'THE RELATIONSHIP BETWEEN DOMESTIC INVESTMENT LAWS AND INTERNATIONAL INVESTMENT LAWS IN THE FLOW OF FOREIGN DIRECT INVESTMENT.'

Rafaa Mazrui*

ABSTRACT

The Liberal International Order (LIO), established in the aftermath of World War II, is underpinned by political and economic liberalism, alongside liberal internationalism, emphasizing liberal democracy, open markets, and cooperative security. However, a dialectical tension between nationalism and internationalism shapes the evolution of international organizations and their governance, impacting their effectiveness in promoting the global common good versus state-centric interests. This paper explores the dynamics of Foreign Direct Investment (FDI) within this framework, particularly considering recent trends of de-globalization, exacerbated by the 2008 financial crisis and the COVID-19 pandemic, which have led to a notable decline in global trade and FDI flows.

A. INTRODUCTION

Political liberalism, economic liberalism, and liberal internationalism serve as the pillars of the Liberal International Order (LIO), which was founded in the years following World War II.[1] It is founded on ideas like liberal democracy, open markets, and cooperation in the security sphere. These are constrained by legal norms like the rule of law and human rights. Liberal internationalism includes cooperation with the aid of multilateral organizations, such as the World Trade Organization (WTO) and the United Nations (UN).[2] 'Nationalism' and 'internationalism' have a dialectical relationship that has shaped the development of international organizations, including the governance of those organizations as a whole.[3] Nationalism expresses the belief that international organizations should serve the interests

* Rafaa Mazrui is a Kenyan lawyer with an LL.B from Kenyatta University and an LL.M in European Legal Perspectives, specializing in International Economic Law from University of Cologne, Germany. Currently, she serves as a Program Consultant at Konrad Adenauer Stiftung's Rule of Law Program for Sub-Saharan Africa. For correspondence, she can be reached at: rafaa-mazrui@gmail.com.

1 Barnett, M. *"International progress, international order, and the liberal international order."* The Chinese Journal of International Politics, 41, (2021): 1–22.

2 Chaisse, Jullien, and Georgios Dimitropoulos. "*Domestic Investment Laws and International Economic Law in the Liberal International Order.*" World Trade Review 22.1 (2023): 1.

3 Mazower, M. *Governing the world: The history of an idea, 1815 to the present*. 2013.

of States, whereas internationalism proposes that these organizations should ultimately serve the interests of the world's population.[4] International institutions of the economic sphere served as vehicles in the post-World War II international order for the liberalization of cross-border trade and investment; the dialectic appeared to have settled in favor of the international, at least when it came to economic issues. Following the global financial crisis of 2008, there has been a relative decline in economic globalization. Since at least 2012, global trade has been declining, and global FDI has been declining since 2016.[5] The COVID-19 pandemic has accelerated these trends even further. This phenomenon has been dubbed "de- globalization".[6] This has affected various aspects of the global economy but most relevant to this study, the flow of Foreign Direct Investments (FDI).

This paper begins by delving into how International Investment Law facilitates FDI and examines the evolution of investment treaties and their contributions to FDI promotion.

The paper further explores the domestication of investment laws, focusing on the historical context, dispute resolution mechanisms, and the legitimacy crisis of the Investor State Dispute Settlement system. It discusses alternatives and the interplay between international and national investment laws in promoting FDI.

A case study on Kenya is presented, analysing its legal framework for FDI in the context of regional frameworks from the East African Community and the African Union, and comparing them to the ASEAN investment system.

Finally, the paper concludes with recommendations for potential reforms and areas of harmonization that could enhance the coherence and effectiveness of the existing framework.

B. PROTECTION OF FDI UNDER INTERNATIONAL INVESTMENT LAW

I. Introduction

Governments and development economists in developing countries see FDI as critical to long-term economic growth. FDI is a relatively stable source of investment capital, in contrast to development models based on international debt or portfolio investment. Because FDI involves a management stake in a company, ex post, investment is relatively immobile. This characteristic of FDI makes it less susceptible to abrupt stops and reversals that have characterized other types of international financial flows.[7] Furthermore, there is substantial evidence that FDI is associated with economic growth by significantly contributing to

4 Mazower.

5 UN Conference on Trade and Development (2020) Global Investment Trends Monitor, Issue No. 33.

6 Irwin, D. A. *"The pandemic adds momentum to the deglobalization trend."* Peterson Institute for International Economics 23 (2020).

7 Danzman, S. B. *"The political economy of bilateral investment treaties."* (2019): 11.

capital formation, technology transfer, and job creation.[8] Given the potential positive effects of FDI on growth, governments are often keen to attract investment flows.[9]

While economic and geographic factors explain a significant portion of FDI flow patterns, political factors also matter because differences in political institutions expose foreign firms to varying degrees of political risk.[10]

International investment laws are treaties and agreements between countries that establish rules and safeguards for foreign investors. Bilateral investment treaties (BITs) and multilateral investment treaties (MITs) are the most common types of these agreements, which aim to protect foreign investors from unfair treatment, expropriation, and other risks. These treaties frequently include provisions for dispute resolution mechanisms, such as international arbitration, that allow investors to seek redress if they believe the host country has treated their investments unfairly.

II. Evolution of International Investment Agreements

It may appear strange at first to suggest that the "BIT era" began in 1989, some 30 years after Germany and Pakistan signed the first treaty commonly referred to as a bilateral investment treaty. A few numbers, on the other hand, indicate that the modern BIT era began later than 1989. The fall of the Berlin Wall, however, serves as a conceptually significant starting point, because the changed political and economic conditions that underpinned the enormous growth in the number of BITs and BIT arbitrations can be traced back to the late 1980s and early 1990s.[11]International Investment Agreements (IIAs) have evolved significantly ever since, reflecting shifts in global economic and political dynamics as well as shifts in investment protection and promotion priorities.

Early versions of IIAs were frequently bilateral in nature, referred to as Bilateral Investment Treaties (BITs). With the passage of time, there has been a shift toward more comprehensive agreements, such as Free Trade Agreements (FTAs) or Economic Partnership Agreements (EPAs), which include investment provisions in addition to trade-related provisions.[12]

Earlier BITs were primarily concerned with protecting foreign investors' rights and ensuring compensation for host-state expropriation and other adverse actions. However,

8 Alfaro, Laura, et al. *"FDI and economic growth: the role of local financial markets."* Journal of international economics 64.1 (2004): 89–112.

9 Danzman, 12.

10 Danzman, 12.

11 Johnson Jr, Thomas, and Jonathan Gimblett. *"From gunboats to BITs: the evolution of modern international investment law."* Yearbook on international investment law and policy 649 (2011): 685.

12 Agreement between Japan and the United Kingdom of Great Britain and Northern Ireland for a Comprehensive Economic Partnership, Japan- United Kingdom CEPA (2020); Economic Partnership Agreement between the Republic of Kenya and the United Kingdom of Great Britain and Northern Ireland, Kenya- United Kingdom EPA (2020).

concerns have arisen that these safeguards may limit a host country's ability to regulate in the public interest. Subsequent IIAs sought to strike a balance between investor protection and the regulatory space of the host country. For instance, in the sensitive sector of public health.[13]

The ISDS mechanism, which allows foreign investors to sue host countries for alleged violations of investment protections, has been criticized for a perceived lack of transparency, the possibility of frivolous claims, and a lack of accountability. As a result, there has been a push for ISDS reform, with efforts to increase transparency, establish appeals mechanisms, and implement anti- abuse safeguards.[14]

Provisions that promote sustainable development, environmental protection, labor rights, and social standards are increasingly being included in modern IIAs. These provisions reflect a growing awareness of the importance of aligning investment activities with larger societal goals.[15]

Some IIAs have been abused through a practice known as "treaty shopping," in which investors purposefully structure investments to take advantage of favorable provisions in specific agreements.[16] Newer IIAs frequently include provisions designed to prevent such abuse and ensure that only legitimate investors benefit from treaty protections.

Large-scale multilateral treaties, such as the Trans-Pacific Partnership (TPP) and the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, have resulted in new standards for investment protection and dispute resolution.[17] These treaties seek to establish a more consistent and predictable international investment framework. Domestic and regional reforms have been implemented by some countries and regions in order to modernize their investment policies and agreements. These reforms frequently entail revising or terminating older BITs and negotiating new agreements that reflect current concerns and priorities.

IIAs are increasingly being accompanied by discussions about corporations' responsibility to respect human rights and the role of states in regulating business conduct. References to international human rights standards and corporate social responsibility are now included in some IIAs.[18]

13 Sheargold, E, and Andrew D. Mitchell. *"Public health in international investment law and arbitration."* Handbook of International Investment Law and Policy. 2021. 1852.

14 Bernardini, P. *"Reforming investor–state dispute settlement: the need to balance both parties' interests."* ICSID Review-Foreign Investment Law Journal 32.1 (2017): 38–57.

15 Alschner, W, and Elisabeth Tuerk. "*The role of international investment agreements in fostering sustainable development."* Investment Law Within International Law: Integrationist Perspectives (CUP 2013) (2013).

16 Chaisse, J. *"The treaty shopping practice: corporate structuring and restructuring to gain access to investment treaties and arbitration."* (2015): 225.

17 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018); Canada- European Union Comprehensive Economic and Trade Agreement (CETA) (2018).

18 Simma, B. *"Foreign investment arbitration: a place for human rights?"* International & Comparative Law Quarterly 60.3 (2011): 574.

III. *Effectiveness of International Investment Laws in Promoting the Flow of Foreign Direct Investments*

Determining the effect of BITs on inward investment has become increasingly relevant to policymakers as concerns about the sovereignty costs these treaties impose have mounted. As a whole, the empirical evidence is decidedly mixed. Some scholars find BITs attract a substantial amount of investment, while some find no evidence that BITs are useful tools for generating FDI inflows. Some find BITs function as substitutes for domestic rule of law in countries that have weak property rights protections, while others find BITs can only attract investment in jurisdictions that achieve some minimum threshold of domestic legal institutional quality.[19]

Some academics argue that BITs serve as costly signals of governments' seriousness about protecting foreign firms' assets. Ratifying BITs can be costly because it necessitates the formation of a domestic coalition, despite the fact that such treaties frequently provide foreign investors with greater legal protection than domestic firms.[20] Thus, ratifying even one treaty may signal to the global investment community the strength of a polity's pro-FDI coalition. To the extent that governments believe they will be punished if they do not follow the terms of the treaty.[21] If BITs function as expensive signals, host countries with an active BIT program should attract more FDI overall, regardless of whether they have a treaty with a specific country partner.

Several studies find evidence to this effect. Neumayer and Spess find in a sample of 119 developing countries from 1970 to 2001 that signing more BITs increases undirected FDI inflows.[22] They estimate a one standard deviation increase in the number of signed BITs a developing country increases FDI inflows between 43.7 and 93.2 percent.[23] Kerner also finds evidence of a positive effect of extra-dyadic BITs on dyadic FDI flows in a sample of 127 developing host countries and 22 developed home countries from 1982 to 2001.[24] Bastiaens finds BITs have a positive effect on monadic FDI inflows in a sample of 87 authoritarian countries from 1990 to 2008.[25]

Another prominent argument is that BITs can influence investor behavior by credibly committing governments to providing specific and enforceable rights to investors covered

19 Danzman, 18.

20 Kerner, A. *“Why Should I Believe you? The Costs and Consequences of Bilateral Investment Treaties.”* International Studies Quarterly 53 (2009), 79–82.

21 Peterson, L. E. International Institute for Sustainable Development and Suisse. *Bilateral Investment Treaties and Development Policy-Making*. 2004.

22 Neumayer, E and Spess, “*Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?”* World Development 33 (2005): 1567–85.

23 Neumayer and Spess, 1582.

24 Kerner, 79–82.

25 Bastiaens, Ida. “*The Politics of Foreign Direct Investment in Authoritarian Regimes.”* International Interactions 42 (2016) 141.

by a treaty. This logic is derived from the literature on bargaining theories of war, which stresses the importance of hand-tying mechanisms to prevent reneging due to time-inconsistent preferences.[26] Scholars argue that BITs credibly commit host states to upholding treaty provisions due to the reputational and financial costs of breaching these treaties. BITs clarify host governments' obligations to foreign investors, making it easier to detect and punish fraud.[27]

Losing in investor-state arbitration can be costly financially and merely having an arbitration claim initiated against a host government may wipe out all of the increased FDI afforded by a BIT as the host country develops a reputation for truculence.[28]

BITs may impose greater restrictions on some countries while only weakly binding others. On the one hand, if BITs serve as a commitment to investor- friendly policies, the credibility of that commitment is determined by both the extent to which investors believe governments will honor their treaty commitments and the extent to which treaty terms offer strong or weak protection. This logic implies that BITs should be used to supplement local domestic laws and that only countries with a minimum level of rule of law and government constraints will be able to use BITs to attract investment.[29]

The impact of BITs on investment flows may be influenced by the prior relationship of the co-signatories to a specific BIT. According to Desbordes and Vicard, BITs are most useful in promoting FDI from home to host countries with a history of tensions; the BIT serves as a signal of the host countries' commitment to pro-market policies as well as important legal safeguards if bilateral relations deteriorate.[30] Investment treaties like BITs might hold a stronger influence on some forms of FDI over others. Kerner and Lawrence demonstrate US BITs increase fixed asset investments in treaty partners, but not other forms of more mobile investment like cash holdings. They argue this indicates that BITs are useful in reassuring investors that their immobile assets are safe, but do not increase more liquid investments.[31]

The totality of evidence suggests BITs probably do have some influence on investment decisions, but this effect is conditioned on several factors including the host country domestic legal environment, treaty design, signatories’ political and economic relationships, and investment type.

26 Fearon, James. “*Signaling Foreign Policy Interests: Tying Hands versus Sinking Costs.”* Journal of Conflict Resolution 41 (1997): 68–90.

27 Garcia-Bolivar, O. E and Schmidt. *“The Rise of International Investment Arbitration in Latin America.”* Latin American Law and Business Report 12 (2006) 25.

28 Allee, T and Peinhardt. *“Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment”* International Organization 65 (2011): 401–32.

29 Danzman, 23.

30 Desbordes, R and Vicard. “*Foreign Direct Investment and Bilateral Investment Treaties: An International Political Perspective.”* Journal of Comparative Economics 37 (2009): 372- 86.

31 Kerner and Lawrence, 107–21.

IV. Conclusion

International investment laws help to promote FDI flows and contribute to economic development in both host and home countries by creating a stable and appealing environment for foreign investors. It is important to note, however, that the effectiveness of these laws can vary depending on factors such as the specific terms of the agreements, host country implementation, and changes in global economic and political conditions.

C. DOMESTICATION OF INVESTMENT LAWS GOVERNING FDI

I. History of domestication of Investment laws.

Political liberalism, economic liberalism, and liberal internationalism serve as the pillars of the Liberal International Order (LIO), which was founded in the years following World War II.[32] It is founded on ideas like liberal democracy, open markets, and cooperation in the security sphere. These are constrained by legal norms like the rule of law and human rights. Liberal internationalism includes cooperation with the aid of multilateral organizations, such as the World Trade Organization (WTO) and the United Nations (UN).[33] 'Nationalism' and 'internationalism' have a dialectical relationship that has shaped the development of international organizations, including the governance of those organizations as a whole.[34] Nationalism expresses the belief that international organizations should serve the interests of States, whereas internationalism proposes that these organizations should ultimately serve the interests of the world's population.[35] International institutions of the economic sphere served as vehicles in the post-World War II international order for the liberalization of cross-border trade and investment; the dialectic appeared to have settled in favor of the international, at least when it came to economic issues.

Following the global financial crisis of 2008, there has been a relative decline in economic globalization. Since at least 2012, global trade has been declining, and global FDI has been declining since 2016.[36] The COVID-19 pandemic has accelerated these trends even further. This phenomenon has been dubbed "de- globalization”.[37] This has affected various aspects of the global economy but most relevant to this study, the flow of Foreign Direct Investments (FDI).

32 Barnett, M, 1–22.

33 Chaisse, Jullien, and Georgios Dimitropoulos. “Domestic Investment Laws and International Economic Law in the Liberal International Order.” *World Trade Review* 22.1 (2023): 1.

34 Mazower, M. *Governing the world: The history of an idea, 1815 to the present*. Penguin, 2013.

35 Mazower.

36 UN Conference on Trade and Development (2020) Global Investment Trends Monitor, Issue No. 33.

37 Irwin, D. A. *"The pandemic adds momentum to the deglobalization trend."* Peterson Institute for International Economics 23 (2020).

Overall, trust in post-World War II LIO of international institutions is dwindling. This is especially true of the institutions of the international economic order, particularly international investment arbitration, which helped shape the post-WWII international order's internationalism.[38]

States have the sovereign right to regulate foreign investment entry and establishment within their borders.[39] Domestic instruments and institutions that regulate foreign investment fall into two categories: domestic investment laws and non-investment specific laws relevant to cross-border trade and investment, such as property laws and arbitration laws.

Such laws coexist with international economic law instruments such as free trade agreements (FTAs) and international investment treaties (IIAs). The domestication of International Investment Law

The domestication of IEL appears to be challenging the post-WWII international order's assumptions. In an era of LIO dominance, IEL was shaped as a separate discipline of international law and has largely accommodated the free movement of goods and capital.[40] This explicit or implied ideological dominance of the LIO, as well as the legitimacy of this order and the international law it gave rise to, has gradually waned as a result of three interconnected developments: the rise of state capitalism as an opposing ideological paradigm, the crisis of international trade law, and the backlash against international investment law and arbitration.

The 'backlash' against international investment law and its institutions is now commonplace, and it is a symptom of a broader loss of faith in global capitalism's institutions.[41] Governments and other stakeholders in both the South and the North have expressed outrage and a desire to reform international investment law.[42] This shift could have far-reaching consequences for the foreign investment regime. The current crisis is serving as a catalyst for much-needed change.

Domestic laws were heavily relied on to regulate cross-border economic activity in the immediate postwar years. Following independence, the new states of the post-colonial world in Asia and Africa began developing domestic investment laws. During the 1950s and 1960s, this sparked academic interest in the field.[43]

Thus, until the middle of the twentieth century, international law was less relevant for regulating cross-border trade. Foreign trade was primarily conducted through the unilateral opening of domestic borders, and it was aided by a series of Treaties of Friendship,

38 Waibel, M. *The backlash against investment arbitration: perceptions and reality*, 2010.

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

40 Charnovitz, S. *"The historical lens in international economic law."* Journal of International Economic Law 22.1 (2019): 93–97.

41 Waibel.

42 Reisman, W. M. *"The empire strikes back: the struggle to reshape ISDS."* (2017).

43 Ahooja, K. *"Investment Laws and Regulations in Africa."* The Journal of Modern African Studies 2.2 (1964): 300.

Commerce, and Navigation (FCN).[44] FCN Treaties were usually signed bilaterally between Western States and included provisions for both trade and investment. Separate international investment treaties have begun slowly when the South's decolonization was well underway.[45] For investment and investor protection, specialized bilateral investment treaties began to replace FCN Treaties. In the second half of the twentieth century, international law largely replaced domestic law as the dominant system for cross-border trade and investment protection.

The rise of LIO and economic globalization accelerated the adoption of international trade and investment treaties. The LIO signaled a shift from domestic to international; an increase in the signing of international investment treaties, as well as a decrease in foreign property nationalization.[46]

In 1992, the World Bank released a study of existing instruments that focused on the admission, treatment, expropriation, and dispute resolution sections of 48 developing country investment codes.[47] Since then, developing countries have adopted some of the World Bank study's recommendations. In response to the World Bank's designation of arbitration as "international best practice," developing countries frequently incorporated international arbitration into their domestic laws.[48]

IEL crises are once again driving countries to adopt strong domestic frameworks for managing foreign economic flows. IEL generally regards FDI regulation as a sovereign right of states. There are no general international obligations to grant foreign investors market access or accept foreign investment into the host country. The standard BIT does not grant a foreign investor a right of admission or any other type of pre-entry protection for foreign investment; instead, BITs generally defer to the requirements of the host states.[49] The same can be said about the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which contains no rules on pre-entry protection for foreign investments.

44 Coyle, John F. *"The treaty of friendship, commerce and navigation in the modern era." Colum. J. Transnat'l L.* 51 (2012): 302–359.

45 Anghie, Antony. *Imperialism, sovereignty and the making of international law*. Vol. 37, 2007: Chapter 4.

46 Chaisse and Dimitropoulos, 3.

47 World Bank. General Counsel, International Finance Corporation. General Counsel, and Multilateral Investment Guarantee Agency. General Counsel. *Legal Framework for the Treatment of Foreign Investment*. Vol. 2. World Bank, 1992.

48 Berge, T. L, and St John. *"Asymmetric diffusion: World Bank 'best practice' and the spread of arbitration in national investment laws."* Review of International Political Economy 28.3 (2021): 584–610.

49 Article 2(1), Model BIT of Germany (2005).

In IEL, 'domestication' can be defined as a process of devolution from the international to the domestic, i.e. a shift from using international to domestic legal instruments to regulate cross-border trade and investment flows.[50]

States have resorted to domestic means to regulate foreign trade and investment more frequently in recent years. Policies aimed at attracting FDI have explicitly emphasized efforts to improve the host countries' overall enabling environment. Domestic law is being used by an increasing number of countries to govern the entry and development of foreign investments, provide assurances for profit repatriation, and resolve investment disputes. Tax breaks are frequently provided as well.[51] For example, use of extremely low corporate tax rates to entice both foreign corporations and domestic enterprises to stay. Preferential tariff regimes reduced red tape, increased infrastructure investment, and educational initiatives have also been implemented. These domestic policies are frequently implemented in order to replace international legal instruments.

These domestic policies are frequently implemented in order to replace international legal instruments. Other countries strengthen their domestic investment legal frameworks while pursuing international economic agreements.

II. Interplay

Overall, these changes in International Investment law may be interpreted as a shift from international to domestic. However, the interaction between domestic and international in IIL is extremely complex. Domestic laws, particularly when it comes to investment treaty arbitration claims, can be viewed as a source of international investment law. Domestic legal frameworks, according to Salacuse, are one of three legal layers of international investment that seek to encourage and control foreign investment.[52]

Domestic law, according to some scholars, is a formal source of foreign investment law.[53] Domestic investment laws may be construed as unilateral acts of states under international law.[54]

In order to promote FDI, governments often adopt national foreign investment statutes. Many of the same substantive protections are provided by these foreign investment laws (FILs) as investment treaties. FILs use definitions of "investor" and "investment" that closely resemble those found in investment treaties. FILs frequently include guarantees

50 Chaisse, Jullien, and Georgios Dimitropoulos, 3.

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

52 Salacuse, J. W. *The three laws of international investment: national, contractual, and international frameworks for foreign capital*, 2013: 36.

53 Douglas, Zachary, Joost Pauwelyn, and Jorge E. Viñuales, eds. *The foundations of international investment law: bringing theory into practice*, 2014: 213, 222.

54 Caron, D. D. *"The interpretation of national foreign investment laws as unilateral acts under international law."* Looking to the Future, 2011: 649.

on capital transfer, expropriation, and non-discrimination i.e national treatment, reflecting core protections in investment treaties. Some FILs also include, the almost universally found in investment treaties, guarantee of fair and equitable treatment.[55] These are aimed at providing assurance about the treatment of foreign investments, and provide consent for non-national dispute resolution mechanisms such as ICSID arbitration.[56]

National Foreign Investment Laws as a Basis for Consent to ICSID Jurisdiction

It is not sufficient that a contracting State ratifies the ICSID convention but both parties should further provide written consent to arbitration under the Convention.[57] Consent can be given in three different ways.

First, through a clause in the Investment agreement between the host state and the investor submitting future disputes to the jurisdiction of ICSID. Second, through national legislation by the contracting state. For this to amount to consent, the investor must accept it or it could be structured in a manner that the mere institution of arbitral proceedings amounts to acceptance. Third, through a BIT or Multilateral Investment treaty between host and home state containing an ICSID arbitration clause where the acceptance by the investor is achieved by instituting the arbitral proceedings.[58]

Therefore, as much as national legislations are unilateral actions, they must be evaluated according to the Vienna Convention and the ILC Guiding principles on unilateral acts which may lead to unilateral obligations that may affect its relationships with other states. it is clear that national legislation can serve as a form of consent to ICSID arbitration.[59]

III. Conclusion

In conclusion, international investment laws play an important role in promoting FDI by providing a stable and predictable legal framework that encourages and protects foreign entities' investments in a host country. These laws foster an environment of trust and security for foreign investors, resulting in increased FDI flows. On the other hand, domestic investment laws encourage and control FDI. Therefore, the two are co-dependent in promoting foreign direct investment.

55 Hepburn, Jarrod. *"Domestic investment statutes in international law."* American Journal of International Law 112.4 (2018): 658.

56 Caron, 649.

57 Article 25(1) ICSID Convention.

58 Schreuer, C. H. (2009). *The ICSID Convention: A Commentary*.241 – 45.

59 Caron, 674.

D. A LOOK AT KENYA'S INVESTMENT FRAMEWORK

I. Legal Framework of Investment Protection

The Investment sector in Kenya is regulated by both domestic, regional and international laws. Domestically, Kenya has various Acts of Parliament including the Investment Disputes Convention Act and the Foreign Investments Protection Act and the Investment Promotion Act. In accordance with Article 1(6) of the Constitution of Kenya, 2010, international treaties on Investment also apply provided they are ratified and are not inconsistent with the Constitution of Kenya.[60] Regionally, the East African Community and the African Union laws and policies also apply.

This section will therefore look into the various domestic and regional instruments governing Investment law and protection of Foreign Direct Investment.

1. Investment Disputes Convention Act

This Act was enacted in November 1966 and was last revised in 2012. This Act gives legal sanction to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other states. This Act confirms the status, immunities and privileges of ICSID as it accepts its Jurisdiction. This could be taken as an expression of Consent in the part of Kenya to arbitral proceedings before the ICSID tribunals. This Act further recognises awards rendered pursuant to the ICSID Convention and provides an obligation for the enforcement of such awards as if they were a final decree of the High Court of Kenya.[61]

2. Foreign Investments Protection Act

This Act was enacted in December 1964 and was last revised in 2017. This Act gives protection to certain approved foreign investments. It provides that the holder of an investor certificate under this Act shall be entitled to transfer out of Kenya profits arising out of his investments, capital and principal and interest of any loan specified in the certificate.

It also provides that no approved property belonging to a foreign investor shall be compulsorily acquired except with the payment of full and prompt payment of compensation as provided for in section 75 of the CoK.[62]

60 The Constitution of Kenya, 2010.

61 Laws of Kenya, Investment Disputes Convention Act, Act No. 31 of 1966.

62 Laws of Kenya, Foreign Investments Protection Act, Act No. 35 of 1964.

3. Investment Promotion Act

This act was enacted in December 2004 and was last revised in 2014. This Act aims at promoting and facilitating investment by assisting investors in obtaining the license necessary to invest and by providing further assistance and incentives. The act provides that an applicant shall be entitled to an investment certificate if the application is complete and satisfies the applicable requirements under this Act, the amount to be invested by a foreign investor is at least one hundred thousand United States of America dollars or the equivalent in any currency; the amount to be invested by a local investor is at least one million shillings or the equivalent in another currency ($10,000); and the investment and the activity related to the investment are lawful and beneficial to Kenya.

The Kenya Investment Authority (Ken Invest) is the primary investment agency in Kenya established by this Act of Parliament. According to the act, the Authority's primary mandate is to promote and facilitate the growth of both domestic and foreign investments in Kenya.[63]

4. EAC Investment Policy

The investment provisions of the EAC Customs Union Protocol include, among other things, rules on pre and post-entry treatment, investment incentives, competition, and dispute resolution.[64] Article 29 of the Common Market Protocol requires Partner States to protect cross-border investments and investment returns of other Partner States' investors within their territories, as well as a timetable for removing existing restrictions on the free movement of capital within the EAC region.[65]

According to the EAC Treaty, Partner States must "harmonise and rationalize investment incentives, including those relating to industry taxation." The free movement of goods, labor, services, and capital is guaranteed by the EAC Common Market Protocol. Its investment provisions call for the protection and harmonization of tax regulations. Finance Ministers developed and approved an EAC Domestic Tax Harmonization Policy at the Sectoral Council on Finance and Economic Affairs' 8th Meeting in May 2018. Detail harmonization proposals for VAT and excise tax rates were being developed for the finance ministers' consideration.

The EAC Model Investment Code of 2006 allows for free asset transfer as well as protection from unjustified expropriation. EAC countries can negotiate and sign third-country investment treaties. A Model Investment Treaty was adopted in 2016 with the intention of guiding and serving as a template for negotiations.[66]

63 Laws of Kenya, Investment Promotion Act, Act No. 6 of 2004.

64 Protocol on the Establishment of the East African Customs Union.

65 Protocol on the Establishment of the East African Community Common Market.

66 www.eac.int/regional-framework/investment-framework (last accessed 8/24/2023).

In contrast, double taxation remains a significant impediment to cross-border investment flows. Cross-border investment income is taxed not only in the country of origin, but also in the taxpayer's home country. The East African Community signed an Agreement on the Avoidance of Double Taxation in November 2011, but the ratification process is still ongoing (EAC, 2016, The East African Community Handbook on the Avoidance of Double Taxation). Because of concerns about revenue loss and tax evasion, the ratification process is taking its time. Kenya, Rwanda, and Uganda have so far ratified the Agreement.

Furthermore, the EAC Partner States have established their own institutions and regulatory frameworks to deal with foreign investment. Each country's requirements for company registration and incorporation procedures, permits and licenses, property acquisition, capital and land access, ownership and management control, and exit procedures are different.

In conclusion, the EAC Investment framework is comprehensive yet it all trickles down to the individual national laws to provide the right environment and good will to advance the EAC objectives.

5. African Continental Free Trade Area (AfCFTA)

The African Continental Free Trade Area (AfCFTA) is one of the African Union (AU) Agenda 2063: *The Africa We Want* flagship projects. It is a high- achievement trade agreement with a broad scope that includes critical areas of Africa's economy, such as digital trade and investment protection, among others. The AfCFTA's goal is to significantly increase intra-Africa trade, particularly trade in value-added production and trade across all sectors of Africa's economy, by eliminating trade barriers in Africa.

The African Continental Free Trade Agreement (AfCFTA) is the world's largest free trade agreement, bringing together the 55 countries of the African Union (AU) and eight (8) Regional Economic Communities (RECs) to form a single market for the continent. The goal is to facilitate the free flow of goods and services across the continent and to strengthen Africa's trading position in the global market.

The AfCFTA's mandate includes removing trade barriers and increasing intra- Africa trade. Its primary goal is to promote trade in value-added production across the African economy's entire service sector. The AfCFTA’s goal is to help Africa establish regional value chains, allowing for investment and job creation. The practical implementation of the AfCFTA has the potential to promote industrialization, job creation, and investment, thereby improving Africa's long-term competitiveness.

The AfCFTA entered into force on May 30, 2019, following the deposit of 24 Instruments of Ratification by 24 Member States following a series of continuous continental engagements that began in 2012. It was launched in July 2019 at the 12th Extraordinary Session of the AU Assembly of Heads of State and Government in Niamey, Niger. The AfCFTA was set to go into effect on January 1, 2021.

The Pan-African Investment Code (PAIC) is the African Union's first model investment treaty covering the entire continent. The PAIC was written with developing and least-developed countries in mind, with the goal of promoting sustainable development. The PAIC contains a number of Africa-specific and innovative features, presumably making it a one-of-a-kind legal instrument today.

Throughout the last fifty years of international investment law practice, African countries have been viewed as 'investment rules takers.' This is due in part to the economic development asymmetry between African host countries and the home countries of investors. African economies relied heavily on international private capital commitments in the past and continue to do so today. In order to attract more foreign investment, African countries signed numerous BITs with capital-exporting countries, typically by accepting those countries' pre-drafted Model BITs.

With the adoption of modern investment treaties or model investment treaties, African RECs have now become "investment rule makers." The COMESA and SADC regions developed instruments that not only protect foreign investors, but also take into account larger policy objectives, particularly sustainable development goals. However, within Africa, regionalism carries the risk of overlapping legal commitments and uncertainty about the applicable rules. If Africa's various RECs develop their own investment regimes, the risk of fragmentation is high. The PAIC is the first continent-wide model investment treaty, which may help to ensure greater consistency in the regulation of foreign investments across the African continent. Despite its non-binding nature, the PAIC will serve as a guide for the IIA negotiations of AU Member States.

II. Reflecting the African Context with the Association of East Asian Nations (ASEAN)

After reviewing the AfCFTA, it is critical to consider how other successful regions have organized themselves and whether Kenya and Africa as a whole are on the right policy track. The ASEAN region is the best and has the fewest disparities with the African context. The establishment of the AEC in 2015 marked a watershed moment after the ASEAN Charter granted the organization legal personality 'as an inter-governmental' organization.[67] In response to the shortcomings of the ASEAN Free Trade Area and the Asian financial crisis, the AEC is one of the three pillars of an ASEAN Community.[68]

The new AEC Blueprint 2025, which succeeded the AEC Blueprint 2015, is an integral part of the guiding document of 'ASEAN 2025: Forging Ahead Together'.[69] The first and most important feature of the AEC Blueprint 2025 is 'A Highly Integrated and Cohesive

67 Arts. 1(1) and 3, Charter of the Association of Southeast Asian Nations (2007).

68 Mercurio, B. *"Trade liberalisation in Asia: why intra-asian free trade agreements are not utilised by the business community."* Asian J. WTO & Int'l Health L & Pol'y 6 (2011): 109.

69 Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together (2015).

Economy.'[70] Its main goal is to "create a more unified market" by enabling "the seamless movement of goods, services, investment, capital, and skilled labor."[71]

The ASEAN way was restructured, and the concept of ASEAN law was reinforced by the AEC and ASEAN Plus One FTAs. The ASEAN way refers to the collective principles of sovereignty, non-intervention, and decision- making consensus, which are based on the Indonesian concepts of musyawarah and mufakat (consultations and consensus).[72] In practice, it has served as an inter-state code of conduct as well as a decision-making mechanism for reaching consensus through consultations.[73]

I believe that the legalization of the AEC has galvanized the ASEAN way into a hybrid political and legal concept. The ASEAN approach to regionalism is no longer regarded as a non-binding soft law approach. The new ASEAN approach, on the other hand, combines structured flexibility with hard-law obligations.[74] The ASEAN Comprehensive Investment Agreement (ACIA) is the key instrument for investment liberalization and protection under the AEC Blueprint 2025. ASEAN's FDI inflows more than tripled during the Third Regionalism, and the value of FDIs now accounts for 21 % of FDI stock in developing countries.[75] In terms of attracting FDI, ASEAN has also surpassed China. The ACIA, which was signed in 2009, combines the Investment Promotion and Protection Agreement of 1987 and the Framework Agreement on the ASEAN Investment Area of 1998. These pre-ACIA agreements and their amending protocols did not have the desired impact.

The 1987 Agreement was comparable to traditional BITs that did not allow for liberalization of investment.[76] With its exclusion lists, the 1998 Framework Agreement was unable to assist ASEAN in recovering from the Asian financial crisis. As a result, the ACIA seeks 'progressive liberalization' of existing restrictions, as well as increased investment protection and transparency of investment rules.[77]

Despite the absence of a direct EU-like effect, the ACIA facilitates the harmonization of domestic investment laws in the ten ASEAN countries and provides best practices for investment reforms.

While de-globalization has reduced multilateral institutions' effectiveness, domestication of international economic law has strengthened the mutual relationship between re-

70 ASEAN Economic Community Blueprint 2025 (2015) (AEC Blueprint 2025).

71 ASEAN Economic Community Blueprint 2025 (2015) (AEC Blueprint 2025).

72 Acharya, Amitav. *Constructing a security community in Southeast Asia: ASEAN and the problem of regional order*, 2014: 3–5.

73 Acharya, Amitav. *"Ideas, identity, and institution-building: From the 'ASEAN way' to the 'Asia-Pacific way'?"* The Pacific Review 10.3 (1997): 319, 328–330.h.

74 Hsieh, P. L. *New Asian regionalism in international economic law*, 2022: 37.

75 Secretariat, A. S. E. A. N. *"ASEAN at 50: A Historic Milestone for FDI and MNEs in ASEAN."* ASEAN Secretariat: Jakarta (2017) :6–7.

76 Chaisse, J, and Jusoh, S. *The ASEAN comprehensive investment agreement: The regionalisation of laws and policy on foreign investment*, 2016: 67- 68.

77 AEC Blueprint 2025.

gional and national investment regimes. New investment laws, particularly in Laos and Myanmar, demonstrate the ACIA's normative impact.[78] The Investment Promotion Law of Laos, as amended in 2016, applies to both domestic and foreign investments, bringing national standards much closer to ACIA requirements.[79]

The ACIA is applicable to ASEAN investors and investments and exemplifies Asia's evolving investment law rulemaking. While investors include both natural and legal persons, a non-ASEAN enterprise may be eligible for ACIA benefits and protection if it is incorporated and maintains 'substantial business operations' in an ASEAN country. The ACIA, influenced by the US Model BIT, adopted a broad, non-exhaustive, asset-based definition of investments that includes 'every kind of asset'.[80]To prevent claims from multiplying, the ACIA excludes assets that lack "investment characteristics."[81]

The ACIA also does an exemplary job in balancing domestic law and traditional bilateral treaties. It provides FET with 'greater certainty' by preventing the host country from denying justice and, according to the investors, due process 'in legal and administrative proceedings'.[82] The ACIA's MFN clause also excludes ISDS proceedings to protect regulatory sovereignty.[83] The ACIA's denial of benefits provisions, which exclude certain investors from the agreement, may further reduce treaty shopping, according to best practices in domestic law.[84] ASEAN Plus One FTAs include similar provisions.[85]

III. Conclusion

In many ways, ASEAN and AfCFTA are similar, but one appears to be more progressive than the other. Perhaps because of the five-year time lag between the implementation of the two systems. Both regional systems are distinguished by a diverse range of cultural and linguistic contexts. The diversity is also visible in the two regions' general economic development levels, which range from developed to least developed. One point of difference is that ASEAN covers a smaller geographical area with ten countries compared to the AU's 55 member states. This, however, does not diminish the similarities between ASEAN and AfCFTA, as they both provide similar levels of diversity. As a result, if ASEAN

78 Jusoh, Sufian. *"Investment Liberalization in ASEAN: Moving Myths to Reality."* ASEAN Law in the New Regional Economic Order: Global Trends and Paradigms, 209 (2019): 209, 218–225.

79 Organisation for Economic Co-operation and Development, *'OECD Investment Policy Reviews: Lao PDR'*, 2017.

80 Art. 4(c), ACIA.

81 Art. 4(c), ACIA.

82 Art. 11, ACIA.

83 Art. 6, ACIA.

84 Ramli, I. M. *"Denial of Benefits in Investment Arbitration: Genesis, Trends, and Application."* Handbook of International Investment Law and Policy, 2021: 1014, 1016–1026.

85 Ramli, 1027–1029.

can be used as a time machine to predict the AfCFTA in the next five years, Africa is unquestionably on the right track.

E. RECOMMENDATIONS AND CONCLUSION

I. Recommendations

Improving the coherence and efficiency of the International Investment Law (IIL) regime and domestic law regime in the context of Foreign Direct Investment (FDI) necessitates careful consideration of a number of factors. Here are some possible reform or harmonization areas that could contribute to a more coherent and effective framework:

1. Definitions and standards must be consistent and clear.

There is need for the establishment of clear and consistent definitions of key terms, such as "investor," "investment," and "expropriation," in order to reduce ambiguity and conflicting interpretations. To further reduce confusion and ensure predictability, there is need for harmonization of the standards of protection and treatment offered to foreign investors across different international agreements and domestic laws.

2. Reform of Investor-State Dispute Settlement (ISDS):

To increase transparency and accountability in ISDS proceedings, open hearings and increased participation of third parties such as civil society organizations should not only be allowed but encouraged.

There is also a need for an appellate mechanism similar to the World Trade Organization's (WTO) Appellate Body to ensure consistency and coherence in the interpretation of investment treaties.

3. Investor Rights vs. Regulatory Sovereignty:

It is important to clarify the scope and limitations of investor rights, such as the right to fair and equitable treatment, in order to strike a balance between protecting investors and preserving host states' regulatory space. There should be clear provisions giving guidance on legitimate public policy objectives such as, health, the environment, and human rights that can be used to justify regulatory measures that may have an impact on foreign investments. Cooperation and coordination:

To facilitate the sharing of best practices and experiences, there is need to establish a platform for regular dialogue and cooperation between international organizations such as UNCTAD and ICSID and national governments. This cooperation and coordination will encourage host countries to implement mechanisms for consulting with foreign investors before making significant regulatory changes that may affect FDI.

4. Technical assistance and capacity building:

Technical assistance and capacity-building programs should be made available to developing countries to assist them in effectively negotiating, implementing, and managing investment agreements. This should be part of an incentive to encourage the development of knowledge-sharing and peer-learning platforms where countries can share their experiences and lessons learned in managing FDI-related issues.

5. Promotion of Alternative Dispute Resolution and Dispute Prevention:

To avoid costly and time-consuming ISDS cases, there is need to encourage the use of alternative dispute resolution mechanisms such as mediation and negotiation. For this to work, however, there is a requirement for the creation of guidelines for the early assessment and resolution of investment-related disputes in order to avoid the need for formal arbitration.

6. Reform of Domestic Law:

To ensure coherence and avoid conflicting obligations, domestic laws should be aligned with international commitments. It is important that clear and transparent domestic investment frameworks are created in order to provide a stable and predictable environment for foreign investors. These potential reform or harmonization areas reflect a comprehensive approach to improving the coherence and efficiency of the International Investment Law regime and the domestic law regime governing Foreign Direct Investment. However, implementing such reforms would necessitate the cooperation of a wide range of stakeholders, including governments, international organizations, investors, and civil society, and would have to take into account the unique circumstances and needs of each country.

II. Conclusion

In conclusion, while domestic investment laws lay the groundwork for a favorable investment climate within a country, international investment laws provide an additional layer of protection and recourse for foreign investors, thereby encouraging FDI by improving legal certainty, transparency, and risk mitigation. Both sets of laws complement one another in order to attract and facilitate foreign direct investment.

Domestic investment laws lay the groundwork for a favorable investment climate within a country. These laws establish the legal framework that governs business operations, protects property rights, and encourages investment. International investment laws, on the other hand, provide an extra layer of protection and assurance for foreign investors, assisting in mitigating the risks associated with investing in a foreign jurisdiction. Together, these laws make the environment more appealing and secure for FDI.

Domestic investment laws that are clear and transparent improve predictability and legal certainty for all investors, both domestic and foreign. This transparency is critical for increasing investor trust and encouraging long-term investment commitments. International investment laws help to achieve this by establishing minimum standards of treatment and dispute resolution mechanisms that contribute to a stable investment environment. International investment laws can assist in mitigating the perceived risks of investing in a foreign country. When investors are confident that they are protected by international treaties, they may be more willing to invest in projects that benefit the host country's economic development.

When a foreign investor and a host country disagree, international investment laws provide mechanisms for resolving disputes outside of the host country's domestic legal system. This can provide a level of impartiality and fairness that is not always guaranteed within the legal framework of the host country.

To sum it up, domestic and international investment laws serve distinct but interconnected functions in promoting foreign direct investment.