Planes of Justice: Investment Law, Basic Structures, and Critical Legal Theory

by

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Abstract

Despite its scope and the striking powers it establishes, the international investment regime, as a whole, has drawn little more than restrained scholarly criticism. One smaller, still nascent body of scholarship has taken to forming systemic critiques of the regime, and it is to it that the author seeks to contribute. He argues that global distributive justice philosophy furnishes a critical, normative framework that is useful for systemic critique, though one that is undermined at present by a widely held and problematic theory of law. The author submits that critical legal theory should be incorporated into global justice philosophy, so as to remedy this problem. His is a double-sided argument: (1) investment law does raise a problem of global distributive justice, and (2) global justice theory’s foundational concept of a ‘basic structure’ should be reimagined as something far more flexible and variable than it is generally taken to be.
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Introduction

The law of international investment serves up an interesting paradox. On the one hand, it appears to be premised on an understanding of the wider world as basically anarchic, lacking as it does any supranational leviathan. If there is no centralized authority able to secure property rights for those investing beyond the bounds of their home states, then piecemeal multi- and bilateral agreements will have to do. On the other hand, the now dense and expansive network of investment agreements, along with its system of private, ad hoc dispute settlement, would seem to belie precisely this understanding of fundamental disorder. If one subscribes to an especially cynical view of global affairs, the international regime of investment protection must seem an astonishing achievement indeed.

At present, foreign investors enjoy powers that were previously unknown. In their essence, investment instruments are straightforward: states agree as between themselves to adhere to standards of protection with respect to foreign investments. In instances where they would appear to have fallen afoul of those standards, investors are enabled to challenge states directly, rather than having to rely on the diplomatic or legal machinations of their home states. These challenges virtually always take the form of claims for compensation, which are usually considerable, given the types of actors and interests liable to be impacted in the ways anticipated by standards of protection. Investment law goes a long way therefore in securing private property rights abroad, but does so by empowering an investor class to challenge a wide range of possible regulatory activities. No other actor, public or private, possesses such a formidable right.

This essay has two aims. One is to contribute to a still largely nascent, but incisive body of scholarship taking aim at the investment regime in its entirety, rather than at any single component. Some among the scholars responsible for it have fashioned their analytical approaches by drawing on other bodies of knowledge – on comparative constitutionalism, for example. The intent in the coming pages is to follow in these footsteps, by adopting the critical, normative framework of global distributive justice. This proposition ultimately demands a fair bit of conceptual work, however, given the problematic theory of law that underwrites much of global justice philosophy. Therein lies the second object of this essay: to propose the incorporation of realist and critical legal theory into the prevailing currents of global justice philosophy.
This is as much a work of political and legal theory, then, as it is an examination of investment law. The double-sided argument is as follows: first, that investment law does raise a problem of global distributive justice, by bestowing significant rights and powers to a privileged class of global actors; second, that global justice theory’s foundational concept of a ‘basic structure’ must be reimagined as something far more flexible and variable than it is widely considered to be, if it is to account for international phenomena like the investment protection regime. Many concepts, norms, and principles at play in global justice theory are both sound and useful, deserving of wider application and influence – they simply need to have certain barring preconceptions taken out of their way.
Mapping the Terrain

The landscape of international investment protection is as expansive as it is complex. Investor protection standards are housed in the Agreement on Trade-Related Investment Measures, under the General Agreement on Tariffs and Trade, as well as in various other trade agreements. The bulk of investment law, however, relates to the just over three thousand bilateral investment treaties (BITs) presently in force.¹ This is far and away the most symbolically potent feature of the regime, too – from the perspectives of scale and historicity – since this figure dwarfs the just under four hundred BITs that were in force at the turn of the nineteen nineties.² These instruments are aimed in all directions. Whereas the early days of investment protection typically witnessed agreements struck between capital exporting states in the global north and their importing counterparts in the global south, the now expansive web of treaties is no longer so unidirectional. BITs now exist as between states in the global north, as well as between those in the global south, and the former capital exporting states have become the largest importers of capital.³ Not surprisingly, important differences exist among the various instruments making up the regime, some entailing significant consequences with respect to the outcomes of particular disputes.⁴

Despite the dizzying number of BITs and their many variegations, on the main it is possible to glean from them a set of basic features allowing for critical assessment of the investment protection regime in general terms. Now, it is certainly accurate to say that the regime is the product of several “historically-contingent and often accidental steps” unfolding over several decades, but this should

not let the prime movers off the hook, many and motley though they doubtless were.\(^5\) It would stretch credulity to maintain that the actors designing the regime and its components did so lacking a general orientation. Besides, as if to prove the point, the regime’s DNA (so to speak) is eminently discernable. Vandevelde has identified six “core principles of BITs” — to wit, “access, reasonableness, security, non-discrimination, transparency, and due process” — as well as the broader normative goal of encouraging the adoption of liberal legalism.\(^6\) BITs do “function to some extent like foundational or constitutional documents,” he observes.\(^7\) For Schneiderman, the “supraconstitutional” investment protection rules function as a kind of “precommitment strategy,” enshrining certain “institutional forms and substantive norms through which politics is [to be] practiced.”\(^8\) The investment rules place constraints on political activities that bring about negative impacts for foreign investors. These form the bulk of investment protection instruments, and here, too, there are broad similarities. The overarching principle at play is that of non-discrimination, whose different facets are reflected in the substantive protections usually accorded under BITs, e.g. the assurance of “fair and equal treatment” for covered investments, or of “free transfer” for investment-related capital.\(^9\) Protection against expropriation is the odd one out in this respect, though it counts as among the most important BIT-derived standards nevertheless.

Investment law’s brand of legalism is reflected well in the investor-state dispute settlement (ISDS) provisions that also typify its myriad instruments. In Van Harten’s estimation, the investment regime demands a particular form of “governing arrangement,” as states are compelled to offer general consent to a “compulsory” form of dispute resolution “with foreign investors as a

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6 Kenneth Vandevelde, Bilateral Investment Treaties: History, Policy, and Interpretation (Oxford: Oxford University Press, 2010) at 2, 3 [Vandevelde, Treaties].

7 ibid at 3.

8 Schneiderman, Constitutionalizing supra note 4 at 3, 4.

9 Vandevelde, Treaties supra note 6 at 5-6.
group.”¹⁰ This requirement constitutes, for him, the “key unifying feature” of the regime.¹¹ Although ISDS provisions are “heterogenous,” much like the regime in general, Schweider discerns “one basic feature”: they all grant to foreign investors the ability to bring claims against host states for alleged violations of a treaty-based protections.¹² This ability is accorded only to foreign investors, who are promised cheap and swift resolution of disputes by “impartial, independent arbitral bodies [in] full control [of] investor-state dispute settlement.”¹³ Such is the point of investment treaties, broadly speaking – to shield foreign investment, indeed, but to do so by putting foreign investors in the driver’s seat. ISDS provisions are the teeth, the bite of what is at bottom a disciplinary regime. Legal debates in investment law concern themselves ordinarily with the black-letter niceties of particular rules and decisions, or with discrete attributes of the regime; these preoccupations would be essentially moot, however, if investment instruments did not at some point empower investors to pose meaningful challenges to offensive state activity. Domestic courts are felt to be poorly suited to the task, given the complexities of transnational commerce, as well as the less charitable and commonly harbored suspicion that they will be biased against foreigners.¹⁴ Unsurprisingly, the number of ISDS claims filed against host states has increased in lockstep with the recent swelling of BIT numbers.¹⁵

Though it would be right to assume that such a legal apparatus demands weighty justifications, these are nowhere to be found. If one of the central justifications of BITs is their “symbolic” function, then the level of disciplinary commitment demanded as a matter of routine seems wholly disproportionate.¹⁶ The oft-touted line that investment rules promote greater flows of capital to

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¹¹ ibid at 28.
¹³ ibid at 184.
¹⁴ ibid at 183.
¹⁶ Vandevelde, Treaties supra note 6 at 4; Schneiderman, Constitutionalizing supra note 4 at 41-2.
developing regions is questionable as well.¹⁷ More than any other, this justification is at bottom an empirical one: investment flows are either increased or not. The mixed evidence turned up to date should give pause to champions of the system.¹⁸ Some have claimed instead that foreign investors’ exclusion from host states’ political processes vindicates their heightened levels of protection, but this line of argument is undermined by evidence suggesting that foreign firms enjoy levels of political influence comparable to their domestic analogues.¹⁹ Finally, as noted, the assumed bias of national courts is also placed frequently on the balance. Van Harten has argued incisively that this line of reasoning is fraught with hypocrisy: if national judges really are incapable of fulfilling their roles as impartial decision-makers, why then should action on this quite serious concern be limited to negative effects on foreign investors, leaving all others in the lurch?²⁰

All said, the leading rationalizations seem incapable of matching up to the force of investment law’s Big Bang. The various agents advancing the regime would thus appear to have marched steadfastly on, impelled by a widespread commitment to certain articles of faith – to the view, for instance, that the Ricardian principle of comparative advantage “should apply” to foreign investment, and that “capital is likely to gravitate to where its marginal productivity is greatest.”²¹ Sornarajah states the matter bluntly: neoliberalism was “the central thrust” behind the rising tide


¹⁸ Schneiderman, Constitutionalizing supra note 4 at 43; Michael J. Trebilcock, Advanced Introduction to International Trade Law (Northampton, MA: Edward Elgar, 2015) at 135 [Trebilcock, International Trade]. As Trebilcock observes, “[p]erhaps the best reading of th[e] evidence is that BITs have a modestly positive impact on attracting [foreign direct investment].” For varying accounts, both positive and negative, see chapters in Part Two of The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows, Karl P. Sauvant and Lisa E. Sachs eds (Oxford: Oxford University Press, 2009).


²⁰ Van Harten, “Justifications” supra note 17 at 33ff.

²¹ Trebilcock, International Trade supra note 18 at 129.
of BITs from the nineties onwards. Investment law can be said therefore to have matched the “neoliberal turn” of the international trade regime, which was also premised on the belief that “the freeing of markets” should be the “primary strategy for growth and prosperity.” States should get out of the way, and goods and capital should flow freely, bringing prosperity to all.

This conviction is hinged on a still deeper one – that markets and states are severable in the first place, that it is even possible for a state to get out of the way of markets, as though the latter were some wholly self-sustaining entity. This view is refracted visibly through the rules of investment protection. States commit to limiting their regulatory activities, and so, inversely, grant wide berths for manoeuvre to foreign actors in their private enterprises. These are not inconsiderable, either. Standards of protection enshrined in investment instruments commonly employ “language that is broad enough to capture [states’] general regulatory activity,” which need neither “directly target [n]or predominantly affect foreign investors.” Reservations and exceptions are generally available to signatories, but these must be set out “up front” in the form of “negative lists” that demand by their very nature “an extraordinary amount of ex ante knowledge.” Termination of BITs, while not impossible, is generally made to be “legally onerous”: in many instances, they may only be terminated at the lapsing of a ten-year period, while disciplines continue to apply for similar period of time with respect to any investments made during the instrument’s time in force. To proceed on these terms could only seem prudent and worthwhile to those already maintaining that certain kinds of economic activity should be placed unreservedly beyond the reach of governments. In some cases, the boundary between state and market should be firm and stark, since it is possible to maintain that regulatory action would never be appropriate. The ‘point’ of the investment protection regime, then, may be stated more sharply still. The purpose of investment

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24 Van Harten, *Investment supra* note 10 at 82

25 Schneiderman, *Constitutionalizing supra* note 4 at 35.

26 *ibid* at 37.
law more generally and ISDS more particularly is to allow private actors in global markets to protect their investments through the assiduous policing of an assumed boundary between states and markets.

Though this foundational aspect of the regime should raise significant existential concerns, the scholarly response has been quite restrained for the most part. A growing, though still terse list of critics has offered penetrating assessments, assailing the regime as a whole. Schneiderman, Sornarajah, and Van Harten count as chief among these. 27 Koskenniemi has very recently added his name to the mix. 28 Schneiderman’s systemic critique, grounded in comparative constitutional law, is the most trenchant: despite its diverse instruments, principles, and institutions, international investment law through his eyes is understood to view democracy with distrust and to place accordingly a host of “constitution-like” limitations on states’ capacity for democratic self-governance. 29 Institutional or substantive problems with the regime are neither mistakes nor accidents, but are rather emblematic of the regime’s basic premises. Regarded thus, the regime’s faults do not appear liable to adequate reform through institutional tinkering or through the law’s working itself pure. Democracy is either valued or it is not. Outside the academy, as well, hostility to investment agreements – and to ISDS above all – has welled in recent years. Many have come to view ISDS panels – typically formed at the International Centre for Settlement of Investment Disputes (ICSID) – as “secretive tribunal[s] of highly paid corporate lawyers” tasked with compensating investors for governments’ decisions to pass laws “to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe.” 30 Yet, for the most part, scholarly literature has shown itself to be largely unconcerned with the regime’s deeper systemic problems. Koskenniemi notes investment law’s status as the preeminent “growth industry among law

27 See: Schneiderman, Constitutionalizing supra note 4; Van Harten, Treaties supra note 6; Sornarajah, Resisting supra note 22.


29 Schneiderman, Constitutionalizing supra note 4 at 2, 4.

faculties,” mirroring again the boom of BITs, with the “lucrative world of commercial arbitration” seen as more of an opportunity for “[a]mbitious young lawyers” than anything else.\(^{31}\) Normalization has been the word. Some scholars have sought to generate a new “consensus and legitimacy around particular global legal projects,” investment law among them, while others have attempted to situate the investment regime within the realms of private commercial arbitration, of public international law, or of “embryonic [...] global administrative law.”\(^{32}\) This is not to say that the academy has turned a blind eye outright to the most disquieting facets of investment protection. The European Union’s recently proposed (and vociferously resisted) “Investment Court System” (ICS), for instance, can be read as an apogee of popularly-derived pressure for reform, and so as evincing a measure of sensitivity to critiques of the system.\(^{33}\) Nevertheless, the assumption that actors in the global market should be empowered to discipline regulatory activity has not been challenged widely. Indeed, the ICS is a sign of that, too.

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II
Global Justice: Promise and Problems

There is likely any number of ways in which further robust, system-oriented challenges to the regime of investment protection might be formulated. The enlisting of other bodies of doctrine or philosophy seems an especially promising approach. In this regard, the literature developing the philosophy of global distributive justice seems an especially promising candidate. Debates in this field center principally on the proper grounding of distributive responsibilities, and on the proper identification of actors or entities bearing such responsibilities. This is usually done with a keen eye turned to global institutions and institutional configurations, making these debates particularly germane to the subject of investment law. The very philosophical issue of global distributive justice itself appears to be bound up in the complex web of transnational economic activities typically slotted under the label of ‘globalized neoliberalism.’ So, too, does international investment law, given its “cumulativ[e]” efforts to weave a “global tapestry of economic policy, property rights, and constitutionalism.” At the very least, the investment regime calls to mind egalitarian distributive norms, since the state is virtually always seen as the main site of distributive obligations in global justice debates, and since – to repeat – the substantive protections found in investment treaties are by and large sufficiently broad to capture a wide range of regulatory activities.

There appears to be a good deal of promise in bringing global distributive justice considerations to bear on the apparatuses of investment protection, and this potential has been overtured by a handful of thinkers. Ratner has recently made a welcome effort to bring the two domains closer together. Assessing the investment protection regime through the lens of human rights protection, he underlines arbitral panels' worrisome tendency to “downplay human rights concerns,” as well as their wonted struggles to reconcile these with investment concerns. García has recently

34 Schneiderman, Constitutionalizing supra note 4 at 2.
35 Van Harten, Investment supra note 10 at 82.
vented down a similar path, noting the relevance of distributive norms to investment law. He concludes that “investment law should be subject to principles of justice (norms of procedural and substantive fairness), as with any framework for allocating social resources,” given that it distributes “rights, privileges, and burdens” among various actors.\textsuperscript{37} Viewing the legal world through a wider optic, Macklem argues that “human rights require the international legal order to attend to pathologies of its own making.”\textsuperscript{38} Where the structure and operation of international law tends to intensify inequalities – in the realms of labour or global poverty, for instance – there arise certain distributive justice problems.\textsuperscript{39} Foreign direct investment is included as a vital component in the global structure of law.

Naturally, global justice scholars outside of the legal academy have written at length on the global economic order, routinely setting their sights on international trade regulation and finance. The World Trade Organization, the International Monetary Fund, the World Bank – each one is a usual suspect. Curiously enough, however, the controversies surrounding investment protection have not elicited much of a response among their ranks, despite the existence of rough institutional counterparts in ICSID and the United Nations Commission on International Trade Law. Investment law and the phenomenon of foreign investment are treated more as addenda to other bodies of law and institutions; ‘trade and investment’ is the prevailing moniker. A few factors might account for this. First, investment law – as a neoliberal project \textit{par excellence} – is liable by its very nature to be lumped in with other such projects. Second, the explosion of BITs is relatively recent, and the proverbial “backlash” against the regime is more recent still, at present little more than a decade old.\textsuperscript{40} Third, and more generally, the philosophical accounts of global justice have “stayed clear of international law,” keeping both its workings and attendant scholarship at arms length.\textsuperscript{41} Neither the sheer volume of investment instruments nor their growing complexity would


\textsuperscript{39} See: \textit{ibid} at Chapters 4 and 8.

\textsuperscript{40} Koskenniemi, “System” \textit{supra} note 28 at 345.

\textsuperscript{41} Ratner, \textit{Thin Justice supra} note 36 at 1.
tend to invite a change in this trend. The investment law regime is undoubtedly unique in its piecemeal and sometimes schizophrenic development of vaguely formulated principles, all through the operation of private arbitration. The broad institutional secrecy that raises concerns to begin with, then, might also impede analysis by those not specialized in law.

These reasons are compelling enough, to a point; there are more fundamental reasons, however, accounting for the gulf between the global justice debates and international investment law. These number at least two. The first emerges from the intractability of investment law itself. The regime not only calls to mind distributive norms, but also simultaneously frustrates inherently any attempt to derive normative conclusions from principles of distributive justice that might be applied to it. The remainder of this section will be devoted to this problem, which, it turns out, is not so fundamental after all – provided that distributive norms are thought to apply not only to the outcomes of any given legal-institutional configuration. The second is much more formidable, emerging from the usually unspoken parameters of global justice debates. The main lines of global justice theory, which are distinctively liberal in their orientation, tend either to struggle with or to resist outright the expanding of distributive obligations beyond the bounds of the state. So, the limits inherent in the very way in which global justice theory conceptualizes distributive justice problems also would tend to frustrate the identification of any compelling distributive issue emergent from investment protection regime. This problem will be considered at much greater length in the next section.

If distributive norms pertain strictly to social goods, to the fruits of industry, to capital, and so on, then the investment regime does prove intractable from the vantage point of global distributive justice. The basic problem is that potential distributive injustices – envisioned crudely, at present, for the sake of simplicity – are wholly contingent upon the actions of several decision-makers presiding over individual cases. Accordingly, the utility of distributive norms would arise only, and only potentially, in the wake of particular investment disputes, rather than from the regime itself. Both the ad hoc nature of investor-state dispute settlement and the absence of any notion of

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42 UNCTAD, Investor-State supra note 3 at Pt. 1, B and C, 4-5.
binding arbitral precedent further compound this difficulty.\textsuperscript{43} Even if every second arbitral decision contained reasoning to the effect that, say, a people’s right to potable water and an investor’s right to protection both rest on the same juridical “plane,” there would still only be several, separate potential problems.\textsuperscript{44} Contrast this with the constitutionalist critiques flagged earlier: the ‘constitution-like’ limitations on self-governance underlined there are always present, even if a state seldom – if ever – runs up against them.

Furthermore, though egalitarian distributive norms may serve ably to highlight individual injustices, it is not altogether clear that they are necessary to their remedy. Stated otherwise, it is not clear whether they draw out aspects of the regime not already revealed by other norms or logics. Blake and Smith raise this point in answer to critics of the WTO, by probing the matter of whether distributive norms are needed to “understand the wrongness” of its purportedly “unjust behavior.”\textsuperscript{45} In the context of an alarming arbitral decision, it might be questioned, similarly, whether the ‘wrongness’ of such a decision could not just as easily be discerned through an alternate frame of reference – through that of human rights, for instance, or, more modestly, through that of statutory interpretation. Distributive norms, moreover, might not provide any distinct advantage in following through on the suspicion that a privatized, investor-driven system of dispute resolution poses a fundamental problem. One might observe that distributive justice does not necessarily entail a strictly egalitarian distribution of goods, capital, etc., as there is more than a single way of characterizing a just distribution. Distributive justice could accommodate the premise of investor advantages in some areas, either as compensation for their disadvantages in others, or as an exchange for the purported advantages they bring to a given state or community.


\textsuperscript{44} Ratner, \textit{Thin Justice supra} note 36 at 367; \textit{SAUR v. Argentina}, ICSID Case No. ARB/04/4, Award, 6 June 2012 at paras 330ff.

Rather than foreclosing the utility of distributive norms, these problems should instead compel the expansion of the critical field of vision. So, too, should the unique structure and history of the investment protection regime, which, perhaps more than any other international regime, demands careful consideration of both the law and its associated institutions on a macroscopic level. To this end, critical legal scholarship has set an example deserving of emulation, allowing as it does for “power, history and political economy” to be brought “back into view.”\(^{46}\) A through line running across most critical projects is that law not only serves as a “too[l]” for “political and economic struggle,” but is often itself at stake in those same struggles.\(^{47}\) This outlook exorcises some of the most problematic assumptions underwriting much of international legal scholarship. Key among them is the view that “distribution, inequality, and conflict” may be consigned to the realms of “politics or economic competition,” since law is little more than “a weak overlay on a political and economic world for which it bears no responsibility.”\(^{48}\) This outlook also invites a significant challenge to the main currents of global distributive justice debates, which usually give short shrift to law and to legal theory. The possibility that the law itself might be subject to distributive norms, and not only as the means of their implementation, does not arise in either body of scholarship. Thus does the first clue present itself.

\(^{46}\) Schneiderman, “Constitutional Order” \textit{supra} note 32 at 192.

\(^{47}\) David Kennedy, \textit{A World of Struggle} (Princeton: Princeton University Press, 2016) at 11 [Kennedy, \textit{Struggle}].

\(^{48}\) Kennedy, \textit{Struggle supra} note 47 at 219.
III
Basic Structures and Liberal Law

Although the law’s subjection to distributive norms may prove a compelling notion, the prevailing currents of global justice debates are apt to resist its introduction. Within them the liberal view of law reigns supreme. Law is apolitical, objective, and determinate – an “autonomous repository of normative standards.” 49 Its imperative is to constitute the bounds of the political, to circumscribe the legitimate terrain of politics, and so the law is imagined as “unpolitical” and “even hostile to politics.” 50 Through this lens, the law differs sharply as between the national and international planes in its ability to delineate communities upon which various distributive obligations can be said to fall. The coordination of governmental, administrative, and coercive apparatuses on the level of the state sets them apart from rough international analogues. Nationally, law structures political community; internationally, where law does not boast the same integrated and hierarchical structures of coercive powers, it serves merely as an ‘overlay.’ These internally set parameters have resulted in the literature’s general disinclination to give full account of the range of factors that produce global inequalities, including power formations, public and private, formed and enabled by law. These parameters have also resulted in the literature’s preference for an idealized vision of state sovereignty, which ignores the ways that sovereign power and influence may be – and actually is – projected well beyond the bounds of the state, through the structure and operation of law.

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To begin, an overview of global justice debates is required. Philosophical discussion of global distributive justice has proven to be wide-ranging and sundry, but can be tied down to a handful of straightforward premises. The basic concern is with the “economic framework” of a given society – with its “laws, institutions, policies,” and so on – all of which tend to produce and


50 *ibid* at 5.
distribute wealth in some fashion or other.\footnote{Lamont and Favor, “Distributive Justice,” The Stanford Encyclopedia of Philosophy, ed. Edward N. Zalta (Winder 2016 edition), online: https://plato.stanford.edu/archives/win2016/entries/justice-distributive/}. Principles of distributive justice “provide moral guidance for the political processes and structures” that determine who is to benefit from or to be burdened by the workings of a society’s ‘economic framework.’ These are amenable to numerous interpretations, pivoting, by and large, on a handful of crucial determinations. Which forms of benefits, for instance, are deemed pertinent for the distributive calculus? What are the attributes of a distributive class? What is the size of that class? Upon what basis or bases is a distribution to be made?\footnote{Ibid.} Reducing these to a more circumspect question, the basic formulation of distributive justice inquiry can be formulated thus: what is owed to whom, and for what reason?

The question of whether states have a positive obligation to transfer their wealth to the global poor forms the bedrock of contemporary global justice debates. Stated otherwise, and at a higher level of abstraction, much of the scholarship can be said to concern itself with whether the workings of the world outside of states’ several, separate ‘economic frameworks’ can give rise to any distributive obligations straddling either those states, their institutions, or their citizens. There are different ways of formulating this question. Most commonly, it is asked whether humanity belongs to a common distributive class entailing distributive responsibilities for its wealthiest states. Global justice philosophers have been divided into two rough camps, depending on their answers to this question – the so-called statists answering in the negative, the cosmopolitans in the positive.

As in modern political theory more generally, the work of Rawls looms large. His seminal contributions are credited with reinvigorating the discipline, and with placing the issue of egalitarian distributive outcomes at the forefront of political theory. Rawls’ sharp distinction between justice on the intra- and international planes, far from an aberration, is necessarily implied by the “dualistic” approach central to his moral philosophy.\footnote{Murphy, “Institutions and the Demands of Justice” (1998) 27 Philosophy and Public Affairs 251 at 254; Thomas Nagel, “The Problem of Global Justice” (2005) 33:2 Philosophy and Public Affairs 113 at 122ff [Nagel, “Global Justice”].} Although he developed his theory of a separate international plane of justice towards the end of his life in The Law of Peoples, the

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distinction was flagged very early on in *A Theory of Justice*. Here Rawls observed that his two principles of justice “may not work for the rules and practices of private associations or for those of less comprehensive groups.” Similarly, the “law of nations” would likely require its own set of distinct principles.\(^{54}\) The operative concept at play here is that of a “basic structure,” a social contractarian notion, which Rawls deems the “primary subject of justice.”\(^{55}\) For him, the problem of justice is assessed on an macroscopic level, within “closed system[s] isolated from other societies,” by considering the institutions that structure the lives of individuals, that divvy among them their various rights and obligations, and that “regulate the division of advantages” arising from their “social cooperation over time.”\(^{56}\) A society’s “political constitution, [its] legally recognized forms of property, and the organization of [its] economy” comprise its basic structure.\(^{57}\) The simple, but significant insight emergent in Rawls’ approach is the frank recognition of the foundational significance of institutional configurations as a whole, as an integrated and distinguishable subject of justice. Social, political, and economic conditions produce in tandem the range of opportunities and positions available to individuals, favoring certain “starting points” as compared to possible others.\(^{58}\) Inequalities on this plane are “pervasive” and “especially deep,” affecting every individual’s life prospects, and “cannot be justified by an appeal to the notions of merit or desert.”\(^{59}\) The choices and actions of individuals are deemed just where they “conform to the demands of just institutions.”\(^{60}\) Hence the ‘dualist’ label: there is not any one set of normative moral standards applicable to all human beings – as monist, cosmopolitan thinkers maintain – but rather several, depending on the given context.


\(^{56}\) Rawls, *Justice supra* note 54 at 7; Rawls, *Fairness supra* note 55 at 10.

\(^{57}\) Rawls, *Fairness supra* note 55 at 10.

\(^{58}\) Rawls, *Justice supra* note 54 at 7.

\(^{59}\) *ibid.*

Rawls, then, falls squarely in the statist camp. Unlike cosmopolitan theory, which postulates that equality among individuals is “just, or a good in itself,” Rawls’ law of peoples sets out a “political conception of right and justice” applicable to the “principles and norms of international law and practice.”61 His development of a political theory of justice corresponds to his fixation on the achievement of “realistic utopia[s].”62 A political, or “public” conception of justice furnishes “a mutually recognized point of view,” from which matters of right may be determined.63 If the principles of justice applicable to the law of peoples seem thinner than they do within the ‘closed system’ of the state, this is simply a reflection of the degree of mutual recognition that Rawls expects could be achieved realistically as among diverse peoples – including those that are illiberal but still “well-ordered.”64 Rawls’ vision of international justice denies that inequalities between the denizens of the world are inherently unjust; they are so only when they cause “unjust effects on the basic structure of the Society of Peoples” – the international community ascribing to the law of peoples – or on the relations within and among the Peoples.65 Again, the benchmark is the capacity to develop and maintain just institutions.66 Duties of assistance lay upon members of the Society in this respect, but only in this respect: once a ‘burdened society’ has achieved the “final political end of society,” once it has become “fully just and stable for the right reasons,” it no longer has any grounds to demand anything more from fellow peoples.67 The “globally worst-off person” is to have her lot assessed, not with an eye to global inequalities, but rather to the just or

62 Freeman, “Overview” supra note 60 at 2; Rawls, Fairness supra note 55 at 4.
63 Rawls, Fairness supra note 55 at 9.
64 See: Rawls, Peoples supra note 61 at 35ff (for a statement of the principles) and 62ff (for an overview of “decent hierarchical peoples”).
65 Rawls, Peoples supra note 61 at 113, 3.
66 ibid at 119.
67 ibid at 119.
unjust inequalities existing within her own state. The riches of the most globally privileged, in other words, do not constitute in themselves an affront to Rawlsian justice.

Conclusions like this one are not so harsh as they appear at first blush, and there are, moreover, sound moral and practical considerations to commend the Rawlsian dualism that produces them. Restraining the framework of distributive justice in this fashion does not benumb its significance – far from it. The trick is not to place undue expectations on the concept. The appeal of the statist account emerges most saliently when this mode justice is recognized as serving the more focused purpose of holding the \textit{producers} of inequality to account. Its appeal emerges, more precisely, through its analytical sharpness, and through its consistency with basic moral intuitions: to wit, that responsibility for various inequalities should not be lain erroneously at the feet of those who are otherwise blameless as to their causes. So, in keeping with this intuition, the analytical rubric of global distributive justice should be understood to apply only to certain kinds of inequality, while different rubrics might, and indeed should be applied to others. There is no single panacea to the plights of the globally worst-off, and distributive justice is not a catch-all for any and every social ill.

Cosmopolitan theory has been critiqued, rightly, for its playing fast and loose in this regard. Echoing Rawls, Blake posits that there must be distinct contexts within which inequalities constitute a form of “objectionable disrespect.” To the extent that “cosmopolitanism abstracts away from empirical notions of attribution and responsibility for distributive outcomes,” it places itself “in tension” with many commonly held moral sentiments. Distinct contexts provide a structure within which normative claims may be formulated and advanced. This is one of the appeals of Rawls’ system: it frames concrete objectives. Rather than applying “continuously without end,” or “without a target,” his duty of assistance sets up a constructive point at which

\begin{itemize}
\item \textsuperscript{68} Rawls, \textit{Peoples supra} note 61 120.
\item \textsuperscript{69} Blake and Smith, “International” \textit{supra} note 45.
\item \textsuperscript{70} Michael Blake, “Global Distributive Justice: Why Political Philosophy Needs Political Science” (2012) 15 Annual Review of Political Science 121 at 128 [Blake, “Global”].
\item \textsuperscript{71} \textit{ibid}.
\end{itemize}
distributive obligations may be understood to cease.⁷² It also ensures that the principles of distributive justice do not attribute doubtful moral significance to mere envy, to take one example.⁷³ Consider the much-loved hypothetical. The lost city of Atlantis has arisen again in a world whose states have all achieved whatever form of distributive justice one prefers. Should the disparities of wealth between the superlatively rich Atlanteans and the comparatively poorer citizens of the world disturb the pre-existing justness of things as they were? Should the Atlanteans be burdened with distributive obligations from the start, by their mere presence?

Though the disagreements between cosmopolitans and statists have formed the principal fault lines of global justice theory, the most interesting debates have emerged as among those who have taken up the idea of a basic structure, and so assumed some manner of dualism in their thinking. Blake has very helpfully labelled this sub-division institutional theory. As with Rawls, institutionalists of all stripes maintain that “relative distributive shares” are “only sometimes important,” and only “for particular and contingent reasons.”⁷⁴ Disagreement among institutionalist thinkers has pertained, not to the question of whether it is the Rawlsian basic structure, or some equivalent institutional framework, that gives rise to distributive concerns, but rather to the narrower question of which institutional frameworks qualify in this regard. Institutionalist scholarship has been concerned, variously, with two basic and interlinked questions. First, are special duties – including and especially those of the egalitarian distributive kind – owed to one’s compatriots? Second, and most controversially, do the many forms of international cooperation and interdependency among states and individuals alike, which are typically mediated by a network of global institutions, give rise to similar duties?

One side of the institutionalist debate has adhered steadfastly to the premise that only ‘closed systems’ can give rise to weighty distributive obligations. The strength of this camp lies in its foregrounding precisely the sound principles noted above. These scholars differ in the niceties of their proposals, but are unified by the common theme of coercion. Blake, for instance, argues that

⁷² Rawls, Peoples supra note 61 at 117.
⁷⁴ Blake, “Global” supra note 70 at 128.
the “political and legal institutions” comprising the “coercive network of state governance” give rise to distributive norms “applicable only within the national context.” He suggests that this is more an empirical claim than a suggestion to the effect that compatriots are deserving of greater “care” than “outsiders”: the institutional context is simply distinguishable to such an extent that “distinct forms of justifications” for distributive claims necessarily arise. Risse echoes this line of reasoning, emphasizing the “coerciveness of state institutions” that gives rise to “a morally relevant property” shared by compatriots. By this, he means the jurisdictional “domain” of the state, which is to be “suitably arranged” if it is to be “justifiable” to those individuals who inhabit and participate in it. Nagel’s account has drawn the most attention by far, no doubt because it is as blunt as it is uncompromising. In his view, distributive justice demands “a collectively imposed social framework, enacted in the name of all those governed by it,” which compels “acceptance of its authority” in all cases. Law backed by the coercive power of the state is central. Justice, for Nagel, applies solely to organizational forms claiming “political legitimacy and the right to impose decisions by force.” Given the horizontal nature of the international order, then, it follows that distributive justice concerns of any kind can arise only within the territorial bounds of the state. In slight contrast, the other strict institutionalists have typically shown themselves to be more amenable to the suggestion that states may have some responsibility to the well-being of others. Many hold, for instance, that states bear a Rawlsian distributive obligation to assist their counterparts in becoming ‘well-ordered.’

76 ibid.
77 Matthias Risse, “What to Say About the State” (2006) 32:4 Social Theory and Practice 671 at 678.
78 ibid.
79 Nagel, “Global Justice” supra note 53 at 140.
80 ibid.
81 Blake and Smith, “International” supra note 45.
Even among the more relaxed of the theories originating on this side of institutionalist debates, the limitation of robust distributive claims to the state does not square very easily with the thickly interconnected global landscape – a facet that has been highlighted compellingly by those on the other side. Concerned with the workings of global political economy, these scholars have introduced the notion that the various political, legal, and economic institutions operative on the international plane establish conjointly a rough counterpart to state-level basic structures. As Cohen and Sabel observe, “[g]lobal politics” is “not an occasional matter of sparse agreements,” but is in fact “enduring and institutionally dense.”

Accordingly, global institutions warrant careful normative examination “on their own merits,” and “as they actually are rather than as pale imitations of territorial state governments.” Such is the common theme of this camp. To its great credit, the second institutionalist branch suggests a more rounded account of at least where and how morally significant causal relationships can originate. Theories of this kind, in other words, are more reflective of an international order capable of producing, for instance, expansive transnational legal and political projects. Moellendorf’s “principle of associational justice” is one notable example. For him, the “duties of social justice” emerge in the context of organized cooperation that is “relatively strong” and “largely involuntary,” that constitutes “a significant part of the background rules” of public life, and that is modulated by norms “subject to human control.”

Cohen and Sabel make a similar argument, positing that “demanding norms” emerge on the international stage on account of three factors: “Strong Interdependence, Cooperativism, and Institutionalism.” In a more moderate vein, Sangiovanni introduces the “relational idea of reciprocity,” intended to operate for the most part, admittedly, on the state level. This results from the state’s peerless ability to both “provide the basic collective goods” required for the protection of its members “from physical attack and to maintain a stable system of property rights.”

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83 Blake, “Global” supra note 70 at 131.


85 Cohen and Sabel, “Justitia” supra note 82 at 164.

86 Andrea Sangiovanni, “Global Justice, Reciprocity, and the State” (2007) 35:1 Philosophy & Public Affairs 1 at 19-20 [Sangiovanni, “Reciprocity”].
Application of the principle is not limited to the state, however, since international institutional arrangements can also approximate this kind of reciprocity, and so may also produce distinctive obligations.\(^87\)

Here, again, the strength of one camp proves to be the other’s weakness. To the extent that this second set of institutionalist thinkers has emphasized befittingly the significance of international institutions, it has struggled in equal measure to reproduce the analytical sharpness of the first. Blake and Smith have argued this point incisively. In their view, thinkers like Cohen, Sabel, Moellendorf, and Sangiovanni have not succeeded in purging the notion of coercion from their proposals. Moellendorf’s ‘principle of associational justice,’ to take one example, includes ‘non-voluntariness’ as one of its four aspects.\(^88\)

In general, it appears as though these moderate institutionalists are “begging the question” by taking for granted that the international order “is indeed coercive, will remain coercive even if reformed, and is coercive in precisely the way needed to generate obligations of distributive justice.”\(^89\) The worry is that while these thinkers are adept at identifying various inequities, they are less so at making a persuasive case that distributive norms ought to have any bearing on their rectification.

This is a considerable challenge, tending to suggest, in the end, that some other moral norm should apply to the distinctive international institutions. Suppose that it may be allowed that this institutional network is coercive, and that distributive norms should govern its several parts. This raises at least two further questions. First, what kinds of distributive consequences follow? Even if one assumes that the WTO, for instance, is subject to distributive obligations, what are they, to whom are they owed, and how can it be known whether and when they have been met? Second, what is to be made of those international structures that do not establish institutions with governance or governance-like capacities, and that preside over neither the production nor the distribution of wealth?

\(^87\) Sangiovanni, “Reciprocity” \textit{supra} note 86.

\(^88\) Blake and Smith, “International” \textit{supra} note 45.

\(^89\) \textit{ibid}.

In this respect, the transnational investment protection regime presents a salient example, mute as it is to the basic question of distribution – the question of what is owed to whom, and for what reason. Investment instruments relate solely to the types of protection accorded to foreign investors. It might be argued that an investor’s property is ‘owed’ to her, but this would distort the conceptual structure and purpose of distributive justice. Far better would it be to deem this a problem of corrective justice, as it is chiefly private in its orientation: in any given case, the investor is the object of concern. It might also be argued, suggestively, that the investor is owed the right – the legal protection – to her property. There is something to this proposition, though only to the extent that it assumes that legal entitlements themselves might be subject to distributive norms. In any event, global justice debates – between statists and cosmopolitans, between the different camps of institutionalism – do not typically make this assumption. What is left for consideration, through this common optic, are institutions like ICSID, which serves as little more than a forum for different disputes, and states. Only the latter could be plausibly subjected to distributive obligations; yet, it is far from clear how a state’s conclusion of an investment agreement, or even several, could found a claim to the effect that, as a result, it is now morally obliged to transfer any amount of its wealth to this or that impoverished or disadvantaged state.

The institutionalist debate, then, leads to an impasse, with each side furnishing an incomplete picture. The first, stricter camp is correct in finding high moral significance in the coercive power of political and legal apparatuses, but is deserving of criticism for limiting rigidly the scope of this power to the territorial jurisdictions of states. The second is correct, despite itself, in identifying coercive powers at play on the international plane, and in asserting their moral significance, but is deserving of criticism for its reluctance to trace the extension of state-level politics and law to that plane.

Though there may be other causes for this institutionalist predicament, chief among these is certainly the theory of law shared by both sides. As things stand, global justice theorists show themselves on the main as subscribing to a distinctly liberal understanding of law – a not terribly surprising point, given the explicitly liberal foundations of this branch of philosophy. These liberal predilections are manifested in two ways. First, the ins and outs, the actual functioning of law is assumed to be of secondary concern with respect to the moral calculus in virtually all theories of justice. As noted, the more philosophical accounts of global justice have kept the workings of
international law at arm’s length. Macklem highlights this general trend as well, observing that cosmopolitans and statists alike have “overlooked” the “structure and operation of the international legal order” within which global poverty is rooted. Tellingly, Rawls himself – perhaps the preeminent liberal theorist – has given short shrift to the law, even on the national level. Undoubtedly, legal rules form an integral component his basic structure; he is cool, however, to the finer points respecting their nature, origins, structure, operation, interpretation, and so on. He signals, for example, the need to continually “adjust” the “reasonable and practical rules” of society, thereby implying that the law merely sits still until the need for “correction” arises.

This first manifestation rests upon the second and more fundamental one – the assumption, tacit or explicit, that the law is apolitical, objective, and determinate. The law is amenable to an arm’s length relationship, to occasional adjustment or tinkering, because the justice it vehicles is at bottom matter of political – and so distinguishable – concern. The realization and application of distributive norms occurs within the firm bounds delimited by legal rules, which, perforce, must be capable of carrying out such a delimitation in the first place. Now, a few sound positivist assumptions underwrite this view, which correspond well with any theory of justice postulating the achievability of consensus among a multitude of coexisting individuals, groups, and polities – or, more to the point, among competing conceptions of the good. The law is a social construction, meaning that “actual human intervention” is required to make it: per Green, “orders need to be given, rules to be applied, decisions to be taken, customs to emerge, justifications to be endorsed or asserted.”

Justifications alone do not make law; ditto for moral precepts. The identification of law is an empirical, descriptive exercise, for law achieves its special status as something distinct from politics or brute coercion only with the emergence and confluence of specific social conditions. Hart’s theory of primary and secondary rules organized around a fundamental ‘rule of

90 Ratner, Thin Justice supra note 36 at 1.
91 Macklem, Sovereignty supra note 38 at 211ff.
92 John Rawls, “The Basic Structure as Subject” (1977) 14:2 American Philosophical Quarterly 159 at 164.
94 ibid, at xviii-xix, xxxiiiff.
recognition’ nicely encapsulates the idea.\textsuperscript{95} Since there is nothing inherently political or moral within the concept of law itself, the justness of legal rules is to be assessed with reference to the social or political animus behind them.

It is beyond this point that the liberal positivist account falters. Under this conception, legal rules and concepts are assumed to be capable of bearing “core meanings” liable to objective verification.\textsuperscript{96} Law, after all, is to be both useful and distinct. Rules must be tinkered with from time to time, not because their indeterminate meanings have been coopted by social, political, or economic powers, but because the distinctly political project they serve demands continuous fine tuning. Note the tension at play: social contexts give rise to law, but only the singular polity is assumed to leave its fingerprints upon the rules. This might make some sense when viewed from the perspective of a common conception of justice; it still seems odd, however, given that this political conception prioritizes – as it should – the political agency of individuals and associations, each with conflicting interests.

Though positivist legal theory is virtually never discussed at any length in institutionalist debates, it is discernable all the same. Among stricter accounts, it may be seen in the premise that morally significant manifestations of law reside only within the bounds of the state, where social conditions are sufficient for law to emerge, and thus for a concrete political purpose to be implemented and evaluated. Among moderate accounts, it may be discerned in the reluctance to challenge this postulate. In both accounts, the world outside the state is assumed to be anarchic for the most part, lacking as it does any approximation of centralized state authority. This signifies in turn that the proper attribution of distributive responsibility for global inequities is all but impossible.

At least two things have followed from this. First, institutionalist thinkers of all stripes have continued in the liberal – or at least the Rawlsian – disinclination to consider at any length the sources of inequality that are unrelated to the design and implementation of a just basic structure. Despite their egalitarian aims, Rawls’ principles of justice have been deemed conservative by


\textsuperscript{96} Koskenniemi, \textit{Apology supra} note 49 at 503.
some. Rawls does suggest that they would be realized best through the superficially radical form of “property-owning democracy;” he offers very little elaboration, however, with respect to his understanding of this political system, to how this how it might be implemented, and to how it might address the pressing issue of inequality. This is reflective of the general tenor of his work. For all his noble intentions, Rawls ultimately lacks “a critical account of the sources of the ills” that his brand of justice is meant to remedy. As Wolin observes, Rawlsian justice focuses indeed on “improving the lot of the disadvantaged,” but is not “committed to eradicating inequality” itself. Inequalities are not seen as posing a threat to polities themselves. Instead, they threaten the careful balancing of “moderate scarcity,” which is meant to achieve an internally fraught, two-fold end – the upholding of a system of productive social incentives, on the one hand, and the avoidance of threats to the cohesiveness of a society’s “economic order,” on the other. Kymlicka echoes this criticism, noting Rawls’ failure to challenge “the civilization of productivity” whose maintenance has involved the perpetuation of entrenched inequalities of race, class, and gender. Fittingly, Rawls’ “economistic” approach to distributive justice problems does not “include a conception of politics and of political power.” His scheme of distributive justice would appear to place economic and administrative stability ahead of active political engagement and social struggle intended to challenge and overcome deeply embedded injustices. The inequalities produced by the very economic system that it would rely upon for its continued stability are assumed to be inevitable, or at least separate from and anterior to the rules of the basic structure

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100 *ibid* at 532.

101 *ibid* at 534.

102 *ibid* at 534.

103 Kymlicka, *Philosophy* supra note 98 at 91.

104 Wolin, *Politics* supra note 100 at 535, 539.
intended to soften their edges. None of this changes in the pivot towards the law of peoples. Through that optic, the unruly international world may be read as an analogue, writ large, of the pre-legal, pre-political state of affairs operating within the state. Law, again, is merely an overlay.

Second, institutionalists have internalized a static conception of sovereignty that sits uneasily with its more dynamic real-world conditions. States very often find their sovereign powers constrained or altered. Lang notes the distinct impact of international economic law in this regard. For him, states’ so-called regulatory autonomy is “something of an illusion in contemporary conditions:” states are both constrained by “international economic structures,” and, to a considerable degree, “subject” to their “logics.”105 Sassen elaborates upon one aspect of this subjection, discerning that the “globalization of a growing range of actors and processes” has tended to produce power disparities as among the various branches of national governments.106 Globalization has not triggered the decline of the state as a whole, but merely parts of it: others have been propped up by it, too, though typically in the “executive branches of government.”107 Certain aspects of the “global” are “endogenous to the local,” in much the same way that certain aspects of the local are reflected in the global, as Schneiderman and Santos suggest.108 This reflects another aspect of dynamic contemporary sovereignty missed by institutionalists. Despite the absence of a supranational leviathan, the international legal order is not quite so anarchic and ramshackle as is rotely assumed. States have also developed ways of projecting or diffusing their sovereign prerogatives and ambitions. Law is key, and Kennedy makes this point nicely. If we consider states to be “the sum of ‘organized society,’” and turn our attention to the various “legal arrangements across the world,” then it does seem as though “there is a great deal of ‘state’” to be found “in

105 Lang, Neoliberalism supra note 22 at 344.
107 ibid at 121.
global political and economic life.” 109 As within national boundaries, law on the international plane “constitute[s] actors, allocate[s] opportunities for gain, and establish[es] patterns of bargaining power.” 110 This is so, even in the absence of a centralized pan-global state or institution bearing a monopoly of coercive power. Far from posterior to the various forms of political and economic forces underlined by moderate institutionalists, the law is bound up in, and indeed gives rise to many of these phenomena.

International institutions and legal orders are their own beasts, of course, as the moderate institutionalists insist; but within the existing global frameworks of sovereignty and law, states remain essential players, even where serving no more than a foundational role. Once more, the investment protection regime is usefully illustrative. From a distance, the regime looks like a widespread incursion of foreign actors into sovereign spheres of regulatory activity – like the so-called free market run amuck. Yet, states have participated at every step of the way in arming global investors with their swords and shields, from the ICSID and New York Conventions down to the individual BITs. 111 The regime is occasionally described as “depoliticized,” but this does not correspond very well with states’ necessary involvement in its establishment and continued development. 112 Global investors are only able to hold offensive state activity to account because states have elected to make themselves vulnerable to these kinds of legal claims.

Similarly, there is no denying the differences between the operation of sovereign power on the national international levels; nevertheless, it is a mistake to conclude that the more troublesome dimensions of the international order – the doubtful “quality” of its law, for instance – mean that most, if not all forms of distributively significant agency and causality are ultimately dissolved by

109 Kennedy, Struggle supra note 47 at 204.
110 ibid at 204.
111 See: Van Harten, Investment supra note 10 at Chapter 3 for further discussion of the international legal architecture of the investment protection regime. Here, Van Harten details the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), “the single most important pillar” of the regime, which assures the enforceability of awards rendered by arbitral tribunals within signatory states (51-52).
it.\textsuperscript{113} Stated otherwise, the differences between the national and international planes cannot be taken to signify that the kinds of agency giving rise to distributive obligations on the national level are strictly consigned to it as a result. They may be calibrated or modified, but surely they do not cease outright. Observe that this is not a cosmopolitan premise. It is not that all moral entities liable to the application of distributive norms are subject to any one set of principles. Rather, as concerns any single moral entity, distributive obligations may emerge from a plurality of relevant contexts, for which that entity bears some responsibility, and from which these norms acquire their shape and substance. Distributive justice norms should apply to much that goes on in the global plane, not because these are derived from a loose and overbroad philosophical framework, but because so little of the world can be described accurately, at present, as wholly unstructured by dominant legal-political frameworks. There are no Atlanteans.

Wolin’s cautions regarding postmodern “vocabularies” are provocative and congenial to this idea, and so warrant consideration. To cast the world as an accumulation of innumerable contingencies – as no more than the sum of anarchic processes – is to obscure the dominant features of “contemporary power-formations.”\textsuperscript{114} These, he observes, are “centralized yet quick to react, essentially economic, founded on corporate capital, global, and best understood in terms of development over time.”\textsuperscript{115} Postmodern discourses that place undue stress on contingencies surrender the analytical tools required to scrutinize those power formations, and can be said therefore to advantage them.\textsuperscript{116} Marks develops this idea further. Her notion of “false contingency” invites recognition of the reality “that things can be, and quite frequently are, contingent without

\begin{thebibliography}{9}
\bibitem{113} Hart, \textit{Concept supra} note 96 at 237.
\bibitem{114} Wolin, \textit{Politics supra} note 100 at 567.
\bibitem{115} Wolin, \textit{Politics supra} note 100 at 567.
\bibitem{116} \textit{ibid} at 567.
\end{thebibliography}
being random, accidental or arbitrary." The “systematicity” of power formations and the forces that produce them must be considered carefully – for these do not spring forth from the aether.\footnote{Susan Marks, “Human Rights and Root Causes” (2011) 74:1 The Modern Law Review 57 at 74. Marks proposes an “anti-moralistic” approach to answer the question of “why governments and others are doing what they are doing,” which would eschew normative concerns with what these actors “should” do (76). Although this stands at odds somewhat with the present arguments, her own are stimulating, germane, and useful nonetheless.}{117} 

\footnote{\textit{ibid} at 74.}{118}
IV
Planes of Justice

A recapitulation is in order. Two conceptual hurdles must be cleared before the insights of global distributive justice debates – specifically, of institutionalist debates – can be enlisted for the purposes of devising a systemic critique of the transnational regime of investment protection. The first is the intractability of the investment regime itself – an easy enough obstacle to surmount, assuming the willingness to envision the law itself as subject to distributive norms. The second, and more formidable hurdle is the unduly narrow (liberal) conceptual parameters underwriting the global justice debates. These are cast in no small measure by a restrictive theory of law, which is not always fully developed or even articulated at all, but is ever present, and which has resulted in an excessively narrow appreciation of state agency and responsibility.

Two propositions are considered for the remainder of this essay. First, each of the above problems can be addressed through the integration of realist and critical legal theoretical insights into the dominant currents of global justice theory. That is the object of this section. Second, once this integration has been carried out – bringing with it important but defensible changes to the concept of the basic structure – the investment regime can then be seen to comprise of a few aspects bearing distributive significance that warrant close attention from legal and global justice scholars alike. That is the object of the next section.

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Legal realism introduced to the mainstream of American legal theory a set of propositions that dealt collectively a near-fatal blow to pervasive formalistic understandings of law. Many of these were internalized by the later school of critical legal theory, and so deserve some consideration. A distinctly American phenomenon, realism emerged in the mid-twentieth century as a challenge to a then-dominant “orthodoxy” that understood the legal world as a neat

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119 The qualifier “near fatal” is meant to reflect the enduring quality of classical legal theory’s structuring of the law. As Grey observes, “modern theorists have not supplanted the classical ordering but have left it to half-survive in the back of lawyers’ minds and the front of the law school curriculum.” See: Thomas C. Grey, “Langdell’s Orthodoxy” (1983) 45:1 University of Pittsburgh Law Review 1 at 50 [Grey, “Orthodoxy”].
“conceptual order.” Orthodox legalism aspired to a “universal formality,” which could be used to ground the “claim that law was a science.” Law was held out as a coherent and “interlocking set of hierarchical distinctions” and a “neutral system of categories within which all legal controversy could take place” that not only could be, but in fact was strictly apolitical. Crucially, its constellation of holdings, rules, concepts, and principles – the stuff of law’s ‘science’ – was thought to be able to furnish by itself the justifications for legal outcomes: a judge rendered a particular decision solely on the basis of the internal conceptual requirements of the category of property, for instance, rather than on the basis of any external considerations.

It was against precisely this understanding that realists levelled their critiques. Their multifaceted, eclectic intervention was nicely emblemized by the sharp words of Cohen, who referred to the whole of orthodoxy as “transcendental nonsense.” For him, and for the realist school more generally, the sources of law could possess no inherent meaning all their own. There was simply nothing internal to holdings, rules, concepts, or principles that could be said to provide the justifications for the outcome of any legal dispute, given the different “equally legitimate, but conflicting, canons of interpretation that courts could apply to extract differing rules” from them. To obscure this reality behind the “poetical or mnemonic devices” common to legal reasoning was to drive from sight both the “social forces which mold the law and the social ideals by which the law is to be judged.” The stuff of law was “empirical,” little more than “patterns of judicial behavior,” and open therefore “to moral criticism.”

120 Grey, “Orthodoxy” supra note 120 at 15.
121 ibid at 11, 15
122 ibid at 47, 48;
125 Cohen, “Nonsense” supra note 124 at 176.
126 ibid at 188-89.
“descriptive theory of adjudication,” rather than a descriptive theory of law, the realists could not but advance a more far-reaching suggestion – that the law is immune neither to the workings of ideology nor to the pressures of political and economic power.¹²⁷

Some realists also advanced the different, though related argument that the law disposed of distributive stakes in a pervasive manner, no matter where it was operationalized. This was a challenge to the classical understanding of law as forming a boundary between different “spheres” of legal relationships – between private persons, for instance, or between private persons and the state – each of which was delegated, through this demarcation, a different set of “legal powers” that were “absolute.”¹²⁸ For these realist thinkers, the fundamental capillary nature of law rendered untenable any bright-line, formalistic distinction between the public and private realms. Law structured power, allocated goods, and regulated behavior regardless of whether it was tied directly to the regulatory prerogative of the state. The distributive aspect of law, in other words, did not cease at the bounds of the private ‘sphere.’ The elder Cohen suggested as much with respect to private property, which he characterized as a form of “sovereign power.”¹²⁹ For him, “dominion over things is also imperium over our fellow beings.”¹³⁰ In recognizing this, Cohen did not mean to indict the institution of property per se, but rather to suggest that the same “considerations of social ethics and enlightened public policy” as in any other discussion of just governance be brought to bear upon it.¹³¹ Hale picked up this thread, though he did not limit his discussion to property. To his reckoning, the whole of the law possessed a general distributive function by virtue of its implication in the web of coercive powers stretching out through every corner of society.¹³²

¹²⁷ Leiter, Naturalizing supra 125 at 60.
¹³⁰ ibid at 13.
¹³¹ ibid at 14.
These were the “weapons,” formed and allocated through the operation of the law, that members of a community deployed against one another.\textsuperscript{133} To take an example, one’s “income” was only the “price paid” for the non-use of legal powers.\textsuperscript{134} To shift these powers as between public and private actors – to regulate or deregulate – was to do nothing to change their basic quality as coercive: it merely “transfer[ed] the constraining power to a different set of persons.”\textsuperscript{135} As there was no freedom from “coercive arrangements,” a state’s decision to refrain from taking regulatory action, in the conventional sense, was merely one among many regulatory choices.\textsuperscript{136}

Much of these realist dissections is familiar to critical legal theory. In concert with their predecessors, critical theorists maintain that the rules of law do not and cannot possess inherent meanings. To operationalize a legal concept is to make a “judgment” concerning the “competing values” that are “embedded” within it, “a judgment that must rely on considerations and intuitions external to the legal concept itself.”\textsuperscript{137} They have also taken up and developed the argument that the law disposes of distributive stakes in a broad, systemic manner. Consider markets, for instance. As Davis and Klare observe, none could exist in the absence of “legal ground rules” setting out the basic components of economic transactions – the definition of contractual capacity, the allocation of property rights, and the distinguishing of “voluntary” from “coerced transfers,” to name a few.\textsuperscript{138} A state or decision-maker’s election to remain “in” or to steer clear of a market is at bottom a fictitious one.\textsuperscript{139} The only real questions in this regard are how laws should “construc[t] and regulat[e] markets and with what effects.”\textsuperscript{140} The law’s capacity to “empower some actors

\textsuperscript{133} Hale, “Coercion” supra note 132 at 99.
\textsuperscript{134} ibid at 99.
\textsuperscript{135} ibid at 98.
\textsuperscript{136} Hale, “Coercion” supra note 132 at 109. See also: Kennedy, Struggle supra note 47 at 90.
\textsuperscript{138} ibid at 444.
\textsuperscript{139} ibid at 444.
\textsuperscript{140} ibid at 444.
while disempowering and subordinating others” does much to structure the “lived experience” of a society.\textsuperscript{141} Wildly different consequences flow from the various types of “entitlements, privileges, and liabilities” that might emerge as between employers and employees, sellers and buyers, landlords and tenants.\textsuperscript{142} This is no less true on the international plane, where, as Kennedy points out, there “is law at every turn.”\textsuperscript{143} Thus, “even informal and clandestine trade” occurs “in a dense regulatory environment,” as between actors bearing “capacities and bargaining powers” constituted by their various “legal powers, obligations, and privileges.”\textsuperscript{144} On both planes, national and international, the structure and operation of the law is shot through with regulatory significance concerning how social, political, and economic life should be organized.

Critical theorists, however, have not merely restated the realist suggestion in stronger terms. Through their optics, the law is not merely vulnerable to the workings of power: it makes the wielders of power just as much as the powers they wield. Law is fundamentally constitutive. Per Davis and Klare, it “is endogenous to human choice and behavior,” since the “institutions, power relationships, and interactions in contemporary societies” are all “at least partially constituted” by its concepts, principles, and rules.\textsuperscript{145} Gordon adds a further, important gloss: since legal concepts delimit the range of practical options, they also go a long way in conditioning “not just our power to get what we want but what we want (or think we can get) itself.”\textsuperscript{146} The constitutive power of law runs deep, moulding legal “consciousness” through its categories and forms, as well as through its “pictures of order and disorder, virtue and vice, reasonableness and craziness, Realism and visionary naiveté.”\textsuperscript{147} Political and economic powers find their victories etched upon the law, 

\begin{quote}
\textsuperscript{141} Davis and Klare, Transformative” supra note 138 at 446.
\textsuperscript{142} ibid at 446.
\textsuperscript{143} Kennedy, Struggle supra note 47 at 174.
\textsuperscript{144} Kennedy, Struggle supra note 47 at 174.
\textsuperscript{145} Davis and Klare, Transformative” supra note 138 at 444.
\textsuperscript{147} ibid at 111, 109.
\end{quote}
certainly, since the meaning of the law’s categories and forms is “under-determined.”\textsuperscript{148} The stuff of law is the subject of possible “struggle[s]” between eventual “winners and losers.”\textsuperscript{149} Yet, the sum of the law itself is not merely a reflection of those powers writ large, either; political projects of all kinds, large and small, originate from and engage with an already extant legal-conceptual thicket.\textsuperscript{150}

Once more, national and international planes may be cast in a similar light. Beyond the bounds of states, the law structures the same forms of authority that structure the law in turn. Its “ubiquity” as “an instrument and stake in struggle,” in other words, counts as a vital component of the international order, as well; the “relative leverage of economic or political actors,” Kennedy notes, “is rooted in the background legal and institutional structures within which people bargain and compete.”\textsuperscript{151} Though the international plane lacks the “functioning system of rules and institutions” prized by institutionalist thinkers, its cast of actors meet upon a “terrain shaped by their respective quiver[s] of powers and vulnerabilities.”\textsuperscript{152} Something akin to Marks’ ‘systematicity’ is therefore discernable through the gradual “consolidat[ion]” of “winnings” and the “lock[ing] in” of “small differences,” from which “large dynamics of inequality can arise.”\textsuperscript{153} The law is posterior to nothing, including – and especially – dominant power formations. It is right there in the fray of political and economic struggle, shaping and shaped by it in a circular fashion.\textsuperscript{154}

In developing their similarly eclectic theses, critical theorists have turned the epiphenomenal realist postulate back round on itself – their most valuable contribution by far. While the aim of

\textsuperscript{148} Davis and Klare, “Transformative” \textit{supra} note 137 at 442.

\textsuperscript{149} Gordon, “Histories” \textit{supra} note 147 at 111.

\textsuperscript{150} Davis and Klare, “Transformative” \textit{supra} note 138 at 442-443.

\textsuperscript{151} Kennedy, \textit{Struggle supra} note 47 at 10-11.

\textsuperscript{152} \textit{Ibid} at 175, 176.

\textsuperscript{153} \textit{Ibid} at 176.

\textsuperscript{154} See: Kennedy, \textit{Struggle supra} note 47 at chapter 6.
legal realism “was to lift the veil of legal Form,” writes Gordon, the critical project has been “to lift the veil of power and need to expose the legal elements in their composition.” Critical analysis of law is not merely the analysis of power and politics, disparaging accounts to the contrary. The capillary and constitutive dimensions of law that critical theory has underlined so well signify that power-formations and law intersect, but are distinguishable nonetheless. To identify the meanings of law, the dominant power formations that struggle over its creation and interpretation must be considered. Yet, on the flip side, to acquire a fulsome account of dominant power formations, the law’s rules and concepts must be considered, too. The relation is circular and particularistic, resistant to essential abstractions. In revealing this relation, the critical approach displays its analytical value, accounting for far more of the complex, interlocking relationships between law and the varied forms of power, both centralized and diffuse. The law is neither an “external, privileged vision of society,” nor a crude blueprint of oppression, imposed upon a society, or societies, by their dominant quarters. This approach also ensures that law, the empirically verifiable social phenomenon, is not trivialized or shorn of its distinctive analytical utility. It is simply Janus-faced, capable, “[t]o some meaningful extent,” of changing “autonomously from” what occurs “outside” of it, but liable to change “in response” to those external forces, as well. Finally, the critical approach underlines the close alignment of law and power, even in the absence of an integrated and hierarchical system of coercive institutions. Where there is power there is usually law, and vice versa.

Admittedly, much of the foregoing is rather more an interpretation of critical theory’s potential than a reflection of any singular project. In truth, there is no such project. There is only a collection of analytical moves, some of which do not fit very comfortably with one another – the proposition that law is simultaneously constitutive and under-determined, to take one example. The charge

156 Davis and Klare, “Transformative” supra note 138 at 442-443.
157 Koskenniemi, Apology supra note 49 at 536, 67.
158 Kennedy, Classical supra note 129 at 27.
159 Gordon, “Histories” supra note 147. The law is “omnipresent in the very marrow of society,” Gordon writes, but it has an “indeterminate relation to social life” (109, 114). To this ambiguity, it might be said that the outcomes of
is often made that critical theorists are adept at identifying various social ills – recalling, in this narrow respect, the moderate institutionalists – but usually lack any constructive recommendations as to how the law might be reorganized or restructured. Similar things might be said of the realists. Hale and Cohen, in particular, were agnostic about how the law might be altered to reflect their otherwise successful interventions into classical legal thought.\textsuperscript{160} The long-term impacts of the realist, and then critical interventions in American legal thought have been nicely encapsulated by Kennedy’s account of a “paradox” emergent in its “critical legalis[t]” branches.\textsuperscript{161} In his view, the “‘viral’ tendency of internal critique” has produced a pervasive belief that the law is fraught inherently with wide-ranging problems, which has been joined, curiously, to an “unshakeable commitment” to the rule of law.\textsuperscript{162} The result is an “utter faith and utter distrust in law.”\textsuperscript{163} On the international stage, Koskenniemi identifies a similarly paralyzing effect of critical interventions, “a kind of legal nihilism,” where the value of legal analysis is called to question by the sheer indeterminacy of the law’s rules and concepts.\textsuperscript{164}

These difficulties cannot be papered over – but they cannot paper over the strengths of critical theory, either. For whatever differences between global justice and critical legal theories that one might be inclined to highlight, each is concerned at bottom with the justness of outcomes of social, political, and economic processes. So far as global justice theory is concerned, critical legal theory could provide at the very least an array of valuable tools. These would allow justice theorists to reckon more forthrightly with the global forces producing the inequities that are of such pressing concern. In drawing out the capillary and constitutive aspects of law, critical theory emphasizes the distributive stakes alive in its structure and operation. This opens the door to theorizing the law itself as subject to distributive norms. As noted already, various actors struggle over the very legal

\textsuperscript{160} See, for instance: Cohen, “Nonsense” supra note 124 at 198-99; Hale, “Coercion” supra note 133 at 109-10.


\textsuperscript{162} \textit{ibid} at 372, 361.

\textsuperscript{163} \textit{ibid} at 359.

\textsuperscript{164} Koskenniemi, Apology supra note 49 at 535.
frameworks within which various goods are allocated. The results of these struggles count for a great many of the inequalities characteristic of the global landscape: to put it crudely, some, on a systemic level, have access to ‘more law’ than others, possessing comparatively larger bundles of rights and powers, and smaller bundles of obligations and vulnerabilities. These results are not wholly, or even chiefly accidental. Neither are they insignificant, for the law’s deep embeddedness in the interlocking fabrics of society means that most phenomena comprising lived experience are touched by it directly or lie within its long shadow.

The disparate, decentralized workings of law, moreover, do not dissolve states’ moral responsibility. Judges, in the critical optic, “bear responsibility” for the “distinctively legal decision-making” they carry out. There is no reason why the legislative or regulatory acts of states should be treated any differently in this respect. Here again the sharper and circumspect conception of distributive justice comes into view: the state, able to sign treaties, to help establish international institutions, to recognize and enforce property rights, to create and enable certain global actors, to bestow certain actors with unique powers, to engage in or refrain from regulatory action, and so on, participates in the delineation of a morally significant plane of distributive justice. Other power formations might be subject to alternate, but no less compelling moral norms. In this larger critical picture, the state’s role should appear as simultaneously contracted and expanded: contracted, insofar as the state cannot be understood, reductively, to simply devise and implement any prefigured epiphenomenal system of laws intended to vehicle any unitary vision of justice; expanded, in that the laws it enacts, or in whose creation it participates, empower actors and establish conditions stretching beyond its territorial jurisdiction. The sum is likely an increase in states’ responsibilities – and, one might venture to guess, in those of other actors and institutions, as well.

Nothing in this is fundamentally at odds with the notion of a basic structure that underwrites the dualist strands of global justice philosophy. In fact, the concept is not totally alien to critical theory, or at least to some of its more promising variants. As Koskenniemi remarks, “[c]riticism without

165 Davis and Klare, “Transformative” supra note 138 at 443.
an ideal of community is without direction and degenerates into cynicism.”  

Critique should instead aim to foreground and ultimately to invite respect for the essentially “conflictual character of social life,” and so be joined to a “normative” vision of “openness and revision.” Consideration of and accountability for the effects of any decision, whether those of a practicing lawyer or a sovereign state, is central to the “ideal of authentic commitment” at play in this normative vision. The “institutions and practices” found even outside state jurisdictions serve as “platforms on which the point” of “collective life as a project” is “constantly imagined, debated, criticized and reformed, over and over again.” There are echoes of Rawls’ political conception of justice at play here. Koskenniemi’s normative vision implies the bare possibility of consensus regarding certain collective projects – the possibility, more precisely, that a critical mass of individuals, institutions, and states would be willing to so imagine, debate, criticize, and reform in the first place.

Nor is any of this to suggest that critical theory should act as a theoretical deus ex machina. Critical theory, indeed, might find both a complement and additional normative bite in the basic structure, whose accent falls after all, rightly, on the “idea of a fair system of social cooperation over time.” Through it, critical theory might find an analytically useful way of framing a distinctive macroscopic plane of distributive justice, underwritten by intuitive and defensible notions of causation and responsibility. There is good reason to conceptualize basic structures as among the primary subjects of justice: among other things, they enshrine property rights (or, different types of ‘imperium’), they distribute rights and obligations, and they organize economies – in a word, they structure individuals’ and societies’ lived experiences. The basic structure is a useful category within which the critical theoretical toolkit can be put to work, and there is nothing intrinsic to the latter that forecloses this possibility. The critical theoretical insights would simply require that

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166 Davis and Klare, “Transformative” supra note 138 at 547.
167 ibid at 546, 547.
168 ibid at 546.
170 Rawls, Fairness supra note 55 at 50.
‘basic structures,’ or morally significant distributive planes, be imagined as fluid, numerous, and variegated.

This reformulated conception, in turn, could better realize the sound philosophical principles that underwrite Rawlsian philosophy. Rawls’ conception of justice has been cast as “homogenizing” and “oppressive” by some, and to the extent that it posits a “public reason” akin to the liberal theory’s vision of law as a “privileged rationality,” there is indeed some merit to this claim.171 In his own fashion, however, Rawls was attempting to formulate a theory of justice that would avoid, ironically, precisely this kind of charge. Echoing the critical vision of social life’s ‘conflictual’ character, Rawls himself posited that democratic societies are not “and cannot be” an assemblage of “persons united in affirming the same comprehensive, or partially comprehensive, doctrine.”172 This is owed to the “fact of reasonable pluralism” – the reality that members of a polity possess “profound and irreconcilable differences” concerning their respective “religious and philosophical conceptions.”173 The atoms of Rawls’ philosophy are intended to reflect this fundamental quality of lived experience. His notion of “justice” as comprising a “fair system of cooperation over time” is to be “worked out” through the entwined concepts of a “well-ordered society” – of which the basic structure is the legal-institutional manifestation – and of “free and equal persons.”174 Each person is assumed to possess certain “moral power[s],” including the “capacity to have, to revise, and [to] rationally pursue a conception of the good.”175 Despite his liberal constructivist project, then, Rawls at least recognizes the fundamental plurality characteristic of all human societies. Furthermore, it bears emphasizing that Rawls himself refrained from providing his basic structure with any “sharp definition” or “criterion” that might determine precisely which “social arrangements, or aspects thereof, belong to it.”176 This corresponds well with Abizadeh and

171 Wolin, Politics supra note 100 at 538; Koskenniemi, Apology supra note 49 at 69.
172 Rawls, Fairness supra note 55 at 3.
173 ibid at 3.
174 Rawls, Fairness supra note 55 at 5, 10.
175 ibid at 18, 19.
176 Rawls, Fairness supra note 55 at 12.
Ronzoni’s separate suggestions that the basic structure is liable to various defensible readings, among them that it is ultimately just as applicable to the international as to the national plane. Rawls’ foundational concept should not be interpreted so restrictively as to render it unable to account for novel social, political, and economic developments, wheresoever they may originate. One passage from *Justice as Fairness* underlines nicely the need for conceptual flexibility, and warrants full reproduction. “The role of a political conception of justice,” Rawls begins, is not to provide specific answers to questions like the one just intimated – the question of what belongs to the basic structure. Rather, the point is to

set out a framework of thought within which they can be approached. Were we to lay down a definition of the basic structure that draws sharp boundaries, not only would we go beyond what that rough idea could reasonably contain but we would also risk wrongly prejudging what more specific or future conditions may call for, thus making justice as fairness unable to adjust to different social circumstances. For our judgments to be reasonable, they must usually be informed by an awareness of those more specific circumstances.178

With these glosses in mind, the following amalgam of institutionalist and realist/critical theory is proposed. A system of laws joined to an integrated, hierarchical structure of coercive powers should not be a condition precedent for the existence of a basic structure. Such conditions may well give rise to a striking and distinctive variant, but legal and institutional matrices in different contexts can also give rise to distributive obligations, even if these differ ultimately to considerable degrees. Distinct planes of justice roughly akin to the Rawlsian basic structure do exist – if in an approximate form – and legal rules themselves and the institutions that interpret and implement them both constitute a vital part of those planes. Everywhere law forms the context within which various forms of wealth are created and distributed. Since the law cannot stand, in the end, entirely apart from the political and economic forces constituting the distributive animus, or anima, law itself must enter the distributive fray. The moral significance of these planes emerges not from any stable set of legal rules and institutions or any singular political will, but from their production of


178 Rawls, *Fairness supra* note 55 at 12.
certain power formations and their entrenchment – often deep – of disparities in social, political, and economic power.
V
Investment Law’s Uneven Plane

What remains, now, is to detail the distributively significant aspects of the international investment regime, the latter residing in a plane of justice that is either wholly its own or shared with other laws and institutions comprising a globalized neoliberal project. This will underline the aspects of the regime that the critical legal lens is well-placed to draw out. Note that the object is not to suggest the kinds of norms that might be formulated, as such an endeavor would demand far more space than is allowed here.

Two aspects of the investment regime are deserving of scrutiny by legal and global justice scholars alike. The first of these is its structural inclination towards the preferences and practices of erstwhile capital-exporting states in the global north. Despite the purported neutrality of investment rules, the regime has tended to project or to reproduce local constitutional experiences on the international plane.\(^{179}\) The standards of protection typically housed in BITs were not “pulled from a hat,” but were drawn from historically contentious principles of international law.\(^{180}\) Sornarajah traces the ascendency of the American preference for exacting standards of compensation in the context of expropriation, which were resisted by Latin American, African, and Asian countries during failed attempts to conclude a multilateral investment instrument.\(^{181}\) Bilateral treaties, in his estimation, were one way of “resolving this impasse.”\(^{182}\) The expropriation rules are but one example; the many and varied standards of protection are all emblematic of the phenomenon of “globalized localism” identified by Santos – the process, more precisely, by which “certain local phenomena achieve supremacy,” or at least vie for supremacy.\(^{183}\) For Santos, globalization is nothing more than “the successful globalization of a particular localism,” as “there

\(^{179}\) See: Schneiderman, “Constitutional Order” supra note 32.

\(^{180}\) Van Harten, Investment supra note 10 at 84

\(^{181}\) Sornarajah, Resisting supra note 21 at 92.

\(^{182}\) ibid at 92.

\(^{183}\) Santos, “Globalizations” supra note 108 at 396; Schneiderman, “Constitutional Order” supra note 32 at 197.
are no global conditions for which we cannot find local roots.”¹⁸⁴ From a broader vantage point, this same process is discernable in the “muscular” structural elements of BITs concluded by either European and North American states.¹⁸⁵ Pre- or post-establishment investment protection is one notable example.¹⁸⁶ Another is the tendency to authorize investors “to bring claims against states in relation to most or all of [a] treaty rather than a more limited class of potential disputes.”¹⁸⁷ The merits of either example, or of any other that might be mentioned, matter less at present than the more basic fact that major strands of the transnational web of BITs are structured so as to reflect or approximate particular interests and experiences. Although the investment protection regime as a whole can no longer be characterized by any unidirectional, north-south paradigm, many of its rules and standards remain steeped in northern legal-conceptual frameworks.

The second aspect of the regime deserving scrutiny is the way that it has enabled two distinct sets of actors to thrive: the global class of transnational investors and the legal practitioners that provide this class with their various services. The former has found its hand bolstered by the BIT web, and – it bears repeating – has been advantaged considerably as compared to strictly domestic investors and citizens across the globe. From a bird’s eye view, the structural configuration emergent from the investment regime is striking: only one class of parties is authorized to initiate claims, while the other is the only class potentially liable to pay compensation.¹⁸⁸ Investment claims, moreover, would seem to have picked up steam in the wake of the BIT explosion during the dusk of the second millennium and the dawn of the third. The United Nations Conference on Trade and Development (UNCTAD) reports that BIT-related ISDS cases in 1998 numbered only fourteen in all.¹⁸⁹ By 2014, that number had grown to just under six hundred, though this figure is likely still

¹⁸⁴ Santos, “Globalizations” supra note 108 at 396.
¹⁸⁶ Van Harten, “Justifications” supra note 17 at 27.
¹⁸⁷ ibid at 26.
¹⁸⁸ Van Harten, “Justifications” supra note 17 at 37.
¹⁸⁹ UNCTAD, Investor-State supra note 3 at 7.
reflective “only of those claims that were disclosed by the parties or arbitral institutions.”¹⁹⁰ UNCTAD cites a few reasons for this sudden increase in claims, notable among them the difficulties endemic to the interpretation of increasingly complex instruments, and the beckoning power of “large, successful claims.”¹⁹¹ Recall that the proliferation of BITs and ISDS claims have not been matched by any strong indication that investment instruments have impacted global investment flows one way or another.

A particularly vivid example of this newfound power vested to the global investor class came about during collapse of the Argentinian economy in 2001. Argentina had concluded a slew of BITs with major Western European and North American countries throughout the nineteen nineties. During the “heyday” of Argentina’s “shock programme of liberalization,” many firms based in these countries acquired Argentinian utilities “assets.”¹⁹² As its economy crumbled, Argentina found many of its frantic efforts to stave off “total collapse” challenged by these firms through a procession of arbitral claims.¹⁹³ In one such claim, the presiding ICSID panel held that the protective standard of “fair and equitable treatment is inseparable from stability and predictability,” finding the latter to be an “objective requirement” under the instrument in question.¹⁹⁴ The panel cited other notable cases in support of this finding.¹⁹⁵

The second set of actors to thrive under the investment protection regime attests to the growing power of the first. These are the so-called “norm entrepreneurs,” who act variously as arbiters and counsel in the handful of dispute resolution centers, or as vocal advocates of the investment


¹⁹³ *ibid* at 2.


¹⁹⁵ The cases were *Metalclad Corporation v. The United States* (2000) ICSID Case No. ARB (AF)/97/1, and *TECMED supra* note 19.
protection regime more generally. The shaky justifications canvassed towards the beginning of the essay emanate in no small measure from this sector. These individuals typify nicely the corps of international experts, who espouse the “potential for order and justice in global affairs,” all the while marshalling “legal argument[s] and assertion[s] ruthlessly for political or economic gain.”

The basic structural paradigm of investment disputes and the significant costs of proceedings together impel arbiters to “interpret the law in favour of prospective clients.” The “revolving doors” between arbiters and counsel has drawn a good deal of warranted criticism, prompting some to conclude that individuals in these positions belong to a sort of “club.” Though it is widely touted as an alternate “court,” investment arbitration is better described as “a private business and (usually) a career path for those employed by it” – and an exclusive one at that. The ranks of investment arbitrators are neither as large nor as diverse as one might expect, given the sheer scope of the investment law landscape. The preeminent ISDS forum, ICSID, comprises chiefly of European and North American lawyers in private practice, the top ten of which account for twenty percent of all panel appointments. Over fifty percent are “single shooters.” This is the sound alternative to purportedly biased courts.

These two aspects of the investment law regime are not merely the accidents or aberrations of some deeper logic. It is tempting to portray them as a laundry list of defects to be remedied, though, this would do justice, neither to the capillary legal and political contexts from which they emerged,

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197 Kennedy, Struggle supra note 47 at 218.


199 Schneiderman, Constitutionalizing supra note 4 at 76.

200 Van Harten, “Justifications” supra note 17 at 37.


202 ibid at 783.
nor to their constitutive impacts upon those same contexts. They are bound up in the regime’s logics, playing a continuous role in steering it this way or that, betraying all the while the premise of a prefigured order placing markets to one side and states to the other, their domains delimited by a determinate and apolitical rule of law. What appears instead is a particular kind of law, wedded to a particular institutional apparatus, and bestowed to a particular, privileged group of actors with a distinct interest in shaping and interpreting it in a particular, self-serving way. The rights and privileges that grow out of this thicket are wholly novel, the results of a system that is in the end skewed in a few select directions.

The capillary and constitutive nature of the two aspects was made particularly clear in the 1990 case of AAPL v. Sri Lanka.\textsuperscript{203} There, for the first time, ICSID recognized the notion of a “bifurcated consent to arbitration;” henceforth, states could be said to have offered, in an “ex ante, standing” fashion their consent to arbitrate any legal dispute arising from a given BIT, such that aggrieved investors could be said to then “perfect” this offer through the mere filing of a notice of arbitration.\textsuperscript{204} The panel recognized, then, the quite radical notion of “standing for a private investor to invoke treaty breach.”\textsuperscript{205} The possibility that the ICSID convention might be interpreted in such a way as to allow for this outcome had never been considered seriously up to that point.\textsuperscript{206} Tellingly, seventy four percent of ICSID’s disputes at present are “filed and decided” on the basis of AAPL’s reasoning.\textsuperscript{207} The institutions and actors comprising the field of investment law made much of the law that made them.

Critics must be careful not to accept and internalize uncritically the basic premises of the regime that emerge through this sort of circular constitution. To cast the regime’s more striking features as accidents or aberrations, and to encourage the law’s working itself pure through this or that reform project, is to allow for those premises to sink deeper into the terrain. These prod and shape

\textsuperscript{203} Pauwelyn, “Design” supra note 5 at 31.
\textsuperscript{204} \textit{ibid} at 31.
\textsuperscript{205} \textit{ibid} at 31.
\textsuperscript{206} \textit{ibid} at 31.
\textsuperscript{207} \textit{ibid} at 31.
common conceptions of what is fair and desirable. Reflexivity in their regard, then, is of the utmost importance. Consider the development of a so-called ‘right to regulate’ in the now-stalled negotiations of the Transatlantic Trade and Investment Partnership (TTIP) between the United States and the European Union. As part of a larger package intended to answer concerns regarding the existing ad hoc ISDS mechanisms, the proposed TTIP draft would have enshrined a right to regulate in relation to specifically outlined domains – in relation to the environment, for instance, or to public health. All others would be deemed not “legitimate.” Onlookers certainly have been invited to see this proposed framework as a reaffirmation of state regulatory authority; states, however, have never possessed a ‘right to regulate’ framed in precisely this way. It would be more accurate to describe this novel contrivance as an immunity pertaining to those carefully bounded domains of regulatory activity. Given the still paramount right to challenge offensive state activity, the result would not have been far from where things stand already: regulation would be presumed to be otherwise actionable, except in relation to certain identified domains. The only difference would have been the specificity of their identification. The TTIP would still have established precisely the inverse of the legal paradigm facing domestic investors and citizens. It would also have represented the acceptance and normalization of a notional boundary between markets and states, and of the belief that a global class of private actors should be entrusted to police it.

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208 See: TTIP supra note 33.
209 Ibid at Section 2, Article 2.
Concluding Remarks

The focus of this essay has been, in part, to demonstrate that the international regime of investment protection raises a handful of distributive justice problems. Of course, this is only one half of a larger project, as the questions raised in placing investment law on a plane of distributive justice do not answer themselves. It is hoped, however, that this opening salvo will be considered worthwhile, nonetheless. The debates in global justice philosophy provide useful frameworks through which certain normative propositions, as defensible as any, may be formulated and advanced. The integration of critical legal insights into those bodies of knowledge is meant to extend their reach, and to emphasize, if nothing else, that there are no privileged principles, concepts, or rationalities. Distributive norms are compelling, to be sure, but they are not truths to be uncovered – they are the foundations of cases to be made.