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Survey Article: Global Investment Rules as a Site for Moral Inquiry*

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For decades, the flows of international investment—the cross-border movement of capital—have been a major element of the world economy and a significant percentage of global GDP.[1] Foreign investment has significant effects on economic development in rich and developing countries alike. In the latter, in particular, foreign investment—or the search for it—can drive economic decision making on issues ranging from extraction of natural resources to production of clothing to privatization of governmental services. Yet the legal regime regulating foreign investment remains virtually untouched as a subject of philosophical inquiry, in sharp contrast to the rules on international trade.[2]

How are rules and institutions of international investment law (IIL) important to our understanding of international political morality or global justice? I offer three reasons.

First, like other rules governing the international economic order, IIL represents a legal instantiation, and in some cases maybe even a causal factor, in the moral problems within the field of global justice. All these regimes represent choices by states and other actors to regulate, or not regulate, international economic relations in ways that have winners and losers.

Second, IIL raises distinctive moral questions because of its potentially strong constraints on a state's ability to manage its own economy. Because foreign investment permeates a state more than the importation of foreign goods, the so-called host state will often seek to regulate it in many ways, and foreign investors will typically seek an array of protections (or insulation) from (mis-) treatment by that state. To protect investors, IIL places deep obligations on states, far exceeding the rules of international trade. States parties to treaties agree to a broad range of guarantees to foreign investors that can affect what might be called their economic sovereignty and their broader policy options.

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[1]For statistics, see "FDI Stocks," <https://data.oecd.org/fdi/fdi-stocks.htm#indicator-chart> (inward investment as 38.3% of GDP and outward investment as 35.9% of GDP in 2016).

[2]See, e.g., Aaron James, *Fairness in Practice: A Social Contract for a Global Economy* (Oxford: Oxford University Press, 2012); Thomas Pogge, "Recognized and violated by international law: the human rights of the global poor," *Leiden Journal of International Law*, 18 (2005), 717–45; Leif Wenar, *Blood Oil: Tyrants, Violence, and the Rules that Run the World* (Oxford: Oxford University Press, 2016).

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Third, IIL raises new questions about moral appraisal of international rules, because of the way it is structured. Instead of a foundational global treaty, like the 1947 General Agreement on Tariffs and Trade, international investment is regulated by some 3200 bilateral investment treaties (BITs), with a dose of regional treaties and influential "soft law" instruments.[3] Instead of a leading global body, like the WTO, to develop and interpret rules, prescription and enforcement is highly decentralized, with new BITs under negotiation and investor–state disputes adjudicated by stand-alone arbitral tribunals set up under different institutional arrangements. This diversity of rules—different treaties may regulate the same issue in highly different ways—along with the fluid nature of interpretation, raises distinct challenges to a moral appraisal of the body of law as a whole. Those bilateral relationships also raise moral questions about bargaining power, as well as how diverse treaties can track, or conflict with, different moral positions.

This article considers the stakes for global justice of the rules of IIL, by identifying the key issues of international political morality within those rules and the questions that need to be answered for a moral evaluation of the law. My analysis in large part is undertaken by unpacking two broad critiques of investment rules currently part of the public and (mostly non-philosophical) academic discourse, in order to reveal the questions they raise—and the assumptions they make—and point the way to more rigorous philosophical analysis. I take this somewhat unusual approach for two reasons. First, because IIL is mostly off the radar screen within international political morality, there is very little philosophical critique with which to engage. Second, because these critiques map on to philosophical positions on global justice, they offer an entrée into, or an opportunity for consideration of, the political morality of IIL. The critiques deserve careful consideration because, at their core, they claim that IIL is unjust.

An analysis of the critiques thus serves as an important first step to developing a philosophical account of a just set of international investment rules. An appraisal of IIL's justice could certainly start from more general premises about a morally desirable global economic order and then apply that theory to the rules we have. But the public debates are, at this stage, very much skewed toward claims of injustice, so it seems fair to tackle those arguments on their terms. Moreover, the questions raised by those critiques are likely to be confronted at some point by any moral appraisal of international investment rules.

The article proceeds as follows. Section I introduces the history, rules, and structural characteristics of IIL and summarizes empirical studies of the effect of IIL on its targets—host states and foreign investors. Section II examines what I call the *structural critique* of the rules, one that can be broken down into two

[3]For the purposes of this article, I will use the term "BIT" to include regional treaties such as the North American Free Trade Agreement, though experts use the term "international investment agreement" to cover both BITs and non-bilateral treaties.

moral claims: (1) that IIL is exploitative in terms of how certain states came to accept its rules and are treated under them; and (2) that IIL is non-reciprocal because it creates only rights for investors and duties for states, but not the reverse. Section III analyzes a second critique of IIL, that I term the *policy-space critique*, which also can be reduced to two basic claims: (3) that IIL deters states from, or penalizes them for, adopting policies to help their own population; and (4) that IIL reallocates the authority for making public policy choices from the state to unaccountable international arbitrators.

For each of the four critiques, I examine its empirical and normative claims or assumptions and identify lines of inquiry for a fuller philosophical account of a just—or unjust—international investment law. One discovers that a number of the critiques depend upon proof of causation between IIL and certain economic effects that, as of now, lack an empirical basis. This finding supports what should be an obvious point, that *some* moral claims about IIL (or other rules of international law) will turn on empirical claims. Moreover, the claims are less than clear in terms of whether they argue that IIL affirmatively harms certain actors (for example, poor states, or the poor in certain states) compared to some baseline, or that IIL does not do more to promote global justice. As a result, appraisals of IIL must be keen to distinguish between arguments of actual harm versus arguments that IIL can do better.

Yet, despite some analytical imprecisions, the claims raise key moral questions that must be addressed in a robust appraisal of the rules. In particular, (1) the argument that IIL is exploitative invites an account of what constitutes non-exploitative investment relations between states; (2) the argument against the non-reciprocal duties in IIL invites an account of why investor–state relations need reciprocal duties; (3) an argument that IIL should not constrain the policy space of states invites an account of the comparative moral value of promises to foreign investors and a state's duties to its own population; (4) a critique of delegation of decision making to arbitrators invites an account of when a state should be permitted to delegate such decisions.

Section IV turns to a third set of justice-related concerns, one not explicitly made in the public debates, but subtextual to them—that IIL must be examined for its contribution to *distributive (in-)justice* either within or across states. It traces out what those arguments could look like and the questions essential to them. In particular, arguments that IIL rules should advance distributive justice need to explain why investment law is the right site for distributive justice. I conclude the article by offering a path for future work to address these challenges.[4]

[4]My analysis does not address matters of democratic theory and its connection to international law. That debate's many contours, including international law's overall tolerance of non-democratic regimes and possible tensions between the international rule of law and democratic decision making, are too far-ranging for inclusion here.

I. A PRIMER ON THE LEGAL LANDSCAPE

A. A Very Brief History

International law's rules governing cross-border investment have evolved over the last century in roughly four phases.[5] During the colonial period, colonial powers often used private or quasi-private investors as an instrument of their colonial power; the United States also saw American companies as symbols of US power abroad, particularly in Latin America. Home states insisted that their investors needed protections from what they regarded as abuses by the host entity, notably from expropriation, or full compensation in the event of one. Northern powers would assert their views as rules of international law by taking up the claims of their investors abroad, including by threatening or carrying out military raids if investors were mistreated. Latin American states responded with the so-called Calvo Doctrine, named after the Argentine scholar Carlos Calvo, which insisted that foreign investors should receive identical treatment to national investors, and nothing better, and denying a right of foreign powers to protect their investors from host state rules.[6]

The second phase is broadly associated with the efforts beginning in the 1950s by newly independent states to assert control over natural resources through seizure of foreign property, notably in the Middle East and North Africa—though it had antecedents in large-scale nationalizations by the USSR, Mexico, and other states. During this period, North and South offered competing claims of international law's duties on host states to foreign investors. The most significant disagreement was over expropriation, which played itself out in bilateral exchanges of legal positions (for example, between the US and Mexico in the 1930s) and at the UN General Assembly. In the latter, the increased membership of newly independent states led to the passage of resolutions asserting (echoing the Calvo Doctrine) that each state could decide whether and how much to compensate foreign investors according to its own law.[7] Most Northern states objected to these claims, with the US insisting that foreign investors were entitled to full compensation for any expropriation.

[5]For histories, see Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd edn (Oxford: Oxford University Press, 2012), pp. 1–12; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013), pp. 21–121; Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge: Cambridge University Press, 2015), pp. 47–70; M. Sornarajah, *The International Law on Foreign Investment*, 4th edn (Cambridge: Cambridge University Press, 2017), pp. 23–36; Stephan W. Schill, Christian J. Tams, and Rainer Hoffmann (eds), *International Investment Law and History* (Cheltenham: Edward Elgar, 2018).

[6]Donald R. Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (Minneapolis: University of Minnesota Press, 1955).

[7]See Permanent Sovereignty over Natural Resources (UNGA Resolution 3171 (XXVIII), 17 Dec. 1973) and Charter of Economic Rights and Duties of States (UNGA Resolution 3281 (XXIX), 12 Dec. 1974).

The third phase coincided more or less with the end of the Cold War and the emergence of the free-market ideology known as the Washington Consensus. Many Southern and East European states that had been the recipients of aid in the Cold War found those sources drying up and increasingly saw that their best hope for development was to welcome foreign investment. To attract that investment and to show political support for key Northern states, they agreed to hundreds of BITs with Northern countries that emphasized investor protection above all, including, as discussed below, a right of investors to take states to international arbitration. NAFTA, the European Energy Charter Treaty, and other regional arrangements also were concluded. Investor–state arbitrations under these BITs began, with significant monetary rewards against host states. This period more or less defines most IIL rules in effect today.[8]

The final phase, which began in the mid-2000s, is best characterized as one of reaction and uncertainty. In response to large awards against host states for violating BITs or the threat of litigation by investors against host states, various states and NGOs began to press for significant revisions to IIL. They sought (a) a recalibration of the obligations of host states toward investors, to allow the former more leeway to enact policies that would not trigger liability under the BITs; (b) the creation of new obligations on (not merely rights for) investors, for example, with regard to human rights, the environment, or corruption; and (c) the reform or elimination of investor–state arbitration, which was seen as having a pro-investor bias. The result is a cacophony of discussions by states and others to terminate or modify existing BITs.

B. The Core Rules of IIL

The Washington Consensus that underlies modern IIL is based on the free-market, neo-liberal premise that foreign investment will increase if investors receive certain guarantees of treatment from host states, and that such increases will economically benefit both the host states and the states of origin. As a result, BITs are organized around four core duties for host states. First, a host state must not *discriminate* in its treatment of investment from another state compared to domestic investment ("national treatment") and investment from third states ("most-favored-nation treatment"). These duties protect foreign investors from measures imposed on them solely due to their nationality.

But because nondiscrimination provides no absolute baseline of treatment by a host state of a foreign investor, IIL includes two core non-relative duties on host states: *fair and equitable treatment* (FET) of investment and a *duty to compensate* a foreign investor if it expropriates the investor's assets. States, international organizations, and tribunals have offered many formulas for these obligations in treaty texts, official pronouncements, and arbitral decisions. IIL includes other

[8]For a database of treaties, see United Nations Conference on Trade and Development [UNCTAD], Investment Policy Hub, <http://investmentpolicyhub.unctad.org/IIA>.

non-relative duties, for example, to allow investors to repatriate profits freely and to allow them to hire senior personnel of their choice.

Lastly, states concluding these treaties generally accept a critical duty regarding the enforcement of the rules—to open their courts to foreign investors claiming a breach of the treaty and to accept *binding arbitration* if an investor brings a claim.[9] Under some treaties, the investor must try domestic remedies first, while under others it can go directly to arbitration. If the host state loses, it can face a large award—even billions of dollars. If the state refuses to pay, the investor will try to enforce the award in countries where the losing state has assets.[10]

Investment law is not, however, a blank check for investors. Treaties may explicitly preserve host states' prerogatives to screen the entry of investment; they often exclude from their coverage specific sectors and industries, such as those associated with national security; and they can contain carve-outs for public health, the environment, labor rights, or other core national interests.[11] Even without these exceptions, the two core non-contingent obligations, FET and protection against expropriation, have been interpreted to give the host state significant flexibility to regulate foreign investment, though observers disagree on just how much.[12]

C. Structural Elements

Beyond these four duties, two structural aspects of IIL are critical. First, although the treaties are formally reciprocal, with equal duties on the states parties and equal protections for the investors from those states, as a practical matter, many are concluded in order to protect investors from one side. Thus, for many BITs between a rich country and a poor one, because the investment flow is principally from the former to the latter, the protections benefit the investors of the former state.[13] At the same time, some states that were formerly mostly recipients of foreign investment, like China and India, now have their own companies investing abroad. As a result, the effective non-reciprocity of the obligations may characterize relations *between* developing states.

Second, the network of treaties creates only duties on *host states toward foreign investors*, not on foreign investors toward host states. Thus, foreign investors can

[9]On the diffusion of arbitration, see Taylor St John, *The Rise of Investor–State Arbitration: Politics, Law, and Unintended Consequences* (Oxford: Oxford University Press, 2018).

[10]For a statistical snapshot of arbitrations, see UNCTAD, *IIA Issues Note: Investor–State Dispute Settlement: Developments in 2017* (June 2018), <http://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf>.

[11]See, e.g., Office of the United States Trade Representative, US Model Bilateral Investment Treaty (2012), Arts. 12, 13, 18, <http://www.state.gov/documents/organization/188371.pdf>.

[12]On FET's permutations, see UNCTAD, *Fair and Equitable Treatment*, UNCTAD Doc. UNCTAD/DIAE/IA/2011/5 (2012), <http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf>.

[13]See Todd Allee and Clint Peinhardt, "Delegating differences: bilateral investment treaties and bargaining over dispute resolution provisions," *International Studies Quarterly*, 54 (2010), 1–26, at p. 6.

sue host states for breaches of the treaty, but host states generally cannot sue foreign investors. Host states may use their domestic courts and administrative bodies to enforce their own laws against foreign investors (sometimes in bad faith), but many poor states lack the capacity to do so.

D. Empirical Findings on the Effects of IIL Rules

International law rules of whatever kind, from the laws of war to those on secession, invite appraisal in part, if not mostly, because they are assumed to affect in some way the behavior of certain actors. Both the critiques and defenses of IIL reflect certain assumptions about those effects.[14] Certainly, if a foreign investor sues a state in an arbitration and a tribunal orders damages paid to the investor, and if the state then pays (as well as changes its laws to avoid future suits), such causation seems obvious. And journalists have uncovered episodes where states have modified policies in response to threats of suits under BITs.[15] But the other effects of investment law are far harder to judge.

Indeed, quantitative research faces significant methodological challenges and has only begun to answer some of the core questions about the effects of IIL. Reviews of existing research offer the following results: (1) studies are divided on whether an investment treaty increases flows of investment to a state, with a majority suggesting some correlation, though those effects may be accounted for by a contemporaneous decision by a state to make its laws more investment-friendly; (2) investment treaties are only one small determinant of companies' decisions on where and how to invest abroad; (3) investment treaties have caused some states to liberalize domestic laws, or to refrain from reimposing new restrictions on foreign investment; (4) the effect of IIL rules on global inequality and on income distribution patterns within states has not been the subject of inquiry; (5) the effect of IIL rules on host state enactment and enforcement of measures to help their populations (for example, environmental rules) has not been demonstrated.[16]

II. THE STRUCTURAL CRITIQUE AND ITS COMPONENT CLAIMS

The structural critique starts with the presumption that investment from developed countries to developing states has harmed recipient states and their

[14]On empirical disagreement in political theory, see Christian Barry, "International political theory meets international public policy," Chris Brown and Robyn Eckersley (eds), *Oxford Handbook of International Political Theory* (Oxford: Oxford University Press, 2018), pp. 481–94, at pp. 486–8.

[15]Chris Hamby, "The court that rules the world," *Buzzfeed*, 28 Aug. 2016, <https://www.buzzfeednews.com/article/chrishamby/super-court#.hyE3dBkjp>.

[16]Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford: Oxford University Press, 2015), pp. 49, 159, 166, 179, 218; Joachim Pohl, "Societal benefits and costs of international investment agreements: a critical review of aspects and available empirical evidence," OECD Working Papers on International Investment, 2018/01, pp. 9–10, 28–9, 32, 55–7, 62–5, <http://dx.doi.org/10.1787/e5f85c3d-en>.

populations through its contribution to corruption, environmental degradation, and severe inequality. It then criticizes IIL for enabling 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 investment treaties is undermined by their utility to only one set of actors and by the asymmetry of duties between investors and host states.

When one examines the critique more closely, its proponents are making two serious claims about investment law—claims that map on to the two structural elements noted in Section I.C above.

A. Claims of Exploitation

i. Restating the Claims

The first claim is that IIL is based on and furthers a relationship whereby rich (mostly Northern) states can and do take advantage of poor (mostly Southern) states. It is a claim about both the origin or purpose of the law and the continued effect of the law. Thus, Sornarajah, the leading developing-world legal scholar of IIL, writes:

> [B]ilateral investment treaties … are usually made between unequal partners. They entrench an inequality that has attended this area of international law. They are usually agreed between a capital-exporting developed state and a developing state keen to attract capital from that state … Though the treaty contemplates a two-way flow of investments … it is usually only a one-way flow that is contemplated and feasible in reality in the context of the disparities of wealth and technology between the two parties … In the belief that foreign investment flows will be forthcoming, there is a surrender of sovereignty on the part of the state that hopes to receive the … foreign investment.[17]

The unequal bargaining power is highlighted by Stiglitz as well, when he writes, "BITs … are part of the *demands* developed countries impose on developing countries … acceded to … because the cost to the developing country is less than the surplus they believe they will receive as a result of the trade deal."[18] He further elaborates that developing countries go into these negotiations with an undue optimism about the investment that will flow from conclusion of a BIT.[19] Others note another handicap of the developing world state—a lack of expertise

[17]Sornarajah, *The International Law on Foreign Investment,* p. 211; see also John Linarelli, Margot E. Salomon, and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford: Oxford University Press, 2018), pp. 159–60 (comparing IIL to extraterritorial concessions imposed on China).

[18]Joseph E. Stiglitz, "Regulating multinational corporations: towards principles of cross-border legal frameworks in a globalized world balancing rights with responsibilities," *American University International Law Review*, 23 (2007), 451–8, at p. 491.

[19]Ibid., n. 92; M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015), pp. 13–14.

and awareness of the exposure of the state to litigation and, eventually, large damage awards.[20]

Empirical studies, both qualitative and quantitative, have endorsed some factual predicates for the exploitation claim, though scholars engaging in these studies typically stay clear of any normative evaluation. Chilton has shown that the US used BITs to advance its political goals and how states acquiesced to further bilateral ties;[21] Allee and Peinhardt have demonstrated how the inequality in bargaining power between the home state and the host state is a good predictor of whether a BIT will include a right of the investor to institute arbitration against the host state (as opposed to having to rely exclusively on domestic courts).[22] Most significantly, Lauge Poulsen's exhaustive study, based on numerous interviews with officials in developing countries who negotiated BITs, finds that developing-state officials engaged in wishful thinking about the rewards and risks of concluding BITs, often lacked expertise on what obligations they were signing up to, and failed to consider alternatives to BITs that might still encourage investment. Yet he rejects the idea that developing states were coerced into concluding the treaties, saying these states were already engaging in domestic reforms.[23]

The exploitation claim thus has three different components: (a) unequal bargaining power between treaty parties; (b) incorrect information—about rewards, risks, and the meaning of treaties—held by the developing state (the weaker party); and (c) an overall result that makes the host state worse off, either compared to the lack of a treaty or perhaps compared to some other treaty. To this one might add a nefarious motivation on the part of the powerful states—hegemonic control, subjugation of the weak, or putting corporate interests first, as highlighted by both Sornarajah and David Schneiderman,[24] though this is not essential to the critique. When those three elements are put together, states sign agreements that force them to undertake domestic change, or at least accept investor–state arbitration, to welcome foreign investors and tie their hands in regulating them in the future, neither of which will be in their interest.[25]

[20]Sornarajah, *The International Law on Foreign Investment*, p. 206; for a rejection of this claim, see Jan Paulsson, "Avoiding unintended consequences," Karl P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (Oxford: Oxford University Press, 2008), pp. 241–65, at pp. 251–2.

[21]Adam S. Chilton, "The political motivations of the United States' bilateral investment treaty program," *Review of International Political Economy*, 23 (2016), 614–42.

[22]Allee and Peinhardt, "Delegating differences."

[23]Poulsen, *Bounded Diplomacy*. See also St John, *The Rise of Investor–State Arbitration,* pp. 47–8.

[24]David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (New York: Palgrave Macmillan, 2013), pp. 92–3; Sornarajah, *Resistance and Change in the International Law on Foreign Investment*, pp. 15–16. In this sense the structural critique also concerns corporate power over the individual.

[25]For my purposes here, I will treat this claim as distinct from claims about distributive justice—both globally and domestically—to which I turn in Section IV.

ii. Exploitation and Fairness

Whether these factors, alone or in some combination, make the treaties that form IIL unjust—something deserving of the term exploitation—becomes the challenge for future inquiry into the justice of IIL. Beyond the generally accepted conceptual starting point that exploitation involves one party taking *unfair* advantage of the other, theoretical work on exploitation has concentrated on personal relationships, or employment relationships, but less on interstate, let alone treaty-based, relationships. It is not obvious, for instance, if the conditions for an exploitative personal or employment relationship can be transferred to the interstate plane, a point of caution Pogge recognized in distinguishing interactional from institutional ethics.[26]

In examining the three factors above, the first two—unequal bargaining power and unequal information—are claims of *procedural unfairness* that renders IIL exploitative. The third factor is a claim about the *substantive unfairness* of IIL. Exploitation in terms of substantive unfairness has already been the subject of work concerning the global economic order (though not of investment rules specifically). Notably, David Miller finds poor states "vulnerable to exploitation and other forms of injustice" by powerful states, citing IMF conditionality, protectionist tariffs, and unstable commodity prices as examples of what the rich must not do. Instead, rich states owe poor states "fair terms of cooperation," by which he means "an international order whose rules allow poor societies adequate opportunities to develop."[27] Yet he admits that it is far easier to demonstrate international actions that are unfair than to find a theory for what is fair.[28]

That challenge has, however, been taken up in the area of international trade. Thus, Mathias Risse argues that the best maxim for fair trade is that "the distribution of gains from trade among countries is just only if no country enjoys gains that come 'at the expense' of people involved in the trade."[29] Aaron James's theory of fair economic relations seeks to focus on specific global practices, arguing against a grand theory that ignores the distinctive nature of each practice.[30] In the case of trade, fairness dictates equal gains from trade, with the key interstate principle of fairness requiring that "gains to each trading society … are to be distributed equally, unless unequal gains flow … to poor countries."[31]

[26]Thomas W. Pogge, "Cosmopolitanism and sovereignty," *Ethics*, 103 (1992), 48–75, at pp. 48, 50–2. For examples in other spheres, see Monique Devaux and Vida Panitch (eds), *Exploitation: From Practice to Theory* (London: Rowman & Littlefield, 2017); Robert E. Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (Chicago: University of Chicago Press, 1985), pp. 195–6.

[27]David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), pp. 252–3.

[28]Ibid., p. 252, n. 32.

[29]Mathias Risse, *On Global Justice* (Princeton: Princeton University Press, 2012), p. 217.

[30]James, *Fairness in Practice,* p. 170.

[31]Ibid., p. 203; see generally chs 6–7.

On James's account, the WTO agreements are fundamentally unfair, indeed exploitative.[32]

iii. Elements of a Justice-based Account

The elements of an account of substantive fairness or non-exploitation for IIL remain to be worked out. If the theory were to rely on some notion of a fair distribution of gains, along the lines of Risse and James, it will need to conceptualize the idea of gains from *investment*, which is not the same as gains from trade, and may well be less quantifiable. Investment rules are about promoting cross-border movement of capital, which creates numerous economic effects compared to the movement of goods. Moreover, there is no evidence to date that states that have concluded investment agreements are worse off economically (overall, or in terms of income inequality) than they would have been in their absence[33]—although this would not matter to a theory that measured exploitation against a benchmark of a fair IIL. Stephan Schill and Vladislav Djanic, reflecting views shared by defenders of IIL, have argued that both foreign investment and IIL have actually yielded many benefits for developing states, including promoting the rule of law, economic growth, and sustainable development.[34] It is thus difficult to determine what constitutes an overall imbalance in the benefits and losses from international investment and thus the changes to be made to IIL to create a fair sharing of benefits.

More tellingly, a substantively fair, in the sense of non-exploitative, investment law may be hard to identify, given the bilateral nature of most rules (in contrast to WTO rules). In other words, the same treaty requirements discussed in Section I.B above may be substantively exploitative in some bilateral (or regional) relationships—by giving an unfair advantage to one treaty partner at the expense of the other—but not in others. That is, even setting aside the question of unequal bargaining power, a BIT between the US and Israel may be fairer than one between Germany and Rwanda, simply in terms of what is demanded from each state and who wins and loses. This could well mean that an account of whether the rules writ large are substantively exploitative is not possible.

If a theory can accept this starting point, it will then need to look at the particular rules in each treaty to determine if the treaty itself is exploitative, which is likely to require engaging very closely with the policy-space critique discussed in Section III below. Thus, unfairness could turn on what constitutes an *unreasonable demand* on states regarding their regulatory space. It may be possible to identify some clauses that are unfair in many situations. For example, clauses that gave states very narrow room to respond to domestic emergencies would be unfair under certain conceptions of fairness (discussed further in Section

[32]Ibid., pp. 308–9.

[33]See Section I.D above.

[34]Stephan W. Schill and Vladislav Djanic, "Wherefore art thou? Towards a public interest-based justification of international investment law," *ICSID Review*, 31 (2018), 29–55.

III); their inclusion in a treaty would be exploitative to the party that is most likely to have to rely on them in the future (usually the less economically stable partner, as in the Germany–Rwanda example); they may not be exploitative, however, in other treaty relationships (like the US–Israel example).

On the procedural side of non-exploitation, one important question will be whether the two procedural aspects, (a) and (b) above, are sufficient to make IIL rules exploitative. This seems part of the critique made, for instance, by Sornarajah and Stiglitz (although they themselves have not addressed that point head-on). Jansen and Wall have argued that the essence of exploitation is consent based on unfavorable "framing conditions," which could include both pressure and lack of knowledge of key facts.[35] But the meaning of such procedural unfairness in *interstate* settings—in particular negotiations—has been very little explored.[36]

In addressing this question, any theory needs to mediate between two extremes. One pole would regard these two procedural traits as sufficient to describe an exploitative relationship. While such a position may work in the case of (some) interpersonal relationships, such an account has shortcomings in evaluating the justice of international legal rules. For in international relations, one state will frequently have negotiating leverage (or informational advantages) over the other. Most states in existence in 1945, for instance, had no say in the drafting of the UN Charter, and certainly none of the states that became independent after that date did; and while they theoretically had a choice not to sign the Charter, their continued membership in the state system, or their entry into it, gave them little choice. We might say the same for states seeking to join the EU, which must accept the *acquis communautaire*. While one might characterize these relationships as exploitative, such a view thins out the concept beyond recognition, except under a very ideal form of theory.

At the other extreme would be a moral counterpart of the international legal rule on treaties. International law regards all unequal bargaining and incorrect (even misleading) information—as well as substantive inequality in the burdens, whether in terms of the stated obligations or of their effect on the parties—as irrelevant to the validity or interpretation of a treaty. Thus, only treaties procured through the threat or use of military force by one state against another (or violating jus cogens) are void ab initio.[37] This position has benefits from the perspective of global stability and the maintenance of peace, and so, all things considered, may be justified.[38] But it need not reflect a just set of procedures.

[35] Lynn A. Jansen and Steven Wall, "Rethinking exploitation: a process-centered account," *Kennedy Institute of Ethics Journal*, 23 (2013), 381–410.

[36] For one exception, see Cecilia Albin, *Justice and Fairness in International Negotiation* (Cambridge: Cambridge University Press, 2001).

[37] Vienna Convention on the Law of Treaties, 23 May 1969, arts. 52–3, <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

[38] See Steven R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford: Oxford University Press, 2015), pp. 197–200.

B. Claims of Non-Reciprocity of Investor/Host State Rights/Duties

i. Stating (and Clarifying) the Claims

The non-reciprocity claim centers on the second structural point noted earlier—that IIL overall places duties on the host state, with investors getting the resultant protections.[39] It does not place duties on investors themselves, prompting Frank Garcia, for instance, to lament the "one-sided norms" of BITs.[40] Investors can sue host states, but host states cannot generally sue investors under BITs (though they can sue them under investor–state commercial contracts, and some BITs allow for counterclaims). This asymmetry does not arise in trade law, where the treaties create reciprocal obligations between states, and states—and only states—can take actions against one another in the WTO.

Before unpacking the critique, it is worth pointing out that some important changes in the legal landscape have made inroads into this problem. First, states, international organizations, and corporations are accepting the idea of duties on foreign investors. Some proposed BITs, such as India's, provide such duties, and bar suits by investors against states if the former has violated key duties.[41] This development fits into a larger move at the global level to recognize the responsibilities of business enterprises to respect human rights (including economic and social rights), most prominently through the UN's Guiding Principles on Business and Human Rights.[42] One investor–state tribunal recently granted Ecuador $40 million in damages against a US mining company for environmental harm, and another recognized the possibility of a state making a counterclaim against a company for human rights violations.[43]

Second, the law has begun to address investor duties in the area of bribing foreign officials for permission to invest, an element of the broader problem of the "resource curse." In recent years, three investor–state tribunals have dismissed claims by foreign investors against states when the underlying investment was procured through bribery.[44] In one famous case, an investor seeking to run the duty-free shops at a Kenyan airport bribed President Daniel Arap Moi with a half-million dollars of cash in a suitcase. After Moi left office and the investment suffered losses, the new government asserted the bribe should preclude a suit by the investor; the

[39]The other structurally non-reciprocal element of IIL—namely the claim that it benefits only rich states and burdens poor ones—is addressed under the exploitation claim.

[40]See Frank J. Garcia, Lindita Ciko, Apurv Gaurav, and Kirrin Hough, "Reforming the international investment regime: lessons from international trade law," *Journal of International Economic Law*, 18 (2015), 861–92, at pp. 869–71.

[41]See Model Text for the India Bilateral Investment Treaty, 2015, arts. 11, 13.4, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560>.

[42]United Nations, *Guiding Principles on Business and Human Rights* (New York: United Nations, 2011), <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

[43]*Burlington Resources* v. *Ecuador*, ICSID Case No. ARB/08/5, Decision on Counter-Claims, 7 Feb. 2017; *Urbaser* v. *Argentina*, ICSID Case No. ARB/07/26, Award, 8 Dec. 2016, paras 1193–221.

[44]*World Duty Free* v. *Kenya*, ICSID Case No. ARB/00/7, Award, 4 Oct. 2006; *Metal-Tech* v. *Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013; *Spentex* v. *Uzbekistan*, ICSID Case ARB/13/26, 27 Dec. 2016.

tribunal agreed. In addition, regional and global treaties require parties to criminalize the giving and taking of bribes.[45] Yet the treaties remain very unevenly enforced.

ii. International Law's Doctrinal Defense

Even with these openings to investor duties under international law, Garcia's overall observation that IIL emphasizes investor rights and state duties remains valid. Traditional IIL doctrine has long had one answer to this concern: that states have regulatory power over the investor through their laws and legal system. In the absence of IIL, it is the state that has all the legal rights and the investor that has none. The investor has only duties—to comply with domestic law. Investment law does not, according to this view, eliminate the state's regulatory power over the foreign investor; it simply subjects it to limitations. Indeed, that imposition of duties on the host state, and the state alone, is the point of IIL. Thus, Dolzer and Schreuer write,

> The context and nature of a foreign investment reveals a structural setting which does not correspond to a transaction or to an agreement in which privileges are exchanged on a mutual basis by two parties … [T]he *raison d'etre* of [IIL] does not reflect the traditional themes of reciprocity and mutuality, but instead sets accepted standards for the unilateral conduct of the host state.[46]

From this perspective, IIL's focus on host state duties creates an overall balance of state duties/investor rights (under the treaties) and investor duties/state rights (under domestic law).

This defense of the non-reciprocal nature of IIL would draw on human rights law as an analogy. That law exists precisely to circumscribe the state's power over the individual. To require the individual to have duties to the state would reinforce the state's power—an argument that many human rights NGOs have made against proposals to supplement human rights law with a corresponding set of individual human duties to the state.[47]

Yet this answer has its own limitations. Foreign investors may have sufficient economic power to dissuade a state from regulating them, so their duties under local law may be in name only—what John Ruggie, the author of the UN Guiding Principles, called a "governance gap."[48] Thus, investor duties under international law may help those harmed by some foreign investments when their own states

[45]See, e.g., United Nations Convention against Corruption, 31 Oct. 2003, <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf>; Transparency International, *Exporting Corruption, Progress Report 2015: Assessing Enforcement of the OECD Convention on Combatting Foreign Bribery* (2015), <https://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd>.

[46]Dolzer and Schreuer, *Principles of International Investment Law*, pp. 20, 24.

[47]See John H. Knox, "Horizontal human rights law," *American Journal of International Law*, 102 (2008), 1–47.

[48]John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 7 Apr. 2008, paras 3, 12–15.

will not protect them. For instance, if BITs precluded investors from recourse to arbitration if they had violated host country law, then an investor's incentive for compliance with that law, even where the state is weak, would increase.[49] Moreover, the analogy between individuals subject to a state's jurisdiction (and thus in need of international human rights law) and foreign investors seems strained; the former are under the state's full jurisdiction, with exit a highly costly—or even impossible—option. The investor, however, can always choose not to invest, or to liquidate at a monetary but not personal loss.

iii. Elements of a Justice-based Account

A critical question for further inquiry would, then, be whether justice requires that IIL recognize reciprocal duties between foreign investors and a host state, including whether IIL must give the state the right to take the investor to international arbitration. One might argue that the host state–foreign investor relationship is so different from the state–citizen relationship—so far from a social contract—that an investor should have far more duties than rights. This conclusion, however, begs the question of whether those duties by foreign investors have to be part of *international* law when they are already duties under domestic law.

One argument for such duties could be that they help correct some injustice. First, it seems unjust for corporations to be able to violate host laws or international norms and nonetheless sue the state in arbitration for mistreating them. Here the corporations have *unclean hands*, a concept common to law and ethics (though narrower in the former context, as it is regarded as a defense to be used in litigation).[50] New duties on corporations in BITs to observe host country law or various international rules, and linkage of arbitration to those requirements, provides a corrective to this injustice.

Second, recognition of corporate duties could benefit actors other than the state, actors who are structurally disempowered within the state—including poor or minorities whom the state may not wish to protect against corporate conduct (think of the villagers near a mine, far from the state's capital). If a treaty required investors to respect human rights, or protect the environment, or not take bribes, those obligations, because they appear in a BIT, might trigger better corporate conduct toward those disempowered groups (that is, independent of any enforcement action by the state). If treaties allowed those affected by corporate conduct—not merely the host state, but individuals within it—to institute proceedings directly against corporations, their weakness in the state would be somewhat improved.

[49]For interpretations in this direction, see *Fraport AG Frankfurt Airport Services Worldwide* v. *Philippines [I]*, ICSID Case No. ARB/03/25, Award, 16 Aug. 2007; *Phoenix Action* v. *Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 Apr. 2009 (denying jurisdiction based on illegal acts of investor).

[50]See Ori J. Herstein, "A normative theory of the clean hands defense," *Legal Theory*, 17 (2011), 171–208.

III. THE POLICY-SPACE CRITIQUE AND ITS COMPONENT CLAIMS

The second, narrower critique of IIL explains much of the current backlash against IIL. This *policy-space critique* claims that, even if foreign investment is not per se harmful to the world's poor, and that international regulation is desirable to promote investor confidence and thus investment, some IIL rules, as interpreted by arbitral tribunals, hurt host states by limiting their ability to protect citizens against harm. This critique offers two distinct (though not wholly separable) claims: that the *substantive obligations* on states in IIL rules improperly limit a state's ability to make important choices about its own destiny; and that the *dispute-resolution process* in BITs constitutes an improper delegation of those sovereign decisions to outsiders.

The policy space is a more compelling challenge to IIL than the structural critiques, because it does not rely on less defined notions such as exploitation or non-reciprocity. Rather, it squarely claims that IIL's rule affirmatively stand in the way of measures a state can take to protect its people. The rules could then be criticized along the same lines as Pogge's criticism of International trade law—and that supporters and enablers of IIL are violating negative duties and not merely positive ones.[51]

A. Substantive IIL Obligations and Policy Space

i. The Critique and Its Assumptions

Certain provisions in treaties lie at the core of the critique: those requiring the state to afford foreign investors "fair and equitable treatment" (FET), those requiring full compensation for expropriation, and those elevating some contractual commitments by the host state to foreign investors into international obligations ("umbrella clauses"). If states take measures against foreign investors in order to help their residents—perhaps even pursuant to duties under human rights treaties to realize certain economic rights—and investors win cases for violations of these clauses, then states are forced to choose between meeting their responsibilities to the public and avoiding large payments to investors. Over time, fear of litigation leads to "regulatory chill," as states refrain from measures to help their people. Thus, after reviewing several cases where investors won or threatened to sue over regulatory measures, Sarah Joseph writes, "the chilling impact of investment law upon a State's willingness to implement its human rights obligations remains apparent."[52]

One fruitful way to unpack the critique is to look at its main target, the FET requirement. Generally, FET obligates states to grant to foreign investors some

[51] Pogge, "Recognized and violated by international law."

[52] Sarah Joseph, "Human rights and international economic law," *European Yearbook of International Law*, 7 (2016), 461–84, at pp. 478–9; Linarelli et al., *The Misery of International Law*, p. 161; for one NGO position, see Trans Atlantic Consumer Dialogue, *Resolution on the EU's Multilateral Investment Court*, 21 June 2108, <www.tacd.org/wp-content/uploads/2018/06/TACD-Resolution_MIC_June-2018_final.pdf>.

baseline—though how minimal is the subject of ongoing legal disagreement—of due process and non-arbitrariness when they regulate them. Proponents of the policy-space critique point to situations where host states imposed regulations over public health that investors claimed violated FET—usually on the ground that the measures violated prior assurances given to the investor, causing it economic harm. For example, in four cases early in the BIT era, brought by foreign investors against Mexico, Argentina, and Tanzania, tribunals set the bar for an FET violation rather low: they interpreted FET to require the host state to offer fairly strong protections to investors, such as transparency, predictability of decisions, and other procedural guarantees. The tribunals then rejected the state's public health justification for the measures and left the host state in most cases liable for damages.[53] Schneiderman criticizes the tribunals for failing to see states as responsible to their people and not merely contractual partners. He asserts that the state did, in fact, act in the interests of public health, even if public pressure played a role in its response.[54]

But the rulings can be interpreted differently. The tribunals spent significant time acknowledging the state's legitimate policy space. Indeed, the rulings for the investor 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 concern for public health.[55]

The most important arbitral ruling on FET and public health, *Philip Morris* v. *Uruguay*, concerning a challenge to the state's strict packaging and sales rules for cigarettes, upheld those rules in strong terms.[56] The case suggests that FET can be interpreted by tribunals in a way that allows the state to protect the health of its inhabitants. All it requires is that the state (1) follow some processes minimally fair to the claimant, for example, not act in an arbitrary manner—though not to the point of scientific perfection; and (2) adhere to any "specific undertaking or representations" made to the investor that induce reliance—but not to the point of maintaining all legislation in place when the investor arrived.[57] Together, these outcomes suggest that FET, as interpreted by the tribunals, did not penalize the state for protecting basic human rights.

[53]See *Técnicas Medioambientales Tecmed* v. *Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003; *Azurix* v. *Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006; *Compañía de Aguas del Aconquija and Vivendi Universal* v. *Argentina*, ICSID Case No. ARB/97/3, Award, 20 Aug. 2007; *Biwater Gauff* v. *Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008.

[54]See Schneiderman, *Resisting Economic Globalization*, pp. 64–70, 119–24. See also Nathalie Bernasconi-Osterwalder, "Giving arbitrators carte blanche: fair and equitable treatment in investment treaties," C. L. Lim (ed.), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornorajah* (Cambridge: Cambridge University Press, 2016), pp. 324–45.

[55]See Ratner, *The Thin Justice of International Law*, pp. 353–9.

[56]*Philip Morris Brands* v. *Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016.

[57]Ibid., paras 410, 420, 422–6.

Yet the victory for Uruguay in *Philip Morris* hardly rebuts the policy-space critique. For the tribunal's deference to the state may be due only to the target of the Uruguayan regulations—cigarettes, a global pariah—and the holding hinged on a finding that the investor did not receive any commitments not to regulate cigarette packaging strictly, suggesting that if that state had given such specific commitments, they might limit the state's regulatory capacity even over tobacco. So the case law is subject to different interpretations.

The policy-space critique also makes an empirical assumption about situations where states are *not* sued, that is, the phenomenon of the chilling effect on regulation. Certainly, there is anecdotal evidence of such causation, including Mexico's and Guatemala's decisions to forgo stricter tobacco regulation.[58] And any smart lawyer in a ministry of justice would consider the losses suffered by states in arbitrations when giving advice on avoiding the risk of suits by foreign investors.[59] But the costs to an investor to bringing a case—hiring lawyers, ruining business relationships in the host state—suggest disincentives to arbitration as well. Most important, as noted above, the economic research is woefully incomplete—with no systematic evidence of regulatory chill by states that enter into investment treaties.[60]

ii. Elements of a Justice-based Account

If we assume that FET could penalize states that take, or deters states from taking, legitimate measures to help their population (including distributive justice measures), a moral appraisal of that feature of IIL must address several questions. First, how demanding a standard of justice do we wish to place on the rules? For instance, we could appraise the rules by asking whether they prevent the state from protecting basic human rights—a "thin" standard of global justice that, in my view, sets a moral baseline for all international law rules.[61] Under that standard, the cases mentioned above (at least interpreted my way and not Schneiderman's) suggest that FET is, provisionally, morally justifiable. Tribunals have not yet characterized the facts as involving a true conflict between a state's investment obligations and its duty to protect human rights, preferring to rule on other grounds—either that the investor got no assurances of non-regulation or

[58]See Jennifer L. Tobin, "The social cost of international investment agreements: the case of cigarette packaging," *Ethics and International Affairs*, 32 (2018), 153–7, at pp. 161–2; see also Claire Prevost and Matt Kennard, "The obscure legal system that lets corporations sue countries," *Guardian*, 10 June 2015; Sergio Puig, "Tobacco litigation in international courts," *Harvard International Law Journal*, 57 (2016), 383–432, at p. 412.

[59]See, e.g., Engela C. Schlemmer, "An overview of South Africa's bilateral investment treaties and investment policy," *ICSID Review*, 31 (2016), 167–93, at pp. 185–8. Investors win about 27% of cases, though they settle with the government in another 26%; UNCTAD, *World Investment Report, 2015: Reforming International Investment Governance*, ch. 3, <http://unctad.org/en/PublicationChapters/wir2015ch3_en.pdf>.

[60]Bonnitcha et al., *The Political Economy of the Investment Treaty Regime*, pp. 239–44; Pohl, "Societal benefits and costs of international investment agreements," pp. 62–5.

[61]See generally Ratner, *The Thin Justice of International Law,* ch. 3.

that the state did not need to violate those assurances to protect public health. Under this moral baseline, tribunals should never interpret FET to require a state to meet commitments to foreign investors where that would prevent it from protecting its residents' basic human rights.

An account of a just investment law could endorse a more demanding standard on IIL—for example, that it not prevent the state from taking *any measures* that would benefit the population (such as redistribution). If so, that account would need to address several questions. First is whether the *promises to a foreign investor*—at the time of establishing the investment—and *promises to the investor's home state*—at the (earlier) time when the investment treaty is concluded—are outweighed by the state's interest in its particular policy preferences. This entails examining the balance to be struck between commitments to investors and their home states, on the one hand, and, on the other, the state's responsibilities to its own population.

Certainly, the case can be made that there is little or no moral value in a state's preservation of its promises to foreign investors. Aaron James has recently built on his theories about international trade to make such a claim about promises to foreign investors. Arguing 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, he claims that host state promises to investors can be justifiably broken, without the need for any compensation. Under that view, promises to investors should be kept if needed to address the worst off, but ignored (or at least violations should not be compensated) for the same reason.[62]

James's position linking the value of promises to investors to overall economic fairness is a useful theoretical move in considering the justice of IIL. Nonetheless, it misses several arguments. First, a state's violation of promises to foreign investors might end up deterring investment that is economically beneficial to the state. Second, the FET standard may warrant respect by the host state because it is part of a *treaty*, whether for that reason alone or because the breaching of treaties can ultimately harm individuals in host states.[63] Thus, the promises made by a state in a BIT to afford FET are not equivalent to contractual promises by the state to an investor. James finds the identity of the promisee (the foreign investor) as dispositive or at least significant of the moral weight of the assurances. But it is an open question whether promises to investors in the form of promises to other states should count less than promises to individuals.

A second line of inquiry would require unpacking the moral relevance of the *expectations of the investor*. James, for instance, emphasizes the voluntary nature of the investor's choices, arguing that they ought to assume the risk of

[62]Aaron James, "Investor rights as nonsense—on stilts," Lisa Herzog (ed.), *Just Financial Markets: Finance in a Just Society* (Oxford: Oxford University Press, 2017), pp. 205–28, at pp. 221–4.

[63]James seems to recognize this difference; see ibid., p. 221.

legislative changes.[64] In a similar vein, Stiglitz points out that foreign investors should know about the regulatory landscape of a country, including the possibility of legislative change or low standards of due process in regulating investment.[65] This argument puts the costs of new regulations on the investor, because of its resources to understand the risk (or even the possibility of buying insurance). But Alexander Brown's recent theory of legitimate expectations within the administrative state attributes certain responsibilities to governmental agents, based on specific actions and roles that create the expectation held by the non-governmental agent (which in this case would be the foreign investor). The state's responsibility creates a prima facie duty (though only that) on governments to respect such expectations.[66] This position, whereby the state assumes some consequences for creating certain expectations by the investor, seems more nuanced and context-sensitive than a complete assumption of risk by any investor, and corresponds to the considerations considered by tribunals hearing FET cases.

Any theory will thus need to consider whether the costs of a broken promise or new regulation ought to switch to the state at some point. My own pre-theoretical hunch is that a just FET should require states to keep some commitments to investors and their states, but rarely, if ever, penalize mere regulatory changes. Indeed, as noted, this is the thrust of the case law now, including in *Philip Morris*. A moral claim that foreign investors should assume *all* the risks of host state conduct may also be defensible, though the result would mean that all investment treaties as currently drafted are per se unjust, which may (if we only knew the empirical connections!) discourage foreign investment. The justice of the FET requirement will raise other issues too, including the rationale of the state in enacting regulation harmful to the investor and the method by which it carries out the regulation in terms of basic due process. These same factors are examined by tribunals today, even if they do it in legal rather than moral terms.[67]

iii. The Problem of Expropriation

The policy-space critique extends to IIL's rules on expropriation, where treaties generally require the state to compensate a foreign investor at market value. In addition, tribunals have occasionally found some governmental regulations to be so-called "indirect" expropriations (and thus compensable)—though, contrary to fears in the early 2000s based on a small number of arbitral awards that adopted a very pro-investor view, tribunals now interpret treaties to reject

[64]Ibid., pp. 216–19.

[65]Stiglitz, "Regulating multinational corporations," pp. 520–3.

[66]Alexander Brown, "A theory of legitimate expectations," *Journal of Political Philosophy*, 25 (2017), 435–60.

[67]See, e.g., Sornarajah, *The International Law on Foreign Investment*, pp. 411–26.

most claims of indirect expropriations.[68] Moreover, new treaties are now drafted to carve bona fide regulations out of the definition of an indirect expropriation.[69]

The requirement of compensation for expropriation would seem prima facie to limit a state's ability to undertake some domestic improvements, including redistributing wealth. (As with FET, there is no systematic quantitative work on whether IIL has had this effect.) An account of the justice of IIL's expropriation rules must address the morality of an uncompensated taking of property, in particular as compared to redistribution in the domestic realm through taxation.[70] That assessment turns on the initial distribution of wealth, how property-holders came to possess it, 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.[71] The morality of the prior appropriation and the behavior of the property-owner are particularly important inputs, so corrective justice notions may enter into the analysis.[72] For example, bribery of a state official could justify uncompensated takings.

The policy-space critique thus makes three assumptions: (a) that BITs are currently interpreted to require states to choose between carrying out their responsibilities to their population and keeping promises to, or protecting the property of, foreign investors; (b) that states are chilled from regulating based on fears of litigation; and (c) that promises to and expectations of foreign investors (or those investors' property claims) are always less important than a state's need for full regulatory flexibility. A theory of the morality of IIL should acknowledge that (a) and (b) require empirical confirmation; more important, it must address point (c) and consider the moral worth of promises to, expectations of, and property interests of foreign investors, as well as treaty duties to home states, as compared to a state's duties to its own people.

B. Delegation to Arbitral Tribunals

A second element within the policy-space critique is that arbitrators interpreting investment treaties have appropriated from states key decisions about how to

[68]The most criticized of the early cases was *Metalclad* v. *Mexico*, where the tribunal found that Mexico's closure of a landfill operated by a US company in response to community protests constituted an expropriation. At the same time, tribunals can characterize similar conduct as FET violations and award huge damages; see Steven R. Ratner, "Regulatory takings in institutional context: beyond the fear of fragmented international law," *American Journal of International Law*, 102 (2008), 475–528.

[69]See, e.g., US Model BIT, art. 6 and Annex B.

[70]See, e.g., Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990), pp. 420–2.

[71]See generally Christian Barry, "Redistribution," *Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/redistribution/>.

[72]See Munzer, *A Theory of Property*, p. 440; Andrea L. Peterson, "The takings clause: in search of underlying moral principles, part ii—takings as intentional deprivations of property without moral justification," *California Law Review*, 78 (1990), 53–162; David Schmidtz, "The institution of property," *Social Philosophy and Policy*, 11 (1994), 42–62.

balance the considerations outlined above. As noted earlier, BITs typically give investors the right to bring their claims against the host state to investor–state arbitration (ISA). Under ISA, a process borrowed from the arbitration of disputes between private parties, each party appoints one arbitrator, and the two sides or two arbitrators appoint a chair of the panel. The panel exists exclusively for that case. Appeal for errors of fact or law is not possible, although the losing party may try to prevent the award's enforcement in domestic courts, but only for certain egregious procedural or substantive errors.

A typical restatement of the critique has it that:

> Through treaty interpretation the system of protection of foreign investment has been significantly expanded … Arbitrators hold that it is not within their province to consider interests other than investment protection … The core problem at hand is one of institutional design, on getting the investor–state arbitration provisions of investment treaties to constrain arbitral tribunals from interpreting provisions to implement a particular version of a … neoliberal order of relations between states.[73]

This critique is central to Schneiderman's work; he argues that the interpretation of these rules by officials outside the state undermines democracy by depriving weak states of the ability to govern themselves, conferring a constitutional-like set of protections on foreign investors.[74] The problem of delegation cannot be isolated from the structural/exploitation issues in Section II.A: greater asymmetry in home state/host state power makes delegation away from host state courts more likely to appear in BITs,[75] and, in a sort of feedback loop, that delegation is said to advance the interests of rich home states as the tribunals deploy questionable methods of interpreting BITs.[76]

The concerns over delegation can be unpacked into two versions (and advocates are not always clear which one they are advancing). Under a simple version of the delegation critique, the delegation of decision-making authority outside the state is unjust, because states alone should be allowed to decide what action to take against foreign investors or, stated differently, they should be able to self-judge whether their actions are consistent with the treaty (in particular if that determination is carried out by independent national courts). Such a claim is morally plausible, in particular if one sees treaties with third-party interpretation and resolution of disputes as undermining democracy. As noted in the introduction,

[73]Linarelli et al., *The Misery of International Law*, pp. 161–2.

[74]David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008); Paddy Ireland, "The corporation and the new aristocracy of finance," Jean-Philippe Robé, Antoine Lyon-Caen, and Stéphane Vernac (eds), *Multinationals and the Constitutionalization of the World Power System* (Routledge, 2016), pp. 53–98, at pp. 92–5. The distinctiveness of these rules as constitutional compared to other international rules limiting states' freedom (e.g., human rights law) is not well defended.

[75]Allee and Peinhardt, "Delegating differences."

[76]Sornarajah, *Resistance and Change in the International Law on Foreign Investment*, pp. 27, 249.

I am bracketing that claim, though I find it normatively unconvincing, in part for ruling out a highly important form of interstate cooperation, for example, regional human rights courts, the ICJ, and the ICC.[77]

A more nuanced version of the critique is aimed at certain institutional features of ISA. Gus van Harten, the leading academic critic offering this formulation, argues that key traits of IIL render ISA an illegitimate delegation of authority: (1) the ability of corporations to challenge governmental regulations and not merely commercial contracts with the host state; (2) provisions in BITs whereby the host state gives its irrevocable consent to arbitration by any investor of the other state; (3) large damage awards against host states; (4) the possibility under many BITs for investors to institute arbitration without first trying domestic courts; and (5) the enforceability of arbitral awards around the world. For van Harten, these features of IIL disputes render them public law disputes that must be decided by a court with its guarantees of *independence* from the parties and the *appearance of impartiality*.[78] A number of these concerns played into Canada's decision to reject investor–state arbitration in the future US–Mexico–Canada free trade agreement that will replace NAFTA (thus limiting claimants to Canadian courts).

ISA lacks these features because, among other reasons, (a) arbitrators are seen as having a monetary incentive—the prospect of reappointment—to rule for the party that appoints them (although many awards are unanimous); (b) arbitrators can serve in multiple arbitrations simultaneously, and even as counsel and arbitrator in different cases (even at the same time)—the phenomenon known as "double-hatting"—meaning their ruling in one case may be influenced by another case; (c) arbitral rules make it difficult to disqualify an arbitrator for the perception of bias, usually entrusting it to the other two arbitrators, who have an incentive not to disqualify lest the tables be turned; (d) arbitrators may have an incentive to rule at least partially in favor of claimants in order to keep the pipeline of cases open in a system where generally only investors can sue; and (e) the pool of arbitrators is very narrow—Northern, white, male, with commercial law expertise and not broader expertise or experience.[79] Defenders of the system downplay these concerns by rejecting the analogy between investor–state disputes and

[77]See Allen Buchanan and Russell Powell, "Constitutional democracy and the rule of international law: are they compatible?", *Journal of Political Philosophy*, 16 (2008), 326–49; Carmen E. Pavel, *Divided Sovereignty: International Institutions and the Limits of State Authority* (Oxford: Oxford University Press, 2015), pp. 25–56. See also Laurence R. Helfer, "Why states create international tribunals: a theory of constrained independence," Stefan Voigt, Max Albert, and Dieter Schmidtchen (eds), *International Conflict Resolution* (Tubingen: Mohr Siebeck, 2006), p. 253.

[78]Gus van Harten, *Investment Arbitration and Public Law* (Oxford: Oxford University Press, 2007), pp. 95–119.

[79]Steven R. Ratner, "International investment law through the lens of global justice," *Journal of International Economic Law*, 20 (2017), 747–75, at pp. 766–70; Gus van Harten, "A case for an international investment court," Society of International Economic Law Inaugural Conference 2008 Paper, pp. 13–15, 20, < https://ssrn.com/abstract=1153424>. A related critique is that the one-off nature of ISA, combined with the lack of an appeals court to resolve different interpretations of similar BIT provisions (or even of the same provision of BIT in different rulings), creates an incoherence that only a court with an appellate body can correct.

public law, emphasizing commonalities with private law litigation.[80] They also note that arbitrators have responded to legitimacy challenges through various interpretive techniques in their rulings and that ISA can be further reformed.[81] Yet even if actual arbitrator bias or lack of independence cannot be shown empirically, a system adjudicating such important disputes must be free from the appearance of partiality. Others criticize ISA in more instrumental terms for leading to pro-investor rulings.[82]

The non-instrumental critique is, fundamentally, that ISA does not respect the rule of law—a claim of *procedural injustice*. An account of the morality of IIL thus needs to consider the elements of the rule of law, whether at the domestic or international level. Jeremy Waldron has identified some elements of the rule of law, but not at a sufficient level of granularity to evaluate IIL's delegation of authority.[83] A moral account of IIL thus needs to identify criteria for a just delegation of a state's decision making over the treatment of foreign investment to third parties. Van Harten has proposed accountability, transparency, coherence, and independence of the tribunal as criteria.[84] All of these would argue for the replacement of ISA with a full-fledged international investment court, as proposed by the European Union.[85] On the other hand, as a matter of institutional design, Jeffrey Dunoff and Mark Pollack have argued persuasively that transparency, accountability, and independence cannot be simultaneously achieved in an international court—courts can only achieve two of the three.[86] Criteria for a just delegation will need to account for this gap between principles of the rule of law and the way international courts are actually put together and operate.

IV. IIL RULES AND DISTRIBUTIVE JUSTICE?

A final set of moral concerns surrounding IIL has been peripheral to the public debate, but nonetheless seems important for any appraisal of the legal landscape: whether IIL should incorporate principles of distributive justice, either within

[80] On these analogies, see Anthea Roberts, "Clash of paradigms: actors and analogies shaping the investment treaty system," *American Journal of International Law*, 107 (2013), 45–94.

[81] See Schill and Djanic, "Wherefore art thou?", pp. 42–8.

[82] Sornarajah, *Resistance and Change in the International Law on Foreign Investment*, pp. 61–3. For a defense of arbitration based on its ability to take disputes out of the state-to-state political context, see Ursula Kriebaum, "Evaluating social benefits and costs of investment treaties: depoliticization of investment disputes," *ICSID Review*, 33 (2018), 14–28.

[83] Jeremy Waldron, "The concept and the rule of law," *Georgia Law Review*, 43 (2008), 1–61, at pp. 6–9; Jeremy Waldron, "Are sovereigns entitled to the benefits of the international rule of law?", *European Journal of International Law*, 22 (2011), 315–43, at pp. 316–17.

[84] Van Harten, *Investment Arbitration and Public Law*, pp. 153–75.

[85] As endorsed ibid., pp. 180–4; and Ratner, "International investment law through the lens of global justice," pp. 770–2; European Commission, "A multilateral investment court" (2017), <http://trade.ec.europa.eu/doclib/html/156042.htm>.

[86] See Jeffrey L. Dunoff and Mark A. Pollack, "The judicial trilemma," *American Journal of International Law*, 111 (2017), 225–76.

states or between them.[87] Indeed, distributive justice concerns lie beneath some of the four major criticisms above. For instance, though Schneiderman focuses more on the policy-space critique, he writes that "the rules and institutions of economic globalization are intended to place limits on the capacity of states to solve redistributive problems," claiming that IIL guarantees investors a rate of return that prevents states from protecting their citizens against harms caused by the free market.[88]

It bears repeating that the causal connections between IIL and either global or domestic inequality have not been carefully examined. That many capital-exporting countries are generally richer than many capital-importing countries does not demonstrate the effect of IIL on those patterns. Moreover, while some capital-importing countries are grossly unequal internally (think of Equatorial Guinea or Nigeria), such inequality need not track with a state's being party to a BIT, nor does it consider that IIL may have effects in the opposite direction in other states.[89]

Regardless of these causal uncertainties, a good theory can certainly address what, if anything, should be the place of IIL rules in efforts to advance distributive justice. A modest demand would argue that IIL rules should not impede distributive justice: that IIL must neither exacerbate distributive injustice nor prevent other actors—host states, home states, or even corporations—from carrying out distributive justice. Such an argument would need to address some of the questions associated with the policy-space critique, for example whether a just IIL can include rules that require a state to honor promises to investors, even if it means forbearing from certain domestic regulation, including regulation or expropriation that would promote distributive justice.

A more robust distributive justice claim would argue that IIL needs to proactively address distributional issues. From such a perspective, IIL would be quite defective now—a conclusion that does not, unlike the more modest claim, depend on any evidence of actual causation of harm. First, host states have no obligations under IIL to use incoming investment in a certain way, though they have duties—mostly of conduct rather than result—to their poor residents under the International Covenant on Economic, Social, and Cultural Rights.[90] Second, the other two actors in the foreign investment process—foreign investors and

[87]I use the term distributive justice broadly, to identify a wide-ranging set of demands for a redistribution of wealth to alleviate global poverty, whether justified on egalitarian grounds or sufficientarian grounds. See Kok-Chor Tan, "Sufficiency, equality and the consequences of global coercion," *Law, Ethics and Philosophy*, 2 (2014), 190–209.

[88]Schneiderman, *Resisting Economic Globalization*, p. 50; see also Nicolás M. Perrone and David Schneiderman, "A critique of international economic law: depoliticization, inequality, precarity," Emilios Christodoulidis, Ruth Dukes, and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar, forthcoming).

[89]On the benefits of IIL, see Schill and Djanic, "Wherefore art thou?".

[90]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). See also Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017) on state obligations under the International Covenant on Economic Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24, 10 Aug. 2017, paras 12–24.

their states of nationality—also lack any duties to redistribute wealth. While the non-binding UN Guiding Principles call on investors not to violate human rights and to recognize duties of states to prevent violations by their companies when investing abroad, they do not speak of distributive justice.[91]

Thus, IIL, like most of the rest of international economic law, incorporates no principle of economic justice, and certainly no global or domestic difference principle. Indeed, it 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-performing institution," in Henry Shue's term, that is needed to protect those basic rights.[92] While those states prescribing IIL might assume that it promotes overall global wealth (although perhaps they only care about the wealth of foreign investors), and even that it has a redistributive effect, that is clearly not its goal.

A claim that IIL must affirmatively promote distributive justice would need to address several core questions. First, it needs to explain why we should make a distributive justice demand on all rules, including IIL rules. We might justify a weaker demand, namely that only international law *as a whole* address the needs of the global poor (egalitarian or sufficientarian), or even that we rely on some non-legalized rules of conduct. Perhaps the rules on international trade, the law of the sea, or international finance fill the gap, or the non-legal expectations on states to achieve the UN's Sustainable Development Goals.

Second, a theory that IIL should promote redistributive goals either across states or within them must consider whether IIL is the right *institutional site* (in Kok-Chor Tan's phrasing) for such an agenda.[93] Certainly states could endorse investment treaties with commitments by host states, home states, and foreign investors to promote or allow investments that help address poverty.[94] But perhaps IIL is doing what it should do—promoting cross-border investment—and 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. Claims that IIL—or any other international regime—is morally deficient for not doing more to address gross inequities in wealth distribution invite, if not demand, an argument of how proposed reforms

[91]UN, *Guiding Principles on Business and Human Rights*, principles 2–3, 11–14. For other proposals for extraterritorial duties on home states, see General Comment No. 24, paras 29–37; *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights*, Sept. 2011, <http://www.etoconsortium.org/en/main-navigation/library/maastricht-principles>.

[92]See Henry Shue, "Mediating duties," *Ethics*, 98 (1988), 687–704, at p. 703.

[93]Tan, "Sufficiency, equality and the consequences of global coercion," p. 205; for this point in the trade context, see Joel P. Trachtman, "Doing justice: the economics and politics of international distributive justice," Chios Carmody, Frank J. Garcia, and John Linarelli (eds), *Global Justice and International Economic Law: Opportunities and Prospects* (Cambridge: Cambridge University Press, 2012), pp. 273–86, at pp. 276–7.

[94]For various proposals in this regard, see Krista N. Schefer, "The law of investment protection and poverty reduction," Stephan W. Schill, Christian J. Tams, and Rainer Hofmann (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar, 2015), pp. 369–89.

to IIL would advance that goal compared to the universe of alternatives. Failure to do so is to act with what Eric Posner and David Weisbach have called policy "blinders" in the climate change context.[95] On the other hand, global distributive justice may require multiple institutional sites, and it places too high a burden on those proposing alternatives to the status quo to demonstrate that their alternative is the best one.

V. CONCLUSIONS

The discussion above has sought to identify the key issues of international morality within international investment law. The structural and policy-space critiques essentially argue that IIL is unjust because it (a) is exploitative in the relationship between rich and poor states; (b) imposes a non-reciprocal distribution of investor rights/duties and host state duties/rights; (c) constrains a host state in carrying out its responsibilities to its people by privileging promises to foreign investors; and (d) delegates core decisions by states to arbitral tribunals that should not deal with such issues. Alongside—or perhaps hidden within—these two critiques were issues of distributive justice, in particular whether IIL either impedes or fails to further either global or intrastate distributive justice.

A. Restating the Research Agenda

Given the importance of IIL to the global economy, it is hoped that this mapping of the justice-related issues will lead to further work on this set of rules and seek to identify the criteria for a just—or at the least, an unjust—IIL. Based on the questions raised in this review, further work could be seen as raising two threshold (or perhaps background) questions: (1) how should an account of a just investment law address the empirical void over many questions about the effects of IIL rules—whether on wealth distribution or a state's policy-making proclivities? and (2) should an account of a just investment law be based on a more modest negative duty—that IIL rules not exacerbate other injustices we may find in international economic relations; in short, not cause additional harm (for example, violate human rights)—or a positive duty to affirmatively contribute to a more just international economic order?

Analysis can then proceed to the key essential elements of a just IIL, in particular: (1) what does it mean for IIL to be non-exploitative in terms of the relations between and demands put upon the treaty partners? (2) does justice require a certain distribution of rights and duties between investors and host states, in particular compared to the status quo where domestic law places duties on the investor and international law mostly places duties on states? (3) how should a just investment law balance the state's duties to its people with its commitments to

[95]Eric A. Posner and David Weisbach, *Climate Change Justice* (Princeton: Princeton University Press, 2010), pp. 60, 73–6.

foreign investors and to their home states, as well as the property rights of foreign investors? (4) are certain forms of delegation of dispute resolution to outside decision makers required or prohibited? and (5) for distributive justice purposes, what should be demanded of IIL? If we wish to see justice in relational terms, these questions (except for (4), which is a procedural justice issue) address the critical *justice-generative relations* within IIL: between states; between the host state and the investor; and among the host state, the investor, and the residents of the host state (though they assume certain starting points about what relations should generate duties of justice in the first place).

B. Modalities of Reform

Once an account of a just—or unjust—investment law is offered, we then turn to the question of legal reform. If that account finds the rules *affirmatively contribute to injustice* (including by preventing states from carrying out distributive justice), then those aspects need to be changed, or other rules of international law that counteract or override IIL need to emerge. If the account finds that the problem with the rules is they *do not affirmatively contribute to justice*, then we need to ask whether justice should be promoted through IIL. This is particularly a point for distributive justice. We need to ask whether the many situations where states fail to carry out domestic distributive schemes through inability or unwillingness should be addressed through rules on the law regarding foreign investment.

In considering specific reforms, statist approaches would point toward adding provisions in future treaties permitting or requiring host states to channel foreign investment to benefit the state more, including the poorest in their society. More cosmopolitan changes to IIL could begin with provisions that place duties or at least responsibilities on foreign investors to ensure that their investments benefit, or at least do not harm, individuals, including the poorest within each host state.[96] It could include global schemes to encourage transborder investment that benefits the poorest people at least by addressing their basic rights.

Reforms to IIL should consider whether to adopt a fault or no-fault approach to justice. The former, corrective-justice approach would seem difficult to theorize, given that host states, Northern (and sometimes former colonial) states, and corporations themselves have all played different roles in the current world economy and its distributive injustices. A no-fault approach might ground duties on different capacities to effect improvement. But here too it might be hard to know the relative capacities, as 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.

[96] See John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W. W. Norton, 2013), pp. 182–6.

C. Broader Implications for International Political Morality

This survey of critiques and approaches to the justice of IIL has clearly put institutions—in this case legal rules and interpretive bodies—first as a subject of philosophical inquiry. IIL is one of many international regimes susceptible to what might be termed an *institutionally centric global ethics*. That approach to ethics has been seen in the work of Pogge, Wenar, James, and others cited here, addressing international economic matters. But such inquiry can extend beyond the economy to many other rules, such as immunity of states from the jurisdiction of other states, and international environmental rules. Each regime both facilitates and constrains actions by states and other global actors that have immediate justice-related implications. And each represents a candidate for new rules that can ameliorate certain injustices.

Institutionally centric approaches are organized, at a high level of generality, around three sets of questions: (1) what, if any, is the underlying moral problem that we associate with the rules under our considered conceptions of international political morality? (2) is our moral evaluation dependent on empirical evidence that the rules affirmatively contribute to the moral problem? and (3) are the rules the right institutional site for carrying out justice? In particular, do the rules have other benefits to global justice that need to be considered alongside their contributions to the moral problem—benefits that would, all things considered, argue against changing them? And is it more institutionally feasible to reform one set of rules rather than another, or to work outside of existing rules and institutions entirely?[97]

As the case of investment law has shown, an institutionally centric approach offers a method for global justice scholarship that mediates between principles of justice and the ongoing practice of global actors. It neither dismisses international rules as purely the product of power politics nor gives undue moral deference to their legal validity. They are instead treated as important sites of injustice, but also of justice.

[97]In this sense, Wenar's recent work is a model, as it focuses on the institutions, including legal institutions, that allow corrupt leaders to sell oil, and identifies institutionally appropriate sites for new rules to rectify these injustices; see generally Wenar, *Blood Oil*.