Oisin Suttle*

Justice and Authority in Investment Protection

https://doi.org/10.1515/ldr-2021-0097
Published online August 30, 2021

Abstract: What role should concerns about distributive justice play in international investment law? This paper argues that answers to fundamental and contestable questions of social and global distributive justice are a necessary, if implicit, premise of international investment law. In particular, they shape our views on the purpose of investment law, and in turn determine the scope of authority that investment law can claim, and that states should accord it. The implausibility of achieving international consensus on these questions constitutes a substantial objection to the harmonization of investment law or the consistent operation of a multilateral investment court.

Keywords: authority, distributive justice, global justice, investment law, service conception, Raz

1 Introduction: What We Disagree About When We Disagree About Investment Law

International investment law looks very different in the eyes of its proponents and its critics. For the former, it is concerned with preserving the rule of law, addressing invidious discrimination, promoting efficient allocations of resources, and facilitating the access of developing countries to the scarce capital they need for their economic development. For the latter, it is a neocolonial conspiracy, facilitating multinational enterprises to extract resources and escape regulation, and undermining environmental, labor, and human rights protections.

Beyond the broad slogans, many disagreements about investment law are, to a significant extent, empirical. They concern the extent to which that law, whether in general, or in particular instances, can contribute towards its claimed goals, or is likely to adversely impact the relevant interests.[1] Others reflect moral disagreement,

1 For a comprehensive review of many of the unanswered empirical questions: J. Bonnitcha, L. Poulsen, and M. Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford: Oxford University Press, 2017).

***Corresponding author: Oisin Suttle**, Department of Law, Maynooth University, Maynooth, Co. Kildare, Ireland, E-mail: oisin.suttle@mu.ie

about how the various values concerned, including in particular economic growth, private property, legitimate expectations, democracy, human rights, environmental protection and so on, should be balanced against one another.[2]

However, this paper argues, there is a further set of disagreements—moral in nature, but also distinctively international and political—that significantly shape our thinking about the rights and wrongs of international investment law and arbitration. This is disagreement about international distributive justice, about the ways we should balance the interests of insiders and outsiders to our political communities. International investment law, after all, is specifically concerned with the rights of investors that are not from "around here." Thinking about their rights—whether legal, political, or moral—must necessarily engage with that fact.

In particular, I argue that answers to fundamental and contestable questions about the relationship between social and global economic justice are a necessary, if implicit, premise of international investment law. How we answer those questions determines the scope of authority that investment law can claim, and that states should accord it. It determines how far states have good reasons to act in accordance with the requirements of investment rules, simply because those rules require it. However, these questions are deeply contested, and it seems implausible that we would achieve international consensus on them. This fact, I suggest, has significant implications for any project of harmonization of investment law, or for the consistent operation of any multilateral investment court. This need not be a problem, given the limited normative significance of arguments for such harmonization, but it should place limits on the institutional ambitions of international investment law.

The argument proceeds in seven parts.

Following this introduction, the second part sets out some—hopefully fairly uncontroversial—premises about the nature of investment law, from which the rest of the argument proceeds. The third part then sketches three ways we might understand the relations of justice that obtain between a host state and an investor. I do not argue for one of these ways over the others, limiting myself to mapping some of the arguments that might be advanced for each. The goal of these early sections is to motivate three claims: (i) that the investor/host-state relationship is—at least potentially—a relationship of justice; (ii) that there are plausible arguments for different and incompatible accounts of what justice requires in this relationship; and (iii) that reasonable persons will in consequence disagree about this.

In the fourth part, I show how each of the three answers to the question of justice points towards a different account of the purpose of international

2 See, for example, on the need to integrate investment protection and human rights concerns, B. Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 International and Comparative Law Quarterly, no. 3 (2011), 573–596.

investment law: if outsiders' rights are morally privileged, investment law makes sense as protecting that privileged status; if outsiders' moral rights rank together with those of insiders, investment law can be understood as redressing bias in administrative and judicial decision-making; if outsiders' moral rights rank behind those of insiders, investment law can be understood as instrumentally protecting outsiders to advance national economic goals. Purpose is here understood objectively and normatively, from the perspective of states parties to investment agreements. The fifth part briefly explains and defends this methodological choice.

The sixth part shifts the focus from the purpose of investment law to the basis of its authority over states. It examines the reasons that apply to states where they are contemplating actions that may affect the interests of an investor. In particular, it asks to what extent a state in these circumstances has reasons to protect or compensate an investor in accordance with the requirements of applicable investment laws, *simply because the law so requires*? A state is of course free to protect or compensate an investor, regardless of any treaty claim, whether on the basis of domestic constitutional rights or primary legislation, or simply as a matter of justice or expedient public policy. However, an obligation under an investment treaty claims to preempt these concerns, requiring compensation simply in virtue of that treaty. This is the question of investment law's practical authority. Adopting Joseph Raz's service conception of authority, I argue that the extent of investment law's practical authority depends on the functions it serves. Our answer to what investment law is for will thus determine when and how it should preempt states' own judgments about policy, investor protection and compensation.

But if—as the earlier sections argue—purpose depends on answering the prior question of justice, and if that question is itself likely a source of persistent disagreement, then it seems difficult to see how we could reach a stable, general, conclusion on the scope of investment law's authority. Rather, that authority seems necessarily to vary across different states, whether in virtue of their objective characteristics or their particular answers to that first question of justice. This need not pose a challenge for investment law. However, I suggest, it does imply that a legitimate investment regime is one that leaves significant space for diversity across states, relationships and agreements, and that arbitrators should be sensitive to that diversity, and avoid the temptation towards harmonization by interpretation.

2 The Moral Standing of Investor Rights in the Host State

As just outlined, the argument in this paper moves through a number of steps. In this first substantive section, I lay some groundwork for that argument, identifying (at a

necessarily quite general level) three key features of the relationship between the investor and the host state and the way international investment law attaches to that relationship:

- *International Investment Law is fundamentally an exercise in allocating costs and benefits*. While investment agreements prescribe detailed requirements of conduct on host states, the investment arbitrator generally has no power to require a state to (prospectively) comply with or (retrospectively) remedy departures from those requirements.[3] Investment law establishes a regime of liability rules, rather than property rights. Indeed, this is frequently highlighted by its proponents as helping reconcile investment law with national sovereignty and regulatory autonomy.[4] The central question of investment law is thus not "how should the investor/investment be treated?" but rather "to what extent should the investor be compensated for the way they are treated?" Put this way, however, the question obscures the fact that compensation must come *from* somewhere. Compensation does not remove a loss, it shifts it from the payee to the payor. Investment claims are made against the host state, which must in turn pass the costs on, whether to the population as a whole through general taxation, or to some specific group (e.g., users of a particular service, residents of a particular region, etc.). The central question thus becomes "how should the costs of particular policies and decisions affecting investors be allocated between investor, host state, and any other affected constituencies?"
- *The international investor is, at least to some extent, an outsider to the political community*. Indeed, their status as an outsider is a threshold condition for invoking protections under international investment law.[5] The extent of that outsider status may vary, depending on the facts of the particular investment, the terms of the particular agreement, and the ways we understand both "membership" and "political community."[6] The investor's outsider status is

3 See, for example, *EU-Canada Comprehensive Economic and Trade Agreement*, art. 8.39:

"If the Tribunal makes a final award against the respondent, the Tribunal may only award, separately or in combination:

(a) monetary damages and any applicable interest;

(b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation, or impending expropriation became known, whichever is earlier, and any applicable interest in lieu of restitution, determined in a manner consistent with Article 8.12."

4 See, *e.g.*, CJEU *Opinion 1/17 on the Comprehensive Economic and Trade Agreement between Canada and the European Union*, para. 72, 144.

5 For example, CETA, art. 8.2.1.

6 Relevant factors here might include: the long- or short-term nature of the investment; the extent to which the investor participates actively in the local economy, as opposed to simply owning assets or intellectual property rights; where the investor is a natural person, whether they have become resident in the host state for the purposes of the investment etc.

also, potentially significantly, qualified by the fact of investment: this establishes a connection between the investor and the community, which may distinguish them from other outsiders who lack that connection.[7] However, at a minimum, we can say that an international investor stands in a formally different relationship to the political community than does a national of the host state.

– *Political institutions have distributive effects, and changes in public policies (almost) always benefit some persons at the expense of others.* How any person's life goes is a function, not simply of their native talents and efforts, but also of the political institutions, including economic arrangements, that they face.[8] The fundamental question of social justice is which institutions, amongst the range of possibilities, we should adopt, support, or promote. Different persons will do better or worse under some institutions rather than others, so the mere fact that a person is less advantaged under the prevailing scheme than they would be under some imaginable alternative is not, without more, a reasonable objection to the prevailing scheme. To the extent that we think both that different political and economic arrangements are permissible, and that political communities are entitled to revise the choices they make about those arrangements, we must also accept that individuals may be permissibly made less well-off (without compensation) through such changes: this is not, without more, objectionable in itself.[9]

So far, so—hopefully—uncontroversial. Putting these three ideas together, the distinctive[10] underlying question of justice in international investment protection

7 Outsiders in this fuller sense, of course, are not protected by investment law, despite the impact that decisions may have on them. Other bodies of law, including in the economic context trade law, may be relevant here. See generally O. Suttle, *Distributive Justice and World Trade Law* (Cambridge: Cambridge University Press, 2018).

8 J. Rawls, *Political Liberalism* (Expanded ed., New York: Columbia University Press, 2005), p. 269.

9 This point is recognised explicitly in many modern investment treaties and in many arbitral awards. See, *e.g.*, *CETA* Annex 8-A, para. 2(a); *Agreement between the United States of America, the United Mexican States, and Canada* (USMCA) Annex 14-B, para. 3(a)(i); *Telenor v. Hungary*, *Telenor v. Hungary*, ICSID Case No. ARB/04/15 (2006) 21 ICSID Rev—FILJ 603, 13 September 2006, para. 64. Of course, the importance of respecting legitimate expectations persons have about how their choices will be rewarded may provide important grounds for softening those changes, whether through delay, compensation, or otherwise. Again, legitimate expectation and its limits is an important aspect of investment law and arbitral practice. See generally F. Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value and Reasonableness* (Oxford: Oxford University Press, 2020).

10 This question is distinctive because, while many other aspects of social justice will remain relevant to such cases, this is the question that distinguishes cases with an international investment aspect from other cases.

becomes: what weight should the interests of outsiders be accorded in assessing the distributive impact of particular public policies? This is not the only relevant question. For any policy, we will likely want to consider its impact on all of those affected. However, investment law singles out the claims of the investor for special examination. We must therefore ask whether there are good reasons why their distinctive position—the fact that investors are outsiders—should lead us to accord greater or lesser weight to their interests, or should we simply apply the same social welfare functions (e.g., Aggregate Welfare Maximization or the Difference Principle) across the whole set of persons affected by a given policy?

3 Three Answers to the Question of International Investor Justice

We are thus led to the somewhat more general question of how we should think about outsiders and their interests in our social welfare calculus. To what extent ought states (as a matter of political morality rather than positive law) consider the effects of their policies on outsiders in choosing how to proceed?

There are many possible answers to this question, which has been a frequent focus of philosophical work on global justice over recent decades.[11] I will here outline three which, while non-exhaustive, seem to bracket the plausible range.[12] While the first and third options described below are stated in stronger terms than most whose views they approximate would likely prefer, they are presented as the outer points on a spectrum, rather than discrete options amongst which we must choose. The fact that there are many intermediate views, which might be more plausible, does not in any way undermine—and in fact reinforces—the overall point made in this part.

i. *The interests of outsiders should be privileged over those of members of the political community*. This will likely seem counterintuitive for many readers. After all, we are more likely to emphasize special duties to compatriots than we

11 For an overview, see generally G. Brock, "Global Justice," in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), available at: <https://plato.stanford.edu/archives/spr2017/entries/justice-global/>.

12 I have, in other work, argued against the first view presented here and set out elements of my own view, which is somewhere between the second and third described below. O. Suttle, *Debt, Default, and Two Liberal Theories of Justice*, 17 German Law Journal, no. 5 (2016), 799–834.

are to strangers.[13] However, there is at least one plausible argument that might be made for this view.

Property is a social institution, and the particular property rights enjoyed by any individual member of a political community are a function of that community's institutions. The only way that any of us have the economic holdings that we do is because we have been facilitated in accruing them by the institutions of the political communities in which we live.[14] We cannot therefore complain if those holdings are reduced or impaired through a just decision of that community. Each of our privately held property is, at least to some extent, also the collective product of our community.

On the other hand, the property of outsiders, we might think, does not constitute an asset of the community in the same way. Rather, it is the product of a different scheme of social cooperation, introduced into our territory and economy, but still distinct from it. Our community is therefore not entitled to interfere with this property in the same way. Property, absent bonds of community, constitutes something closer to a libertarian entitlement, which operates as a side-constraint on decisions that our political community might make.[15] To the extent this is the case, any adverse impact on those property rights resulting from changes in host-state policies would require to be compensated in full.[16]

This view finds echoes in historical (and to a lesser extent contemporary) justifications of robust protections for aliens' property, and of a high international minimum standard of treatment,[17] and has found support in at least some recent

13 As Scheffler, amongst others, argues, such special duties are in part constitutive of many valuable relationships. It is hard to know what else valuing a particular person or relationship might mean, if not that we treat that relationship as a special reason for acting to benefit that person. S. Scheffler, *Boundaries and Allegiances* (Oxford: Oxford University Press, 2003).

14 For this familiar point see, *e.g.*, A. Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 Philosophy & Public Affairs, no. 3 (2007), 3–39, at 25–27.

15 While the point is distinct, the sentiment here will be familiar from Rawls' rejection of global distributive justice, in part due to the distinct nature of cooperation in domestic and global contexts. See generally, J. Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

16 A helpful analogy here might be to the ways I can treat my own child and my neighbour's child. That fact that I can confiscate my own child's toy, but not my neighbour's, does not imply that I value my neighbour's child more than my own. Rather, it reflects the essentially socialised nature of holdings within many families, subject to revision at the discretion of the family's adult members. My child's toys are "ours," while my neighbour's child's toys are "theirs." The fact that the children are both playing with those toys in my house does not change that.

17 See, for example, Root's 1910 Address to the American Society of International Law:

"There is a standard of justice, very simple, very fundamental, and of such general acceptance

investment awards.[18] That the privileging of aliens' property rights, and the willingness of home states to use force in their defense, has played a role in the historical development of investment law is not in dispute.[19] The point here is only that a—somewhat—plausible defense of that privilege is possible.

ii. *The interests of outsiders should carry the same weight as those of members of the political community*. This view will seem intuitively plausible for those attracted to broadly cosmopolitan accounts of political morality, under which claims of justice are ultimately explicable in terms of our shared humanity.[20] While, on this view, particular individuals may have different claims, resulting from *inter alia* the relationships in which they stand and their past interactions, these are all simply applications in particular circumstances of more general principles that apply equally to all human persons. According outsiders' interests the same weight as those of members is simply a matter of treating like cases alike. Indeed, on this view, "insider" and "outsider" are not fundamentally important categories.[21]

To the extent that uncompensated harm to the economic interests of outsiders is permissible on this view (and of course, in many cases it will not be), it will be on the same basis, and to the same extent, as it is permissible to harm insiders in an analogous position. The criteria for judging and justifying such harm (as, e.g., necessary to increase aggregate welfare, or advance distributive equality, or protect basic liberties) will be the same in the two cases. Outsiders will only have a complaint in circumstances where relevantly positioned insiders would, unless outsiders have been in some way singled out (A libertarian interpretation of this cosmopolitan view, for example, would frequently endorse the same complaints

---

by all civilized countries as to form a part of the international law of the world. … If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens."

quoted in R. Polanco Lazo, *The No of Tokyo Revisited: Or How Developed Countries Learned to Start Worrying and Love the Calvo Doctrine*, 30 ICSID Review, no. 1 (2015), 172–193, at 175.

18 See discussion in N. Perrone, *Investment Treaties and the Legal Imagination* (Oxford: Oxford University Press, 2021), p. 129.

19 See generally K. Miles, *The Origins of Investment Law: Empire, Environment and the Safeguarding of Capital* (Oxford: Oxford University Press, 2013), ch. 2.

20 See generally S. Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005).

21 One difficulty faced by such views, at least insofar as they seek to make sense of many widely shared intuitions about duties to compatriots, is the difficulty reasoning from a fundamental moral universalism to a defence of the state and its particular concerns for its members. For this challenge, D. Miller, *On Nationality* (Oxford: Oxford University Press, 1997), ch. 3. Of course, many cosmopolitans happily embrace the revolutionary implications of their view for the state system.

as an advocate of the first view above, but would regard insiders as equally entitled to make those complaints).

This view finds historical expression in Latin American support for the Calvo doctrine, arguing for the treatment and compensation of aliens on the same basis as a state's own nationals.[22] More recently, concerns in developed countries that investment treaties provide greater protection to foreigners than to the state's own citizens can be understood in these terms.[23]

iii. *The interests of outsiders should carry little or no weight when weighed against those of members of the political community*. On this view, claims of social justice are exclusively claims of members amongst themselves, whether because they depend on social cooperation of a kind that exists only among members of a particular community, or are required to justify the pervasive coercion that states exercise over their subjects, or derive from the shared identities of member of a particular national community, etc.[24] The economic claims of outsiders have no intrinsic moral weight on this view.

This does not mean that a state should not have regard to those interests. However, they play a strictly instrumental role: the interests of outsiders should be protected and advanced only to the extent that this in turn benefits insiders (e.g., through leading outsiders to make investments they would not otherwise make). It is each state's own principles of domestic social justice, and the ways different policies would realize desired outcomes for the domestic community over whom those principles apply, that should dictate how outsiders are treated.[25]

This third view, I suggest, represents a prominent (if not always explicit) starting point of much economically-influenced scholarship on international

---

22 M. Sornarajah, *Mutations of Neo-Liberalism in International Investment Law*, 3 Trade Law and Development, no. 1 (2011), 203–232, at 210–212.

23 For this story, in both it's earlier North/South and contemporary rich country iterations, Rodrigo Polanco Lazo, *The No of Tokyo Revisited: Or How Developed Countries Learned to Start Worrying and Love the Calvo Doctrine*, 30 ICSID Review, no. 1 (2015), 172–193; W. Shan, *From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 Northwestern Journal of Law and Business, no. 3 (2007), 631–664.

24 A particularly strong version of this claim appears in T. Nagel, *The Problem of Global Justice*, 33 Philosophy & Public Affairs, no. 2 (2005), 113–147. However, weaker variants, giving some weight to outsiders' interest but substantially privileging those of insiders, are common in the global justice literature. See, *e.g.*, M. Blake, *Distributive Justice, State Coercion and Autonomy*, 30 Philosophy & Public Affairs, no. 3 (2001), 257–296; D. Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007); Rawls (1999), *supra* note 15; Sangiovanni (2007), *supra* note 14.

25 Elements of this view are made explicit in Freeman's argument that a commitment to domestic distributive justice, in the form of Rawls' difference principle, leaves little space for global distributive principles: S. Freeman, *Justice and the Social Contract* (Oxford: Oxford University Press, 2006), ch. 9.

> economic law, and of public political debate more generally.[26] While many of the architects of the contemporary investment regime may have been primarily concerned to protect the interests of capital and capital exporters, that regime was sold to capital importers on the basis that according rights to foreign investors would advance their domestic concerns for economic development.[27]

These international distributive concerns, whether of capital exporting countries seeking to defend their investors, or of capital importers seeking to develop their economies, have played an important role in the development of the investment regime. They remain prominent, particularly in the critical scholarship on that regime, albeit joined by concerns along competing dimensions, including between public and private interest, between capital and labor, and concerns with other marginalized groups and interests.[28] Others, as in many legal fields, seek to work at a doctrinal or public policy level, largely leaving these more abstract questions aside.[29] In consequence, the ways disagreement about law reflect deeper disagreement about political morality are not always made explicit. However, the political morality of international investment protection looks very different, depending on which of these views one adopts, with immediate implications for how we view particular situations, cases and rules.

Consider the simplest example of an interference with investor rights, an uncompensated expropriation.[30] On the first view above, this will always constitute an injustice, regardless of the circumstances or purpose of the expropriation. A public purpose may be necessary for expropriation to be lawful, but it does not affect the

26 See, for example, the discussion in B.A. Simmons, *Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment,* 66 World Politics, no. 1 (2014), 12–46.

27 See generally Perrone (2021), *supra* note 18.

28 See, for example, N. Perrone, *The International Investment Regime and Foreign Investor Rights: Another View of a Popular Story*, 11 Manchester Journal of International Economic Law, no. 3 (2014), 397–420, for a view of investment law as delimiting the boundary between public power and private right; T. Van Ho, *Is it already too late for Colombia's Land Restitution Process?*, 5 International Human Rights Law Review, no. 1 (2016), 60–85, on the ways investment law may prejudice justice for those affected by conflict; U. Kriebaum, "Human rights and international investment law," in Yannick Radi (ed.), *Research Handbook on Human Rights and Investment* (Edward Elgar, 2007), on the various interfaces between investment protection and human rights.

29 Dolzer and Schreuer, for example, while acknowledging concerns about the balance of obligations under investment treaties, preempt these distributive concerns through the invocation of sovereign choice on the part of host states, and a joint purpose shared by host state and investor. R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd ed., Oxford: Oxford University Press, 2012), pp. 80–81.

30 In practice, of course, uncompensated direct expropriation is a relatively rare issue in contemporary investment practice. However, the simplicity that makes it unappealing as a strategy of host states subject to investment laws also makes it a useful reference point for thinking through the proper place of those laws.

obligation to compensate the investor whose interests are impaired in pursuit of that purpose.[31] On the second, its justice will depend *inter alia* on the reasons behind and context of the expropriation (does it serve a *bona fide* public purpose?), and whether the investor has been singled out in virtue of their outsider status, or treated less favourably than domestic counterparts (is it discriminatory?).[32] On the third, there will be no question of any injustice towards the investor, and the only moral (as opposed to legal) question to be asked is whether expropriation and/or compensation (and more importantly, legal protection against the former and requiring the latter) advances the domestic goals of the host state.

A final point to note in his section is that the three perspectives sketched above represent distinct answers to the specific question of how the interests of the investor, as an outsider, should be integrated into thinking about social justice in the host state. They need not reflect particular answers to the separate question of what social justice demands amongst citizens of that state. Rather, these two questions are orthogonal to each other. One might combine, for example, a strongly egalitarian view of distributive justice domestically with any of the three views above.[33] Equally, one might adopt a utilitarian perspective, emphasizing aggregate welfare above all, but apply that maximizing injunction over the national population only, or over a global population, or perhaps over either national or global populations subject to a side-constraint in relation to foreigners' rights.[34] The issue here described is thus not simply a translation to the international plane of well-rehearsed debates about social justice, but rather constitutes an additional dimension along which we may agree or disagree.

---

31 This view is well captured in Dolzer and Bloch's summary of the argument for the "sole effects" doctrine: "[T]he issue is not whether certain public goods should be protected. It is rather whether the affected owner or the public should pay for the protection of that value." R. Dolzer and F. Bloch, *Indirect Expropriation: Conceptual Realignments,* 5 International Law Forum, no. 3 (2003), 155–165, at 164

32 This second view is better reflected in recent widespread challenges to the sole effects doctrine in both arbitral practice and treaty reform, and in efforts to reinforce the general regulatory right, or police powers, of the host state. See for an overview Dolzer and Schreuer (2012), *supra* note 29, pp. 152–154. Kriebaum's distinction between a "moderate" and "radical" police powers doctrine, and proposal for a more nuanced proportionality approach, may be helpful here: U. Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 Journal of World Investment and Trade, no. 5 (2007), 717–744.

33 On the ways that egalitarian commitments frequently run out at the border: C. Barry and L. Valentini, *Egalitarian Challenges to Global Egalitarianism: A Critique,* 35 Review of International Studies, no. 3 (2009), 485–512.

34 On the problem of boundaries in consequentialist approaches or international economic law: F. Garcia, *Trade, Inequality and Justice: Toward a Liberal Theory of Just Trade Law* (Leiden: Brill, 2003), 77–83.

4 What is International Investment Law for?

While by no means the only question of justice that is relevant, the insider/outsider issue is distinctive of international investment law.[35] It generates a number of different, and conflicting, conclusions we might reach on the international political morality of investment protection. However, its implications for the prevailing practice of investment law run deeper. In particular, in this section I argue that these different answers point towards different accounts of the *function* of international investment law, and the purposes that it serves. To the extent this is the case, it implies that judging what international investment law is for, and how far it succeeds in its purpose, requires first settling on an answer to the underlying question of international political morality.

To see why this is the case, consider three familiar stories, commonly told, about the nature and function of international investment law:[36]

i. *International Investment Law prescribes a global minimum standard of property, contract, and administrative protections, and preserves and promotes the rule of law*. This is the version of investment law that we find *inter alia* in global administrative law scholarship.[37] Persons have an (international) right to be treated in particular ways.[38] Many countries' domestic legal systems do not consistently afford adequate protection. The investment regime thus constitutes a backstop, expressing an internationally shared consensus or best-practice in these matters.[39] This sense of a "moral minimum" is captured in the emotive language of the Neer arbitration (not an investment case, of course, but one frequently cited by investment arbitrators), condemning conduct amounting "to an outrage, to bad faith, to wilful neglect of duty, or to an

35 On some of the other interests and values at stake in investment law: C. Schreuer and U. Kriebaum, "From Individual to Community Interest in International Investment Law", in U. Fastenrath et al. (eds.) *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011).

36 For an overview of the various stories, Bonnitcha et al., (2017), *supra* note 1.

37 See, *e.g.*, B. Kingsbury and S. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, 9 NYU School of Law Public Law and Legal Theory Research Paper Series, Working Paper 46 (2009); B. Kingsbury and S. Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality", in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010).

38 A frequent criticism of this interpretation highlights the fact that foreign investors, and nobody else, is accorded the benefits of these minimum rights. See, *e.g.*, A. Yilmaz Vastardis, *Justice bubbles for the privileged: a critique of the investor-state dispute settlement proposals for the EU's investment agreements*, 6 London Review of International Law, no. 2 (2018), 279–297.

39 The quote above from Root, *supra* note 17, captures this idea well.

insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[40] States may be free to treat their own citizens less well than this internationally shared standard,[41] but the minimum rights of foreigners are not subject to abrogation in pursuit of domestic public policies or social justice.[42] This story thus tracks the first, quasi-libertarian, account of the morality of investment. It links back to classical, inter-state international law, and the idea that a state's subjects are its own, and that it can treat them in ways others cannot.[43]

ii. *International Investment Law protects international investors' rights to equal treatment, given distinctive risks that they face because they are outsiders.* Different versions of this story emphasize the particular pressures and temptations on governments to impose the costs of public policies disproportionately on outsiders who lack voice in the political system; or the difficulty for foreigners obtaining a fair hearing in states with weak legal systems; or the ways certain policies not targeting outsiders will nonetheless disproportionately impact them (e.g., currency controls).[44] These explanations have in common an underlying assumption that insiders and outsiders enjoy the same relevant moral rights, but distinctive political and institutional pathologies mean that we must accord outsiders additional international legal rights in order to make those equal moral rights effective.[45] It thus recalls the second, cosmopolitan answer to the underlying question of political morality.

---

40 *Neer v. Mexico*, 15 October 1926, UN Reports of International Arbitral Awards, vol. IV, pp. 60–66, at 61–62.

41 Subject to relevant human rights protections.

42 The different roles that exceptions and proportionality analysis play in human rights and international investment law makes sense on this basis.

43 See, *e.g.*, T.G. Nelson, *Human Rights Law and BIT Protection: Areas of Convergence*, 12 Journal of World Investment & Trade, no. 1 (2011), 27–47. For a critical view, R. Howse, *International Investment Law and Arbitration: A Conceptual Framework*, NYU Institute for International Law and Justice Working Paper (2017), pp. 37–41.

44 For an overview, Bonnitcha et al. (2017), *supra* note 1, pp. 148–154. There is an important empirical question here about how far international investors are in fact exposed to these risks as a result of being outsiders. In fact, evidence suggests they are generally treated better than locals: A. Aisbett and L. Poulsen, *Relative Treatment of Aliens: Firm-level Evidence from Developing Countries*, University of Oxford, Global Economic Governance Programme Working Paper no. 122 (2016).

45 An analogous argument supports the use of protected categories/characteristics in nondiscrimination laws. We protect against discrimination on grounds of, for example, race and sexual orientation, but not on grounds of hair colour because racism and homophobia are significant features of many societies, whereas hair-based discrimination is not. We identify protected characteristics not simply by reference to their importance for persons but also by the particular risks to which they are exposed.

iii. *International Investment Law makes it easier for capital-importing states to attract investment by making credible commitments and reducing political risk faced by investors.* Investors, on this account, are less likely to invest in states where they perceive higher levels of political risk. The concern may be weak rule of law and security environments, political corruption, or simply the dynamic inconsistency problems arising once investors have incurred the sunk costs of investment, putting their capital at the relative mercy of the host state.[46] Regardless of the particular risk, the upshot is that affected states struggle to attract capital, which is assumed to be necessary for economic development. By guaranteeing particular standards of treatment to investors, investment treaties offset this risk, or its perception, making it easier to attract international capital, with consequent economic benefits. The normative assumptions of this view, to the extent they are identifiable, accord no independent weight to the rights guaranteed to investors.[47] It is the host state's ability to attract investment, and to thereby develop its own economy for the benefit of its own citizens, that is the ultimate value in this story. We treat investors well because doing so is best for us, not because we care about them. The investor's incentives are variables, to be manipulated to achieve a specific outcome. This story thus tracks the third, anti-cosmopolitan account of the morality of investment, which accords no intrinsic weight to the interests of outsiders.

Each answer to the question of economic justice thus points towards a different answer to the question of what the purpose of investment protection is: if we think outsiders' property has a privileged status, we will interpret investment law as guaranteeing an international minimum standard of economic rights protection; if we think insiders and outsiders have the same moral claims on the state's economic policies, then we will likely understand investment protection as addressing

46 For a comprehensive review of the arguments and evidence, Bonnitcha et al. (2017), *supra* note 1. It is worth noting here that the extent to which investment treaties in fact have this effect is substantially contested, with significant variation across empirical studies suggesting that, to the extent there is an impact on investment, it is relatively minor, and limited to specific circumstances, states and industries. For critics of neoliberalism, the crises of 1998–2008 undercut the developmentalist economic justification of investment liberalisation and protection, forcing its exponents to find justification elsewhere, including in appeals to the rule of law: M. Sornarajah (2011), *supra* note 22, at 216–227.

47 This point comes out clearly in a recent paper, which argues that compensation should only be provided to investors to the extent necessary to address the specific economic problem (hold-up risk) that the authors identify investment treaties as solving: E. Aisbett and J. Bonnitcha, *A Pareto-Improving compensation Rule for Investment Treaties*, 24 Journal of International Investment Law, no. 1 (2021), 181–202.

tendencies towards illicit discrimination; if we think economic policy should be primarily concerned with the interests of insiders, then we will understand protections for international investors in largely instrumental terms. We cannot converge on a view about the point of investment law until we have a shared answer to the question of economic justice underlying it.

5 On Method: Purpose and Morality

Let me pause at this point to address a potential objection to the argument so far. Some readers might worry that the previous section impermissibly conflates a normative/moral question with a historical/sociological/empirical one. The purpose of a rule, institution or practice, this objection runs, is surely a matter of the goals of those who instituted it? Why should we not seek to identify the purpose of investment law (or of a particular international investment agreement) with the actual intentions of its authors, without engaging with these contestable moral questions? Indeed, how can it make sense to attribute a purpose to an institution by reference to our own values, rather than enquiring into the intentions of its authors? It is their institution, so surely its purpose is their purpose?

While a full discussion of the issues involved here is beyond the scope of this paper,[48] two immediate answers arise, one empirical and conceptual, and one normative.

i. The empirical and conceptual answer is that, given the diversity of agents involved and the persistence of agreements over time, there simply is no basic social or psychological fact that constitutes the purpose of an investment agreement. The investment regime emerged from the interaction of many competing, conflicting, and sometimes unthinking, initiatives by different actors with different goals.[49] As a matter of history, there is no single coherent purpose behind that regime. We might narrow our focus, from the purpose of the regime to the purpose of a given agreement, but each agreement is negotiated amongst teams of officials on each side, reporting to trade or foreign ministers, who are in turn aggregating the views of diverse government departments and private sector stakeholders. It is ratified in parliament, where tens or more often hundreds of representatives cast votes, some

48 For a fuller discussion, albeit from a somewhat different theoretical and doctrinal perspective, O. Suttle, *Rules and Values in International Adjudication: The Case of the WTO Appellate Body*, 68 International and Comparative Law Quarterly, no. 2 (2019), 399–441.

49 See, *e.g.*, J. Pauwelyn, "Rational Design or Accidental Evolution? The Emergence of International Investment Law" in Zachary Douglas, Joost Pauwelyn and Jorge E. Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: Oxford University Press, 2014); Miles (2013), *supra* note 19; Perrone (2021), *supra* note 18.

on the basis of expressed views, others mutely. They act in the name of their constituents, who may (rarely) have some awareness of the issue, or more often are entirely oblivious. We are thus left wondering, if purpose is a matter of historical fact, which are the psychological or social facts that might determine the purpose of the relevant agreement?

ii. The normative answer is that, even if there were such a fact, it is the public meaning of political acts, not the private intentions behind them, that plausibly shape legal rights and duties.[50] Laws seek to guide their subjects, and frequently license penalties for noncompliance, so it makes little sense to link them back to private purposes that those subjects cannot access. Further, it is the purpose that institutions can and do serve for their current users, not the goals of their past authors, that determine their proper role in those users' practical reasoning. International agreements frequently endure for decades. Seventy five years after the United Nations Charter was signed, few if any (and if any then only the most junior) of those involved in its drafting and ratification can still be alive. To ask about the intentions of the Charter's authors may have historical interest, but it is hard to see what normative relevance it has. Why should the dead hand of the past control our understanding of institutions in the present? This seems particularly true in the context of agreements that—at least in theory—could have been subject to termination at any point in the interim. Treaties are in force today not simply because they were entered into by their original authors, but also because they were not terminated by the states parties at any time since.

The upshot is that purpose in this context is a question that must be answered in the present tense, having regard to the various moral and prudential reasons that apply. Investment law is *for* whatever purpose it can best serve, for us, here and now, and that is at least in part a normative enquiry.

6 The Legitimate Authority of Investment Law

Identifying the purpose of international investment law might be relevant to a number of tasks. First, it may play a critical role: if we know what it is for, then we

50 Regan makes an analogous point in criticising public-choice-influenced accounts of the purpose of trade agreements. Advancing the selfish private interests of politicians and interest groups simply should not be a candidate as the "true" purpose of an international agreement entered into on behalf of the state: D. Regan, *What are Trade Agreements For? Two Conflicting Stories Told by Economists, with a Lesson for Lawyers*, 9 Journal of International Economic Law, no. 4 (2006), 951–988, at 965.

can judge whether it is in fact achieving its goals, or should instead be reformed or abolished.[51] Second, it may play an interpretive role, allowing adjudicators to choose, amongst possible interpretations, the ones that best advance those goals.[52] However, my interest in this paper is to examine how purpose might shape our understanding of the legitimate authority of investment law.

By authority, I mean the ways investment law claims to provide reasons for its subjects—states—to act in particular ways.[53] Agents, including states, act (we hope) based on reasons. This is what it means to be rational. These include moral reasons, which we might loosely define as reasons concerned with the interests of others, and prudential reasons, which are concerned with our own interests and how these can best be advanced.[54] In noninstitutionalized contexts, agents can be expected to directly weigh the reasons for and against the available courses of action, and to act in accordance with the balance of reasons. Laws claim to provide additional reasons that, depending on the account adopted, are either added to the other reasons that apply, or alternatively replace some of those reasons, such that agents are expected to defer to the law, rather than acting in accordance with their own judgment, at the relevant time, as to what is the best course of action.[55]

International investment law, like most (perhaps all) law, claims authority in this sense. States subject to that law are expected to act in accordance with it, including compensating investors where the law so requires. It is not for states subject to that law to decide for themselves about matters covered by investment

51 So, for example, those who interpret investment law in economic terms argue its compensation provisions should be limited to what is required to address the specific economic problem addressed. *E.g.*, Bonnitcha and Aisbett (2021), *supra* note 47.

52 This is purposive interpretation and, when combined with the moralised account of purpose advocated here, Dworkinian constructive interpretation. See generally R. Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

53 This reason-giving account of authority is the dominant, but certainly not the only, conception of authority in legal theory. For reviews of competing approaches: T. Christiano, "Authority", in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2020 Edition), available at: <https://plato.stanford.edu/archives/sum2020/entries/authority/>; L. Green, "Legal Obligation and Authority", in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), available at: <https://plato.stanford.edu/archives/win2012/entries/legal-obligation/>.

54 The distinction here is imperfect: a suitably capacious understanding of an agent's interests effectively collapses the distinction. See, *e.g.*, J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), pp. 313–320. Nothing significant turns on the distinction for my purposes, provided we recognise that "reason" is broader than "interest," at least in a narrow self-interested sense. *Homo Economicus* is not our political ideal.

55 For the view that authority replaces (preempts) existing reasons, Raz (1986), *supra* note 54. For criticism of this view, and discussion of alternative ways authority's reasons enter out practical reasoning: S. Shapiro, "Authority," in Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002).

law, and, that law claims, they act wrongfully to the extent they act other than in accordance with its requirements. But to what extent is investment law justified in making this claim? To what extent does investment law enjoy not only *de facto*, but also *legitimate*, authority over host states?

Putting the matter in slightly different terms, what role should the requirements of investment law play in the practical reasoning of states about administrative decisions and public policies, simply in virtue of being requirements of that law? To what extent should states, in selecting amongst policies, defer to the requirements of an applicable investment agreement, where these conflict with the option that, *ceteris paribus*, appears to best advance the reasons that the state itself judges apply to it? And how should we feel about cases where states do in fact defer in this way? There are growing concerns about the "chilling effect" of investment law, whereby states adopt "second best" policies to mitigate the risk of investment complaints.[56] Should we interpret this as pathological, as something to be regretted and (if possible) remedied, or as states properly acting on the reasons that legitimate investment law gives them?

Reaching conclusions on these important questions, about the role that investment law does and should play in state decision-making, requires forming a view on the grounds and extent of investment law's legitimate authority. If we set aside arguments from consent (and, for reasons beyond the scope of this paper, we should[57]), the leading account of legitimate authority in legal philosophy is Joseph Raz's *Service Conception*, and in particular his *Normal Justification Thesis*, which holds that "*the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him … if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the*

56 For a recent example, see T. L. Berge and A. Berger, *Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity*, 12 Journal of International Dispute Settlement, no. 1 (2021), 1–41.

57 I set aside arguments from consent to authority as both incoherent and normatively unattractive. The deficiencies of relying on state consent are well explored in: A. Buchanan and R. O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 Ethics & International Affairs, no. 4 (2006), 405–437. Consent, on the view I adopt, has little intrinsic significance for law's authority (though it may have instrumental significance). This has the positive upshot (for law's defenders) that we no longer need to worry too much about the often ignoble circumstances of law's creation: its legitimate authority is largely determined in the present tense. For an effort to make space for consent in a broadly Razian account of international law's authority, S. Besson, *State Consent and Disagreement in International Law-Making. Dissolving the Paradox*, 29 Leiden Journal of International Law, no. 2 (2016), 289–316.

reasons which apply to him directly."[58] Raz's account is nuanced and much more has been written, by Raz and others, developing its implications and complications. However, this quote captures the essence of the view. The state, this view implies, should defer to the prescriptions of international investment law, instead of acting on its own immediate judgment in particular circumstances, if and only if it is more likely to "get things right" by doing so.[59]

The challenge posed by this view, however, is that it leaves authority hostage to an account of the antecedent reasons that apply to a particular agent.[60] We can only judge whether investment law can help states comply with the reasons that apply to them once we know what those reasons are, at least at some appropriate level of generality. Authority is a tool, and we need to know what our goals are before we can decide how useful that tool is, or what it can do, or in which contexts we should apply it. A sledge hammer is a wonderful tool, which can be applied to a brick wall with great effect, but whether it should be depends importantly on whether that wall requires to be demolished, or instead repaired, plastered, and painted. Authority thus becomes contingent on purpose. But—as noted above—purpose is in turn contingent on justice. So, it seems, we can only reach sound conclusions on the authority of investment law by first settling the controversial question of the relationship between global and social justice in international investment protection.[61]

To see how this is the case, consider the following:

i. if we think that investment law expresses the privileged moral status of outsiders' property and due process claims, establishing a global minimum standard of property and administrative protections, then its authority will only hold as regards states that plausibly risk falling below that standard. States with well-established and robust property and public law institutions

58 Raz (1986), *supra* note 54, p. 53. For a more recent comprehensive restatement of the view: J. Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 Minnesota Law Review (2006), 1003–1044.

59 While Raz is clear that authority, as he understands it, is a relationship between agents, I generally refer throughout this paper to the authority of investment law itself. To the extent that we insist on authority as a feature of relations between agents, these references can be read as a shorthand for the authority of the authors of investment agreements and of the adjudicators tasked with their interpretation and application.

60 For this point, as a criticism of Raz, A. Buchanan, "Institutional Legitimacy" in D. Sobel, P. Vallentyne, and S. Wall (eds.), *Oxford Studies in Political Philosophy, Vol. 4* (Oxford: Oxford University Press, 2018), 53–78, p. 70.

61 Raz uses the language of dependent reasons to capture this relationship. Authority preempts certain reasons (dependent reasons) that would otherwise apply to an agent, but that authority's legitimacy depends in part on its itself seeking to act on—or rather, to help the agent to act on—those same dependent reasons.

will likely do better to follow their own standards than those in investment agreements.

ii. if we think investment law protects the equal rights of outsiders in the face of incentives towards bias, then its authority will only hold where such incentives apply. Which features of a state make such bias more or less likely is an empirical question. In some cases, constitutional protections that are restricted to citizens may effectively require the courts to discriminate against foreign investors. In others, the presence of well-organised domestic lobby groups might create strong incentives for bias in administrative decision-making. However, this will by no means always be the case, and in fact the problem of bias may be more pronounced in the other direction, with foreign investors being treated better than their domestic counterparts.[62]

iii. if we think investment law is simply about attracting investment, then its authority will be limited to states where political risk is a genuine disincentive to investment, and to policies whose adoption would likely impact future investment. As to the former, while the impact that investment treaties have on investment flows remains contested, the hypothesised mechanisms whereby it would have that effect (reputation and commitment) imply that, to the extent it may be effective, it will be so only for states lacking stable domestic property institutions and rule of law, or lacking a strong international reputation in this regard. States that are already successful in attracting investment simply lack any reason to accept the authority of investment law. Even where investment laws do enjoy authority over a particular state, on this view, the scope of that authority will be limited to the extent required to address the particular economic problem grounding it.

Recall, identifying legitimate authority requires a probabilistic judgment—is the agent likely better to comply with reason by deferring to the authority or by deciding for themselves. Each of the different answers to the underlying moral question, and in turn each of the different accounts of the purpose of investment law, points us towards a different probabilistic judgment. However, in each case, that judgment also points towards different answers in the case of different states, and in the case of different policies and remedies as regards each of those states. Where the relevant conditions hold, each view suggests, states should defer to the injunctions of investment law. Where they do not, states should (and should be free to) act on their own judgment. But the three stories diverge: so we can expect adherents of each to reach different conclusions about the legitimate authority of investment law in particular circumstances.

62 See sources at *supra* note 44.

Those troubled by this patchwork of authority may be tempted to argue for uniform authority, perhaps invoking concerns for sovereign equality to suggest that the authority of law over some states provides a plausible basis for recognising that authority over all states. This argument seems particularly attractive if we find, as seems plausible, that the patchwork of authority in fact points towards investment law frequently binding already less-advantaged former colonial and post-conflict states, while leaving the already advantaged states in the global North free to act on their own judgments.[63] This is a serious concern, pointing towards a potentially significant conflict between important values. However, the temptation to resolve it through enlarging investment law's authority is not costless. Where the investment law's protection goes beyond what is required, under whichever story we choose, this imposes real costs on states and other stakeholders involved. Enlarged rights for investors translate into reduced rights for everyone else, while concerns with regulatory chill suggest an overextended investment law poses significant impediments to important public policies.

Or we might draw the opposite conclusion, holding—again, because of a concern for sovereign equality—that authority that did not extend to all states could not bind any states. Once again, however, this response imposes costs. On each of the plausible moral views sketched above, there are potentially valuable services that investment law might provide. I say potentially, because the arguments all have significant empirical premises, and those premises are by no means firmly established. However, at least while key empirical questions remain unanswered, it seems unhelpful to deny those services to states who might benefit from them, simply because other states would not.

Of course, the fact of underlying moral disagreement is not unique to investment law. Rather, it is a pervasive feature of our social lives, and one that law often claims an important role in ameliorating.[64] It does so by appealing to reasons for coordination in circumstances of moral disagreement.[65] For many questions in domestic law, and at least some in international law, it is more important that we converge on a shared answer than that we adopt the strictly "right" answer. This may be because achieving anything at all requires many agents acting in concert,

63 Recurrent criticisms of the International Criminal Court strike a similar note. For a somewhat different bootstrapping argument for the general authority of human rights courts: A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations of International Law* (Oxford: Oxford University Press, 2003), pp. 295–299.

64 See, for example, J. Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).

65 This appeal to the value of a shared answer as being more important than the triumph of any particular answer in turn plays an important role in the social contract tradition, especially in Rawls' appeal for an approach that is "political not metaphysical." See generally Rawls (2005), *supra* note 8.

because each individual's uncoordinated efforts, while potentially making a contribution, risk being cancelled out by the competing efforts of others, or simply because each individual acting on their own best judgment risks generating conflict amongst those whose views differ. There is, for example, scope for reasonable disagreement about the ideal structure of the tax system. Progressive, proportional and poll tax systems all have their supporters. However, given the need for general coordination across the population for any tax system to work, and the importance of a tax system for a state to achieve any of its important goals, persons with very different views on the morality of particular tax schemes can reasonably regard the tax law as enjoying legitimate authority, not because it better tracks their perceived first order reasons to contribute the ideal amount of tax, but because it tracks their second order reasons to coordinate with all others on a single tax scheme, reasons that they could not possibly act on in the absence of an authoritative tax law. Coordination thus becomes a (for some the) key source of political authority.[66] In the international context, a similar argument might be made for the authority of many provisions of the law of the sea, and of international trade law: it is more important that there be a recognised rule, and that everyone converge on that rule, than that the rule itself perfectly track the moral fact of the matter.

However, this strategy is less readily available to ground the authority of investment law. Investment law is not obviously concerned with international coordination, or solving free-rider problems or international prisoner's dilemmas. Nor does it seem to be especially important in providing legal certainty for states or investors *ex ante*.[67] Indeed, it is not clear what if any significant value would be realised through states converging on a single set of rules and principles governing their treatment of international investment.[68] Arguments for depoliticization of investment disputes may support the existence of some investment law to govern each such dispute, but they do not require that this law take any particular form.[69]

---

66 For a view making coordination central in this way, Buchanan (2018), *supra* note 60, at 56. Raz, by contrast, identifies coordination as only one amongst a number of services that political institutions provide. Raz (1986), *supra* note 54, at 75.

67 J. Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 Virginia Journal of International Law (2010), 397–442.

68 Arguments from efficiency (reducing transaction and information costs) might be made here, but these would only hold to the extent that the existence and robustness of international investment protections was a significant factor in investor decision making. As noted above, the evidence for this is far from clear. Concerns for legal certainty and administrative efficiency might be relevant, but these surely count for little when weighed against a state's conception of social justice.

69 This fact seems to make sense of the way the investment regime combines multilateral dispute resolution mechanism with bilateral substantive rulemaking.

In consequence, there is no overarching coordination value to which we can appeal to legitimise rules in circumstances of background moral disagreement.

7 Conclusion

Where does this leave us?

I have argued that competing answers to fundamental questions of international political morality, about the weight to be given to outsiders' interests in state policy-making, support competing accounts of the function of international investment law, and in turn of the extent of its legitimate authority. This implies that a single story about the legitimate authority of investment law, which applies and is acceptable to all states is an unrealistic goal.[70] Not only is moral disagreement unavoidable but on each of the competing moral stories investment law's authority is limited in various different ways. The grounds and the extent of investment law's authority will vary from state to state. Different answers to fundamental questions about social justice and the moral status of outsiders will lead different states to different understandings of the purpose of the investment regime and of its authority.

But—and this is perhaps the key point on which to conclude—this need not be a problem. If there is no overarching value in coordination then little is lost by accepting that the scope of investment law's authority will vary across states, across investors, and across disputes. There are, on this view, a plurality of possible international investment laws that states might choose (or not). It is uniformity and harmonisation, not incoherence, that is the real danger.[71]

---

70 The distinction between application and acceptability in this sentence highlights one important distinction which my account otherwise elides: that between the actual authority of investment law, which depends on the actual/objective/true reasons that apply to states, and the perceived authority of that law, which depends on the perceived/subjective reasons accepted by states. The discussion in Part 3, and its emphasis on reasonable disagreement, leans very much on the latter, while the account of authority I adopt in Part 6 emphasizes the former. There is a conflict here, but its significance is limited. Ultimately, the capacity of authority to enhance the practical reasoning of agents depends on their recognizing, from their own perspective, and based on their own beliefs, the value that it can add. Grounding authority narrowly in an objective moral truth that agents can neither identify nor endorse is ultimately sterile.

71 For a similar view, from somewhat different foundations: T. Schultz, "Against Consistency in Investment Arbitration," in Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: Oxford University Press, 2014).

Acknowledgments: Earlier versions of this paper were presented at PluriCourts University of Oslo Workshop on *Reforms of International Investment Arbitration: Philosophical Perspectives* December 2018, iCourts University of Copenhagen Conference on The Power of International Courts May 2019, the Society of Legal Scholars *Annual Conference* August 2019, and Maynooth University Department of Law Research Seminar February 2021. I am grateful to audiences on each occasion, and to anonymous peer reviewers for this journal, for helpful suggestions.

References

Agreement between the United States of America, the United Mexican States, and Canada (USMCA) 2018.

Aisbett, A. and L. Poulsen, *Relative Treatment of Aliens: Firm-level Evidence from Developing Countrie*s, University of Oxford, Global Economic Governance Programme, Working Paper No. 122 (2016).

Aisbett, E. and J. Bonnitcha, *A Pareto-Improving compensation Rule for Investment Treaties*, 24 Journal of International Investment Law, no. 1 (2021), 181-202.

Barry, C., and L. Valentini, *Egalitarian Challenges to Global Egalitarianism: A Critique*, 35 Review of International Studies, no. 3 (2009).

Berge, T. L. and A. Berger, *Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity*, 12 Journal of International Dispute Settlement, no. 1 (2021).

Besson, S., *State Consent and Disagreement in International Law-Making. Dissolving the Paradox*, 29 Leiden Journal of International Law, no. 2 (2016).

Blake, M., *Distributive Justice, State Coercion and Autonomy*, 30 Philosophy & Public Affairs, no. 3 (2001).

Bonnitcha, J., L. Poulsen, and M. Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford: Oxford University Press, 2017).

Brock, G., "Global Justice," in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), available at: <https://plato.stanford.edu/archives/spr2017/entries/justice-global/>.

Buchanan, A., "Institutional Legitimacy," in D. Sobel, P. Vallentyne, and S. Wall (eds.), *Oxford Studies in Political Philosophy, Vol.* 4, (Oxford: Oxford University Press, 2018).

Buchanan, A., and R. O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 Ethics & International Affairs, no. 4 (2006).

Buchanan, A., *Justice, Legitimacy and Self-Determination: Moral Foundations of International Law* (Oxford: Oxford University Press, 2003).

Caney, S., *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005).

Christiano, T., "Authority," in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (Summer 2020 Edition), available at: <https://plato.stanford.edu/archives/sum2020/entries/authority/>.

CJEU *Opinion 1/17 on the Comprehensive Economic and Trade Agreement between Canada and the European Union*.

Dolzer, R. and C. Schreuer *Principles of International Investment Law,* (2d ed., Oxford: Oxford University Press, 2012).

Dolzer, R. and F. Bloch *Indirect Expropriation: Conceptual Realignments*, 5 International Law Forum, no. 3 (2003).

Dworkin, R., *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

EU-Canada*Comprehensive Economic and Trade Agreement* (2017).

Freeman, S., *Justice and the Social Contract* (Oxford: Oxford University Press, 2006).

Garcia, F., *Trade, Inequality and Justice: Toward a Liberal Theory of Just Trade Law* (Brill, 2003).

Green, L., "Legal Obligation and Authority," in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), available at: <https://plato.stanford.edu/archives/win2012/entries/legal-obligation/>.

Howse, R., *International Investment Law and Arbitration: A Conceptual Framework*, NYU Institute for International Law and Justice Working Paper (2017).

Kingsbury, B. and S. Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality," in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010).

Kingsbury, B. and S. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, 9 NYU School of Law Public Law an Legal Theory Research Paper Series, Working Paper 46 (2009).

Kriebaum, U., "Human rights and international investment law," in Yannick Radi (ed.), *Research Handbook on Human Rights and Investment* (Edward Elgar, 2007).

Kriebaum, U., *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 Journal of World Investment and Trade, no. 5 (2007).

Miles, K., *The Origins of Investment Law: Empire, Environment and the Safeguarding of Capital* (Oxford: Oxford University Press, 2013).

Miller, D., *On Nationality* (Oxford: Oxford University Press, 1997).

Miller, D., *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007).

Nagel, T., *The Problem of Global Justice*, 33 Philosophy & Public Affairs, no. 2 (2005).

Neer, v. *Mexico*, 15 October 1926, UN Reports of International Arbitral Awards, vol. IV.

Nelson, T. G., *Human Rights Law and BIT Protection: Areas of Convergence*, 12 Journal of World Investment & Trade, no 1 (2011).

Ortino, F., *The Origin and Evolution of Investment Treaty Standards: Stability, Value and Reasonableness* (Oxford: Oxford University Press, 2020).

Pauwelyn, J., "Rational Design or Accidental Evolution? The Emergence of International Investment Law," in Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: Oxford University Press, 2014).

Perrone, N., *Investment Treaties and the Legal Imagination* (Oxford: Oxford University Press, 2021).

Perrone, N., *The International Investment Regime and Foreign Investor Rights: Another View of a Popular Story*, 11 Manchester Journal of International Economic Law, no. 3 (2014).

Polanco Lazo, R., *The No of Tokyo Revisited: Or How Developed Countries Learned to Start Worrying and Love the Calvo Doctrine*, 30 ICSID Review, no. 1 (2015).

Rawls, J., *Political Liberalism* (Expanded ed., New York: Columbia University Press, 2005).

Rawls, J., *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).
Raz, J., *The Morality of Freedom* (Oxford: Oxford University Press, 1986).
Raz, J., *The Problem of Authority: Revisiting the Service Conception*, 90 Minnesota Law Review (2006).
Regan, D., *What are Trade Agreements For? Two Conflicting Stories Told by Economists, with a Lesson for Lawyers*, 9 Journal of International Economic Law, no. 4 (2006).
Sangiovanni, A., *Global Justice, Reciprocity, and the State*, 35 Philosophy & Public Affairs, no. 3 (2007).
Scheffler, S., *Boundaries and Allegiances* (Oxford: Oxford University Press, 2003).
Schreuer, C. and U. Kriebaum, "From Individual to Community Interest in International Investment Law," in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011).
Schultz, T., "Against Consistency in Investment Arbitration," in Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: Oxford University Press, 2014).
Shan, W., *From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 Northwestern Journal of Law and Business, no. 3 (2007).
Shapiro, S., "Authority," in Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002).
Simma, B., *Foreign Investment Arbitration: A Place for Human Rights?* 60 International and Comparative Law Quarterly, no. 3 (2011).
Simmons, B. A., *Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment,* 66 World Politics, no. 1 (2014).
Sornarajah, M., *Mutations of Neo-Liberalism in International Investment Law*, 3 Trade Law and Development, no. 1 (2011).
Suttle, O., *Debt, Default, and Two Liberal Theories of Justice*, 17 German Law Journal, no. 5 (2016).
Suttle, O., *Distributive Justice and World Trade Law* (Cambridge: Cambridge University Press, 2018).
Suttle, O., *Rules and Values in International Adjudication: The Case of the WTO Appellate Body*, 68 International and Comparative Law Quarterly, no. 2 (2019).
Telenor v. *Hungary*, ICSID Case No ARB/04/15 (2006) 21 ICSID Rev—FILJ 603, 13 September 2006.
Van Ho, T., *Is it already too late for Colombia's Land Restitution Process?* 5 International Human Rights Law Review, no. 1 (2016).
Waldron, J., *Law and Disagreement* (Oxford: Oxford University Press, 1999).
Yackee, J., *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 Virginia Journal of International Law (2010).
Yilmaz Vastardis, A., *Justice bubbles for the privileged: a critique of the investor-state dispute settlement proposals for the EU's investment agreements*, 6 London Review of International Law, no. 2 (2018).