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Preface

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International Trade Law (Federation Press 2018)

Giovanni Di Lieto & David Treisman

Monash University

Preface

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You are about to embark on the study of international trade and investment law, with materials that incorporate the most advanced and up-to-date research on the law, treaties, statutes, cases and doctrines that together make up international trade and investment law today (collectively part of international economic law or “IEL”). Some of you may have skimmed ahead and are surprised to find that the syllabus includes consideration of justice and its relationship to both trade and investment law. Why, you may be asking, do we need to consider something as old-fashioned and theoretical as justice in connection with trade or investment law? For some of you, this question simply means that you’ve never thought about how justice might relate to international economic law or any branch of law. For others of you the question may imply that trade and investment law seem just fine, thank you very much, without any “justice talk”—we can approach either perfectly well as a legal system of rules, doctrines, procedures, institutions, etc.. Some of you might even put the point more strongly, that any talk of justice in trade or investment law sounds like it is inserting someone else’s external agenda where it doesn’t belong, making trade into human rights, for example, or foreign investment into some cosmopolitan vision of the world as it might be.

Both implications would be mistaken—by diving into the question of justice, you are going into the heart of international economic law, what it is, what it does in our society, and what we expect it to do, and not off on some other agenda. In other words, both trade and investment law are essentially about justice, if by justice we mean the fairness of our economic relationships, and in fact this question is implicit in every assignment you will read. While we can always say in general about law that it involves questions of justice, we can say this in a very particular way about IEL, because, for example, as you will see trade law consists of rules about economic policies and economic exchanges. Such rules by their very nature always involve decisions about who gets how much of what, and that is essentially the question of justice.

Let me put the question another way: do income tax law or health care policy involve questions of justice? To this we generally and quickly answer yes. Our income tax system and our health care system are both fundamental social institutions involving significant resources, and both systems involve decisions about how those resources (and burdens) are allocated. In such cases, it seems intuitively obvious that we would want to know if those decisions are fair. Theories of justice play an essential role in answering that question: tax law and health care

are two areas in which legislators, policy makers and academics routinely refer to principles of justice in working out the basic framework of these systems, and in analyzing, criticizing and proposing reforms for these institutions.

In a similar sense, I hope it is at least a bit clearer now why trade and investment law also need theories of justice. Both trade and investment law involve significant resources, and decisions about how those resources are allocated. So, as with tax law or health care policy, we naturally want to know whether such decisions are fair.¹ One way to think about the question of fairness in IEL, is to look at trade or investment law as a process of public decision-making about social goods. Whenever people use social institutions to make decisions allocating social goods (such as wealth, opportunities, rights, privileges, etc.), this is the domain of justice. In other words, the work of justice theory is to evaluate such decisions, and the institutional methods of decision-making, according to principles of justice.

IEL is one such social system, part of what John Rawls calls the “basic structure”- that set of major institutions, including economic arrangements, which together distribute fundamental rights and duties and determine the division of the advantages arising from society, understood here as a cooperative scheme for mutual benefit. As you will learn, trade and investment law involve numerous decisions allocating the benefits and burdens of social cooperation, in everything from market access to subsidy rules to dispute resolution to the rights of investors to the role of knowledge, and everything in between. To say IEL does not need theories of justice, then, would be to suggest that the question of fairness is irrelevant to the pattern of allocation that trade and investment create on such topics. We don’t say that about any other social institution – why would we say that about trade law?²

I encourage you to keep this perspective in mind as you delve into the assignments ahead.

¹ Economics can help us analyze whether such decisions are efficient, but can never itself tell us if they are fair, since that is a question of justice, not economic analysis. Occasionally one reads arguments to the effect that efficiency is fairness, but this is actually a theory of justice, not an economic argument, and has to be defended on philosophical grounds, not by charts and graphs. I shall say more about this later.

² That question is only partly rhetorical—there are in fact reasons why the question of fairness may be kept at a distance, or buried, in international economic relations today, but I am getting ahead of myself.