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Investment treaties are about justice

by

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Controversy over investor-state dispute settlement (ISDS) and the social impact of international investment agreements (IIAs) surrounds the Trans-Pacific Partnership agreement and negotiations for a Transatlantic Trade and Investment Partnership. Such controversy illustrates why investment law can no longer be managed as if it were merely a system of private ordering setting out the protected rights of capital owners. Instead, IIAs are increasingly recognized as instruments of economic governance, and by nature subject to principles of procedural and distributive justice, as with any system that allocates social resources.

The international investment regime certainly involves private actors with valid and important interests, but it is not solely about private actor rights—it is also about state responsibilities to the larger society. IIAs are part of a governance system meant to ensure justice and the rule of law for everyone in the allocation of investment capital. Yet, as a system of governance, investment law today is seriously deficient. Structural and normative aspects of IIAs—their asymmetric focus on investor rights and how those rights are interpreted by arbitral panels—leave large segments of the affected public in host countries, meaning most people, without effective voice.

This represents a governance crisis, and an opportunity. Thomas Franck reminds us that, in domestic economies, capital operates within political systems wherein the expectations of capitalists are not usually the sole or last word.[1] Yet the domestic equivalent to the political economy of the IIA regime would be the reinstatement of property requirements as a condition of voting rights: only those with capital would have a voice. Such an approach to investment law, in which capital's needs and interests are privileged in the political process, is no longer sustainable. Investment touches so many core social issues and host country responsibilities that it simply cannot be managed from the perspective of capital alone. To continue doing so would be to ignore investment rules' public nature and their allocative effects on legal rights and economic resources.

Instead, investment law should be subject to principles of justice (norms of procedural and substantive fairness), as with any framework for allocating social resources. Investment law allocates social resources in at least three ways:

- IIAs allocate rights, privileges and burdens *between* investors and host countries regarding, for example, the establishment and operation of a foreign investment, minimum standards of treatment, the right to regulate, and dispute settlement.
- IIAs impact the allocation of rights, privileges and burdens among a range of stakeholders *within* host countries, including government, domestic capital, foreign capital, producers, consumers, and citizens.
- Finally, IIAs influence the global allocation of investment capital, a socially produced resource.

Such allocative effects render investment law a matter of justice. This is not new—allocative effects subject many other areas of law (e.g., banking, taxation, trade) to principles of justice—but it is under-acknowledged in investment law. Recognizing allocative effects makes it clear that investment law does not operate outside the bounds of justice. Rather, managing capital for the benefit of capital owners and the larger society is *inherently* about justice, for all affected stakeholders and not investors alone.[2]

Recognizing that investment law is a matter of justice is a paradigm shift with profound implications for investment law and policy. Essentially, it requires that we examine the investment law regime in terms of the fairness norms we would apply to any system of governance allocating economic rights and resources across a range of settings.[3] Ensuring a secure return on investment *is* fair, but this does not necessarily exhaust what fairness requires of investment law. Discovering what fairness means in investment law is what contemporary policy debates and treaty negotiations are about. Properly understood, many current investment reform proposals—such as appellate review of the sort agreed by Canada and the EU,[4] enhanced transparency provisions and balanced social clauses effectively (not aspirationally) protecting the right to regulate—cannot be rejected as unwelcome "intrusions" into a private ordering system. Instead, they are efforts to make investment law more *just* by ensuring it embodies essential civil and political values, such as procedural fairness, equality before the law, the rule of law, and the right to political voice for all affected parties.[5] We should expect nothing less from today's economic governance systems.

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[1] Thomas Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon, 1998), pp. 438-439.

[2] Rudolf Dolzer, although connecting investment law to justice, confines this to "outcomes generally considered *by the investment community* to be just": "Fair and equitable treatment: today's contours," *Santa Clara Journal of International Law*, vol. 12 (2014), p. 33 (emphasis added).

[3] *See, e.g.*, Franck, supra n. 1; Frank J. Garcia, "Justice, the Bretton Woods institutions, and the problem of inequality," in John Jackson and William J. Davey (eds.), *The Future of International Economic Law* (Oxford: OUP, 2008), pp. 23-44.

[4] "CETA: EU and Canada agree on new approach on investment in trade agreement" (Feb. 29, 2016), available at http://europa.eu/rapid/press-release_IP-16-399_en.htm.

[5] *See, e.g.*, Benedict Kingsbury and Stephan Schill, "Investor-state arbitration as governance: fair and equitable treatment, proportionality and the emerging global administrative law," *IILJ Working Paper* (Global Administrative Law Series, 2009).

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