


10-24-2016

Investment Treaties Are About Justice

Frank J. Garcia

Boston College Law School, garciafr@bc.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/lspf>

 Part of the [Banking and Finance Law Commons](#), [International Trade Law Commons](#), [Internet Law Commons](#), and the [Securities Law Commons](#)

Recommended Citation

Frank J. Garcia. "Investment Treaties Are About Justice." *Columbia FDI Perspectives* no.185 (2016): 1-3.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.



Columbia Center
on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 185 October 24, 2016

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Daniel Allman (daniel.allman@columbia.edu)

Investment treaties are about justice

by

Frank J. Garcia *

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

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

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

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

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

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

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

* Frank J. Garcia (garciafr@bc.edu) is Professor of Law and Dean’s Global Fund Scholar, Boston College Law School. This *Perspective* is based on Frank J. Garcia, Lindita V. Ciko Torza, Apurv Gaurav, and Kirrin Hough, “Reforming the international investment regime: lessons from international trade law,” *Oxford Journal of International Economic Law*, vol. 18 (2015) pp. 861-892. The author is grateful to Andrew Newcombe, Ted Posner and Americo Zampetti for their helpful peer reviews, and to Julie Maupin, Federico Ortino, Joost Pauwelyn, and Lisa Toohey for their comments. **The views expressed by the author of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

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

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

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

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

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

The material in this Perspective may be reprinted if accompanied by the following acknowledgment: “Frank J. Garcia, ‘Investment treaties are about justice,’ Columbia FDI Perspectives, No. 185, October 24, 2016. Reprinted with permission from the Columbia Center on Sustainable Investment (www.ccsi.columbia.edu).” A copy should kindly be sent to the Columbia Center on Sustainable Investment at ccsi@law.columbia.edu.

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Daniel Allman, daniel.allman@columbia.edu.

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at <http://www.ccsi.columbia.edu>.

Most recent Columbia FDI Perspectives

- No. 184, Lukas Linsi, “Less compelling than it seems: rethinking the relationship between aggregate FDI inflows and national competitiveness,” October 10, 2016.
- No. 183, Karl P. Sauvart and Güneş Ünüvar, “Can host countries have legitimate expectations?,” September 26, 2016.
- No. 182, Tania Voon and Andrew D. Mitchell, “Philip Morris vs. tobacco control: two wins for public health, but uncertainty remains,” September 12, 2016.
- No. 181, John Gaffney, “The EU proposal for an Investment Court System: what lessons can be learned from the Arab Investment Court?,” August 29, 2016.
- No. 180, M. Sornarajah, “An International Investment Court: panacea or purgatory?,” August 15, 2016.

All previous *FDI Perspectives* are available at <http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>.