



# Rethinking National Investment Laws

A study of past and  
present laws to inform  
future policy-making

**IISD REPORT**



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### **Rethinking National Investment Laws: A study of past and present laws to inform future policy-making**

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Any remaining errors or omissions are our own.

### **Disclaimer**

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## Executive Summary

National investment laws are versatile policy instruments, which can serve a broad and varied set of functions. These laws vary widely across countries and have changed significantly over time. Investment laws have often been underestimated, sometimes even being mistaken for domestic versions of investment treaties.

This report provides a resource for policy-makers interested in reforming their countries' national investment laws. It consists of four sections: an introduction and three substantive sections. Section 2 charts how national investment laws have changed over time. Section 3 surveys contemporary investment laws, identifying seven main functions that these laws serve today. Section 4 looks to the future, articulating lessons from the past and providing a framework for policy-makers considering reforming their investment laws.

The report emphasizes three main findings.

### **1. Investment laws have changed over time and can be redesigned to meet new challenges and opportunities.**

National investment laws have changed significantly over time in many countries. The earliest investment laws emerged in developing countries in the 1950s, and through the 1960s and 1970s, these laws were usually driven by domestic policy objectives. These objectives included bringing cohesion to inherited colonial-era laws, fostering more coordination between ministries, and implementing a country's development plan. As a result, the functions and content of investment laws varied widely.

In the 1980s, investment laws were reimagined as tools through which international standards, largely related to investment protection, could be brought into domestic law. Many developing countries rewrote their investment laws between 1980 and 2010, often in ways that aligned them more closely with investment treaties. The inclusion of tax incentives also became more prominent in these years. These shifts in function and content reflected a higher-level shift in policy objectives as states became more focused on the objective of attracting and promoting investment. International organizations also began issuing guidance for national investment laws, but their guidance differed: the World Bank recommended laws with content aligned with investment treaties, the United Nations Conference on Trade and Development recommended laws aligned with more developmentalist considerations, while the Organisation for Economic Co-operation and Development has been agnostic about the need for investment laws.

The trend of rewriting investment laws to incorporate investment treaty standards was widespread between 1980 and 2010 but never universal. Even among developing countries, there were a variety of approaches. A number of developed countries wrote or rewrote investment laws during these years, too; these laws focused on the admission and screening of inbound foreign investment only and were driven by domestic policy objectives, not international guidance or standards.



Since the 2000s, concerns about investment laws modelled on investment treaties have become more prominent. Such laws risk becoming disconnected from the wider national legal system and pose many of the same legal risks and policy concerns as old-style investment treaties. These concerns are leading to renewed interest in national investment laws and a growing diversity in practice. This report documents how countries have changed their investment laws in the past, with an eye to helping those policy-makers who are rethinking these laws today.

## 2. National investment laws are versatile domestic policy instruments and vary widely today.

Investment laws in force today vary widely in structure and content. Previous observers have sought to locate investment laws on a spectrum running from those laws that seek to **control** investment to those that seek to **facilitate** investment. However, it is important to move beyond a discussion of the policy **objectives** investment laws seek to achieve and to also explore the diverse **functions** that they perform. This is for three reasons. First, focusing only on the question of objectives overlooks the fact that investment laws govern a variety of issues that arise at different stages of the investment process. Second, focusing on objectives obscures the fact that laws that share similar high-level objectives, such as promoting or facilitating investment, can pursue those objectives in very different ways. Third, identifying and clarifying diversity in the functions of investment laws helps explain diversity in the **content** of these laws—an investment law that governs the admission and approval of new foreign investment will contain different provisions than an investment law that deals with the conferral of investment incentives.

Conceptually, then, we suggest it is useful to think about investment laws as involving a three-step inquiry that considers

1. the policy **objective(s)** that the law seeks to achieve (e.g., promoting sustainable investment, coordinating action across government);
2. the **function(s)** that the law serves (e.g., governing the admission and approval of new foreign investment); and
3. the structure and **content** of the law (e.g., whether the law applies to all investments or only foreign investments; whether the law deals with the amount of compensation owing in the event of an expropriation, etc.).

Each step in the inquiry entails a move from more general issues to more specific ones.

We organize our survey of investment laws by the function or functions the laws perform. Through our survey of 70 investment laws, we identify seven main functions of investment laws.

- **Governing the admission and approval of new foreign investment.** At least 60% of the laws we reviewed dealt with admission. A small minority of laws adopt a “positive list” approach in which foreign investment is permitted only in listed sectors. In contrast, others use a “negative list” approach in which foreign investment is allowed in all sectors except those listed. Among states adopting a negative list



approach, there is variation in terms of which sectors are closed and in terms of the way investment approval is administered. Some entry regimes only certify compliance with stated regulatory requirements; in others, decision-makers have more discretion to make decisions about the desirability of an investment, including through screening of proposed investments in sectors that are open to investment in principle.

- **Conferring and administering investment incentives.** At least 80% of the investment laws we reviewed dealt with investment incentives, with a lot of diversity in sectors eligible for incentives, the value of incentives, and other design elements.
- **Facilitating investment.** A significant minority of investment laws deal with facilitation, understood in the specific sense of addressing practical impediments to investment. These provisions can confer power on an investment promotion agency or establish “one-stop shops” for approvals and permits relating to investments.
- **Guaranteeing legal protection to investment.** Roughly 70% of investment laws we reviewed guarantee legal protection to investors. The most commonly included protections are guarantees of compensation in the event of expropriation and guarantees of free transfers of funds relating to an investment. However, it remains uncommon for investment laws to provide the full range of protections commonly found in treaties. For example, fewer than 10% of laws include fair and equitable treatment provisions. Even among laws that include apparently similar protections, such as provisions on compensation for expropriation, there are important differences in the drafting of these provisions.
- **Establishing and/or specifying a system for managing investor–state disputes.** Almost 70% of the laws we reviewed dealt expressly with the settlement of investment disputes. They do so in a variety of ways. Some establish new national institutions designed to prevent or resolve investment disputes; others assert the primacy of domestic courts; others recognize the possibility of investor–state dispute settlement through international arbitration in principle, subject to a specific agreement providing consent; and, finally, some provide advance consent on behalf of the state to investor–state dispute settlement.
- **Specifying investors’ obligations and responsibilities.** Investment laws are only one part of the domestic legal framework governing investment, and investors will ordinarily remain bound by laws of general application that relate to their activities: contract law, environmental law, corporate law, labour law, tax law, and so on. Some investment laws clarify that this is the case for the avoidance of doubt, while other investment laws highlight specific areas in which investors must comply with obligations under domestic law. Other investment laws go further, placing obligations on investors beyond what is contained elsewhere in the domestic legal framework.
- **Monitoring and oversight of foreign investment.** This function has received relatively little attention to date, in part because monitoring depends as much on bureaucratic practices as it does on powers conferred under a law. That said, some laws place obligations on investors to report to an investment agency (or some similar body), potentially envisaging that agency playing a role in overseeing and verifying compliance with domestic law.



### 3. There is no “off-the-shelf” model for the functions and design of an investment law. Appropriate design varies by context and by the function(s) policy-makers want the law to serve.

We provide a framework for policy-makers thinking about national investment laws. The framework neither recommends a specific design or legal content, nor does it assume that an investment law will be necessary or appropriate in all circumstances. Instead, the purpose of the framework is to encourage policy-makers to ask the right questions, the answers to which will depend on national context and policy objectives.

#### A Framework for Rethinking a National Investment Law

As a first step toward assessing whether to reform or adopt an investment law, countries should clarify the ultimate objective that the law aims to achieve. For most states, their ultimate objective will be to promote sustainable development. Disaggregating this ultimate objective may highlight other proximate objectives that are thought to contribute to realizing sustainable development. Such specific objectives might include

- encouraging investment in prioritized sectors, including by signalling to investors that investment in prioritized sectors is welcome;
- maximizing the benefits (and minimizing the costs) associated with investment for the domestic economy and for third-party stakeholders, such as local communities;
- ensuring that investment is appropriately regulated;
- affirming (or contesting) standards of investment protection contained in investment treaties;
- ensuring that investment doesn't jeopardize national security; and
- fostering greater coordination and consistency of action across government.

A challenge then arises in designing and drafting an investment law that is likely to assist in realizing abstract objectives of this sort. To help translate policy objectives into practice, we recommend that policy-makers focus on the *functions* that the law is intended to perform, and how these functions relate to their ultimate objective of promoting sustainable development, as well as proximate national policy objectives and priorities.

We provide a framework as a guide for internal discussion within government, to help policy-makers reflect on the functions their current law is serving and articulate the functions that they want a law to serve. In some contexts, it may be more appropriate for investment to be governed by a combination of laws of general application and sector-specific laws rather than an investment law. It is important to discuss these questions internally before deciding if a law is needed, and if so, deciding how to design the law.

#### A. Articulating and Evaluating Functions of the Current Investment Law

Any rethinking of investment laws must begin with clarity on their intended functions.

- What are the intended functions of our current investment law?
- Is our current investment law fulfilling its intended functions?



- Is our current investment law serving any unintended functions?
- Are the law's intended and actual functions still necessary or relevant in the current national and international context?
- For each function that is deemed still necessary and relevant, how does the investment law serve this function?

## B. Articulating Desired Functions

There is no best practice or set of functions that investment laws “should” include; whether a particular function is relevant and necessary depends on country context.

- What functions do we want an investment law to serve?
- How does this relate to wider investment policy objectives?
- What do we expect our objectives to be in 5 years? In 10 years?

## C. Comparing Policy Tools

An investment law is a domestic policy tool. It may be a useful tool, or it may not, depending on the context, other available tools, and the proximate policy objectives of a government.

- Is an investment law the appropriate instrument to perform a given function?
- Would some functions assigned to the investment law be better addressed through another instrument?
- Could the investment law temporarily fill a regulatory capacity gap for certain functions?

## D. Designing an Investment Law to Serve Desired Functions

Questions of content and design should be considered only after the desired functions are clear. Cross-cutting questions to consider, regardless of desired functions, include the following:

- What is the scope of application of the law?
- How will the law interface with the country's laws/regulations of general application?
- What is the best institutional structure for the administration or enforcement of the investment law?

## E. Considering Objectives, Implications, and Risks Associated With Specific Functions

If a government is considering keeping (or adding) a particular function in an investment law, then it is necessary to review different models and examine the risks and implications of each model. Much will depend on how wider policy objectives relate to the performance of any given function—for example, whether the purpose of establishing new rules to govern the admission and approval of foreign investment is to send a signal of openness to foreign investors, to drive domestic economic reform, to increase oversight over prospective investment that poses national security risks, or some combination of these and other objectives. Beyond tailored questions and considerations for each function, we identify common risks or implications:



- **Admission:** Some options, for instance, when approval is granted automatically after the expiry of a specified time period, may pose risks for countries with limited bureaucratic capacity to evaluate applications, especially if investment authorization intersects with environmental or other impact assessments.
- **Incentives:** Certain tax incentives create acute risks, including the risk of depleting public funds to support investment that would have occurred anyway. Incentives may be better placed in general tax law, and developments at the Organisation for Economic Co-operation and Development regarding a minimum global tax may create a need for rethinking or removing tax incentives.
- **Investment facilitation:** This raises few acute risks, but legislation may not be the appropriate tool to address practical impediments to investment, and doing so can come with costs. It can also be challenging to identify genuine impediments.
- **Legal protection for (foreign) investors:** Certain protections, such as stabilization or fair and equitable treatment provisions, raise acute risks, similar to old-style investment treaties, and there are additional risks of unintended interaction with contracts, treaties, and other laws.
- **Systems for managing investment disputes:** Certain approaches raise acute legal and financial risks, for instance, providing consent to international arbitration, and may also impact the role of the national judiciary.
- **Obligations on (foreign) investors:** These raise few acute risks but do raise practical challenges. The value of singling out certain types of obligations (environmental, labour, reporting) in an investment law rather than referring to other domestic laws can be questioned.
- **Monitoring and oversight of investment:** This raises few acute risks, but there may be challenges in regulatory and institutional design.





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# 1.0 Introduction

## 1.1 Why This Report?

National investment laws are versatile policy instruments. They can serve many functions, and governments can use them to ensure investment is governed in line with proximate national policy objectives and the ultimate objective of promoting sustainable development. However, in policy discussions, they are often seen as laws with one main function, usually to provide incentives or to provide legal protection to investors. This narrow view misses the wide range of functions that investment laws perform today, and it also underestimates the potential of national investment laws as policy tools to help governments reach development and policy goals.

The purpose of this report is to help policy-makers rethink their national investment laws. It is a resource that policy-makers can use to learn more about the different policy objectives that have led states to enact investment laws and to clarify the diverse functions that these laws can serve. It is also a tool for thinking about reform. The final section outlines a framework for use during reform discussions, which includes questions and considerations to help policy-makers reflect on the functions that a law is currently serving, articulate the functions they want an investment law to serve, and then design or draft accordingly.

National investment laws are currently in force in many developing countries, but these laws vary widely in terms of the functions they serve as well as their content. They can come to the attention of policy-makers for a variety of reasons.

- Perhaps policy-makers are evaluating the effectiveness of the tax incentives provided in the national investment law, and are asking, Do the incentives we provide to certain types of investors work as intended? If not, why not, and could we target the incentives we offer more specifically? How common are incentives in other countries' laws?
- Perhaps a dispute with an investor becomes an arbitration case, with the national investment law as the basis for jurisdiction. This experience may prompt policy-makers to ask questions about standards in the law, such as, Why is a fair and equitable treatment provision in our national investment law if it does not appear in our constitution or elsewhere in our laws? Do other countries' laws include it? Have other states removed it, and if so, what happened when they did?
- Perhaps a foreign firm makes an investment in an industry with national security relevance, which leads elected officials and policy-makers to consider if the screening and approval procedure outlined in the national investment law needs to be updated.
- Perhaps bilateral or regional investment treaties are being negotiated or reformed, and this prompts policy-makers to ask, How do our treaties and national laws relate to each other? Are their functions and content complementary? Do they still serve our policy objectives, and do they promote sustainable development?



- Perhaps wider investment law reform discussions prompt policy-makers to ask, Is our investment law outdated? Have our policy objectives evolved, but our investment law still reflects older objectives?
- Perhaps the investment climate was reviewed by an external organization, and the review recommended reforming the legal framework for investment, including updating an existing national investment law or even writing a new one. Reforming the legal framework may be recommended as a way to enhance coordination among ministries and other institutions too.

Policy-makers may want to know more about national investment laws and may consider creating, reforming, replacing, or removing national investment laws in any of these circumstances. This report is intended as a resource that policy-makers can use to learn about how national investment laws have evolved and been repurposed over time, about the various functions they can serve, and about how they vary around the world today. It also looks to the future, setting out a positive agenda for national investment laws that can help policy-makers reimagine what functions national investment laws can and should serve.

## 1.2 Questions This Report Addresses

Unlike the large literature and lively debate on investment treaties, there are relatively few resources on national investment laws. Sometimes, these laws are seen as merely the domestic counterparts to investment treaties, but there are many reasons for thinking about national investment laws separately. Historically, these laws emerged independently and for different reasons than treaties. Governments can and do use investment laws to respond to many different domestic pressures or work toward domestic policy objectives, which partly explains the variation in their content.

In this report, we approach national investment laws on their own terms, as domestic policy instruments. Like all domestic policy instruments, they come with design trade-offs and invite questions about whether the law “in the books” is having intended and unintended effects in practice. In order to help policy-makers make evidence-based decisions regarding national investment laws, this report provides answers to the following foundational questions about national investment laws.

### Section 2. Questions About the Past

- When and how did the idea for national investment laws emerge and spread?
- Why do some but not all countries have national investment laws, and, for countries that do have national investment laws, how similar are they to one another?

### Section 3. Questions About the Present

- What functions do existing national investment laws serve?
- How common are particular functions in contemporary national investment laws? How similar or different is the content of these laws?



## Section 4. Questions About the Future

- What lessons should inform the future of national investment laws?
- What questions should policy-makers ask as they consider reimagining national investment laws?

Before these questions can be addressed, an even more foundational question requires discussion: What is an investment law?

### 1.3 What Is an Investment Law?

In almost every legal system, foreign investment is governed by many different bodies of law: contract law, environmental law, corporate law, labour law, tax law, and so on. For the purpose of this study, the concept of an investment law refers to something more specific than a law that applies generally within a country, including to investments. The concept of an **investment** law connotes laws that are specifically focused on investment in some way. This clarification, however, falls short of a full definition, and the problem of definition is not unique to our study. There is no single, widely accepted definition of the concept of an investment law.

One way to approach the problem of definition is to look to the emergence of investment laws historically. In Section 2, we suggest that the idea of a national investment law—also referred to, in this context, as an “investment code”—emerged in the 1950s and 1960s. Investment laws in this period were understood as laws that defined the basic legal framework governing inward foreign direct investment in a country and associated cross-border capital movements. Given developments over the past 40 years (discussed in Sections 2.2 and 2.3), this is a too-narrow definition for our purposes, but it does provide a useful point of reference.

Another way to approach the problem of definition is simply to look to a law’s title. On this view, any law that uses the word “investment” in its title is an investment law. This approach yields important insights into variations in the function, content, and scope of investment laws. It also comes with its own problems. If one considers two countries’ laws that are otherwise identical, should one law really be excluded from the scope of our study solely because of a difference in the words used in the title?

We resolve the challenge of definition in three stages. First, we begin with laws with titles that clearly identify them as an “investment law,” “foreign investment law,” or “investment code.” As a second step, we review these laws, of which there are more than a hundred, to identify their main functions. We identify seven main functions of national investment laws:

- governing the admission and approval of new foreign investment
- conferring and administering investment incentives
- facilitating investment (understood in a specific sense)
- guaranteeing legal protection to investment
- establishing and/or specifying a system for managing investor–state disputes
- specifying investors’ obligations and responsibilities
- monitoring and oversight of investment



As a third step, we extend our definition to include any law that performs any of these seven functions, so long as its operation is directed to investment specifically. (Thereby excluding from our conception of “investment laws,” for example, tax laws of general application, which are relevant for investors but not directed toward investment specifically.)

This leaves us with a conception of “investment laws” that is at least as broad as the conception embedded in the United Nations Conference on Trade and Development’s (UNCTAD’s) Investment Laws Navigator database and in the work of scholars writing in this field.<sup>1</sup> At the same time, we re-emphasize that many laws that are directly relevant to investment fall outside our definition of “investment law.” Sector-specific laws—for example, mining laws, banking laws, and telecommunications laws—often play an important role in governing investment in a given sector but fall outside our definition. Similarly, laws that establish special jurisdictions, such as special economic zones, are important but fall outside our definition because they do not cover the entire jurisdiction of a country.<sup>2</sup> These somewhat artificial but necessary definitional boundaries serve to underscore that an investment law is only one part of the legal framework governing foreign investment in any given country and not necessarily the most important part.<sup>3</sup>

### Box 1. Investment law or foreign investment law?

One important question relating to the scope of any investment law is whether it applies to all investment within a jurisdiction or only to **foreign** investment. Consistent with existing academic scholarship and policy studies, our conception of an investment law includes both laws that are specific to foreign investment and laws that apply to all investment regardless of origin.

A related policy question is whether investment laws **should** apply equally to all investment or only to foreign investment. These questions cannot be sensibly answered until the law’s functions have been articulated. For example, if a law’s only function is to govern the screening and approval of new investments on national security grounds, then it may be more appropriate for the law to apply to foreign investment only. If the law’s functions include investment facilitation or specifying investor obligations, then it may be more appropriate for the law to apply to all investment.

For this reason, it is possible for parts of a single investment law to differ in their scope of application. For example, Myanmar’s Investment Law applies, in principle, to both domestic and foreign investment. However, Chapter X recognizes that **foreign** investors are subject to additional restriction on the sectors in which they can invest; Chapter XV, on the other hand, grants **foreign** investors additional rights to transfer capital abroad that go beyond the rights of domestic investors.

<sup>1</sup> See, for instance: Chaisse, J., & Dimitropoulos, G. (2023). Domestic investment laws and international economic law in the liberal international order. *World Trade Review*, 22(1), 1–17, at 14; Hepburn, J. (2023). The past, present, and future of domestic investment laws and international economic law. *World Trade Review*, 22(1), 18–34, at 19; and Dimitropoulos, G. (2023). The right to hospitality in international economic law: Domestic investment laws and the right to invest. *World Trade Review*, 22(1), 90–108, at 96.

<sup>2</sup> Similarly, Chaisse & Dimitropoulos, *supra* note 1, at 14.

<sup>3</sup> Similarly, Chaisse & Dimitropoulos, *supra* note 1, at 9–15.



## 1.4 Structure of the Report

The report has three substantive sections, focusing on the past, present, and future of national investment laws. Section 2 shows that the earliest national investment laws often reflected domestic policy priorities; in the 1950s–1970s, states decided on domestic policy objectives and then designed investment laws to deliver on those goals. Starting in the 1980s, a new trend emerged as many **developing** countries' investment laws began to reflect international standards rather than domestic policy priorities. Standards from investment treaties, like fair and equitable treatment, began appearing in some national investment laws at this time. A separate trend, which emerged in the 1970s, was for **developed** countries to enact laws focused on the screening of inward foreign investment.

Section 3 surveys the functions and content of contemporary investment laws. We identify and discuss seven main functions of these laws, related to admission, incentives, investment facilitation, legal protections, dispute settlement, investor obligations, and investment monitoring. Governments adopt laws to serve diverse policy objectives and in diverse circumstances, which helps explain why different countries' laws perform different functions and why laws that perform the same functions may differ dramatically in how they do so. We explore how the context in which a law is adopted shapes its functions, using four national laws as examples. The section concludes with a survey of developing country investment laws that identifies how common each of the seven functions is and describes variations within each function.

Section 4 looks to the future, asking what lessons can be learned from this analysis for the design and operation of investment laws going forward. It outlines a framework for policy-makers thinking about revising national investment laws and identifies considerations and questions for policy-makers to ask that are specific to each of the seven functions.



## 2.0 Past: The evolution of national investment laws

### KEY MESSAGES

- National investment laws first emerged in the 1950s in developing countries.
- While the provisions and contents of early investment laws varied, most were driven by domestic policy objectives.
- In the 1970s, developed countries began to enact investment laws that outlined approval or screening procedures but did not include other provisions.
- In the 1980s, international standards started to influence developing countries' national investment laws, with some developing countries adapting provisions from investment treaties into their laws.
- Many countries have changed their national investment laws significantly over time as their domestic policy objectives changed.

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When, where, and why did the idea of defining the basic legal framework governing inward foreign direct investment in single, comprehensive national law emerge? Surprisingly little is known about the history of national investment laws, especially compared to the well-researched history of investment treaties. Investment laws emerged around the same time as modern investment treaties but for different reasons and with different proponents. Many developing countries initially enacted national investment laws to ensure that foreign investment was governed in line with national policy and development objectives, but those policy objectives varied widely—some states sought mainly to attract investment or certain types of investment, while others also sought to challenge Western conceptions of international economic law.<sup>4</sup>

National investment laws first began to appear after World War II, with scholars citing Israel's 1950 investment law as an early, and perhaps the first, example of a policy instrument that sought to define the basic legal framework governing inward foreign direct investment through a single, comprehensive law.<sup>5</sup> Many features that have come to define investment laws were already present in Israel's law, including tax incentives and the creation of an agency to approve new investments, issue licences, and provide assistance to foreign investors.<sup>6</sup> In 1951,

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<sup>4</sup> Olaoye and Sornarajah emphasize investment laws as a tool to challenge Western conceptions of international law. They describe six different periods of national investment laws: colonial, decolonization (1950–1969), New International Economic Order (1970–1988), liberalization (1990–2003), backlash (2004–2014), reform and recalibration (2015–present). Olaoye, K., & Sornarajah, M. (2023). Domestic investment laws, international economic law, and economic development. *World Trade Review*, 22(1), 109–132.

<sup>5</sup> Buxbaum, R. & Riesenfeld, S. (1985). Investment codes. In R. Bernhardt (Ed.), *Encyclopedia of Public International Law*. Elsevier, at 344; Burgstaller, M. & Waibel, M. (2011). Investment codes. In R. Wolfrum (Ed.), *Max Planck Encyclopedia of Public International Law*. Oxford University Press, at 11.

<sup>6</sup> Littell, N. (1952). Improvements in legal climate for investments abroad. *Virginia Law Review*, 38(6), 729–744, at 733–6.



Turkey passed a similar law, which removed restrictions on foreigners entering professions and created a committee to authorize inward investments and outward transfers of hard currency.<sup>7</sup>

Apart from these few exceptions, however, laws designed to define the basic legal framework governing foreign investment were rare in the 1950s. In 1951, the United Nations surveyed governments in Asia regarding “the laws and regulations governing the treatment of foreign investments in their territories, including the remittance of dividends, interests and profits, taxation, etc.” and not one of the countries surveyed had a comprehensive investment law.<sup>8</sup> Investment laws were also rare in African countries in the 1950s, many of which remained under military occupation or colonial control and had not yet articulated post-independence investment policies.<sup>9</sup> The picture was slightly different in some Latin American countries, like Peru, for instance, which passed a Mining Code in 1950 that included all provisions believed to be relevant for foreign investors in mining, the main sector with foreign investment.<sup>10</sup> Sector-specific laws remain important, even today, and can have a variety of relationships to investment laws; sometimes, governments have tried out provisions in a sector-specific law first and then replicated them in a later general investment law.<sup>11</sup>

The general picture is that throughout the 1950s, laws designed to define the legal framework governing foreign investment through a single, comprehensive instrument were rare—a 1955 United Nations report on foreign capital in Latin America does not mention any investment laws covering all sectors, for instance.<sup>12</sup> Investment laws became more common only in the 1960s, as discussed next.

## 2.1 National Investment Laws Driven by Domestic Priorities, 1950–1979

In many countries, national investment laws emerged after independence as policy instruments to align foreign investment with newly articulated national development objectives. This trend was particularly pronounced in African countries. A 1963 United Nations survey observed that 17 African countries drafted investment laws “almost

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<sup>7</sup> Ibid. at 731.

<sup>8</sup> Secretariat of the Economic Commission for Asia and the Far East. (1951). *Foreign investment laws and regulations of the countries of Asia and the Far East* (UN Doc No. ST/ECAFE/1). United Nations, at vii. See also: Alexander, C. H. (1952). Foreign investment laws and regulations of the countries of Asia and the Far East. *International and Comparative Law Quarterly*, 1(1), 29–39.

<sup>9</sup> The UN survey was sent out in 1949, and in some instances, it was even completed by colonial authorities. For instance, Indonesia’s survey was filled in by Dutch officials. Secretariat of the Economic Commission for Asia and the Far East, *supra* note 8, at 35.

<sup>10</sup> Littell, *supra* note 6, at 742.

<sup>11</sup> Knieper, R. (1989) The new investment code of the Central African Republic: Profound changes. *ICSID Review*, 4(1), 90–99, at 94.

<sup>12</sup> The report instead notes, “The answers to these questions [about the investment climate] are found partly in constitutional provisions, laws and regulations that, in most countries, represent an unsystematic accretion rather than a set of co-ordinated measures.” Department of Economic and Social Affairs. (1955). *Foreign Capital in Latin America* (UN Doc No E/CN.12/360 and ST/ECA/28). United Nations, at 16.





simultaneously” in early 1962.<sup>13</sup> That survey drew a direct connection between countries gaining independence, formulating their general economic and development policies, and drafting their investment laws. National investment laws were seen as “a legal counterpart of the development plan”—a tool to bring coherence and order to the overlapping, outdated legal arrangements inherited from the colonial period as well as a tool to ensure the legal framework governing investment was conducive to development.<sup>14</sup>

The first wave of national investment laws had a close relationship with both economic planning and national development aims. The 1963 UN survey of African investment laws stated that:

Economic planning gives concrete expression to aspirations that lead to independence and investment legislation that facilitates the realization of the development plans. It is not surprising, therefore, that the first set of laws to undergo rapid change happened to be those that affect investment.<sup>15</sup>

The survey presented investment laws as a tool to help transform piecemeal inherited laws into more coherent legal systems to support development.<sup>16</sup>

By 1963, 20 out of the 30 surveyed African countries had collected all the basic elements of the framework governing investment in a single, purportedly comprehensive, law. All formerly French colonies had an investment law except Togo, and some of these laws were similar: Central African Republic, Chad, The Republic of the Congo, and Gabon, for instance, had only small differences between their laws. By contrast, none of the formerly British colonies had an investment law except Ghana.<sup>17</sup> The UN Economic Commission for Africa encouraged countries without national investment laws to draft them, suggesting laws relevant to investment “be expressed in one easily accessible and understandable legal instrument.”<sup>18</sup> Drafting these laws was seen as a way to generate more coordination between ministries:

There is still considerable room for a better coordination between the development plan and investment law. These two are usually formulated by different ministries. It would not be untrue to state that the left hand often does not know what the right hand is doing.<sup>19</sup>

More coordination and discussion between ministries about investment was assumed to go hand-in-hand with bringing cohesion to, or replacing, inherited colonial-era laws.<sup>20</sup>

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<sup>13</sup> Economic Commission for Africa. (1963). *Investment laws and regulations in Africa* (UN Doc No. E/CN.14/INR/28). United Nations, at 1.

<sup>14</sup> *Ibid.*, at 5.

<sup>15</sup> *Ibid.*, at 1.

<sup>16</sup> *Ibid.*, at 5.

<sup>17</sup> There may have been World Bank involvement with Ghana’s law. The 1963 UN survey notes that the Investment Act in Ghana “introduced a new element” which is that in case of dispute on the amount of compensation, then as a last resort, “the matter shall be referred to arbitration through the agency of the IBRD.” *Ibid.*, at 35.

<sup>18</sup> *Ibid.*, at 36.

<sup>19</sup> *Ibid.*, at 36.

<sup>20</sup> *Ibid.*, at 36.



African states were early adopters of national investment laws, but by the early 1980s, 60 countries around the world, with diverse policies toward foreign investment (including socialist economic programs), had adopted investment laws.<sup>21</sup>

## 2.2 Functions of Early Investment Laws

While there are important differences among early investment laws, there are also relevant similarities. This likely reflects similarities in developing countries' domestic priorities.<sup>22</sup> Other provisions common to these early laws reflect the historical context in which they were adopted. For instance, since many currencies were not convertible in the 1960s or 1970s, provisions governing currency exchange and the transfer of capital in and out of countries were important. In the rest of this section, we describe four functions that were common to many, but not all, early investment laws.

### 2.2.1 Governing the Admission and Approval of New Foreign Investment

Provisions governing the admission and approval of new investment were an important part of many early investment laws and the primary purpose of some laws, such as Botswana's 1968 Industrial Development Act. The premise behind this act, like many early laws, is that foreign investment is not permitted unless approved—enterprises were required to apply for licences, and the criteria for approval related to national industrial development.<sup>23</sup>

Many early investment laws established a review board or committee or agency to review proposed new investments, composed of representatives from several ministries.<sup>24</sup> For instance, Ghana's 1972 law established a Capital Investments Board with an official from the central bank, ministry of finance, ministry of industry, and others as needed. This board was designed to encourage inter-ministerial communication and coordination, as well as provide investors with a single entity that could grant approvals for new investment, issue licences, and liaise between the investor and government agencies as needed.<sup>25</sup> Some laws combined the review or approval process with the granting of incentives. For example, Indonesia's 1967 law established a National Investment Coordination Board to review proposed investments and then provide approved enterprises with tax relief.<sup>26</sup>

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<sup>21</sup> Buxbaum and Riesenfeld, *supra* note 5, at 346.

<sup>22</sup> Studies from these years often identified a few key provisions that reflected policy priorities of governments in developing countries and focused on those provisions. For instance, one 1955 UN report focused on approval procedures, transfer provisions, incentives and taxation, expropriation and default (Department of Economic and Social Affairs, *supra*, note 12). A different 1956 report by the UN Secretariat focuses on entry of foreign private capital, transfer restrictions, and incentives (without raising expropriation). See: Secretary-General of the United Nations. (1956). *The international flow of private capital* (E/3021). United Nations, at 45.

<sup>23</sup> Article 10.2a, Botswana's Industrial Development Act, 1968.

<sup>24</sup> Ahojja, K. (1964). Investment laws and regulations in Africa. *The Journal of Modern African Studies*, 2(2), 300–303, at 302.

<sup>25</sup> Articles 1–7, Ghana, National Redemption Council, Proclamation 9 January 1973.

<sup>26</sup> Law No. 1, 1967, Republic of Indonesia, discussed in Buxbaum and Riesenfeld, *supra* note 5, at 347.



As instruments to achieve national development goals, many early investment laws included requirements to use local products and resources, or hire and train local employees, or transfer technology. Sometimes these requirements were phrased as criteria for the review board or committee to use in considering whether to grant initial approval to the investment.<sup>27</sup> In other laws, they were framed as the goals of the law; for instance, Sudan's 1974 law sought to encourage investments that depended on local materials and provided employment opportunities, among other aims.<sup>28</sup> Many of these requirements or goals were subsequently removed in the 1980s or 1990s, as discussed in Section 2.3.

Other laws sought to assert more control over particular industries or the economy as a whole by requiring more local ownership or participation. The Nigerian Enterprises Promotion Decree of 1977 charged the Nigerian Enterprises Promotion Board with assisting “in ensuring the assumption of the control of the Nigerian economy by Nigerians in the shortest possible time.”<sup>29</sup> Papua New Guinea also envisioned progressive nationalization in a 1974 constitutional report that drew extensively from United Nations studies, in particular a Group of Eminent Persons Report.<sup>30</sup> Papua New Guinea's report recommended that foreign enterprises be progressively transferred to Papua New Guinean hands “in the interests of achieving greater control of our economy.”<sup>31</sup>

Even in the 1970s, progressive nationalization was not common in investment laws, and today no laws (that we are aware of) envision it. Yet concerns about control and undue foreign influence over national economies have not gone away, nor are they limited to developing countries. In the 1970s, laws emerged in several developed countries that sought to address these concerns by setting out investment screening procedures, as discussed next.

### **2.2.1.1 Investment Screening Laws in Developed Countries, 1970 and Onward**

Concerns about control and foreign influence over the national economy often appear when there are high levels of foreign investment in a country, especially when that foreign investment is concentrated in sensitive sectors or deriving from one home state. These concerns are present today in many countries and were also prominent in earlier times in both developed and developing countries. In response to these concerns, a new type of law setting out a procedure to screen or approve foreign investment started to emerge in the 1970s in developed countries that were importing foreign capital, like Canada and Australia.

These laws are distinct from earlier investment laws in that they only had one function, investment screening, and that they usually screened investments on the basis of national interest or national security. While these laws were less focused on questions of industrial development than the early laws of developing countries, there is a clear overlap in their content and operation. For instance, Canada's 1973 Foreign Investment Review Act states: “the extent to which control of Canadian industry, trade and commerce has become acquired

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<sup>27</sup> Article 7, The Industrial Development Incentives Ordinance, Tonga, 1977.

<sup>28</sup> Chapter II, The Development and Encouragement of Industrial Investment Act, Sudan, 1974.

<sup>29</sup> Article 2, Nigeria, Enterprises Promotion Decree of 1977.

<sup>30</sup> Report of the Group of Eminent Persons. (1974). *The impact of multinational corporations on development and international relations* (UN E/5500/Rev.1/ST/ESA/6). United Nations.

<sup>31</sup> Article 150 and 151, Papua New Guinea, Constitutional Planning Committee Report, 1974.



by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment is a matter of national concern.”<sup>32</sup> The act required proposed investments by non-Canadians to be reviewed and approved, using criteria including the significance of participation by Canadians, effect on employment and resource processing in Canada, and compatibility with national industrial and economic policies.<sup>33</sup>

Screening procedures emerged for similar reasons in other countries around the same time. For instance, in 1975, broadly similar screening legislation came into force in Australia, in which private investments above a threshold require approval from the Foreign Investment Review Board, discussed more in Section 3.3.<sup>34</sup> Also in 1975, the U.S. government created the Committee on Foreign Investment in the United States, a foreign investment review body that has had its powers expanded over time.<sup>35</sup> The Australian and American screening systems have both evolved and become notably more robust in recent years. Yet the operation of investment screening in these countries needs to be understood in light of the general backdrop of openness of the domestic legal environment to foreign investment in each case. In principle, *foreign* investment is subject to all the same laws as other investment once allowed.

In recent years, investment screening has attracted considerable attention, as many countries enhanced or implemented screening frameworks: UNCTAD found that between 1995 and 2023, 37 countries introduced a regulatory framework for screening foreign investment.<sup>36</sup> Major emerging economies like China, India, and South Africa now have investment screening systems, as do an increasing number of European Union states.<sup>37</sup> In 2020, the European Union’s new investment screening framework came into effect, which aims to foster cooperation among member states regarding investment screening on the grounds of security or public order.<sup>38</sup> The European Commission even suggested that member states without screening mechanisms set them up.<sup>39</sup>

While investment screening laws are designed to perform a common function, they differ in the details of their design: notably, they vary in terms of what triggers screening (sector, size of investment, investor’s home state, etc.) and in terms of what policy criteria are used

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<sup>32</sup> Article 3 (1) Canada, Foreign Investment Review Act, 1973.

<sup>33</sup> Article 2 (2) Canada, Foreign Investment Review Act, 1973.

<sup>34</sup> Foreign Acquisitions and Takeovers Act, Australia, 1975.

<sup>35</sup> Baltz, M. J. (2017). Institutionalizing neoliberalism: CFIUS and the governance of inward foreign direct investment in the United States since 1975. *Review of International Political Economy*, 24(5), 859–880.

<sup>36</sup> United Nations Conference on Trade and Development. (2023). *The evolution of FDI screening mechanisms: Key trends and features* (Investment Policy Monitor No. 25). See also United Nations Conference on Trade and Development. (2019). *National security-related screening mechanisms for foreign investment: An analysis of recent policy developments* (Investment Policy Monitor No. 22).

<sup>37</sup> China: Measures on Security Review of Foreign Investment, issued 19 December 2020; India: Foreign Exchange Management Regulations 2017; South Africa: Competition Amendment Act of 2018; European Commission, List of Screening Mechanisms Notified by Member States (updated 10 May 2022). [https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc\\_157946.pdf](https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf)

<sup>38</sup> European Union. (2019). Establishing a framework for the screening of foreign direct investments into the Union. Regulation 2019/452 of the European Parliament and of the Council, 19 March.

<sup>39</sup> European Commission. (2020, March 25). *Communication from the commission: Guidance to the member states concerning foreign direct investment and free movement of capital from third countries* (pp. 1–2).



for screening (national interest, net benefit, public order, national security, etc.).<sup>40</sup> These laws do not incorporate standards from investment treaties or best practices articulated by international organizations; by contrast, they were often adopted as a direct response to domestic political pressure.

The basis for screening and the conditions attached to investment approval in these laws differ from the approval procedures mentioned earlier in this section. Most notably, screening laws do not normally place “developmentalist” conditions, for instance, requirements about employment of nationals, using domestic content, or manufacturing for export, that were often seen in developing country investment screening laws, like Botswana’s 1968 law, mentioned above.

## 2.2.2 Conferring and Administering Investment Incentives

Some, but not all, early investment laws included incentives intended to encourage investment. Providing incentives was even the sole purpose of a few early laws, like Lesotho’s Pioneer Industries Encouragement Act of 1969. Laws that provided incentives varied in several ways; this variation is discussed more systematically in Section 3.4 since a similarly wide variety exists in today’s incentive provisions.

In the 1960s, there were already concerns about tax incentives for investment. After discussing common incentives, one study by a UN official concluded that countries were competing in a race to the bottom by offering tax incentives: “Individual African countries are competing in granting tax exemptions, thus weakening their collective position.”<sup>41</sup> Even in the 1980s and 1990s, as other elements of investment laws were rethought, international organizations still recommended against investment incentives, as one study noted, there is “little evidence that investment incentives (which have been used for the last 40 years in various parts of the world) are effective as a means to increase investments.”<sup>42</sup>

One notable aspect of some early laws is that policy priorities or development goals were connected to the granting of incentives. For instance, Liberia specified that no incentives shall be granted unless an enterprise falls within the overall priority established by the National Planning Council, ensures permanent employment of Liberians, leaves an option open for Liberians to participate in ownership, and uses raw materials and supplies from Liberia.<sup>43</sup> Similarly, in Lesotho’s 1969 law, incentives were available to domestic and foreign investors, but to receive incentives, an enterprise needed to satisfy Lesotho’s Pioneer Industries Board that it would contribute to the economic development of Lesotho.<sup>44</sup> That said, other laws designed to promote industrial development did not include incentives at all. Malawi’s

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<sup>40</sup> See Bonnitca, J. (2020). The return of investment screening as a policy tool. *Investment Treaty News*. <https://www.iisd.org/itn/en/2020/12/19/the-return-of-investment-screening-as-a-policy-tool-jonathan-bonnitca/>

<sup>41</sup> Ahooja, *supra* note 24, at 302.

<sup>42</sup> Voss, J. (2001). Basic elements for foreign investment legislation in the NIS: An introductory note. *ICSID Review – Foreign Investment Law Journal*, 16(1), 61–104, at 148.

<sup>43</sup> Section 4, Act Amending the Investment Incentive Code of the Republic of Liberia.

<sup>44</sup> Article 7 (1), Lesotho, Pioneer Industries Encouragement Act 1969.



1966 law contains many details about the process to approve new investments but does not mention incentives.<sup>45</sup>

### 2.2.3 Defining Policies Related to Expropriation

Section 3.4 of this paper surveys the legal protections guaranteed to (foreign) investors in contemporary investment laws, finding that the most common protections are guarantees of compensation in the event of expropriation and guarantees of free transfer of funds. These protections either did not exist or did not look the same in earlier investment laws. When surveying earlier investment laws, it makes more sense to think of them as defining national policies related to the expropriation of private property in general, rather than guaranteeing legal protections just to foreigners.

In 1964, a study of national investment laws noted that “in both national and international law, the rights of a nationalized enterprise and of the government are ill-defined” because the rights granted varied in national laws and states had different views on international law.<sup>46</sup> There was no one set of policies or standards that was most common or widely seen as best practice with regard to expropriation. Provisions related to expropriation varied widely, and many countries defined expropriation without reference to international law or standards, instead referring to other domestic laws or the constitution. For instance, Kenya’s 1964 investment law referred to the Kenyan constitutional provision on compulsory acquisition of property.<sup>47</sup>

### 2.2.4 Establishing and/or Specifying a System for Managing Investor–State Disputes

Section 3.4.5 of this paper illustrates that 70% of contemporary investment laws establish or specify a system for managing disputes but that they do this in a variety of ways. A similar variety can be seen in early investment laws; some referred to the relevant constitutional procedures or domestic court procedures, while others established special arrangements for the settlement of disputes with foreign investors, including references to arbitration.

The 1964 Kenyan law mentioned above, for instance, referred investors to the Kenyan Supreme Court, without establishing any special arrangements for investment disputes.<sup>48</sup> In contrast, the 1972 Ghanaian investment law bypasses all local courts, referring investors in

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<sup>45</sup> Malawi, Industrial Development Act, 21 December 1966.

<sup>46</sup> Ahooja, *supra* note 24, at 302.

<sup>47</sup> Article 8, Kenya Foreign Investment Protections Act, 1964, referencing Section 19, Constitution of Kenya:  
No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say (a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and (b) the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

<sup>48</sup> Article 8, Kenya Foreign Investment Protections Act, 1964, referencing Section 19, Constitution of Kenya.



case of a dispute over the amount of expropriation to an arbitrator appointed by the parties or, failing such appointment, provides consent for the dispute to be submitted to arbitration under the International Centre for Settlement of Investment Disputes (ICSID) Convention.<sup>49</sup> As noted in Section 3.4.5 2(d), the difference between a law that recognizes the validity of arbitration in principle and a law that provides consent to arbitration is significant, as demonstrated in a number of investor–state dispute settlement (ISDS) cases with jurisdiction based on national investment laws.

## 2.3 National Investment Laws Driven by International Standards, 1980–2010

In the 1980s, national investment laws were reimagined. The earlier view of these laws as policy instruments for aligning investment with national policy or development goals was gradually replaced by a view of these laws as instruments for bringing international standards into domestic law. Some observers began to see these laws as domestic corollaries of investment treaties, with the same function of providing legal protection to foreign investors. As Hepburn observes, investment treaties and investment laws were not perceived to be in competition with each other; instead, investment laws were commonly adopted as part of a package of reforms in line with new thinking about foreign investment or on the advice of external observers.<sup>50</sup> Many developing countries rewrote their investment laws between 1980 and 2010, often in ways that aligned them more closely with their investment treaties. This sub-section describes general trends in these years, and then Section 3 of the paper discusses functions and content in more detail since many of the drafting changes made between 1980 and 2010 still appear in contemporary laws.

Calls for international standards or procedures to be incorporated into national investment laws became influential in the 1980s, although they existed beforehand. Transnational investor groups had taken an active interest in national investment laws in earlier decades, and while much of what these groups sought could be reconciled with laws motivated by domestic and developmental priorities, they also pushed for international standards and procedures in national laws. For example, in 1950, the International Bar Association, a private association of legal practitioners, adopted a resolution to study the law and procedures of each country with a view to accomplishing six objectives, including

removing unnecessary restrictions on the establishment and operation of enterprises from foreign sources; assuring just and equitable treatment of enterprises from foreign sources; and development of uniform order for the arbitration of disputes between persons of different nationalities and between governments and investors of funds from foreign sources.<sup>51</sup>

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<sup>49</sup> Article 11.3, Ghana, National Redemption Council (Establishment) Proclamation.

<sup>50</sup> Hepburn, J. (2023). The past, present, and future of domestic investment laws and international economic law. *World Trade Review*, 22(1), 18–34, at 21.

<sup>51</sup> Littell, *supra* note 6, at 729. Some of these objectives, like the reference to “just and equitable treatment,” echo terms already under discussion internationally in 1950, notably in the Havana Charter (1948) envisioned to create an International Trade Organization, as well as in many freedom, commerce, and navigation treaties signed during these years. Others, like pre-establishment rights, would appear in international negotiations only later.



Several factors helped make the view of investment laws as instruments through which international standards could be brought into domestic law more mainstream in the 1980s. One factor was broader ideological shifts and new international commitments to liberalize—for instance, in the 1980s and 1990s, many developing countries acceded to the World Trade Organization (WTO) and accepted Article 8 at the International Monetary Fund. These new commitments often had consequences for the content of investment laws, for instance, by limiting the use of performance requirements or limiting states’ ability to control transfers of funds. A second factor was that international organizations began providing technical assistance on—and then issuing guidance for—national investment laws, which fostered a sense that there was a set of international best practices for these laws. The World Bank issued the *Guidelines on the Treatment of Foreign Direct Investment* in 1992, a group of experts connected to the World Bank and OECD published the *Basic Elements for Foreign Investment Legislation* in 2001 (the “Basic Elements”), the OECD released a *Policy Framework for Investment* in 2006, and UNCTAD released the *Investment Policy Framework for Sustainable Investment* in 2012.<sup>52</sup> While these documents defined best practices differently, as elaborated below, the idea that there was a set of international standards or best practices for national investment laws (which hadn’t existed before the 1980s) spread widely. Some laws, like El Salvador’s 1999 investment law, even began to state that they were written in accordance with “best practices.”<sup>53</sup>

The spread of bilateral investment treaties was another factor that helped make this new view of investment laws mainstream. During these years, bilateral investment treaties were sometimes seen as a source of best practices and international norms, and national investment laws were increasingly compared to treaties or understood through their relationship to treaties. Some guidance even encouraged states to harmonize their treaties and investment laws, thereby reconceiving investment laws as a mechanism to incorporate treaty standards in domestic law. For instance, the Basic Elements mentioned above state that “investment laws ideally reinforce [investment] treaties by reiterating their substance in the form of domestic legislation.”<sup>54</sup>

Thinking of investment laws as tools to reinforce investment treaties led to several changes in the functions and content of investment laws. We use two examples to give a general sense of the changes. First, procedures for the admission and approval of new foreign investment were often changed dramatically: in the 1980s and 1990s, many countries weakened requirements or removed approval procedures altogether. For instance, the Central African Republic’s 1988 investment law removed the institutional apparatus to approve investments established by earlier laws and entitles anyone to invest without approval.<sup>55</sup> Some laws go even farther, prohibiting the government from using performance requirements or decreeing that if the

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<sup>52</sup> World Bank. (1992). *Legal framework for the treatment of foreign investment. Volume II: Guidelines*; Voss, *supra* note 42; Organisation for Economic Co-operation and Development. (2023). *The policy framework for investment*. <https://www.oecd.org/investment/pfi.htm>; United Nations Conference on Trade and Development. (2012). *Investment policy framework for sustainable development*. <https://investmentpolicy.unctad.org/investment-policy-framework>.

<sup>53</sup> Preamble, Decree No. 732 of the Legislative Assembly of the Republic of El Salvador, 14 October 1999.

<sup>54</sup> Voss, *supra* note 42, at 64.

<sup>55</sup> Articles 8–10, Central African Republic, Investment Code (Loi No. 88.004 du 9 Mai 1988 portant Code des Investissements en République Centrafricaine). See also Knieper, *supra* note 11, at 94.





relevant authorities have not registered an investment within 30 days, the registration is granted automatically—the risks of provisions like this are discussed in Section 4. Additionally, earlier national laws often governed currency convertibility and transfers of funds, but in the 1980s, free transfer of funds provisions became more common in national laws, reflecting the content of investment treaties. Cameroon’s 1990 law, like many written during these years, provides a guarantee that investors can transfer funds into and out of the country freely.<sup>56</sup>

Second, while earlier investment laws had generally applicable provisions on expropriation, often referencing other national laws or the constitution, in the 1980s and 1990s, some national laws began to include protection standards from treaties or other legal protection offered only to foreign investment. For instance, the provision on expropriation in Egypt’s 1989 law was drafted to conform “to the Egyptian constitution as well as to the 15 bilateral investment treaties which have so far been concluded by Egypt and which generally contain detailed provisions in this respect.”<sup>57</sup> Some international guidance, such as the Basic Elements mentioned above, suggested introducing “treatment principles which are common in treaty practice” into national laws, including fair and equitable treatment and full protection and security.<sup>58</sup> The Basic Elements, like World Bank guidance, also recommended providing consent to international arbitration.<sup>59</sup> Laws that include both fair and equitable treatment and consent to arbitration create similar risks of expansive tribunal interpretation as some investment treaties, as elaborated in the next section.

Rewriting investment laws with inspiration from investment treaties or other international standards led these laws to become disconnected from the wider national legal system. An observer of Vietnam’s special regime for foreign investment described it as a “legal enclave” and argued that even if a legal enclave can be useful in the short term to attract foreign investments, in the long term, a sound investment climate and stable legal framework are preferable to an enclave strategy.<sup>60</sup> This is an important point that we will return to in Section 4, to consider what functions investment laws should serve and what functions are better served by strengthening the wider legal framework. International organizations recognized that investment laws had become isolated enclaves and recommended that they “not distract from efforts to develop the general legal framework.”<sup>61</sup> The Basic Elements saw investment laws as temporary; in this view, laws should facilitate the absorption of international standards into national legal systems on a temporary basis.<sup>62</sup> While investment laws have been reformed or repealed in some countries, by and large they have not been temporary. In some countries, they continue to exist separately from, and even take precedence over, the wider legal

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<sup>56</sup> Article 81(1), Cameroon, Ordinance Law 90/7 of November 1990. See Kofele-Kale, N. (1991). Investment codes as instruments of economic policy: A Cameroon case study. *The International Lawyer* 25(4), 821–858.

<sup>57</sup> Marchais, B. P. (1989). The new investment law of the Arab Republic of Egypt. *ICSID Review*, 4(2), 297–309, at 305. Article 8, Egypt, Law No. 230 for 1989.

<sup>58</sup> Voss, *supra* note 42, at 97.

<sup>59</sup> Voss, *supra* note 42, at 148.

<sup>60</sup> Thuyet, P. V. (1999). Vietnam’s legal framework for foreign investment. *The International Lawyer*, 33, 765–799.

<sup>61</sup> Voss, *supra* note 42, at 67–8.

<sup>62</sup> Voss, *supra* note 42, 67–8.



framework; for instance, Jordan’s 2014 investment law states that it takes precedence over other legislation.<sup>63</sup>

The trend of rewriting investment laws to incorporate international standards was widespread but never universal—importantly, it was primarily evident in the structure and content of *developing* countries’ investment laws. To the extent that developed countries wrote or rewrote investment laws during these years, they were still driven more by domestic priorities and were screening laws, as discussed in Section 2.2.1.1. Guidance from international organizations has also varied over time and by country. The OECD’s Policy Framework on Investment, for instance, does not see investment laws as strictly necessary, but notes that in certain circumstances, laws can enhance transparency:

Many countries, including OECD Members, do not have a specific investment law. Such a law is neither a guarantee of, nor a prerequisite for, a sound investment policy framework. Investment policy can be embodied in other legislation (e.g., the constitution, laws regulating the behaviour of companies or sector-specific legislation). While an investment law may add transparency to the applicable investment regime, it can also create uncertainty if inconsistent with other laws.<sup>64</sup>

The World Bank and UNCTAD also provide technical assistance related to national investment laws, but they have tended to recommend investment laws if countries do not already have them.<sup>65</sup> The approaches of the three organizations are distinct from each other and have also changed over time.<sup>66</sup> In broad strokes, the World Bank has recommended content aligned with investment treaties, while UNCTAD has recommended content aligned with more developmentalist considerations, and the OECD has not always seen investment laws as necessary, instead recommending a non-discriminatory framework of general law, and, only if required, a screening mechanism for essential security reasons. In part because of this diverse international guidance, but also for other reasons, there is a lot of variation in the functions and content of investment laws today.

The next section discusses seven functions of contemporary investment law; interestingly, while a few of these functions were not common in earlier laws, their absence sometimes struck observers. For instance, after studying Tanzania’s 1990 investment law, an observer noted that it “places very few obligations on investors” despite the reality that “there are obligations ... which might well have been included,” such as “those that relate to environmental protection, consumer protection, workers’ rights and interests” and other issues.<sup>67</sup>

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<sup>63</sup> Article 44, Jordan, Investment Law, No. 30 for the Year 2014. See also Dimitropolous, *supra* Note 1.

<sup>64</sup> Organisation for Economic Co-operation and Development. (2015). *Policy framework for investment*. <https://doi.org/10.1787/9789264208667-en>, at 2.

<sup>65</sup> Although there are exceptions, particularly in UNCTAD’s recent practice; for instance, UNCTAD’s Investment Policy Review for Cote d’Ivoire recommended that the existing investment law be repealed, as the country’s overall legal and regulatory framework was clear and well-developed.

<sup>66</sup> Berge, T. G., & Fauchald, O. K. (2023). International organizations, technical assistance, and domestic investment laws. *World Trade Review*, 22(1), 147–172.

<sup>67</sup> Maina Peter, C. (1991). Promotion and protection of foreign investments in Tanzania: A new investment code. *ICSID Review*, 6(1), 42–64, at 61.



## 3.0 Present: The functions and content of investment laws today

### KEY MESSAGES

- It is more useful to think about the function(s) an investment law serves rather than categorize it as controlling or facilitative.
- We identify seven common functions in contemporary investment laws; while some laws seek to perform only one function, others perform several.
- In addition to their intended functions, the content and structure of national investment laws are shaped by the context in which they are adopted and the policy objectives they are designed to achieve.
- We discuss four recent investment laws in China, Myanmar, Australia, and South Africa and show how the functions each performs were shaped by the context in which it was adopted and the policy objectives it was designed to achieve.
- We survey 70 investment laws to evaluate how common particular functions are in these laws and begin to map the variation in how laws address these functions.

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In this section, we provide an overview of the function and content of domestic investment laws in force around the world today. As the previous section has shown, investment laws were enacted for different reasons at different times in different countries. This diversity creates challenges in organizing any overarching review.

We begin, in Section 3.1, with a distinction that is used in much of the existing scholarship on investment laws. On this view, it is possible to distinguish investment laws that aim to regulate and control foreign investment from those that aim to facilitate and promote foreign investment. While this distinction draws attention to some of the ways in which investment laws differ, it overlooks the fact that different investment laws govern different types of issues that arise at different stages of the investment process.

In Section 3.2, we suggest that a more useful starting point is to recognize that different investment laws have different underlying functions. Through a review of existing investment laws, we identify seven main functions of investment laws, recognizing that some laws perform several of these functions. In Section 3.3, we consider the examples of investment laws in Australia, China, Myanmar, and South Africa. These examples show that the function(s) and content of a country's investment law often reflect the historical and political context in which it was adopted. With this framing and context in mind, Section 3.4 provides an overview of provisions that are commonly found in investment laws today.

### 3.1 Beyond the Controlling vs. Facilitative Distinction

In recent decades, many scholars have categorized investment laws as aiming either to regulate and control investment or to facilitate and promote investment. In 1992, Parra argued that these two different purposes led to two different types of laws, observing that the laws of



developed countries have a control orientation, while the laws of developing countries have a promotional orientation.<sup>68</sup> Writing a few years earlier, Buxbaum and Riesenfeld argued that regulation and facilitation should be seen as two ends of a spectrum and that, although no country's law was fully one or the other, it was capital-importing developed states that tended to be on the ends of the spectrum: "It is possible to place a country like Canada, with its Foreign Investment Review Act, at one end of the spectrum, and one like Singapore, with its tax incentive legislation, at the other end."<sup>69</sup> In more recent work, Burgstaller and Waibel take a similar view, arguing that investments "typically reflect a compromise between control over, and facilitation of, foreign investment."<sup>70</sup>

A distinction between the objectives of control and facilitation is useful in understanding some of the differences between investment laws. Salacuse, for instance, describes a change in Turkey's investment law in 2003 from a system that had required prospective foreign investment to be screened and approved prior to admission to a new system where only notification of the investment—not pre-approval—was required.<sup>71</sup> This is a shift to a more facilitative framework governing the admission of new foreign investment.

There are, however, at least three problems with using the controlling–facilitative spectrum to understand investment laws and their provisions. First, the distinction risks obscuring the fact that different investment laws govern different issues that arise at different stages of the investment process. For example, Australia's Foreign Acquisition and Takeover Act governs the entry and admission of new foreign investment, whereas South Africa's Protection of Investment Act deals with the protection of investment that is already lawfully established in South Africa. Seeing the former as "controlling" and the latter as "facilitative" misses the more important point that the two laws govern different issues that arise at entirely different stages of the investment process.

Second, the controlling–facilitative distinction obscures differences among investment laws that share similar high-level objectives. For example, the Malaysian Promotion of Investment Act deals exclusively with the grant of investment incentives. In contrast, as noted above, South Africa's Protection of Investment Act provides legal protection to lawfully established foreign investment. South Korea's Foreign Investment Promotion Act differs again in providing the legal basis for the establishment and operation of South Korea's well-known Foreign Investment Ombudsman. All three laws might be described as facilitative in some sense. However, tax incentives, legal guarantees and investor aftercare institutions are different strategies to facilitate investment with potentially different effects and implications.

Third, the controlling–facilitative distinction tends to oversimplify the way in which investment laws govern any given issue. For example, Part II of the Kenyan Investment Promotion Act establishes the legal framework that governs the issuance of investment

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<sup>68</sup> He evaluated the laws of five developed countries, all of which were primarily investment importers when the laws in question were drafted: Australia, Canada, Japan, New Zealand, and Spain. Parra, A. R. (1992). Principles governing foreign investment, as reflected in national investment codes. *ICSID Review - Foreign Investment Law Journal*, 7(2), 428–45, at 434.

<sup>69</sup> Buxbaum and Riesenfeld, *supra* note 5, at 345.

<sup>70</sup> Burgstaller and Waibel, *supra* note 5, at 2.

<sup>71</sup> Salacuse, J. (2017). *The three laws of international investment*. Oxford University Press, at 107.



certificates to both domestic and foreign investors. In determining whether to issue a certificate, the Kenyan Investment Authority must consider a range of national development criteria specified in Section 4(2) of the Act. According to Section 12 of the Act, the grant of an investment certificate then entitles the investor to the licences necessary to operate in industries regulated by other laws. This framework might be described as controlling in that it integrates national development criteria into the operation of a screening mechanism. But it is also facilitative in that it provides a common framework for both domestic and foreign investors to acquire licences necessary to operate in industries that are otherwise closed to new investment. Rather than seeking to locate the framework for the issuance of investment certificates somewhere along an imagined spectrum from controlling to facilitative laws, it is more useful to observe that this part of the law deals with the admission of foreign investment, before moving to a more detailed inquiry regarding how the law governs admission of investment in regulated industries.

Given these problems with the controlling–facilitative spectrum, we propose a different way of organizing our review of investment laws.

### 3.2 Seven Main Functions of Investment Laws

A more useful starting point for a review of investment laws is the recognition that different investment laws perform different functions. We identify seven main functions that investment laws perform. Some investment laws seek to perform only one of these functions, and others perform several. The seven functions are as follows:

- **Governing the admission and approval of new foreign investment.** This is a core function of many investment laws, with its roots in the early investment laws of developing countries described in Section 2.2. Most developing country investment laws in force today perform this function in one way or another.<sup>72</sup> This is also the core—and normally the only—function of developed countries’ investment screening laws described in Section 2.2.1.1. While this function is common to most investment laws, there is considerable diversity in how they govern the admission of new investment. To serve this function, investment laws generally establish or confer power on an investment agency or some other agency of government.<sup>73</sup> The framework governing admission and related approvals of new foreign investment is often the most complex part of an investment law.
- **Conferring and administering investment incentives.** This is also a common—if problematic—function of many investment laws, particularly in developing countries. While the granting of investment incentives is not unheard of in developed countries,<sup>74</sup> developed countries almost never deal with investment incentives in their investment

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<sup>72</sup> United Nations Conference on Trade and Development. (2016). *Investment laws: A widespread tool for the promotion and regulation of foreign investment*. [https://unctad.org/system/files/official-document/webdiaepcb2016d5\\_en.pdf](https://unctad.org/system/files/official-document/webdiaepcb2016d5_en.pdf), at 5.

<sup>73</sup> Similarly, Dimitropoulos, *supra* Note 1, at 98.

<sup>74</sup> Jensen, N. M., & Malesky, E. (2018). *Incentives to pander: How politicians use corporate welfare for political gain*. Cambridge University Press.



laws.<sup>75</sup> As with the function of governing admission and approval of new investment, this function is normally institutionalized through establishment or conferral of power on an investment agency.

- **Facilitating investment.** Facilitating investment, understood in a narrow and specific sense,<sup>76</sup> refers to investment laws' cross-cutting function in addressing practical impediments to investment, independent of the substantive content of laws and policies.<sup>77</sup> As with the two previous functions, this function is often connected with establishment of an investment agency and the conferral of powers on it. For example, Kiribati's law provides the creation of an "integrated client service facility" to facilitate investment by sharing information with investors and assisting investors in navigating regulatory processes.<sup>78</sup>
- **Guaranteeing legal protection to investment.** This is a function of investment laws in many developing countries, which has become more common in recent decades, as described in Section 2.3. In contrast to developing country investment laws, developed countries' investment laws rarely provide legal guarantees to (foreign) investors.<sup>79</sup> No developed country's investment law provides the suite of protections commonly found in investment treaties.
- **Establishing and/or specifying a system for managing investor–state disputes.** This is a function of a significant number of investment laws in developing countries. There is considerable variation in how investment laws provide for the resolution of investment disputes. Some investment laws establish domestic institutions to prevent and resolve investor grievances at an early stage; while others provide that investment disputes are subject to national law and the ordinary jurisdiction of domestic courts.<sup>80</sup> A significant minority of developing countries' investment laws provide advance consent to investor–state arbitration.

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<sup>75</sup> See Articles 9, 26, 27 of the South Korea Foreign Investment Promotion Act for an exception.

<sup>76</sup> The goal of encouraging and facilitating investment, understood in a different and broader sense, can also be understood as a high-level objective of many investment laws. For the reasons explained in Section 3.1, we do not find this broad conception of facilitation analytically useful.

<sup>77</sup> This is consistent with the definition of investment facilitation said to underpinning the WTO Joint Statement Initiative (JSI), see: World Trade Organization. (2023). *Investment facilitation for development in the WTO*. [https://www.wto.org/english/tratop\\_e/invfac\\_public\\_e/factsheet\\_ifd.pdf](https://www.wto.org/english/tratop_e/invfac_public_e/factsheet_ifd.pdf), at 1. We note, however, that discussions around the JSI have considered inclusion of many issues that do not relate to the function of facilitating investment as we understand it. These include requirements to establish processes for appeal and review of administrative acts affecting investment (which, in terms of this paper, relates to the function of establishing or specifying a system for managing investor–state disputes), provisions guaranteeing the free movement of capital (which, in terms of this paper, relates to the function of guaranteeing legal protection to foreign investment), and provisions specifying standards of responsible business conduct (which, in terms of this paper, relates to the function of specifying investors' obligations and responsibility). For analysis of the range of issues that have been discussed in the context of WTO JSI, see: Bernasconi-Osterwalder, N., Campos, S. L., & van der Ven, C. (2020). *The proposed multilateral framework on investment facilitation: An analysis of its relationship to international trade and investment agreements*. International Institute for Sustainable Development. <https://www.iisd.org/system/files/2020-09/multilateral-framework-investment-facilitation-en.pdf>

<sup>78</sup> Article 7 of Kiribati's Foreign Investment Act 2018.

<sup>79</sup> Article 3(2) of the South Korea Foreign Investment Promotion Act, for example, grants foreign investors the right to national treatment, but this is subject to any discrimination provided for by other laws.

<sup>80</sup> Sections 28(1)–(2) Solomon Island Foreign Investment Act 2005.



- **Specifying investors' obligations and responsibilities.** Investment laws are one small part of a country's domestic legal framework. It would be impossible to compile an investor's obligations and responsibilities in a single legal instrument, not least because the range of relevant obligations will depend on the type of investment an investor operates, and no country seeks to do this. Instead, investor obligations are found in a range of laws and regulations—building codes, consumer protection law, corporations law, employment law, environment law, and tax law, among others—as well as in the contracts to which an investor is party. Nevertheless, a significant minority of investment laws do place obligations on foreign investment. These vary from requirements to report regularly on an investment, a legal basis for which is found in China's Foreign Investment Law,<sup>81</sup> to more generally framed obligations relating to the preservation of the environment found in Zimbabwe's Investment Protection and Development Act.<sup>82</sup>
- **Monitoring and oversight of investment.** Investment laws in many developing countries also have a monitoring and oversight function. In investment laws that do perform this function, it is generally conferred on an investment agency. For example, Benin's Investment Code (2020) confers responsibility on the Investment Control Commission for “verifying the conformity of investments, the respect of the investor's commitments and for certifying the end of the investor's installation period.”<sup>83</sup>

This list of possible functions of investment laws is not exhaustive. For example, UNCTAD (2016) identifies a broader investment promotion function that includes the marketing of a country as an investment destination. This function is sometimes conferred on investment agencies by investment laws. Although it is distinct from the functions of administering incentives and facilitating investment, it shares in common with these functions that it is directed toward the policy objective of encouraging and attracting investment.<sup>84</sup> Nevertheless, the seven functions we have chosen to highlight serve to illustrate a key point: investment laws govern many different types of issues that arise at different stages of the investment process.

Distinguishing between the distinct functions of investment laws is only a first step in the analysis. In relation to each function, there are also cross-cutting questions about how the investment law fits into a country's wider system of laws and institutions. Some key questions include

- The scope of the investment law's application, including which “investors” and “investments” are covered and whether there are limits to sectoral or geographic (for

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<sup>81</sup> Article 34 Foreign Investment Law. For more detail <https://www.china-briefing.com/news/chinas-foreign-investment-information-reporting-system-how-does-it-work/>

<sup>82</sup> Section 21.

<sup>83</sup> Article 9.

<sup>84</sup> Yackee, J. (2015) Do investment promotion agencies promote bilateral investment treaties? In A. Bjorklund (Ed.), *Yearbook on international investment law and policy 2013-2014* (pp. 529–552). Oxford University Press, at 532, describing the investment promotional activities typically performed by investment promotion agencies: They engage in country image building; they facilitate investments and they serve investors by, for example, providing information and answering questions; they attempt to generate investment through various marketing activities (direct mailings, advertisements, targeted pitches to potential investors); and they may engage in policy advocacy.



example, as is the case with special economic zones) application. The appropriate scope of an investment law depends on the function that it performs.

- How the investment law relates to other parts of a state's legal system.
- What institutional structure the law establishes and/or utilizes for its own enforcement and implementation.

We return to these questions in Section 4.

### 3.3 Wider Contexts in Which States Adopt Investment Laws

In addition to distinguishing between the various functions that investment laws perform, it is also important to appreciate the differing historical and institutional contexts in which investment laws are adopted. In this section, we explore how context has shaped four investment laws. The key insight that emerges from these case studies is the diversity in circumstances and policy objectives that shape investment laws' content and structure. Such contextual factors help explain why different countries' investment laws perform different functions; they also help explain why laws that perform common functions may differ dramatically in how they perform those same functions. These observations have implications for states considering the drafting of a new investment law, or modification of their existing law, which we explore in Section 4.

#### 3.3.1 China's Investment Law: Investment law as a tool of domestic economic reform

In March 2019, China enacted a new Foreign Investment Law. The content and intended operation of the Foreign Investment Law were further elaborated in the Regulation for Implementation of the Foreign Investment Law, issued in December 2019.

The Foreign Investment Law performs several functions. Most importantly, it governs the admission and approval of new foreign investment. It does this through the adoption and formalization of the principle of pre-establishment national treatment, which is subject to a negative list of fields in which foreign investment is restricted.<sup>85</sup> The law also provides for cross-cutting review of investments on national security grounds.<sup>86</sup> This represents a major change in the way new foreign investment in China is governed; previously, all new investment in China required review and approval on a case-by-case basis.<sup>87</sup> The Foreign Investment Law also has several additional functions beyond regulating the admission and approval of new investment. It deals with investment protection<sup>88</sup> and the establishing of new

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<sup>85</sup> Article 4.

<sup>86</sup> Article 35.

<sup>87</sup> Kong, Q. (2019). *New Foreign Investment Law is milestone in China's opening-up process*. CGTN. <https://news.cgtn.com/news/3d3d414e32597a4d33457a6333566d54/index.html>

<sup>88</sup> Chapter III.





mechanisms for both the resolution of investment disputes<sup>89</sup> and the monitoring and oversight of foreign investment.<sup>90</sup>

To understand the structure and content of the Foreign Investment Law, it is important to appreciate the role of the Foreign Investment Law in wider processes of domestic economic reform in China. From 2013, China piloted the negative list approach to admission of new investment in an increasing number of free trade zones.<sup>91</sup> These trials were seen as successful. In this context, the role of the Foreign Investment Law was to implement this shift in policy nationally. Given China's size, an ongoing practical challenge of investment governance facing the central government is controlling the conduct of subnational levels of government.<sup>92</sup> This specific concern is reflected across the Foreign Investment Law through provisions that specifically address subnational governments and clarify that the Foreign Investment Law is binding on them.<sup>93</sup> It is also reflected in the design of the complaint mechanism, which is intended to facilitate central oversight and rectification of subnational government conduct inconsistent with the Foreign Investment Law.<sup>94</sup>

International factors also played a role in shaping China's Foreign Investment Law. U.S. concerns relating to forced technology transfer under China's previous investment regime became a flashpoint in the U.S.–China trade war during the Trump presidency.<sup>95</sup> In 2018, both the United States and the EU initiated claims against China at the WTO relating to China's alleged breaches of international obligations relating to the protection of intellectual property rights. Most commentators believe that this international pressure played at least some role in shaping the investment protection provisions of the Foreign Investment Law.<sup>96</sup> In contrast to the sorts of investment protection provisions commonly found in investment treaties, several of the investment protection provisions of the Foreign Investment Law are specifically focused on prohibiting and preventing forced technology transfer.<sup>97</sup> These provisions also reflect domestic considerations identified above—Article 22 prohibits administrative departments from circumventing the prohibition on forced technology transfer through administrative means, such as withholding necessary permits.

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<sup>89</sup> Article 26, see also 《外商投资企业投诉工作办法》 [Measures on work related to complaints of FIEs] (People's Republic of China) Ministry of Commerce, 25 August 2020.

<sup>90</sup> Article 34.

<sup>91</sup> Jie Huang. (2018). *Nationwide regulatory reform starting from China's free trade zones: The case of the negative list of non-confirming measures*, p. 89. <https://academic.oup.com/book/34982/chapter-abstract/298644598?redirectedFrom=fulltext>

<sup>92</sup> See generally Zhenyu Xiao. (2022). *The evolution of the settlement of investor-state disputes in China* (PhD thesis), University of New South Wales.

<sup>93</sup> Arts. 23, 24, and 25.

<sup>94</sup> Zhenyu Xiao, *supra* note 92, p 200.

<sup>95</sup> Zhang, S. (2022). Protection of foreign investment in China: The foreign investment law and the changing landscape. *European Business Organization Law Review*, 23, at 1055. <https://link.springer.com/article/10.1007/s40804-022-00247-1>

<sup>96</sup> Zhou, W., Jiang, H., & Kong, Q. (2020). *Technology transfer under China's foreign investment regime: Does the WTO provide a solution?* *Journal of World Trade*, 54(3) at 470. <https://kluwerlawonline.com/journalarticle/Journal+of+World+Trade/54.3/TRAD2020021>

<sup>97</sup> Article 22.



### 3.3.2 Myanmar's Investment Law: Investment law as a signal of regime change, and the role of foreign advisors

Section 2 showed that new investment laws are often adopted at moments of significant change in a state's political regime. Examples include the investment laws adopted by many African states in the 1960s shortly after their independence and the investment laws adopted by former Soviet states following the dissolution of the USSR in 1991.<sup>98</sup> While most investment laws from these two waves of political change have subsequently been amended or replaced, high-level political and policy change is a factor that continues to influence the drafting of investment laws in force today.

An example is Myanmar's current Investment Law, which was enacted in 2016. As with China's Foreign Investment Law, the law performs multiple functions, including regulating the admission and approval of new investment, establishing a system of investment incentives, guaranteeing investment protection, and establishing a new mechanism for the resolution of investment disputes. Two background contextual factors played a major role in shaping this law. The first was the transition from military-aligned government to a quasi-democratic regime that began in 2011.<sup>99</sup> In 2012, early in this process of transition, Myanmar adopted a new Foreign Investment Law. As compared to the 1988 Foreign Investment Law, the 2012 Law and regulations made under it reflected the more positive attitude toward foreign investment of the new government, both through provisions that allowed a higher percentage of foreign ownership in many sectors and through increases in incentives available to investors.<sup>100</sup> The objective of signalling greater openness to foreign investment also played an important role in shaping the 2016 Investment Law. The Myanmar government came to believe that consolidating separate laws that governed foreign and Myanmar investment into a single law governing both foreign and domestic investors would send a positive signal to foreign investors that they were likely to be treated in a fair and non-discriminatory way.<sup>101</sup> The wider policy objective of attracting more foreign investment was also reflected in the content of the new law, both in the shift to a qualified (if unreliably administered) "negative list" approach to the approval of new investment and in the strengthening of provisions dealing with investment protection.

A second related factor that shaped the development of the 2016 Investment Law is the involvement of foreign experts. For example, the idea that enacting a single investment law to cover both domestic and foreign investment would send a positive signal to foreign investors originally came from International Financial Corporation (IFC) experts advising

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<sup>98</sup> Voss, *supra* note 42, at 67.

<sup>99</sup> Following a coup in February 2021, Myanmar is again under military rule.

<sup>100</sup> Tun, A. H. (2012). *Myanmar state media details new foreign investment law*. Reuters. <https://www.reuters.com/article/us-myanmar-investment-idUSBRE8A204F20121103>; Morgan, Lewis & Bockius LLP. (2013). *Myanmar's Foreign Investment Law 2012: a short commentary*. <https://www.lexology.com/library/detail.aspx?g=ca12c950-e5a7-4164-b9be-88d46acefd99>

<sup>101</sup> Bonnitcha, J. (2017). *Investment laws of the ASEAN states: A comparative review*. International Institute for Sustainable Development. <https://www.iisd.org/publications/report/investment-laws-asean-countries-comparative-review>



the Myanmar government.<sup>102</sup> It was then reinforced by a 2014 OECD report. IFC advisers subsequently played an important, if contested, role in shaping the structure and content of the 2016 Investment Law.<sup>103</sup> This dynamic is not unique to Myanmar. Foreign experts have played a major role in shaping the structure and content of national investment laws in many other developing countries.<sup>104</sup>

### 3.3.3 Australia's Foreign Acquisition and Takeover Act: Investment screening as a mechanism to secure public support for openness to foreign investment

Australia's current investment law—the Foreign Acquisitions and Takeover Act—was enacted in 1975. Like many developed country investment laws, its sole function is to govern the admission and approval of new investment by establishing a framework for foreign investment screening. Although the law has been amended on several occasions, changes to the law over time have not involved the inclusion of additional functions.

Through the 1960s and early 1970s, Australia experienced an economic boom in the natural resources sector. This led to a sharp rise in foreign ownership in the mining industry, in particular. By the mid-1970s, growing foreign control of Australian natural resources became an “explosive political issue,”<sup>105</sup> and the government had introduced a series of administrative measures restricting inward foreign investment.<sup>106</sup> In this context, the adoption of Australia's investment law in 1975, and the establishment of the Foreign Investment Review Board in 1976 to administer the law, represented a shift to a less restrictive investment framework than the arrangements that immediately preceded it.<sup>107</sup>

In establishing a framework for the screening of foreign investment against a “national interest” test, Australia's investment law helped address public concern about unmanaged foreign investment. However, because the operation of the screening mechanism starts from the presumption that foreign investment is generally in the national interest, the vast majority of proposed investments are ultimately approved, although sometimes with conditions.<sup>108</sup>

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<sup>102</sup> Bonnitcha, J. (2022). The impact of investment treaties on the Rule of Law in Myanmar. In N. J. Calamita & A. Berman (Ed.), *Investment treaties and the rule of law promise* (pp. 127–165), Cambridge University Press.

<sup>103</sup> Bonnitcha, J., & Phillips Williams, Z. (2023). The impact of investment treaties on domestic governance in developing countries, *Law & Policy* (forthcoming).

<sup>104</sup> Berge, T. L. & St John, T. (2020). Asymmetric diffusion: World Bank ‘best practice’ and the spread of arbitration in national investment laws. *Review of International Political Economy*, 28(3), 584–610; Berge & Fauchald, *supra* note 66.

<sup>105</sup> Galligan, B. (1987). The regulation of direct foreign investment in the Australian mining sector, *Australian Journal of Political Science*, 22(1), at 37 <https://doi.org/10.1080/00323268708402012>

<sup>106</sup> Bell, H. F. (1976). Australian government policy in relation to foreign direct investment. *The Australian Quarterly*, 48(1), 47–49.

<sup>107</sup> For a more detailed account Hundt, D. (2020). The changing role of the FIRB and the politics of Foreign Investment in Australia. *Australian Journal of Political Science*, 55(3), 330–331. <https://doi.org/10.1080/10361146.2020.1766415>

<sup>108</sup> For the most recent data on investment approvals see Australian Government Treasury. (2022). *Quarterly report on foreign investment 1 July–30 September 2022*. [https://treasury.gov.au/sites/default/files/2022-12/p2022-344038\\_1\\_0.pdf](https://treasury.gov.au/sites/default/files/2022-12/p2022-344038_1_0.pdf)



The Australian example illustrates the importance of political and historical context in understanding the rationale for a law that might, if read out of context, be understood as embodying a restrictive attitude to foreign investment.

Although the [law] has been perceived by some observers ... as restrictive of access by foreign investors to the Australian market, it can be persuasively argued that over the years it has served precisely the opposite role, keeping Australia open to direct investment from abroad in the face of political pressure to be more restrictive.<sup>109</sup>

### 3.3.4 South Africa: Domestic investment law as a partial substitute for investment treaties

Among investment laws, South Africa's Protection of Investment Act 2015 is somewhat unusual in that it does not govern the admission or approval of new foreign investment.<sup>110</sup> Its functions are limited to guaranteeing certain standards of legal protection to investment and, to a lesser extent, establishing a system of mediation of investment disputes that supplements the role of domestic courts.<sup>111</sup>

The Protection of Investment Act was adopted at a time when South Africa was terminating its “old-style” bilateral investment treaties. In 2007, a group of Italian investors initiated an ISDS claim against the application of South Africa's affirmative action legislation to the granite mining sector. While the claim ultimately settled, the experience triggered deep concern within the South African state about the potential constraints that investment treaties placed on policies intended to redress the injustices of apartheid. A 3-year review of South Africa's investment treaties by the Department of Trade and Industry raised serious concerns about the content of investment treaties and the circumstances in which they had been adopted.<sup>112</sup> In response, in 2012, South Africa began a process of terminating its existing old-style investment treaties.<sup>113</sup> In this context, the South African government sought to both reassure foreign investors that their investments retained legal protection under South African law<sup>114</sup> and align these protections with the South African constitution.<sup>115</sup> Both the focus and content of the Protection of Investment Act reflect its intended function as a partial substitute for the protection that had been provided by “old-style” investment treaties.

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<sup>109</sup> Drysdale, P. (2011). A new look at Chinese FDI in Australia. *China & World Economy*, 19(4), 56. <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1749-124X.2011.01250.x>

<sup>110</sup> Section 7, which deals with the establishment of new investment, is included only to clarify that the Protection of Investment Act does not address this issue, which is governed by other laws.

<sup>111</sup> See Section 13.

<sup>112</sup> Mossallam, M. (2015). *Process matters: South Africa's experience exiting its BITs* (GEG Working Paper 2015/97).

<sup>113</sup> Investment Treaty News. (2012). *News in brief*. <https://www.iisd.org/itn/en/2012/10/30/news-in-brief-9/>

<sup>114</sup> Mossallam, *supra* note 112, at 23.

<sup>115</sup> Carim, X. (2013). *South Africa and bilateral investment treaties* [PowerPoint presentation]. Presentation to the SAIIA event “How Should Foreign Investments Into South And Southern Africa Be Regulated And Protected?” Sandton, September 6, 2013. <https://www.saiia.org.za/wp-content/uploads/2015/05/2013-09-06-Pres-Xavier-Carim-SA-BITs-DTI.pdf>; Forere, M. A. (2018). The new South African Protection of Investment Act: Striking a balance between attraction of FDI and redressing the apartheid legacies. In F. Morosini (Ed.), *Reconceptualizing international investment law from the Global South*, at 252.



## 3.4 A High-Level Survey of Contemporary Investment Laws

In this section, we provide a survey of contemporary national investment laws. This survey draws on two sources. The first is UNCTAD’s Investment Laws Navigator, the most comprehensive single source of information on national investment laws.<sup>116</sup> UNCTAD lists 129 economies as having an investment law<sup>117</sup> and a further 23 countries not included in this initial count as having an investment screening law, which also falls within our conception of an investment law. In-house researchers then conducted a review of a selection of 70 of these investment laws, focusing specifically on the laws’ functions. While not a representative selection—both investment screening laws and laws for which no English translation is available were under-represented—this review gives some rough sense of how common different provisions are in investment laws. We have also drawn on UNCTAD’s coding of investment laws, which can be accessed through the Investment Law Navigator, as a supplementary source of information.

### 3.4.1 Admission

Of the investment laws we reviewed, at least 60% dealt with the admission and establishment of new investment. “Positive list” approaches, under which foreign investment is only permitted in enumerated sectors, are now rare; our review did not identify any clearcut examples of positive list approaches today.<sup>118</sup> We did, however, identify a small minority of countries that maintain variations of a positive list approach. An example is the United Arab Emirates’ Federal Law Regarding Foreign Investment of 2018, where majority foreign ownership of investment is only possible in sectors on the positive list.<sup>119</sup> (The practical effect of this law also needs to be understood in light of the large number of Special Economic Zones in the United Arab Emirates, which are generally more open to foreign investment.)<sup>120</sup>

Negative list approaches—under which foreign investment is permitted in all sectors except those specifically listed as restricted or closed to foreign investment—are more common and are becoming increasingly popular.<sup>121</sup> For example, Vietnam switched to a negative list approach in its new Investment Law, adopted in 2020.<sup>122</sup>

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<sup>116</sup> Inevitably, there are challenges in maintaining up-to-date information on national laws, which are constantly being amended and replaced. For example, in 2021, Syria enacted a new investment law, which is not included in the UNCTAD database. The database also overlooks Turkmenistan’s 2008 Law on Foreign Investment, which superseded Turkmenistan’s 1992 Investment Law.

<sup>117</sup> The term “economies” reflects the fact that this count includes Kosovo, Palestine, and Taiwan.

<sup>118</sup> In 2016, UNCTAD noted “nine laws, mainly in Africa” that adopt a positive list approach (UNCTAD, *supra* note 72, at 5). We could not confidently identify any of these laws, although it is possible that many of the countries, such as China, have shifted their approach in the intervening period.

<sup>119</sup> Article 6 and 10, Federal Law by Decree No. (19) of 2018 Regarding Foreign Direct Investment, United Arab Emirates.

<sup>120</sup> We are grateful to Georgios Dimitropoulos for this point.

<sup>121</sup> UNCTAD, *supra* note 72.

<sup>122</sup> Scoles, S., & Solomon, M. (2020). *Key outcomes for foreign investors in Vietnam's new law on investment*. White & Case. <https://www.whitecase.com/insight-alert/key-outcomes-foreign-investors-vietnams-new-law-investment>



Even among states that adopt a negative list approach, there is significant variation both in the content of the list of “closed” and “restricted” sectors and the way in which investment approval is administered. For example, under the terms of Myanmar’s Investment Law, investment in sectors open to foreign investment does not require approval of the Myanmar Investment Commission. However, as a matter of practice, Investment Commission approval through an “endorsement” remains necessary to operate in the country and as a formal condition for the authorization of leases and provision of investment incentives on which an investment will ordinarily rely.<sup>123</sup> In contrast, under China’s Foreign Investment Law, approval of investment in both restricted and open sectors is not performed by a centralized investment agency but by relevant departments and subnational units of government.<sup>124</sup> This approval remains subject to conditions and restrictions that apply to Chinese investors on a national treatment basis.

There are also important differences between entry regimes that only verify compliance with regulatory requirements, and regimes where discretion as to the desirability of an investment is vested in a decision-maker, as is commonly the case under investment screening regimes. An example of the former is Section 15 of Nepal’s Foreign Investment and Technology Transfer Act (2019), which appears to require that new foreign investments obtain prior approval from the Foreign Investment Approving Body. However, the law requires the Foreign Investment Approving Body to approve the investment within 7 days if all documents constituting the application have been completed in required form. Developed countries’ investment screening laws normally take a different approach. The default position is usually that prospective foreign investors must notify their intention to make investments that meet certain “triggers.” Such investments must then be approved unless the screening agency actively takes steps to prohibit them within a specified time limit. The decision of whether to prohibit or place conditions on the proposed investment generally involves the application of abstract criteria by the decision-maker, such as “national security” or “the national interest.”<sup>125</sup>

As noted, in some investment admission regimes, approval is deemed to have been granted to a proposed investment upon expiry of a specified time limit. For example, under Section 7 of Burkina Faso’s investment code, new investments require authorization from the Minister of Industry, but this authorization is deemed to have been granted if no response is made to the application for authorization within 3 months. While such time limits are designed to encourage timely evaluation of applications, the possibility of projects being approved by default poses particular risks for developing countries that may have limited bureaucratic capacity to assess and evaluate applications. Such time limits are especially problematic when the process of investment authorization intersects with other regulatory processes—or example, the submission and review of environmental and social impact assessments.

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<sup>123</sup> Interview 8, cited in Bonnitca, *supra* note 102.

<sup>124</sup> Articles 4, 6, and 7.

<sup>125</sup> For more detail see United Nations Conference on Trade and Development, *supra* note 36; see also Bonnitca, *supra* note 40.



### 3.4.2 Incentives

At least 80% of the investment laws we reviewed dealt with tax incentives for investment. While UNCTAD's coding suggests that provisions dealing with incentives are somewhat less common,<sup>126</sup> such provisions are found in a clear majority of investment laws. Over recent decades, the consensus in economic policy has shifted decisively against the wisdom of some categories of tax incentives. Policy risks associated with tax incentives include the risk of depleting public funds to support investment that would have occurred anyway, and the risk that focusing on the fiscal environment diverts attention from more reforms to the economic and regulatory environment that would have more widespread benefits. As such, this is a potential area for reform.

There is significant variation in the incentive regimes administered under national investment laws—for example, in the sectors eligible for the grant of tax incentives, the variety and value of incentives, and the general fiscal environment, which forms the backdrop against which incentives are offered. Incentive schemes established under investment laws also reflect a range of less obvious system-design choices. For example, under Benin's investment law,

- both domestic and foreign investors are eligible to benefit from tax incentives;<sup>127</sup>
- whether tax incentives are granted to an eligible project appears to involve a discretionary decision, as opposed to automatic conferral on projects that satisfy eligibility criteria;<sup>128</sup> and
- the maximum duration of tax incentives depends on the size of the investment in question.<sup>129</sup>

These are just a few of the characteristics that states should consider when evaluating whether to include or amend a system of investment incentives in a national investment law.

### 3.4.3 Investment Facilitation

A significant minority of the investment laws we reviewed deal with investment facilitation, understood in the specific sense of addressing practical impediments to investment.<sup>130</sup> Such provisions are more common in developing countries' investment laws and generally involve conferral of power on an investment agency. One example is Nigeria's Investment Promotion Commission Act (1995), which confers a range of functions on the Nigerian Investment Promotion Commission, including to

- (d) collect, collate, analyse and disseminate information about investment opportunities and sources of investment capital, and advise on request, the availability, choice or suitability of partners in joint venture projects;

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<sup>126</sup> UNCTAD's coding identifies 80 investment laws as having provisions on incentives.

<sup>127</sup> Article 4.

<sup>128</sup> Article 32.

<sup>129</sup> Article 29.

<sup>130</sup> UNCTAD's coding identifies 13 laws that perform this function, although their conception of investment facilitation does not correspond exactly with ours.



...

- (j) assist incoming and existing investors by providing support services.

In such cases, the investment law itself provides relatively little information on how an agency performs these functions in practice. To understand how investment agencies perform their investment facilitation function requires consideration of regulations and policies made under the investment law, as well as insight into the day-to-day practices of the relevant agency.

Another way that investment laws seek to facilitate investment is through the establishment of one-stop shops for approvals and permits relating to foreign investment. One-stop shops deal with issues that go beyond approvals related to the admission of new investment; they normally seek to streamline the process of obtaining permits and approvals from other ministries or agencies relating to the development and operation of investment, which could include land-use approvals, construction permits, visas, and the like. The benefits and problems associated with the establishment and operation of one-stop shops have been considered in detail in policy literature on investment facilitation.<sup>131</sup>

UNCTAD's coding suggests that 20% of investment laws envisage the establishment of a one-stop shop. Ethiopia's Investment Proclamation, for example, states that the Ethiopian Investment Commission "shall provide one-stop services to investors it has issued investment permits pursuant to this Proclamation; it shall coordinate relevant Agencies and synchronize their daily functions."<sup>132</sup> Likewise, Article 26 of Indonesia's Law Concerning Investment envisages the establishment of a "One-Stop Integrated Service" to "assist investors in obtaining service convenience, fiscal facility, and information about investment." In Indonesia, there is no general requirement of approval for investment in sectors designated as open to foreign investment under the new investment list,<sup>133</sup> but a range of licences will ordinarily be required, depending on the sector of the investment. Under the authority of Presidential Regulations made under Article 26, the Indonesian Investment Coordinating Board operates an "online single-submission" portal intended to centralize and smooth the process of obtaining many of these licences.<sup>134</sup>

### 3.4.4 Guaranteeing Legal Protection to Investment

Of the investment laws we reviewed, roughly 70% of investment laws guarantee legal protection to investors. The most common protections were guarantees of compensation in the event of expropriation and (often qualified) guarantees of free transfers of funds relating to investments. This is broadly consistent with UNCTAD's coding. UNCTAD identifies 103 (out of 152) investment laws as having provisions dealing with the free transfer of funds.

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<sup>131</sup> United Nations Conference on Trade and Development. (2017). *Global action menu for investment facilitation*. [https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%202023-05-2017\\_7pm\\_print.pdf](https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%202023-05-2017_7pm_print.pdf)

<sup>132</sup> Section 24.

<sup>133</sup> Presidential Regulation No. 10 of 2021. For commentary, see Dawborn, D., Tang, V., Arwiko, T. & Ayuyantrie, R. (2021). *Indonesia's new investment list increases FDI opportunities for foreign investors*. Hiswara Bunjamin & Tandjung. <https://www.hbtlaw.com/latest-thinking/indonesia%E2%80%99s-new-investment-list-increases-fdi-opportunities-foreign-investors>

<sup>134</sup> <https://oss.go.id/en>





This is the most common investment protection provision in national investment laws and a provision where there is a relatively high degree of similarity in internal structure: most establish the basic principle that funds relating to an investment may be transferred out of the country in freely convertible currency, but subject this right to conditions and/or exceptions.<sup>135</sup> Provisions dealing with compensation for expropriation are also common, being found in a little over 60% of all investment laws. There are, however, important differences in the drafting of these provisions. Some incorporate the “prompt, adequate and effective” standard of compensation, which Western countries have long argued constitutes the customary international law standard of compensation, into national law. Others adopt different standards, possibly due to efforts to ensure consistency with domestic legal standards of compensation.<sup>136</sup>

A smaller number—slightly less than half the investment laws we reviewed—guaranteed national treatment to foreign investors. Again, there are very significant differences among the laws, both in the scope of the national treatment guarantee and the exceptions to which it is subject. Article 8 of Albania’s Foreign Investment Act, for example, provides that “The foreign investor enjoys the same rights and obligations as the Albanian investor, except in cases determined by law.” This affirms the default position in most countries, in which laws of general application—environmental law, corporate law, employment law, contract law, and so on—apply equally to both domestic and foreign investors operating in the country, save to the extent that such laws specifically provide otherwise. Article 2 of Peru’s Investment Law goes further, in providing for national treatment subject only to exceptions provided for in the Constitution and the Investment Law itself. Section 8 of South Africa’s Investment Act includes a general guarantee of national treatment, subject to a range of specific exceptions, including in relation to government procurement, subsidies, and affirmative action measures taken to redress historic discrimination and disadvantage.

It remains uncommon for national investment laws to provide the full range of investment protections that are commonly found in investment treaties. For example, on UNCTAD’s count, only 13 investment laws contain fair and equitable treatment provisions, or a little under 10% of laws. An example is Article 12 of Burkina Faso’s Investment Code (2018). That such provisions are relatively uncommon reflects the fact that other parts of state’s domestic legal framework will generally address questions of procedural fairness and government accountability in much greater specificity than a general promise of fair and equitable treatment. Most-favoured nation provisions are almost never found in national investment laws, reflecting the fact that investment laws are unilateral rather than bilateral instruments.

Other potentially problematic provisions appear to be more common in investment laws than investment treaties. For example, many of the investment laws adopted by newly independent former Soviet states contain qualified stabilization clauses that insulate investors from subsequent changes in investment legislation. Such clauses raise particular concerns when coupled with consent to ISDS, as they can prevent necessary legal change over time—for example, changes to regulatory frameworks or carbon pricing necessary to meet the challenge

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<sup>135</sup> UNCTAD, *supra* note 72 at 8.

<sup>136</sup> UNCTAD, *supra* note 72 at 7. South Africa’s Protection of Investment Act, for example, simply cross-references the South African constitutional standard on expropriation and compensation.



of climate change. Even here, however, there is variation and nuance in the drafting of investment laws. Article 10 of Azerbaijan’s Foreign Investment Law (1992) protects foreign investment from legislative change for 10 years from the time of investment but excludes legislative changes for the purpose of environmental protection. Mongolia’s Investment Law (2013) allows for stabilization but only with respect to tax; it establishes a special system to administer this through the granting of stabilization certificates.<sup>137</sup>

### 3.4.5 Dispute Settlement

Of the investment laws we reviewed, almost 70% dealt expressly with the settlement of investment disputes. They did this, however, in a variety of ways. First, investment laws may establish new national institutions designed to prevent or resolve investment disputes, as is the case with China and Myanmar’s laws, discussed above.<sup>138</sup> Second, national investment laws may clarify the relationship between domestic courts and international adjudicative processes, notably ISDS. They can do this in a variety of ways:

- By asserting the primacy of domestic courts. Djibouti’s Investment Code (1984) is an example.<sup>139</sup>
- By recognizing the validity of ISDS in principle subject to a specific agreement between the relevant state entity and the investor providing the consent of both. Turkey’s Foreign Investment Law (2003) is an example.<sup>140</sup>
- By granting advance consent to ISDS on behalf of the state. For example, Article 18(2) of Kyrgyzstan’s law has been understood to provide the state’s implicit consent to ISDS in any dispute between a foreign investor and a state body. By UNCTAD’s count, 55 investment laws—a significant minority—fall into this final category, although ambiguities in drafting leave real uncertainty about whether an ISDS tribunal would interpret them as granting consent.

### 3.4.6 Investor Obligations

Investment laws are only one part of the domestic legal framework governing investment in a state. Regardless of the content of a state’s investment law, investors will ordinarily remain bound by laws of general application that relate to their activities – corporations law, employment law, environment law, laws governing land ownership and tenure, laws governing the storage and use of data, to name a few. For the avoidance of doubt, some investment laws clarify that this is indeed the case. For example, Article 6 of China’s Foreign Investment Law reads: “Foreign investors and foreign-funded enterprises carrying out investment activities

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<sup>137</sup> Chapter V.

<sup>138</sup> For further analysis of the design and function of investment dispute prevention and management agencies, see: Bonnitca, J., & Williams, Z. (2022). *Investment dispute prevention and management agencies: Toward a more informed policy discussion*. International Institute for Sustainable Development. <https://www.iisd.org/publications/investment-dispute-prevention-and-management-agencies>. It is important to note, however, that such agencies are not always established by domestic investment laws.

<sup>139</sup> Article 43.

<sup>140</sup> Article 3. (e).



within the territory of China shall observe the Chinese laws and regulations, and shall not impair China's security or damage any public interest.”

Other investment laws highlight specific fields of domestic law with which investors must comply. For example, Article 18(e) of Angola's Private Investment Law (2018) requires investors to comply with domestic environmental obligations.<sup>141</sup>

Beyond restating investors' obligation to comply with relevant domestic law, the most common investor obligations appear to be those relating to record-keeping and reporting. Article 13 of UAE's Federal Law Regarding Foreign Direct Investment (2018), for example, places an obligation on foreign investors to maintain regular accounts and to report to the Foreign Direct Investment Committee. A different type of provision is contained in Egypt's Investment Law, which affirms investors' ability to choose, at their discretion, to allocate a percentage of their profits to social development and allows the responsible minister to create a list that recognizes investors that do so.<sup>142</sup> A small subset of investment laws places general obligations on investors that go beyond what is contained elsewhere in the domestic legal framework. Section 21 of Zimbabwe's Investment Protection and Development Act,<sup>143</sup> for example, places an obligation on all investors to ensure that “the products produced, works conducted and services provided by them comply with national **and international** standards.”<sup>144</sup>

### 3.4.7 Investment Monitoring and Oversight

A final function that some investment laws serve, which has received relatively little attention to date, is monitoring and oversight of investment. This is partly because this does not appear to be the primary function of many investment laws. However, it may also be because this function is more difficult to understand from a textual analysis of legal provisions; the operation of any system of monitoring depends as much on bureaucratic practices as powers conferred under a law. In the coding of its online database, UNCTAD does not seek to identify provisions of investment laws performing this function and, in our in-house research at the International Institute for Sustainable Development (IISD), we struggled to articulate a way of reliably identifying provisions linked to this function.

That said, the provisions of some investment laws imply that the law performs some monitoring and oversight functions. Myanmar's Investment Law, for example, clarifies that the powers of the Myanmar Investment Commission include the following:<sup>145</sup>

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<sup>141</sup> UNCTAD's coding of investment laws identifies investor obligations in relation to a range of specific subject matters that, on closer examination, do not impose any obligation on foreign investors beyond compliance with domestic law. We see investor obligations as an area for future research that distinguishes between different types of obligations, and after this research is concluded, then more meaningful numbers can be reported, for instance, of the number of laws that impose investor obligations not found elsewhere in domestic law.

<sup>142</sup> Article 15, Egypt Investment Law (2017) see also The Executive Regulation of the Investment Law No. 72 Ch. II, Arts. 2 & 3 <https://www.gafi.gov.eg/English/StartaBusiness/Laws-and-Regulations/PublishingImages/Pages/BusinessLaws/law%20no.72.pdf>

<sup>143</sup> Section 21.

<sup>144</sup> Emphasis added.

<sup>145</sup> Article 25(k).



scrutinizing whether or not the investor and its investment complies with this Law and its rules, regulations, notifications, orders, directives and procedures and provisions contained in contracts, and if not, ensuring the investor to abide and taking action against the investor and its investments that do not abide by such matters in accordance with the laws.

More generally, investment laws that place obligations on investors to report to an investment agency (or similar) potentially envisage that agency playing a role in overseeing and verifying compliance with domestic law. For countries with low bureaucratic capacity, investment agencies may play an outsized role in economic regulation because they interact directly with foreign investors. This is an important area for further research.



## 4.0 Future: What Lessons can be learned for design and operation of investment laws?

### KEY MESSAGES

- Many governments have the same overarching objective: to promote sustainable development. Governments can customize the functions and content of their investment law so it helps deliver on this outcome.
- There is no “off-the-shelf” model for investment laws: they vary in function, structure, and content.
- Investment laws can be redesigned to meet new challenges and opportunities and to reflect current priorities in national and international investment governance.
- Any rethinking of investment laws must begin with clarity on their intended functions and how the law should serve each function, noting the following:
  - Some functions currently performed by national investment laws may be better managed by other instruments or tools.
  - Some new functions can be assigned to investment laws to lay a foundation or fill a void on emerging issues.
- An investment law may not be necessary in all circumstances. In some contexts, it may be more appropriate for investment to be governed by a combination of laws of general application and sector-specific laws, rather than an investment law.

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As noted at the outset of this paper, a range of circumstances might prompt a government to review its investment law. These could include a reassessment of tax incentives provided in the law, experience of a costly investment dispute, advice from an international organization, development of new regional or international investment frameworks, the need to reflect new investment policy objectives, and concerns about national security, among others. Whatever the impetus, this can be an opportunity for broader reflection on the investment law’s objectives, functions, and content.

Several countries have revised their investment laws in the last decade, while others have begun or are considering a revision process.<sup>146</sup> While these reforms vary and reflect the very different contexts in which they occur, this section draws out common underlying issues and considerations that policy-makers face when embarking on a revision of an investment law.

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<sup>146</sup> Since 2015, there have been roughly 121 investment policy measures adopted worldwide on an annual basis. Despite the differences in their approaches, recent trends show that both developing countries and developed countries are active in revising investments laws. See United Nations Conference on Trade and Development. (2022). *World investment report: International tax reforms and sustainable investment*, at 56. <https://unctad.org/publication/world-investment-report-2022>. See also Olaoye, K., & Sornarajah, M. (2023). Domestic investment laws, international economic law, and economic development. *World Trade Review*, 22(1), 109–132.



As a first step toward assessing whether to reform or adopt an investment law, policy-makers should clarify the ultimate objective that the law aims to achieve. For most states, this objective will be to promote sustainable development. States should consider ensuring that this ultimate objective is explicitly recognized in the law, both as a tool to assist in interpretation and implementation of the law and as a signal to investors and other stakeholders.<sup>147</sup> To help achieve their ultimate objective of promoting sustainable development, policy-makers may articulate lower-level objectives as policy priorities. These specific objectives might include promoting investment in prioritized sectors, ensuring investment is appropriately regulated, and facilitating coordination across government.

A key step for policy-makers is translating their objectives into practice. How should policy-makers design and draft an investment law to deliver on their objectives? We recommend that policy-makers focus on functions to address this challenge. Policy-makers should identify the functions that the law is intended to perform, then reflect back on how these functions relate to specific policy objectives as well as the overarching objective of promoting sustainable development.

Once the law's intended functions have been articulated, the next step is to ensure that the overall approach and specific contents of the law are designed to perform those functions. The approach and content need to be carefully considered to ensure that the investment law is fit for purpose and actually contributes to sustainable development. To this end, this section discusses considerations related to each of the seven functions of investment laws identified in the previous section.

These tasks are relevant for countries developing a new investment law, countries reforming or reviewing their existing law, and countries not currently reviewing their law. Ensuring that an investment law is contributing to sustainable development and performing the functions it is intended to perform is an ongoing job—for countries not currently reviewing their law, the questions and guidance below may prompt policy-makers to see their investment law in a new light and even initiate a review or reform.

## 4.1 Reasons to Rethink Investment Laws

The evolution of investment laws described in Sections 2 and 3 shows that many countries have reformed their laws over time. This section provides three reasons why countries may want to rethink them again today, especially developing countries, who have traditionally been the main innovators with regard to investment laws and who also face greater risks from outdated laws since they are on the front lines of multiple complex global crises.

First, investment laws should be reformed in light of 21st-century challenges and opportunities. Investment laws have often emerged in times of upheaval, including to foster greater coherence, fill gaps in existing legal frameworks, or address pressing policy challenges

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<sup>147</sup> According to UNCTAD, in 2016 only 13 of the 111 laws explicitly refer to the concept of “sustainable development” in their preamble. See United Nations Conference on Trade and Development. (2016). *Investment laws, a widespread tool for the promotion and regulation of foreign investment*. Investment Policy Monitor, at 4. <https://investmentpolicy.unctad.org/publications/155/investmentlaws-a-widespread-tool-for-the-promotion-and-regulation-of-foreign-investment>



related to development. Investment laws can be seen as a tool that helps states to address today's broader challenges, such as climate change, gender inequalities, and public health concerns. The role of investment in tackling these challenges means that it behooves states to ensure their investment laws support their ambitions, while also recognizing that investment laws are not a panacea but only part of a wider policy response to these challenges. Investment laws can also be seen as a tool that helps states to implement new norms or policies in areas such as business and human rights, climate finance, and the global minimum tax. Global developments in areas like these may create a need for states to update their investment laws or at least reassess them.

Second, investment laws should be reformed to match their dynamic wider national contexts. As shown in Section 3.3 with the examples of China, Myanmar, Australia, and South Africa, states adopt or reform their investment laws in diverse contexts, for diverse reasons, and this diversity in circumstances and policy objectives shapes the resulting laws. Different functions are relevant to different national contexts or at different moments. Investment laws are a tool of domestic policy and should fit the wider national context, including the specific policy objectives of the country.

Finally, investment laws should be reformed to decrease legal risks. Poorly designed laws can create significant legal risks, particularly if they include investment protection and dispute settlement as functions. The risks associated with these functions can mirror those posed by old-style investment treaties, especially if advance consent to ISDS is provided through the law. Other risks are akin to those found in unbalanced investor–state contracts, such as broad stabilization clauses or counterproductive tax incentives. Failure to reduce these risks can result in costly investment disputes, lost tax revenue, and undue narrowing of the state's policy space to regulate in the public interest.

## 4.2 Guiding Questions for Rethinking Investment Laws

Policy-makers reassessing their investment laws may find the following decision-making framework a useful tool. The framework does not recommend a specific design or legal content, nor does it assume that an investment law will be necessary or appropriate in all circumstances. Instead, the framework consists of questions for policy-makers to discuss and analyze internally—the framework's purpose is to encourage policy-makers to ask the right questions, the answers to which will depend on national context and policy objectives.

### 4.2.1 Are Functions Assigned to the Existing Investment Law Still Relevant?

If a country has an existing investment law, any process of rethinking should start with an assessment of the current investment law's intended and actual functions. In answering this first question, governments could consider the following sub-questions:

- **What are the intended functions of the investment law?** Having clarity about intended functions is essential for analyzing whether: (a) the law is serving those functions and (b) whether those functions remain relevant today.



- **What are the actual functions of the investment law?** What role is it playing in practice, not just on paper? Is the investment law performing any unintended functions?
  - The law may be serving unintended functions that are useful and important to formalize or, alternatively, serving unwanted and unintended functions. For example, an investment agency may be performing an important role in practice, but its powers are not formalized or sufficiently clear in the existing investment law.
- **Are the law’s intended and actual functions still necessary in the current national and international contexts?**
  - A function may have been essential and legitimate in a past context but is no longer relevant today. For example, reforms to tax laws or the process of negotiating investor–state contracts may mean that conferral of profit-based tax incentives through an investment law is no longer necessary to achieve objectives relating to the attraction of investment.
- **For each function deemed necessary, does the investment law serve this function?** For functions deemed necessary but not being served by the current law, why is this so? Is the problem how the law deals with the function, or is the function better addressed in a different law?
  - For example, policy-makers may deem the function of managing investor–state disputes still necessary, but decide, for instance, if the only provision related to disputes in the current law is the state’s advance consent to ISDS, that the way in which the law serves this function may need to be reconsidered.
  - Similarly, a system to govern the admission of new foreign investment may still be needed, but the process and criteria by which prospective investments are screened may need to be revised.

#### 4.2.2 Is an Investment Law the Appropriate Instrument to Perform the Desired Functions?

An investment law should be tasked only with necessary functions that it is well-placed to deliver. There is no “best practice” here; whether a function is necessary depends on the country context. Even if one or more functions are deemed necessary, if other parts of the legal and regulatory framework perform them well, then there may be no need for an investment law. Singapore, for example, does not have an investment law, nor does Brazil, Mauritius, Botswana, or Hong Kong—all countries that have attracted and retained a lot of inward foreign investment.

To decide if an investment law is the appropriate instrument to perform the desired functions, policy-makers might consider:

- **Would some of the functions assigned to the investment law be better addressed through another instrument?**





- Investment laws are better suited to performing some functions—for example, governing the admission and approval of new foreign investment—than others.
  - Some functions – for example, placing obligations on (foreign) investors—are important but may not be appropriate for an investment law, unless consideration is given to how these obligations interact with the wider domestic legal framework and how they are to be enforced.
  - Some functions may be appropriate to address through an investment law but may also bring risks—for example, tax incentives and dispute-settlement functions.
- **Could the investment law temporarily fill a regulatory capacity gap for certain functions?**
    - Appropriate design of an investment law and what functions it includes also depends on regulatory capacity.
    - There may be a policy case for investment authorities to perform wider regulatory functions in a low-capacity environment, where other state agencies have limited practical ability to monitor and enforce other laws that apply to investment. In these contexts, the investment authorities often control one of the few effective regulatory levers—the ability to confer and withdraw permits and/or incentives under the investment law.
    - However, these issues raise difficult questions of regulatory design, and there have been almost no empirical studies on which claims about “good practice” could be based. In this context, peer-to-peer learning opportunities and transnational policy networks could be useful.

### 4.2.3 What Approach Is Appropriate to Fulfill These Functions?

Most questions about an investment law’s content should be considered only after a state’s objectives have been clarified and questions about the investment law’s functions are answered. For example, it makes little sense to talk about how to define key terms like “investor” or “investment” in an investment law without clarifying the function(s) of the law because these definitions will need to be tailored to the law’s intended functions. The appropriate definition of “investor” and “investment” in a law that serves primarily as an investment screening mechanism may be different than definitions that are appropriate in a law which affords post-establishment legal protections or grants incentives. There are some questions, however, that are relevant regardless of a law’s functions:

- **What is the scope of application of the law?** One important question is whether the law should apply to all investment or only to *foreign* investment. It is not possible to answer this question without first clarifying the law’s function(s). Some functions are likely relevant to all investment (e.g., incentives), whereas other functions may reflect concerns that are specific to *foreign* investment (e.g., screening and admission). For investment laws with multiple functions, it may be appropriate to design different



scopes, thresholds, and even key definitions to apply in relation to different parts of the law that serve different functions.

- **How will the law interface with the country’s laws/regulations of general application?** For example, to the extent there is inconsistency, will the investment law prevail over other laws relevant to investment?
- **What is the best institutional structure for the administration or enforcement of the investment law?** For example, an investment law designed to screen inbound investment might require a differently structured administrative agency to one focused on managing investor grievances. Where the law combines various such functions, it may need to assign administrative oversight to different agencies.

## 4.3 Considerations Relating to Particular Functions

This section discusses questions and considerations related to each of the seven functions. The list of questions under each function is not exhaustive but rather a starting point for policy-makers—and, as above, the answers to many of these questions depend on context.

### 4.3.1 Considerations Relating to the Design and Operation of Investment Laws That Govern Admission/Establishment of New Investment

When an investment law pursues this function, the following elements, at a minimum, should be considered.

- Are there requirements as to the form or ownership structure of an investment?
  - For example, requirements for prospective foreign investors to establish a joint venture with a local company, or for an entity to be incorporated domestically, or for a minimum amount of domestic shareholding?
  - Are there minimum capital requirements?
- Does the law distinguish between sectors that are, in principle, open to *foreign* investment and those that are not?
  - If so, what criteria determine whether an investor/investment qualifies as “domestic” or “foreign”?
  - Does the law adopt a positive list approach setting out all sectors open to foreign investment (meaning that non-listed sectors are not open to foreign investment), or a negative list approach, setting out all sectors in which foreign investment is not permitted (meaning that non-listed sectors are open)?
    - The recent trend in developing country investment laws is toward the adoption of negative list approaches.
    - One potential advantage of a negative list is the consolidation of prohibitions/restrictions on foreign investment that were previously spread across multiple laws and regulations into a single, authoritative instrument.



This may increase the transparency and clarity of the investment environment for prospective investors. A concomitant challenge is making sure that the negative list accurately captures all relevant limitations and conditions on foreign investment in particular sectors.

- For countries adopting a negative list, it is important to build in processes of periodic review to consider whether sectors should be added to or removed from the list. (Such processes do not need to be reflected in the text of the investment law itself.)
- Does foreign investment in sectors that are, in principle, open to investment still need to be registered with/approved by the investment agency?
- Does the law provide for discretionary evaluation or review of proposed investment in sectors that are, in principle, open to foreign investment—for example, through a screening mechanism?
  - If so, what is the institutional architecture for the evaluation/screening process?
    - For example, which institution vets prospective investments?
    - How is this institution constituted?
  - What are the thresholds/triggers that determine whether the investment should be evaluated/screened?
    - For example, is only foreign investment subject to evaluation/screening and, if so, how is “foreignness” determined?
    - Are only investments over a certain value subject to evaluation/screening?
    - Are only investments in specified sectors subject to evaluation/screening?
  - What are the criteria against which prospective investments will be assessed?
    - “National interest” or “national security” tests?
- What is the relationship between the investment law and other laws and regulatory processes?
  - Does investment approval entitle investors to get licences or permits, and, if so, which ones? Alternatively, is investment approval conditional on approval/permit being granted in other regulatory processes—for example, submission and approval of an investor’s environmental and social impact assessment?
  - Are there other regulatory elements embedded in the investment screening process? One example is competition law processes, such as merger clearance requirements.



### 4.3.2 Considerations Relating to the Design and Operation of Investment Laws That Govern the Award of Tax Incentives

This function raises concerns on at least three levels.

First, the premise of tax incentives for investment, particularly profit-based incentives, as a strategy to increase sustainable investment is questioned today.<sup>148</sup> It is increasingly accepted that tax incentives are instruments to be used conservatively and cautiously. Indeed, over the last 20 years, numerous studies have shown the ineffectiveness of tax incentives in attracting foreign investment and revealed the cost of tax incentives to the public purse.<sup>149</sup> The prevailing international consensus, reflected in the recommendations of international institutions, is to encourage reforms and to abandon tax incentives in order to mobilize domestic revenues more effectively.

Second, it is recommended to consolidate tax incentives in general tax codes for better transparency, coherence, and efficient administration. Consolidating all tax incentives in tax laws—rather than in investment laws and executive regulations, legislation governing specific industries, or one-off agreements with companies—can enhance transparency, reduce potential redundancy, and reduce confusion over the administering authority.<sup>150</sup> The ministry of finance is often best placed to grant tax incentives and monitor their costs. Other ministries may be more inclined to offer tax incentives as they are not in charge of tax collection or necessarily aware of the state's fiscal needs.

Finally, it is essential to assess the impact of ongoing global tax reform processes, such as the OECD's proposed global minimum tax, on the effectiveness of any tax incentives granted to investors.<sup>151</sup> Countries may need to adapt their domestic tax policy in response to the global minimum tax, since some domestic tax measures intended to attract or retain foreign investment may lose their effectiveness as a result of the global minimum tax.<sup>152</sup> It is important to examine the consequences of these ongoing global tax reform processes for national laws, especially if tax incentives are included in an investment law.<sup>153</sup>

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<sup>148</sup> Andersen, M. R., Kett, B. R., & von Uexkull, E. (2018). Corporate tax incentives and FDI in developing countries. In World Bank (Ed.), *2017/2018 global investment competitiveness report: Foreign investor perspectives and policy implications* (73–100). World Bank.

<sup>149</sup> Klemm, A. & Parys, S. (2012). Empirical evidence on the effects of tax incentives. *International Tax and Public Finance*, 19, 393–423.

<sup>150</sup> See Organisation for Economic Co-operation and Development. (n.d.). *Principles to enhance the transparency and governance of tax incentives for investment in developing countries*. <https://www.oecd.org/ctp/tax-global/transparency-and-governance-principles.pdf>

<sup>151</sup> Christians, A., Lassourd, T., Mataba, K., Ogbemor, E., Readhead, A., Shay, S., & Pougá Tinhaga, Z. (2023). *A guide for developing countries on how to understand and adapt to the Global Minimum Tax*. International Institute for Sustainable Development & International Senior Lawyers Project. <https://www.iisd.org/publications/guide/developing-countries-adapt-to-global-minimum-tax>; Liotti, B. F., Waruguru Ndubai, J., Wamuyu, R., Lazarov, I., & Owens, J. (2022). The treatment of tax incentives under Pillar Two. *Transnational Corporations*, 29(2), 25–46; Heitmüller, F. & Mosquera, I. (2021). Special economic zones facing the challenges of international taxation: BEPS Action 5, EU Code of Conduct, and the future, *Journal of International Economic Law*, 24(2), 473–490.

<sup>152</sup> For a simple framework to understand and adapt to the Minimum Global Tax, see Christians et al., *supra* note 152.

<sup>153</sup> UNCTAD, *supra* note 147, at 142–153.



When an investment law includes provisions on tax incentives, the following elements, at a minimum, should be specified:

- The broader economic rationale. The policy objectives and economic rationale for granting incentives should be articulated and be measurable.
- The form (tax or non-tax) and scope of the incentives. Scope can include, for example:
  - Eligible sectors and required social and environmental performance
  - Duration and applicable phase-out periods (if any) of incentives
- Applicable definitions, including which types of investors and investments are eligible for incentives.
- Objective, clear, and transparent eligibility criteria for each category of incentives, such as investment amount, annual turnover, location of headquarters, jobs created, etc.
- Procedures for evaluating, granting, revoking, and revising incentives.
- The specific conditions imposed on beneficiaries in return for the incentives granted and the mechanisms for monitoring and controlling their compliance (and penalizing non-compliance).
- Institutional architecture:
  - Who decides and approves the awarding of incentives?
  - How are risks associated with corruption and agency capture addressed?
- The interaction between the investment law and other laws and regulations, and, with the general tax code and any incentives granted therein.
  - For example, does the tax code prevail over the investment code to the extent of any inconsistency?

### 4.3.3 Considerations Relating to the Design and Operation of Investment Laws That Govern Investment Facilitation

This function raises a broad range of potential policy considerations and practical implications that differ depending on the types of investment facilitation measures included in the law. For this reason, addressing investment facilitation can raise higher-level policy questions.<sup>154</sup>

A useful first step before designing investment facilitation measures is to learn what investors and prospective investors perceive as obstacles. With this information, policy-makers can design investment facilitation measures that will be meaningful to investors. Without this

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<sup>154</sup> For a WTO approach to investment facilitation see, Jose, R. (2023). *The Joint Initiative on Investment Facilitation for Development: Evolution from 2022 and the road to MC13*. International Institute for Sustainable Development. <https://www.iisd.org/publications/report/joint-initiative-investment-facilitation-mc13>. For a discussion on special economic zones see United Nations Conference on Trade and Development. (2019). *World Investment Report 2019—Chapter 4: Special economic zones*. [https://unctad.org/system/files/official-document/WIR2019\\_CH4.pdf](https://unctad.org/system/files/official-document/WIR2019_CH4.pdf)



information, policy-makers may commit the government to measures that are costly to maintain but of limited benefit since they do not address what investors perceive as obstacles.

Once policy-makers have identified the investment facilitation measures they wish to introduce, two further questions arise: (1) What are the ongoing costs associated with that measure? and (2) Does that investment facilitation measure require a legislative basis?

Answering these questions requires looking at each investment facilitation measure individually—not by looking at “investment facilitation” collectively. The term “investment facilitation” is a broad banner under which many different concepts and approaches are grouped. Even within this paper’s definition (measures aimed at addressing practical impediments to investment), several types of investment facilitation measures exist that raise different implications.

The administrative burden and cost of committing to investment facilitation measures in an investment law should also be considered. Some measures are relatively simple and low-cost, for example, committing to publish relevant laws and policies in order to promote transparency and make compliance easier. Other measures may involve higher and ongoing administrative costs, for example, establishing one-stop shops or conducting public consultations for all new laws and policies. The latter measure also introduces complex policy questions, for instance, how will consultations be protected from undue influence by industrial interests? It is important to ensure such considerations are explored before embedding investment facilitation measures in an investment law.

In relation to one-stop shops specifically, the following elements should be specified:

- What will the scope of the services provided by the one-stop shop be?
  - Will it be a single source of consolidated information only? Or will it also receive and process applications for relevant investment approvals and permits?
  - Will its services be available to new investors in their establishment phase only? Or will it also provide aftercare services throughout the life of an investment and, as a result, touch upon the function of monitoring and oversight (see below 4.3.6)?
- How will the one-stop shop be staffed?
  - Will officials be seconded from key ministries and departments to ensure that, for example, applications for environmental permits etc. are assessed and issued by those with appropriate technical knowledge?
  - Or will the one-stop shop be staffed by customer service experts whose role is to be an interface between investors and the technical specialists in charge of reviewing and issuing permits?
- Who is eligible to access the services of the one-stop shop?
  - Foreign investors only?



- Domestic and foreign investors, with investments meeting a certain size threshold?
- Investors in key sectors? For example, some countries establish one-stop shops to service investors in special economic zones.
- Will the one-stop shop be virtual, physical, or both?
  - How will questions of expertise be managed? For example, some countries ensure that environmental approvals are evaluated/issued by those with appropriate technical knowledge.

#### 4.3.4 Considerations Relating to the Design and Operation of Investment Laws That Provide Legal Protection to Investors

This function comes with significant risks and raises questions about how the investment law's protection provisions interact with the country's investment treaties and contracts. Any dispute-settlement arrangements that apply to protection provisions in an investment law need particular attention and precision (more on this below).

A first step when considering protection provisions is to articulate their purpose or additional benefit (if any): policy-makers considering including such protections in their investment law should identify what these protections will offer investors that is not already provided for in the domestic laws. For example, many countries' constitutions provide protections for private property rights, so what value is added by a protection against expropriation in an investment law? Similarly, many of a country's largest investors may be covered by investment contracts, which might contain protections that have been calibrated in light of the specific project and the benefits it brings the country.

It is not recommended to “copy and paste” investment protections from an investment treaty into an investment law. These protections are not common in domestic laws—it is worth recalling here that developed countries' investment laws rarely provide legal guarantees to foreign investors. Including protections from treaties can create a risk of costly litigation or arbitration, especially if coupled with access to ISDS.

When an investment law includes the function of protection, the following elements, at a minimum, should be considered:

- Which protections are to be provided?
- How will the scope of these protections be defined? For example,
  - Which investors and investments will be covered by the protection?
  - Are domestic investors equally entitled to protection?
- Are there relevant exceptions to each protection?
  - For example, if investors' rights to repatriate the proceeds of their investments are to be protected, under what circumstances can the state prevent a transfer?



- Can investors or their investment be disqualified from protection, for example, if they break domestic laws or engage in corruption?
- What is the relationship between the protections provided for in the investment law and other national laws? For example, do the investment law's provisions override inconsistent legislation? Or are they subject to limitations provided in other national laws?
- What is the relationship between the protections provided for in the investment law and the country's investment treaties?
  - Where a particular investor is covered by investment treaty protections that are more generous than what the investment law provides for, which protection is intended to prevail?
  - Note that it is unlikely to be legally effective for the investment law to unilaterally modify investment treaty provisions, but it could clarify that the law's provisions will be overridden by more generous treaty provisions, to cut down on overlap.
- What is the relationship between the protections provided for in the investment law and individual investment contracts?
  - For example, are the investment law's protections intended to override any previously concluded inconsistent protection provisions in an investor-state contract? If so, does this expose the government to potential litigation and/or liability under the existing contracts?
- What remedies are available to investors for breach of the investment protection provisions?
  - For example, is compensation available and, if so, how is this calculated?
  - If public law remedies are available, which ones?
  - Will the investment law provide specific remedies or just reference those available under general domestic law?

#### 4.3.5 Considerations Relating to the Design and Operation of Investment Laws That Place Obligations on Foreign Investors

This function raises complex practical issues. Beyond the reiteration of the general principle that investors must comply with all their obligations under domestic law and contracts, there are questions about the added value of singling out classes of obligations in an investment law (environment, labour, reporting, etc.).

A first step is to interrogate the additional benefit of investment obligations in an investment law. Contrary to other instruments, such as investment treaties or contracts, this function might be redundant in investment law. Investment treaties may serve the purpose of elevating domestic legal obligations to the international law level and making them self-enforcing within the logic of the treaty by linking them to ISDS (if provided). Investment contracts can serve





to translate general investor obligations under the law into specific, tailored, and measurable commitments, and this is particularly relevant for local content requirements in some sectors.

When an investment law addresses investor obligations, the following elements, at a minimum, should be specified:

- Insofar as the law goes beyond affirmations of obligations to comply with national and relevant contracts, do specific obligations relate to reporting/process only or also to substantive obligations?
- What are the specific requirements under those obligations beyond those already provided in other domestic laws?
  - For example, identifying (at a high level) classes of obligation whose breach results in specific sanctions, for example, underpaying workers results in a sanction but being late in providing an annual report does not.
- What types of breach will result in loss of privilege, and what defines each type of breach?
  - For example, does the breach need to be “material”? Sustained or repeated? Deliberate/wilful/malicious?
  - What distinguishes a substantive breach from an administrative breach (for example, is there a reference to domestic law penalties once a breach carries a penalty above a certain amount)?
- What are the specific sanctions if the investor violates these obligations?
  - Are the sanctions related only to losing privileges granted in the investment law—for instance, sanctions could mean access to the investment law's investment facilitation provisions, investment incentives, or specialized dispute settlement being revoked?
- Are there specific sanctions if the investor violates domestic law or breaches contracts with the state, and with local communities or employees?
- What is the process for determining when rights or privileges conferred under the investment law will be revoked?
  - For example, will revocation happen if the investor has been convicted/found to be in breach by a court? Or can the question of compliance be resolved through an administrative determination by the investment agency?
- What is the process for challenging a revocation of privileges, and having them reinstated, if any?



### 4.3.6 Considerations Relating to the Design and Operation of Investment Laws That Establish Systems for Monitoring and Oversight of Foreign Investment

As noted above, countries with limited bureaucratic capacity may confer a greater role in monitoring and enforcing compliance with domestic laws on investment agencies, on the basis that an investment agency has a closer and more direct relationship with foreign investors. In such cases, the investment law could be an appropriate instrument to establish the legal parameters for the investment agency to perform this function. However, as highlighted above, this presents complex questions of regulatory design, for instance, how to avoid or manage conflicting mandates of the investment agency.

When an investment law envisages an investment agency performing this function, the following elements, at a minimum, should be specified:

- What is the scope of the investment authority's monitoring and oversight function?
  - Does it involve monitoring foreign investment operations only, or domestic investments as well? Is there a size threshold determining which investments are monitored?
  - Does it relate only to compliance with the investment law and with conditions attached to authorizations/permits issued under that law?
  - Does it cover investor–state contracts?
  - Does it cover contracts between investors and third parties? In some circumstances, there may be a rationale for the investment agency to oversee contracts between investors and certain classes of third parties, for example, local communities, legitimate tenure rights holders, workers, and local small and medium-sized enterprises—who would be significantly impacted by the investor's breach of contract but lack resources to monitor compliance and hold the investor to account.
- What powers and resources does the investment authority need to carry out its monitoring and oversight function effectively?
  - Is the investment authority responsible for overseeing compliance by investors with other laws?
    - If so, which laws? For example, laws relating to labour, taxes, and the environment.
    - If so, which provisions? For example, substantive and procedural/administrative provisions?
  - Does the investment authority need new regulatory powers, for example, the ability to carry out unannounced inspections of project sites, search powers, the ability to compel interviews, reports, and the production of documents?



- How should the investment authority coordinate with other agencies' investigators, for example, with the police, environmental authority, or labour inspectors?
- Should the investment law impose additional obligations on investors to facilitate this oversight and monitoring function and ease the administrative burden for the investment authority?
  - Should investors of a certain size or holding certain permits be required to periodically report on their compliance with their permit conditions or the applicable domestic laws overall?
- What sorts of enforcement powers should the investment authority have to enforce breaches it identifies during its monitoring and oversight activities?
  - Can the investment authority issue on-the-spot fines or penalties for breaches? Revoke or suspend benefits afforded under the investment law? Institute criminal or civil proceedings for breach?
- What are the risks of conferring regulatory functions on an investment authority that may also have a mandate to promote and retain foreign investment?
  - Are there ways to separate the parts of the investment authority that deal with investment promotion from those that deal with monitoring and oversight?
  - Does the governance structure of the investment authority ensure that monitoring and oversight functions are not displaced by the authority's investment promotion mandate? Clearly recognizing that the ultimate objective of the investment law is to promote sustainable development—not to maximize investment—may be an important initial step in this regard.

### 4.3.7 Considerations Relating to the Design and Operation of Investment Laws That Establish Systems for Managing Investment Disputes

This function must be approached with caution because of the legal and financial risks it may raise. As outlined above in Section 3, there are several possible approaches to disputes that an investment law may take. These approaches exist on a spectrum: at one end, advance consent to international investment arbitration, a seriously risk-laden approach to be avoided. At the other end, a reaffirmation that domestic courts have exclusive jurisdiction over all investment-related disputes. An option somewhere in the middle is to recognize the power of state entities to consent to international investment arbitration on a case-by-case approach, in individual contracts, or in respect of individual disputes as they arise. These choices touch on deep matters of state sovereignty and the role of the national judiciary and so merit careful consideration.

Once a state has resolved these high-level questions about the appropriate forum(s) for resolution of investor–state disputes, a range of further questions arise. In our view, it is never



advisable for a state to grant general, advance consent to investor–state arbitration in an investment law. So, the questions that follow relate to other options:

- If the national courts are to have exclusive jurisdiction over investment disputes, do they need additional capacity, support, or resources to carry out this function effectively and expeditiously?
  - Should there be training and capacity development for judges in investment law issues, or dedicated administrative support for investment disputes?
  - Should timeframes or targets for the administration and conclusion of investment disputes by the national courts be put in place?
  - Should mediation and other forms of alternative dispute resolution be provided for?
- If an investment law is to acknowledge the validity of ISDS in principle subject to a specific agreement between the relevant state entity and the investor providing the consent of both, should the law also establish a framework governing the process by which state entities can grant consent? If so,
  - Are there to be certain investment thresholds, priority sectors, or other criteria based on the nature and identity of the investor and investment guiding when arbitration is appropriate?
  - What institution(s) and/or officials are empowered to provide consent to arbitration on behalf of the state?
  - What rules of arbitral procedure will the state agree to?
  - Will the investor be required to exhaust domestic remedies before the state will consent to arbitration?
  - What arbitral arrangements must be in place? For example, must the arbitration be administered by an international arbitration centre based in the country or region?
- A separate IISD publication has considered the design and operation of national dispute prevention and management agencies (DPMAs) in detail.<sup>155</sup> The questions identified in that report are equally relevant in assessing whether an investment law should establish such an institution and, if so, how it should be designed:
  - What policy problem is the DPMA intended to solve? Is the objective to attract and retain foreign investment, to manage legal risks to the state, or something else?
  - How will the DPMA interact with other agencies of government? What powers will the DPMA have, and what mechanisms of accountability and oversight will be put in place to prevent capture and corruption within the DPMA?

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<sup>155</sup> Bonnitca & Williams, *supra* note 139.



- What types of investment disputes are appropriate for a DPMA to attempt to resolve? Are there any types of disputes that the DPMA should not attempt to resolve?
- Insofar as it is appropriate for a DPMA to attempt to resolve a dispute, what legal or policy framework should the agency apply in assessing the dispute and evaluating options for resolving the dispute?
- What mechanisms of monitoring and evaluation should be put in place to assess the effectiveness of the DPMA and ensure learning over time?
- What evaluation criteria should be adopted to ensure that the DPMA does not become overly focused on retaining and promoting investment at the expense of other interests or policy priorities?

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