

ORIGINAL ARTICLE

# International Organizations, Technical Assistance, and Domestic Investment Laws

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## Abstract

Can supranational actors influence domestic policy? In this article, we study how international organizations have sought to shape the contents of domestic laws aimed at protecting foreign investment. Traditionally, the influence of international organizations on public policy has been assumed to run through loan conditionalities. We build on a recent strand of literature indicating that international organizations can also influence public policy through technical assistance. Empirically, we present a cross-sectional mapping of the protection that states offer foreign investors in domestic investment laws, and a mapping of the advisory activities of the three main organizations offering technical assistance on foreign investment laws: the United Nations Conference on Trade and Development, the Organization for Economic Co-operation and Development, and the World Bank. We find that there are significant variations in protection offered under domestic investment laws, and variation in international organizations' technical assistance over time and across organizations. To explore technical assistance as a causal mechanism for influence on public policy more closely in this field, we conduct a case study of the development of domestic investment legislation in Bosnia and Herzegovina.

**Keywords:** investment law; investment protection; technical assistance; World Bank; UNCTAD; OECD; Bosnia and Herzegovina

## 1. Introduction

In 2011, as the sun was setting on Myanmar's old military regime, a wide range of legal reforms to attract foreign direct investment (FDI) commenced.<sup>1</sup> One of the first laws enacted by the new civilian regime was the 2012 *Foreign Investment Law*.<sup>2</sup> In the absence of a network of international investment agreements (IIAs),<sup>3</sup> the law granted protections to foreign companies investing in Myanmar. Another law, the *Myanmar Citizens Investment Law* was passed in 2013, giving similar protections to domestic investors.<sup>4</sup>

<sup>1</sup>The reforms were put forth under the *Framework for Economic and Social Reforms*, which was adopted by President Thein Sein's government in 2012. See G. Gabusi and M. Boario (2020) 'Industrial policy and economic zones', in A. Simpson and N. Farrelly (eds.), *Myanmar: Politics, Economy and Society*. Routledge, 126–127.

<sup>2</sup>*Foreign Investment Law*, The Pyidaungsu Hluttaw Law No. 21/2012. Unofficial translation available at: [www.myanmar-embassy-tokyo.net/laws/foreign\\_investment\\_law\\_eng.pdf](http://www.myanmar-embassy-tokyo.net/laws/foreign_investment_law_eng.pdf).

<sup>3</sup>Myanmar had only five IIAs in force in 2011. Their treaty partners were: The Philippines, China, Laos, Thailand, and India. See <https://investmentpolicy.unctad.org/country-navigator/147/myanmar>.

<sup>4</sup>*Myanmar Citizens Investment Law*, The Pyidaungsu Hluttaw Law No. 18. For a summary of the law, see [www.dica.gov.mm/en/myanmar-citizen-investment](http://www.dica.gov.mm/en/myanmar-citizen-investment). See also: J. Bonnnitcha (2017) 'International Investment Arbitration in Myanmar: Bounded Rationality, but not as We Know It', *Journal of World Investment and Trade* 18, 982.

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As Myanmar's two investment laws were being drafted, the Government faced substantial advocacy from international organizations (IOs). Turnell documents how the World Bank and the International Monetary Fund (IMF) sought to influence banking reform and broader financial regulation in Myanmar.<sup>5</sup> Similarly, Bonnitcha outlines the broad field of state and non-state actors that worked to influence the country's industrial policy.<sup>6</sup> Within this environment, work on a new, consolidated investment law soon began. The initial propulsion for consolidation came in a 2014 review of Myanmar's investment policy conducted by the Organization for Economic Co-operation and Development (OECD).<sup>7</sup> Myanmar responded by embarking on a process of legal reform, to which the World Bank contributed technical assistance on legal drafting<sup>8</sup> through its Foreign Investment Advisory Service (FIAS).<sup>9</sup> The consolidated *Myanmar Investment Law* was enacted in 2016.<sup>10</sup>

Under the Westphalian assumption of state sovereignty as political autonomy, the impetus for legislative reform come from within states.<sup>11</sup> However, as the Myanmar example illustrates, IOs and international law represent important international sources of domestic politics, penetrating 'the once exclusive zone of domestic affairs'.<sup>12</sup> Myanmar is far from unique. In this article, we first show how accounting for domestic investment laws changes the legal status and protection of FDI. We then present a typology of IO technical assistance before taking a closer look at *which* IOs advise states on domestic investment law reform, *what* type of assistance and recommendations IOs provide, and *how* their engagement has changed over time. To do so, we draw on unique coding of archival data detailing the technical assistance that the World Bank, the OECD, and the United Nations Conference on Trade and Development (UNCTAD) has provided. We have also interviewed former and current officials from these three organizations.

We start by exploring how domestic investment laws contribute to the global landscape of FDI protection. When mapping countries' level of FDI protection, we find that taking domestic investment laws into account significantly changes global patterns of investment protection. Unlike IIAs, which are most often used by high- and middle-income states, domestic investment laws with investor–state dispute settlement (ISDS) are almost exclusively maintained by low-income states. Moreover, there is interesting variation in the contents of investment laws, both over time and geographically.

Next, we discuss the concept of technical assistance as a channel for IO influence on states' domestic policy. While we acknowledge the importance of other actors, such as states' aid agencies, non-governmental organizations, and multinational enterprises, we focus on the role of IOs. Our contribution thus provides a basis for future exploration of the relative roles of different actors. We find that the three IOs that are most active in this field – the World Bank, the

<sup>5</sup>S. Turnell (2014) 'Banking and Financial Regulation and Reform in Myanmar', *Journal of Southeast Asian Economies* 31 (2), 225–240.

<sup>6</sup>Bonnitcha, *supra* n. 4, 974–1000.

<sup>7</sup>OECD (2014) *Myanmar – OECD Investment Policy Review*. OECD, 32.

<sup>8</sup>Bonnitcha, *supra* n. 4, 982–983. The World Bank has given Extensive Advice on Myanmar's Investment Law. See IFC (2013) *Annual Report 2013: The Power of Shared Partnerships*. World Bank; IFC (2015) *Annual Report 2015: Opportunity, Capital, Growth, Impact*. World Bank.

<sup>9</sup>For more on FIAS, see L.N.S. Poulsen (2015) *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries*. Cambridge University Press, 77–79 and T.L. Berge and T. St John (2021) 'Asymmetric Diffusion: World Bank "Best Practice" and the Spread of Arbitration in National Investment Laws', *Review of International Political Economy* 28(3), 584–610.

<sup>10</sup>*Myanmar Investment Law*, The Pyidaungsu Hluttaw Law No. 40/2016, <https://investmentpolicy.unctad.org/investment-laws/laws/172/myanmar-myanmar-investment-law>.

<sup>11</sup>J. Bartelson (2006) 'The Concept of State Sovereignty Revisited', *European Journal of International Law* 17(2). Research on FDI policy also points to domestic forces as key drivers of reform. See S.B. Danzman (2019) 'Foreign Direct Investment Policy, Domestic Firms, and Financial Constraints', *Business & Politics* 22(2), 279–306.

<sup>12</sup>A.-M. Slaughter and W. Burke-White (2006) 'The Future of International Law is Domestic (or, the European Way of Law)', *Harvard International Law Journal* 47(2), 327.

OECD, and UNCTAD – organize their technical assistance very differently. In short, the World Bank has provided much more direct drafting assistance than the other two organizations. Moreover, we find interesting variation in the advice each IO has provided over time. Finally, we present a case study of domestic investment law-making in Bosnia and Herzegovina that demonstrates the ways in which IO technical assistance can influence states' domestic policy processes in practice.

Overall, we contribute to at least two strands of literature. First, we speak to the literature on global investment protection, which only recently started to focus on domestic investment laws.<sup>13</sup> Second, we contribute to the literature on what drives states' economic policies. Existing research has focused on international economic agreements.<sup>14</sup> We follow a strand of literature on the role of IO analytical institutions<sup>15</sup> and contend that IOs can significantly influence domestic legislative reform through *technical assistance*.

## 2. Why do Countries Adopt Domestic Laws to Protect the Interests of Foreign Investors?

While there is significant variation in the level of protection countries offer under domestic investment laws, they often include similar substantive protections as are found in IIAs.<sup>16</sup> Importantly, states frequently consent to ISDS in domestic investment laws.<sup>17</sup> The fact that states willingly give foreign investors legal protection through domestic laws rather than through IIAs is puzzling. Under IIAs, investors from both treaty party get reciprocal treaty protection.<sup>18</sup> While there are examples in investment legislation where protection is made available on the condition of reciprocal protection in investors' home country, most investment laws protect *all* foreign investors without domestic investors getting any protection in return.<sup>19</sup>

There are, however, also some reasons why states may choose to protect FDI under domestic laws instead of in IIAs. First, many states passing investment laws are almost exclusively capital importers, with few domestic investors in need of overseas protection.<sup>20</sup> Second, IIA negotiations are resource demanding and depend on interest from other countries, as well as bureaucratic capacity and a certain level of bargaining power.<sup>21</sup> Enacting domestic laws does not require external interest and demands less resources altogether. Third, it is less diplomatically confrontational and

<sup>13</sup>J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue. See also J. Bonnitca, L.N.S. Poulsen, and M. Waibel (2017) *The Political Economy of the Investment Treaty Regime*. Oxford University Press; J. Hepburn (2018) 'Domestic Investment Statutes in International Law', *American Journal of International Law* 112(4), 658–706; Berge & St John supra n. 9; and G. Dimitropoulos (2020) 'National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform', *Journal of World Investment and Trade* 21(1), 71–103.

<sup>14</sup>T. Allee and C. Peinhardt (2014) 'Evaluating Three Explanations for the Design of Bilateral Investment Treaties', *World Politics* 66(1), 47–87; L. Baccini, A. Dür, and M. Elsig (2015) 'The Politics of Trade Agreement Design: Revisiting the Depth-Flexibility Nexus', *International Studies Quarterly* 59(4), 765–775.

<sup>15</sup>A. Broome and L. Seabrooke (2012) 'Seeing Like an International Organization', *New Political Economy* 17(1), 1–16.

<sup>16</sup>Hepburn, supra n. 13.

<sup>17</sup>Berge and St John, supra n. 9.

<sup>18</sup>This has been referred to as the 'grand bargain' of IIAs. See J. Salacuse and N. Sullivan (2005) 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain', *Harvard International Law Journal* 46(1), 67–130.

<sup>19</sup>K.F. Olaoye and M. Sornarajah, 'Domestic Investment Laws, International Economic Law, and Economic Development', A. Sands, 'Regulatory Chill and Domestic Law', G. Dimitropoulos, 'The Right to Hospitality in International Economic Law', as well as J. Hepburn, 'The Past, Present, and Future of Domestic Investment Laws and International Economic Law', this special issue, suggest that new domestic investment laws are limited to providing a level playing field for foreign and domestic investors domestically.

<sup>20</sup>See O.K. Fauchald (2021) 'International Investment Law in Support of the Right to Development?', *Leiden Journal of International Law* 34(1), 192.

<sup>21</sup>T.G. Berge and Ø. Stiansen (forthcoming) 'Bureaucratic Capacity and Preference Attainment in International Economic Negotiations', *The Review of International Organizations*.

less resource demanding to withdraw investor protection in domestic legislation than to withdraw from or re-negotiate IIAs,<sup>22</sup> even if IIAs are often subject to sunset periods of ten to 20 years.<sup>23</sup>

Domestic investment laws rest on the assumption that they attract FDI. So far, no research has examined the link between investment laws and FDI, and the empirical literature on whether IIAs help states attract FDI is inconclusive.<sup>24</sup> Even if laws do attract FDI, giving extensive substantive protections to foreign investors is associated with an increased risk of ISDS claims,<sup>25</sup> the defence of which entails substantial costs for states.<sup>26</sup> At the same time, there are concerns over bias in ISDS proceedings.<sup>27</sup> If the investors win, such cases may ultimately undermine efforts to attract FDI.<sup>28</sup>

## 2.1 Domestic Investment Laws: Importance and Distribution

Before we take a closer look at the advisory role of IOs in relation to domestic investment laws, we assess the variation in domestic investment laws, and how these laws increase global protection of investment. In UNCTAD's database of investment laws, 148 countries are listed as having some sort of domestic investment law in force.<sup>29</sup> These laws vary widely in scope and content. Based on a recent dataset provided by Berge and St John,<sup>30</sup> we have identified countries with laws that provide *both* substantive investor rights for foreign investors *and* access to ISDS. There are (at least) 31 countries that have, or have had, such domestic investment laws.<sup>31</sup> These countries are clustered around the low end of various measures of development. Sixteen states are classified as *least developed countries*<sup>32</sup> and 15 are listed as having *low human development*, according to the United Nations (UN).<sup>33</sup> The World Bank has classified 15 as low-income and 12 as lower-middle-income economies.<sup>34</sup> None of the countries is a member, candidate, or key partner to the OECD or among the 80 high-income economies of the world.

<sup>22</sup>T.-A. Huikuri (forthcoming) 'Constraints and Incentives in the Investment Regime: How Bargaining Power Shapes BIT Reform', *The Review of International Organizations*.

<sup>23</sup>IISD (2020) *Terminating a Bilateral Investment Treaty*. International Institute for Sustainable Development, 4. J. Hepburn, 'The Past, Present and Future of Domestic Investment Laws and International Economic Law', this special issue

<sup>24</sup>Bonnitcha, Poulsen, and Waibel, supra n. 13, 158–166.

<sup>25</sup>T.L. Berge (2020) 'Dispute by Design? Legalization, Backlash and the Drafting of Investment Agreements', *International Studies Quarterly* 64(4), 919–928.

<sup>26</sup>R. Wellhausen (2016) 'Recent Trends in Investor–State Dispute Settlement', *Journal of International Dispute Settlement* 7 (1), 117–135.

<sup>27</sup>M. Langford, D.F. Behn, and R.H. Lie (2017) 'The Revolving Door in International Investment Arbitration', *Journal of International Economic Law* 20(2), 301–332; D.F. Behn, T.L. Berge, and M. Langford (2018) 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration', *Northwestern Journal of International Law & Business* 38(3), 333–389.

<sup>28</sup>T. Allee and C. Peinhardt (2011) 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment', *International Organization* 65(3), 401–432.

<sup>29</sup>See <https://investmentpolicy.unctad.org/investment-laws>.

<sup>30</sup>Berge and St John, supra n. 9.

<sup>31</sup>D. Behn, O.K. Fauchald, and M. Langford (2022) 'The International Investment Regime and Its Discontents', in D. Behn, O.K. Fauchald, and M. Langford (eds.), *The Legitimacy of Investment Arbitration: Empirical Perspectives*. Cambridge University Press, 41–52.

<sup>32</sup>Afghanistan, Benin, Burkina Faso, Burundi, Democratic Republic of Congo, Gambia, Guinea, Liberia, Madagascar, Mali, Nepal, Sierra Leone, Somalia, South Sudan, Timor-Leste, and Togo. See [www.un.org/development/desa/dpad/least-developed-country-category/lcds-at-a-glance.html](http://www.un.org/development/desa/dpad/least-developed-country-category/lcds-at-a-glance.html).

<sup>33</sup>See UNDP, 'The Next Frontier, Human Development and the Anthropocene', Human Development Report 2020, pp. 343–346 (ranking within parenthesis). Afghanistan (169), Benin (158), Burkina Faso (182), Burundi (185), Democratic Republic of Congo (175), Côte d'Ivoire (162), Gambia (172), Guinea (178), Liberia (175), Madagascar (164), Mali (184), Nigeria (161), Sierra Leone (182), South Sudan (185), and Togo (167). In addition, Somalia is among the six countries not ranked.

<sup>34</sup>Classification as of October 2021: Afghanistan (low income), Benin (lower middle), Burkina Faso (low), Burundi (low), Cabo Verde (lower middle), Cameroon (lower middle), Democratic Republic of Congo (low), Côte d'Ivoire (lower middle), El

Consider next how the laws of these 31 countries contribute to the overall global protection of investment. In the 565 country-pairs where both states have a domestic investment law in force with substantive investment protection and access to ISDS,<sup>35</sup> the laws establish reciprocal bilateral investment protection.<sup>36</sup> In 5177 further bilateral relationships, the laws establish unilateral investment protection, which in only a few cases is conditional on reciprocity.<sup>37</sup> Overall, domestic investment laws create enforceable investor rights in 5642 country pairs.<sup>38</sup>

Another vantage point for assessing the contribution of domestic investment laws to global investment protection is to compare them with IIAs.<sup>39</sup> As of the end of 2018, the global pool of IIAs with ISDS covered 18.7% of all possible pairs of states (3638 of 19503 bilateral relationships).<sup>40</sup> When assessing the distribution of investor protection under IIAs across state income groups, we find a very different coverage pattern from the one found for domestic investment laws.<sup>41</sup> Table 1 shows the share of country-pairs covered by an IIA ordered on the treaty parties' World Bank income group.<sup>42</sup>

The saturation of treaty protection is highest among states in the high- and upper-middle-income categories. Over one-third of all country pairs, where both parties are classified as high-income, are covered by an IIA, and a little under one-third of all country pairs, where one is classified as high-income and the other as upper-middle-income, has IIA coverage. At the other end of the development scale, saturation is much lower. In country dyads where one party is classified as low income, the share of IIA coverage ranges between 7.5% and 16%. The overall picture is that pairs of low- and lower-middle-income countries have less IIA protection than pairs including upper-middle- and/or high-income countries.

When expanding our analysis to also take into account investment protection afforded in domestic investment laws, we have to distinguish between states consenting to ISDS and states benefiting from such consent (Table 2).<sup>43</sup> If we eliminate the instances where IIAs have already established bilateral investment protection, the 31 domestic investment laws that contain *both* substantive investment protection and consent to ISDS establish 358 *new* bilateral investment protection relationships and 4438 *new* unilateral investment protection relationships. This brings the total number of reciprocal consents to ISDS to 4006, supplemented by an additional 4438 consents that are unilateral. The global saturation of investment protection for both types of consent is 31.9% (up from 18.7% when only looking at IIAs).<sup>44</sup>

Thus, the global *distribution* of investment protection changes dramatically when we include domestic investment laws in the calculation. By adding low-income countries' investment laws, we find that they as a group expand investment protection with ISDS from between 7.5 and 16% under IIAs to approximately 56% of potential bilateral relationships. On average, upper-middle-income and high-income countries only afford investment protection to 22.5 and 24.6% of their respective bilateral relationships. In addition, investors from low-income countries benefit less from investment protection than investors from other countries. On

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Salvador (lower middle), Gambia (low), Ghana (lower middle), Guinea (low), Honduras (lower middle), Kyrgyzstan (lower middle), Liberia (low), Madagascar (low), Mali (low), Mongolia (lower middle), Nepal (lower middle), Nigeria (lower middle), Sierra Leone (low), Somalia (low), South Sudan (low), Syria (low), Timor-Leste (lower middle), and Togo (low).

<sup>35</sup>We assume that the total number of countries worldwide is 198: all member states of the United Nations (UN) (193) and five other economies that have undertaken obligations under IIAs (Hong Kong, Kosovo, Macau, Palestine, and Taiwan).

<sup>36</sup>Calculated as follows:  $(31 \times 30)/2 = 565$ .

<sup>37</sup>Calculated as follows:  $31 \times 167 = 5177$ .

<sup>38</sup>Calculated as follows:  $565 + 5177 = 5642$ .

<sup>39</sup>See also Behn, Fauchald, and Langford *supra* n. 28.

<sup>40</sup>Calculated as follows:  $(198 \times 197)/2 = 19\,503$ .

<sup>41</sup>As per 2018, <https://investmentpolicy.unctad.org/international-investment-agreements>.

<sup>42</sup>As per 2018, <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>.

<sup>43</sup>We have excluded states where the consent was unclear, and states that previously consented to ISDS in their laws but subsequently withdrew that consent. Examples of the latter include Kazakhstan (1994–2003) and Mauritania (2003–2012).

<sup>44</sup>Calculated as follows:  $\frac{4006 + (4438)}{19503} = 31.9$ .

**Table 1.** Percentage of Bilateral Relations Covered by IIAs Ordered on Parties' World Bank Income Groups

|              | High  | Upper Middle | Lower Middle | Low   |
|--------------|-------|--------------|--------------|-------|
| High         | 38.6% | 28.0%        | 21.0%        | 10.8% |
| Upper middle |       | 16.5%        | 11.9%        | 7.5%  |
| Lower middle |       |              | 11.7%        | 11.4% |
| Low          |       |              |              | 16.1% |

**Table 2.** Percentage of Unilateral Relationships Covered by either IIAs and/or Domestic Investment Laws Ordered on Parties' World Bank Income Groups

|             |              | Party Providing Protection |              |              |       | Average |
|-------------|--------------|----------------------------|--------------|--------------|-------|---------|
|             |              | High                       | Upper Middle | Lower Middle | Low   |         |
| Beneficiary | High         | 38.6%                      | 32.6%        | 37.6%        | 56.8% | 41.4%   |
|             | Upper middle | 28.0%                      | 23.4%        | 29.4%        | 55.1% | 34.0%   |
|             | Lower middle | 21.0%                      | 18.9%        | 30.7%        | 55.6% | 31.6%   |
|             | Low          | 10.8%                      | 15.1%        | 29.1%        | 56.2% | 27.8%   |
|             | Average      | 24.6%                      | 22.5%        | 31.7%        | 55.9% |         |

average, investors from high-income countries enjoy investment protection backed up by ISDS in 41.7% of all bilateral relationships, while investors from low-income countries enjoy investment protection in only 27.8% of relationships.

## 2.2 Domestic Investment Laws: Variation

Taking domestic investment laws into account is crucial to understand the global protection of foreign investment. But how do these laws vary? Our mapping of investment legislation in the 148 countries that have submitted their laws to UNCTAD shows broad variation. However, it does not provide the full picture as additional legislation also affects the level of foreign investment protection. Moreover, in addition to being incomplete, the legislation submitted may be outdated, and translations may be inaccurate.<sup>45</sup> Nevertheless, on the aggregate, the data provided by UNCTAD are a valuable source for mapping the general approaches to FDI in domestic laws within groups of countries.

We first distinguish between legislation that seeks to protect FDI and legislation that only seeks to screen FDI with a view to blocking unwanted foreign investment due to, for example, security concerns. When we eliminate countries that have submitted only screening legislation, we are left with 121 countries.<sup>46</sup>

<sup>45</sup>See *inter alia* the Law No. 2013/004 of 18 April 2013 to lay down private investment incentives in the Republic of Cameroon (2013), unofficial translation, <https://investmentpolicy.unctad.org/investment-laws>.

<sup>46</sup>The following countries had notified only FDI screening legislation: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Hungary, India, Italy, Japan, South Korea, Latvia, New Zealand, Norway, Poland, Portugal, Romania, Samoa, Solomon Islands, Spain, Thailand, Trinidad and Tobago, Tuvalu, the United Kingdom, and the USA.



Another distinction is between investment legislation that does not differentiate between domestic and foreign investors, and legislation with special rights for foreign investors.<sup>47</sup> The majority of the remaining countries (70) apply their investment laws to both domestic and foreign investment. These laws vary significantly in terms of degree of differential treatment among domestic and foreign investors, as well as in their relative emphasis on investment protection, investment incentives, investment screening, and institution building. This category also includes a few instances where the rules are approximately the same for both groups of investors. The main examples are laws that focus extensively on promoting sustainable development and investment incentives and contain few clauses to protect investors' rights.<sup>48</sup>

The remaining investment laws (51) focus on foreign investment. They vary from emphasizing investment screening while containing some basic elements of investment protection, to legislation that contains no investment screening and extensive investment protection. Investment screening is frequently used to determine whether investors qualify for incentives. The most common investment protection clauses are non-discrimination, right to transfer, and expropriation. Differences among investment laws also include carve-outs for foreign investment, particularly in sensitive sectors, and favourable treatment of FDI in terms of access to tax, tariff, and trade privileges. A few investment laws make protections or privileges dependent on reciprocal access to such protections or privileges in the investor's home country.

If we look at the years of adoption of the investment legislation, we find that recent legislation integrates rules applicable to *both* domestic and foreign investors to a larger extent than older legislation.<sup>49</sup> The comprehensive approach taken in more recent investment laws is likely to avoid unjustified differential treatment based on the origin of the investment.

The above is a snapshot of domestic investment legislation as of 2022. This section has shown that countries with a low level of economic development have a more pronounced tendency to adopt liberal domestic investment legislation than more economically developed states. In the rest of this article, we assess how IO technical assistance has contributed to the spread of domestic investment legislation.

### 3. Technical Assistance, International Organizations, and Domestic Investment Laws

Peter Gourevitch once noted that '[i]nstead of being a cause of international politics, domestic structure may be a consequence of it'.<sup>50</sup> International relations<sup>51</sup> and international law<sup>52</sup> scholars have since detailed how domestic and international politics are interlinked, and empirical studies have identified mechanisms through which international politics influence national politics. The most prominent strand of research shows how loan conditionalities allow IOs to influence policy development in borrowing states.<sup>53</sup> Another strand shows how states sometimes choose *not* to

<sup>47</sup>UNCTAD, 'Investment Laws: A Widespread Tool for the Promotion and Regulation of Foreign Investment', *Investment Policy Monitor*, Special Issue November 2016, and G. Dimitropoulos, 'The Right to Hospitality in International Economic Law: Domestic Investment Laws and the Right to Invest', this special issue.

<sup>48</sup>Examples include Bolivia, Ley de Promoción de Inversiones, No. 516, 4 April 2014; Loi No. 038-2018/An Portant Code des Investissements au Burkina Faso.

<sup>49</sup>The average year of adoption of foreign investment legislation is 2000, as compared with 2006 for legislation applicable to both domestic and foreign investment.

<sup>50</sup>P. Gourevitch (1978) 'The Second Image Reversed: The International Sources of Domestic Politics', *International Organization* 32(4), 882.

<sup>51</sup>R.D. Putnam (1988) 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', *International Organization* 42 (3), 427–460; H.V. Milner and R.O. Keohane (eds.) (1996) *Internationalization and Domestic Politics*. Cambridge University Press.

<sup>52</sup>Slaughter and Burke-White, *supra* n. 12; A.-M. Slaughter and W. Burke-White (2002) 'An International Constitutional Moment', *Harvard International Law Journal* 43(1), 1–21.

<sup>53</sup>C. Burnside and D. Dollar, 'Aid, Policies, and Growth', *The American Economic Review* 90(4); W. Easterly (2005) 'What did Structural Adjustment Adjust? The Association of Policies and Growth with Repeated IMF and World Bank Adjustment

adopt otherwise legitimate policies out of fear of economic liability under the rules of international economic institutions.<sup>54</sup> Both these research strands assume that IO influence on domestic politics is explicitly or implicitly coercive.

A third branch of research focuses on a 'softer' mode of influence. While constructivist scholars have long examined the diffusion of human rights and national security norms from the international level to the national level,<sup>55</sup> more recent empirical research shows that IOs have managed to convince states to adopt specific policies through strategic promotion of the potential gains from adherence.<sup>56</sup> There is literature that highlights the circumstances under which IOs can use technical assistance to build state capacity in advisee states,<sup>57</sup> how IOs can exert influence on states' domestic affairs through monitoring their policy performance,<sup>58</sup> through creating comparative policy rankings,<sup>59</sup> and through the use of best practice benchmarking in advisory work.<sup>60</sup> A recent study details how the World Bank has influenced states' decisions to include ISDS in domestic investment laws through supplying best practice templates.<sup>61</sup> This article elaborates on such notions of 'technical assistance'.

### 3.1 Technical Assistance and Domestic Investment Laws

What constitutes technical assistance, and how is it distinguished from forms of IO influence that are more coercive? One way to understand technical assistance is to sort assistance activities on a continuum ordered on the degree of IO involvement (see Table 3). At one end, IOs may offer hands-off assistance through high-level evaluations of state practices. Such advice usually involves a limited number of encounters between the advisor and the advisee, and results in a one-off recommendation – usually by way of a written report. At the other end, IOs may offer hands-on assistance through direct help in the formation of policies and legislation through iterative encounters between advisor and advisee over an extended period. Direct assistance can be given through helping with actual drafting, sharing example drafts or best practices, or commenting on drafts. In between these two extremes, there is a range of intermediate modes of assistance, such as capacity building to bolster advisee states' ability to understand and carry out suggested reforms, and facilitation of fora where personnel from advisee states can discuss reforms under the guidance of IO advisers.

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Loans', *Journal of Development Economics* 76(1); A. Dreher (2009) 'IMF Conditionality: Theory and Evidence', *Public Choice* 141(1); A. Dreher and M. Gassbender (2012) 'Do IMF and World Bank Programs Induce Government Crises? An Empirical Analysis', *International Organization* 66(2). See also K.F. Olaoye and M. Sornarajah, 'Domestic Investment Laws, International Economic Law, and Economic Development', this special issue.

<sup>54</sup>F. De Ville and G. Siles-Brügge (2017) 'Why TTIP is a Game-Changer and its Critics have a Point', *Journal of European Public Policy* 24(10); T.L. Berge and A. Berger (2021) 'Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity', *Journal of International Dispute Settlement* 12(1); C. Moehlecke (2020) 'The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty', *International Studies Quarterly* 64(1); A. Sands, 'Regulatory Chill and Domestic Law: Mining in the Santurbán Páramo', this special issue.

<sup>55</sup>P.J. Katzenstein (ed.) (1996) *The Culture of National Security: Norms and Identity in World Politics*. Columbia University Press; T. Risse, S.C. Ropp, and K. Sikkink (eds.) (1999) *The Power of Human Rights: International Norms and Domestic Change*. Cambridge University Press.

<sup>56</sup>Poulsen, *supra* n. 9, 71–109.

<sup>57</sup>M. Godfrey, C. Sophal, T. Kato, L.V. Piseth, P. Dorina, T. Saravy, T. Savora, and S. Sovannarith (2002) 'Technical Assistance and Capacity Development in an Aid-Dependent Economy: The Experience of Cambodia', *World Development* 30(3), 355–373.

<sup>58</sup>Broome and Seabrooke, *supra* n. 15.

<sup>59</sup>J. Kelley and B.A. Simmons (2015) 'Politics by Number: Indicators as Social Pressure in International Relations', *American Journal of Political Science* 59(1).

<sup>60</sup>A. Broome, A. Homolar, and M. Kranke (2018) 'Bad Science: International Organizations and the Indirect Power of Global Benchmarking', *European Journal of International Relations* 24(3).

<sup>61</sup>Berge and St John, *supra* n. 9.



**Table 3.** Variations in Technical Assistance Activities of IOs

| IO Technical Assistance   |  |   |
|---|--|---|
| Hands-off Involvement   | Intermediate Involvement   | Hands-on Involvement  |
| <ul style="list-style-type: none"> <li>– Short term relationships</li> <li>– Low degree of in-country presence</li> </ul> | <ul style="list-style-type: none"> <li>– Limited relationships</li> <li>– Periodic in-country presence</li> </ul>  | <ul style="list-style-type: none"> <li>– Temporally stable relationships</li> <li>– Sustained in-country presence</li> </ul>                                  |
| <i>Activities</i>   | <i>Activities</i>  | <i>Activities</i>   |
| <ul style="list-style-type: none"> <li>– High-level policy reviews</li> <li>– General policy frameworks</li> </ul>        | <ul style="list-style-type: none"> <li>– Capacity building workshops</li> <li>– Discussion fore for dissemination of practices between states</li> </ul> | <ul style="list-style-type: none"> <li>– Detailed, provisions-level advice on policies, regulations, or laws</li> <li>– Direct drafting assistance</li> </ul> |

What unites different types of technical assistance is that they carry the normative weight of being based on *expert advice*. It is this normative weight that is the vehicle for influence. Normative weight can stem from different sources, including academic analysis, private sector knowledge about business operations,<sup>62</sup> international best practices,<sup>63</sup> or statistical indicators.<sup>64</sup>

### 3.2 An Overview of IO Technical Assistance on Domestic Investment Laws

While the field of actors that offer development assistance is crowded,<sup>65</sup> the group of actors that offer assistance on domestic investment law reform is limited. Based on interviews with expert officials and reviews of IOs' development assistance programs, we have identified three actors that offer dedicated technical assistance on domestic investment legislation: the World Bank, the OECD, and UNCTAD. This is not to say that other actors, such as development banks, national aid agencies, non-governmental organizations, and law firms are absent. However, the World Bank, the OECD, and UNCTAD have the most specialized assistance programs.

The three IOs differ significantly in their geographical scope. While UNCTAD and the World Bank are quasi-universal,<sup>66</sup> the OECD has a strictly limited membership.<sup>67</sup> The general purposes of the IOs also differ significantly. The purposes of the World Bank and the OECD are set out in their respective foundational treaties and subsequently elaborated through policy decisions.<sup>68</sup> According to their most recent policy statements, the World Bank's core mission is to end extreme poverty and promote shared prosperity. The OECD's vision is the preservation of individual liberty, the values of democracy, the rule of law, and the defence of human rights based on

<sup>62</sup>A. Broome and L. Seabrooke (2021) 'Recursive Recognition in the International Political Economy', *Review of International Political Economy* 28(2).

<sup>63</sup>Broome, Homolar, and Kranke, supra n. 60; Berge and St John, Berge and St John cross reference in note 63 to note 9.

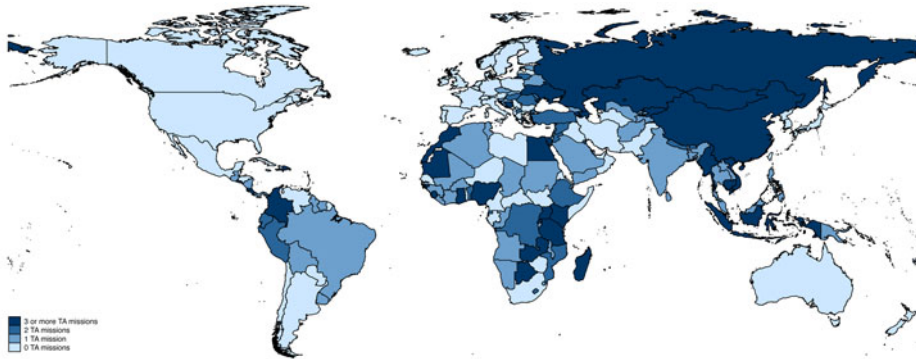
<sup>64</sup>Kelley and Simmons, supra n. 59.

<sup>65</sup>F. Zimmermann and K. Smith (2011) 'More Actors, More Money, More Ideas for International Development Co-Operation', *Journal of International Development* 23(5).

<sup>66</sup>UNCTAD covers all UN members as well as the Vatican and Palestine. The World Bank includes all UN members except Andorra, Cuba, North Korea, Liechtenstein, and Monaco, as well as Kosovo.

<sup>67</sup>The OECD has 38 members. However, the OECD Investment Committee includes additional countries (15) as 'associates' and 'participants': Argentina, Brazil, Bulgaria, Croatia, Egypt, Indonesia, Jordan, Kazakhstan, Morocco, Peru, Romania, Russia, Tunisia, Ukraine, and Uruguay, see <https://oecdgroups.oecd.org/Bodies/ShowBodyView.aspx?BodyID=7232&Lang=en>.

<sup>68</sup>See Article I of Articles of Agreement of the International Bank for Reconstruction and Development (1944) and Article 1 of the Convention on the Organization for Economic Co-operation and Development (1960).



**Figure 1.** Overall load of technical assistance missions on domestic investment law reform (1990–2021). Darker colours indicate more technical assistance missions

open and transparent market economy principles.<sup>69</sup> Due to its lack of a foundational treaty, UNCTAD has less formalized and more flexible statements of purposes, which are renegotiated every four years. From mainly pursuing trade issues in close interaction with the World Trade Organization, UNCTAD started engaging more actively in investment issues from 2005.<sup>70</sup> Their emphasis is on states' policy space to achieve sustainable development.<sup>71</sup> UNCTAD aims to enhance the ability of countries to build a fairer, more equitable, resilient, inclusive, just, and sustainable world – a world of shared prosperity.<sup>72</sup>

What separates the World Bank, the OECD, and UNCTAD from other actors in the field of technical policy assistance is their systematic and long-term approach. However, there is also significant variation among the three IOs on this issue. The OECD and UNCTAD mainly offer technical assistance through investment policy reviews (IPRs), while the World Bank offers more sustained assistance through an extensive network of in-country offices.<sup>73</sup> Figure 1 depicts the overall technical assistance on domestic investment law reform provided by the World Bank,<sup>74</sup> the OECD,<sup>75</sup> and UNCTAD.<sup>76</sup> All three IOs started providing technical assistance on domestic investment laws in the 1990s,<sup>77</sup> and 115 states have received technical assistance on domestic investment laws from at least one of these organizations.

The first thing to note when looking at this map is that countries in Asia, Eastern Europe, and Sub-Saharan Africa have received more technical assistance on domestic investment laws than

<sup>69</sup>See [www.worldbank.org/en/who-we-are](http://www.worldbank.org/en/who-we-are) and <https://oe.cd/il/42j>.

<sup>70</sup>J. Toye (2014) *UNCTAD at 50: A Short History*, Chapters VII and VIII.

<sup>71</sup>UNCTAD (2015) São Paulo Consensus, TD/410, 25 June 2004, para. 8 and UNCTAD, *Investment Policy Framework for Sustainable Development*.

<sup>72</sup>UNCTAD, The Bridgetown Covenant, TD/541/Add.2, 10 November 2021, para. 107.

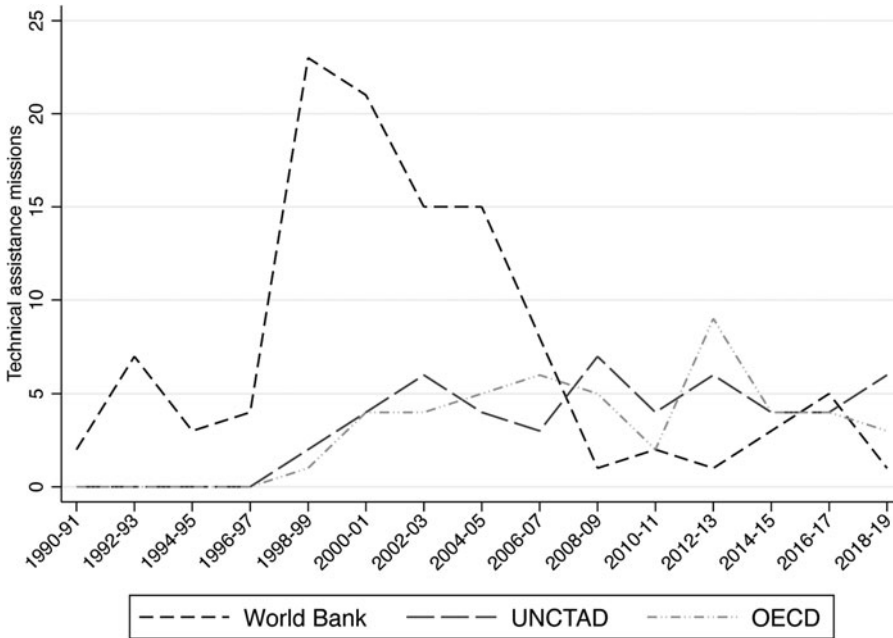
<sup>73</sup>FIAS, official 3.

<sup>74</sup>FIAS technical assistance missions were identified in the organization's annual reviews. We used data until 2016 from Berge and St John, supra n. 9 and coded reviews form the last five years ourselves, [www.thefias.info/publications](http://www.thefias.info/publications). Note however, that this coding probably undershoots the overall load of assistance programs carried out by FIAS quite a bit. As the case study of the foreign investment law in Bosnia and Herzegovina below illustrates, the only assistance missions that make their way into FIAS' annual reports are those funded by FIAS itself. Sometimes however, FIAS also give technical assistance with funding from other sources, such as the national aid agencies of World Bank member states (FIAS, official 4).

<sup>75</sup>OECD technical assistance missions were identified through publicly available IPRs, see [www.oecd.org/investment/countryreviews.htm](http://www.oecd.org/investment/countryreviews.htm). We only assessed *Investment Policy Reviews*, not the older publications labelled *OECD Reviews of Foreign Direct Investment*.

<sup>76</sup>UNCTAD technical assistance missions were identified through publicly available IPRs. See <https://unctad.org/topic/investment/investment-policy-reviews>.

<sup>77</sup>See the full list of assistance mission by each organization in Table A1 in the Appendix.



**Figure 2.** Bi-annual count of technical assistance missions on domestic investment law reform carried out by the World Bank, the OECD, and UNCTAD (1990–2019)

countries in other regions. No high-income developed state has received technical assistance. There is also substantial overlap between the assistance missions of our IOs. Thirty-four states have received technical assistance from at least two IOs,<sup>78</sup> and the Dominican Republic, Morocco, Tanzania, Viet Nam, and Zambia have received assistance from all three.

Figure 2 illustrates how technical assistance on investment laws has developed over time. The first mover was the World Bank through assistance missions in the early 1990s. Both the OECD and UNCTAD started their IPR programmes in the late 1990s. Unlike the Bank, however, the number of technical assistance missions conducted by the OECD and UNCTAD has remained stable over time. UNCTAD's first IPRs were finalized in 1999, while the OECD's first review was finalized in 1998. The OECD and UNCTAD have each produced an average of five IPRs bi-annually since the start of their IPR programmes.

Below, we analyse each technical assistance program in detail. To do so, we have collected a wide range of archival documents – most prominently the IPRs produced by the OECD and UNCTAD. We have then gone through and coded each IPR for specific recommendations given on advisee states' domestic investment laws.<sup>79</sup> A similar coding exercise is not possible for the World Bank since there are no public reports from their assistance missions. For the Bank, we therefore assess advice based on input documents, such as reform handbooks and policy documents. For all IOs, we have interviewed key officials that work, or have worked, within their assistance programs.<sup>80</sup>

### 3.3 The World Bank

The World Bank has long been in the business of advising developing states on investment policies. St John shows how the former General Counsel of the World Bank, Aron Broches, set up

<sup>78</sup>See Table A1 in the Appendix.

<sup>79</sup>See Table A2 in the Appendix for the codebook used to analyze the OECD's and UNCTAD's IPRs.

<sup>80</sup>See Table A3 in the Appendix for the full list of interviewees.

the International Centre for the Settlement of Investment Disputes (ICSID) within the Bank in the 1950s and 1960s through targeted efforts against states.<sup>81</sup> While Broches' main aim was for states to refer disputes under IIAs to ICSID, the Bank also saw national legislation as a fertile ground for promoting the use of ICSID. In 1965, the World Bank Executive Directors released a report in which they discussed how states could refer disputes with foreign investors to arbitration under national laws.<sup>82</sup> In the 1970s and 1980s, the ICSID secretariat started collecting domestic investment laws enacted in the developing world.<sup>83</sup> This project put the World Bank 'in an advisory relationship with states'<sup>84</sup> on domestic investment laws, which, in Broches' words, was a service borne out of 'the expertise of the [ICSID] Secretariat'.<sup>85</sup>

The first step towards institutionalizing the Bank's technical assistance came in the mid-1980s, when officials started formulating a series of best practices for domestic investment laws.<sup>86</sup> The result was the 1992 *Guidelines on the Treatment of Foreign Direct Investment*,<sup>87</sup> a menu of templates states could consult when formulating investment laws.<sup>88</sup> At the same time, the World Bank established the Foreign Investment Advisory Service (FIAS).<sup>89</sup> Officials detail how the Service came about as a function of World Bank advisory work in China in the 1980s.<sup>90</sup>

FIAS was placed under the World Bank's private sector lending arm: the International Finance Corporation.<sup>91</sup> The intention was to insulate FIAS' technical assistance projects from the loan activity of the International Bank for Reconstruction and Development. However, FIAS was also insulated from the broader investment activities of the International Finance Corporation – at least in its early years. Officials who worked in FIAS in the late 1980s underline its unique independence from broader World Bank activities. They note that this independence was a function of the fact that FIAS was financed via a trust fund rather than through the World Bank budget and that it was reporting directly to the Bank's Board of Directors.<sup>92</sup>

Over time, FIAS' independence from broader World Bank activities waned. In the early 2000s, the International Finance Corporation started integrating FIAS' technical assistance into its core activities,<sup>93</sup> and, as such, assistance became intertwined with the World Bank's broader investment and lending activities.<sup>94</sup> The peak of FIAS technical assistance missions in the early 2000s (see Figure 2) coincides with a focus on legal and regulatory functions of states,<sup>95</sup> and with extensive use of policy conditionalities in loan portfolios at the World Bank.<sup>96</sup>

<sup>81</sup>T. St John (2018) *The Rise of Investor-State Arbitration: Politics, Law and Unintended Consequences*. Oxford University Press.

<sup>82</sup>A. Parra (2017) *The History of ICSID*, 2nd edn. Oxford University Press, 81.

<sup>83</sup>Parra, supra n. 82, 139–141.

<sup>84</sup>St John, supra n. 81, 192.

<sup>85</sup>Address by Aron Broches to the Second Annual Meeting' (ICSID 1968), cited in St John, supra n. 81, 193.

<sup>86</sup>A. Parra (1992) 'Principles Governing Foreign Investment, as Reflected in National Investment Codes', *ICSID Review* 7 (2), 428–452.

<sup>87</sup>World Bank (1992) *Legal Framework for the Treatment of Foreign Investment. Volume II: Guidelines*. World Bank, 35–44.

<sup>88</sup>I. Shihata (1991) 'Promotion of Foreign Direct Investment: A General Account, with Particular Reference to the Role of the World Bank', *ICSID Review* 6(2).

<sup>89</sup>It is now called 'The Facility for Investment Climate Activity Services', but the World Bank has continued to use the 'FIAS'-acronym. See [www.thefias.info/](http://www.thefias.info/).

<sup>90</sup>FIAS, official 5; FIAS, official 6.

<sup>91</sup>World Bank (2006) *Improving Investment Climates: An Evaluation of World Bank Group Assistance*. World Bank, 8.

<sup>92</sup>FIAS, official 5; FIAS, official 6.

<sup>93</sup>World Bank, supra n. 91, 19.

<sup>94</sup>*Ibid.*, 20.

<sup>95</sup>*Ibid.*, 7. World Bank (2010) *Poverty Reduction Support Credits: An evaluation of World Bank Support*. World Bank.

<sup>96</sup>World Bank (2005) *Conditionality Revisited: Concepts, Experiences, and Lessons*. World Bank.

### 3.3.1 What Type of Assistance Does FIAS Give?

Technical assistance from FIAS begins with a formal Government request. Officials from the World Bank's many country offices often encourage their host states to seek advice on investment law reform.<sup>97</sup> After the formal request, funding is required. Most FIAS projects have hybrid financing models – including money from FIAS' own trust fund and other donors. Advisee states are also expected to partly finance advisory projects themselves. This buy-in by states has been a feature of FIAS technical assistance since its inception. Officials note that it is meant to increase advisee states' commitment to the project.<sup>98</sup>

Projects are staffed with a mix of FIAS experts from both regional headquarters and country offices, as well as (external) local lawyers who understand the domestic legal context.<sup>99</sup> In the first stage of FIAS projects, the team travels to the advisee state for initial scoping exercises and consultations with public and private sector stakeholders.<sup>100</sup> An important exercise in this phase is to map the advisee's existing investment laws against best practices and to carry out regulatory impact assessments.<sup>101</sup>

After the diagnostic phase, FIAS offers two deliverables to states, both of which are very hands-on. The first deliverable is legal text. While FIAS officials underline that it is important that advisee states themselves *own* the drafting of new investment laws or revised clauses,<sup>102</sup> they often end up providing drafts, either indirectly through sharing best practices from other states, or directly through drafting text for their advisee.<sup>103</sup> The second deliverable is capacity building and implementation support. After reform suggestions are made, states are advised to set up internal drafting committees. FIAS officials often provide the committees with training on technical legal issues and on how to enact legal reforms efficiently. In some instances, FIAS also provides capacity building for parliamentarians, or they help bureaucrats explain the legal implications of investment legislation to politicians.<sup>104</sup> Overall, FIAS provides assistance on the whole process of investment law formation. As one official put it:

I think one of the advantages that we can bring to the table is that we provide hand-holding services. We don't leave it at ... 'okay, here's a report, these are our recommendations.' We provide the report and then, once they agree to it, we say: 'Okay, let's implement it together. We can show you how to do it. We can provide you training. We can give you example clauses and text. We can bring experts to work with you on a day-to-day basis.' So, in other words, we provide service from A to Z, from scoping to the actual reform is implemented.<sup>105</sup>

### 3.3.2 What Recommendations does FIAS make?

We base our assessment of FIAS' advisory activities on World Bank policy documents. In the 1980s, FIAS advice was largely *ad hoc*, but officials underline how their advice on domestic investment laws was moored in the normative ideals of the liberal economic world order.<sup>106</sup> The first specific framework FIAS advisers used in their assistance missions were the 1992 *Guidelines*, which affirmed the liberal normative ideals of the World Bank at the time. They were 'based

<sup>97</sup>Berge and St John, *supra* n. 9.

<sup>98</sup>FIAS, official 6.

<sup>99</sup>FIAS, official 3.

<sup>100</sup>FIAS, official 3.

<sup>101</sup>FIAS, official 2.

<sup>102</sup>FIAS, official 3.

<sup>103</sup>Berge and St John, *supra* n. 9, 10.

<sup>104</sup>FIAS, official 4.

<sup>105</sup>FIAS, official 3.

<sup>106</sup>FIAS, official 5.

on the general premise that equal treatment of investors in similar circumstances and free competition among them are prerequisites of a positive investment environment,<sup>107</sup> and laid out rules on admission, treatment, expropriation, and dispute settlement.

While the *Guidelines* were mainly thought of as standards states could follow when making investment policies, they ‘could also help in the coordination of technical assistance to countries in the formulation of investment laws’.<sup>108</sup> It is likely that FIAS’ domestic investment law advice in this period was centred on enshrining the *Guidelines* into domestic laws.<sup>109</sup> In short, states were advised to give extensive substantive protections to foreign investors, limit barriers to foreign investment, and allow foreign investors access to international arbitration.

In 2006, an internal evaluation of technical assistance in the World Bank Group noted the need for more specific ‘guidelines for technical assistance and advisory work related to the investment climate’.<sup>110</sup> As a result, the 2010 *Investment Law Reform Handbook* was developed within FIAS.<sup>111</sup> The *Handbook* is premised on the same liberal approach to investment protection as the 1992 *Guidelines*, but it is more detailed and explicitly written for advisers working on investment law reform. While the *Handbook* maintains that domestic investment laws should admit investors as freely as possible and that foreign investors and domestic investors should be given *de jure* equal treatment – the most definitive advice in the *Handbook*, and perhaps the advice that most starkly distinguishes FIAS’ advice from that of the OECD and UNCTAD, is that it recommends states to give foreign investors access to ISDS under domestic laws.<sup>112</sup> FIAS advisers confirm that advisory missions on domestic investment law reform convey such advice in practice.<sup>113</sup>

### 3.4 The Organization for Economic Co-operation and Development (OECD)

The OECD was founded in 1961 as a forum where countries committed to democracy and a market-based economy could seek common answers on how to strengthen world trade and investment.<sup>114</sup> OECD member states are typically high-income states, but the OECD’s mandate is also to provide development assistance to non-member states.<sup>115</sup> The normative pillar of the OECD’s development assistance is the assumption that foreign investment can be mobilized for development.<sup>116</sup> In 1976, the OECD adopted the *Declaration on Investment and Multinational Enterprises* which includes standards for treatment of foreign investors.<sup>117</sup> The OECD Investment Committee has developed extensive expertise on investment issues, and for many years it provided more or less *ad hoc* policy assistance and technical policy reviews for both member and non-member states.

In 2003, the *OECD Initiative on Investment for Development* was launched. This *Initiative* consolidated the OECD’s *ad hoc* work on investment policy reform:

The Initiative represents an overarching strategy for OECD co-operation with the developing world on investment issues and supports countries’ sustained efforts to attract and generate more and better investment. It attaches central importance to creating the policy

<sup>107</sup>World Bank, *supra* n. 87, 36.

<sup>108</sup>*Ibid.*, 14.

<sup>109</sup>See also Poulsen, *supra* n. 9, 79.

<sup>110</sup>World Bank, *supra* n. 91, 24.

<sup>111</sup>FIAS (2010) *Investment Law Reform: A Handbook for Development Practitioners*. World Bank.

<sup>112</sup>FIAS, *supra* n. 111, 53. How the 2010 *Handbook* deals with ISDS is discussed in-depth in Berge and St John, *supra* n. 9.

<sup>113</sup>FIAS, official 2.

<sup>114</sup>OECD (1960) *Convention on the Organization for Economic Co-operation and Development*, art. 1(c).

<sup>115</sup>*Ibid.*, art. 1(b).

<sup>116</sup>OECD (2002) *Foreign Direct Investment for Development: Maximising Benefits, Minimizing Costs*. OECD.

<sup>117</sup>OECD (1976) *Declaration on International Investment and Multinational Enterprises*. OECD.



environments needed to unleash the full benefits from investment, in terms of economic growth, poverty reduction, and sustainable development.<sup>118</sup>

The 2003 *Initiative* sets the scene for a more programmatic approach to investment policy assistance at the OECD. A central part of this development was the establishment of a systematic tool for policy assistance in non-member states. This tool, the *Policy Framework for Investment* (PFI), was finalized and adopted by the OECD Council of Ministers in 2006.<sup>119</sup>

#### 3.4.1 What Type of Assistance Does the OECD Give?

The PFI forms the backbone of the OECD's investment policy review programme.<sup>120</sup> At the time of writing, the OECD has produced 52 IPRs, most of which were based on the PFI. OECD IPRs are demand-driven, meaning they all start with a formal request from a state to the Secretary-General of the OECD. After the request, prospective advisees must secure at least partial funding for the IPR themselves.<sup>121</sup> The OECD also helps to secure funding, but officials note that the commitment of partial self-funding makes it easier to get other donors on board.<sup>122</sup>

After the IPR is funded, the advisee state is asked to set up a task force with broad government representation.<sup>123</sup> Thereafter follows a preparatory phase where the OECD evaluates the request for assistance and carries out fact-finding missions, as well as a self-assessment and review period where the OECD prepares a draft review based on the PFI. Officials from advisee states are sometimes offered coaching and guidance in practical policy-making and legislative work during this phase. The draft review is presented to the state officials and final amendments are made before the IPR is handed over to the advisee state.<sup>124</sup>

After the review period is over, the OECD sometimes gives technical advice on implementation of suggested reforms – but more often they partner up with other IOs on implementation. For example, in Myanmar, as discussed in the introduction, advisers from the World Bank picked up on OECD's suggestion to consolidate Myanmar's investment laws.<sup>125</sup> With this method of cooperation 'road-tested', the OECD notes that it 'will be extended to other countries jointly identified by the OECD and the [World Bank]'.<sup>126</sup>

#### 3.4.2 What Recommendations does the OECD make?

The PFI takes a whole-of-government approach to investment climate reform and provides a checklist of key policy issues to assess in states' investment policy frameworks.<sup>127</sup> In practice however, reviews are done on a case-by-case basis, and the OECD relies on experts to propose reforms from the PFI that are appropriate in any given country.<sup>128</sup> A core area discussed in the PFI is policies to attract and protect FDI.<sup>129</sup> While OECD officials underline that they always assess stand-alone investment legislation in IPRs, they have no line on what the most appropriate instruments to implement investment policies in are.<sup>130</sup> This is reflected in the PFI's chapter on

<sup>118</sup>OECD (2006) *Investment for Development: Investment Policy Co-operation with Non-OECD Economies, Annual Report 2006*. OECD, 7.

<sup>119</sup>Chair's summary of the OECD Council at Ministerial Level, Paris, 23–24 May 2006 – Delivering Prosperity, [www.oecd.org/general/chairsummaryoftheoecdCouncilatministeriallevelparis23-24may2006-deliveringprosperity.htm](http://www.oecd.org/general/chairsummaryoftheoecdCouncilatministeriallevelparis23-24may2006-deliveringprosperity.htm).

<sup>120</sup>OECD (2021) *OECD Investment Policy Reviews*.

<sup>121</sup>OECD, supra n. 120.

<sup>122</sup>OECD, official 1.

<sup>123</sup>Ibid.

<sup>124</sup>OECD, supra n. 120.

<sup>125</sup>World Bank (2015); FIAS, official 1; OECD, official 1; FIAS, 2015 *Annual Review* 16.

<sup>126</sup>OECD (2015) *Policy Framework for Investment. From Advice to Action* 12.

<sup>127</sup>OECD (2015) *Policy Framework for Investment. 2015 Edition*.

<sup>128</sup>OECD, official 2.

<sup>129</sup>OECD, supra n. 127, 23.

<sup>130</sup>OECD, official 1.

investment policy, which focuses on the restrictiveness, transparency, and predictability of policies and laws generally,<sup>131</sup> rather than on specific types of laws.<sup>132</sup> In short, the PFI focuses less on *how* states should afford protection to foreign investors, and more on *what* protections states should provide.

The PFI's focus on *what* rather than on *how* is again reflected in the content of the IPRs. First, in 14 of the 52 OECD IPRs, states did *not* have a domestic investment law in place at the time of the review. In most of these cases, the OECD did not recommend the advisee state to enact an investment law – they focused on amending protection in existing policy instruments. The only states without an investment law that were advised to adopt one were Antigua and Barbuda<sup>133</sup> and Botswana.<sup>134</sup> Second, the 24 OECD IPRs carried out until 2009 make remarkably few recommendations on advisee states' existing domestic investment laws (see Table 4). After 2010, following the adoption of the PFI, the OECD started providing specific advice concerning the content of domestic investment laws. The direction of the advice shows a preference for a liberal investment policy. In one third (10 of 29) of the IPRs from 2010 and onwards, the OECD suggests that advisee states should increase the substantive protections in their domestic investment laws. While these IPRs increasingly advise states to clarify the protections enshrined in their domestic investment laws (13 of 29), they never advised states to reduce substantive protections. Similarly, the IPRs from the 2010s are very vocal on the issue of barriers to investment. More than half of the reviews (17 of 29) recommend states to lower barriers to investment through domestic investment laws. No state has ever been recommended to raise the barriers to investment in their domestic investment laws by the OECD. Finally, approximately half of the IPRs after 2010 suggested consolidation of overlapping pieces of investment legislation (15 of 29).

### 3.5 The United Nations Conference on Trade and Development (UNCTAD)

Established in 1962, UNCTAD was set up as an intergovernmental forum for developing countries to discuss trade and investment issues. However, in the aftermath of the 1980s' debt crisis, UNCTAD also started giving *ad hoc* technical assistance to developing countries.<sup>135</sup> Following its eighth session in Cartagena, Colombia in 1992, UNCTAD incorporated technical assistance as an organizational activity into its mandate. In the final report from Cartagena, UNCTAD noted that going forward, 'the functions of UNCTAD [shall] comprise policy analysis; intergovernmental deliberation, consensus-building and negotiation; monitoring, implementation and follow-up; and *technical co-operation*'.<sup>136</sup> The deliberations in Cartagena completed the conceptual convergence of UNCTAD towards an institution in line with the Washington Consensus. At the core of this consensus was the idea that economic liberalization is key to economic development.<sup>137</sup> At its ninth session in 1995, UNCTAD finalized organizational changes to fit the new mandate.<sup>138</sup>

UNCTAD started to provide high-level advice on strategies to attract FDI in its *World Investment Reports*.<sup>139</sup> Its work on IPRs started in 1997 with the objective 'to provide developing

<sup>131</sup>Importantly, the OECD published the first iteration of a FDI Regulatory Restrictiveness Index in 1997, which already at that time collected data on twelve non-OECD countries. See S.S. Golub (2003) *Measures of Restrictions on Inward Foreign Direct Investment for OECD Countries*, OECD Economic Studies, No. 36.

<sup>132</sup>OECD, supra n. 127, 23–37. This approach may reflect a change in the OECD's attitude following the unsuccessful negotiations of a Multilateral Agreement on Investment during the 1990s.

<sup>133</sup>OECD (2006) *OECD Investment Policy Reviews: Caribbean Rim. Antigua and Barbuda, Grenada and St. Lucia*, 14.

<sup>134</sup>OECD (2014) *OECD Investment Policy Reviews: Botswana*, 16.

<sup>135</sup>UNCTAD (2014) *UNCTAD at 50: A Short History*, United Nations, 11, 65–66.

<sup>136</sup>Italics added. See UNCTAD, *A New Partnership for Development: The Cartagena Commitment*, Eighth session, 27. February 1992, para. 50, see [https://unctad.org/system/files/official-document/tviiimisc4\\_en.pdf](https://unctad.org/system/files/official-document/tviiimisc4_en.pdf).

<sup>137</sup>UNCTAD, supra n. 135, 67.

<sup>138</sup>*Ibid.*, 83.

<sup>139</sup>UNCTAD (1993) *World Investment Report 1993: Transnational Corporations as Integrated International Production*. United Nations, chapter XI.

**Table 4.** Coding of Domestic Investment-Law Advice in OECD IPRs over Time (Shares of IPRs Providing Specific Advice per Period in Parentheses)

| Time Period | # of PRs | Substantive Prot. Up | Substantive Prot. Down | Access to ISDS Up | Access to ISDS Down | Raising Barriers | Lowering Barriers | Clarify Language | Harmonize/ Consolidate |
|-------------|----------|----------------------|------------------------|-------------------|---------------------|------------------|-------------------|------------------|------------------------|
| Pre-2005    | 12       | 0 (0.00)             | 0 (0.00)               | 0 (0.00)          | 0 (0.00)            | 0 (0.00)         | 0 (0.00)          | 0 (0.00)         | 0 (0.00)               |
| 2005–2009   | 12       | 0 (0.00)             | 0 (0.00)               | 0 (0.00)          | 0 (0.00)            | 0 (0.00)         | 0 (0.00)          | 1 (0.08)         | 1 (0.08)               |
| 2010–2014   | 15       | 5 (0.33)             | 0 (0.00)               | 4 (0.27)          | 0 (0.00)            | 0 (0.00)         | 8 (0.53)          | 5 (0.33)         | 9 (0.60)               |
| Post-2014   | 14       | 5 (0.36)             | 0 (0.00)               | 1 (0.07)          | 1 (0.07)            | 0 (0.00)         | 9 (0.64)          | 8 (0.57)         | 6 (0.43)               |

countries with an external tool for assessing how their policy stance in attracting FDI in consonance with stated national objectives, and incorporating a medium-to-long-term perspective on how to respond to emerging regional and global opportunities'.<sup>140</sup> In 1999, the Director of UNCTAD's investment division, Karl Sauvant, launched the first two reports of the IPR programme. The programme used personnel from UNCTAD's investment division to give concrete FDI policy recommendations to states. At UNCTAD's eleventh conference in São Paulo, Brazil, in 2004, following a general evaluation of UNCTAD's technical cooperation activities,<sup>141</sup> the IPR programme was extended to include technical assistance such as 'helping [advisee states] to formulate and implement investment policies and by assisting with relevant legislation and regulations'.<sup>142</sup> UNCTAD is the only IO that publishes separate implementation reports as a follow-up to IPRs. At the time of writing, UNCTAD has finalized 50 IPRs, and 18 implementation reports.<sup>143</sup>

### 3.5.1 What Type of Assistance Does UNCTAD Give?

Technical assistance under UNCTAD's IPR programme consists of three deliverables.<sup>144</sup> The first deliverable is the IPR itself. To commence an IPR, there needs to be a review request from a government, including a commitment to reform. While preparing an IPR, officials from UNCTAD conduct a broad examination of the investment climate in the advisee state through fact-finding missions and interaction with relevant government officials and national stakeholders. UNCTAD reports that it frequently cooperates and coordinates with other IOs when doing reviews – not only other UN agencies, which have funded a major share of the IPRs,<sup>145</sup> but also the OECD and the World Bank.<sup>146</sup> Before the review is handed over to the advisee state, UNCTAD hosts a year-long intergovernmental peer review period. The aim of the peer review is to benchmark 'against international best practices in [investment] policy making' and to get advisee states to take ownership of the IPR before it becomes public.<sup>147</sup>

The second deliverable is practical assistance and capacity building activities in advisee states. Follow-up assistance may include a wide range of activities: practical help to implement reforms suggested in an IPR, help to draft new laws or revise existing laws, capacity-building workshops, and preparation of so-called 'blue books' with policy measures that can be implemented within a year.<sup>148</sup> Follow-up activities have to be requested by states, and UNCTAD officials report that most countries make such requests after receiving IPRs.<sup>149</sup> UNCTAD has supplied technical assistance in the drafting of new investment laws to Botswana, Colombia, The Dominican Republic, Ghana, Lesotho, Morocco, Sri Lanka, and Tanzania.<sup>150</sup>

The third deliverable is IPR implementation reports which assess whether states have implemented the reforms proposed in IPRs.<sup>151</sup> Similar to the IPRs, implementation reports are

<sup>140</sup>Capacity Building in UNCTAD's Technical Cooperation Activities, TD/B/WP/188 UNCTAD Secretariat, 1998-2000 plan for technical cooperation, TD/B/WP/104, p. 28.

<sup>141</sup>J.-E. Denis, H. Saha, and D. Griffiths, Evaluation of Capacity Building in UNCTAD's Technical Cooperation Activities, TD/B/WP/155, 12 July 2002, see para. 64.

<sup>142</sup>UNCTAD, *São Paulo Consensus*, Eleventh session, 13–18. June 2004, para. 53.

<sup>143</sup>See Table A1 in the Appendix.

<sup>144</sup>UNCTAD (2012) *The Investment Policy Reviews: Shaping Investment Policies around the World*. United Nations.

<sup>145</sup>UNDP has been the most important funder of UNCTAD's IPRs, see Annex II: Statistical tables in UNCTAD's annual Review of the technical cooperation activities of UNCTAD and their financing. There are also examples of bilateral funding of IPRs; Germany funded Rwanda's and Ghana's IPRs, and Ireland funded Viet Nam's and Zambia's IPRs.

<sup>146</sup>UNCTAD, supra n. 144, 9.

<sup>147</sup>UNCTAD (2008) *The Investment Policy Review Programme: A Framework for Attracting and Benefitting from FDI*. United Nations, 3.

<sup>148</sup>UNCTAD, supra n. 147, 3.

<sup>149</sup>UNCTAD, official 1.

<sup>150</sup>UNCTAD, supra n. 144, 26; UNCTAD supra n. 147, 13.

<sup>151</sup>UNCTAD (2018) *Implementation Reports: Lessons Learned*. United Nations.

demand-driven. UNCTAD practices a minimum of five years between the IPR and the implementation assessment.<sup>152</sup>

### 3.5.2 What Recommendations Does UNCTAD Make?

In the early years of UNCTAD's IPR programme, when the Washington Consensus stood strong within UNCTAD, the focus in IPRs was on the removal of policies that were restrictive to foreign investment.<sup>153</sup> In these first years, advisory personnel at UNCTAD had no handbook or overarching policy strategy to guide their work.<sup>154</sup> Instead, they worked off institutional knowledge and generic advice formulated in their *World Investment Reports*. This pool of institutional knowledge was later used as the basis for UNCTAD's current framework for technical assistance: *The Investment Policy Framework for Sustainable Investment* (IPFSD), published in 2012.<sup>155</sup> As one senior UNCTAD official put it:

The [early] investment policy reviews were based on several decades of work done by UNCTAD on investment ... issues. All the knowledge accumulated, as well as the country work done in the context of the IPRs have enabled UNCTAD to put together the IPFSD.<sup>156</sup>

Importantly, from the IPR programme's inception, investment law advice has been a core feature of UNCTAD's IPRs. In the 2015 version of the IPFSD, a range of options for enhancing foreign investment legislation is suggested on issues such as entry and establishment, treatment and protection, and investor obligations.<sup>157</sup> The framework does not have any clear guidelines on whether dispute settlement is best dealt with through domestic courts or ISDS, but it notes that enforcement of contracts and regulations should 'operate under the rule of law'.<sup>158</sup> In our coding of UNCTAD's 50 IPRs, we find that almost all advisee states had a domestic investment law in place at the time of UNCTAD's review. Among the states that did not, most were encouraged to adopt foreign investment laws. We only found three instances where states without a foreign investment law were *not* encouraged to adopt one.<sup>159</sup>

UNCTAD's early IPRs rarely touched upon substantive investment protection (Table 5). In the 2010s, however, substantive issues were more often evaluated. Between 2005 and 2021, more than half of their IPRs proposed to *increase* the substantive investment protection under foreign investment laws. Overall, UNCTAD more often suggests that states should increase substantive protections in their foreign investment laws than water down such protections. The advice on substantive protection in the IPRs has also become increasingly specific over time. In the early years, advice was often generic. In later years, especially after the formulation of the IPFSD, recommendations have engaged more specifically with individual substantive provisions in advisee states' investment laws. States are most often recommended to increase investor protection through providing free transfer of capital and national treatment. One substantive provision that UNCTAD often advises states to stop including in their domestic investment laws is stabilization clauses.

<sup>152</sup>UNCTAD, supra n. 144, 20–21.

<sup>153</sup>UNCTAD, supra n. 135, 85.

<sup>154</sup>UNCTAD, official 1.

<sup>155</sup>UNCTAD (2012) *Investment Policy Framework for Sustainable Development*. United Nations.

<sup>156</sup>UNCTAD, official 3.

<sup>157</sup>UNCTAD (2015) *Investment Policy Framework for Sustainable Development*. United Nations, 59–60.

<sup>158</sup>UNCTAD, supra n. 157, 60.

<sup>159</sup>North Macedonia was already perceived to be 'open to foreign investors'. See UNCTAD (2012) *Investment Policy Review: The Former Yugoslav Republic of Macedonia*. United Nations, 36. Rwanda, through its 2003 Constitution and joint laws, was seen as having Africa's 'most open FDI regime'. See UNCTAD (2006) *Investment Policy Review: Rwanda*. United Nations, 31. Sri Lanka was advised to instead reorient its Board of Investment. See UNCTAD (2004) *Investment Policy Review: Sri Lanka*. United Nations, 71–73.

**Table 5.** Coding of Domestic Investment-Law Advice in UNCTAD IPRs over Time (Shares of IPRs Giving Specific Advice per Period in Parentheses).

| Time Period | # of IPRs | Substantive Prot. Up | Substantive Prot. Down | Access to ISDS Up | Access to ISDS Down | Raising Barriers | Lowering Barriers | Clarify Language | Harmonize/ Consolidate |
|-------------|-----------|----------------------|------------------------|-------------------|---------------------|------------------|-------------------|------------------|------------------------|
| Pre-2005    | 14        | 4 (0.29)             | 1 (0.07)               | 2 (0.14)          | 0 (0.00)            | 0 (0.00)         | 9 (0.64)          | 2 (0.14)         | 4 (0.29)               |
| 2005–2009   | 12        | 7 (0.58)             | 0 (0.00)               | 5 (0.42)          | 0 (0.00)            | 0 (0.00)         | 11 (0.92)         | 3 (0.25)         | 3 (0.25)               |
| 2010–2014   | 10        | 5 (0.50)             | 3 (0.30)               | 2 (0.20)          | 1 (0.10)            | 1 (0.10)         | 4 (0.40)          | 3 (0.30)         | 4 (0.40)               |
| Post-2014   | 15        | 8 (0.53)             | 4 (0.27)               | 0 (0.00)          | 5 (0.33)            | 0 (0.00)         | 11 (0.73)         | 10 (0.67)        | 10 (0.67)              |



Second, UNCTAD has trended away from suggesting that states should consider *increasing* investors' access to ISDS in their domestic investment laws towards a stance where ISDS should be restricted. The fact that ISDS is not frequently discussed in UNCTAD's IPRs is not surprising, given the lack of specificity on the issue in the IPFSD.<sup>160</sup>

Third, UNCTAD has been consistent in their recommendations on investment barriers, and lowering such barriers is a core feature of their IPR programme. In the late 2000s, three of four advisee states were recommended to lower their barriers to investment, and UNCTAD has rarely recommended states to introduce or increase restrictions on foreign investment, whether sector-based or more general. In substance, the advice on barriers to investment has also remained stable. UNCTAD frequently suggests that entry procedures for foreign investors should be simplified, that laws banning foreign investments under specific thresholds are poor instruments to attract specific types of investment, and that negative lists are better tools to protect sectors of the economy from foreign competition than positive lists.

Fourth, over time, UNCTAD has paid increasing attention to harmonization of investment protection across states' laws, and they often suggest clarifying the contents of specific laws. While only 20% of UNCTAD's IPRs dealt with the harmonization of investment protection across different domestic investment laws in the early 2000s, almost 70% of IPRs have addressed this issue since 2015. We find the same tendency as concerns recommendations to clarify advisee states' domestic investment laws. While UNCTAD did not pay much attention to the need for clarifications in the first period they provided IPRs, almost 70% of IPRs concluded since 2015 included such recommendations. The most common recommendations made are to clarify definitions of investment and the definitions of key substantive provisions.

### 3.6 Summary of Findings

Table 6 summarizes the different ways in which the World Bank, the OECD, and UNCTAD provide technical assistance on domestic investment laws. On the one extreme, the OECD mostly gives hands-off technical assistance, with some intermediate involvement such as coaching on investment policymaking. On the other extreme, FIAS' technical assistance is almost exclusively done on a hands-on basis through the World Bank's country offices. UNCTAD writes high-level reviews, they conduct capacity-building workshops, and they assist states with drafting when so asked. The drafting assistance is mostly limited to sharing example texts.<sup>161</sup> In contrast, direct drafting assistance is FIAS' *modus operandi*. In terms of personnel, FIAS uses a mix of internal experts and external lawyers in their projects, while the OECD and UNCTAD rely mostly on their own teams when writing IPRs and only consult external parties as part of fact-finding missions.

In terms of advice given, there are also some interesting differences.<sup>162</sup> First, the OECD and FIAS offer more liberal advice than UNCTAD, at least when it comes to domestic investment laws. UNCTAD did have a relatively liberal approach to domestic investment laws during its first decade of IPR-making, but in later years it has focused more on the balance between investor rights and states' room to regulate, as well as the importance of textual clarity in domestic investment laws. Another difference is found when looking at what policy instruments advisees are advised to use. The OECD is less concerned about what instruments states use and focuses on the substance of protection. FIAS and UNCTAD seem to think that domestic investment laws are a useful way to extend protections to foreign investors, and they frequently suggest to states without domestic investment laws that they should adopt one.

<sup>160</sup>UNCTAD, *supra* n. 157, 59–60.

<sup>161</sup>UNCTAD, official 3.

<sup>162</sup>Note that differences in advice given by OECD and UNCTAD in their IPRs could be a function of their advisee samples. UNCTAD has for example advised more archetypical developing states than the OECD. Similarly, the OECD has given advice to more states without a domestic investment law in place than UNCTAD.

**Table 6.** Comparing the Activities used by UNCTAD, the OECD, and FIAS When Giving Technical Assistance on Domestic Investment Laws

|        | IO Technical Assistance   |  |  |
|--------|---|--|--|
|        | Hands-off Involvement   | Intermediate Involvement   | Hands-on Involvement   |
| UNCTAD | <ul style="list-style-type: none"> <li>- Investment policy reviews</li> <li>- Implementation reports</li> </ul> | <ul style="list-style-type: none"> <li>- Capacity-building workshops</li> <li>- 'Blue books' on short-term policy options</li> </ul> | <ul style="list-style-type: none"> <li>- Practical implementation assistance</li> <li>- Drafting assistance</li> </ul>                                   |
| OECD   | <ul style="list-style-type: none"> <li>- Investment policy reviews</li> </ul>                                   | <ul style="list-style-type: none"> <li>- Coaching on investment policymaking</li> </ul>  |  |
| FIAS   |   | <ul style="list-style-type: none"> <li>- Capacity building</li> <li>- Implementation support</li> </ul>                              | <ul style="list-style-type: none"> <li>- Direct drafting assistance</li> <li>- Indirect drafting assistance</li> <li>- Sharing best practices</li> </ul> |

To explore *how* IOs exert their influence on domestic investment laws in practice, as well as the *potential causal impact* of technical assistance, we have carried out a case study of Bosnia and Herzegovina's (BiH) domestic investment law. We choose BiH as a case because it was a fragile and newly independent state at the time of passing its domestic investment law in 1998. BiH has also been on the receiving end of an extraordinary amount of development assistance. As such, BiH constitute a *typical case* where the effects of technical assistance on domestic policymaking should be very visible.<sup>163</sup>

#### 4. Bosnia and Herzegovina's Domestic Investment Law

In the early 1990s, the war in Bosnia and Herzegovina dominated headlines in Europe; the war came to an end in 1995 with the signing of the Dayton peace accords at Versailles. In the years since, BiH has 'been the site of internationally sponsored political engineering on a remarkable scale',<sup>164</sup> and thousands of staffers from civil and military IOs have been deployed to support peace. The Dayton peace accords established the *Office of the High Representative* (OHR) as the head of civilian peace-building efforts in BiH.<sup>165</sup> On paper, the OHR was set up to oversee compliance with the Dayton accords and foreign aid in BiH, as well as to coordinate various IOs' efforts in the country.<sup>166</sup> To carry out its mandate, the OHR was given extensive powers. It could veto decisions taken by BiH's political leadership, fire BiH officials if needed, and impose the legislation needed to enforce the Dayton accords.<sup>167</sup> The OHR was also allowed to procure assistance from non-state parties, and in 1996 the office used this power as it sought assistance to develop a domestic investment law for BiH.

##### 4.1 The Law on the Policy of Foreign Direct Investment in Bosnia and Herzegovina

The OHR wanted BiH to develop a domestic investment law as FDI in post-war BiH was close to zero. More generally, re-building BiH's economy was one of the core goals of the Dayton accords.

<sup>163</sup>J. Seawright and J. Gerring (2008) 'Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options', *Political Research Quarterly* 61(2), 299.

<sup>164</sup>S. Bose (2002) *Bosnia after Dayton: Nationalist Partition and International Intervention*. Oxford University Press, 3.

<sup>165</sup>'The General Framework Agreement for Peace in Bosnia and Herzegovina', The Dayton Peace Accord 1995, Article VIII; Annex 10.

<sup>166</sup>G. Toal and C.T. Dahlman (2011) *Bosnia Remade: Ethnic Cleansing and its Reversal*. Oxford University Press, 204.

<sup>167</sup>T. Banning (2014) 'The "Bonn powers" of the High Representative in Bosnia and Herzegovina: Tracing a Legal Figment', *Goettingen Journal of International Law* 6(2).

The lack of investment in post-war BiH was a function of the war itself – but it was also rooted in patrimonial state structures from the pre-war years<sup>168</sup> and extensive political corruption.<sup>169</sup>

Within the newly formed BiH government, there was no legal capacity to develop investment legislation. There was also strong distrust between politicians from the two political entities (*The Federation of Bosnia and Herzegovina* and *Republika Srpska*). Even if various lending institutions and aid agencies had extensive presence in the late 1990s,<sup>170</sup> Carlos Westendorp, the High Representative at the time, sought help to draft an investment law elsewhere. At first, a French investment lawyer was hired to draft a law that could be presented to BiH politicians. A former World Bank official who worked closely with the OHR at the time explained that this draft ended up being way too extensive and complex. Westendorp then turned to his Senior Economist, Egbert Gerken, who had previously worked for the World Bank, for advice on how to proceed.<sup>171</sup>

Even though the World Bank had officials in BiH after Dayton,<sup>172</sup> Gerken suggested bringing in help from FIAS. In 1997, a small FIAS team arrived in Sarajevo to commence the technical assistance mission.<sup>173</sup> A senior official who was part of the mission noted that instead of a complex investment law drafted from the point of view of a well-developed West European economy, as suggested by the French lawyer first hired by the OHR, what BiH needed was a law that tackled two simple things: entry of investment and equal treatment.<sup>174</sup> The officials from FIAS therefore proposed a simple law with five articles covering entry and nine articles covering the treatment of foreign investors. Even if the FIAS draft had a simple structure, similar to that of traditional investment treaties, BiH officials struggled to enact it. Advisers from FIAS report that they spent months traveling back and forth between *The Federation of Bosnia and Herzegovina* and *Republika Srpska* to arrange for the law to be passed, but disagreements on who would oversee the law at the federal level created an impasse.<sup>175</sup>

Despite these disagreements, Westendorp decided to forward the draft to BiH's parliamentary assembly for consideration and approval in February 1998. A month later, the House of Representatives decided to remove the draft from its agenda. As a response, the OHR decided to use its powers according to the Dayton Agreement to take direct action.<sup>176</sup> In Westendorp's own words:

More than two years after the signing of the Dayton Peace Agreement, the International Community cannot tolerate that the arrival of foreign investment, which is so necessary for sustained economic recovery, continues to be impeded by the lack of a legal framework. I have decided to put into force the Law on the Policy of Foreign Direct Investment in Bosnia and Herzegovina ... This Decision will take effect on the day of publication in the BiH Official Gazette.<sup>177</sup>

<sup>168</sup>M. Pugh (2002) 'Postwar Political Economy in Bosnia and Herzegovina: The Spoils of Peace', *Global Governance* 8(4).

<sup>169</sup>B. Divjak and M. Pugh (2008) 'The Political Economy of Corruption in Bosnia and Herzegovina', *International Peacekeeping* 15(3).

<sup>170</sup>Bose supra n. 164, 3; World Bank (2004) *Bosnia and Herzegovina: Post-Conflict Reconstruction and the Transition to a Market Economy*. World Bank, 9.

<sup>171</sup>FIAS, official 5.

<sup>172</sup>World Bank (1997) *Bosnia and Herzegovina – From Recovery to Sustainable Growth*. World Bank.

<sup>173</sup>The assistance mission is recorded in an internal evaluation of FIAS' assistance efforts in the 1980s and 1990s. See IBRD/IFC (1998) *An Evaluation of the Foreign Investment Advisory Service (FIAS)*. World Bank, 35. A BiH official also confirmed FIAS' role in the drafting of the law (BiH, official 1).

<sup>174</sup>FIAS, official 6.

<sup>175</sup>Ibid.

<sup>176</sup>The Dayton Peace Accord, supra n. 165.

<sup>177</sup>Westendorp made this statement in a direct letter to BiH parliamentarians preceding the draft law. See [www.worldcourts.com/ohr/eng/decisions/1998.03.05\\_PFDiBiH.htm](http://www.worldcourts.com/ohr/eng/decisions/1998.03.05_PFDiBiH.htm). The final law was published in the official Gazette of BiH No. 17/98.

*The Law on the Policy of Foreign Direct Investment in Bosnia and Herzegovina* (hereafter: the *FDI Law*) was thus enacted by the OHR. Moreover, the text was almost entirely produced by FIAS. Indeed, the *FDI Law* was accentuated as a key World Bank achievement in BiH at the time. An internal evaluation from 1998 highlights how FIAS had ‘drafted a compromise Foreign Investment Law’ for BiH after a ‘Government Working Group had been unable to agree on a draft law for a period of 1.5 years’ The evaluation notes that BiH ‘accepted FIAS’s (sic) draft with minor changes’.<sup>178</sup>

#### 4.2 Amendments to the *FDI Law*

The *FDI Law* has been amended three times since its adoption. Each of these amendments liberalized the initial law. The first amendment (in 2003) abolished an obligation to register foreign investments at both the federal level and the entity level in BiH. Only registration at the federal level was now required.<sup>179</sup> The second amendment (in 2010) eliminated the registration procedures for foreign investors at the federal level and allowed foreign investment into production of weapons and military equipment.<sup>180</sup> The third amendment (in 2015) opened up BiH’s media sector to foreign investment.<sup>181</sup>

Our data show that both the World Bank and UNCTAD had technical assistance missions in BiH in 2015 (see Table A1); but we also find partial evidence that FIAS worked on the amendments in 2003 and 2010. As regards the first amendment, a FIAS official working in the Bank’s country office in Sarajevo in the 2000s reports that he worked with BiH officials in preparing the official documents leading to the single registration amendment.<sup>182</sup> However, we find no further corroborating evidence documenting FIAS’ involvement in BiH in 2003.

FIAS’ involvement is much more pronounced in conjunction with the second amendment. Both BiH and FIAS officials independently confirm that FIAS worked together with BiH officials at the federal level to design this amendment.<sup>183</sup> The extent of the involvement is laid out in an International Finance Corporation Smart Lesson written by FIAS’ operational advisers in BiH at the time.<sup>184</sup> The FIAS project started in 2007, when the Ministry of Foreign Trade and Economic Relations in BiH requested assistance from the Bank to assess how to facilitate entry for foreign investors in BiH. ‘Recognizing the limitations of [their] counterparts’,<sup>185</sup> FIAS officials report that they provided ‘handholding, on-the-job-training, and significant investment of ... consultants’ time’ to help BiH officials do a regulatory impact assessment.

The assessment resulted in three reform options. FIAS recommended the option that simplified registration procedures for foreign investors.<sup>186</sup> After almost two years, during which FIAS worked closely with officials from different ministries and courts, both houses of the BiH Parliament adopted the final draft amendment, written with direct assistance from FIAS, in April 2010.

Both FIAS and UNCTAD had in-country presence in BiH during the period leading up to the third amendment. However, only FIAS had direct influence on the amendment. UNCTAD’s

<sup>178</sup>Another internal World Bank evaluation confirm the influence of FIAS on the initial draft law, see World Bank, *supra* n. 170, 68.

<sup>179</sup>Official Gazette of BiH No. 13/03. See Article 5.a. of the 1998 *FDI Law*.

<sup>180</sup>Official Gazette of BiH No. 48/10. See Article 5.a. of the 1998 *FDI Law*.

<sup>181</sup>Official Gazette of BiH No. 22/15. See Article 4.a. of the 1998 *FDI Law*.

<sup>182</sup>FIAS, official 4.

<sup>183</sup>BiH, official 1; FIAS official 4.

<sup>184</sup>IFC (2010) *Smart Lessons: Levelling the Playing Field in Bosnia and Herzegovina. Simplifying Entry Requirements for Foreign Investors*. World Bank.

<sup>185</sup>IFC, *supra* n. 184, 1.

<sup>186</sup>IFC, *supra* n. 184, 2.

advisory mission started in early 2014 and culminated with an IPR published in July 2015.<sup>187</sup> UNCTAD's only direct advice on the domestic investment law was to amend or abolish investment protection against future policy changes,<sup>188</sup> which has not been followed up on by BiH.<sup>189</sup> The third amendment only removed the foreign equity ownership cap of 49% in parts of the BiH's media sector.<sup>190</sup> In FIAS' annual report from 2015, the amendment is reported to be 'drafted with [International Finance Corporation] help',<sup>191</sup> and officials from both FIAS and BiH confirm extensive cooperation in the drafting of the amendment.<sup>192</sup>

### 4.3 A Link to Loan Conditionalities?

IOs can influence states' political processes in many ways. The avenue for influence most prominently discussed in the empirical literature is conditionalities.<sup>193</sup> A 2004 evaluation of World Bank activities in BiH notes that, over time, 'the Bank has substantially tightened its insistence on adherence to conditionality' in BiH and that 'outside pressures, whether from ... OHR, EU, World Bank, IMF, or other agencies, have been instrumental in most reform measures adopted [in BiH]'.<sup>194</sup> In the years after the Dayton accords, loans from the International Bank for Reconstruction and Development to BiH skyrocketed.<sup>195</sup> We therefore examined whether BiH's adherence to FIAS' advice on its *FDI Law* was related to development loans or loan conditionalities imposed by the World Bank?

FIAS' work on the initial *FDI Law* in 1997 was *not* related to World Bank lending. The draft was procured by the OHR, and it was the OHR who passed the law. It is more difficult to determine whether World Bank lending was separate from FIAS technical assistance during the subsequent amendments. We find no evidence of the amendments being explicit conditions for development loans. However, a FIAS official who worked in BiH in the 2000s notes that before 2006, he could tag regulatory reforms onto development loans as conditionalities.<sup>196</sup> While the official cannot recall whether the 2003 amendment to the *FDI Law* was a precondition for any loans, he notes that in general it was easier to get BiH officials to accept regulatory changes in the pre-2006 era, when the possibility of development loans being made conditional on regulatory changes loomed in the background.

Overall, however, this case study shows that BiH's *FDI Law*, including the three amendments, was heavily influenced by technical assistance from IOs. As documented in a similar study of the Kyrgyz Republic's domestic investment law,<sup>197</sup> the World Bank, through FIAS, was the main influencer. FIAS is also the only IO that has worked hands-on with BiH officials on the drafting of legal texts. A BiH official noted that FIAS officials work side-by-side with BiH bureaucrats and that they are given the same access to office space and parliamentarians as the bureaucrats. The same official underlined that 'the support of international organizations is very useful' and that 'the World Bank Group has helped [BiH] get closer to best practices' on domestic investment legislation.<sup>198</sup>

<sup>187</sup>UNCTAD, official 3.

<sup>188</sup>UNCTAD (2015) *Investment Policy Review: Bosnia and Herzegovina*. United Nations, 11.

<sup>189</sup>*The FDI Law*, Article 20.

<sup>190</sup>Article 4 in *The FDI Law* originally forbade foreign investors to own more than 49% in media companies. The 2015 amendment removed the ownership cap for enterprises engaged in print media and television production. The cap was not removed for public TV and radio services.

<sup>191</sup>FIAS, *2015 Annual Review* (World Bank 2016), 71.

<sup>192</sup>BiH, official 1; FIAS, official 4.

<sup>193</sup>Burnside and Dollar, *supra* n. 53; Easterly, *supra* n. 53.

<sup>194</sup>World Bank, *supra* n. 170, 10, 31.

<sup>195</sup>See <https://data.worldbank.org/indicator/DT.DOD.MWBG.CD?locations=BA>

<sup>196</sup>FIAS, official 4.

<sup>197</sup>Berge and St John, *supra* n. 9, 16–21.

<sup>198</sup>BiH, official 1.

## 5. Concluding Notes

In this article, we first explore variation in states' domestic investment laws, and how such laws contribute to global investment protection. We then examine how IO technical assistance can be organized, and analyse the technical assistance provided by three IOs on states' domestic investment laws. While IOs are not the only external actors influencing countries' domestic policy choices, our findings indicate that they frequently are the key actors.

We find that while middle- and high-income states are the most prominent users of IIAs, almost only states with low levels of economic development have domestic investment laws with *both* substantive protection and ISDS. Many of these states have few, if any, IIAs. We demonstrate how domestic investment laws significantly increases the protection afforded to foreign investors in such states. We also find significant variation across domestic investment laws, both in time and space. States increasingly seem to consolidate different investment laws, and fewer and fewer states operate with separate legislation for domestic and foreign investors. Increasingly, legislation with special treatment for foreign investors needs to be justified based on states' special needs.

As regards IOs' technical assistance on domestic investment laws, we find that there are three main IOs giving technical assistance on domestic investment laws: the World Bank, the OECD, and UNCTAD. We find substantial variation in both *how* these IOs operate their technical assistance programs, and *what* advice they give to states. As regards the form of assistance they give, we find that the World Bank provides hands-on advice and direct drafting assistance, while the OECD and UNCTAD mostly engage with advisee states on a more hands-off basis through high-level reviews. As regards the type of advice these IOs give, we find that both of the institutions dominated by developed country perspectives – the World Bank and the OECD – provide more pro-liberal advice than the institution dominated by developing country perspectives; UNCTAD.

While our study of technical assistance programs is mostly descriptive, our case study of Bosnia and Herzegovina's domestic investment law illustrates the immense potential for influence in IO technical assistance. BiH's domestic investment law was by and large drafted by World Bank advisers, and it was put into force by the Office of the High Representative without parliamentary debate. The three subsequent amendments to the investment law were also heavily influenced by World Bank advice. This case study also underlines the importance of the mode in which advice is provided – hands-on advice seems to be more influential than hands-off advice, even when the latter is followed up through reviews.

While our study is part of a growing strand of research detailing how IOs increasingly use soft modes of influence *vis-à-vis* states, more research is needed to probe the external validity of the causal relationship between IO technical assistance and domestic policymaking – both in the field of domestic investment laws and in other areas of public policy.

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