

INTRODUCTION

Domestic Investment Laws and International Economic Law in the Liberal International Order

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Abstract

International Economic Law (IEL) has largely regulated cross-border trade and investment in the post-WWII world. IEL has become an important part of the Liberal International Order that prescribes a set of rule-based relationships for international cooperation based on political liberalism, economic liberalism, and liberal internationalism. However, economic globalization has witnessed a relative decline, especially after the 2008 global financial crisis and the COVID-19 pandemic. This form of ‘de-globalization’ challenges the assumptions upon which modern IEL is premised. This introductory article to the special issue on ‘Domestic Investment Laws and International Economic Law in the Liberal International Order’ explains how domestic law has started playing an increasingly important role in regulating foreign investment. Often overlooked instruments such as Domestic Investment Laws, Investment Screening Mechanisms, and Investment Promotion Agencies are now important tools in promoting or restricting foreign investment flows. Expanding on this premise, the article examines the transition from international to domestic in the Liberal International Order with a focus on Domestic Investment Laws. The move to domestic law does not signal a new era of economic isolation for States. Instead, it presents an effort to achieve similar ends of attracting foreign investors using different means while exercising more control over foreign investment.

Keywords: domestic investment laws; foreign direct investment; investment screening mechanisms; liberal international order

1. Introduction

The Liberal International Order (LIO) established in the aftermath of WWII is a set of international rule-based relationships founded on political liberalism, economic liberalism, as well as liberal internationalism.¹ It builds on principles such as open markets, security cooperation, and liberal democracy. These are circumscribed by legal principles such as the (international) rule of law and human rights. Liberal internationalism involves international cooperation through multilateral institutions such as the international organizations forming part of the United Nations and the World Trade Organisation (WTO).²

The intergovernmentalism promulgated by the LIO lies between two extremes: the complete absence of international organized collaboration, on the one side, and the desire for a world

¹See generally M. Barnett (2021) ‘International Progress, International Order, and the Liberal International Order’, *Chinese Journal of International Politics* 14(1), 1 (on a contemporary account with further references).

²Bilateral Investment Treaties (BITs) covered ground in the area of foreign investment that had not been made subject to multilateral cooperation. See G. Dimitropoulos (2020) ‘The Conditions for Reform: A Typology of “Backlash” and Lessons for Reform in International Investment Law and Arbitration’, *The Law & Practice of International Courts and Tribunals* 18(3), 416.

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government, on the other.³ International bodies – and overall governance by international organizations – were also developed within a dialectic relationship between ‘nationalism’ and ‘internationalism’.⁴ Nationalism expresses the view that international institutions should be serving the interests of States; internationalism suggests instead that the purpose of international institutions is eventually to serve the global public good.⁵ In the post-WWII international order, international institutions of the economic sphere became vehicles for the liberalization of cross-border trade and investment; the dialectic seemed to have settled in favour of the international – at least when it came to economic matters.

In the aftermath of the 2008 global financial crisis, there has been a relative decline in economic globalization. Global trade has been receding since at least 2012,⁶ and global FDI has seen a dip since 2016.⁷ The COVID-19 pandemic has further accelerated these trends.⁸ This development has been described as ‘de-globalization’,⁹ or ‘slowbalization’.¹⁰

Overall, faith in the post-WWII LIO of international institutions is diminishing.¹¹ This is particularly the case with the institutions of the international economic order¹² – especially international investment arbitration – that had given shape to the internationalism of the post-WWII international order.¹³ We observe, as a result, a trend towards institutional and legal deglobalization too¹⁴ – or a process that we identify as ‘domestication’ of IEL. We understand domestication as a process of development of domestic rules instead of, or sometimes in parallel to the rules of international (economic) law.¹⁵ States have a sovereign right to regulate the entry and

³M. Mazower (2013) *Governing the World: The History of an Idea, 1815 to the Present*. Penguin Books, Introduction, xiii. The classic analysis of international relations, scholar Hedley Bull places the internationalist (or Grotian) tradition of inter-governmentalism between a realist (or Hobbesian) tradition that sees international politics as a constant state of war of all against all on the one side, and a cosmopolitan (or Kantian) tradition of cosmopolitanism based on federation on the other; H. Bull (1995) *The Anarchical Society: A Study of Order In World Politics*, 2nd edn. Macmillan, 23–26. See also in the frame of Domestic Investment Laws, Georgios Dimitropoulos, ‘The Right to Hospitality in International Economic Law: Domestic Investment Laws and the Right to Invest’, this special issue.

⁴Mazower, supra n. 3.

⁵Ibid.

⁶See IRC Trade Task Force, ‘Understanding the Weakness in Global Trade: What is the New Normal?’, Occasional Paper Series No. 178, September 2016, www.ecb.europa.eu/pub/pdf/scpops/ecbop178.en.pdf. The global economy experienced a significant contraction and an estimated shrink in the global trade volume of 9.2% in 2020; see WTO (2020) ‘Trade Shows Signs of Rebound from COVID-19: Recovery Still Uncertain’, www.wto.org/english/news_e/pres20_e/pr862_e.htm (accessed on 21 August 2022).

⁷See UN Conference on Trade and Development (2020) *Global Investment Trends Monitor*, Issue No. 33; UN Conference on Trade and Development (2019) *World Investment Report: SEZs*, 92, Doc. No. UNCTAD/WIR/2019.

⁸D. Irwin, ‘The Pandemic adds Momentum to the Deglobalisation Trend’, *Voxeu*, 5 May 2020, <https://voxeu.org/article/pandemic-adds-momentum-deglobalisation-trend> (accessed on 21 August 2022); according to the WTO, international trade is ‘set to plunge as COVID-19 pandemic upends global economy’; see WTO (2020), supra n. 6.

⁹W. Bello (2002) *Deglobalization: Ideas for a New World Economy*. Zed Books.

¹⁰L. D’Urbino (2019) ‘The Steam Has Gone Out of Globalisation’, *The Economist*, 24 January 2019, www.economist.com/leaders/2019/01/24/the-steam-has-gone-out-of-globalisation (accessed on 21 August 2022).

¹¹M. Mazower, supra n. 3, at Introduction, xiii.

¹²See generally F. Montanaro and F. Violi (2020) ‘The Remains of the Day: The International Economic Order in the Era of Disintegration’, *Journal of International Economic Law* 23(2), 299.

¹³See M. Waibel, A. Kaushal, K. Chung, and C. Balchin (2012) *The Backlash against Investment Arbitration: Perceptions and Reality*. Wolters Kluwer; M. Langford, D. Behn, and O.J. Fauchald (2018) ‘Backlash and State Strategies in International Investment Law’, in T. Aalberts and T. Gammeltoft-Hansen (eds.), *The Changing Practices of International Law*. Cambridge University Press; G. Wang (2010) International Investment Law: An Appraisal from the Perspective of the New Haven School of International Law’, *Asia Pacific Law Review* 18(1), 19–44; Dimitropoulos, supra note 2.

¹⁴See also G. Dimitropoulos (2021) ‘International Commercial Courts in the “Modern Law of Nature”: Adjudicatory Unilateralism in Special Economic Zones’, *Journal of International Economic Law* 24(2), 361, at 373.

¹⁵See also J. Chaisse and G. Dimitropoulos (2021) ‘SEZs in International Economic Law: Towards Unilateral Economic Law’, *Journal of International Economic Law* 24(2), 229–257.

establishment of foreign investment within their borders.¹⁶ Foreign trade and investment have a domestic life too – which remains largely understudied.¹⁷ Borrowing the concept of an ‘ecosystem’ from the field of ecology, we compare the diverse components of domestic rules regarding foreign trade and investment to the different biotic and abiotic components of an ecosystem. What results is a ‘foreign investment ecosystem’.¹⁸ The foreign investment ecosystem is currently growing in the process of domestication. There are three main types of domestic instruments and institutions regulating foreign investment: Domestic Investment Laws,¹⁹ Investment Screening Mechanisms,²⁰ and Investment Promotion Agencies.²¹ There are also non-investment specific laws relevant to cross-border trade and investment such as property laws and arbitration laws. Such laws co-exist with instruments of International Economic Law such as Free Trade Agreements (FTAs) and International Investment Agreements (IIAs).²² This article and special issue focus on the relationship between Domestic Investment Laws and IEL in the contemporary environment of contestation of economic globalization.

The domestication of IEL seems to be challenging the assumptions of the post-WWII international order. This article examines the ways in which the foundations of the LIO may be seen to be changing with the transition from international to domestic rules for the regulation, control, and/or promotion of cross-border trade and investment. The article is structured as follows: Section 2 discusses the origins and relationship between the LIO and contemporary international law. It then explores the process of ‘domestication’ of IEL. Section 3 provides a typology of domestic laws relating to foreign investment in the broader ‘ecosystem’ of domestic investment law; the main focus is Domestic Investment Laws. Section 4 concludes and outlines the special issue.

2. From Domestic to International in International Economic Law

The present section discusses the origins of both international law and the LIO, as well as conceptualizes the relationship between contemporary international law and the LIO. It finally discusses the process of what is identified in the article as the ‘domestication’ of IEL.

¹⁶See UN Conference on Trade and Development (2019) *World Investment Report: SEZs*, 92, Doc. No. UNCTAD/WIR/2019.

¹⁷But see G. Dimitropoulos (2020) ‘National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform’, *Journal of World Investment & Trade* 21(1), 71; S. Puig and G. Shaffer (2018) ‘Imperfect Alternatives: Institutional Choice and the Reform of Investment Law’, *American Journal of International Law* 112(3), 361.

The present article – and the broader special issue – does not deal with the treatment of domestic law in international investment arbitration; see, for example, K.H. Elisabeth (2013) *Applicable Law in Investor–State Arbitration: The Interplay between National and International Law*. Oxford: Oxford University Press. It does not deal with the impact of international investment law on domestic investment law, institutions, and governance. The literature covering this aspect of the interplay between international economic law and domestic is increasing; see, for example, M. Sattorova (2018) *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?*. Hart Publishing; J. Ostránský and F. Pérez-Aznar (2021) ‘Investment Treaties and National Governance in India: Rearrangements, Empowerment, and Discipline’, *Leiden Journal of International Law* 34(2) 373; N.J. Calamita and A. Berman (eds.) (2022) *Investment Treaties and the Rule of Law Promise: An Examination of the Internalisation of International Commitments in Asia*. Cambridge University Press.

¹⁸See section 3.1.

¹⁹UNCTAD, ‘Investment Laws: A Widespread Tool for the Promotion and Regulation of Foreign Investment’, Investment Policy Monitor Special Issue (November 2016), <https://investmentpolicy.unctad.org/publications/155/investment-laws-a-widespread-tool-for-the-promotion-and-regulation-of-foreign-investment>; see also section 3.2 below.

²⁰T. Voon and D. Merriman (2022) ‘Incoming: How International Investment Law Constrains Foreign Investment Screening’, *The Journal of World Investment & Trade* 23(3) 1–40; see also section 3.2 below.

²¹M. Zanatta (2006) ‘Foreign Direct Investment: Key Issues for Promotion Agencies’, Policy Brief-United Nations University 10, 1.

²²They also co-exist with more specialized domestic investment law instruments, including special jurisdictions such as Special Economic Zones (SEZs); see Chaisse and Dimitropoulos, *supra* n. 15.

2.1 International Law and the Liberal International Order: Origins and Crises

The twentieth century was marked by the Great Depression and two world wars. A new system was envisaged approximately 75 years ago to avert a repeat of the first half of the twentieth century's major man-made disasters. This is referred to today as the LIO. The LIO is a system based on rules that are applied equally to all countries and encourage each nation to be democratic and operate an open economy. It is a global system in the sense that all states are encouraged to join and adhere to the rules – even if some decide not to join or adhere to them. It is also a system that promotes order with subscribing countries bearing obligations to respect each other's borders and seek peaceful resolution of their differences. International institutions were established to serve as an aspirational blueprint for what became known as the liberal world order.²³

While these institutions laid the groundwork for the liberal world order, the US was ultimately responsible for its shaping and development after its victory in WWII and subsequent economic boom. The US attributed its success to democracy and free markets and urged other countries to improve their democratic institutions and develop economies that were open to trade and investment.²⁴ While entry into the LIO remains voluntary, exiting or refusing to engage with the institutions of the LIO is not a realistic option for most states.²⁵ The liberal economic model achieved near-hegemony – even though countries implemented some of the central tenets of the LIO, such as capitalism, differently. The majority of states have shifted to market-based economic management and are integrated into the global economic system.²⁶

IEL was shaped as a separate discipline of international law in an era of LIO dominance and has largely accommodated the freedom of movement of goods and capital.²⁷ This explicit or implied ideological dominance of LIO, as well as the legitimacy of this order and the international law it gave rise to, has receded gradually due to three interrelated developments: the rise of state capitalism as an opposing ideological paradigm, the crisis of international trade law, and the backlash against international investment law and arbitration.

'State capitalism' as a political and economic system puts LIO to the test.²⁸ State capitalism can be broadly defined as an economic system whereby the State plays an active role in business and

²³K. Hopewell (2021) 'Strategic Narratives in Global Trade Politics: American Hegemony, Free Trade, and the Hidden Hand of the State', *Chinese Journal of International Politics* 14(1), 51–86; J. Wilde and Y. Xing (2021) 'Comprehensive Sovereign Agency? China's Model of International Recognition', *Chinese Journal of International Politics* 14(1), 87–126.

²⁴A. Bradford and E. Posner (2011) 'Universal Exceptionalism in International Law', *Harvard International Law Journal* 52(1), 35–38. See also J. Kraska (2005) 'International Law, Economic Development, and Democracy', *Whitehead Journal of Diplomacy & International Relation* 6(2), 73.

²⁵Recent evidence on states withdrawing from international organizations or international organizations closing down reveals that these events primarily affect regional, specialized, or defunct organizations. For example, withdrawals from the World Tourism Organization (see P. Shackelford (2020) *Francesco Frangialli Becomes Secretary-General Ad Interim: A History of the World Tourism Organization*. Emerald Publishing Limited, 247–260; I. von Borzyskowski and F. Vabulas (2019) 'Hello, Goodbye: When Do States Withdraw from International Organizations?'. *Review of International Organizations* 14, 335–366, the International Whaling Commission (see M. Kolmaš (2021) International Pressure and Japanese Withdrawal from the International Whaling Commission: When Shaming Fails', *Australian Journal of International Affairs* 75(2), 197–216), and the United Nations Industrial Development Organization account for nearly a quarter of all international organization withdrawals in the post-war period. On withdrawals from IOs generally, see N. Blokker (2021) 'Withdrawing from International Organizations', *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development – Liber Amicorum Nico Schrijver*. Boston: Brill, 1–20; A. Morelli (2021) 'Appendix Table of Withdrawals', *Withdrawal from Multilateral Treaties, Series: Theory and Practice of Public International Law*, Vol. 4. Boston: Brill, 207–236; and I. von Borzyskowski and F. Vabulas (2019) 'Hello, Goodbye: When do States Withdraw from International Organizations?'. *Review of International Organization* 14, 335–366.

²⁶A. Kentikelenis and E. Voeten (2020) 'Legitimacy Challenges to the Liberal World Order: Evidence from United Nations Speeches, 1970–2018', *The Review of International Organizations* 16(3), 721–754.

²⁷S. Charnovitz (2019) 'The Historical Lens in International Economic Law', *Journal of International Economic Law* 22(1), 93–97.

²⁸I. Bremmer (2009) 'State Capitalism Comes of Age: The End of the Free Market', *Foreign Affairs* 88(3), 40; See also N. Ferguson (2012) 'We're All State Capitalists Now', *Foreign Policy* 9; L.A. Lin, and C.J. Milhaupt (2013) 'We Are the

commercial activity – through State-Owned Enterprises (SOEs) or otherwise.²⁹ State capitalism has exited the realm of the state and become a global paradigm of economic organization. SOEs such as Sovereign Wealth Funds (SWFs) and other government investors have started operating internationally and exercising significant economic influence across borders.³⁰ State capitalism is reshaping the foundations of international investment law,³¹ and raises, among others, issues relating to the protection of sovereign investments under IIAs, and posing thus potential challenges to the system of investor–state dispute settlement (ISDS).³²

The Doha Development Round has largely come to a deadlock. The main success in the multi-lateral negotiations since the establishment of the WTO has been the Trade Facilitation Agreement (TFA) and the agreement on export subsidies in agriculture.³³ The ‘Geneva Package’ adopted during the 12th Ministerial Conference on 17 June 2022, including among others a historic deal on fisheries subsidies, has been celebrated as a big success of multilateralism.³⁴ Still, the crown jewel of the WTO, i.e. the dispute settlement mechanism under the Dispute Settlement Understanding, remains under severe criticism. Washington has frequently criticized the Appellate Body’s (AB) operation, claiming that it ruled unfavourably against the US in trade disputes due to ‘judicial overreach’. In recent years, the US has obstructed new appointments to the AB. This has halted the appeals process, effectively shutting down the mechanism for resolving disputes.³⁵

(National) Champions: Understanding the Mechanisms of State Capitalism in China’, *Stanford Law Review* 65(4), 697; M. Du (2014) ‘China’s State Capitalism and World Trade Law’, *International & Comparative Law Quarterly* 63, 409.

²⁹On State-Owned Enterprises, see M. Feldman (2016) ‘State-Owned Enterprises as Claimants in International Investment Arbitration’, *ICSID Review* 31(1), 24–35; See also P. Blyschak (2011) ‘State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?’, *Journal of International Law and International Relations* 6(1), 1–49; I. Willemyns (2016) ‘Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?’, *Journal of International Economic Law* 19, 657; J. Chaisse (2016) ‘Untangling the Triangle: Issues for State-Controlled Entities in Trade, Investment and Competition Law’, in J. Chaisse and Tsai-yu Lin (eds.), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita*. Oxford Scholarship Online, 233–257.

³⁰IWG, ‘Sovereign Wealth Funds: Generally Accepted Principles and Practices’ (October 2008), www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf (accessed on 21 August 2022); IMF, ‘Sovereign Wealth Funds’, www.imf.org/external/pubs/ft/gfsr/2007/02/pdf/annex12.pdf (accessed on 28 December 2021); M. Burgstaller (2011) ‘Sovereign Wealth Funds and International Investment Law’, in C. Brown and K. Miles, *Evolution in Investment Treaty Law and Arbitration*. Cambridge University Press; R. Epstein and A.M. Rose (2009) ‘The Regulation of Sovereign Wealth Funds: The Virtues of Going Slow’, *University of Chicago Law Review* 76; F. Bassan (2015) *Research Handbook on Sovereign Wealth Funds and International Investment Law*. Edward Elgar Publishing.

³¹See generally P. Delimatsis, G. Dimitropoulos, and A. Gourgourinis (eds.) *State Capitalism and International Investment Law*. Hart; L.N.S. Poulsen (2012) ‘Investment Treaties and the Globalization of State Capitalism: Opportunities and Constraints for Host States’, in R. Ehandi and P. Sauvé (eds.), *Prospects in International Investment Law and Policy*. Cambridge University Press.

³²This is evidenced in investment claims such as *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, Kaliningrad Region v. Lithuania, Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan, Al-Kharafti and Sons Co. v. Libya, Abengoa S.A. y COFIDES S.A. v. Mexico, Beijing Urban Construction Group (BUCG) v. Yemen, and Ras-AI-Khaimah Investment Authority v. India*. see M. Feldman (2016) ‘State-Owned Enterprises as Claimants in International Investment Arbitration’, *ICSID Review* 31(1), 24–35.

³³See generally M. Elsig (2016) ‘The Functioning of the WTO: Options for Reform and Enhanced Performance’, E15 Expert Group on the Functioning of the WTO – Policy Options Paper. E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, <http://e15initiative.org/publications/functioning-wto-options-reform-enhancedperformance/>; A. Berger, C. Brandi, M. Elsig, A. Hoda, and X. Tu (2020) ‘Improving Key Functions of the World Trade Organization: Fostering Open Plurilaterals, Regime Management, and Decision-Making’, 20 November 2020 (Last updated 10 December 2020), www.g20-insights.org/policy_briefs/improving-key-functions-of-the-world-trade-organization-fostering-open-plurilaterals-regime-management-and-decision-making/.

³⁴WTO Members Secure Unprecedented Package of Trade Outcomes at MC12’, www.wto.org/english/news_e/news22_e/mc12_17jun22_e.htm.

³⁵A. Tirkey and S. Pradeep (2020) ‘The WTO Crisis: Exploring Interim Solutions for India’s Trade Disputes’, ORF Occasional Paper No. 274, Observer Research Foundation.

The ‘backlash’ against international investment law and its institutions is now commonplace and a symptom of the overall loss of faith in the institutions of global capitalism.³⁶ The backlash as well as the willingness to reform international investment law has been expressed by governments and other stakeholders in both the South and the North.³⁷ This shift could have far-reaching implications for the regime of foreign investment. The current crisis is acting as a catalyst to long-overdue change.

2.2 International Economic Law: Towards Domestication

In the immediate post-war years, there was a heavy reliance on domestic laws for the regulation of cross-border economic activity. The new states of the post-colonial world in Asia and Africa started developing domestic investment laws upon independence. This also attracted academic interest in the field during the 1950s and 1960s.³⁸ Some of the first studies focusing on domestic investment law were carried out by the United Nations regional commissions for Asia³⁹ and Africa.⁴⁰ This gave rise to a series of studies focussed on laws in other economic groupings and jurisdictions.⁴¹ These studies highlighted the different approaches adopted by states and focused among other things also on constitutional law, admission requirements, and guarantees against expropriation.

International law was thus less relevant for the regulation of cross-border trade until the middle of the 20th century. Foreign trade operated mostly with the unilateral opening of domestic borders and was supported by a series of Treaties of Friendship, Commerce, and Navigation (FCN).⁴² FCN Treaties were concluded bilaterally (usually) between Western States and included

³⁶See M. Waibel, A. Kaushal, K. Chung, and C. Balchin (2012), *The Backlash against Investment Arbitration: Perceptions and Reality*. Wolters Kluwer; M. Langford, D. Behn, and O.K. Fauchald (2018) ‘Backlash and State Strategies in International Investment Law’, in T. Aalberts and T. Gammeltoft-Hansen (eds.), *The Changing Practices of International Law*. Cambridge University Press. This backlash derives from mounting tension in recent years due mostly to certain historical path-dependencies in the field; see generally Dimitropoulos, supra n. 2.

³⁷See W.M. Reisman, ‘The Empire Strikes Back: The Struggle to Reshape ISDS’, *White & Case International Arbitration Lecture (The Lamm Lecture)* (16 February 2017), <https://ssrn.com/abstract=2943514>.

³⁸See K. Ahojja (1964) ‘Investment Laws and Regulations in Africa’, *The Journal of Modern African Studies* 2(2), 300; E. Nwogugu (1965) *The Legal Problems of Foreign Investment in Developing Countries*. Manchester University Press; K. Ahojja (1968) ‘Investment Legislation in Africa’, *Journal of World Trade* 2(5), 495; J.K. Chuang (1969) ‘Investment Laws in the Republic of China and the Republic of Korea: A Comparative Study’, *Journal of Law & Economic Development* 4, 338.

³⁹C.H. Alexander (1952) ‘Foreign Investment Laws and Regulations of the Countries of Asia and the Far East’, *International and Comparative Law Quarterly* 1(1), 29.

⁴⁰UNECA (1963) Investment Laws and Regulations in Africa <https://repository.uneca.org/bitstream/handle/10855/41638/Bib-48820.pdf?sequence=1&isAllowed=y> (accessed 10 February 2022).

⁴¹G.C. McKinnis (1978) ‘The Argentine Foreign Investment Law of 1976’, *Columbia Journal of Transnational Law* 17(3), 357; M.B. Pešelj (1968) ‘Yugoslav Laws on Foreign Investments’, *The International Lawyer* 2(3) 499–518; J.G. Scriven, (1979) ‘Yugoslavia’s New Foreign Investment Law’, *Journal of World Trade Law* 13, 95; J.W. Salacuse (1975) ‘Egypt’s New Law on Foreign Investment: The Framework for Economic Openness’, *The International Lawyer* 9(4), 647; H.R. Zheng (1986) ‘Foreign Investment Law in the People’s Republic of China: A 1986 Update’, *NYU Journal International Law & Politics* 19(2), 269; S. Juncadella (1982) ‘The Foreign Investment Laws of Latin America: Present and Future’, *The International Lawyer* 16(3), 463; C. Hardenberg (1986) ‘The German Foreign Investment Law-Taking Stock after 15 Years’, *International Business Law* 14(11), 397; P.D. Fidler (1999) ‘Foreign Private Investment in Palestine Revisited: An Analysis of the Revised Palestinian Investment Law’, *Case Western Reserve Journal of International Law* 31(2), 293; M.P. Porter (1999) ‘The Ethiopian Investment Law’, *ICSID Review* 14(2), 362; S.N. Carlson (1995) ‘Foreign Investment Laws and Foreign Direct Investment in Developing Countries: Albania’s Experiment’, *The International Lawyer* 29(3), 577–598.

⁴²J.F. Coyle (2013) ‘The Treaty of Friendship, Commerce and Navigation in the Modern Era’, *Columbia Journal of Transnational Law* 51(2), 302–359; H. Walker Jr. (1958) ‘Modern Treaties of Friendship, Commerce and Navigation’, *Minnesota Law Review* 42(5), 805–824. The US Reciprocal Trade Act of 1934 is a good example of a domestic law that led to a series of international agreements between the US and another 27 countries, as well as laid out the foundations of the GATT; see M.J. Hiscox (1999) ‘The Magic Bullet? The RTAA, Institutional Reform, and Trade Liberalization’, *International Organization*, 53(4), 669–698.

both trade and investment provisions. Separate international investment agreements started slowly being developed when decolonization of the South was well underway.⁴³ Specialized bilateral investment treaties started replacing FCN Treaties for investment and investor protection. International law largely replaced domestic law as the dominant system for cross-border trade and investment protection in the second half of the twentieth century.

It was the rise of LIO and economic globalization that led to the increasing adoption of international trade and investment agreements. The LIO signaled a shift from domestic to international; an increase in the conclusion of international investment treaties as well as a reduction in nationalization of foreign property. Academic interest in national investment laws dropped as well during the same time.⁴⁴ The World Bank published in 1992 a study of existing instruments focussing on the admission, treatment, expropriation, and dispute settlement sections of 48 developing country investment codes.⁴⁵ Since then, developing countries adopted some of the guidelines put forward by the World Bank study.⁴⁶ Developing countries often incorporated, for example, international arbitration into their domestic laws responding to the labeling of arbitration as ‘international best practice’ by the World Bank.⁴⁷

The crises of IEL discussed in the previous section are driving countries again towards the adoption of robust domestic frameworks for the management of foreign economic flows. IEL generally recognizes the regulation of FDI as a sovereign right of states. There are no general international obligations to allow market access to foreign investors and admit foreign investments into the host state. The standard BIT does not grant a right of admission to a foreign investor or any other type of pre-entry protection for foreign investment; BITs generally defer to the requirements of the host states.⁴⁸ The same is true for the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which includes no rules on pre-entry protection for foreign investments.

‘Domestication’ in IEL may be understood as a process of devolution from the international to the domestic, i.e. a transition from the use of international to domestic legal instruments for the regulation of cross-border trade and investment flows. States around the world have been

⁴³See A. Anghie (2005) *Imperialism, Sovereignty and the Making of International Law*. Cambridge University Press, Chapters 4, 5; D. Schneiderman (2019) ‘The Coloniality of Investment Law’, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3392034 (accessed on 21 August 2022). The majority of BITs until this day are between a country from the North and West, on the one side, and a country from the South and East, on the other. International investment law as a separate field of international law may be viewed as having been established with the 1959 Germany–Pakistan BIT, <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1732/germany--pakistan-bit-1959->.

Investment protection has otherwise been part of general international law in the form of the Minimum Standard of Treatment (MST). See generally T. Johnson Jr. and J. Gimblett (2010) ‘From Gunboats to Bits: The Evolution of Modern International Investment Law’, in K.P. Sauvant (ed.), *Yearbook on International Investment Law & Policy*. Oxford University Press, 649; See also S. Schill, C.J. Tams, and R. Hofmann (2018) *International Investment Law and History*. Edward Elgar; G. Wang (2010) ‘International Investment Law: An Appraisal from the Perspective of the New Haven School of International Law’, *Asia Pacific Law Review* 18(1), 19–44; T. St John (2018) *The Rise of Investor–State Arbitration: Politics, Law, and Unintended Consequences*. Oxford University Press.

⁴⁴C. Schreuer (1996) ‘International and Domestic Law in Investment Disputes: The Case of ICSID’, *Austrian Review of International and European Law Online* 1, 89; J.W. Salacuse (2007) ‘The Treatification of International Investment Law’, *Law and Business Review of the Americas* 13(1), 155; S. Shubber (2009) *The Law of Investment in Iraq*. Brill Nijhoff.

⁴⁵World Bank (1992) ‘Legal Framework for the Treatment of Foreign Investment’, Vol. 2.

⁴⁶The Guidelines noted that for ‘drafters of national laws on foreign investment, the provisions of the guidelines may, depending on the circumstances, needs and policies of the country concerned, be suggestive of desired provisions in the laws; or the guidelines may simply serve as a checklist of the types of matters that the laws might usefully address’; *Ibid*, at 14.

⁴⁷T. Berge and T. John (2020) ‘Asymmetric Diffusion: World Bank “Best Practice” and the Spread of Arbitration in National Investment Laws’, *Review of International Political Economy* 28(3), 584–610.

⁴⁸See, for example, Article 2(1) of the Model BIT of Germany (2005); see also UK Model BIT (2005, 2006), art 2(1); China Model BIT art 2(1). There are some ‘pre-entry BITs’, which grant market access to prospective investors. These BITs grant a right of admission, which is limited in scope, and is usually based on a national treatment clause; see, for example, US Model BIT (2004), Article 3(1).

resorting again in more recent years ever more frequently to domestic means to regulate foreign trade, investment, and finance. Policies aimed at attracting FDI have explicitly focused on attempts to improve the host nations' broader enabling environment.⁴⁹ An increasing number of nations are using domestic law to govern the entry and development of foreign investments, give assurances for the repatriation of profits, and resolve investment disputes.⁵⁰ Tax breaks are often provided too.⁵¹ Some governments, for example, have used very low corporate tax rates to entice foreign corporations – as well as to induce domestic enterprises to stay. Other policies have included preferential tariff regimes, reduced red tape, increased infrastructure investment, and educational initiatives. These domestic policies are often adopted with a view to replacing international legal instruments. South Africa, for example, decided to terminate or not to renew the BITs concluded after 1994. The Protection of Investment Act (PIA) of 2015 aims instead at replacing BITs as the main instrument for FDI regulation.⁵² Other countries enhance their domestic investment legal framework while continuing to pursue international economic agreements.

Overall, these changes may be interpreted as a move from the international to the domestic in IEL. Yet, the interplay between domestic and international in IEL is very complex. Domestic laws can be viewed as a source of international investment law, especially when it comes to investment treaty arbitration claims. Salacuse identifies domestic legal frameworks as one of the three legal layers of international investment that seek to encourage and control foreign investment.⁵³ Some scholars see domestic law as a formal source of foreign investment law.⁵⁴ Domestic investment laws may be interpreted as functioning as unilateral acts of states under international law.⁵⁵ Jarrod Hepburn argues that foreign investment laws (FILs) occupy a complicated position in public international law;⁵⁶ for this reason, claims under FILs are neither mere treaty claims nor contract claims. Instead, such claims possess a separate and distinct nature, raising unique questions of general international law – particularly the law of state responsibility and unilateral acts.⁵⁷ Over the last few decades, there has also been an increase in domestic investment law-based international arbitration claims.⁵⁸ Thus, recent studies have focussed on international arbitration resulting from domestic law – with a focus on issues such as consent to ICSID

⁴⁹See section 3.

⁵⁰See UN Conference on Trade and Development (2000) *Tax Incentives and Foreign Direct Investment* Doc No. UNCTAD/ITE/IPC/Misc.3.

⁵¹Ibid.

⁵²See section 3.2 below. See generally M.A. Forere (2017) 'The New South African Protection of Investment Act: Striking a Balance between Attraction of FDI and Redressing the Apartheid Legacies', in F. Morosini and M. Ratton Sanchez Badin (eds.), *Reconceptualizing International Investment Law from the Global South*. Cambridge University Press, 218.

⁵³J.W. Salacuse (2013) *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital*. Oxford University Press, 36.

⁵⁴F. Grisel (2014) 'The Sources of Foreign Investment Law', in Z. Douglas, J. Pauwelyn, and J. Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice*. Oxford University Press, 213, 222.

⁵⁵D.D. Caron (2010) 'The Interpretation of National Foreign Investment Laws as Unilateral Acts under International Law', in M.H. Arsanjani and J. Cogan (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*. Martinus Nijhoff Publishers, 649; M.M. Mbengue (2012) 'National Legislation and Unilateral Acts of States', in T. Gazzini and E.D. Brabandere (eds.), *International Investment Law: The Sources of Rights and Obligations*. Martinus Nijhoff Publishers, 183.

⁵⁶J. Hepburn (2020) 'Non-State Actors in International Dispute Settlement: The Case of Domestic Investment Statutes', in K. Scott, K. Claussen Charles-Emmanuel Côté, and A. Kanehara (eds.), *Changing Actors in International Law*. Martinus Nijhoff Publishers, 380–406.

⁵⁷J. Hepburn (2018) 'Domestic Investment Statutes in International Law', *The American Journal of International Law* 112, 658–705.

⁵⁸The Investment Arbitration Reporter database contains 76 profiles for arbitration claims instituted on the basis of domestic law, www.iareporter.com/arbitration-cases/ (accessed 20 December 2021).

arbitration in domestic investment laws,⁵⁹ and the risk of arbitration in accordance with domestic laws.⁶⁰

Independent of the exact classification of the role of domestic law under international law, the move to domesticate IEL does not generally signify a new era of economic isolationism for states. Instead, it is largely an effort to achieve similar ends of attracting foreign investors using different means while exercising at the same time more control over foreign investment. Thus, the domestication of IEL is not necessarily incompatible with the core values of IEL – that remain the freedom of cross-border movement of goods and capital. However, the domestication process in IEL still challenges the dominant paradigm of the LIO, where trade and investment were to be regulated at the international level by multilateral and other international rules and institutions.

The next section of the article turns to the discussion of laws relating to foreign investment with a focus on Domestic Investment Laws.

3. Laws Relating to Foreign Investment

Laws relating to foreign investment may be specialized, dedicated to investment, or non-specialized; they may include special provisions for foreign investors or may apply to any investor independent of nationality; they may be promoting and facilitating, or controlling foreign investment.⁶¹ This section of the article discusses Domestic Investment Laws and other laws relating to foreign investment in the broader ‘ecosystem’ of domestic investment law.

3.1 The Legal Ecosystem of Foreign Investment

A very broad set of diverse laws may have an impact on foreign investment. A national legislative and regulatory framework pertaining to foreign investment may be understood as forming an ‘ecosystem’ of domestic investment law. An ecosystem is a term from the field of ecology that can usefully be applied to describe the way domestic laws regulate investment.⁶² The legal ecosystem on foreign investment (Figure 1) has three distinct features. First, it is a system greater than the sum of its components. Second, any change in one element of the ecosystem impacts the rest of the system. Third, the ecosystem is organized as a hierarchy.

As shown in Figure 1, the legal ecosystem of foreign investment comprises interactions and relationships between players in the same region or section of the environment. The ecosystem’s ‘dynamic elements’ include law firms, law schools, in-house counsel, regulators, and alternative suppliers. Regulations and other external factors are examples of non-living components – and are the focus of the article.

The investment law ecosystem of a jurisdiction may be comprised of legislation that is specialized and specifically addressed to foreign investors; or it may be comprised of more general

⁵⁹M. Potesta (2011) ‘The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws’, *Arbitration International* 27(2), 149–170.

⁶⁰S. Nikiéma and N. Maina (2020) ‘The Risk of ISDS Claims through National Investment Laws: Another “Damocles Sword” Hanging Over Governments: COVID-19 Related measures?’, International Institute for Sustainable Development.

⁶¹See also on some of these distinctions G. Dimitropoulos (forthcoming) ‘The Viability of the Alternatives to International Investment Law and Arbitration: International and Domestic Perspectives’, in M. Reisman and N. Blackaby (eds.), *Arbitration beyond Borders: Essays in Memory of Guillermo Aguilar Álvarez*. Wolters Kluwer.

⁶²In the most basic definition, an ecosystem is a community or collection of living and non-living creatures and their interaction with each other in a given environment; see D.R. Blew (1996) ‘On the Definition of Ecosystem’, *Bulletin of the Ecological Society of America* 77(3), 171–173. See also M. Tsujimoto, Y. Kajikawa, J. Tomita, and Y. Matsumoto (2018) ‘A Review of the Ecosystem Concept – Towards coherent ecosystem design’, *Technological Forecasting and Social Change* 136(1), 49–58.

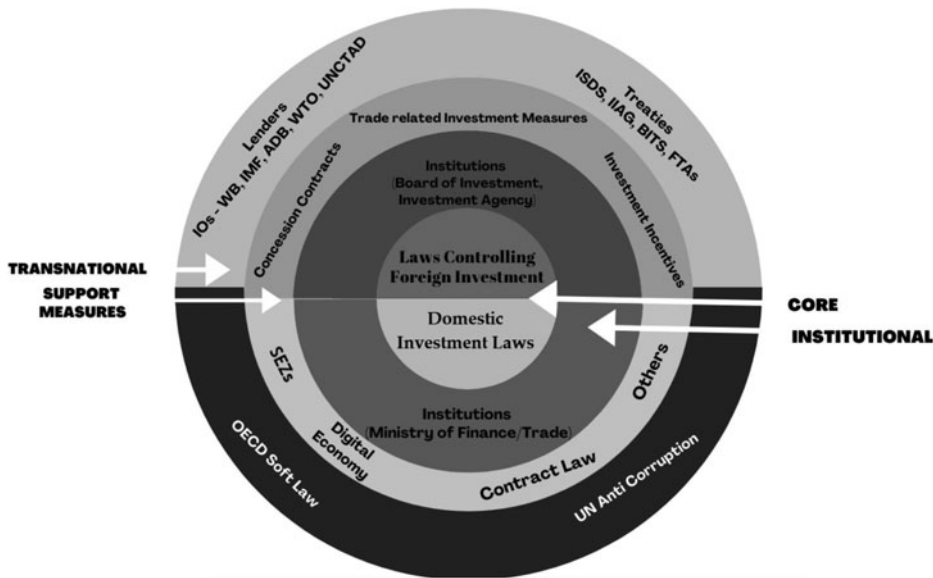


Figure 1. The Legal Ecosystem of Foreign Investment
Source: prepared by the authors.

legislative instruments that may have an impact on foreign investment flows.⁶³ Some countries have no laws to regulate investment specifically. Jurisdictions with a more liberal approach to foreign investment often choose not to have laws specifically addressed to prospective investors.⁶⁴ Hong Kong, for example, has no general investment legislation governing the admission of foreign investment.⁶⁵ Hong Kong's laws do not differentiate between domestic and foreign investors; foreign investors are treated like domestic investors and the general competition law applies to them, as well as regulations governing mergers and acquisitions. Jurisdictions with less liberal approaches to FDI have also sometimes followed the same approach.⁶⁶

There are many laws that form part of the broader legal ecosystem but are not always designed specifically to promote and/or facilitate foreign investment. Public procurement and Public-Private Partnerships (PPPs) are the two main financing tools that are used to attract private

⁶³See generally S. Globerman and D. Shapiro (2003) 'Governance Infrastructure and US Foreign Direct Investment', *Journal of International Business Studies* 34(1), 19–39; see also F.L. Bartels and S.A. de Crombrughe (2009) 'FDI Policy Instruments: Advantages and Disadvantages', Working Paper 01/2009, United Nations Industrial Development Organization.

⁶⁴Countries operating under this system will have the tendency to attract high volumes of stocks and/or FDI in services; see United Nations Conference on Trade and Development Report, 'Measuring Restrictions on FDI in Services in Developing Countries and Transition Economies, New York and Geneva', 2006 (mentioning the examples of Chile, Bolivia and the Czech Republic).

⁶⁵T. Miller, A.B. Kim, and J.M. Roberts (2018) *2018 Report of Index of Economic Freedom*. The Heritage Foundation, 215. At the same time, Hong Kong has only signed a limited number of FTAs and BITs; see Hong Kong, China SAR, on UNCTAD's Investment Policy Hub, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/93/hong-kong-sar-china>.

⁶⁶In China, under the previous legal regime foreign investors had to resort to laws and regulations and fulfil certain sectoral requirements to be admitted for investment in the relevant sectors; see The Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures, the Law of the People's Republic of China on Wholly Foreign-owned Enterprises, and the Law of the People's Republic of China on Sino-Foreign Cooperative Joint Ventures shall be repealed simultaneously. On the previously applicable laws, see M. Williams (2009) 'Foreign Investment in China: Will the Anti-monopoly Law Be a Barrier or a Facilitator?', *Texas International Law Journal* 45(1), 127. The new investment law progressively abolishes the old regulatory framework in favour of a general investment law for all sectors of the economy.

investment, often foreign,⁶⁷ for public projects.⁶⁸ Many countries have used PPP laws as a substitute for or complement to international investment law. The government of Ecuador, for example, famously terminated several BITs based on the findings of a committee tasked with auditing Ecuador's IIAs – the Ecuador Investment Treaties Audit Commission (CAITISA).⁶⁹ At the same time, it introduced a new PPP law with the aim of replacing the international law protection mechanism with a domestic framework.⁷⁰

An often-disregarded category of laws of the broader legal ecosystem of foreign investment are property laws. Many jurisdictions place restrictions on real estate ownership by foreigners; for instance, countries in the Middle East and North Africa Region have traditionally had in place laws limiting the purchase of land by foreign nationals. Latin American countries, on the other side, are often open to foreign investment in real estate and infrastructure sectors, making foreign ownership of land and investment in infrastructure generally possible.⁷¹ Besides property laws, employment laws will have an impact on foreign investment too. Nationality and residence laws are equally important. Governments have started placing a greater emphasis on these aspects of the domestic investment framework by giving, for example, nationality to foreign investors or adopting 'golden visa' schemes to attract foreign investors.⁷² In the digital age, new types of laws are added to the overall foreign investment ecosystem,⁷³ amongst which laws governing data – whether commercial or personal.⁷⁴

Laws and institutions pertaining to dispute settlement are also an integral part of the ecosystem. National arbitration laws often form part of the factors foreign investors consider when deciding to invest in a foreign jurisdiction. National arbitration laws are often drafted based on an international arbitration law template, such as the UNCITRAL Model Law, with a view to reassuring foreign investors that potential disputes will be adjudicated based on arbitration laws with which they are familiar.⁷⁵

⁶⁷Privatization has often been seen in different countries as transferring control of national interests to foreign parties; see P. Starr (1988) 'The Meaning of Privatization', *Yale Law and Policy Review* 6(1), 32.

⁶⁸See generally P. Burger and I. Hawkesworth (2011) 'How to Attain Value for Money: Comparing PPP and Traditional Infrastructure Public Procurement', *OECD Journal on Budgeting*, Organisation for Economic Cooperation and Development.

⁶⁹Ecuador Investment Treaties Audit Commission (CAITISA), 'Findings and Recommendations', www.tni.org/en/article/why-did-ecuador-terminate-all-its-bilateral-investment-treaties (accessed 20 December 2021).

⁷⁰See J. Jaramillo and R. Montalvo, 'The New Ecuadorian PPP Act: A New Opportunity for Foreign Investment? Some Caveats Regarding Arbitration', *Kluwer Arbitration Blog* (19 February 2017), <http://arbitrationblog.kluwerarbitration.com/2017/02/19/the-new-ecuadorian-ppp-act-a-new-opportunity-for-foreign-investment-some-caveats-regarding-arbitration/> (accessed 10 February 2022). Eventually, the government presented in March 2018 a new Model BIT that draws on the conclusions of the CAITISA. The PPP served thus enabled a smooth reactivation of the engagement of Ecuador with the international investment regime; see S. Espinosa, 'The Evolution of the System of Foreign Investment Protection in Ecuador', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*. Singapore: Springer, 2645–2676.

⁷¹See Global Property Guide, Property Rights Index in Latin-America, www.globalpropertyguide.com/Latin-America/property-rights-index (accessed 20 December 2021).

⁷²See A. Christians (2017) 'Buying In: Residence and Citizenship by Investment', *Saint Louis University Law Journal* 62 (51), 51–71.

⁷³See generally G. Dimitropoulos (forthcoming) 'Law and Digital Globalization', *University of Pennsylvania Journal of International Law*.

⁷⁴See, for example, A.D. Mitchell and T. Samlidis (2022) 'Cloud Services and Government Digital Sovereignty in Australia and Beyond', *International Journal of Law and Information Technology* 30(1), 1–31; J. Chaisse, "'The Black Pit': Power and Pitfalls of Digital FDI and Cross-Border Data Flows', this special issue.

⁷⁵See recently Federal Law No. 6 of 2018 ('Arbitration Law') of the United Arab Emirates; see also Arentsen, N., and Matthew S. Weber, 'UNCITRAL Model Law: Still a Model or Second Best?', *Kluwer Arbitration Blog* (1 July 2014) <http://arbitrationblog.kluwerarbitration.com/2014/07/01/uncitral-model-law-still-a-model-or-second-best/> (accessed 23 December 2021).

3.2 Domestic Investment Laws

More recently, countries around the world have started adopting specialized investment laws. Laws that control and restrict foreign investment have started becoming popular. Almost all major economies have in place mechanisms to control inward investment flows. One can distinguish between two main types of foreign investment control: outright prohibition and screening.⁷⁶ Some countries – either alongside or without a formal review process – may prohibit foreign investment in certain industries or restrict market access to certain sectors or (the extent of) ownership in certain sectors, such as very often in the natural resource and real estate sectors. For example, Russia does not allow foreign investors and foreign SOEs to gain majority interests in ‘business entities of strategic importance for national defence and state security’ in industries such as defence, oil and gas, and aviation.⁷⁷ France uses the *Banque publique d’investissement* (Bpifrance) to block takeovers of ‘strategic companies’ in which the government owns shares by using the ‘golden share’ mechanism, as well as further actions such as sanctions imposed by the Minister for the Economy and Finance.⁷⁸

Amongst foreign control mechanisms, investment screening statutes establishing foreign investment screening mechanisms have become widespread.⁷⁹ Most countries in the West have now established investment screening mechanisms to control investment flows from emerging economies.⁸⁰ The example of the Committee on Foreign Investment in the United States (CFIUS), an interagency committee established in 1975 by President Gerald Ford, has often

⁷⁶Cf with a tripartite differentiation M. Burgstaller (2011) ‘Sovereign Wealth Funds and International Investment Law’, in C. Brown and K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration*. Cambridge University Press.

⁷⁷Federal Law N57-FZ (2008) ‘Procedures for Foreign Investments in the Business Entities of Strategic Importance for Russian National Defence and State Security’.

⁷⁸See Government of the French Republic, PACTE, the Action Plan for Business Growth and Transformation, www.economie.gouv.fr/plan-entreprises-pacte and <https://www.gouvernement.fr/en/pacte-the-action-plan-for-business-growth-and-transformation>. Bpifrance recorded losses in 2020 after having made significant financial provisions due to the COVID crisis. However, Bpifrance recorded in 2021 a historic net profit of 1.8 billion euros which is almost double the previous record of 2019, confirming thus its important role in the French economic system; see Romain Geugneau, Bpifrance, acteur incontournable de la gestion de crise et de la relance, *Les Echos* 3 February 2022 <https://business.lesechos.fr/entrepreneurs/financer-sa-croissance/0700865337182-bpifrance-acteur-incontournable-de-la-gestion-de-crise-et-de-la-relance-346976.php>.

⁷⁹See generally A.G. Wint (1992) ‘Liberalizing Foreign Direct Investment Regimes: The Vestigial Screen’, *World Development* 20(10), 1515–1529; K.P. Sauvart (2009) ‘FDI Protectionism is on the Rise’, Policy Research Working Paper 5052, Washington, DC: International Trade Department, The World Bank, Washington; H.-T. Shin and J.A. Kim (2011) ‘Balancing the Domestic Regulatory Need to Control the Inflow of Foreign Direct Investment Against International Treaty Commitments: A Policy-Oriented Study of the Korean Foreign Investment Promotion Act and the Korea–US FTA’, *Asia Pacific Law Review* 19(2), 177–194; M. Holden (2007) ‘The Foreign Direct Investment Review Process in Canada and Other Countries’, Parliamentary Information and Research Service, Ottawa; H.T. Moran (2017) ‘CFIUS and National Security: Challenges for the United States, Opportunities for the European Union’, Peterson Institute for International Economics (PIIE). The rise of screening mechanisms has been identified since at least 2012; see S.T. Anwar (2012) ‘FDI Regimes, Investment Screening Process, and Institutional Frameworks: China versus Others in Global Business’, *Journal of World Trade* 46(2), 213–248; J. Chaisse (2015) ‘Demystifying Public Security Exception and Limitations on Capital Movement: Hard Law, Soft Law and Sovereign Investments in the EU Internal Market’, *University of Pennsylvania Journal of International Law* 37(2), 583; Y. Li and C. Bian (2016) ‘A new dimension of foreign investment law in China – evolution and impacts of the national security review system’, *Asia Pacific Law Review* 24(2), 149–175; G. Grieger (2019) ‘EU framework for FDI screening’, PE 614.667 European Parliamentary Research Service, 4. The World Investment Report also includes a chapter dedicated to domestic investment measures, including screening mechanisms; see for example UNCTAD (2019) *World Investment Report: Special Economic Zones*. UN, 96. The OECD has developed the ‘FDI Regulatory Restrictiveness Index’, <https://www.oecd.org/investment/fdiindex.htm>.

⁸⁰The primary source of concern for Western countries has been outward investment primarily by Chinese SOEs whose ownership is unknown (see for example L. Knight and T. Voon (2020) ‘The Evolution of National Security at the Interface between Domestic and International Investment Law and Policy: The Role of China’, *Journal of World Investment & Trade* 21, 104–139), and the fear that Chinese companies will not invest abroad in accordance with market and commercial criteria (cf. generally C. Milhaupt and W. Zheng (2015) ‘Beyond Ownership: State Capitalism and the Chinese Firm’, *Georgetown Law Journal* 103, 705–707).

been followed.⁸¹ Countries from other regions already have a longstanding tradition of controlling foreign investment flows.⁸² Investment screening mechanisms block or limit the entry of foreign investors, generally or for certain sectors, and/or subject them to requirements listed in the law. Protection of national security interests is the main driver behind the establishment of investment screening mechanisms.⁸³ Contemporary investment screening laws move beyond national defence and link national security to three additional considerations: the involvement *per se* of SOEs; protection of critical technologies with a view to keeping a technological edge in today's competitive economy; and the protection of critical infrastructure.⁸⁴

Other legislative frameworks still aim at promoting and/or facilitating foreign investment. Investment promotion and/or facilitation laws aim at achieving their result by providing – organizational, infrastructural, and/or fiscal – incentives for foreign investment in certain sectors.⁸⁵ Tax incentives, for example, have long been used to attract, retain, and expand business. By creating more job opportunities, they in turn have significant local benefits. Nationals will benefit from increased employment and income as a result of more local jobs. More jobs may result in 'fiscal benefits' in the form of increased tax income that exceeds growth-induced increases in government expenditures.⁸⁶

Different jurisdictions also have different institutional set ups to manage the domestic investment ecosystem. National authorities must determine the amount of decision-making power that will be transferred to lower levels of government. This decision is determined by the type of FDI incentive methods adopted. Providing the local level of governance with greater leeway, for example, often allows nations to benefit from the detailed knowledge of sectors that local state actors typically possess. Further, investment projects then become more locally accessible. However, this comes with the risk of inciting competitive bidding and other wasteful activities within the jurisdiction.⁸⁷ Some countries establish, instead, Investment Promotion Agencies (IPAs) to proactively promote and facilitate foreign investment in their jurisdiction at the central government level.⁸⁸ Irrespective of where administrative and political responsibility is assigned, it is widely acknowledged that the implementation of FDI incentives should be driven by a set of clearly defined policies conveyed to the appropriate authorities by policymakers. Greater standards of accountability and transparency to the general public provide clarity and allow for generalized support of the investment policies.⁸⁹ On the other side, political pressure and media

⁸¹Apart from the US, countries such as Australia, Canada, Japan as well as Member States of the European Union (EU) have investment screening mechanisms in place. According to UNCTAD, at least 11 countries have introduced new laws for the screening of foreign investment since 2011, while 41 significant amendments in 15 jurisdictions have taken place during the same time, and even more are forthcoming; see UNCTAD (2019) 'World Investment Report: SEZs', UN, 94.

⁸²According to the OECD FDI Regulatory Restrictiveness Index, www.oecd.org/investment/fdiindex.htm, the majority of the countries that are the most restrictive, and at the same time the ones that will most probably feature a screening mechanism, fall under two categories: Countries in the Asia-Pacific region, and larger countries; see S. Thomsen and F. Mistura (2017) 'Is Investment Protectionism on the Rise? Evidence from the OECD FDI Regulatory Restrictiveness Index', Global Forum on International Investment, www.oecd.org/investment/globalforum/2017-GFII-Background-Note-Is-investment-protectionism-on-the-rise.pdf, at 3–4.

⁸³See Dimitropoulos, *supra* n. 17.

⁸⁴See European Commission, 'Review of National Rules for the Protection of Infrastructure Relevant for Security of Supply', final report, February 2018; G. Grieger. Foreign Direct Investment Screening: A Debate in Light of China–EU FDI flows, European Parliamentary Research Service (Briefing May 2017), Members' Research Service PE 603.941, at 4.

⁸⁵T. Krista (2012) 'Review of Investment Incentives Best Practice in Attracting Investment', International Growth Centre.

⁸⁶T.J. Bartik (2018) 'Who Benefits from Economic Development Incentives? How Incentive Effects on Local Incomes and the Income Distribution Vary with Different Assumptions about Incentive Policy and the Local Economy', Upjohn Institute Technical Report No. 18-034, Kalamazoo, MI: W.E. Upjohn Institute for Employment Research. Providing budgets for such incentives often means that states and local governments neglect public services; *ibid*.

⁸⁷Checklist for Foreign Direct Investment Incentive Policies, www.oecd.org/investment/investment-policy/2506900.pdf (accessed on 28 December 2021).

⁸⁸Zanatta, *supra* note 21.

⁸⁹It may, however, it may be impossible to hold policy execution to such high standards; see *ibid*.

speculation make the management of incentive schemes more challenging. When FDI incentives are contested in the legislature or the media, it is particularly difficult for public sector managers to negotiate with prospective investors.⁹⁰

The article – as well as broader special issue – focuses on Domestic Investment Laws (DILs) that seek to promote and/or facilitate foreign investment. While different types of laws and institutions in the broader foreign investment ecosystem touch upon investment, DILs may be defined as specialized statutes that seek to promote and regulate (foreign) investment in one single document.⁹¹ While thematically specialized, DILs apply in the whole jurisdiction of the country that adopts them.⁹²

DILs and their recent coming into vogue remain largely understudied.⁹³ Developing countries have historically promulgated statutes promoting and facilitating (foreign) investment in one single instrument.⁹⁴ These laws vary significantly in scope and include foreign investment codes, national investment codes, etc. Some countries, while having in place DILs, provide for the same or similar treatment to both domestic and foreign investors.⁹⁵ For example, the South African Protection of Investment Act of 2015 applies to both national and foreign investors.⁹⁶ The statute safeguards national treatment to foreign investors.⁹⁷ Other countries choose instead to adopt DILs that apply exclusively to foreign investors. Countries in the Gulf Region – such as Qatar, Kuwait, and the United Arab Emirates – have traditionally followed this approach. Their foreign investment statutes place restrictions on the participation of foreign investors in certain sectors of the economy, and/or mandate the involvement of nationals in economic activity. Non-nationals are usually allowed to invest in most sectors of the economy provided that they become shareholders in a company that is established according to national law and that they

⁹⁰See E.C. Donciu (2014) ‘Promoting and Attracting Foreign Direct Investment’, CES Working Papers, 6(3), Centre for European Studies, Alexandru Ioan Cuza University, Iasi, Romania

⁹¹In its database, UNCTAD counts 186 investment laws; see UNCTAD Investment Laws Navigator <https://investmentpolicy.unctad.org/investment-laws> (accessed 10 February 2022).

⁹²The difference between DILs, on the one side, and special jurisdictions such as SEZs, on the other side, is that the zones carve out a ‘special’ jurisdiction for a separate economic regime within the country. Rules applied in these areas differ from the rest of the domestic jurisdiction and are specifically designed with a view to promoting foreign investment and trade in the zone. Overall, SEZ regimes differ from DILs in geographic scope, substance, and governance mechanisms. See generally FIAS (2008) ‘Special Economic Zone: Performance, Lessons Learned, and Implication for Zone Development’, World Bank, Washington; T. Farole and G. Akinci (2011) *SEZs: Progress, Emerging Challenges, and Future Directions*. Washington: World Bank; UNCTAD (2019) *World Investment Report 2019 – SEZs*. UNCTAD, 128; Chaisse and Dimitropoulos, *supra* n. 15.

⁹³But see A.R. Parra (1992) ‘Principles Governing Foreign Investment, as Reflected in National Investment Codes’, *ICSID Review – Foreign Investment Law Journal* 7(2) 428–452; M. Burgstaller and M. Waibel (2011) ‘Investment Codes’, *Max Planck Encyclopaedia of Public International Law*; UNCTAD, *supra* note 19. There seems to be a recent resurgence in interest in DILs in legal scholarship. Some studies focus on the domestic laws of specific states; see for example D.N. Dagbanja (2014) ‘The Changing Pattern and Future of Foreign Investment Law and Policy in Ghana: The Role of Investment Promotion and Protection Agreements’, *African Journal of Legal Studies* 7, 253. Other studies focus on a comparison of domestic laws in economic regions like the ASEAN; see J. Bonnitcha (2017) ‘Investment Laws of ASEAN Countries: A Comparative Review’, International Institute for Sustainable Development. Some studies focus on the treatment of DILs under international law; see J. Hepburn (2017) *Domestic Law in International Investment Arbitration*. Oxford University Press, 2.

⁹⁴A.R. Parra (1992) ‘Principles Governing Foreign Investment, as Reflected in National Investment Codes’, *ICSID Review – Foreign Investment Law Journal* 7(2), 428–452.

⁹⁵The OECD Declaration on International Investment and Multinational Enterprises includes a commitment by the OECD’s 30 member countries and seven non-member countries to provide national treatment to foreign enterprises operating in their territories and to encourage multinational enterprises to engage in responsible business practices. ‘OECD Declaration on International Investment and Multinational Enterprises’ (21 June 1976; reviewed and amended 1979, 1984, 1991, 2000, and 2011), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0144>, section II.

⁹⁶Act No. 22 of 2015: Protection of Investment Act, 2015, Government Gazette Vol. 606 Cape Town 15 December 2015 No. 39514.

⁹⁷See Section 8 of PIA.

have a local partner that contributes no less than 51% of the capital of the company.⁹⁸ This has recently started changing as more Gulf countries adopt new foreign investment laws lifting some of these restrictions.⁹⁹

Unlike the rules of international investment law, DILs are unilateral laws stipulated at the domestic level, which may extend protection to both domestic and foreign investors.¹⁰⁰ DILs are introduced with a view to applying domestic law either instead of or in parallel with the instruments of international economic law as a way to attract foreign investment and provide safeguards to foreign investors.

4. Conclusion and Outline of the Special Issue

The focus of this special issue is on the relationship between DILs, as well as other aspects of the domestic legal ecosystem of foreign investment, and IEL. The articles cover a broad range of theoretical issues pertaining to DILs and international investment, as well as more concrete applications of the interplay between these two means of regulating cross-border economic flows.

Jarrod Hepburn in the Article titled 'The Past, Present and Future of Domestic Investment Laws and International Economic Law' discusses the history and the future of domestic 'facilitative' investment laws. These statutes encourage foreign investment by providing substantive protections to foreign investors as well as consent to international arbitration over investment disputes. The author suggests that while investment treaties perform very similar functions to facilitative investment laws, states have had independent reasons to enact domestic laws alongside the international agreements. The article then argues that investment laws can be characterized either as unilaterally assumed international obligations or as simple domestic laws. The different classification leads to varying consequences. Finally, the article discusses four possible futures for investment laws: contamination, continuation, compromise, and contestation.

In the contribution to this issue titled 'Domestic Investment Incentives in International Economic Law', Anastasios Gourgourinis discusses various types of domestic investment incentives and how they are dealt with under the WTO agreements. Investment incentives are often included in domestic investment laws aiming at influencing investment location decisions by creating favourable conditions for foreign investment. The article explains that the WTO agreements set implicit constraints on potentially trade-distorting investment incentives. The author finally claims that this poses limitations to the process of domestication in IEL.

The article by Anna Sands discusses 'Regulatory Chill and Domestic Law: Mining in the *Santurbán Páramo*'. The article – deviating from methodological orthodoxy – addresses regulatory chill from the perspective of the state itself. The article fills a gap in the relevant scholarship by providing an analysis of the interplay of domestic laws and institutions in the context of potential investment claims – using a case study of mining in the *Santurbán páramo* region in Colombia. Colombia had created laws and institutions internalizing international investment rules. The article highlights instead the role of domestic constitutional law in averting regulatory chill. The case study also adds to the discussion of how the contemporary international order may be shifting from international to domestic governance. It does so by stressing that domestic laws and institutions may have diverging priorities, which also determines how the risk of investment claims may be dealt with domestically.

⁹⁸For example, foreign investors were allowed until 2018 to only invest in Qatar in accordance with the provisions of Law No. 13 of 2000 'Regulation of the Investment of Non-Qatari Capital in the Economic Activity'. Foreign investment was generally limited to 49% of the capital for most business activities with Qatari partner(s) holding at least 51%. Foreign investors were not allowed to invest under Law No. 13 of 2000 in commercial agencies or, broadly speaking, real estate; see the old Investment Law No. 13 of 2000 Article 2.3. Nr. 2.

⁹⁹See, for example, the new Qatar Law No. (1) of 2019 'On Regulating Non-Qatari Capital Investment in the Economic Activity'.

¹⁰⁰On the new economic unilateralism in IEL see Chaisse and Dimitropoulos, supra n. 15.

Julien Chaisse's article titled "The Black Pit." Power and Pitfalls of Digital FDI and Cross-Border Data Flows' addresses the relationship between international investment and increasing cross-border data flows. It discusses the legal aspects of new data paradigms in the broader framework of globalization and the LIO. The author discusses the interplay between national and international legal regimes, and how the changing nature of the LIO impacts cross-border data flows. The article addresses the lack of overarching international legal and policy frameworks governing cross-border data flows, and puts forward the proposal to update existing international agreements with a view to including digital FDI.

In a contribution titled 'The Right to Hospitality in International Economic Law', Georgios Dimitropoulos discusses the ways in which investment law has been shaped in the interaction between national and international rules. While under the LIO, investment protection to foreign investors was supposed to be granted by international law and institutions, current economic de-globalization is giving way to institutional and legal de-globalization. DILs, and other domestic laws relating to foreign investment, are largely playing the role BITs and other IIAs used to perform. This suggests a move away from some of the principles of the LIO. The author provides an explanation for this process based on an alternative political economy for international and domestic law. The cornerstone of this new law and political economy framework is a 'right to hospitality', which is reflected in a 'right to invest' in IEL.

Kehinde Olaoye and Muthucumaraswamy Sornarajah discuss – in a contribution titled 'Domestic Investment Laws, International Economic Law, and Economic Development' – how 'development' continues to be at the forefront of the interaction between DILs and IEL. The study of over 3000 IIAs and DILs signed in the last 70 years helps the authors identify the ways in which development as a concept has evolved together with the growth of IEL. The authors then break down the history of international investment law in six main phases, and trace the emergence of 'development' as a pertinent topic in DILs to the decolonization era. They also look into the interpretation of 'investment' by ICSID tribunals, the continued relevance of the New International Economic Order, and the more recent shift to sustainable development in academic debates and practice in IEL.

The article of Xu Qian titled 'Domestic Investment Laws and State Capitalism' suggests that state capitalism and the LIO are in a competitive relationship. While IEL during the LIO has generally aimed at reducing the role of the state in the economy, SOEs have more recently increased in size and importance domestically, as well as internationally. The article undertakes an analysis of the principles and of state capitalism with a view to understanding whether domestic laws promoting investment are positive, negative, or neutral to state capitalists.

Tarald Gulseth Berge and Ole Kristian Fauchald, in their contribution titled 'International Organizations, Technical Assistance, and Domestic Investment Laws', discuss how international organizations have been trying to shape domestic laws aimed at protecting foreign investment. While the influence of international organizations has been generally assumed to operate through loan conditionalities, the article studies the influence of international organizations on domestic policy through technical assistance. The empirical study presents a cross-sectional mapping of the protection offered by states to foreign investors in DILs, as well as a mapping of the advisory activities of the three main organizations active in the field of technical assistance – the United Nations Conference on Trade and Development, the Organization for Economic Co-operation and Development, and the World Bank. The authors find significant variations in the protection offered under DILs, as well as the types of technical assistance offered across international organizations – as well as by the different international organizations over time.

Finally, Pasha Hsieh, in his article on 'New Investment Rulemaking in Asia: Between Regionalism and Domestication', provides an analysis of investment rulemaking in the context of new Asian regionalism as well as emerging and evolving national legislation of Southeast Asian states. The author suggests that the Association of Southeast Asian Nations (ASEAN) and the Regional Comprehensive Economic Partnership (RCEP) represent Asia's 'pragmatic

incrementalism' in reforming the investment regime. This is, according to the author, a process that reinforces the relationship between IEL and DILs. Alongside transforming international investment agreements, ASEAN expedited investment and trade in services and established ISDS. The author argues that RCEP further consolidates ASEAN Plus One agreements – despite the exclusion of ISDS. The article then discusses the Asian countries' recent investment agreements as well as domestic dispute settlement that seems to complement the LIO. The author concludes that the Asian paradigm may provide a model for developing countries and emerging economies, as well as contribute to the broader discussion on global investment reform.

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