

Principles for a 21st Century Investment Law Regime (ver. 09/05/17)

Joint Working Group on Trade & Investment Law Reform,
Boston College Law School/Pontifical University of Chile Law Faculty

Professors Frank J. Garcia and Sebastian Lopez Escarcena, co-chairs

1. International Investment Agreements (IIAs) form a key part of global economic governance, whose role and responsibilities cannot be fully compassed by a private arbitration model alone.
2. As institutions that allocate social resources, IIAs and the international investment law regime as a whole are subject to basic principles of distributive justice. IIAs play a key role in allocating investment capital and legal rights and duties among home and host states, foreign investors, domestic investors, and a range of stakeholders within host state societies.
3. As such, the object and purpose of IIAs is to secure, allocate and protect investment capital and legal rights and duties, towards sustainable development. The protection of capital, therefore, is an instrumental value within the framework of IIAs, and should be understood in light of this object and purpose.
4. In view of the above, current IIA dispute settlement mechanisms (principally some form of investor-state arbitration) would benefit from reforms that would strengthen their capacity to deliver rule-of-law *desiderata* (transparency, predictability, certainty and coherence), such as a permanent arbitral court, a multilateral appellate mechanism, revised arbitrator codes of conduct, and other appropriate measures.
5. Also in view of the above, the capacity of the IIA regime to contribute outcomes promoting good governance and fairness would be enhanced by a range of substantive IIA reforms, including provisions recognizing reciprocal obligations (i.e., state counter-claims), allowing more balanced integration between investment and non-investment values (i.e., effective public policy exceptions), promoting proportionality between harm, claim and remedy (i.e., narrowed scope for National Treatment and Fair & Equitable Treatment claims), permitting a broader use of domestic institutions prior to accessing international justice, and limiting the potential effects of Most Favored Nation clauses to eviscerate more modern IIAs, among others.
6. Negotiation of new and modified IIAs would benefit from multilateral or plurilateral approaches that help minimize the distorting effects of power and information asymmetries among negotiating parties and key stakeholders. International Organizations, civil society, and academia can play key roles in minimizing information asymmetries and building capacity among host state negotiators.

Resources:

UNCTAD Investment Policy Framework for Sustainable Development,
http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_summary_en.pdf

IISD Model International Agreement on Investment for Sustainable Development
https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf

Center for International Governance Innovation (CIGI) Reports and Publications,
<https://www.cigionline.org/publications>

Columbia Center on Sustainable Investment Reports and Publications,
<http://ccsi.columbia.edu/publications/>