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Introduction: Investment Law for the Twenty-First Century

Frank J. Garcia
Boston College Law School, garciafr@bc.edu

Sebastián López Escarcena
Pontifical Catholic University of Chile, rlopeze@uc.cl

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INVESTMENT LAW FOR THE TWENTY-FIRST CENTURY

FRANK J. GARCIA
SEBASTIÁN LÓPEZ ESCARCENA

On October 25, 2017, a distinguished group of panelists and participants met at Boston College Law School for a conference on "Reforming International Investment Law," funded in part through a grant from the Luksic Family Foundation. This conference explored both the nature of the current crisis in investment law, and how the core policies and basic structures of investment law could be rethought and reformed so that investment law could more effectively discharge its key role in twenty-first century global economic governance. The panellists represented a diverse range of regions, institutions and perspectives, but shared a common interest in the balanced and coherent evolution of investment law norms and institutions. A concern for the social and normative critiques of international investment agreements (IIAs), in addition to more traditional institutional and doctrinal critiques (see Annex I), was also at the forefront of the conference.

The questions facing the international investment regime today are fundamental, even existential. To begin with, why should foreign capitalists get rights that local capitalists don't, that states under IIAs don't, and that other stakeholders in foreign investment don't? What is the best way to balance the protection of foreign investment and the regulatory space needed by states to implement a range of important domestic policies, particularly in a system of expanding interpretations of key doctrines of state responsibility unpoliced by any appellate regime? And what is the most principled way to resolve disputes concerning the rights of foreign capitalists, cases which will also affect other stakeholders and key domestic policy goals, and involve potentially significant sums of public money?

First the foreign capitalist question. The obvious answer is that they enjoy additional rights because they *can*—because they have the leverage to bargain for additional rights in their investment contracts or, through their home states, in the bilateral investment treaties that set the terms for foreign investment today.[1] But that is a dissatisfying answer, for reasons that are

[1] For an analysis of the distorting effect of negotiation asymmetries in the trade agreement context, see generally FRANK J. GARCIA, CONSENT AND TRADE: TRADING FREELY IN A GLOBAL MARKET (2018).

obvious as well. That may be how politics and some negotiations can trend, but it is no way to justify social policy or law.

A more principled answer is because foreign capitalists face political risks that local capitalists don't face. For instance, host states may act from animus towards foreigners, municipal law may easily be modified after an investment has been made, and in many countries domestic courts may not be the best venue to settle complex cases where the state is the defendant. For these and other reasons, an international minimum standard of treatment has long been advocated in favor of foreigners investing abroad. In other words, historically, the rationale for the regime has been to shift or mitigate these unique risks.

The modern bilateral investment treaty (BIT) regime, with its controversial investor-state dispute settlement mechanism (ISDS) (collectively the BIT/ISDS regime) exists because, starting in the post-colonial period, it was considered necessary by investors and states to offer additional rights in order to attract foreign capital for development. It was perhaps even appropriate given the risks faced by foreign capital. However, the result today is what Alessandra Arcuri calls "The Great Asymmetry," a regime in which investors get the overwhelming share of the rights and privileges, while states and other stakeholders bear the duties, costs and burdens.[2] The key question is whether "The Great Asymmetry" is justifiable today in context of the early twenty-first century global economy and its emerging global governance norms.

We are over half a century away from the genesis of the modern IIA regime,[3] and the contemporary debate over the BIT/ISDS regime suggests that a return to these questions is long overdue. One reason for re-examination is that a half-century of experience has not conclusively demonstrated that these additional rights *are* indeed necessary in order to attract and retain foreign capital. Economic studies have not conclusively established that the existence of a BIT has any strong, consistent impact on a state's foreign direct investment (FDI) flows.[4] These findings undercut the primary existential rationale, at least from the state's perspective, for the very existence of this regime.

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[2] *See generally* Alessandra Arcuri, *The Great Asymmetry, in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY (Lisa Sach et al. eds, 2018) (forthcoming 2019).

[3] The first BIT was signed between Germany and Pakistan in 1959. UNITED NATIONS, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT: BILATERAL INVESTMENT TREATIES 1959–1999 (2000), http://unctad.org/en/docs/poiteiiad2.en.pdf [https://perma.cc/5HMH-Z5CY].

[4] *See generally* EMMA AISBETT ET AL., RETHINKING INTERNATIONAL INVESTMENT GOVERNANCE: PRINCIPLES FOR THE 21ST CENTURY (2018), http://ccsi.columbia.edu/files/2018/09/Rethinking-Investment-Governance-September-2018.pdf [https://perma.cc/K7RC-5GJW].

If a half-century's experience has failed to establish that BITs are necessary for FDI, it has at the same time demonstrated that these additional rights come at some considerable cost to the host state and other stakeholders. There is, of course, the cost of defending against investment claims, estimated at an average of $8 to $10 million per case.[5] There is also the cost of funding the awards in a successful claim, which have also been recently estimated to average $300 to $400 million.[6] These are not small sums for any state, but they are particularly burdensome for developing countries, where each dollar is precious and needed to fund multiple social priorities.

These costs must be evaluated in the context of an unfortunate upward trend in the number of claims filed, as well as the escalation of legal costs and the size of awards.[7] Two additional trends further complicate the picture: a disproportionate number of the claims are filed by investors from developed countries against developing states,[8] and investors win a disproportionate number of cases when the responding state is a developing state.[9] These are real costs and risks, and they are borne, due to the nature of ISDS, by the citizens and taxpayers of respondent states. This alone would be cause for reforming at least the various well-documented rule-of-law deficits plaguing ISDS, if not a re-examination of the asymmetry in BIT norms.[10]

As if this were not enough for a perfect storm of costs and burdens against already-burdened states, the recent rise in third party funding (TPF) has led not only to an increase in the resources available to investors to bring claims, but also to a change in the dynamics of investment arbitration. TPF funders bring with them a different set of priorities, centered on speculative gain, compared to those of the traditional FDI claimant. TPF's assertion of some degree of control of the case in return for litigation funding can

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[5] U.N. Gen. Assembly, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session (Vienna, 27 Nov.–1 Dec. 2017), Comm'n on Int'l Trade Law, U.N. Doc. A/CN.9/930 (2017).

[6] *Id.*

[7] UNCTAD, *Special Update on Investor-State Dispute Settlement: Facts and Figures*, IIA ISSUES NOTE, No. 3, Nov. 2017, at 1, 5, https://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf [https://perma.cc/9MWW-KYP3] (noting an average of $522 million awarded per successful claimant).

[8] UNCTAD, *Recent Trends in IIAS and ISDS*, IIA ISSUES NOTE, No. 1, Feb. 2015, at 7, https://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf [https://perma.cc/T5B6-X9FX].

[9] COLUM. CTR. FOR SUSTAINABLE INV., THIRD PARTY FUNDING IN INVESTOR-STATE DISPUTE SETTLEMENT: ROUND TABLE DISCUSSION ON THIRD PARTY FUNDING IN INVESTOR-STATE DISPUTE SETTLEMENT WITH ICCA/QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION DRAFT REPORT FOR PUBLIC DISCUSSION 1 (2017), http://ccsi.columbia.edu/files/2017/11/Third-Party-Funding-in-ISDS-Roundtable-Outcome-Document-FINAL-2.pdf [https://perma.cc/BU5Y-SDP7].

[10] *See, e.g.*, Garcia et al., *Reforming the International Investment Regime: Lessons from International Trade* Law, 18 J. INT'L ECON. L. 861 (2015).

alter the calculus of important decisions such as settlement towards priorities and interests that the regime was not intended to serve. Whatever one's view of the appropriateness of TPF in a number of traditional litigation settings, the arguments don't transfer well to ISDS. In an asymmetric regime such as BITs in which vast sums of public money are at stake and in which decisions cannot be appealed, one can readily conclude that the presence of TPF in ISDS is at least overheating the regime in pursuit of speculative returns, if not working an outright exploitation of the regime.[11]

Thus far we have only been looking at the financial costs of the BIT/ISDS regime. There are other socioeconomic costs that must also be considered. To begin with, BITs affect other stakeholders besides investors—they affect local investors, workers, consumers, and the general public in host states, in at least two important ways. First, BITs are allocative social mechanisms—they allocate rights, privileges, resources, costs, duties and burdens among a range of stakeholders. This means IIAs must also be evaluated according to principles of fairness, as with any other major piece of socioeconomic regulation. Some proponents of the regime do invoke principles of justice, characterizing BITs as bringing justice to investors.[12] However, when one enlarges the frame it is clear that justice must be evaluated with regard to everyone, at least in liberal societies, not just investors, and here BITs fall short.[13]

Second, the evolution of key investment law doctrines such as Fair and Equitable Treatment (FET) has trended towards ever more expansive interpretations. This means that as investors secure wins in a greater and greater number of cases, these doctrines increasingly impinge upon the policy space for domestic regulation in a range of key areas such as health, energy and the environment. This can lead to increased costs of regulation in the form of expensive arbitral awards, and to the possibility of regulatory chill.

All of this means that IIAs must be re-evaluated as part of a comprehensive system of twenty-first century global economic governance. First, is the regime as designed accomplishing its core goals for states and investors? For other stakeholders? If not, then does it need reform, realignment or more? Our keynote speaker, Eric De Brabandere, challenges a broad range of both reform and status-quo views, arguing in *(Re)Calibration,*

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[11] *See* Frank J. Garcia, *Third-Party Funding as Exploitation of the Investment Treaty System*, 59 B.C. L. REV. 2911 (2018).

[12] *See* Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 33 (stating that although BITs connect investment law to justice, it confines it to "outcomes generally considered *by the investment community* to be just" (emphasis added)), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1147&context=scujil [https://perma.cc/WA5W-D3WE].

[13] Frank J. Garcia, *Investment Treaties Are About Justice*, COLUM. FDI PERSPECTIVES, No. 185 (2016), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2034&context=lsfp.

Standard-setting and the Shaping of Investment Law and Arbitration that emerging standards in investment law and arbitration should be "recalibrated" instead of "rebalanced."[14] He rejects both the "balancing metaphor", and the underlying view that investment law consists of "ideal" and equally important elements that must be maintained in a sort of equilibrium.

Second, it is important to consider the relationship between IIAs and other key instruments and priorities of contemporary global governance, such as human rights, environmental protection, and sustainable development. Our panelists considered a range of theoretical and cross-cutting issues relevant to this inquiry, highlighting the limits of this sort of cross-fertilization as well as the opportunities it can create. For example, Enrique Boone Barrera questions the too-easy parallels sometimes drawn between protecting investments under BITs and protecting property as a human right under international human rights norms, arguing that ISDS filters out the social aspects of property by exclusively focusing on financial loss. The human rights framework is better suited to launching a critique of BITs than to absorbing the investment law approach to property.[15] Similarly, Sebastián López Escarcena argues that Global Administrative Law, another important theoretical perspective in global governance debates today, is ill-suited to illuminate critical issues in the evolution of Fair and Equitable Treatment.[16]

Two papers address the relationship between investment law and environmental policy and sustainable development. Elizabeth Trujillo argues in *Balancing Sustainability, the Right to Regulate and the Need for Investor Protection: Lessons from the Trade Regime* that IIAs unjustifiably impinge upon key policy space for sustainable development, and that the system should take its cues from the trade regime, in which a more nuanced and policy-friendly approach to balancing these factors has evolved.[17] Finally, Sergio Puig and his co-author Daniel B. Magraw in *Greening Investor-State Dispute Settlements* argue for a better integration between IIAs and climate change policy, arguing that the urgency of climate change requires that BITs be fundamentally revised to better allow policy space for climate change regulation.[18]

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[14] *See* Eric De Brabandere, *(Re)Calibration, Standard-setting and the Shaping of Investment Law and Arbitration*, 59 B.C. L. REV. 2607 (2018).

[15] *See* Enrique Boone Barrera, *Property Rights as Human Rights in International Investment Arbitration: A Critical Approach*, 59 B.C. L. REV. 2635 (2018).

[16] *See* Sebastián López Escarcena, *Investment Disputes* Oltre lo Stato*: On Global Administrative Law, and Fair and Equitable Treatment,* 59 B.C. L. REV. 2685 (2018).

[17] *See* Elizabeth Trujillo, *Balancing Sustainability, the Right to Regulate, and the Need for Investor Protection: Lessons from the Trade Regime*, 59 B.C. L. REV. 2735 (2018).

[18] *See* Daniel B. Magraw & Sergio Puig, *Greening Investor-State Dispute Settlement*, 59 B.C. L. REV. 2717 (2018).

Third, reforming IIAs means considering how IIAs fit into other key (and controversial) elements in the global financial architecture such as offshore financial centers ("OFCs"), as Karl Lockhart argues in his essay *Investment Treaties, Offshore Finance, and the Resource Curse*. Lockhart draws parallels between countries choosing to become OFCs and countries facing the resource curse, with important implications for how we conceptualize and critique foreign investment law as well as regulate foreign investment, an essential element in OFC operations.[19]

The papers go on to consider a range of substantive and procedural reforms as well. In *Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?,* José Manuel Alvarez Zárate addresses the creation of a Multilateral Investment Court, which has been a diplomatic priority of the European Union.[20] Alvarez Zárate reminds us of the need to follow democratic principles for such a proposal to be legitimate, and offers the WTO DSU and ICJ appointments as examples to follow. Furthermore, two panelists address the issue of stakeholders and their role in investment dispute settlement. In *Justice for All? Protecting the Public Interest in Investment Treaties*, Alessandra Arcuri, with her co-author Francesco Montanaro, address the asymmetric character of investment treaty arbitration, which must be reformed by placing the rights of the investment-affected people on par with those of the investors.[21] According to Arcuri and Montanaro, given their prominent public dimension, investment disputes should either be solved by public alternative complaint mechanisms or by a radically transformed arbitration system.

Similarly, Emmanuel Laryea's *Making Investment Arbitration Work for All: Addressing the Deficits in Access to Remedy for Wronged Host State Citizens through Investment Arbitration* aims at contributing to the reform effort towards stakeholder voice in ISDS. He focuses on one of the major deficiencies of the current investor-state arbitration system: the fact that it protects only investors' interests, but not those of host states or other affected persons.[22] Laryea argues that access to remedy for wronged Host States Citizens can be operationalized within ISDS by adapting it to an Investment-Related Dispute Settlement system, available for all affected persons.

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[19] *See* Karl M.F. Lockhart, *Investment Treaties, Offshore Finance, and the Resource Curse*, 59 B.C. L. REV. 2663 (2018).

[20] *See* José Manuel Alvarez Zárate, *Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?*, 59 B.C. L. REV. 2765 (2018).

[21] *See* Alessandra Arcuri & Francesco Montanaro, *Justice for All? Protecting the Public Interest in Investment Treaties*, 59 B.C. L. REV. 2791 (2018).

[22] *See* Emmanuel T. Laryea, *Making Investment Arbitration Work for All: Addressing the Deficits in Access to Remedy for Wronged Host State Citizens Through Investment Arbitration*, 59 B.C. L. REV. 2845 (2018).

Caroline Henckels and Camille Martini both address the issue of policy space and the right to regulate, looking at policy exceptions in BITs and their effectiveness. In *Should Investment Treaties Contain Public Policy Exceptions?,* Henckels argues that the exceptions contained in investment treaties should be understood as permissions that limit the scope of the investment protections in the treaty, and not as defenses invoked to justify prima facie unlawful conduct.[23] Her paper also explores the desirability of including exceptions in treaties in light of recent innovations that clarify the substantive content of investment obligations. In *Avoiding the Planned Obsolescence of Modern Bilateral Investment Treaties: Can General Exception Mechanisms Be Improved, and How?,* Camille Martini asserts that general exceptions clauses modelled on Article XX on the General Agreement on Tariffs and Trade (GATT) are, in their current form, a source of uncertainty rather than coherence in BITs. As he explains, recent arbitration cases have shed light on the unworkable enforceability requirements contained in general exceptions clauses, preventing in most cases these clauses from being successfully implemented. In his view, the incorporation of more balanced provisions in investment treaties allows for the introduction of public policy concerns directly in the text of these agreements, which represent a necessary step in the quest for a more transparent and sustainable model for investor-state dispute resolution.[24]

The symposium closes with a focus on third-party funding ("TPF") in ISDS. Following an edited transcript of the panel discussion itself, Rachel Denae Thrasher offers a balanced and comprehensive proposal to strengthen TPF regulation beyond current industry self-regulation proposals, towards stronger disclosure, and a careful examination of the resulting data on TPF effects.[25] Garcia advocates a more radical approach, banning all TPF from ISDS on the grounds that it works an exploitation of target state taxpayers and citizens in favor of wealth transfers to speculative finance, and thus threatens key stakeholder interests and the stability of ISDS itself. Finally, in a companion piece published in the *Boston College Law Review Electronic Supplement*, Boston College Law students Tara Santosuosso and

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[23] *See* Caroline Henckels, *Should Investment Treaties Contain Public Policy Exceptions?*, 59 B.C. L. REV. 2825 (2018).

[24] *See* Camille Martini, *Avoiding the Planned Obsolescence of Modern Bilateral Investment Treaties: Can General Exception Mechanisms Be Improved, and How?*, 59 B.C. L. REV. 2877 (2018).

[25] *See* Rachel Denae Thrasher, *Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*, 59 B.C. L. REV. 2935 (2018).

Randall Scarlett systematically dismantle the TPF community's claims of promoting access to justice.[26]

In order to make the most of this historic moment, we must not shy away from these difficult questions if we hope to create an investment regime for the twenty-first century. To begin with, is it enough to recalibrate emerging standards in investment law, or we do need to reform it, or should we aim for a more sweeping rebalance the IIA system towards enhanced procedural legitimacy and a more justifiable distribution of rights and responsibilities? Is it even enough to realign the system towards contemporary global priorities such as sustainable development, environmental protection and human rights?[27] Or do we need to go further and consider fundamentally altering the nature of investment protection, perhaps even doing away with the BIT/ISDS system altogether?

Taken together, the essays raise these and other troubling and challenging questions and issues for the modern IIA system, and offer a range of well-thought-through solutions. We hope this symposium will contribute to our collective reflection on these urgent and challenging issue, and enhance our collective deliberations on the many reform proposals currently being debated.

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[26] *See* Tara Santosuosso & Randall Scarlett, *Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance*, 60 B.C. L. REV. E. SUPP. (forthcoming 2019), http://lawdigitalcommons.bc.edu/ljawps/8/.

[27] *See* AISBETT ET AL., *supra* note 4.

Annex I

Principles for a Twenty-First Century Investment Law Regime (ver. 09/25/18)

Joint BCLS/PUC Working Group on Trade & Investment Law Reform, Professors Frank J. Garcia and Sebastián López Escarcena, co-chairs.

1. International Investment Agreements (IIAs) form a key part of global economic governance, whose role and responsibilities cannot be fully compassed by a private arbitration model alone.

2. As institutions that allocate social resources, IIAs and the international investment law regime as a whole are subject to basic principles of distributive justice. IIAs play a key role in allocating investment capital, public finances, and legal rights and duties among home and host states, foreign investors, domestic investors, and a range of stakeholders within host state societies.

3. As such, the object and purpose of IIAs should be to secure, allocate and protect investment capital and legal rights and duties, towards sustainable development. The protection of capital, therefore, must be an instrumental value within the framework of IIAs, and should be understood in light of this object and purpose.

4. In view of the above, current IIA dispute settlement mechanisms (principally some form of investor-state arbitration) would benefit from reforms that would strengthen their capacity to deliver rule-of-law *desiderata* (such as transparency, predictability, certainty and coherence), through mechanisms such as a permanent arbitral court, a multilateral appellate mechanism, revised arbitrator codes of conduct, or other appropriate measures.

5. Also in view of the above, the capacity of the IIA regime to contribute outcomes promoting good governance and fairness, and ultimately the rule of law, would be enhanced by a range of substantive IIA reforms, including provisions recognizing obligations for foreign investors as well rights (i.e., offering a basis for state counter-claims), allowing more balanced integration between investment and non-investment values (i.e., effective public policy exceptions), promoting the application of proportionality in some IIA protections (i.e., a narrowed scope for Fair & Eq-

uitable Treatment claims), allowing domestic institutions to settle investment disputes prior to accessing international justice within reasonable time-limits (a return to exhaustion of remedies doctrine), and restricting the potential effects of MFN clauses to eviscerate more modern IIAs, among others.

6. Negotiation of new and modified IIAs would benefit from multilateral or plurilateral approaches that help minimize the distorting effects of power and information asymmetries among negotiating parties and key stakeholders. International Organizations, civil society, and academia can play key roles in minimizing information asymmetries and building capacity among host state negotiators.

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