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ORIGINAL ARTICLE

The Right to Hospitality in International Economic Law: Domestic Investment Laws and the Right to Invest

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Abstract

Under the Liberal International Order (LIO) of the post-WWII years, foreign investment protection was meant to be granted by international law and institutions. But current economic de-globalization is giving way to institutional and legal de-globalization. Domestic laws relating to foreign investment, especially in the form of Domestic Investment Laws, are taking over International Investment Agreements as the standard means of regulating cross-border trade and investment flows. The article compares substantive and procedural standards of investor protection in international and domestic investment law, as well as old and new Domestic Investment Laws, with a focus on non-discrimination and dispute settlement. The move to domestic law in IEL does not always signify a trend for most states to isolate themselves from the international economy. Rather, it is often an effort to achieve similar ends as those of the LIO but using different means. The article discusses an alternative political economy framework for an international (economic) law of ends, the cornerstone of which is the right to hospitality.

Keywords: de-globalization; domestic investment laws; investment dispute; liberal international order; right to invest; right to hospitality

1. Introduction

Domestic laws regulating cross-border trade and investment are proliferating in jurisdictions all over the world.[1] Domestic regulation of foreign investment sometimes takes the form of control, and sometimes the form of promotion and/or facilitation of cross-border trade and investment. Domestic Investment Laws (DILs) are specialized statutes introduced by national legislatures to promote and/or facilitate investment.[2] This article discusses the role and function of DILs in

[1]The domestic side of foreign trade and investment remains largely understudied. But see, for example, A. Santos (2012) 'Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico', *Virginia Journal of International Law* 52, 551–632; R.C. Chen (2017) 'Bilateral Investment Treaties and Domestic Institutional Reform', *Columbia Journal of Transnational Law* 55, 547; S. Puig and G. Shaffer (2018) 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law', *American Journal of International Law* 112, 361; G. Dimitropoulos (2020) 'National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform', *Journal of World Investment & Trade* 21, 71.

[2]See also A.R. Parra (1992) 'Principles Governing Foreign Investment, as Reflected in National Investment Codes', *ICSID Review – Foreign Investment Law Journal* 7, 428; M. Burgstaller and M. Waibel (2011) 'Investment Codes', *Max Planck Encyclopaedia of Public International Law* 6 (referring to 'regulatory' and 'facilitative' codes); J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue. Investment laws – more often than not, facilitative – may be found under 'Investment Laws Navigator' of the UNCTAD's Investment Policy Hub, https://investmentpolicy.unctad.org/investment-laws

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the system of International Economic Law (IEL);[3] it highlights the differences in design, scope, and purpose between old DILs and newer DILs developed since 2015.[4]

The dominant political economy paradigm of the post-war Liberal International Order (LIO) and IEL presumed – as well as required – that cross-border trade and investment be regulated at the international level by multilateral and other international agreements and institutions – such as Bilateral Investment Treaties (BITs) and other International Investment Agreements (IIAs).[5] States have recently started moving away from this paradigm. The proliferation of DILs and other forms of domestic law relating to foreign investment indicates a broader move from the international to the domestic in IEL.[6] There are many underlying reasons for this. Especially in the field of international investment law, IIAs have arguably become legal privileges for foreigners without the responsibilities usually associated with such privileges.[7] IIAs introduce principles and rules of investment protection above and beyond the ones provided to domestic investors. The process of replacing or complementing international agreements in the economic sphere with domestic laws such as DILs – or what is referred to here as 'domestication' – presents a challenge to the paradigm of the LIO. The article examines the ways in which the foundations of the LIO may be changing with the recent transition from international to domestic rules for the regulation of cross-border trade and investment.

The move to domestic law in IEL does not signify a trend for most states to isolate themselves from the international economy.[8] Rather, it is often an effort to achieve similar ends as those of the LIO but using different means: of attracting foreign trade and investment while at the same time allowing for more control over the types and means of foreign economic activity.[9] Thus, the broader domestication move – with the adoption of DILs – does not always suggest the abandonment of the fundamental values of IEL – such as the freedom of movement of products and

[3]The article does not cover the issue of DILs as a source of international investment law; see J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue. It does not equally cover DILs as unilateral acts of states under international law; ibid.

[4]The article draws on the six phases of the interaction between domestic and international investment law developed in K.F Olaoye and M. Sornarajah, 'Domestic Investment Laws, International Economic Law, and Economic Development', this special issue. South Africa's Protection of Investment Act has been seminal in re-conceptualizing the investment regime. Most examples are drawn from the DILs of South Africa, Nepal, Sudan, and Vanuatu. The DILs of Qatar and the United Arab Emirates are considered too. On the historical development of DILs, see also J. Hepburn, 'The Past, Present and Future of Domestic Investment Laws and International Economic Law', this special issue.

[5]See recently, M. Barnett (2021) 'International Progress, International Order, and the Liberal International Order', *Chinese Journal of International Politics* 14, 1 (with further references). See also – with a historical analysis of multilateralism – M. Pinchis-Paulsen (2020) 'Trade Multilateralism and US National Security: The Making of the GATT Security Exceptions', *Michigan Journal of International Law* 41, 109–193.

[6]There seems to be a resurgence in the interest in DILs in legal scholarship as well. Studies focus on the domestic laws of specific states; see D.N. Dagbanja (2014), 'The Changing Pattern and Future of Foreign Investment Law and Policy in Ghana: The Role of Investment Promotion and Protection Agreements', *African Journal of Legal Studies* 7, 253; J. Bonnitcha, 'The Impact of Investment Treaties on Domestic Governance in Myanmar' (8 November 2019), available at SSRN, https://ssrn.com/abstract=3644056. Other studies focus on a comparison of domestic laws in economic regions such as the ASEAN; see J. Bonnitcha, 'Investment Laws of ASEAN Countries: A Comparative Review', IISD (December 2017), https://acc.coj.go.th/th/file/get/file/20190822a4f6007129bad58e2cc87dda91a75629141341.pdf (accessed 15 January 2022). Cf. also the relatively older literature: M.P. Porter (1999) 'The Ethiopian Investment Law', *ICSID Review* 14, 362; S. Shubber (2009) *The Law of Investment in Iraq*, Brill Nijhoff.

[7]I. Alvik (2020) 'The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy', *European Journal of International Law* 31(1), 289–312. But see S. Schwebel (2009) 'The Overwhelming Merits of Bilateral Investment Treaties', *Suffolk Transnational Law Review* 32, 263.

[8]See also Dimitropoulos, supra n. 1; J. Chaisse and G. Dimitropoulos (2021) 'Special Economic Zones in International Economic Law: Towards Unilateral Economic Law', *Journal of International Economic Law* 24(2), 229–257.

[9]See also UNCTAD, 'Investment Laws: A Widespread Tool for the Promotion and Regulation of Foreign Investment', *Investment Policy Monitor Special Issue* (November 2016), https://investmentpolicy.unctad.org/publications/155/investment-laws-a-widespread-tool-for-the-promotion-and-regulation-of-foreign-investment, at 11 (hereinafter UNCTAD, 'Investment Laws: A Widespread Tool').

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capital across borders. New DILs reject though the idea of reverse discrimination, and thus of a more favourable treatment of foreign investors over domestic ones, in favour of a regime that applies equally to both domestic and foreign investors.

Overall, domestication is akin to a different vision of international political economy compared to the one represented by LIO. The economic law of post-globalization draws on a long, yet sometimes forgotten, history of international law that is unveiled in the article; an international (economic) law of ends, rather than means. The centrepiece of this alternative line of international law is a 'right to hospitality', which is reflected in a 'right to invest' in contemporary DILs and broader international (economic) law.[10]

The article proceeds as follows: Section 2 discusses the ways in which the discipline of investment law has been shaped in the antagonism between national and international rules to regulate cross-border trade and investment. While the law under the LIO suggested that investment protection is to be granted by international law and institutions, current economic de-globalization is giving rise to institutional and legal de-globalization. Domestic laws relating to foreign investment are taking over from BITs and other IIAs as means of regulating cross-border trade and investment flows. Section 3 compares substantive and procedural standards of investor protection in IIAs and DILs, as well as new and old DILs in the admission, post-admission, and dispute settlement stages. The process of domestication suggests a move away from some of the principles of traditional IEL. To explain this process and the changes it suggests in international ordering, Section 4 discusses an alternative political economy framework for international law. The right to hospitality is the cornerstone of this international political economy, and is reflected in a right to invest in IEL.

2. Investment Law between the Liberal International Order and 'De-Globalization'

This section of the article gives a brief account of the historical development of international investment law in its relationship with the political economy of the LIO. Contemporary international law has been shaped in the broader environment of the LIO and post-WWII globalization. As de-globalization gains momentum, international investment law is subject to fundamental changes too. The trend of 'domestication' leads to an increasing reliance on domestic laws relating to foreign investment. DILs have a special place in this process; the section also outlines the lay of the land on DILs.

2.1. Liberal International Order and the Law: From Globalization to 'Domestication'

The Liberal International Order came to rise in the aftermath of World War II. Liberal internationalism reflects the ideas of political and economic liberalism at the international level.[11] The LIO operates based on the principles of open markets, security cooperation, and liberal democracy. The post-WWII order has been marked by the globalization of economies, culture, societies, and the law. Globalization is a top–down movement that highlights the supremacy of economic relationships in the interaction between the global and local. One of the main features of post-WWII globalization was that politics at the domestic and international levels were sometimes perceived as secondary to the development of the global economy. Globalization may be described as a process of 'de-nationalization'; of gradual merging of markets, politics, and the law – as well as integration of peoples and individuals.[12]

[10]See section 4.

[11]Stanley Hoffman has called liberal internationalism and communism the two great post-war ideologies; see S. Hoffmann (1995) 'The Crisis of Liberal Internationalism', *Foreign Policy* 98,159.

[12]J. Delbrück (1993) 'Globalization of Law, Politics and Markets', *Indiana Journal of Global Legal Studies* 1, 9, at 9. On a recent nuanced approach to (ecomomic) globalisation, see A. Roberts and N. Lamp (2021) *Six Faces of Globalization: Who Wins, Who Loses, and Why it Matters*. Harvard University Press.

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A series of economic, financial, political, and health crises have questioned economic globalization since 2008.[13] 'De-globalization' or 'slow-balization' trends seem to be taking over.[14] Global trade has been receding since 2012,[15] as well as global FDI since at least 2016.[16] The COVID-19 pandemic has provided further impetus to these trends.[17]

The balance of power in international relations is changing too. The BRICS countries,[18] for example, have developed in very different ways than other developing nations; they occasionally adopt foreign and international economic policies that are like the ones of traditional capital-exporting countries. Several highly competitive economies have emerged in the South and East of the world beyond the BRICS, all of which have a strong interest in investing abroad revenue generated through the exploitation of natural resources or otherwise, with a strong preference for investments in the North. The governments of emerging economies have surfaced as foreign investors, using such vehicles as state-owned enterprises and sovereign wealth funds.[19]

Overall, and beyond the economy, the previous trust in international institutions is on the decline.[20] In recent years, there has been a significant pushback against international economic integration.[21] IEL, and its subfields of international trade and investment law, have been subject to severe criticism.[22]

Before the rise of LIO, international law was less relevant for the regulation of international trade and investment. Foreign trade operated mainly with the unilateral opening of domestic borders,[23] often supported by Treaties of Friendship, Commerce, and Navigation (FCN). International law was also largely irrelevant for the regulation of foreign investment until the 1960s. Upon independence, the new states of the post-colonial world in Asia and Africa started

[13]Cf. J. Crawford (2018) 'The Current Political Discourse Concerning International Law', *Modern Law Review* 81, 1; D.S. Grewal (2018) 'Three Theses on the Current Crisis of International Liberalism', *Indiana Journal of Global Legal Studies* 25, 595.

[14]See W. Bello (2002) *Deglobalization: Ideas for a New World Economy*. Zed Books (on the former). 'Slowbalisation: The Steam Has Gone Out of Globalization', *The Economist*, 24 January 2019), www.economist.com/leaders/2019/01/24/the-steam-has-gone-out-of-globalisation (on the latter).

[15]See IRC Trade Task Force, 'Understanding the Weakness in Global Trade: What is the New Normal?', Occasional Paper Series No. 178 (September 2016), www.ecb.europa.eu/pub/pdf/scpops/ecbop178.en.pdf.

[16]See UNCTAD (2019) 'Global Investment Trends Monitor', Issue No. 33 (January 2020); UNCTAD, World Investment Report 2019 – Special Economic Zones.

[17]D. Irwin (2020) 'The Pandemic adds Momentum to the Deglobalisation Trend', 5 May 2020, https://voxeu.org/article/pandemic-adds-momentum-deglobalisation-trend; see also www.wto.org/english/news_e/pres20_e/pr855_e.htm.

[18]BRICS stands for the group of countries consisting of Brazil, Russia, India, China, and South Africa.

[19]See generally, J. Chaisse, D. Chakraborty, and J. Mukherjee (2011) 'Emerging Sovereign Wealth Funds in the Making: Assessing the Economic Feasibility and Regulatory Strategies', *Journal of World Trade* 45(4), 837–875; J. Chaisse (2018) 'State Capitalism on the Ascent: Stress, Shock, and Adaptation of the International Law on Foreign Investment', *Minnesota Journal of International Law*, 342.

[20]M. Mazower (2012) *Governing the World: The History of an Idea, 1815 to the Present*, at Introduction, xiii.

[21]The European Commission, for example, issued in 2017 a Reflection Paper on 'Harnessing Globalisation' to assess the current status of the influence of globalization on the EU; see European Commission, Reflection Paper on Harnessing Globalisation, COM (2017) 240 of 10 May 2017.

[22]See generally, F. Montanaro and F. Violi (2020) 'The Remains of the Day: The International Economic Order in the Era of Disintegration', *Journal of International Economic Law* 23, 299.

The criticism has been mostly expressed as the 'backlash' against international investment arbitration; see M. Waibel et al. (eds.) (2012) *The Backlash against Investment Arbitration: Perceptions and Reality*. Wolters Kluwer; M. Langford, D. Behn, and O.K. Fauchald (2018) 'Backlash and State Strategies in International Investment Law', in T. Alberts and T. Gammeltoft-Hansen (eds.), *The Changing Practices of International Law*. Cambridge University Press, 70; G. Dimitropoulos (2020) 'The Conditions for Reform: A Typology of "Backlash" and Lessons for Reform in International Investment Law and Arbitration', *The Law and Practice of International Courts and Tribunals* 18, 416.

[23]See B. Lindsey (2000) 'Free Trade from the Bottom Up', *Cato Journal* 19, 359, 362–363 (with further references).

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developing their national investment laws relating to foreign investment.[24] The trend proliferated in other developing countries too.[25]

The law has been called upon to play a special role in the constitution of LIO. Liberal internationalism involves international cooperation through multilateral institutions like the international organizations forming part of the United Nations family and the World Trade Organization (WTO), as well as regional organizations such as the European Union. IEL was shaped as a separate discipline of international law in the era of the dominance of LIO and has largely accommodated the freedom of movement of goods and capital. International investment law, in the form of the BIT system,[26] developed as a separate field to accommodate the main tenets of the LIO.[27] International law largely replaced domestic law as the dominant means for cross-border trade and investment protection in the second half of the twentieth century.[28] In the 1990s, many developing countries adopted in their domestic laws too some of the guidelines suggested by a World Bank study.[29] As the number of international investment treaties increased,[30] academic interest in domestic laws relating to foreign investment decreased.

Following economic de-globalization and slow-balization, a trend towards legal and institutional de-globalization started emerging too. Governments worldwide have terminated several of their BITs or have allowed many of their BITs to expire.[31] Instead, many governments are developing robust domestic frameworks for the management of foreign trade and investment flows.

The current 'domestication' trend seems to be challenging the assumptions of the post-WWII international order.[32] The remainder of this section gives a brief account of domestic laws relating to investment with a focus on DILs.

[24]See K. Ahooja (1964) 'Investment Laws and Regulations in Africa', *The Journal of Modern African Studies* 2, 300; K. Ahooja (1968) 'Investment Legislation in Africa', *Journal of World Trade Law* 2, 495; C.H. Alexander (1952) 'Foreign Investment Laws and Regulations of the Countries of Asia and the Far East', *International & Comparative Law Quarterly* 1, 29; UNECA (1963) 'Investment Laws and Regulations in Africa', https://repository.uneca.org/bitstream/handle/10855/41638/Bib-48820.pdf?sequence=1&isAllowed=y.

[25]See G.C. McKinnis (1978) 'The Argentine Foreign Investment Law of 1976', *Columbia Journal of Transnational Law* 17, 357; J.G. Scriven (1979) 'Yugoslavia's New Foreign Investment Law', *Journal of World Trade Law* 13, 95; J.W. Salacuse (1975) 'Egypt's New Law on Foreign Investment: The Framework for Economic Openness', *International Lawyer* 9, 647; S. Juncadella (1982) 'The Foreign Investment Laws of Latin America: Present and Future', *The International Lawyer* 16, 463; C. Hardenberg (1986) 'The German Foreign Investment Law-Taking Stock after 15 Years', *International Business Lawyer* 14, 397.

[26]See generally, T. Johnson Jr. and J. Gimblett (2010–2011) 'From Gunboats to Bits: The Evolution of Modern International Investment Law', in K.P. Sauvant (ed.), *Yearbook on International Investment Law & Policy*, 649; see also generally, T. St. John (2018) *The Rise of Investor–State Arbitration: Politics, Law, and Unintended Consequences*. Oxford University Press.

[27]See generally, A. Anghie (2005) *Imperialism, Sovereignty and the Making of International Law*. Cambridge University Press, Chapters 4 and 5; D. Schneiderman, 'The Coloniality of Investment Law' (21 May 2019), available at SSRN: https://ssrn.com/abstract=3392034.

[28]See also J.T. Gathii (2009) 'War's Legacy in International Investment Law', *International Community Law Review* 11, 353 (discussing the continuity between war and the contemporary means of international investment law).

[29]World Bank (1992) *Legal Framework for the Treatment of Foreign Investment*. Volume 2, 14.

[30]J.W. Salacuse (2007) 'The Treatification of International Investment Law', *Law & Business Review of the Americas* 13, 155.

[31]See generally, M.N. Hodgson (2020) 'Reform and Adaptation: The Experience of the Americas with International Investment Law', *Journal of World Investment & Trade* 21, 140 (on developments in Latin America); see also A. Crockett (2015) 'Indonesia's Bilateral Investment Treaties: Between Generations?', *ICSID Review – Foreign Investment Law Journal* 30, 437 (on developments in Indonesia).

[32]These developments are obviously non-linear. Ecuador, for example, re-joined ICSID; see https://icsid.worldbank.org/news-and-events/news-releases/ecuador-signs-icsid-convention; Mexico recently signed ICSID too.

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2.2. From Laws Relating to Investment to Domestic Investment Laws

The overall domestic political and legal framework plays a vital role in the decision of an investor to make an investment in a foreign jurisdiction. There is a great variety of specialized and non-specialized laws that differ significantly in scope, and could be considered as part of a broader set of laws relating to foreign investment.[33]

Some jurisdictions do not have in place a separate legislative framework for the regulation of foreign investment. Foreign investors are treated like domestic investors under the regular laws of the host state. Laws in the areas of competition and company law, such as mergers and acquisitions, may apply to foreign investors.[34] Property laws often place restrictions on real estate ownership by foreigners,[35] or operate as an investment incentive. Employment laws will impact foreign investment, as well as nationality and residence laws.[36] Recently, data-related laws have also become very pertinent to foreign investors.[37] Public procurement and public–private partnerships laws will apply to investors entering a foreign jurisdiction too.[38] Arbitration laws often form part of the factors foreign investors consider when deciding whether to invest in a foreign jurisdiction; states willing to create attractive fora for foreign investors often draft arbitration laws on the example of the UNCITRAL Model Law; this is arguably a safeguard for foreign investors who can rely on potential disputes being adjudicated under a legal framework they are familiar with.[39]

Some countries opt to develop a specialized legal framework for foreign investment. A long-standing, yet sometimes unnoticed, institution for the promotion of foreign investment is that of Special Economic Zones (SEZs).[40] SEZs are geographic areas designated as zones for the promotion of trade and attraction of foreign investment.[41] Zones carve out a 'special' jurisdiction for a separate economic regime within the broader national jurisdiction. Rules that find application in these areas – investment and trade laws, tax laws, labour laws, customs laws, etc. – differ from the rest of the domestic jurisdiction and are specifically designed with the intent of attracting foreign investment and trade in the zone.

There are moreover laws that aim at controlling investment. Investment Screening Laws (ISLs) emerged in the 1970s, and have been making a come-back recently.[42] Some countries have a

[33]See generally, S. Globerman and D. Shapiro (2003) 'Governance Infrastructure and US Foreign Direct Investment', *Journal of International Business Studies* 34, 19.

[34]For example, Hong Kong has no general investment legislation governing the admission of foreign investors; see T. Miller, A.B. Kim, and J.M. Roberts (2018) *2018 Report of Index of Economic Freedom*. The Heritage Foundation, 215.

[35]For instance, countries in the Middle East and North Africa Region have traditionally had in place laws limiting the purchase of land by foreign nationals.

[36]In view of this, governments have started emphasizing these aspects of the domestic investment framework by issuing, for example, immigrant visas for foreign investors or adopting 'golden visa' schemes to attract foreign investors; see generally, A. Christians (2017) 'Buying In: Residence and Citizenship by Investment', *Saint Louis University Law Journal* 62, 51.

[37]J. Chaisse, '"The Black Pit": Power and Pitfalls of Digital FDI and Cross-Border Data Flows', this special issue.

[38]Many countries have used PPP laws as a substitute or as a complement to international investment law. See J. Jaramillo and R. Montalvo, 'The New Ecuadorian PPP Act: A New Opportunity for Foreign Investment? Some Caveats Regarding Arbitration', Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2017/02/19/the-new-ecuadorian-ppp-act-a-new-opportunity-for-foreign-investment-some-caveats-regarding-arbitration/ (accessed 15 September 2019) (discussing Ecuador).

[39]One recent example is the Arbitration Law of the United Arab Emirates, which is largely based on the UNCITRAL Model Law; see Federal Law No. 6 of 2018 ('Arbitration Law').

[40]See generally, FIAS, *Special Economic Zone: Performance, Lessons Learned, and Implication for Zone Development*. World Bank 2008; UNCTAD, World Investment Report 2019, supra n. 16; T.W. Bell (2018) 'Special International Zones in Practice and Theory', *Chapman Law Review* 21, 273; Chaisse and Dimitropoulos, supra n. 8.

[41]FIAS, supra n. 40, at 2.

[42]See generally, G. Dimitropoulos (2020) 'National Security: The Role of Investment Screening Mechanisms', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*. Singapore: Springer.

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longstanding tradition in ISLs;[43] investment screening mechanisms are now proliferating, as mature economies have been developing investment screening frameworks to control investment flows from emerging economies. Different rationales may lie behind the promulgation of such laws; national security is the main consideration.[44] While domestic screening systems have generally evolved in accordance with each country's political and economic specificities, the example of the Committee on Foreign Investment in the United States (CFIUS) has often been followed.[45] Investment screening mechanisms are sometimes embedded in broader investment statutes, such as DILs.

According to Parra, developed country investment laws traditionally have the goal to control and supervise foreign investment;[46] on the other side, investment statutes of developing countries have historically had a 'promotional' character – aiming at promoting or facilitating foreign investment.[47] These specialized legislative instruments that seek to attract – promote and/or facilitate – investment are identified as DILs in this article. Some countries also have established Investment Promotion Agencies (IPAs) to institutionally facilitate attracting foreign investment to their jurisdiction.[48]

DILs also come in many forms. There are generic DILs that address investment independent of the origin of the investor – domestic or foreign. Other DILs address foreign investment specifically. Such DILs have historically been mostly stipulated by developing countries and emerging markets seeking to promote and facilitate foreign investment in one single instrument.[49] They are sometimes referred to as Foreign Investment Laws (FILs) to distinguish them from generic DILs.[50] Countries in the Gulf Region, for example, have traditionally opted for the latter approach. Still, most generic DILs have separate provisions on foreign investors and investments too.

DILs, unlike the rules of international investment law, are unilateral laws stipulated at the domestic level, which may extend protection to both domestic and foreign investors.[51] DILs include investment-related rules under one heading with a view to facilitating and/or promoting investment.[52] The broader function of DILs is to help foreign investors identify the rules that apply to them.[53] This function is usually associated with the provision of more favourable treatment to foreign investors than national legal systems would otherwise guarantee.[54] DILs aim at attracting investment by providing financial and institutional incentives to (foreign) investors. The next section turns to the ways in which these broader functions of DILs are operationalized in the specific rules they provide for.

[43]Countries in the Asia-Pacific region, and larger countries are the most likely to feature an investment screening mechanism; see T.S. and F. Mistura (2017) 'Is Investment Protectionism on the Rise? Evidence from the OECD FDI Regulatory Restrictiveness Index', Global Forum on International Investment, www.oecd.org/investment/globalforum/2017-GFII-Background-Note-Is-investment-protectionism-on-the-rise.pdf, at 3–4.

[44]See Dimitropoulos, supra n. 42.

[45]S.T. Anwar (2012) 'FDI Regimes, Investment Screening Process, and Institutional Frameworks: China versus Others in Global Business', *Journal of World Trade* 46(2), 213–248, at 215–216.

[46]Parra, supra n. 2, at 434.

[47]Ibid., at 428, 434.

[48]M. Zanatta (2006) 'Foreign Direct Investment: Key Issues for Promotion Agencies', *Policy Brief-United Nations University* 10, 1.

[49]See UNCTAD, 'Investment Laws: A Widespread Tool'.

[50]Ibid.

[51]On economic unilateralism in IEL, see Chaisse and Dimitropoulos, supra n. 8.

[52]Parra, supra n. 2.

[53]Ibid., at 428. On the other side, the presence of DILs may further expose national governments to the risk of arbitration; S. Nikièma and N. Maina (2020) 'The Risk of ISDS Claims Through National Investment Laws: Another "Damocles sword" Hanging Over Governments: COVID-19 Related measures?', IISD.

[54]Burgstaller and Waibel, supra n. 2, at para. 29. In fact, some DILs explicitely trump other statutes in the host country; see, for example, Article 44 of Jordan Investment Law (2014).

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3. International and Domestic Investment Laws: The Function and Role of DILs

The present section discusses the functions of DILs in the broader system of IEL. It compares substantive and procedural standards of investor protection in IIAs and DILs, as well as old and new generation DILs. The analysis focuses on the function of investor protection standards in the pre-admission, post-admission, as well as dispute settlement stages. The level of protection in domestic and international frameworks is roughly equivalent. The main differences between the two levels of investor protection are in the scope of application. The provisions of IIAs are broad and worded in ways that can be applied universally, regardless of the parties to the international agreement. New generation DILs move away to some extent from the boilerplate language of IIAs, and are more specific in scope. They moreover reject the idea of more favourable treatment of foreign investors, and thus reverse discrimination, in favour of rules that apply equally to both domestic and foreign investors.

3.1. Admission

The two non-discrimination standards – National Treatment (NT) and Most-Favoured Nation (MFN) – are the cornerstone of the international economic order.[55] National Treatment does not allow parties to an international treaty to treat domestic market actors more favourably than foreign market actors; MFN does not allow parties to treat foreign market actors from certain countries more favourably than from others.[56] The essence of non-discrimination is to provide foreign market actors 'access to a domestic market under equal competitive parameters compared to domestic market actors'.[57]

These standards apply to all types of obstacles at the border or after the border.[58] There is yet a difference between trade and investment law in the application of the non-discrimination standards. The General Agreement on Tariffs and Trade (GATT) generally recognizes market access rights,[59] but states have a sovereign right under IEL to regulate the entry and establishment of foreign investment within their borders.[60] NT and MFN generally find application after an investment has been given market access.

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) does not include any rules on pre-entry protection. States may grant foreign investors admission or establishment rights in their market using BITs or other IIAs. Only a limited number of IIAs grant market access rights, or any other pre-entry safeguards, to prospective investors. Such 'pre-entry IIAs' grant a right of establishment, which is often limited in scope, subject to a 'national law' clause, or expressed as 'soft' or 'best endeavour'

[55]G. de Búrca (2002) 'Unpacking the Concept of Discrimination in EC and International Trade Law', in C. Barnard and J. Scott (eds.), *The Law of the Single European Market: Unpacking the Premises*. Hart Publishing, 181; N. DiMascio and J. Pauwelyn (2008) 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?', *American Journal of International Law* 102(1), 48–89; N.F. Diebold (2011) 'Standards of Non-Discrimination in International Economic Law', *International and Comparative Law Quarterly* 60(4), 831–886; A.N. King (2018) 'National Treatment in International Economic Law: The Case for Consistent Interpretation in new Generation EU Free Trade Agreements', *Georgetown Journal of International Law* 49, 929; J.M. Claxton (2021) 'The Standard of Most-Favored-Nation Treatment in Investor–State Dispute Settlement Practice', in J.Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*. Springer, Singapore; M. Brar (2021) 'The National Treatment Obligation: Law and Practice of Investment Treaties', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*. Singapore: Springer.

[56]Diebold, supra n. 55, at 831.

[57]Ibid., at 832.

[58]Ibid.

[59]The market access provisions in the GATS and other WTO agreements are subject to various qualifications and exceptions.

[60]See UNCTAD, World Investment Report 2019, supra n. 16, at 92; see also *Canada – Administration of the Foreign Investment Review Act*, Report of the Panel adopted on 7 February 1984 (L/5504 - 30S/140), para. 5.1.

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obligations.[61] Admission rights are sometimes recognized under the National Treatment clause. A commonly cited example is the US Model BIT of 2012:

> Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the *establishment*, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.[62]

DILs may play a similar role; they liberalize the rules governing admission and entry, as well as conduct, of foreign investors in the host state. Almost no DIL provides for an unrestricted right of entry into the host market though.[63] DILs increasingly now play the role of specifying the conditions for the establishment of foreign investors, an area that is not regulated under IIAs, and not specifically otherwise regulated under regular domestic law. Generic DILs develop one umbrella framework for both domestic and foreign investors; they still almost invariably include separate provisions for foreign investors. The separate provisions may either aim at promoting and/or facilitating foreign investment, or instead be controlling in nature, including investment prohibitions or screening mechanisms.[64] Some DILs regulate both issues pertaining to foreign investment in the general jurisdiction, as well as in SEZs.[65]

DILs also define the admission process and its administration, including screening and entry approvals, or even sometimes access to land, site development, and utility connections, as well operational requirements.[66] New DILs often establish 'one-stop shops' for investment approvals.[67] One-stop shops may be political or bureaucratic and technical bodies, or combinations thereof. The Council of Ministers of the United Arab Emirates (UAE), for example, is responsible for the appointment of a Foreign Direct Investment Committee that monitors and implements the UAE Foreign Investment Law. The committee is chaired by the Minister of Economy and involves representatives from competent authorities.[68] This committee oversees all issues relating to foreign investment. A more technical Foreign Direct Investment Unit embedded within the Ministry of Economy is further involved in both policy-making and implementation of the law.[69] Different agencies may then be responsible for foreign investment licensing.

DILs often include provisions restricting foreign investment. Foreign investors may be prohibited from investing in specific industries, or their access may be restricted to certain sectors or (the extent of) ownership in specific sectors, such as the natural resource and real estate sectors.[70] DILs may include 'lists' with requirements that foreign investors will have to fulfil for their investments to be established in that jurisdiction. Some jurisdictions only allow market access and admit foreign investors based on a 'positive list' of sectors and requirements that foreign investors

[61]See, for example, Article 2(1) of the Germany Model BIT (2008); Article 2(1) of the UK Model BIT (2008). See generally on the differentiation between 'post-entry' and 'pre-entry' investment treaties UNCTAD (1999) 'Most-Favoured Nation Treatment, in Series on Issues in International Investment Agreements', 8.

[62]Article 3(1) of the US Model BIT (2012) (emphasis added).

[63]Parra, supra n. 2, at 433.

[64]R. Echandi (2021) 'Investor–State Conflict Management Mechanisms (CMMs) in International Investment Law: A Preliminary Sketch of Model Treaty Clauses', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*. Singapore: Springer.

[65]See Egypt's Law No. 72 of 2017.

[66]J. Morisset and O. Neso (2002) 'Administrative Barriers to Foreign Investment in Developing Countries', The World Bank, at https://openknowledge.worldbank.org/bitstream/handle/10986/14794/multi0page.pdf?sequence=1&isAllowed=y.

[67]Parra, supra n. 2, at 433.

[68]Article 6(1) of the UAE Federal Law by Decree No. (19) of 2018 Regarding Foreign Direct Investment (hereinafter: UAE FDI Law).

[69]Article 5 of the UAE FDI Law.

[70]UNCTAD interprets such provisions as exceptions to the NT standard; see UNCTAD, 'Investment Laws: A Widespread Tool', at 7.

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need to comply with. When a positive list is in place, all other economic sectors are closed to foreign investment.

More liberal DILs adopt a 'negative list'; foreign investment is allowed in all sectors except for the ones excluded under the list. Newer DILs move towards negative lists. Under Investment Law No. 1 of 2019 of Qatar, for example, all sectors are open to foreign investment; still, foreign investors are not allowed to invest in banks and insurance companies unless the Council of Ministers licences the investment in these areas.[71] Until recently, China was following the positive list system under the Guideline of Industries for Foreign Investment. The 2019 Foreign Investment Law of the People's Republic of China adopted a negative list system.[72]

3.2. Post-Admission

Once foreign investors are admitted in the host jurisdiction, they may be protected under IIAs against expropriation as well as under substantive standards of protection such as NT, MFN, Fair and Equitable Treatment, Full Protection and Security, and transfer of funds.[73] These protections for foreign investors find application if there is an IIA in place. NT as a norm of IEL has a relatively limited scope, even though it generally applies to *de jure* as well as *de facto* discriminatory measures:[74] it must be explicitly stipulated in an international agreement; it usually applies post-establishment, unless otherwise stipulated in the IIA; it is subject to domestic law requirements.

Otherwise, foreign investors will have to rely on the domestic legal framework for protection of their investments. There are three main investor rights and safeguards found in most DILs: NT, protection against expropriation, as well as assurances for the repatriation of investment and profits.[75]

DILs have historically included NT provisions;[76] the majority of contemporary DILs still include a NT provision.[77] Yet, the NT standard is usually qualified,[78] using similar language as that of BITs. NT is provided to investors in 'like circumstances', or is subject to reciprocity.[79] Moreover, NT operates in different ways in generic DILs and FILs. FILs are explicit about the fact that foreign investors are a different category of investors altogether. NT under DILs finds application after the admission has been granted to a foreign investor, and has the function of extending equivalent treatment to foreign investors as to domestic ones. Independent of the type of DIL, foreign investors, once admitted, will only be allowed to operate under the conditions prescribed in domestic law and/or in designated economic sectors. DILs define the policy objectives that allow domestic non-discriminatory and non-protectionist measures.

DILs have often gone beyond that. They frequently provide fiscal and other privileges to foreign investors, such as tax incentives, that are not available for nationals.[80] In this way, they sometimes provide treatment that is more favourable than the regular legal framework that finds application to domestic investors.[81] However, there seems to be reversal of the practice in more recent DILs. The South African example highlights this.

[71]Article 4(a) of Investment Law No. 1 of 2019, 'Regulating the Investment of Non-Qatari Capital in Economic Activity'.

[72]See Articles 4, 28, and 36 of the Foreign Investment Law of the People's Republic of China. On China's use of negative lists, see J. Hu (2021) 'From SEZ to FTZ: An Evolutionary Change toward FDI in China', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*. Singapore: Springer.

[73]See J. Bonnitcha, L.N.S. Poulsen, and M. Waibel (2017) '4 Standards of Investment Protection', in *The Political Economy of the Investment Treaty Regime*. Oxford University Press.

[74]Diebold, supra n. 55, at 832.

[75]UNCTAD, 'Investment Laws: A Widespread Tool', at 6.

[76]Parra, supra n. 2, at 435–437. This is not the case with other standards, such as Fair and Equitable Treatment; ibid., at 435.

[77]UNCTAD, 'Investment Laws: A Widespread Tool', at 7.

[78]Ibid. This is two thirds according to UNCTAD.

[79]Ibid.

[80]Parra, supra n. 2, at 437.

[81]Burgstaller and Waibel, supra n. 2, at para. 5.

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After the fall of the apartheid regime, the South African government entered into many BITs – mostly with western European countries – that included boilerplate substantive standards of protection such as NT, MFN, FET, repatriation of investment returns, as well as Investor-State Dispute Settlement (ISDS). In 2005, the Department of Trade and Industry conducted a review of the compatibility of South African BITs with national laws. The review concluded that the terms of the BITs were inconsistent with the National Strategic Plan (NSP) and the Black Economic Empowerment (BEE) program as they were too intrusive into government policy, largely favouring private investors.[82] It also found certain BITs as not compatible with the South African Constitution, especially Section 25 on property and expropriation.[83] Based on this review, the Government of South Africa decided not to renew the BITs concluded after 1994 and to terminate most of them. Instead, it brought forward a national legislative framework in the form of a DIL, the Protection of Investment Act (PIA) of 2015.[84]

The PIA is concise and includes provisions that are generally found in BITs, as well as some significant innovations. According to Section 5 PIA, the Act applies to all investments in the Republic made in accordance with the requirements of the Act. Section 8 safeguards NT and proclaims that foreign investors must not be treated less favourably than local investors in like circumstances.[85] Foreign investors have an equal right to property as provided for under the South African constitution.[86] Foreign investors may also repatriate funds subject to taxation and other applicable legislation, such as exchange control regulations.[87]

While extending NT to foreign investors, the government's 'right to regulate' finds an important place in the Act.[88] Moreover, PIA identifies an 'investor' as 'an enterprise making an investment in South Africa regardless of nationality';[89] it thus adopts the 'enterprise-based' definition of investment, as opposed to the 'assets-based' definition, according to which an investor would have to be an incorporated legal entity in compliance with domestic law to qualify as a protected investment. This goes against the tradition of qualifying as an investment any 'asset' without the need for incorporation.

While both general international law and international economic law allow that foreign citizens be treated less favourably than nationals in the host jurisdiction, the PIA clarifies that 'reverse discrimination' is unconstitutional under the South African Constitution.[90] The rationale underlying the new statute and the broader South African policy is to level the playing field between domestic and foreign investors – this time in favour of domestic investors.[91] This highlights a new function that new DILs have been called upon to play recently.[92]

[82]South Africa Department of Trade and Industry, Bilateral Investment Treaty Policy Framework Review (2009), www.pmg.org.za/policy-documents/2009/06/25/bilateral-investment-treatypolicy-framework-review (accessed 15 October 2018).

[83]BITs signed by South Africa – following the standard BIT approach – provide for 'prompt/efficient and adequate/appropriate compensation' interpreted as market value compensation by investment tribunals. The South African Constitution allows for less than market value compensation; see Section 25(3) of the South African Constitution.

[84]Act No. 22 of 2015: Protection of Investment Act, 2015 (Government Gazzette, Vol. 606, Cape Town, 15 December 2015, No. 39514), www.thedti.gov.za/business_regulation/acts/Investment_Act_22of2015.pdf (accessed 15 October 2018); see generally, M.A. Forere (2017) 'The New South African Protection of Investment Act: Striking a Balance between Attraction of FDI and Redressing the Apartheid Legacies', in F. Morosini and M.R.S. Badin (eds.), *Reconceptualizing International Investment Law from the Global South.* Cambridge University Press, 218.

[85]See also the exceptions of Section 8(4) PIA.

[86]See Section 10 PIA, as well as Section 25 of the Constitution of South Africa.

[87]Section 11 PIA.

[88]See preamble and Section 12 of PIA.

[89]Section 1 PIA.

[90]See Preamble and Section 4(c) PIA.

[91]Dimitropoulos, supra n. 1.

[92]See section 4 below.

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The presence of an IIA determines to some degree the way DILs may function in the overall system of investment protection. This plays out in the safeguard of the second prong of the non-discrimination principle, MFN. The adoption of DILs instead of – rather than in addition to – IIAs usually leads to the exclusion of MFN treatment; MFN is more often than not excluded from the scope of DILs. South Africa, for example, both withdrew from its BITs, and does not provide for MFN treatment in the PIA. A notable exception is the Zimbabwe Investment and Development Agency Act of 2020 that provides for MFN treatment to foreign investors.[93] Still, this is subject to several exceptions, among which is ISDS under IIAs.[94]

3.3. Settlement of 'Investment Disputes'

While WTO law follows the traditional pattern of inter-state dispute settlement, international investment law allows foreign investors access to international tribunals in the form of ISDS.[95] During the 1990s, at the peak of the LIO, a great number of disputes between foreign investors and national governments broke out. DILs are now defining a new category of domestic 'investment disputes'.[96]

The historically dominant, at least among developing nations, dispute settlement mode in DILs is international arbitration.[97] Countries in the North and West have instead traditionally not included international arbitration clauses in their investment laws.[98] The first post-war DILs often included no provisions on dispute resolution. This implicitly delegated the task of resolving investment disputes to domestic courts. In the era of the consolidation of the Washington Consensus, most DILs adopted international arbitration for the settlement of investment disputes.[99] The same applied to DILs stipulated during the 1990s.[100]

The most commonly used mechanisms for the settlement of investment disputes in DILs are international arbitration, local courts, and Alternative Dispute Resolution (ADR).[101] Many DILs set ADR as the starting point for the resolution of investment disputes.[102] Following negotiation, most DILs still favour international arbitration and include ISDS provisions.[103] The overwhelming majority of investment laws makes reference to ICSID procedural rules; UNCITRAL and other institutional and ad hoc rules remain the exception.[104] Many DILs provide for consent to ISDS, sometimes with explicit reference to ICSID.[105] In some of the newer DILs, prospective investors can often bring a claim before a grievance committee against the decision denying them market access;[106] grievance committees are part of the executive branch of government.

[93]Section 14, Zimbabwe Investment and Development Agency Act.

[94]Section 14(3), Zimbabwe Investment and Development Agency Act.

[95]See, for example, K.J. Alter (2006) 'Private Litigants and the New International Courts', *Comparative Political Studies* 39, 22; G.B. Born (2012) 'A New Generation of International Adjudication', *Duke Law Journal* 61, 775.

[96]See, for example, Article 63 of Uzbekistan 'Law on Investments and Investment Activity'.

[97]Parra, supra n. 2, at 444–445.

[98]Ibid., at 447.

[99]See Article 19 of Somalia Foreign Investment Law No. 19 of 1987 (establishing a hierarchy in favour of contractual freedom, then international arbitration, then domestic arbitration); see also Article 43 of Djibouti Investment Code of 1984.

[100]See Article 15 of Albania Foreign Investment Law No. 7764 of 1993 (favouring UNCITRAL Rules); but see Article 16 for certain types of cases that are to be referred to domestic courts. Developing countries often adopted international arbitration in their DILs responding to the identification of arbitration as 'international best practice' by the World Bank; see T.L. Berge and T. St John (2020) 'Asymmetric Diffusion: World Bank "Best Practice" and the Spread of Arbitration in National Investment Laws', *Review of International Political Economy* 1.

[101]UNCTAD, Investment Laws, at 10.

[102]See, for example, Article 12 of UAE FDI Law.

[103]UNCTAD, Investment Laws, at 10.

[104]Ibid., at 11.

[105]See generally, M. Potestà (2011) 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws', *Arbitration International* 27, 149.

[106]See, for example, Article 11 of UAE FDI Law (grievance against an investment refusal decision).

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A minority of DILs provide for the exclusive jurisdiction of domestic courts in investment cases.[107] Recent DILs seem to be further pursuing this approach, or similar approaches that favour more domestic means for the settlement of investment disputes. The South African PIA exemplifies again the new directions in DIL design.[108] It provides for a combination of means of dispute settlement. In case of a complaint against the government, investors may within six months request the Department of Trade and Industry to appoint a mediator and facilitate the resolution of the dispute through mediation.[109] The investor may moreover initiate proceedings before the South African courts or tribunals.[110] Subject to exhaustion of local remedies, the South African Government may consent to *ad hoc* inter-state arbitration between South Africa and the home state of the foreign investor.[111] In Sudan, the 2021 Investment (Encouragement) Act sets a default rule in favour of domestic 'competent courts' for the settlement of investment disputes; this does not apply if the dispute is covered by agreements Sudan is a party of, or the parties have agreed otherwise.[112] The statute also provides for the establishment of specialized courts for investment disputes,[113] as well as a specialized prosecution bureau for violations relating to investments.[114]

Nepal's law may be seen as an effort to reconcile old and new approaches to dispute settlement. The Foreign Investment and Technology Transfer Act of 2019 carries on the tradition of favouring arbitration; at the same time, investor–state disputes are to be resolved using UNCITRAL rules and procedures, unless otherwise agreed upon by the parties to the dispute.[115] Such arbitration shall be held in Nepal, and the law of Nepal shall apply.[116] The law even provides for a mechanism for the resolution of investment disputes between a Nepali investor and a foreign investor in relation to foreign investment. These disputes are to be resolved by recourse to domestic arbitration.[117]

More recent DILs seem thus to be following in the settlement of investment disputes an approach similar to the one adopted for substantive law matters. A reimagined NT principle guides the design of dispute settlements provisions too;[118] recent DILs subject foreign and domestic investors to the same dispute settlement fora – rejecting the idea of reverse discrimination;[119] a preference for domestic courts can be observed too.

4. Towards an International Economic Law of Ends

The transition to a post-globalization international economy indicates a similar transition at the level of law and institutions. This may be perceived as a challenge to the LIO and its institutions. In the post-globalization order, domestic law has a central place in the regulation of cross-border trade, investment, and finance. At the same time, the move to the domestic does not suggest a denial of the most basic principles of IEL. The article's final section discusses theories of international relations and international political economy that help explain and provide a theoretical

[107]UNCTAD, Investment Laws at 10.
[108]See Section 13 PIA.
[109]Section 13(1) and (2) PIA.
[110]Section 13(4) PIA.
[111]Section 13(5) PIA.
[112]Article 34(1) of Sudan Investment (Encouragement) Act of 2021.
[113]Article 35 of Sudan Investment (Encouragement) Act of 2021.
[114]Article 36 of Sudan Investment (Encouragement) Act of 2021.
[115]Section 40(5) of Nepal Foreign Investment and Technology Transfer Act of 2019.
[116]Section 40(6) of Nepal Foreign Investment and Technology Transfer Act of 2019.
[117]See Section 40(1)–(4) of Nepal Foreign Investment and Technology Transfer Act of 2019.
[118]See also 55(1) of Vanuatu Foreign Investment Act no. 25 of 2019 ('A dispute involving a foreign investor who carries out an investment activity is to be dealt with under the laws of Vanuatu as if it were a dispute involving a citizen of Vanuatu').
[119]In some jurisdictions, the possibility of reverse discrimination persists even in more recent DILs; see Article (12)(2) of UAE FDI Law.

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framework for the current trend of 'domestication'. It concludes with a discussion of the 'right to invest' as a reflection of the 'right to hospitality' in a new political economy of IEL – one of ends, rather than means.

4.1. Domestic Law and International Principles

The theory of the modern state developed around an epistemological condition: the 'state of nature'. The state of nature is a state of anarchy before individuals form civil society.[120] This is the epistemological starting point of modern international relations and international law too.[121] Anarchy has given rise to different interpretations and traditions of international law and international relations. International relations scholar Hedley Bull has identified three patterns of thought regarding the role of international law in the history of the modern states system.[122] In the realist or Hobbesian tradition, international politics are seen as a constant state of war of all against all. The law has little to say in the relations among states.[123] The Grotian tradition sees international politics as taking place within the international society of states.[124] While accepting the original premise of the Hobbesian pattern that international politics is made by states rather than individuals, it suggests instead that states are limited in their conflicts by common rules and institutions.[125] Coexistence and cooperation in the society of states are predicated upon common imperatives of morality and law within a framework of common rules and institutions.[126] The cosmopolitan or Kantian tradition focuses on transnational social bonds that link individuals as human beings.[127] A community of men has the potential to subsume states in a just world order based on federation.[128] International law and morality eventually suggest the formation of a cosmopolitan society as a universal community of mankind.[129]

This tripartite typology has been subject to some criticism more recently – by both international relations and international legal scholars.[130] Recent scholarship on Hobbes suggests that the English political philosopher was not a 'Hobbesian'.[131] Hobbes imagined instead a different political economy than the one ascribed to him – or the one that eventually gave rise to the contemporary system of international law and international relations.[132] Equally, it has been suggested that Kant is not a Kantian. While a proponent of Perpetual Peace,[133] the Prussian philosopher did not see the world State as a way to achieve it.[134] National legal systems that showcase

[120]Thomas Hobbes (1996) *Leviathan* (ed. by Richard Tuck, Cambridge University Press), pt. 1, ch. 13.

[121]The use of the term goes back to the work of G. Lowes Dickinson; see G.L. Dickinson (1926), *The International Anarchy, 1904–1914*. The Century Company. The 'domestic analogy' suggests that states find themselves in the same relationship as individuals before forming civil society. H. Bull (1995) 'Society and Anarchy in International Relations', in J.D. Derian (eds.), *International Theory: Critical Investigations.* Palgrave Macmillan.

[122]H. Bull (1995) *The Anarchical Society: A Study of Order in World Politics*, 2nd edn. Macmillan Press at 23–26.

[123]Ibid., at 24.

[124]Ibid., at 25.

[125]Ibid., 25.

[126]Ibid., 25–26.

[127]Ibid., at 24.

[128]See, for example, J. Habermas (2007) 'A Political Constitution for the Pluralist World Society?', *Journal of Chinese Philosophy* 34, 226.

[129]Bull, supra n. 122, at 25.

[130]E. Keene (2002) *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics.* Cambridge University Press.

[131]See R. Tuck (1987) 'The "Modern" Theory of Natural Law', in A. Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe.* Cambridge University Press, 99; see also R. Tuck (1993) *Philosophy and Government*. Cambridge University Press, 1572–1651.

[132]See D.S. Grewal (2016) 'The Domestic Analogy Revisited: Hobbes on International Order', *Yale Law Journal* 125, 620.

[133]I. Kant (1970), 'Conjectures on the Beginning of Human History (1786)', in *Political Writings* ed by H.S. Reiss, Cambridge University Press (hereinafter: *Political Writings*), 221, at 232.

[134]I. Kant (1970), 'Perpetual Peace (1795)', in *Political Writings*, 93, at 113 (on the world State as a 'soulless despotism').

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greater respect for their citizens and grant them further civil liberties and rights are instead necessary. The first and foremost step towards Perpetual Peace is state formation and the gradual transformation of European states into constitutional republics.[135]

When it comes to commerce, *doux commerce* theory suggested that international commerce would eventually pacify states in their interaction.[136] For others, commerce had become the state of war equivalent in the economic rivalry among sovereigns;[137] economic antagonism was added to political rivalry.[138] The modern state system was thus seen as largely incompatible with international trade.[139] The line of law and political economy presented here perceives the relationship between domestic law and foreign commerce in the same way as the relationship between domestic law and international politics. Kant was generally favourably predisposed towards international commerce;[140] he also had a deterministic approach to the expansion of commerce around the globe. The 'spirit of commerce' would result in the pacification of the relations among European states, as well as between them and polities in the other continents.[141] While war would cause the gradual transformation of European states into republics, commerce would allow the development of human relations into a cosmopolitan order.[142]

This discussion reveals a more nuanced picture about Kant than Bull's interpretation of 'Kantianism'. While favouring cosmopolitan ideals such as Perpetual Peace in international politics, or the value of international commerce to achieve peace and economic prosperity, the means to achieve these goals are largely domestic. The envisaged international law is one of ends, rather than means. The means to achieve the ends – international pacification or commerce – may be domestic. This strand of international political economy imagined an international law based on cosmopolitan goals, values, and principles, which were not necessarily reflected in positive international law or international institutions.[143]

This alternative political economy supports current developments in IEL. While some domestic measures indicate a move away from IEL as developed during the LIO, most of them take place in an environment of broader acceptance of the values of the international economic system.[144] This has not always been the case with previous moves to 'domesticate' international law such as the Calvo doctrine.[145] This approach is also different from the approach under the New International Economic Order (NIEO) that used international law to promote domestic goals.[146]

While on the face of it IEL may be seen as retracting, domestic policies and measures such as DILs may be indications of the furtherance of IEL principles. There is a trend, for example,

[135]ibid, at 99–102 (first definitive article).

[136]See generally, A.O. Hirschman (1997) *The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph*. Princeton University Press, 61–63.

[137]D. Hume (1987) 'Of Civil Liberty (1741)', in E. Miller (ed.), *Essays: Moral, Political, and Literary*, rev. edn, Indianapolis, Ind.: Liberty Classics, 88–89.

[138]I. Hont (2005) 'Adam Smith and the Political Economy of the "Unnatural and Retrograde" Order', in *Jealousy of Trade*. Harvard University Press, 354.

[139]One such example is the German Philosopher and intellectual follower of Kant, Johann Gottlieb Fichte; see generally on Fichte and his work, I. Nakhimovsky (2011) *The Closed Commercial State: Perpetual Peace and Commercial Society from Rousseau to Fichte*. Princeton University Press.

[140]See S. Fleischacker (1996) 'Values behind the Market: Kant's Response to the Wealth of Nations', *History of Political Thought* 17, 379, at 379.

[141]Kant, 'Perpetual Peace', in *Political Writings*, 114.

[142]Ibid., at 106.

[143]Followers of Kant, such as Fichte, further elaborated on this approach; see Nakhimovsky, supra n. 139.

[144]Dimitropoulos, supra n. 1.

[145]The objective of the Calvo doctrine was to balance the equation on the side of the host state with the primary objective for foreign investors to be equally treated as domestic ones jurisdiction.

[146]See generally, K.F. Olaoye and M. Sornarajah, 'Domestic Investment Laws, International Economic Law, and Economic Development', this special issue.

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towards a unilateral extension of the NT standard to foreign investors.[147] At the same time, the NT standard receives a new and more domestic law-oriented interpretation. Moreover, investors receive a clear and less ambiguous definition of the scope of application of NT.

This is admittedly different when it comes to MFN. MFN has a long but eventful history in international (economic) law. Already its designation as a treatment accorded to the 'most-favoured-nation' is not accurate per se. MFN clauses in international economic agreements do not guarantee more favourable treatment; instead, their aim is to grant equally favourable treatment to signatories and their nationals. MFN treatment gained general acceptance in IEL with the introduction of an unconditional MFN clause in Article I of the GATT. From its origin in trade, it found its way into BITs and other IIAs. The operation of MFN clauses in the trade and investment law contexts is, however, different. The WTO operates as an institutional umbrella for MFN, and involves horizontal disputes between states. International investment law, on the other side, is fragmented and gives rise to disputes between states and private parties. Moreover, while MFN in the GATT concerns the treatment of goods coming from different markets, MFN in investment law allows *ad hoc* tribunals to compare investors, businesses, business sectors, and possibly also broader legal systems of three different countries to determine whether or not the host state has violated the MFN clause. The most recent developments discussed in the previous section suggest that the future of the MFN principle in international investment law remains uncertain.[148]

Contemporary developments in IEL such as legal and institutional de-globalization are admittedly a deviation from the liberal international order. But they are not a deviation from any alternative perception of international law developed during the formation years of the discipline. Instead, they vindicate the approach to international law and international political economy presented above.

4.2. A 'Right to Invest': The Right to Hospitality and the Protection of Investor Rights

Kant identified three layers of public law. Besides constitutional and international law, he added 'cosmopolitan law' (*Weltbürgerrecht*) as a third layer.[149] The difference between international law and cosmopolitan law are their addressees: while international law regulates the relationship between states, cosmopolitan law is a body of law that regulates the status of individuals as human beings as opposed to individuals as citizens of a state, as well as the status of individuals when engaging with states they are not citizens of.[150]

In Kant's classification, 'citizens of the world' (*Weltbürger*) have 'cosmopolitan rights' independent of their nationality.[151] The 'right to hospitality' is the most central right of cosmopolitan law.[152] '*Hospitality* means the right of a stranger not to be treated with hostility when he arrives on someone else's territory'.[153] This includes a right for individuals and states '*to try to* establish' economic relations with other states and citizens in other states, as well as to '*visit* all regions of

[147]Dimitropoulos, supra n. 1.

[148]The trend towards moving away from MFN seems to be broader – even when this is achieved using the means of international law. The Indian Model BIT of 2016, for example, does not include an MFN clause. The Model BIT of 2016 is available at https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf. See generally, L. Choukroune (2016) 'Indian International Investment Agreements and "Non-Investment Concerns": Time for a Right(s) Approach', *Jindal Global Law Review* 7, 157; P. Ranjan and P. Anand (2017) 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction', *Northwestern Journal of International Law & Business* 38, 1.

[149]See the Third Definitive Article of a Perpetual Peace at Kant, Perpetual Peace, in *Political Writings*, 105–108; I. Kant (2017) 'Metaphysical Principles of the Doctrine of Right', in L. Denis (ed.) and M. Gregor (transl.), *The Metaphysics of Morals*. Cambridge: Cambridge University Press, 6:352–354 (hereinafter: Metaphysics of Morals).

[150]P. Kleingeld (1998) 'Kant's Cosmopolitan Law: World Citizenship of a Global Order', *Kantian Review* 2, 72, at 74.

[151]Kant, Metaphysics of Morals, at 6:353.

[152]Kant, 'Perpetual Peace', in *Political Writings*, 105–108.

[153]Ibid., 105.

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the earth'.[154] However, this broad right does not include the right to enter foreign territory or '*make a settlement* on the land of another nation'.[155] A contract is needed for that. Instead, it is a right to 'attempt to enter into relations' with the local population.[156]

The right to hospitality corresponds to a legal obligation for states to let foreigners use parts of their territory under certain circumstances. States retain the power though to refuse foreign nationals wanting to enter their territory. The right does not add up to a legal requirement to give up part of one's property for the benefit of strangers.[157] Later scholars such as Fichte echoed Kant. Upon landing on a foreign shore, the only right that the foreigner could possibly claim from local institutions and individuals was mere hospitality – the rest was purely voluntary on behalf of the host state:

> He has that original human right which precedes all rightful contracts and which alone makes them possible: the right to every other human being's expectation to be able to enter into a rightful relation with him through contracts. This alone is the one true human right that belongs to the human being as such: the right to be able to acquire rights. This, and only this, right must be granted to everyone who has not expressly forfeited it through his actions.[158]

Kant did not exactly define the issues relating to the potential institutionalization of cosmopolitan law and cosmopolitan rights.[159] Perpetual Peace and a cosmopolitan order can be achieved without an international law in the contemporary sense. International institutions may be complementary but not necessary for the peaceful coexistence of nations. Domestic law may instead contribute to the realization of international legal principles and values. Ultimately, what matters is the 'proper' republican constitution of states. Cosmopolitan rights can (also) be guaranteed by domestic law and institutions.[160]

DILs, especially more recent ones, establish the right to hospitality in international investment law. Foreign investors obtain a 'right to invest' under DILs.[161] The right to invest may be seen as a cosmopolitan right to hospitality institutionalized at the domestic level.

The level of protection of investor rights is also provided for along the lines of the right to hospitality. The right to invest is a right to minimum, rather than maximum protection; it is a right to attempt to invest in accordance with domestic laws. In the South African example, despite the withdrawal from BITs, domestic law adopts the idea of providing foreign investors and their investments treatment no less favourable than that accorded to domestic investors. Similar trends may be observed elsewhere, such as in the Gulf Region. Gulf states have a tradition of only allowing foreigners to invest in most sectors of the economy provided that they become shareholders of a company established under domestic law and that they have a local partner that contributes no less than 51% of the capital of the company.[162] Recent foreign investment laws in Gulf countries lift some of these restrictions; the new investment laws of the UAE and Qatar, for example, allow majority foreign shareholding in domestic companies as a default rule

[154]Kant, Metaphysics of Morals, at 6:353 (emphasis in the original).

[155]Ibid.

[156]Kant, 'Perpetual Peace', in *Political Writings*, 106 (emphasis in the original).

[157]Foreigners, for example, should be able to use foreign land temporarily if this is necessary for their continued existence; see Kant, 'Perpetual Peace', in *Political Writings*, 10–106.

[158]Nakhimovski, supra n. 139, at 51 (citing Fichte, Foundations of Natural Right) (emphasis omitted).

[159]Kleingeld, supra n. 150, at 81.

[160]See also P. Capps and J. Rivers (2010) 'Kant's Concept of International Law', *Legal Theory* 16, 229, at 230.

[161]See, for example, Article 37 of Djibouti Investment Code ('freedom of investment by every physical or legal person of Djiboutian nationality or foreign … '); Article 6 of El Salvador Investment Law (1999); Article 12 of Zimbabwe Investment and Development Agency Act.

[162]Until 2018, foreign investors were allowed to only invest in Qatar, for example, in accordance with the provisions of Law No. 13 of 2000 'Regulation of the Investment of Non-Qatari Capital in the Economic Activity'. Foreign investment was generally limited to 49% of the capital for most business activities with Qatari partner(s) holding at least 51%. Foreign investors were not allowed to invest under Article 2.3. Nr. 2. of that law in, among others, real estate broadly speaking.

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for almost all sectors.[163] In the same spirit, MST and NT are sometimes extended – beyond the post-admission – to the admission stage too. As discussed above, prospective investors can now often bring a claim before a grievance committee against the decision denying them market access in the first place.[164]

The right to hospitality does not go beyond what domestic law would guarantee to nationals of the host state. Intergenerational and sustainable development goals of investment, corporate social responsibility standards, or human rights-related obligations, for example, are only imposed on foreign investors to the extent that they are imposed on domestic investors.[165]

The other side of the coin of the provision of the right to invest to foreign investors is the equalization of protection between foreign and domestic investors. International law generally allows reverse discrimination;[166] customary international law allows treating aliens and their property more favourably than host state nationals. International investment law provides for substantive rights to foreign investors that go beyond non-discrimination, as well as a forum for dispute settlement that is not in place for nationals. Many kinds of protection become available to foreign investors under IIAs that may not be available for domestic investors. It thus arguably institutionalizes reverse discrimination.[167] Reverse discrimination is now seen in some countries as violating domestic constitutional rights and principles, such as equality – as it allows for discrimination against domestic investors.[168] Under new DILs, NT is now acquiring new dimensions towards mandating the equal treatment of foreign and national investors.[169] Foreign investors are required to resort to domestic courts, or other means of dispute settlement that are the same as for domestic investors. The South African PIA, for example, purports at bringing foreign investment protection in line with the South African Constitution; the Act was a move by the South African government to provide a framework that regulates investment in the country while redressing the injustices caused by the apartheid rule that excluded historically disadvantaged social and ethnic groups from economic activities.[170]

The new international political economy acknowledges cosmopolitan goals, values, and principles; yet, in this new order the ends do not justify the means.

5. Conclusion

The overarching globalization of domestic economies under the LIO is giving way to a more balanced relationship between the domestic and the international. The domestic dimension of

[163]See UAE FDI Law; Qatar Investment Law No. 1 of 2019 'Regulating the Investment of Non-Qatari Capital in Economic Activity'.

[164]See section 3.3 above.

[165]Only few DILs have taken the next step of providing for such obligations; see UNCTAD, 'Investment Laws: A Widespread Tool', at 11.

[166]On reverse discrimination in international law, see European Court of Human Rights, *James et al v UK*, Judgment (21 February 1986), at para. 63.

[167]J. Bonnitcha (2017) 'Assessing the Impacts of Investment Treaties: Overview of the Evidence', International Institute for Sustainable Development (September), 5. Sometimes, it is the extensive interpretation of substantive standards of protection in favour of foreign investors by investment tribunals, rather than the standards per se, that results in reverse discrimination; see M. Sattorova (2009) 'International Investment Law: Reconciling Policy and Principle', *European Journal of International Law* 20(3), 931–935, at 933 (with reference to J. Calamita, 2009, 'The British Bank Nationalizations: An International Law Perspective', *International and Comparative Law Quarterly* 58, 119). See generally, M. Baudena (18 February 2021), 'Investor–State Dispute Settlement: Understanding the System's Legitimacy Crisis in Constitutional Terms', *LSE Law Review Blog*, https://blog.lselawreview.com/2021/02/investor-state-dispute-settlement; C. Riffel (2020) 'Does Investor-State Dispute Settlement Discriminate Against Nationals?', *German Law Journal* 21, 197–222

[168]See also A. Sands, 'Regulatory Chill and Domestic Law: Mining in the Santurbán Páramo', this special issue; Dimitropoulos, supra n. 1.

[169]See also Article 5 of El Salvador Investment Law (1999) (stipulating that foreign investors 'shall enjoy the same rights', while at the same time they are 'bound by the same responsibilities as local investors and partnerships').

[170]See Forere, supra n. 84.

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investment is gaining considerable ground. However, the process of domestication seems to be one of means. States worldwide are using the means of domestic law to achieve goals of international (economic) law; in that, 'the idea of a cosmopolitan right is therefore not fantastic and overstrained'.[171] DILs - and the broader process of regulating cross-border economic activity with domestic law - pose a challenge to the LIO. They do not pose a challenge to international (economic) law; they are international law come true.

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[171]Kant, 'Perpetual Peace', in *Political Writings*, at 108.

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