank.org.
[157] The three arbitrators are Fransisco Rezek(CMS-case, Compania de Aguas del Aconquija- case and the LG&E-case), Piero Bernadini (El Paso- case, Unisys-case, Mobile-exploration case, Houston Industries- case, pioneer-case, Wintershall-case and RGA insurance-case) and Christer Söderlund (Continental casualty company and sempra energy-case).
[158] Van Harten 2007, p. 169f.
[159] Table based on information gathered by the author found on italaw.com and icsid.worldbank.org.

This shows that many of the arbitrators come from different countries; however, a relatively large amount of arbitrators come from the U.S. and Spain. Van Harten argues that since ICSID is to closely attached to the World Bank it would influence the appointed arbitrators so they are positive against the investment-exporting states.[160] The World Bank is situated in the U.S. and mentioned above the U.S. is the country where most arbitrators come from. This is an indication that van Harten might be correct with the claim that many arbitrators come from the same countries, from investment-exporting countries and that the fact that the World Bank does have an influence on appointed arbitrators.

6.8.4 Home states

To detect the bias in the awards an examination of the home states has been conducted. By looking at the home states of the investors one might see an indication of whether there is a connection between the arbitrators origin and the home states of the investors.

Countries	Claims against Argentina
Unites States of America	20
Spain	9
France	7
Italy	5
Germany	4
Belgium-Luxemburg	3
United Kingdom	3
Chile	2
Netherlands	1

[161]

It is nine countries that have been involved as home states in publicly available investment treaty disputes with Argentina. U.S. investors has raised twenty of the claims and Spain nine of them. The U.S. and Spain were also the two states where most arbitrators came from. This information may explain why so many arbitrators come from the U.S. and Spain, the link may be between home states and arbitrators origin. The investors choose one of the appointed arbitrators, and an investor might see it as an advantage that the arbitrator that they appoint is from their home country since they will speak the same language and share the same cultural and moral background. This information is one explanation for why so many arbitrators come from the U.S. and Spain; it may not be linked to the fact that the headquarters of the World Bank is situated in the U.S.

[160] Van Harten, 2007, p. 170f.
[161] Information gathered and compiled by the auther from italaw.com and icsid.worldbank.org. See appendix.

7 Conclusion

The system of investment treaty arbitration is both praised and strongly criticised. The views and opinions concerning the system run over a broad spectrum. Gus van Harten finds the system highly inappropriate as a way of settling regulatory disputes. Others like Meyers, Franck and Alvarez finds it functioning very well. They see the system with completely different eyes which makes it hard for them to understand the others point of view.

The system is not perfect; it is a young system that is still developing. A lot of issues have been raised in this thesis; some have been confirmed through the study of Argentina and some have been rejected due to empirical facts. Van Harten has a lot of points with his critique and it is important with critique for the system to be able to develop into its full potential. There is still a long way to go, but the development seems to be in the right direction.

The investment treaty arbitration system has provided investors with more safety and security when investing in a foreign state. Today investors are able to bring their own claims against a host state that has breached a treaty obligation; they are no longer dependent on diplomatic protection by their home state. This creates a positive investment climate in the world, something that hopefully will lead to economic development. Today with the global financial crisis it is important that foreign investments are being promoted so that it can help weaker economies to grow stronger.

Van Harten had four main areas of critique against the system.

1. The courts should solve regulatory disputes that may affect the public. The arbitration process cannot fulfil core features of dispute settlement since it lacks in accountability, openness, coherence and independence.

The accountability is stronger than van Harten claims, it is possible to appeal and a lot of cases have been going through annulment proceedings under ICSID. However, since it is not possible to see the possibilities to appeal in other arbitration institutes it is hard to say for certain that the system is entirely accountable. Van Harten's critique is therefore not legitimate when it comes to ICSID arbitration, although it might be with other institutes.

The openness is not as good as it could or should be, today one can find awards online, however, it is not possible to know how many one cannot find. The openness is therefore not complete and Van Harten's critique is therefore legitimate to a certain extent on this point.

The coherence is going in the right direction, the tribunals do look at previous cases but they are not bound to do it. Awards with similar facts

have been decided in different ways leaving the coherence unfulfilled. Van Harten has a point when claiming a lack of coherence, however, the system is becoming more and more coherent so the issue might not be as imminent as claimed by van Harten.

2. The way of settling disputes through investment treaty arbitration is unlike any other system of international law, the system gives a private actor a lot of power.

It is true that the system is unlike any other within international law. The investors do have a lot of power in investment treaty arbitration since they are the only part that can raise a claim. However, this author does not see that as a problem as van Harten does. The possibility for arbitrators to seek arbitration creates a secure investment climate, which promotes foreign investment.

3. Van Harten claims that there is a bias in favour of the investors. This due to the arbitrator's lack of tenure, which makes them dependent on prospective claims, claims that only the investors can bring.

The claimed perceived bias in favour of investors seems rather unlikely when studying Argentina. As Alvarez said, intentionally deciding in favour of investors would harm the system in the long run since it would not be accountable anymore. Being subjective would therefore leave the arbitrators without jobs in the future since no state or investor would utilise a dispute settlement system that is not objective.

4. The system can put a strain on host state economies due to its high awards and strong enforceability.

The damages that has been rendered in the awards has in some cases been very high, putting an strain on the host states economy. However, one has to keep in mind that the host state has most likely gained a lot of money when receiving an increased amount of foreign investors due to the added security that a BIT can bring. The risk of facing arbitration and the cost it brings might not be as imminent as the gain a state might get from foreign investments. If they are to pay damages, it means that the host state has breached a BIT, and breaching a treaty or any other contract has its consequences.

All in all one can say that van Harten has a lot of good point with his critique, nevertheless, the critique is exaggerated. The issues raised are not as imminent as van Harten portrays them. The system works a lot better than the previous one with diplomatic protection. It is therefore not necessary to alter it the was van Harten desires, changing it would leave the investors uncertain about the rights and possibilities, something that would risk their will at investing, which could be very harmful for the economic development. The system is developing in the right direction and hopefully

the deficiencies that do exist will vanish when the system evolves and grows more mature. Rome was not built in one day, nor will this system be.

Appendix

7.1 Information about the Argentina Cases[162]

7.1.1 Cases where an Award has been Issued

1. **CMS Gas Transmission Company v. Argentine Republic** ICSID Case No Arb/01/8
Gas transportation
Home state: U.S.
Date Registered: 24 August 2001
Award in favour of the claimant for $133.2m rendered on 12 May 2005
Annulment proceedings rejecting the application concluded 25 September 2007.

Original tribunal:
President: Francisco Orrega Vicuna (Chile)
Arbitrators: Marc Lalond (Canada)
Francisco Rezek (Brazil)

Annulment tribunal:
President: Gilbert Guillaume (France)
Arbitrators: Nabil Elaraby (Egypt)
James R Crawford (Australia)

2. **Azurix v. Argentine Republic** ICSID Case No Arb/01/12
Water and sewer services concession
Home state: U.S.
Date Registered: 23 October 2001
Award in favour of the claimant for $165.2m rendered on 14 July 2006
Annulment proceedings rejecting the application concluded 1 September 2009.

Original Tribunal:
President: Andrés Rigo Sureda (Spain)
Arbitrators: Marc Lalond (Canada)
Daniel H Martins (Uguguay)

Annulment tribunal:
President: Gavan Griffith (Australia)
Arbitrators: Bola Ajibola (Nigeria)
Michael Whang (Singapore)

[162] All information is gathered from italaw.com and icsid.worldbank.org

3. **Siemens A.G. v. Argentine Republic**, ICSID Case No Arb/02/8
Informatic services contract
Home state: Germany
Date Registered: 17 July 2002;
Award in favour of the claimant for $208.7m rendered on 6 February 2007
Annulment proceeding initiated.
Settlement agreed by the parties and proceedings discontinued at their request 9 September 2009.

Original Tribunal:
President: Andrés Rigo Sureda (Spain)
Arbitrators: Charles N Brower (U.S)
Domingo Bello Janiero (Spain)

Annulment tribunal:
President: Gillbert Guillame (France)
Arbitrators: Florentino P Feliciano (Philippines)
Muhammed Shahabuddeen (Guyana)

Revision tribunal:
President: Andrés Rigo Sureda (Spain)
Arbitrators: Charles N Brower (U.S)
Domingo Bello Janiero (Spain)

4. **LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic**, ICSID Case No Arb/02/1
Gas distribution
Home state: U.S.
Date Registered: 31 January 2002
Award in favour of the claimant for $57.4m rendered on 25 July 2007
Request for supplementary decision denied on 8 July 2008
Claimants request for annulment of the "necessity" defence section of the award pending on the parties agreement 12 June 2009.

Original Tribunal:
President: Tatiana Bogdanowsky de Maekelt (Venezuela)
Arbitrators: Fransisco Rezek (Brazil)
Albert Jan van den Berg (Netherlands)

5. **Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic**
ICSID Case No Arb/01/3
Gas transportation
Home state: U.S.
Date Registered: 11 April 2001
Award in favour of the claimant for $106.2m rendered on 22 May 2007
Award rectification proceedings concluded on 25 October 2007
Annulment proceedings are pending.

Original Tribunal:

President: Francisco Orrega Vicuna (Chile)
Arbitrators: Albert Jan van den Berg (Netherlands)
Pierre-Yves Tschanz (Switzerland/Ireland)

Annulment tribunal:
President: Gavan Griffith (Australia)
Arbitrators: Patrick L Robinson (Jamaica)
Per Tresselt (Norway)

Resubmission tribunal:
President: Cecile W M Abraham (Malaysia)
Arbitrators: Kamal Hossein (Bangladesh)
David A R Williams (New Zealand)

6. **Sempra Energy International v. Argentine Republic**, ICSID Case No Arb/02/16
Gas supply and distribution
Home state: U.S.
Date Registered: 6 December 2002
Award in favour of the claimant for $128.2m rendered on 28 September 2007
Annulment proceedings concluded 7 August 2009, award annulled.
Resubmission proceedings pending.

Original tribunal:
President: Francisco Orrega Vicuna (Chile)
Arbitrators: Marc Lalond (France)
Sandra Morelli Rico (Colombia)

Annulment proceedings:
President: Christer Söderlund (Sweden)
Arbitrators: David A O Edward (UK)
Andreas J Jacovides (Cyprus)

Resubmission tribunal:
President: Vaughan Lowe (UK)
Arbitrators: Kamal Hossein (Bangladesh)
David A R William (New Zealand)

7. **British Gas Group Plc v. Argentine Republic,** UNCITRAL 2003
Gas distribution
Home state: United Kingdom
Award in favour of the claimant for $185.2m rendered on 24 December 2007
Challenge of the award pending before the Washington D.C. Courts.
Original tribunal:
President: Guillermo Aguilar Alvarez (Mexico)
Arbitrators: Alejandro M Garro (Argentina)
Albert Jan van den Berg (Netherlands)

8. **Metalpar S.A. and Buen Aire S.A. v. Argentine Republic**, ICSID Case No Arb/03/5
Motor vehicle enterprise
Home state: Chile
Date Registered: 7 April 2003
Award denying jurisdiction rendered on 6 June 2008.

Original Tribunal:
President: Rodrigo Oreamuno (Costa Rica)
Arbitrators: Duncan H Cameron (U.S.)
Jean Paul Chabaneix (Peru)

9. **Continental Casualty Company v Argentine Republic**, ICSID Case No Arb/03/9
Insurance company
Home state: U.S.
Date Registered: 22 May 2003
Award in favour of the claimant for $2.8m rendered on 5 September 2008
Claimants' request for annulment of the "necessity" defence section of the award dismissing the request concluded 16 September 2011.

Original tribunal:
President: Giorgio Sacerdoti (Italy)
V.V. Veeder (UK)
Michell Nader (Mexico)

Annulment tribunal:
President: Gavan Griffith (Australia)
Arbitrators: Bola Ajibola (Nigeria)
Christer Söderlund (Sweden)

10. **National Grid plc v. Argentine Republic**, UNCITRAL 2003.
Electricity transmission
Home state: United Kingdom
Award rendered in favour of the claimant for $54m on 3 November 2008.

Original tribunal:
President: Andrés Rigo Sureda (Spain)
Arbitrators: Alejandro M Garro (Argentina/ U.S.)
Judd L Kessler (U.S.)

11. **Wintershall Aktiengesellschaft v. Argentine Republic**, ICSID Case No Arb/04/14
Gas and Oil Production
Home state: Germany
Date Registered: 15 July 2004
Award denying jurisdiction rendered on 8 December 2008.

Original Tribunal:
President: Fali S. Nariman (India)
Arbitrators: Santiago Torred Bernardez (Spain)
Piero Bernardini (Italy)

12. **TSA Spectrum de Argentina, S.A. v. Argentine Republic**, ICSID Case No Arb/05/5
Home state: Netherlands
Telecommunications service provider
Date Registered: 8 April 2005
Award denying jurisdiction rendered on 19 December 2008.

Original tribunal:
President: Hans Danelius (Sweden)
Arbitrators: Georges Abi-Saab (Egypt)
Grant D Aldonas (U.S.)

13. **Compania de Aguas del Aconcuija S.A. and Vivendi Universal S.A. v. Argentine Republic**, ICSID Case No Arb/97/3
Water supply
Home state: France
Date Registered: 19 February 1997
Award in favour of the respondent rendered 21 November 2000
Original award annulled 3 July 2003
Award in favour of the claimant for $105 million 28 August 2007.

Original tribunal:
President: Francisco Rezek (Brazil)
Arbitrators: Thomas Buergenthal (U.S.)
Peter D Trooboff (U.S)

Annulment tribunal:
President: L Yves Fortier (Canada)
Arbitrators: James R Crawford (Australia)
José Carlos Fernández Rozas (Spain)

Resubmission tribunal:
President: J William Rowley (Canada)
Arbitrators: Gabrielle Kaufmann-Kohler (Switzerland)
Carlos Bernal Verea (Mexico)

Second annulment tribunal:
President: Ahmed Sadek El-Kosheri (Egypt)
Arbitrators: Andreas J Jacovides (Cyprus)
Jan Hendrik Dalhuisen (Netherlands)

14. **El Paso Energy International Company v. Argentine Republic**, ICSID Case No Arb/03/15
Hydrocarbon and Electricity Concessions

Home state: U.S.
Date registered: 12 June 2003
Award rendered in favour of the claimant for $43 million on 31 October 2011.
Pending due to Annulment proceedings.

Original tribunal:
President: Lucius Caflish (Switzerland)
Arbitrators: Piero Bernadini (Italy)
Brigitte Stern (France)

Annulment tribunal:
President: Rodrigo Oreamuno (Costa Rica)
Arbitrators: Theresa Cheng (China)
Rolf Knieper (Germany)

15. **Houston Industries Energy Inc and others v. Argentine Republic**, ICSID Case No Arb/98/1
Energy supply
Home state: U.S.
Date Registered: 25 February 1998
Award rendered 24 August 2001, not public.

Original tribunal:
President: Piero Bernardini (Italy)
Arbitrators: Santiago Torres Bernárdez (Spain)
Albert Jan van den Berg (Netherlands)

16. **EDF International, SAUR International and León Participaciones Argentinas v. Argentine Republic**, ICSID Case No Arb/03/23
Electricity Distribution
Home state: France and Belgium-Luxemburg
Date registered: 12 August 2003
Award in favour of the claimant for $136 million rendered 11 June 2012
Pending due to annulment proceedings.

Original tribunal:
President: William W Park (U.S.)
Arbitrators: Gabrielle Kaufman-Kohler (Switzerland)
Jesús Rémon (Spain)

17. **Impregilo S.p.A v. Argentine Republic**, ICSID Case No Arb/07/17
Water services concession
Home state: Italy
Date registered: 25 July 2007
Award in favour of the claimant for $21.3 million rendered 21 June 2011.
Pending due to annulment proceedings.

Original tribunal:

President: Hans Danlius (Sweden)
Charles N Brower (U.S.)
Brigitte Stern (France)

Annulment tribunal:
President: Rodrigo Oreamundo (Costa Rica)
Arbitrators: Eduardo Zuleta (Colombia)
Theresa Cheng (China)

18. **DaimlerChrysler Services AG v. Argentine Republic**, ICSID Case No Arb/05/1
Leasing and Financial Services
Home state: Germany
Date registered: January 14, 2005
Award in favour of the respondent rendered 22 August 2012, not public.

Original tribunals:
President: Pierre-Marie Dupuy (France)
Arbitrators: Charles N Brower (U.S.)
Domingo Bello Janeiro (Spain)

7.1.2 Pending Cases

1. **Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic**, ICSID Case No Arb/03/17
Water services concession
Home state: Spain and France
Date registered: 17 July 2003
Jurisdictional phase concluded
Hearing on the merits concluded in November 2007
Proceedings resumed pursuant to a request for disqualification of an arbitrator declined on 12 May 2008.
Decision on liability in favour of the claimant 20 July 2010
Await award.

Original Tribunal:
President: Jeswald W Salacuse (U.S.)
Arbitrators: Gabrielle Kaufman-Kohler (Switzerland)
Pedro Nikken (Venezuela)

2. **Suez, Sociedad General de Aguas de Barcelona S.A., Vivendi Universal S.A. v. Argentine Republic**, ICSID Case No Arb/03/19
Water and sewer services concession
Home state: Spain and France
Date registered: 17 July 2003
Hearing on the merits concluded in November 2007
Procedural order issued 18 August 2012.

Original tribunal:
President: Jeswald W Salacuse (U.S.)
Arbitrators: Gabrielle Kaufman-Kohler (Switzerland)
Pedro Nikken (Venezuela)

3. **AWG Group Ltd. v. Argentine Republic**, UNCITRAL 2003
Water and sewer services concession
Home state: United Kingdom
Date registered: 17 July 2003
Hearing on the merits concluded in November 2007
Decision on liability in favour of the claimant 30 July 2010
Awaits award.

Original tribunal:
President: Jeswald Salacuse (U.S.)
Arbitrators: Gabrielle Kaufman-Kohler (Belgium)
Pedro Nikken (Venezuela)

4. **Total S.A. v. Argentine Republic**, ICSID Case No Arb/04/1
Gas Transportation / Power Generation / Gas and Oil Production
Home state: France
Date registered: 22 January 2004
Decision on liability in favour of the claimant 27 December 2010
Awaits award.

Original tribunal:
President: Giorgio Sacerdoti (Italy)
Arbitrators: Henri C Álvarez (Canada)
Luis Herrera Marcano (Venezuela)

5. **Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic**, ICSID Case No Arb/04/16
Gas Production
Home state: U.S.
Date registered: 5 August 2004
Tribunal constituted on 14 August 2008.

Original tribunal:
President: Gustaf Möller (Finland)
Piero Bernardini (Italy)
Antonio Remiro Brotóns (Spain)

6. **Asset Recovery Trust S.A. v. Argentine Republic**, ICSID Case No Arb/05/11
Collection contract
Home state: U.S.
Date registered: 23 June 2005
Stayed for non-payment.

Original tribunal:
President: Jaime C Irarrázabal (Chile)
Arbitrators: Ernesto Canales Santos (Mexico)
Antonio A. Cancado Trindade (Brazil)

7. **Abaclat and others v. Argentine Republic**, ICSID Case No Arb/07/5
Bondholders
Home state: Italy
Date Registered: 7 February 2007
Decision on jurisdiction and admissibility 4 August 2011
Request for disqualification 15 September 2011.

Original tribunal:
President: Pierre Tercier (Switzerland)
Arbitrators: Santiago Torres Bernárdez (Spain)
Albert Jan van den Berg (Netherlands)

8. **Giovanni Alemanni and others v. Argentine Republic**, ICSID Case No Arb/07/8
Bondholders
Home state: Italy
Date registered: 27 March 2007
Tribunal constituted on 3 July 2008.

Original tribunal:
President: Franklin Berman (U.K.)
Arbitrators: Karl-Heinz Böckstiegel (Germany)
J. Christopher Thomas (Canada)

9**. Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic**, ICSID Case No Arb/07/26
Water services concession
Home state: Spain
Date registered: 1 October 2007
Decision on disqualification dismissed 12 September 2011.

Original tribunal:
President: Andreas Bucher (Switzerland)
Arbitrators: Campbell McLachlan (New Zealand)
Pedro J. Martínez-Fraga (U.S.)

10. **HOCHTIEF Aktiengesellschaft v. Argentine Republic**, ICSID Case No Arb/07/31
Highway construction contract
Home state: Germany
Date registered: 18 December 2007
Decision granting jurisdiction on 24 October 2011.

Original tribunal:

President: Vaughan Lowe (U.K.)
Arbitrators: Charles N. Brower (U.S.)
J. Christopher Thomas (Canada)

11. **Giordano Alpi and others v. Argentine Republic**, ICSID Case No Arb/08/9
Bondholders
Home state: Italy
Date registered: 28 July 2008
Tribunal constituted on 5 December 2008.

Original tribunal:
President: Bruno Simma (Germany/Austria)
Arbitrators: Karl-Heinz Böckstiegel (Germany)
Santiago Torres Bernárdez (Spain)

12. **Teinver S.A., Transportes de Cercanias S.A. and Autobuses Urbanos del Sur S.A v. Argentine Republic**, ICSID Case No Arb/09/1
Transportation
Home state: Spain
Date Registered: 30 January 2009
The tribunal issued procedural orders on 3 October 2012.

Original tribunal:
President: Thomas Buergenthal (U.S.)
Arbitrators: Henri C. Álvarez (Canada)
Kamal Hossain (Bangladesh)

7.1.3 Proceedings Suspended or Discontinued

1. **AES Corporation v. Argentine Republic**, ICSID Case No Arb/02/17
Electricity generation and distribution
Home state: U.S.
Date registered: 19 December 2002
Jurisdictional phase concluded
Suspended by agreement of the parties on 23 January 2006.

Original tribunal:
President: Pierre-Marie Dupuy (France)
Arbitrators: Karl-Heniz Böckstiegel (Germany)
Domingo Bello Janeiro (Spain)

2. **Camuzzi International S.A. v. Argentine Republic**, ICSID Case No Arb/03/2
Gas Supply and Distribution
Home state: Belgium- Luxemburg
Date registered: Date registered: 27 February 2003
Proceedings suspended at the request of the parties.

Original tribunal:
President: Francisco Orrego Vicuna (Chile)
Arbitrators: Marc Lalonde (Canada)
Sandra Morelli Rico (Colombia)

3. **Compañía General de Electricidad S.A. and CGE Argentina S.A. v. Argentine Republic**, ICSID Case No Arb/05/2
Electricity Distribution
Home state: Chile
Date registered: 4 February 2005
Settlement agreed by the parties and proceedings discontinued at the request of the claimants.

Original tribunal:
President: Pierre Tercier (Switzerland)
Arbitrators: Henri C. Álvarez (Canada)
Georges Abi-Saab (Egypt)

4. **Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic**, ICSID Case No Arb/03/22
Electricity Distribution
Home state: France
Date registered: 12 August 2003
Tribunal constituted on 2 June 2004
Suspended by agreement of the parties on February 5, 2008.

Original tribunal:
President: William W Park
Arbitrators: Gabrielle Kaufman-Kohler (Switzerland)
Fernando de Trazegnies Granda (Peru)

5**. Enersis S.A. and Others v. Argentine Republic**, ICSID Case No Arb/03/21
Electricity Distribution
Home state: Spain
Date registered: 22 July 2003
Tribunal constituted on 21 January 2004
Suspended by agreement of the parties on 28 March 2006.

Original tribunal:
President: Roberto Maclean (Peru)
Arbitrators: Luis Herrera Marcano (Venezuela)
Robert Volterra (Canada)

6. **Gas Natural SDG, S.A. v. Argentine Republic**, ICSID Case No Arb/03/10
Gas Supply and Distribution
Home state: Spain
Date Registered: 29 May 2003

Jurisdictional phase completed
Suspended by agreement of the parties on 11 November 2005.

Original tribunal:
President: Andreas F Lowenfeld (U.S.)
Arbitrators: Henri C. Álvarez (Canada)
Pedro Nikken (Venezuela)

7. **SAUR International v. Argentine Republic**, ICSID Case No Arb/04/4
Water and sewer services concession
Home state: France
Date registered: 27 January 2004
Jurisdictional phase concluded
Suspended by agreement of the parties on 7 April, 2006.

Original tribunal:
President: Juan Fernández-Armesto (Spain)
Arbitrators: Bernard Hanotiau (Belgium)
Christian Tomuschat (Germany)

8. **Telefónica S.A. v. Argentine Republic**, ICSID Case No Arb/03/20
Telecommunications service provider
Home state: Spain
Date registered: 21 July 2003
Settlement agreed by the parties and proceedings discontinued at their request.

Original tribunal:
President: Giorgio Sacerdoti (Italy)
Arbitrators: Charles N Brower (U.S.)
Eduardo Siqueiros T. (Mexico)

9. **Unisys Corporation v. Argentine Republic**, ICSID Case No Arb/03/27
Information Storage and Management Project
Home state: U.S.
Date registered: 15 October 2003
Tribunal constituted on 3 September 2004
Suspended by agreement of the parties on 26 October 2004.

Original tribunal:
President: Juan Fernández-Armesto (Spain)
Arbitrators: Piero Bernardini (Italy)
Jean Paul Chabaneix (Peru)

10. **Aguas Cordobesas SA, Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic**, ICSID Case No Arb/03/18
Water services concession
Home state: Spain
Date registered: 17 July 2003

Settlement agreed by the parties and proceedings discontinued at their request on 24 January 2007.

Original tribunal:
President: Jeswald W. Salacuse (U.S.)
Arbitrators: Gabrielle Kaufman-Kohler (Switzerland)
Pedro Nikken (Venezuela)

11. **BP America Production Company and others v. Argentine Republic**, ICSID Case No Arb/04/8
Hydrocarbon Concessions and Power Generation
Home state: U.S.
Date registered: 27 February 2004
Settlement agreed by the parties and proceedings discontinued at their request on 20 August 2008.

Original tribunal:
President: Lucius Caflish (Swizerland)
Arbitrators: Brigitte Stern (France)
Albert Jan van den Berg (Netherlands)

12. **Camuzzi International S.A. v. Argentine Republic**, ICSID Case No Arb/03/7
Electricity distribution and transportation
Home state: Belgium - Luxemburg
Date registered: 23 April 2003
Settlement agreed by the parties and proceedings discontinued at their request on 25 January 2007.

Original tribunal:
President: Enrique Goméz-Pinzón (Colombia)
Arbitrators: Henri C. Álvarez (Canada)
Hector Gros Espiell (Uruguay)

13. **France Telecom S.A**. **v. Argentine Republic**, ICSID Case No Arb/04/18
Telecommunications service provider
Home state: France
Date Registered: 26 August 2004
Settlement agreed by the parties and proceedings discontinued at their request on 30 March 2006.

14. **Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic**, ICSID Case No Arb/03/13
Hydrocarbon and Electricity Concessions
Home state: U.S.
Date registered: 6 June 2003
Settlement agreed by the parties and proceedings discontinued at their

request on 20 August 2008.

Original tribunal:
President: Lucius Caflish (Switzerland)
Arbitrators: Albert Jan van den Berg (Netherlands)
Brigitte Stern (France)

15**. Pioneer Natural Resources Company, Pioneer Natural Resources (Argentina) S.A. and Pioneer Natural Resources (Tierra del Fuego) S.A. v. Argentine Republic**, ICSID Case No Arb/03/12
Hydrocarbon and Electricity Concession
Home state: U.S.
Date registered: 5 June 2003
Settlement agreed by the parties and proceedings discontinued at their request on 23 June 2005.

Original tribunal:
President: Lucius Caflisch (Switzerland)
Arbitrators: Piero Bernardini (Italy)
Brigitte Stern (France)

16. **RGA Reinsurance Company v. Argentine Republic**, ICSID Case No Arb/04/20
Financial Reinsurance Services
Home state: U.S.
Date registered: 11 November 2004
Settlement agreed by the parties and proceedings discontinued at their request on 14 September 2006.

Original tribunal:
President: Fali S. Nariman (India)
Arbitrators: Piero Bernardini (Italy)
Georges Abi-Saab (Egypt)

17. **Azurix Corp. v. Argentine Republic**, ICSID Case No Arb/03/30
Water and sewer services concession
Home state: U.S.
Date Registered: 8 December 2003
Discontinued due to lack of payment.

Original tribunal:
President: Gustaf Möller (Finland)
Arbitrators: Bernard Hanotiau (Belgium)
Donals M. McRae (New Zealand/Canada)

18. **CIT Group Inc**. **v. Argentine Republic**, ICSID Case No Arb/04/9
Leasing Enterprise
Home state: U.S.

Date registered: 27 February 2004
The proceeding was discontinued pursuant to ICSID Arbitration Rule 44.

Original tribunal:
President: Pierre-Marie Dupuy (France)
Arbitrators: Claus von Wobeser (Mexico)
Christian Tomuschat (Germany)

19. **Lanco International Inc v. Argentine Republic**, ICSID Case No Arb/97/6
Rubber tire manufacturer
Home state: U.S.
Date registered: 14 October 1997
Proceeding discontinued at Claimant's request 17 October 2000.

Original tribunal:
President: Bernardo M. Cremades (Spain)
Arbitrators: Guillermo Aguilar Alvarez (Mexico)
Luiz Olavo Baptista (Brazil)

20. **Empresa Nacional de Electricidad S.A v. Argentine Republic**, ICSID Case No Arb/99/4
Electricity supply
Home state: Spain/Chile
Date registered: 12 July 1999
Proceedings discontinued at Claimant's request 8 February 2001.

Original tribunal:
President: Rodrigo Oreamuno (Costa Rica)
Arbitrators: Enrique Elías (Peru)
Héctor Gros Espiell (Uruguay)

21. **Mobil Argentina S.A v. Argentine Republic**, ICSID Case No Arb/99/1
Oil and Gas
Home state: U.S.
Date registered: 9 April 1999
Proceedings discontinued at Claimant's request 21 July 1999.

Tribunal not official

22. **Impregilo S.p.A v. Argentine Republic**, ICSID Case No Arb/08/14
Highway construction concession
Home state: Italy
Date registered: 15 October 2008
Tribunal not yet constituted.

Original tribunal:
President: Hans Danelius (Sweden)
Charles N. Brower (U.S.)

Kamal Hossein (Bangladesh)

Bibliography

Treaties and Conventions

- ASEAN Agreement for Promotion and Protection of Investment.
- Czech Republic- Netherlands BIT.
- Czech Republic- United Stated BIT.
- Energy Charter Treaty, ECT.
- France-Argentina BIT.
- Germany-Argentina BIT.
- International Center for Settlement of Investment Dispute Convention, ICSID Convention.
- North American Free Trade Agreement, NAFTA.
- Spain-Argentina BIT.
- Switzerland- Pakistan BIT.
- Switzerland- Philippines BIT.
- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), New York 10 June 1958, 330 UNTS 3; entered into force 7 June 1959.
- US- Argentina BIT.
- US- Honduras BIT.

Textbooks

- Dolzer Rudolf & Schreuer Christoph, *Principls of International Investment Law*, 2008, Oxford University Press, New York.
- Dugan Christopher, Wallace Don Jr, Rubins Noah and Sabahi Borzu, *Investor-State Arbitration*, 2008, Oxford University Press, New York.
- Folsom Ralph, Gordon Michael W and Spanogle Johan, *International Trade and Investment – in a nutshell*, 2000, West Group, United States of America.
- McLachlan QC Campbell, *Shore Laurence and Weiniger Matthew, International Investment Arbitration – Substantive Principles*, 2007, Oxford University Press, New York.
- Muchlinski Peter, *The Oxford Handbook of International Investment Law* – Ch 1 Policy Issues, 2008, Oxford University Press, New York.
- Reinisch August and Malintoppi Loretta, *The Oxford Handbook of International Investment Law* – Ch 18 Methods of Dispute Resolution, 2008, Oxford University Press, New York.
- Romson Åsa, *Environmental Policy Space and International Investment Law*, 2012, Acta Universitatis Stockholmiensis Department of Law Stockholm University, Stockholm.
- Salacuse Jeswald, *The Law of Investment Treaties*, 2010, Oxford University Press, New York.

- Schlemmer Engela, *The Oxford Handbook of International Investment Law* – Ch 2 Investor, Investments, Shareholders, 2008, Oxford University Press, New York.
- Schreuer Christoph, *The ICSID Convention: A Commentary*, 2001, Cambridge University Press, Cambridge.
- Sornarajah Muthucumaraswamy, *The Settlement of Foreign Investment Disputes*, 2000, Kluwer Law international, Hague.
- Van Harten Gus, *Investment Treaty Arbitration and Public Law*, 2007, Oxford University Press, New York.
- Yannaca-Small Katia, *Arbitartion under International Investment Agreements – A guide to the key issues*, 2010, Oxford University Press, New York.

Articles

- Alexandrov Stanimir, *Breaches of Contract and breaches of treaty*, Issue 4 Journal of World Investment and Trade, 2004.
- Alvarez José, *Investment Treaty Arbitration and Public Law by Gus van Harten Review by José Alvarez*, The American Journal of International Law, Vol. 102 No. 4, October 2008.
- Barrow Martin, *Argentina puts bankers to the test*, The Times, August 7 2001.
- Coe Jack, *Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch Symposium: Romancing the Foreign Investor: BIT by BIT*, 12 University of California Davies Journal of International Law & Policy 8 No. 2, 2005
- DePalma Anthony, *NAFTA's Powerful Little Secret*, The New York Times, 11 March 2001.
- Douglas Zachary, *The Hybrid Foundations of Investment Treaty Arbitration*, British Yearbook of International Law, 74, 2003.
- Franck Susan, *Development and outcome of investment treaty arbitration*, Harvard International Law Journal, Vol. 50, No. 2, Summer 2009.
- Franck Susan, *Empirically Evaluating Claims about Investment Treaty Arbitration*, North Carolina Law Review, Vol. 86, 2007.
- Giamini Michel, *Argentina faces debt default as IMF stops loans*, The Times, December 8 2001.
- Hindelang Steffen, *Bilateral Investment Treaties, Custom and a Healthy Investment climate –The question of whether BITs Influence Customary International Law Revisited*, Journal of World Investment and Trade, issue 5, 2004.
- Hjälmroth Carolinn, *'Securing High Investment Protection for EU Investors – A review of EU Member states' model BITs'* National board of trade, ISBN: 978-91-86575-18-2, 2011.
- Ishikawa Tomoko, *Third party participation in investment treaty arbitration*, International and comparative law quarterly, Vol. 59, pp 374-412, April 2010.
- Khayat Dany, *Enforcement of awards in ICSID arbitration*, published on the website of the lawfirm Mayer Brown, accessed on

9th December 2012. http://www.mayerbrown.com/publications/enforcement-of-awards-in-icsid-arbitration-12-19-2011/ .

- McLachlan Cambell, *Investment treaties and general international law*, The international and comparative law quarterly – The British institute of international and comparative law, Vol. 57 no. 2, 2008.
- Meyers Daniel, *In Defence of the International Treaty Arbitration System*, Houston journal of International Law, Vol. 31 Issue 1, p47-82, 2008.
- Schwartz Eric, *International Conciliation and the ICC*, 10 ICSID review – Foreign Investment Law Journal, 1995.
- Shackelford Scott, *Investment Treaty Arbitration and Public Law by Gus van Harten Review by Scott Shackelford,* Stanford Journal of International Law, 44:205, 2008.
- Van Harten Gus, *Commentary: A case for an international investment court,* Investment treaty news, International institute for sustainable development iisd, August 7 2008.
- Van Harten Gus, *Contributions and Limitations of empirical research on independence and impartiality in International Investment Arbitration*, Onati Socio-Legal Series, Vol. 1 No .4, 2011.
- Van Harten Gus, *Fairness and independence in investment arbitration: A critique of "Development and Outcomes of Investment Treaty Arbitration,* Investment Treaty News, International institute for sustainable development iisd, December 16 2010.
- Vandevelde Kenneth, *A Brief History of International Investment Agreements*, 12 University of California Davis journal of international law and policy issue 157, 2005.
- Wendell Holmes Oliver, *The Path of the Law*, Harvard Law Review, Vol. 10, 1897.
- Wong Jarrod, *Umbrella clauses in bilateral investment treaties: Of breaches of contract, treaty violations, and the divide between developing and developed countries in foreign investment disputes,* Geo.Mason Law Rev. 2006.

Reports

- Peterson Luke, *Bilateral Investments Treaties and Development Policy-making*, International institute for Sustainable Development, November 2004.
- United Nations Conference on Trade and Development, UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, New York and Geneva, United Nations 2007.
- United Nations Conference on Trade and Development, UNCTAD, *Scope and definition*, Series on issues in international investment agreements, New York and Geneva, United Nations 1999
- United Nations Conference on Trade and Development, UNCTAD, *Taking of Property*, series on issues in international investment agreements, New York and Geneva, United Nations, 2000.

- United Nations Conference on Trade and Development, UNCTAD, *World Investment Report 2010.*

Webpages

- www.italaw.com
- www.icsid.worldbank.org

Table of Cases

- Abaclat and others v. Argentine Republic, ICSID Case No. Arb/07/5
- AES Corporation v. Argentine Republic, ICSID Case No. Arb/02/17
- Aguas Cordobesas SA, Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. Arb/03/18
- Anglian Water Group (AWG) ltd v. Argentine Republic, UNCITRAL 2003
- Asset Recovery Trust S.A. v. Argentine Republic, ICSID Case No. Arb/05/11
- Azurix v. Argentine Republic, ICSID Case No. Arb/01/12
- Azurix Corp v. Argentine Republic, ICSID Case No. Arb/03/30
- Barcelona Traction, Light and Power Company Ltd, Belgium v. Spain, 1970, ICJ Rep 3; (1970) 64 AJIL 653
- BP America Production Company and others v. Argentine Republic, ICSID Case No. Arb/04/8
- British Gas Group v. Argentine Republic, UNCITRAL 2003
- Camuzzi International S.A. v. Argentine Republic, ICSID Case No. Arb/03/2
- Camuzzi International S.A. v. Argentine Republic, ICSID Case No. Arb/03/7
- CIT Group Inc. v. Argentine Republic, ICSID Case No. Arb/04/9
- CME Czech Republic BV v. Czech Republic (Final Award), 14 March 2003, UNICITRAL
- CMS v Argentine Republic, ICSID Case No. Arb/01/8
- Compania de Aguas del Aconquija and Vivendi Universal v. Argentine Republic, ICSID Case No. Arb/97/3
- Compañía General de Electricidad S.A. and CGE Argentina S.A. v. Argentine Republic, ICSID Case No. Arb/05/2
- Continental Casualty Company v. Argentine Republic, ICSID Case No. Arb/03/9
- DaimlerChrysler Services AG v. Argentine Republic, ICSID Case No. Arb/05/1
- EDF International S.A., SAUR International S.A. and Léon Participaciones Argentinas S.A v. Argentine Republic, ICSID Case No. Arb/03/23
- El Paso Energy International Company v Argentine Republic, ICSID Case No. Arb/03/15
- Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic, ICSID Case No. Arb/03/22
- Empresa Nacional de Electricidad S.A v. Argentine Republic, ICSID Case No. Arb/99/4
- Enersis S.A. and Others v. Argentine Republic, ICSID Case No. Arb/03/21
- Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. Arb/01/3

- France Telecom S.A. v. Argentine Republic, ICSID Case No. Arb/04/18
- Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. Arb/03/10
- Giordano Alpi and others v. Argentine Republic, ICSID Case No. Arb/08/9
- Giovanni Alemanni and others v. Argentine Republic, ICSID Case No. Arb/07/8
- HOCHTIEF Aktiengesellschaft v. Argentine Republic, ICSID Case No. Arb/07/31
- Houston Industries Energy Inc and others v. Argentine Republic, ICSID Case No. Arb/98/1
- Impreglio S.p.A. v. Argentine Republic, ICSID Case No. Arb/07/17.
- Impregilo S.p.A v. Argentine Republic, ICSID Case No. Arb/08/14.
- Lanco International Inc v. Argentine Republic, ICSID Case No. Arb/97/6
- Lauder (Ronald S) v Czech Republic (Final award) 3 September 2001
- LG&E Energy Corporation., LG&E Capital Corporation and LG&E International Corporation v. Argentine Republic, ICSID Case No. Arb/02/1
- National Grid plc v. Argentine Republic, UNICITRAL 2003.
- SGS Société General de Surveillance S.A v Islamic Republic of Pakistan, ICDIS Case No. Arb/01/13
- SGS Société General de Surveillance Holding S.A v République Islamique du Pakistan, 4C. 250/2000, Swiss Federal Court, 23 November 2000
- Islamic Republic of Pakistan, Through Secretary, Ministry of Finance v Société General de Surveillance S.A, Supreme Court of Pakistan, 3 July 2002, 8 ICSID Reports 356
- Metalpar S.A. and Buen Aire S.A. v. Argentine Republic, ICSID Case No. Arb/03/5
- Mobil Argentina S.A v. Argentine Republic, ICSID Case No. Arb/99/1
- Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic, ICSID Case No. Arb/04/16
- Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic, ICSID Case No. Arb/03/13
- SAUR International v. Argentine Republic, ICSID Case No Arb/04/4
- Pioneer Natural Resources Company, Pioneer Natural Resources (Argentina) S.A. and Pioneer Natural Resources (Tierra del Fuego) S.A. v. Argentine Republic, ICSID Case No. Arb/03/12
- RGA Reinsurance Company v. Argentine Republic, ICSID Case No. Arb/04/20
- Sempra Energy International v. Argentine Republic, ICSID Case No. Arb/02/16

- SGS Société General de Surveillance S.A v Republic of Philippines, ICSID Case No. ARB/02/6
- Siemens A.G. v Argentine republic, ICSID Case No. Arb/02/08
- Suez, Sociedad General de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic. ICSID Case No. Arb/03/17
- Suez, Sociedad General de Barcelona S.A. and Vivendi Universal S.A. v Argentine Republic, ICSID Case No. Arb/03/19
- Teinver S.A., Transportes de Cercanias S.A. and Autobuses Urbanos del Sur S.A v. Argentine Republic, ICSID Case No. Arb/09/1
- Telefónica S.A. v. Argentine Republic, ICSID Case No. Arb/03/20
- Total S.A. v. Argentine Republic, ICSID Case No. Arb/04/1
- TSA Spectrum de Argentina, S.A. v. Argentine Republic, ICSID Case No. Arb/05/5
- Unisys Corporation v. Argentine Republic, ICSID Case No. Arb/03/27
- Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. Arb/07/26
- Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. Arb/04/14