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Steven R. Ratner*

ABSTRACT

The last decade has witnessed a series of criticisms from states, NGOs, and scholars of international investment law's rules and procedures. Running in parallel, and for a longer period, political philosophers have developed theories about what would constitute a just international economic order. Yet international law and philosophy have not directly engaged with one another regarding the justice of international investment law. This article attempts to breach that gap by analyzing the key critiques of investment law from the perspective of theories of global justice. Philosophical approaches are useful for appraising investment law because they offer a rigorous framework for thinking carefully about where investment law should be going; because rules that align with our sense of justice are more likely to be respected; and because these inquiries force lawyers to be more honest about the moral assumptions they already make in defending or attacking international investment law. Two of the main critiques of investment law—a systemic critique and a policy-space critique—are analyzed from the perspective of distributive justice. A third, institutional, critique is examined from perspectives within legal philosophy concerning procedural justice and the rule of law. The piece concludes with a series of suggestions for integrating the legal and philosophical discussions regarding investment law.

The saga of international investment law (IIL) for the last century has centered on a set of competing claims by states hosting foreign investment, on the one hand, and foreign investors and their home states, on the other, over the control of the generation of global wealth, along with associated debates over global values such as human rights and environmental protection. Lawyers and legal scholars have focussed on the prescription, interpretation, and enforcement of those norms by states and tribunals, some settling for thick doctrinal analysis and others moving into normative evaluation and criticism of existing law. Much of the latter project has centered on the (il)legitimacy of IIL, with critiques directed at the norms and at the processes of making, interpreting, and enforcing them.

On another disciplinary stage, philosophers have for many decades looked critically at the international economic order. Political and moral philosophers working

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on global justice have asked whether that order, and in particular the vast disparities in wealth between and within countries and the persistence of terrible poverty, is just in terms of its allocation of benefits and burdens, and rights and duties, among the various stakeholders of the planet. Their answers have been varied, nuanced, and often carefully argued and compelling. Some focus on responsibilities of individuals, others on those of institutions; some suggest leaving economic justice mostly to states, while others see a need for global assistance or reallocation directly to those most in need.

But for the most part, international law and political and moral philosophy do not really engage with each other. While they share some common vocabulary—words like 'justice', 'community', and 'duties'—more often than not those terms are *faux amis* that mean different things to each group of scholars. The causes of the lack of interchange are numerous, from legitimate methodological differences to rejection by each of the relevance of the other's work.[1] This is most unfortunate, because, despite obvious differences in methodologies and some goals between and within the two fields, both international law and philosophy share, at a general level, an agenda of—or at least an interest in—a more just world order. The result is a fractured approach to global justice, economic and otherwise, where the lawyer's insights (both conceptual and technical) into how institutions and rules work in practice are not integrated with the philosopher's critical skills and lengthy tradition of rigorous debates over questions of justice. This disconnect is particularly apparent concerning international investment, where, with a handful of exceptions, lawyers have not engaged with philosophical debates and philosophers seem to have neglected any serious study of IIL.

Why should the community of international investment lawyers and scholars care about philosophical conceptions and debates about global justice? Three reasons should, I hope, make the case.

First, philosophy provides a set of analytical tools to get to core questions about the distribution of wealth that underlie the structure and rules of IIL. Political and moral philosophy provide a foundationally grounded way of thinking about who should bear the benefits and burdens of transnational economic interactions, whether trade, investment, or immigration. International lawyers can gain from philosophy a carefully derived set of ideas for evaluating existing law, promoting changes in it, and developing institutions to implement it. Foundational work can open up space for lawyers to think outside the box, to channel discussions, and propose new legal norms or institutions for a contemporary problem. Although the nature of legal rules—the need to make them capable of comprehension and administration by their targets—means that they will never reflect all the morally significant differences that philosophers identify, the lawyer can still benefit from understanding those differences. For example, the philosophical discourse on duties to persons beyond our borders can encourage creative thinking about the proper balance of rights and duties by host states, home states, and foreign investors in international law. Moral considerations about the respective roles of governments and corporations in

1 See Steven R. Ratner, 'Ethics and International Law: Integrating the Global Justice Project(s)', 5 International Theory 1 (2013).

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protecting the human rights of people in host states can inform one's understanding of fair and equitable treatment.

Second, for IIL lawyers who see international law as playing a role in constructing a just world order, inquiry into the justice of existing rules can give international actors—from leaders of host and home states to foreign investors to civil society groups—*good reasons* to respect the rules, or good reasons to change or supplement them. If rules of IIL are defensible under a considered moral viewpoint—a critical morality or autonomous standard for judging the norms of a society[2]—those actors have additional (and arguably more persuasive) reasons for respecting them beyond the fear of adverse consequences for violations, or an appeal to respect for the law as law, and a good reason to appreciate the consequences of altering the law. But where the law does not meet that considered moral standard, we clearly have good reasons to change some rules, as well as guideposts for that change. With respect to investment law, a moral appraisal of the legal landscape can end up providing arguments that encourage respect for certain rules in investment treaties by different stakeholders even as it suggests the need to change other rules.

Third, engagement with theories of global justice can encourage lawyers to put their cards on the table in a way that encourages more honest debate. Lawyers need to recognize that when they engage in normative and even descriptive scholarship, they often, if not inevitably, *are already taking an ethical and not just a pragmatic position* on issues of global justice. For all but the most mundane analysis, legal scholars are assuming something about key global values. In investment law, for instance, it seems hard to believe that the deeply held positions about compensation for expropriations do not reflect some moral position by the proponent about the powers of corporations as compared to host states and who should bear the burdens of economic development—or, to paraphrase one of my own mentors, how we thought before we thought like a lawyer. Engagement with philosophical work is based on the reality that ethical inquiry cannot be irrelevant or *ultra vires* for the lawyer. That reality does not equate with an abandonment of accepted methods of legal interpretation, especially in certain contexts (e.g. in front of tribunals); but it does mean that, as we evaluate whether to keep existing rules and prescribe new ones, we need to recognize, and perhaps challenge, our ethical assumptions.[3]

With these three advantages of philosophical work in mind, this essay attempts to place the key current criticisms of IIL law in the context of philosophical work on global justice. My goal is to demonstrate how critiques prevailing in debates over IIL incorporate or reflect certain moral arguments that the law is *unjust or unfair*. The essay also reveals how, in some cases, the critiques are based on unstated premises

2 See H.L.A. Hart, *The Concept of Law,* 3rd ed. (Oxford: Oxford University Press, 2012) 171–72, 180–83 (contrasting positive morality of society with morality as offering standards for criticizing societal rules); Peter Cane, 'Morality, Law and Conflicting Reasons for Action', 71 Cambridge Law Journal 59, 63–66 (2012). See also Neil Cooper, 'Two Concepts of Morality', in *The Definition of Morality* (London: Methuen, 1970) 72 (making similar, though more nuanced, distinctions among morality).

3 The benefits of scholarship go the other way, as well, with philosophers benefitting from an understanding of the law. See generally Ratner, above n 1. For example, in terms of Hart's distinction noted above n 2, the legalized nature of some aspects of positive morality can offer us a good (though not conclusive) reason for respecting that part of morality.

that are contestable both normatively and empirically. I hope to show that deployment of global justice discourse, as well as cognate concepts from legal philosophy, can strengthen those critiques by providing a set of moral arguments in their favor, even as that discourse requires critics to address certain analytic gaps in their claims. By examining IIL from the perspective of global justice and procedural fairness, we are provided with tools for a more convincing set of claims about the flaws (and merits) of IIL.

My inquiry proceeds as follows. Part I identifies what I consider the three main critiques of IIL, two concerning the substantive law and one concerning the process of dispute resolution; and Part II provides an overview of several key concepts from global justice that are most relevant for appraising the morality and justice of IIL. In Parts III and IV, I map the critiques concerning the substantive law onto the philosophical scholarship in an effort to demonstrate both the harmonies between the two fields and the unstated empirical and normative contingencies in the critiques. In Part V, I examine the third major critique, concerning dispute resolution, from the perspective of jurisprudential concepts of the rule of law. Part VI offers some thoughts on ways forward to promote a more just and fair international investment law.

Before beginning, it is worth clarifying that this essay is not meant to restate, let alone take a position on, the manifold debates in IIL about the substantive norms or processes of dispute resolution, but rather frame those debates within philosophical concepts to encourage more disciplined as well as creative thinking about the problem. It is also beyond the scope of this essay to defend one particular theory regarding global justice (distributive or otherwise) over another. While some of the frameworks about global justice and the rule of law point toward needed reform, I will avoid delving into the details of what such reforms might look like or the legal vehicles for them.

I. THREE CRITIQUES OF INTERNATIONAL INVESTMENT LAW

Governments, international organizations, NGOs, and academics have offered compelling criticisms of many aspects of international economic law. Most of the attacks on the status quo can be seen as falling into three distinct (though at times overlapping) critiques—a *systemic critique*, a *policy space critique*, and an *institutional critique*. For purposes of this essay, I will deploy this construct with respect to IIL, but one can just as easily use it to criticize international trade law, financial law, and other areas.[4] And when I speak of investment law, I am speaking of the regime as it currently exists through the network of international investment agreements (IIAs) and some customary international law, as interpreted by states and tribunals—not an idealized or even reformed investment law that could well address many of these critiques.

The first and broadest critique is the *systemic critique*. Under that view, foreign investment itself, though perhaps in theory important for economic development, has

4 For an elaboration of the critique with respect to trade, see Steven R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford: Oxford University Press, 2015) 327–47.

harmed recipient developing states and their populations through its contribution to corruption, environmental degradation, and severe inequality. International law, broadly considered, enables these harms by creating a legal structure that promotes the interests of corporations, principally from the North, while burdening developing states with obligations that they did not expect. The formally reciprocal nature of IIAs is undermined by their utility only to one set of actors—investors from capital exporting states—and by the asymmetry of duties between investors and host states.[5]

Indeed, the essence of the systemic critique of IIL (and what distinguishes it somewhat from the systemic critique of trade law) is that the rules are fundamentally nonreciprocal: investment law places duties on host states but not on foreign investors or on their home states, thereby contributing to the problems associated with foreign investment.[6] As a structural critique, it goes beyond particular provisions of IIAs, viewing the entire project of IIAs as part of a Northern agenda. The power that IIL gives foreign investors has led some scholars to claim that, beyond the specific harms noted above, IIL (like other aspects of international economic law) undermines democracy by depriving weak states of the ability to govern themselves as they see fit, and, moreover, that it confers a constitutional-like set of protections on foreign investors.[7] At the same time, as discussed below, the critique depends on empirical claims about the effects of foreign investment, as compared to domestic structural factors, on host states, and the effects of IIAs as well.

A second, narrower critique is the *policy space critique.* This view claims that, even if we assume that foreign investment is not per se harmful to the world's poor, and that some international regulation is desirable to promote investor confidence and thus investment, some IIL rules hurt host states and their populations by limiting the state's ability to protect its citizens against various harms. Its target is narrower than the systemic critique by focusing on particular rules, notably provisions in IIAs granting fair and equitable treatment (FET) to foreign investors, requiring full compensation for expropriation, and elevating commitments by the host state to the foreign investor into international obligations (umbrella clauses). If investors win cases for violations of these clauses against states trying to help their residents—perhaps even doing so pursuant to duties under human rights treaties to realize certain economic rights—then states are forced to choose between meeting their responsibilities to the public and avoiding large payments to investors.[8] Over time, fear of litigation

5 See, e.g., M. Sornarajah, *The International Law on Foreign Investment*, 4th ed. (Cambridge: Cambridge University Press, 2017) 60–80; Joseph E. Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities', 23 American University International Law Review 451, 506–529 (2007).

6 See Frank J. Garcia et al., 'Reforming the International Investment Regime: Lessons from International Trade Law', 18 Journal of International Economic Law 861, 869–71 (2015).

7 See, e.g., Paddy Ireland, 'The Corporation and the New Aristocracy of Finance', in Jean-Philippe Robé et al. (eds), *Multinationals and the Constitutionalization of the World Power System* 53, 92–95 (Abingdon: Routledge, 2016); David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008).

8 For a key work, also sharing some of the systemic critique, see David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Basingstoke: Palgrave Macmillan, 2013) (grounding critiques in scholars of critical theory rather than global justice).

leads to regulatory chill. Whether investment law and decisions are actually having this effect also remains subject to disagreement.

The final set of attacks on investment law falls under the rubric of an *institutional critique*. Observers of IIL contend that the institutions responsible for interpretation and enforcement of investment rules, in particular investor-state arbitration, are seriously flawed. The institutional critique focuses on the inadequacy of importing the private law model of international arbitration into a set of problems that are fundamentally different.[9] In particular, party-appointed arbitrators are concerned about future appointments and have actual or perceived conflicts of interest if they serve in more than one case as an arbitrator or as counsel; proceedings and even awards can be secret and allow for only limited participation by third parties; and the system lacks an appeal mechanism. The result may be caselaw unfavorable to host states and oblivious of other international law rules, such as those on human rights, the environment, or corruption; or poorly reasoned caselaw and lack of doctrinal clarity. Professional arbitrators continue to defend the practice as fair to both sides, but concerns remain given the large awards now routinely issued against host states.[10]

These three critiques are not merely the stuff of academic commentary. Each has led decision makers to challenge the normative framework that seemed on a smooth trajectory until a decade ago. The policy space critique has been seen in the refusal or reluctance of states like Argentina, Venezuela, and Ecuador to pay tribunal awards; termination of BITs by India and Ecuador and calls by South Africa to renegotiate existing IIAs; withdrawals by some states from ICSID; and new treaties (e.g. Iran's new BIT with Slovakia) and model treaties (e.g. that of India) that are more sensitive to host state concerns. And the institutional critique can been seen in various agreements and proposals for a permanent court to handle disputes under a treaty or multiple treaties, as well as proposed new rules on conflicts of interests by arbitrators, all of which have taken off a great deal since the conclusion of the EU's free trade agreements with Canada and Vietnam.[11] While no state seems to take the systemic critique to the point of closing its doors to foreign investment and states overall still seem to support the regime of IIAs,[12] other actors, such as anti-corruption NGOs (e.g. Transparency International) and state–private partnerships (e.g. the Extractive Industries Transparency Initiative), are highlighting the dangers to some host states of some foreign investment. The critiques also overlap, and critics of the status quo often deploy aspects of all three.

9 See generally Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007).

10 See Howard Mann, *Who Wins More, Investors or States?* (International Institute for Sustainable Development, 2015), available at www.iisd.org/itn/wp-content/uploads/2015/06/itn-breaking-news-june-2015-isds-who-wins-more-investors-or-state.pdf (visited 12 December 2017).

11 See, e.g., Comprehensive Trade Agreement between the European Union and Canada, 30 October 2016, arts 8.27–8.30, available at http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf (visited 12 December 2017).

12 See Alec Stone Sweet et al., 'Arbitral Lawmaking and State Power: An Empirical Analysis of Investor-State Arbitration', 8 Journal of International Dispute Settlement 579 (2017).

II. SITUATING THE GLOBAL JUSTICE DISCOURSE

Given the public traction of the three critiques, an independent normative framework in which to evaluate those criticisms becomes imperative. For many of the specific criticisms of IIL falling under these headings are that it is, at its core, *unjust*—unjust in the sense that at least some of the benefits and burdens of the actors governed or affected by IIL (e.g. states, investors, individuals) are not morally defensible. Thus, for the reasons stated earlier, we can and should deploy the global justice scholarship to see how the criticisms fare.

A. Legal versus philosophical conceptions of global justice

As an initial matter, we should distinguish between views of justice dominant within international legal circles and those within philosophical circles.

The *international lawyer's* approach to global justice is, overall, highly constrained. Many international lawyers, even (or especially) academic ones, ignore global justice as something belonging to morality and thus outside the law. As a consequence, many scholars write for an imagined audience, in particular a judicial one, that would consider moral arguments *ultra vires*.[13] For the mainstream, international justice means international criminal justice or perhaps, just slightly more broadly, the decisions of international courts. (Scholars in the 'New Stream' equate it, often in an undertheorized way, with a greater concern for populations that have been marginalized in the international legal system.) Meting out justice at the international level means channeling disputes to courts where judges hear cases between states, or by individual claimants, or by an international prosecutor.[14] International lawyers examining the substantive rules that those courts apply, and the resulting interpretations, do not typically look at them for their substantive justice. The assumption seems to be that justice has been served if an international court has ruled by reference to legal rules and in accordance with some due process standards.

Indeed, in the context of IIL, justice has a very idiosyncratic meaning. Denial of justice refers to the claim of a foreign investor that a state has not provided adequate domestic judicial venues for the treatment of the investor's claim. Its contours have been elaborated in key arbitrations, notably *Mondev v United States*.[15] In *Mondev*, the tribunal held that a judicial decision by a host state results in a denial of justice to the investor in violation of many IIAs only if, 'having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment'.[16] To the typical investment lawyer, then, denial of justice has little to do with whether investment law itself or the processes for enforcing it are morally just.

13 Cf. Daniel Bodansky, *The Art and Craft of International Environmental Law* (Cambridge, Mass: Harvard University Press, 2010) 96–101.

14 See Benedict Kingsbury, 'International Courts: Uneven Judicialization in Global Order', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) 203, 221–22.

15 ICSID Case No. ARB (AF) 99/2, Award, 11 October 2002, paras 126–27.

16 Ibid, para 127.

Nonetheless, as discussed further below, some appraisals of IIL from within law have endorsed broader concepts of justice than the internal view noted above.

The moral or political *philosopher's* approaches to global justice are capacious and multifaceted, allowing for moral appraisal of all sorts of human and institutional acts and arrangements. Global justice scholarship—sometimes called global ethics or international political morality—encompasses an enormous range of issues. Though philosophers share a general understanding of the term global justice—what Laura Valentini and Tiziana Torresi call 'a set of normative standards whose aim is to protect fundamental human interests and values in the world at large',[17] they differ greatly on the roles and weight to be afforded individual as compared to community and institutional (including state) interests.

The philosophical strand most relevant to IIL falls under the rubric of distributive justice, as well as, at times, corrective justice; but, as we will see, conceptions of procedural justice from legal philosophy will prove important as well. Distributive justice is the key element of the Rawlsian idea of social justice—the justice of the basic structure of society, originally a domestic polity but now understood by many philosophers to include the world at large.[18] Rawls' difference principle, under which discrepancies in wealth between individuals can be morally justified only to the extent they help the poorest in society, continues to exert a strong gravitational pull on all debates, even if few if any states seem to act on it in their domestic or international policies.

Yet philosophers differ on at least five key issues that can be somewhat roughly described as follows: (i) whether *global* redistribution is a matter of justice at all, as opposed to humanitarianism;[19] (ii) the general *methodology* for determining principles of global distributive justice (e.g. utilitarian, deontological, contractarian, or otherwise);[20] (iii) the *grounds for* any distribution, including positive or negative duties and the place of human rights;[21] (iv) the *substantive principles* for distribution, including the priority to be given, if at all, to nationals of one's own state compared to those outside it;[22] and (v) the *bearer of duties or responsibilities* for achieving a just

17 Laura Valentini and Tiziana Torresi, 'International Law and Global Justice: A Happy Marriage', 37 Review of International Studies 2035, 2036 (2011).

18 John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, Mass: Harvard University Press, 1999) 6.

19 Compare Kok-Chor Tan, *Justice without Borders: Cosmopolitanism, Nationalism, and Patriotism* (Cambridge: Cambridge University Press, 2004) (defending idea of global distributive justice) with Thomas Nagel, 'The Problem of Global Justice', 33 Philosophy & Public Affairs 113 (2005) (denying possibility of global distributive justice).

20 Compare Peter Singer, 'Famine, Affluence, and Morality', 1 Philosophy & Public Affairs 229 (1972) (utilitarian) with Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004) (mostly deontological).

21 Compare Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, 2nd ed. (Princeton: Princeton University Press, 1996) 52–64, 114–30 (emphasizing positive duties) with Thomas Pogge, 'Recognized and Violated by International Law: The Human Rights of the Global Poor', 18 Leiden Journal of International Law 717 (2005) (emphasizing negative duties).

22 Compare Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 2nd ed. (Cambridge: Polity Press, 2008) (favoring global version of Rawlsian difference principle) with David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007) (recognizing special duties to compatriots).

distribution, i.e. individuals, states, or international institutions.[23] For purposes of this article, I will focus primarily on the last three of these, as they map onto the critiques of IIL, but the other debates are lurking in the background as well. Although my own views on these aspects of distributive justice are beyond the scope of this essay, it will be clear that the overall agenda of economic justice across borders is one I share.

B. Cosmopolitanism and nationalist views of distributive justice

Within philosophical work on global justice, much of the thinking is often characterized as cosmopolitan, on the one hand, versus nationalist (or, more broadly, anti-cosmopolitan) on the other.[24] At a very general level, cosmopolitans start from the idea that the individual, wherever situated, is the ultimate unit of moral concern, and each individual—qua individual and not as a member of a community or state—is equal as the object of moral concern.[25] Cosmopolitans generally downplay the ethical significance of national boundaries per se and believe in one global community for purposes of deriving duties of justice—though a strand of cosmopolitanism (weak cosmopolitanism) accepts the idea of special duties to those with whom we are in special relationships, such as fellow citizens, that need not be derivative of general duties we have to all humans.

Among the numerous examples of strong cosmopolitan approaches to distributive justice, Peter Singer has argued, from a utilitarian perspective, that everyone on the planet has an affirmative duty to give away his or her wealth to the poor until the marginal utility to the recipient matches the marginal loss to the donor.[26] Charles Beitz and Thomas Pogge have advocated for a global version of Rawls' difference principle for domestic polities, with the latter seeing global wealth disparities as actually caused by Northern states and institutions and accusing individuals of the North of violating their negative duties to the global poor by perpetuating those institutions.[27] Henry Shue has called for Northern states and global institutions—and, to a certain extent, individuals—to accept various duties to protect the basic human rights of the global poor, which is a less demanding duty than that of Rawlsian distributive justice.[28] We thus see among scholars a distinction between those who advocate distribution specifically to correct for economic inequalities across states or

23 Compare Toni Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States', 15 Ethics & International Affairs 67 (2001) with Singer, above n 20 (focusing on individuals).

24 I use the term nationalist rather than communitarian, as the latter is generally used to describe moral approaches that start with groups, as opposed to states as a whole. See below n 30. Sometimes philosophers use the term 'statist' to describe the nationalist position.

25 See Samuel Scheffler, 'Conceptions of Cosmopolitanism', in *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001) 111, 114 ('norms of justice must be seen as governing the relations of all human beings to each other, and not merely as applying within individual societies or bounded groups of other kinds').

26 Singer, above n 20.

27 Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979); Pogge, above n 21, and Pogge, above n 22.

28 Shue, above n 21. See also Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009) 142–43 (defending human rights-based standards for global concern).

individuals—egalitarian approaches—and those who wish to focus on the basic needs of the global poor—sufficientarian approaches.[29]

Nationalists, on the other hand, see the national interest as the lodestar for ethical decision making in international affairs.[30] As a result, they emphasize the importance of special duties to those in our country and are more skeptical of the idea of a global community. With respect to distributive justice, nationalists generally reject any internationalization of the Rawlsian difference principle and, indeed, do not insist that each state follow the difference principle domestically, leaving that up to each state to decide. Rawls himself rejected global redistribution as a principle, though he recognized a duty on liberal states to give humanitarian aid to help so-called burdened states improve their political culture, manage their own affairs, and become either liberal democratic or so-called 'decent' societies.[31] David Miller's important work generally views each state as the principal vehicle to eliminate its own poverty. Each state bears the primary duty to rectify it, with outsiders having only limited, residual duties to protect basic human rights, e.g., if they have caused a particular harm or if the state is unwilling or unable to help itself.[32] And Thomas Nagel has gone even further, endorsing a Hobbesian conception that completely rejects the idea of justice beyond the state and instead proposing 'basic duties of humanity' that entail some aid to those in extremis through starvation, malnutrition, or other grave threats.[33]

The philosophical literature is thus diverse in terms of the basic question of what, if anything, the rich owe to the poor, either across borders or within them. The global difference principle continues to hold much sway among philosophers of global justice, despite its ideal quality and significant institutional impediments to its realization, though the emphasis in much scholarship on guaranteeing human (economic and social) rights shows the pull of a more sufficientarian perspective. Many scholars see states as having special responsibilities to their own people, with transnational aid more about filling in gaps in state capacity. With this basic elaboration of the frameworks, we can return to the three critiques.

III. THE SYSTEMIC CRITIQUE AND GLOBAL JUSTICE

Philosophers working on distributive justice have not yet directed their inquiry squarely at IIL. But the systemic critique—that IIL helps enable global economic injustice—resonates with strong cosmopolitan critiques of the international order when it comes to distributive justice.

29 For useful clarification, see Kok-Chor Tan, 'Sufficiency, Equality and the Consequences of Global Coercion', 2 Law, Ethics and Philosophy 190, 192–94 (2014).

30 Nationalists are often communitarians, who see morality and justice as defined in the context of certain communities and that, indeed, the community helps constitute the individual. But nationalists can be liberal too and thus downplay group identity. See generally Richard Shapcott, *International Ethics: A Critical Introduction* (Cambridge: Polity Press, 2010) 52–55, 70–71.

31 John Rawls, *The Law of Peoples* (Cambridge, Mass: Harvard University Press, 1999) 105–20.

32 Miller, above n 22, at 247–51.

33 Nagel, above n 19, at 118.

A. Distributive justice perspectives

Within that view, Pogge, for example, has criticized international trade law for exacerbating North–South wealth differentials, e.g., in the area of subsidies and intellectual property rights, and violating a negative duty not to harm others.[34] And he also criticizes the rule of governmental recognition that generally gives governments in effective control of the state's territory the authority to bind the state internationally,[35] calling it an 'international resource privilege' that allows corrupt leaders to sell their state's resources to the highest bidder, pocketing the profits at the expense of his people.[36] Leif Wenar's recent treatment of cross-border trade in natural resources similarly criticizes the legal order's default position as encouraging traders to work with whatever corrupt regime is in power in another state (though he too skirts treatment of IIL).[37] These criticisms of the economic status quo are often coupled with attacks on unequal political power across states, a reality that international lawyers accept with resignation or enthusiasm, or seek to challenge, depending on their and their clients' views.[38]

As it currently stands, IIL falls quite short if one views global distributive justice in strong cosmopolitan terms—as requiring that key international institutions, including treaties (and, on some accounts, corporations, and individuals), proactively correct economic inequalities across the planet. States receiving foreign investment have no obligations under IIL to use that investment in a certain way, though they have duties to their poor (and other) residents—mostly of conduct, rather than result—under the International Covenant on Economic, Social, and Cultural Rights,[39] and they must take measures to prevent and respond to violations of those rights by private actors.[40]

Foreign investors and their states of origin also lack any duties to redistribute wealth to the global poor. Thus IIL, like the rest of international economic law, incorporates no principle of economic justice, and certainly neither a global difference principle nor a domestic difference principle. This failure to incorporate the difference principle features highly in the criticism of IIL offered by Frank Garcia, one of a handful of legal scholars to apply a Rawlsian viewpoint to international economic law.[41] Indeed, IIL does not itself contain duties on any actor regarding even the basic rights of the global poor, and thus does not serve as the sort of 'positive-duty

34 Pogge, above n 21.

35 See Siegfried Magiera, 'Governments', in *Max Planck Encyclopedia of Public International Law*, paras 31–35, available at www.opil.ouplaw.com/home/EPIL (visited 12 December 2017). The key case is *Great Britain v Costa Rica*, 1 RIAA 369 (1923), in which arbitrator William Howard Taft ruled that Costa Rica was bound by contracts concluded by its former president, who had seized power unconstitutionally and whose government was not recognized by Britain, based on that government's effective control.

36 Pogge, above n 22, at 119.

37 Leif Wenar, *Blood Oil: Tyrants, Violence, and the Rules that Run the World* (New York: Oxford University Press, 2016) 208–19.

38 For one of many examples, see Richard W. Miller, 'Global Power and Economic Justice', in Charles R. Beitz and Robert E. Goodin (eds), *Global Basic Rights* (Oxford: Oxford University Press, 2009) 156.

39 ICESCR, art. 2 (duty to 'take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization' of ESC rights). Committee on Economic, Social, and Cultural Rights, General Comment No. 24, 10 August 2017, paras 23–24, UN Doc. E/C.12/GC/24 (obligation to fulfill).

40 See generally *Velasquez-Rodriguez v Honduras*, Inter-Am. Ct. H.R. (Ser. C), No. 4 (1988), paras 172–77.

41 See Garcia et al., above n 6, at 879.

performing institution' that, in Henry Shue's term, is needed to guarantee those rights.[42] While those prescribing IIL might be assuming that it promotes overall global wealth (although perhaps they only care about the wealth of foreign investors) and even that it has some sort of redistributive effect or improves basic human rights over time, that is clearly not the goal of IIL.

At the same time, states have taken some small steps toward addressing distributive justice concerns in the area of IIL. First, decision makers are accepting the idea of duties on foreign investors themselves, e.g., in some proposed IIAs.[43] This development fits into a much larger effort to recognize the responsibilities of global business to respect human rights (including ICESCR rights), most prominently through the UN's Guiding Principles on Business and Human Rights.[44] If future IIAs were to include such duties on businesses, investors and states were to agree to send disputes over such duties to arbitration, or tribunals were to accept claims against investors for violations of those duties, the result might be some amelioration of conditions of some people living in host states.[45] At least an investor would be legally liable internationally if it directly harmed the health of those in the vicinity of an investment. But the current debates on IIA reform have not yet suggested imposing duties of wealth redistribution on the investor. The Guiding Principles also recognize a role for home states in preventing violations of human rights (including of economic rights) by their own investors, though they too do not speak of distributive justice.[46]

Second, the law has backhandedly responded to the 'international resource privilege' identified by Pogge, as three investor-state tribunals have rejected claims by foreign investors against host states when the underlying investment was procured through bribery.[47] In addition, international rules against both bribe-giving and

42 See Henry Shue, 'Mediating Duties', 98 Ethics 687, 703 (1988) (elaborating on role of individual versus institutional duties).

43 See Text for the India Bilateral Investment Treaty, 2016, art. 11, available at www.investmentpolicyhub.unctad.org/Download/TreatyFile/3360 (visited 12 December 2017).

44 See UN Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 21 March 2011, UN Doc. A/HRC/17/31, available at www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (visited 12 December 2017) [hereinafter UNGPs]; see also United Kingdom Foreign & Commonwealth Office, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* (2016) 14–19.

45 For counterclaims pursuant to an investor-state compromis, see *Burlington Resources v Ecuador*, Decision on Counter-Claims, ICSID Case No. ARB/08/5, 7 February 2017 (imposing $40 million award for environmental harm); for an interpretation of an IIA to allow human rights counterclaims, see *Urbaser v Argentina*, ICSID Case No. ARB/07/26, 8 December 2016, paras 1193–221. For a proposal for arbitration of business-related human rights abuses, see Claes Cronstedt et al., 'International Arbitration of Business and Human Rights: A Step Forward', *Kluwer Arbitration Blog*, 16 November 2017, available at http://arbitrationblog.kluwerarbitration.com/2017/11/16/international-arbitration-business-human-rights-step-forward/ (visited 12 December 2017).

46 UNGPs, above n 44, princ. 2–4. For more far-reaching ideas for duties on home states, see General Comment No. 24, above n 39, paras 30–35; *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights* (September 2011), princ. 23–27, available at http://www.etoconsortium.org/en/main-navigation/library/maastricht-principles (visited 12 December 2017); see Malcolm Langford et al. (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013).

47 *World Duty Free v Kenya*, ICSID Case No. ARB/00/7, 4 October 2006; *Metaltech v Uzbekistan*, ICSID Case No. ARB/10/3, 4 October 2013; *Spentex Netherlands v Uzbekistan*, ICSID Case No. ARB/13/26, 27 December 2016 (not public but discussed at *Investment Arbitration Reporter*, 22 June 2017). I am not

bribe-taking, including regional treaties, the OECD Anti-Bribery Convention, and the UN Convention Against Corruption, might change some attitudes of investors and host state officials, although those rules remain very unevenly enforced.[48] These new treaties and arbitral rulings might dissuade investors from engaging in some investments where a host country leader pockets significant side benefits. Yet the dismissal of the cases brought by bribe-giving foreign investors has the effect of rewarding host states whose officials have taken bribes (because the tribunal will not proceed to hear the investor's complaints of unfair treatment). Moreover, they do not address misappropriation of the benefits of the investment beyond bribery, which is central to Pogge's and Wenar's critiques.

Cosmopolitanism could endorse a weaker demand, namely that only international law as a whole, rather than all its subfields, address the needs of the global poor (egalitarian or sufficientarian), or that we rely on some nonlegalized but enforceable rules of conduct. If that is the demand, then we need to consider whether other regimes within international law in a sense make up for the silence of IIL on economic justice. Cosmopolitans can also differ on the weight of the redistribution requirement compared to other duties individuals or institutions might have. If, for instance, a redistribution requirement made it harder for states to carry out more important duties, then, all things considered, IIL could not be seen as unjust.

Though the systemic critique of IIL is supported by strong cosmopolitan critiques of the international economic order, it is worth noting that even a nationalist approach to distributive justice might also endorse the critique. Under a theory that emphasizes the role of individual states in providing adequate resources to their population (whether or not it acts based on the difference principle), then IIL's structure of providing rights only to investors, if it prevents the state from providing those resources—or forecloses certain options that would harm foreign investors—would be morally suspect. On the other hand, if IIL can encourage investors to put resources into the developing world, host states can then use those resources to fulfill their special responsibilities to their own people.[49]

B. Contingencies in cosmopolitan criticisms

Although the systemic critique of IIL relies on, or at least reflects, a cosmopolitan view of global justice, it also depends on either a *factual* premise or a *normative* one. The factual premise is that the current framework of IIL is actually harming the global poor; the normative premise is that IIL is unjust unless it actively promotes a redistributive project. As for the factual premise, what is the baseline for such a claim of harm? Are we trying to compare global poverty or income distribution before IIAs with the situation today? Or poverty in states with IIAs compared to those without

suggesting that tribunals were motivated by distributive justice concerns. Indeed, the motivation for decision makers in promulgating or interpreting rules is distinct from the moral content of the rule.

48 See, e.g., Transparency International, Exporting Corruption, Progress Report 2015: Assessing Enforcement of the OECD Convention on Combatting Foreign Bribery (2015), www.transparency.org (visited 12 December 2017).

49 See Miller, above n 22, at 119–24, 230–47. The claimed anti-democratic nature of investment law offered as part of the systemic criticism, above n 7, is indirectly related to distributive justice insofar as it suggests that host states are unable to respond to public demands to structure their economy in a certain way, including one that would help poor citizens.

IIAs? [50] Economists have yet to systematically link IIAs to worsening global poverty or income distribution patterns. Indeed, even the link between an IIA and the amount and use of foreign investment within particular countries is the subject of disagreement, though most studies show some positive correlation between treaties and inward investment flows.[51] So it is unclear whether the current norms of IIL harm the global poor even under a loose sense of causation.

In addition, much harm to the global poor that civil society associates with foreign investment is not regulated by IIL. In the case of the fire in the Bangladesh apparel factory in November 2012 that killed 112 people and the building collapse there in April 2013 that killed over 1100 workers, the factories, owned and operated by Bangladeshi companies, produced apparel under contract for large multinational companies. Thus, the companies' purchases of apparel were not governed by IIL (because purchases are not investments).[52] Even if a factory in Bangladesh were set up by a foreign company and thus constituted an investment, we would still need to know if the investment was done pursuant to an IIA and whether that treaty's provisions gave the investor guarantees that may have contributed to the accident. So we cannot be sure there are causal connections.

The systemic critique is also based on a normative premise about the role IIL should play in promoting global distributive justice. Yet it is not always clear whether that premise tracks a more or less ambitious position within cosmopolitanism—whether it assumes IIL must actively advance distributive justice or simply not stand in the way. It seems that the systemic critique takes the former position, with the latter normative position more closely linked to the policy space critique discussed next. If the systemic critique assumes that all actors have a duty to advance distributive justice at the global level, then the flaw of IIL is the absence of affirmative duties on host states, investors, and home states to redistribute.[53]

If this is IIL's flaw, one initial question is whether new duties could have harmful repercussions beyond distributive justice. Consider the rule closely linked to IIL that both Pogge and Weinar criticize: that governments with effective power in the territory, without regard to their behavior vis-à-vis their citizens, generally have the authority to bind their states internationally, including in deals with foreign investors. That rule turns out to serve an important value by creating some minimal form of sovereign equality between states. If IIL required or permitted foreign investors to

50 See, e.g., Aaron James, 'Investor Rights as Nonsense—on Stilts', in Lisa Herzog (ed.), *Just Financial Markets: Finance in a Just Society* (Oxford: Oxford University Press, 2017) 205, 212 (baseline should be investment that would take place in the absence of agreements). As Carmen Pavel has pointed out in a critique of Pogge, identifying whether international rules have harmed anyone involves certain normative claims about the meaning of harm. Carmen Pavel, 'Negative Duties, the WTO and the Harm Argument', 63 Political Studies 449 (2015).

51 Jonathan Bonnitcha et al., *The Political Economy of the Investment Treaty Regime* (2017) 158–66. See also UNCTAD, *The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1988-2014* (2014).

52 On the structure of the Bangladeshi apparel industry, see Sarah Labowitz and Dorothée Bauman-Pauly, *Business as Usual is Not an Option: Supply Chains and Sourcing After Rana Plaza* (New York University Stern School Center for Business and Human Rights, April 2014), available at http://www.stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf (visited 12 December 2017).

53 This normative premise seems part of Garcia's et al. critique of IIL, above n 6, at 877–79.

ignore the government in power on the ground that it did not look out for the welfare of its people, powerful states could displace governments they did not like in favor of an opposition group. It is noteworthy that both Pogge and Wenar offer solutions to the resource privilege/curse that do not actually dispense with the international law rule they find so morally problematic.[54]

But suppose we can imagine an alternative form of IIL that promotes redistributive goals either across states (the cosmopolitan preference) or within them (the nationalist preference) without harming other important values. The question then becomes whether investment law is the right 'institutional site', in Kok-Chor Tan's phrase, for such a redistributive agenda, a point made by Joel Trachtman in the trade context.[55] Certainly one could develop IIAs with commitments by host states and home states to promote or allow investments that help address poverty.[56] But the most direct avenue for redistribution might be to fund bilateral and multilateral programs that help the state improve its taxation system, or to impose direct wealth transfers. In a similar vein, the best way to avoid future Rana Plazas may be to build on programs such as the one European companies set up to monitor conditions in factories from which they buy apparel.[57] Those seeing IIL as morally deficient for not doing more to address gross inequities in wealth distribution have, it seems, a responsibility to demonstrate that proposed reforms to IIL would advance that goal compared to alternatives. Failure to do so is to act with what Eric Posner and David Weisbach have called policy 'blinders' in the climate change context.[58] Rectifying global poverty is about consequences, not just motivations.

Yet the search for the right site for distributive justice should not ask too much. Global redistributive justice may well require multiple institutional sites or entry points, and it places too high a burden on those proposing alternatives to the status quo to demonstrate that their alternative is the best one. Obviously, questions of feasibility will enter into play in assessing the various choices of institutional sites.

IV. THE POLICY SPACE CRITIQUE AND GLOBAL JUSTICE

The policy space critique is narrower than (though in a sense derivative of) the systemic critique in that it focuses on the effects of specific provisions IIL on policy choices of host states. And philosophical accounts of global justice provide important arguments in its favor. Cosmopolitan arguments endorsing the systemic critique

54 Pogge proposes states adopt a constitutional amendment to prevent them from selling assets if their governments are authoritarian. Pogge, above n 22, at 168–72. Wenar calls for importing states to link importation of products from a state to the basic human rights practices of the exporting government. See Wenar, above n 37, at 283–312.

55 Tan, above n 29, at 205; Joel P. Trachtman, 'Doing Justice: The Economics and Politics of International Distributive Justice', in Chios Carmody et al. (eds), *Global Justice and International Economic Law: Opportunities and Prospects* (Cambridge: Cambridge University Press, 2012) 273, 276–77.

56 For one suggestion, see Karl P. Sauvant, 'Reforming the International Investment Regime: Two Challenges', in Julien Chaisse et al. (eds), *Asia's Changing Investment Regime: Sustainability, Regionalization, and Arbitration* (Singapore: Springer, 2017) 41.

57 See Accord on Fire and Building Safety in Bangladesh, 13 May 2013, available at http://bangladeshaccord.org/wp-content/uploads/2018-Accord-full-text.pdf (visited 12 December 2017).

58 Eric A. Posner and David Weisbach, *Climate Change Justice* (Princeton: Princeton University Press, 2010) 73–75.

apply a fortiori to the policy space critique. Even the more anti-cosmopolitan accounts of distributive justice at the international level, such as Rawls' or Miller's, would criticize a set of international rules that make it difficult for the state to carry out its responsibilities to improve the economic welfare of its people. A statist may or may not care whether IIL promotes global redistribution, but if it stands in the way of the state helping its own people, then it would seem presumptively unjust.[59] In that sense, scholars of global justice, whether cosmopolitan or statist, help us identify a potential moral flaw with the system of rules in IIL.

The policy space critique, in other words, is yet another a moral critique of IIL. Yet the persuasiveness of the critique, like that of the systemic critique, requires unpacking its empirical and normative premises. Two norms at the center of the critique offer useful examples for understanding the critique and the role of global justice scholarship in revealing its vulnerabilities.

A. Fair and equitable treatment requirements

Advocates of the policy space critique point, among other things, to arbitrations addressing claims by investors that certain regulations by the state in the area of public health amounted to a denial of FET to the foreign investor. For example, in four early cases, arbitral tribunals set the bar for an FET violation rather low, rejected the state's public health justification, and left the host state in most cases liable for large damages. At the same time, the tribunals spent significant time acknowledging the state's legitimate policy space, and the rulings seemed to turn on a finding of a lack of connection between the words and deeds of the state and the merits of its dispute with the claimant. The tribunals generally found that the state authorities were acting for a narrow political gain, including by inflaming public opinion, rather than a legitimate concern for public health.[60] Indeed, the host states did not argue that the laws were necessary to carry out their duties under human rights treaties.

The most important arbitral ruling on FET and public health to date, *Philip Morris v Uruguay*, concerning the state's strict packaging and sales rules for cigarettes, upheld those rules in strong terms.[61] *Philip Morris* suggests that FET can be interpreted by tribunals in a way that allows the state to protect the human rights of its inhabitants as long as the state follows certain basic processes fair to the claimant—notably not acting in an arbitrary manner (i.e. reasonableness, rather than scientific perfection) and adhering to 'specific undertaking or representations' made to the investor that induce reliance (not maintain all legislation).[62]

59 See, e.g., Miller, above n 22, at 253 (need for 'international order whose rules allow poor societies adequate opportunities to develop').

60 See *Técnicas Medioambientales Tecmed S.A. v Mexico*, ICSID Case No. ARB (AF) 00/2, Award, 29 May 2003, paras 160–64; *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras 144, 372, 374–77; Compañía de Aguas de Aconquija S.A. and *Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, paras 7.4.26–7.4.31; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras 602, 626–28, 654, 696, 698, 707, 709.

61 *Philip Morris Brands v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016.

62 Ibid, paras 410, 420, 422–26.

These cases can be interpreted in a variety of ways. I read tribunals' rulings thus far, for the most part, as not forcing states to choose between their IIA obligations and securing the basic human rights of their people.[63] David Schneiderman has offered a starkly different view of some of the earlier disputes, arguing that the tribunal did force the state into such a choice, as the state acted in the interests of public health, and that its response to public pressures and a public health purpose should not be viewed as alternatives.[64] Moreover, the *Philip Morris* ruling was 2-1, suggesting the tenuousness of the holding. And its interpretation of FET still seems to privilege specific commitments to the investor over the state's duty to protect human rights if there were a direct conflict between them, leaving open the possibility that Uruguay would have lost if it had made such commitments.

We can also disagree about the real-world impact of these decisions on other states, for part of the policy space critique is that IIA litigation makes other states reluctant to regulate to protect residents' right to life or health for fear of an expensive case brought against them. It is difficult to know whether states will refrain from safeguarding key economic rights of their residents for this reason, but the losses suffered by states in some cases are likely in the minds of government lawyers advising states on avoiding the risk of suits by foreign investors (a factor that also plays into the choice to allow investor-state arbitration in the IIA).[65] The economic research is, at this stage, woefully incomplete—with no quantitative evidence (though some anecdotal evidence) of regulatory chill by states that enter into IIAs.[66]

But one's ultimate evaluation of the policy space critique depends not only on these empirical questions, but also on taking a normative position on what IIL must or must not do. In a recent book, I proposed evaluating the morality of many of the core rules of international law—not just those of IIL—according to a nonideal, 'thin' standard of global justice that takes account of certain realities of the existing international system. These realities include states as the primary actors, international institutions with limited enforcement capacities, and, most significantly, the continued danger of interstate and intrastate wars—a factor that many philosophers assume away. Under that view, any norm of international law that prevents the state from protecting the basic human rights of its people, including their basic economic rights, is morally suspect.[67] Because the cases, at least as I interpret them, did not force the host state to choose between investor rights and its duty to protect basic human rights, we have a good moral argument against (or, at a minimum, one fewer moral argument in favor of) the policy space critique.

63 For detailed analysis, see Ratner, above n 4, at 353–59.

64 See Schneiderman, above n 8, at 64–70, 119–24. See also Public Statement on the International Investment Regime, 31 August 2010, para 5, available at www.osgoode.yorku.ca/public-statement/documents/Public_Statement_(final)_ (Dec_2013).pdf (visited 12 December 2017).

65 See generally Engela C. Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy', 31 ICSID Review 167, 185–89 (2016).

66 Bonnitcha et al., above n 51, at 239–44; Sergio Puig, 'Tobacco Litigation in International Courts', 57 Harvard International Law Journal 383, 412 (2016); Claire Prevost and Matt Kennard, 'The Obscure Legal System that Lets Corporations Sue Countries', *The Guardian*, 10 June 2015.

67 See Ratner, above n 4, at 64–90. To meet the standard of 'thin justice', rules must also advance, or at least not detract from, interstate or internal peace.

But of course our moral position could—and, I would argue, should, in the case of evaluating norms of international *economic* law—be quite more demanding, one focused on distributive justice. Both cosmopolitan (interstate) and even nationalist (intrastate) conceptions of distributive justice insist that states do more than guarantee basic economic rights to their residents; they must engage in other measures to improve the welfare of their citizens, e.g., by increasing spending on education, or devoting more money to infrastructure. If in the course of such changes they breach specific commitments they have made to foreign investors, then FET clearly could prevent them from engaging in some modalities for meeting out distributive justice.

But the policy-space critique of FET still needs to be more explicit on the relative value of distributive justice and commitments to investors. Some approaches to global justice may see little or no value in a state's preservation of its promises to foreign investors if it prevents the state from engaging in distributive justice. Aaron James has recently argued that the legitimate expectations of investors must be subordinated to an overall system of cooperation between states that addresses the needs of the worst-off.[68] Indeed, it could be argued that violations of FET actually serve to transfer resources from rich to poor countries and thus further global distributive justice. Others might see an inherent value in preservation of promises. Still others, more consequentialist in outlook, might criticize as deficient a principle in which the state can redistribute wealth in breach of commitments to foreign investors if it ends up deterring investment that may be economically beneficial to the state.

When the policy space critique is examined through the lens of global justice, we are better able to judge its persuasiveness with respect to FET rules. In other words, we must have a position about the real-world effect of the rule, as well as a standard of distributive justice that tells us what the state must be allowed to do (and FET must not be allowed to prevent), to appraise the critique. Even as scholars will differ about the data and the relevant moral standard, it becomes clear that FET is certainly not, as some investment law scholars have suggested, some embodiment of an ideal balance between the need for stability and change.[69]

B. Expropriation limits

IIL's rule on expropriations raise similar questions from the perspective of distributive justice. Both treaties and custom generally require the state to compensate a foreign investor at market value when it takes private property. In addition, tribunals continue to find some governmental actions to cross the line to compensable expropriations, even as they reject most governmental regulatory actions as nonexpropriatory.[70] To take an obvious case of expropriation, what if, in the name of assuming its

68 Aaron James, *Fairness in Practice: A Social Contract for a Global Economy* (Oxford: Oxford University Press, 2012) 240–41; for his even more expansive claim that state promises to investors have no moral value, see James, above n 50.

69 See Roland Kläger, '*Fair and Equitable Treatment*' *in International Investment Law* (Cambridge: Cambridge University Press, 2011) 153 (FET as 'an embodiment of justice'); Ioana Knoll-Tudor, 'The Fair and Equitable Treatment Standard and Human Rights Norms', in Pierre-Marie Dupuy et al. (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 310, 341–43.

70 See generally Steven R. Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law', 102 American Journal of International Law 475 (2008).

responsibilities for its people, the state engages in outright confiscation of foreign property, e.g., the large-scale seizure of land from US landowners by Mexico in the 1930s? Or suppose a foreign-owned mine is operated such that few of its profits remain at home, and the state decides that it needs to take it over to provide revenue to build schools for its population? Or suppose these actions are taken against industries regardless of nationality, affecting both domestic and foreign investors?[71]

IIL has incorporated the possibility of allowing states some flexibility about expropriation for redistributive purposes—very obliquely—in two ways. First, the World Bank Guidelines for the Treatment of Foreign Investment recognize the possibility that in case of expropriatory measures by a state as part of 'large scale social reforms under exceptional circumstances', full compensation is not legally required. However, those measures must be 'comprehensive [and] non-discriminatory'—presumably not targeted at foreign investors—and the Guidelines did *not* endorse the position that no compensation was needed.[72] The Guidelines, moreover, are not binding, and I am not aware of any provisions in IIAs allowing for such exceptions. In what could have been a test of this provision, in 2006, a group of Italian nationals sued South Africa alleging that its law transferring ownership of certain mines to black South Africans was an illegal expropriation. However, the two sides settled the case before any tribunal ruling.[73]

Second, the possibility that a state can invoke an emergency clause in an IIA or even assert the customary law defense of necessity provides a small opening to the possibility that a taking of property without compensation would not trigger legal liability for the state. (These clauses also insulate FET violations from liability as well.) Yet, for the most part, tribunals remain fairly unpersuaded when states invoke either of these two options.[74] In particular, the standard for the necessity defense remains very high.

From the perspective of global justice, because a legal requirement of full compensation discourages the state from undertaking some redistributive actions, it works directly contrary to (i) cosmopolitan visions of distributive justice—by preventing some forms of transnational movement of wealth to poor states, and (ii) nationalist visions—by preventing states from rearranging domestic wealth. Thus, although the FET requirements may constrain the state on a more ongoing basis, it is the compensation requirement for expropriation, which is the bedrock of IIL and generally accepted even among proponents of the policy space critique,[75] that has the greater potential to stand in the way of redistribution, both globally and domestically.

Expropriation without compensation sounds, of course, highly illegal to the international lawyer today, though one should note that developing states advocated this

71 For the sake of brevity, I leave aside the complicated question of taxation and its links to expropriation.

72 World Bank Guidelines on the Treatment of Foreign Direct Investment, art. IV.10, available at www.italaw.com/documents/WorldBank.pdf (visited 12 December 2017).

73 *Piero Foresti et al. v Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award, 4 August 2010 (discontinuing proceedings after settlement).

74 See the discussion in Ratner, above n 4, at 364–70.

75 See, e.g., Schneiderman, above n 8, at 80–88, 122–23 (focusing on misreading of criteria for indirect expropriation, not direct takings).

possibility for many years.[76] But from the perspective of distributive justice, it is a morally defensible way to redistribute wealth. The morality of an uncompensated taking turns on the initial distribution of wealth, the means by which various property holders came to possess their property, the utility associated with the use of the property by the property-holders as compared to the public, the authority of the entity engaging in the distribution, and other factors.[77] So a blanket moral prohibition on taking of property without compensation seems quite simplistic.

For the policy space critique of expropriation provisions to be persuasive as a philosophical matter, we still need a theory of when the state should be able to take foreign property without compensation. (We also need empirical validation of the effect of expropriation provisions in IIAs.) And if we are to criticize the high bar that tribunals have set for the doctrine of necessity, we also need a theory of when the state ought to be able to ignore not merely specific commitments to the investor, or even its property rights, but all the commitments it has made in the treaty, not only to the investor but to its home state.

V. THE INSTITUTIONAL CRITIQUE AND PROCEDURAL FAIRNESS

Philosophical approaches to global distributive justice offer fewer insights regarding the institutional critique. That critique is about the actors responsible for the decision making under IIL, with arbitral tribunals in the crosshairs. If we see the institutional critique as merely a claim that the institutions produce outcomes that are likely to constrain the policy space of states to undertake their responsibilities to their populations, then it is no more than a category of the policy space critique, and the approaches of global justice would allow us to parse it.[78] But the institutional critique is really quite different, for it is focused on *processes* far more than outcomes. Those processes themselves might be evaluated under substantive principles of global justice. For instance, the argument that investor-state arbitration is preferable to espousal by states essentially claims that that arbitration advances peace, which might argue for its 'thin justice' (if, of course, that process does not itself undermine respect for basic human rights).

But the real force of the institutional critique is not that the arbitral process is unjust in a thin or even thickly distributive sense, but that it is *unfair*, or, we might say procedurally unjust.[79] Societies have a particular set of expectations about the appropriate processes for the promulgation, interpretation, and enforcement of legal norms; their faith in and general acceptance of (and perhaps even their legal duties to respect) legal rules turn on these expectations. If, for instance, institutions do not

76 See, e.g., GA Res. 3171 (1973), para 3 ('each State is entitled to determine the amount of possible compensation').

77 See generally Christian Barry, 'Redistribution', in *Stanford Encyclopedia of Philosophy* (2014), available at www.plato.stanford.edu (visited 12 December 2017). See also Andrea L. Peterson, 'The Takings Clause—In Search of Underlying Moral Principles—Part II: Takings as Intentional Deprivations of Property Without Moral Justification', 78 California Law Review 53 (1990) (claiming courts make a moral judgment as to whether the government's action is in response to a prior wrong, or to prevent a future wrong, by the property owner).

78 For an example linking all three critiques, see John Gerard Ruggie, 'Multinationals as Global Institution: Power, Authority, and Relative Autonomy', 11 Regulation and Governance (online version, 2017).

79 I use the term unfair advisedly, insofar as Rawls equated justice with fairness. See John Rawls, *Justice as Fairness: A Restatement* (Cambridge, Mass: Harvard University Press, 2001) 5–8.

meet these expectations about the process of interpreting rules in situations where parties expect disputes to be decided in accordance with the rules, those parties regard the institutions as acting unfairly. Although the claim of unfairness may get more traction publicly when it is linked with specific outcomes (e.g. large judgments against host states), the essence and strengths of the critique hold even if we do not look at the holdings of the tribunal. So even a decision that undercuts the policy-space critique, like *Philip Morris*, can still be unfair with respect to the process of decision making.

Here is where legal philosophy offers its comparative advantage. While in some sense legal philosophy might be at the edge of philosophical work on global justice, it is better viewed as a cognate discipline in light of its persistent engagement with questions of justice and fairness. And it clearly offers important frameworks for appraising the institutional critique. Lon Fuller, for instance, identified criteria for what he called the internal morality of the law—factors that in his view make a rule a legal rule (as opposed to a social or other rule) and a system of governance a legal system.[80] Fuller's larger point was that the fidelity of the governed to the law turns on certain attributes of the law and the way that it is administered.[81] Jeremy Waldron has usefully built on Fuller's insights to speak about the notion of the *rule of law* as going beyond rules meeting Fuller's criteria to extend to procedural fairness in the administration of the rules—a sort of due process for the participants.[82] The institutional critique is based on the shortcomings in that procedural fairness.

On a superficial level, IIL could be said to be implemented through a fair process. Arbitral tribunals have accepted practices—what Thomas Carbonneau calls 'the arbitral legal culture'.[83] Arbitrators who treat their profession seriously will do certain obvious things to further that end—notably decide only matters within the scope of the arbitration, utilize rules that treat each party equally, and write opinions that rely on persuasive legal reasoning. That culture includes several additional components: (i) repeat players, notably the arbitrators and counsel who appear in many cases, as well as secretariat officials from institutions like ICSID or the Permanent Court of Arbitration; (ii) ethical constraints on arbitrators, e.g., concerning their relationship with the parties that appoint them;[84] and (iii) a desire by arbitrators to get reappointed to future arbitrations, as a result of which their opinions will stay within the mainstream of legal opinion. All of these might be said to provide a form of fairness to the parties, and that process still has many defenders.

Though a full discussion of these debates is beyond the scope of this article, it is important to see how the concept of the rule of law strongly supports the

80 Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) 38–94.

81 Ibid, at 41.

82 Jeremy Waldron, 'The Concept and the Rule of Law', 43 Georgia Law Review 1, 6–9 (2008); Jeremy Waldron, 'Are Sovereigns Entitled to the Benefits of the International Rule of Law?' 22 European Journal of International Law 315, 316–17 (2011).

83 See Thomas E. Carbonneau, 'Arbitral Law-Making', 25 Michigan Journal of International Law 1183, 1199 (2004).

84 See, e.g., International Bar Association, IBA Guidelines on Party Representation in International Arbitration (2013), available at http://www.ibanet.org (visited 12 December 2017).

institutional critique. The connection between these two was captured by Gus Van Harten over a decade ago, when he characterized the disputes between foreign investors and host states as public law disputes in light of the stakes for host states—the key repeat players—in adjusting national policies to IIA standards and devoting significant resources to pay damages, with open-ended exposure to arbitration by foreign investors. The resolution of those public law disputes needs to meet a procedural standard required for those sorts of claims—one associated with the rule of law.[85] The current controversies are thus not about narrow issues regarding the conduct of arbitration, but the fundamental compatibility of the arbitral model with the rule of law.

A. Impartiality as a demand of the rule of law

A primary characteristic of the rule of law is put by Waldron as follows:

> The Rule of Law is not just about general rules; it is about their impartial administration . . .. A procedural understanding of the Rule of Law requires not only that officials apply the rules as they are set out; it requires application of the rules with all the care and attention to fairness that is signaled by ideals such as 'natural justice' and 'procedural due process'.[86]

Impartiality and the perception thereof are lodestars of the rule of law.[87] From that perspective, it is worth briefly summarizing the most important shortcomings of the status quo.

(1) The investor-state arbitral process still suffers from the *appearance* of partiality for at least three reasons.

- First, parties generally nominate arbitrators because they predict that their picks are likely to side with them; and the arbitrators themselves may see the likelihood of future appointments as linked to ruling for the side that appointed them. Those expectations by litigants and possible predispositions of arbitrators (and even fears of collusion between counsel and arbitrators) create a perception of partiality by both the litigants and outside audiences.[88] That factor alone does not make the panel as a whole *actually* partial—and one could always argue that each

85 See generally van Harten, above n 9; See also Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', 107 American Journal of International Law 45, 63–68 (2013) ('public law paradigm' and its limitations).

86 Waldron, 'Concept', above n 82, at 7–8.

87 Lon Fuller, 'The Forms and Limits of Adjudication', 92 Harvard Law Review 353, 365 (1978). For a review of relevant caselaw on the appearance of partiality, see Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003) 137–38.

88 See Jan Paulsson, 'Moral Hazard in International Dispute Resolution', 25 ICSID Review 339, 348–55 (2010) ('Disputants tend to be interested in one thing only: winning. They exercise their right of unilateral appointment, like everything else, with that overriding objective in view. The result is speculation about ways and means to shape a favorable tribunal . . . Forgotten is the ideal of an arbitrator trusted by both sides.') (Ibid, at 352).

party-appointed arbitrator's possible partiality is cancelled out by the other party-appointed arbitrator—but the perceptions of partiality are reinforced, not cancelled out, by party appointment.
- A second important shortcoming as a matter of perceptions is that of an incentive of all arbitrators to rule at least partially in favor of claimants to keep the pipeline of cases open in a system where generally only investors can sue.
- And finally, because arbitrators can simultaneously serve as counsel and work alongside other arbitrators as counsel, the perception remains that an arbitrator may be influenced in his or her ruling by the positions he or she is taking as counsel; and may have relationships with counsel in cases that suggest a lack of impartiality.[89]

The arbitral community has ethical rules about these issues, and party-appointed arbitrators have at times resigned in the face of challenges, but it remains uncommon for the other two arbitrators, or an appointing authority, to disqualify an arbitrator. Indeed, the practice of allowing two arbitrators to decide on the fate of the third raises its own concerns, as the two may be concerned not to offend the third, who might be—or whose law firm might be—in a position to appoint them in a future case.[90] In general, the arbitral community remains fairly dismissive of these concerns. A joint American Society of International Law-International Council for Commercial Arbitration report recently tried to wrestle with the possibility of more rigorous standards for disqualification of arbitrators, but ultimately called the double-hatting practice merely 'problematic' and refused to endorse the concerns about it.[91] The closed nature of the arbitral community and (what at least to me seems to be) the actual impartiality of many arbitrators acts as a barrier to arbitrators' willingness to accept the perception of partiality that is at the core of the institutional critique.

(2) The arbitral process lacks sufficient breadth of expertise beyond investment and commercial law. Human rights law, international environmental law, and other areas generally remain outside their expertise. A handful of arbitrations have mentioned human rights but tended to given it no special weight in evaluating host state defenses (in part because the state did not plead that it was required by a human rights treaty to breach an IIA).[92] And a number of investment panels or the states

89 See Malcolm Langford et al., 'The Revolving Door in International Investment Arbitration', 20 Journal of International Economic Law 1, 321–31 (2017) (mapping prevalence of 'double-hatting').

90 See Nathalie Bernasconi-Osterwalder and Diana Rosert, *Investment Treaty Arbitration: Opportunities to Reform Arbitral Rules and Processes* (International Institute for Sustainable Development, 2014), available at http://www.iisd.org/pdf/2014/investment_treaty_arbitration.pdf (visited 12 December 2017).

91 Report of the ASIL-ICCA Task Force on Issue Conflicts in Investor-State Arbitration (2016), paras 128–33, 170–71, available at www.asil.org/asil-icca-joint-task-force (visited 12 December 2017).

92 See, e.g., *SAUR v Argentina*, ICSID Case No. ARB/04/4, 6 June 2012, Decision on Jurisdiction and Liability, paras 330–31; *Suez, Vivendi, and AWG v Argentina*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para 262; *EDF International v Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para 912. See also *Phoenix Action, Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para 78 (denial of jurisdiction for 'investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or . . . slavery . . .').

signing IIAs have allowed for the submission of *amicus curiae* briefs from interested third parties, some of which have argued human rights concerns.[93] Although a few general international lawyers receive important appointments, on balance, the arbitral world is quite small in the investor-state area.[94]

Though arbitrators have shown some sensitivity to the legitimate regulatory needs of host states in the expropriation context and in some key cases under FET, as witnessed in *Philip Morris*—though even that case was decided by 2-1—the perception of partiality again demands that multiple perspectives be represented on panels.[95] Joost Pauwelyn has recently suggested that the professional identities of WTO DSB members as compared to investor-state arbitrators may have a significant effect on the rulings.[96] Additional expertise may be particularly important if states raise human rights and environmental counterclaims against investors, as has happened recently.[97] This concern does not mean that human rights lawyers with no background in investment issues would be more qualified as arbitrators than the current crop, for arbitrators must obviously know substantive investment law and arbitral procedures. It rather suggests the need for at least some representation of different backgrounds and expectations.

Both of these perception-of-impartiality-driven aspects of the institutional critique strongly argue for replacement of the current system. The general principle ought to be for tribunals to resemble courts as much as possible in their composition, with full-time judges selected by states parties to an IIA, nonparty appointment, strict limits or bans on other work, and some form of job security. Though the full range of options is beyond the scope of this essay, certainly a multilateral court model would accomplish much in this regard. Yet the practicing bar of international arbitration generally remains quite resistant to these moves, calling them unnecessary, infeasible, self-destructive, and more.[98]

93 See NAFTA Free Trade Commission, Statement on non-disputing party participation (7 October 2003), available at www.state.gov/documents/organization/38791.pdf (visited 12 December 2017); Submission of the Quechan Indian Nation, *Glamis Gold v United States*, 19 August 2005, available at https://www.state.gov/documents/organization/52531.pdf (visited 12 December 2017).

94 Langford et al., above n 89; Sergio Puig, 'Social Capital in the Arbitration Market', 25 European Journal of International Law 387 (2014); for a harsher critique, see Corporate Europe Observatory, *Who Guards the Guardians? The Conflicting Interests of Investment Arbitrators* (November 2012).

95 As Fuller put the issue many decades ago:

> In practice, however, another kind of 'partiality' is much more dangerous. I refer to the situation where the arbiter's experience of life has not embraced the area of the dispute, or, worse still, where he has always viewed that area from some single vantage point. Here a blind spot of which he is quite unconscious may prevent him from getting the point of testimony or argument. By and large I think the decisions of our courts in commercial cases do not represent adjudication at its highest level. The reason is a lack of judicial 'feel' for the problems involved.

Fuller, above n 87, at 391.

96 Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus', 109 American Journal of International Law 761 (2015).

97 See above n 45.

98 For a few examples, see Piero Bernardini, 'Reforming Investor-State Dispute Settlement: The Need to Balance Both Parties' Interests', 32 ICSID Review 38 (2017); see also Koorosh Ameli et al., Task Force Paper regarding the proposed International Court System (ICS) (EFILA, 2016),

B. Systemic integrity as a demand of the rule of law

Beyond these two concerns grounded in the requirements of impartiality (and the perception thereof), procedural fairness points to another shortcoming of the present system. The rule of law encompasses what Waldron calls a kind of 'systematicity', where the norms fit into a coherent order—a kind of systemic integrity.[99] We expect lack of contradictions, a set of principles beyond individual judgments, and the creation of a fabric, not just a patchwork, of law to guide the behavior of host states, home states, foreign investors, and other stakeholders. This aspect of the rule of law would suggest that the current system's lack of an appellate mechanism is deficient.

The arguments against appellate review are well-known: arbitration should prefer finality (and brevity, though current proceedings are hardly brief) over good or consistent law; good judgments eventually eclipse bad ones; and serious flaws in a judgment may be addressed through annulment, nonenforcement, and set-aside.[100] But from the perspective of systemic integrity, appellate review serves an important function of error correction that instills confidence of the various parties. This function is taken for granted in domestic court systems, and even a few at the international level (such as the WTO and the European Court of Human Rights) have accepted this point. For IIL is not any longer about one-off disputes between investors and host states; it is a mature legal regime that needs a mature system for formal adjudication of claims.[101]

Indeed, systemic integrity points in the direction of a single appellate court with jurisdiction over multiple IIAs—indeed even a single court of first instance with the same jurisdiction. For as much as the texts of individual IIAs may differ, and the Vienna Convention mandates for treaty interpretation must be respected, IIL as a maturing legal system also needs some authoritative cross-treaty interpretations for certain areas of investment law. These cross-treaty judicial elaborations would certainly be of use to host states, investors, and future tribunals where treaties have identical texts; and they could also help in areas where treaty texts differ, such as the doctrine regarding provisional measures or remedies.[102] Systemic integrity in the face of multiple IIAs will clearly require a court to develop its own methodology for approaching these questions. A domestic analogy worth considering is the routine

available at http://efila.org.domainpreview.nl/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf (visited 12 December 2017).

99 Waldron, 'Concept', above n 82, at 33–34 ('systematicity amounts to something like Lon Fuller's requirement of consistency: people must not be confronted by the law with contradictory demands . . . Beyond that, there is a felt requirement essential to law that its norms make some sort of sense in relation to one another.')

100 See, e.g., Barton Legum, 'Options to Establish an Appellate Mechanism for Investment Disputes', in Karl P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (Oxford: Oxford University Press, 2008) 231; for claims of other risks, see Mark Feldman, 'Investment Arbitration Appellate Mechanisms Options: Consistency, Accuracy, and Balance of Power', 32 ICSID Review 528 (2017); for a more positive outlook, see Gabriel Bottini, 'Reform of the Investor-State Arbitration Regime: The Appeal Proposal', in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Leiden: Brill Nijhoff, 2015) 455.

101 See Garcia et al., above n 6, at 872–83 (need for 'coherence' within IIL).

102 For one proposal, see Steven R. Ratner, 'Compensation for Expropriations in a World of Investment Treaties: Beyond the Lawful/Unlawful Distinction', 111 American Journal of International Law 1 (2017).

interpretation of contracts, whereby domestic courts create jurisprudence of various principles of contract interpretation that apply to all contracts. Many legal vehicles for an international investment court are possible.[103]

In the case of the institutional critique, these elements of fairness (or procedural justice)—impartiality and systemic integrity—have actually driven policy. The inclusion of clauses in the recent Canada-EU and Vietnam-EU Free Trade Agreements, as well as the EU's proposal for the Transatlantic Trade and Investment Partnership Agreement (TTIP), for permanent arbitrators and an appellate body nominated by states are welcome steps in this direction.[104] And the decision by UNCITRAL to explore these issues in further depth suggests that the appearance of impartiality is something about which a number of governments now care.[105] Procedural justice may have other elements as well, notably reciprocity, i.e., the ability of each party to a dispute to sue the other.[106] The absence of such a possibility under most IIAs is central to the systemic critique but not yet a major part of the agenda of institutional reform.

VI. TOWARD A MORE JUST AND FAIR INTERNATIONAL INVESTMENT LAW

The above analysis suggests that the justice of IIL is highly contingent—contingent on the understanding of global justice we apply to the norms, contingent on empirical claims about the effect of existing law on wealth distribution or enjoyment of human rights, and contingent on the state of the law at any given time, as determined by states, arbitrators, and other decision makers. Under the investment lawyer's standard of justice, there may be little to complain about, as the denial of justice that seems to matter most is when domestic courts to do not provide an investor with a fair process. But under a philosophical concept, the picture is far more fraught.

If we adopt the standard of thin justice, it appears premature to say that IIL is unjust, for tribunals do not seem to have interpreted an IIA so as to truly prevent a host state from protecting the basic human rights of its people. But under standards of distributive justice, IIL may—again, in light of the above contingencies—have significant shortcomings either because (i) IIAs lack provisions requiring host states, foreign investors, or home states act to improve the welfare of the poor within host states (the systemic critique); or (ii) IIAs limit a state's ability to mete out distributive justice through domestic policy (the policy space critique). From the perspective of procedural fairness, these contingencies seem somewhat less relevant, for the rule

103 See, e.g., Gabrielle Kaufmann-Kohler and Michele Podestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or Appeal Mechanism?* (Geneva Center for International Dispute Settlement, 2016).

104 Catherine Titi, 'The European Union's Proposal for an International Investment Court: Significance, Innovations, and Challenges Ahead', 14 Transnational Dispute Management Issue 1 (online 2017); see also N. Jansen Calamita, 'The (In)Compatability of Appellate Mechanisms with the Existing Instruments of the Investment Treaty Regime', 18 Journal of World Investment & Trade 585 (2017).

105 United Nations Conference on International Trade Law, Possible future work in the field of dispute settlement: Reforms of Investor-state dispute settlement (ISDS), 20 April 2017, UN Doc. A/CN.9/917.

106 Waldron, 'Sovereigns', above n 82, at 317 (rule of law includes requirement that 'everyone has access to the courts'.).

of law seems to enjoy a greater consensus on its contours than does substantive distributive justice at the global level. At least based on that concept, the party-appointed arbitrator model is seriously flawed.

The global justice and procedural fairness lenses points to several necessary changes in the status quo, some of which have already been advocated by states, NGOs, and other actors.

1. IIL must, at a minimum, in both its texts and interpretive decisions, meet the thin standard of global justice in that its norms should not, nor be interpreted to, interfere with respect for basic human rights, in particular economic rights. Thus, norms concerning FET and expropriation should not force a state to choose between protecting those basic rights and avoiding a large judgment to a foreign investor. Tribunals must be vigilant when the state is acting in a bona fide manner to protect those rights. A just investment law must not make it too costly for the state to protect basic human rights, regardless of investor expectations. In that sense, even the FET standard of *Philip Morris*, with its significant deference to the state's right to regulate, requires further refinement if it means that investors who are given specific undertakings are protected regardless of the magnitude of the state's interest in later rescinding them. Tribunals will also need to remain open to accepting claims by host states under emergency clauses in IIAs or the customary international law doctrine of necessity as a way to preserve the state's ability to protect basic rights.

2. States, international organizations, NGOs and others should begin a dialogue about the desirability of incorporating ideas of distributive justice more directly into IIL. Philosophers, who have engaged only marginally with IIL, should be part of this conversation. They will need to discuss whether the failure (through inability or unwillingness) of states to carry out domestic distributive justice schemes can and should be mitigated by IIL. This dialogue would ideally produce some sort of agreed sense on the desirability of moving beyond market mechanisms to help the poorest within a state or globally, but also, as noted earlier, a decision as to whether investment law is a good vehicle by which to advance a redistributive agenda.

If decision makers think IIA is a site for distributive justice and favor a more statist approach, they might include provisions in future IIAs permitting or requiring host states to take measures to channel investment to the poorest in their society. They might also place duties or at least responsibilities on foreign investors to ensure that their investments benefit, or at least do not harm, the economic welfare of the poorest within each host state.[107]

More cosmopolitan approaches to global distributive justice will prove more difficult for the home states of foreign investors to accept or even discuss. But some redistributive aspects could be part of future IIL, e.g., some kinds of global schemes to encourage transborder investment in a way that benefits the global poor. Given the number of players in the foreign investment process, distributive justice might be more effective through incentives than any formal regulation.

107 See John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton, 2013) 182–86 (suggesting similar ideas as part of the implementation of the UN Guiding Principles).

If decision makers can be persuaded to think through these options, whether from a statist or a cosmopolitan perspective, they should consider carefully whether to adopt a fault or no-fault approach to distributive justice. The former, corrective-justice sort of approach would require identifying the actors who have contributed to global poverty and attempting to impose new duties on them through IIL.[108] This process, however, seems quite difficult to operationalize, given that host states, home states, and corporations themselves have all played different roles in the current world economy and its distributive injustices. Indeed, one central disagreement between Thomas Pogge and David Miller is that the former sees external factors as the key cause of poverty in the developing world while the latter says that one cannot dismiss the importance of domestic factors.[109]

A no-fault approach, in contrast, might seek to ground duties on different *capacities* to effect improvement. But here too it might be hard to know the relative capacities given that host states can be highly functional or incompetent, home states of investors can be large or small, and foreign investors can range from large multinational corporations to small businesses. Perhaps some of the lessons of international environmental law can apply here too. In that context, states have recognized the principle of common but differentiated responsibilities, trying to cash out this concept in terms of different duties on states to improve the environment.[110] More generally, both legal and philosophical scholarship on shared responsibility represent useful platforms for considering the possible use of IIL to allocate responsibility for effecting global distributive justice.[111]

Decision makers will also need to decide whether any new duties on states or investors toward the global poor will be grounded in existing human rights under international law or in some other notion of needs, e.g., metrics of human survival or welfare such as those in the UN's Sustainable Development Goals.[112] A rights-based approach has a certain appeal in that states agree at least somewhat on their content and, as a result of the UN's Guiding Principles, many states and (at least major) corporations accept the connection between foreign investment and human rights. But a scientific, nonlegal measurement of welfare standards has its own appeal.

3. Whether or not states choose to adjust IIL over time, they can and should take action in other areas of international law related to foreign investment in a way to make the overall architecture of international law regulating foreign investment more just. Anti-corruption law, both domestic and international, creates the possibility for severe penalties on both bribe-givers and bribe-takers and can prevent some investment benefitting unscrupulous rulers. But enforcement needs serious political attention. International environmental law should also empower home states of foreign

108 For a skeptical view of this approach in the climate change context, see Posner and Weisbach, above n 58, at 99–118.

109 See Miller, above n 22, at 238–47.

110 See Philippe Sands, *Principles of International Environmental Law*, 3rd ed. (Cambridge: Cambridge University Press, 2012) 233–36.

111 For the former, see André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (Cambridge: Cambridge University Press, 2015) (with some contributions by philosophers as well) and other work of the SHARES project, www.sharesproject.nl (visited 12 December 2017); for a philosophical take, see David Miller, 'Distributing Responsibilities', 9 Journal of Political Philosophy 453 (2001).

112 http://www.un.org/sustainabledevelopment/sustainable-development-goals (visited 12 December 2017).

investors to regulate their conduct, as has been done in other so-called civil liability regimes.[113] Sanctions by home states to prevent investment in situations that will harm local inhabitants should remain in the quiver of policy alternatives.

4. Finally, independent of efforts to improve the substantive justice of international investment law, the procedural fairness concerns require the replacement of party-appointed arbitrators with a judicial-like system for investor-state (or state-investor) cases. We do not need to wait for progress on redistributive matters to correct these obvious defects of the system from the perspective of the rule of law.

* * *

Though philosophical scholarship on global justice has yet to engage closely with IIL, its methodologies for analyzing global poverty and distributive justice offer a template for thinking about areas for improvement. Progress on this front requires an active collaboration of three disciplinary tracks—economists and political scientists with the relevant empirical skills for gauging the impact of certain rules; political and moral philosophers with the theories for what makes a just international investment process; and lawyers with the expertise on constructing legal regimes, including binding rules and institutions for interpreting and enforcing them. If any of the three is missing from the process, an essential element for factually grounded, conceptually reasoned, and reasonably feasible prescription will be lacking. In the meantime, international investment lawyers cannot dismiss ideas of distributive justice as far-fetched simply because states do not accept them today; and philosophers need to move beyond ideal theorizing to think about reform in the context of the world as it currently exists.[114]

Of the four agenda items above, the final (procedural fairness reforms) has gained the most attention of the states and investors in the investment community, even as some investment lawyers downplay the concerns. The first (thin justice) and third (ancillary areas of law) are already part of global discussions concerning foreign investment. They are less demanding in terms of reimagining IIL, though even meeting the standard of thin justice will require that states and arbitral tribunals not allow investment law to impede the enjoyment of basic human rights. But the agenda of distributive justice is just as urgent, whether it is carried out through statist or cosmopolitan solutions. It is time to begin this conversation.

113 See Steven R. Ratner, 'Business', in Daniel Bodansky et al. (eds), *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) 807.

114 For one promising methodological alternative, see David Wiens, 'Prescribing Institutions Without Ideal Theory', 20 Journal of Political Philosophy 45 (2012).