

Introduction

The law of foreign investment is at a crossroads, in the wake of a dramatic surge of investment treaty arbitration cases (Figure 1) and an unprecedented global financial crisis leading to a sharp decrease in global investment flows (Figure 2). Scholars and government officials from both developed and developing worlds have been debating whether and to what extent the previously neo-liberalist approach represented by liberal bilateral investment treaties (BITs) should be reformed to fit the new reality of the current world. This study presents an updated account of the status quo of the legal protection of foreign investment in the world, on the basis of a comparative study of reports on the subject from 22 representative jurisdictions, taking into account other relevant recent studies, such as those conducted by the UNCTAD and OECD.

The main purpose of this report is to identify major differences, similarities and trends in the law of foreign investment protection in different jurisdictions, and make suggestions for future actions to be taken at global and/or jurisdictional levels. The surveyed laws cover both domestic law and applicable international treaties. Wherever possible, it also investigates how they have been implemented and interpreted in practice.

This report is primarily based on 22 original jurisdictional reports¹ produced by leading scholars from the corresponding jurisdictions, comprising Argentina, Australia, Canada,

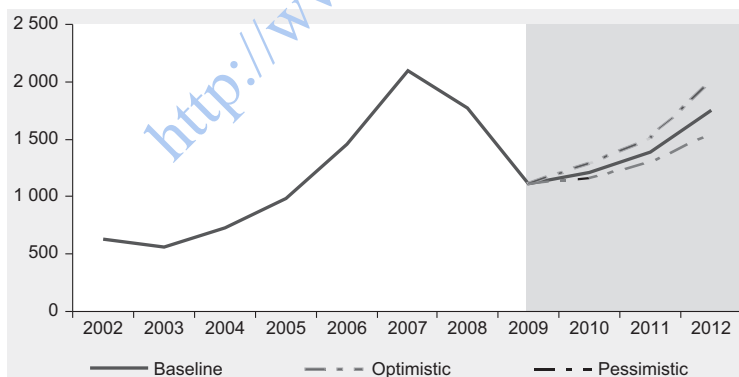


Figure 1: Global FDI Flows 2002–09, with Predictions for 2010–12 (US\$ billion)
Source: UNCTAD, *World Investment Report 2010*

¹ The commonly used term is 'national report'. However, the term 'jurisdictional report' is used here as it is more appropriate to also cover the report of Macau, which is not a 'National Report'.

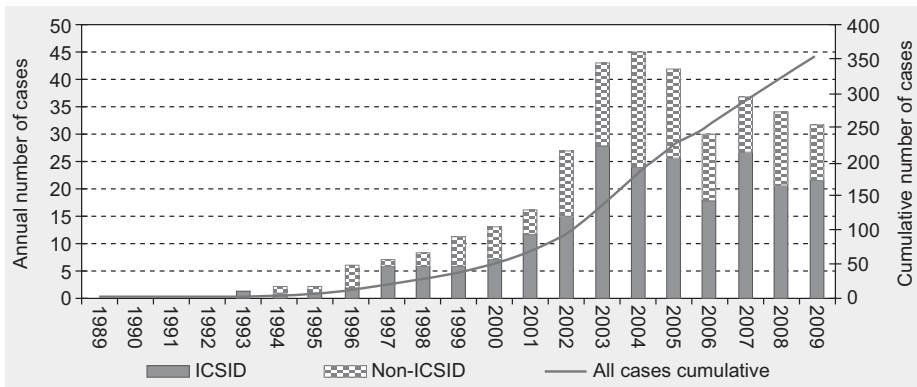


Figure 2: Known Investment Treaty Arbitration Cases (Cumulative and new cases) 1989–2009
 Source: UNCTAD, *World Investment Report 2010*

China, Croatia, Czech Republic, Ethiopia, France, Germany, Greece, Italy, Japan, South Korea, Macau, Peru, Portugal, Russia, Singapore, Slovenia, Turkey, the UK and the US.² They cover all of the five continents, and three major categories of economies namely developed, developing and the transition economies. They not only include 7 of the top 10 foreign direct investment (FDI) recipients in the world, but also 8 of the top 10 capital exporting countries (Figure 3). Six of the reported economies are also among the top ten signatories of BITs up to end 2003 (Figure 4). It can therefore be said that, to a considerable extent, this study illustrates the status quo of legal protection of foreign investment in the world.

As do the jurisdictional reports, this general report follows the questionnaire designed by the general reporter for this study. It intends to cover the most important aspects concerning the protection of foreign investment, ranging from admission regimes to post-admission standards of treatment, from protection against expropriation and guarantee of free transfer to settlement of investment disputes. It starts with a comparison of the overall legal framework for foreign investment and concludes with an outlook at the future regime on international investment.

The study has identified three main themes of recent development in foreign investment protection, namely harmonisation, balancing and socialisation. It concludes that the paradigm of international investment law has been shifting from a north–south divide to a private–public debate, and that the future development of international investment law will most likely lead to a multilateral investment agreement (MIA) effectuating a balanced liberal investment regime.

² Jurisdictional Reporters are approved by the International Academy of Comparative Law (IACL) upon nominations by either the corresponding national committee of the IACL or the general reporter.

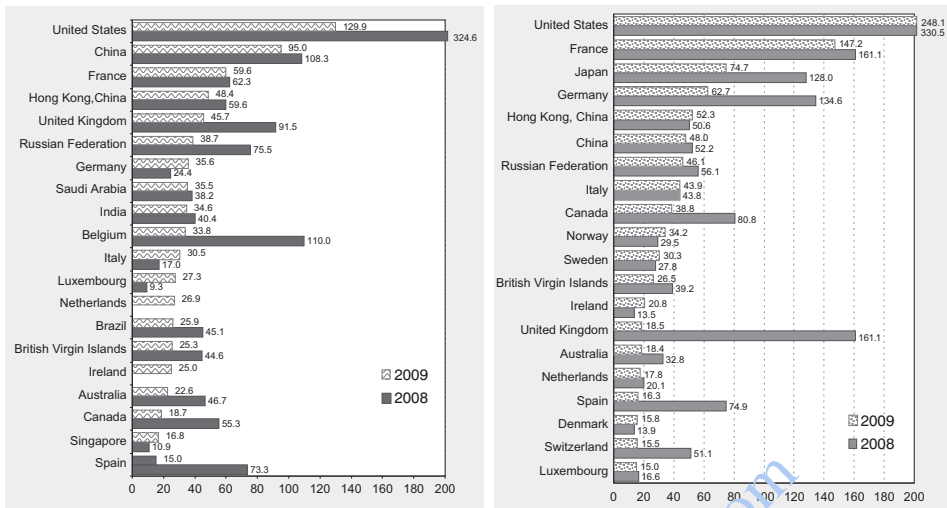


Figure 3: Top 20 FDI Importers and Exporters 2008–09 (billion US\$)
 Source: UNCTAD: *World Investment Report 2010*

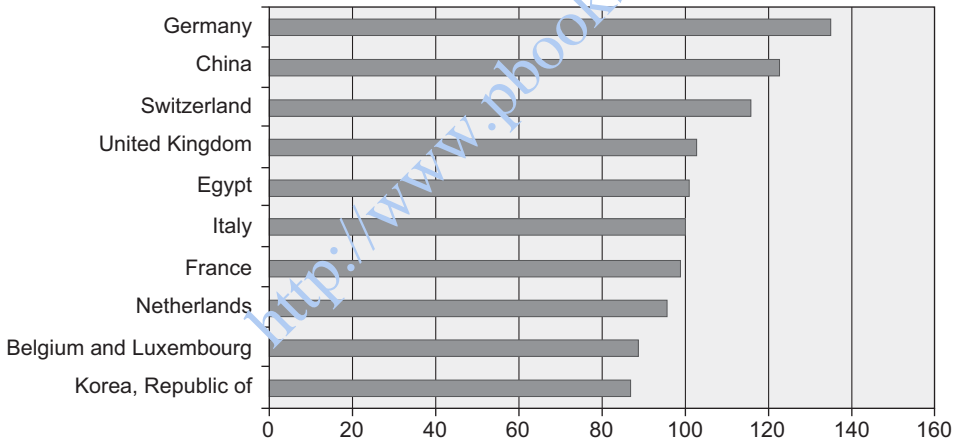


Figure 4: Top Ten Signatories of BITs by 2008
 Source: UNCTAD (www.unctad.org/iia)

I. The Legal Framework

A. Domestic Laws and Regulations

Protection of foreign investors and investments is often provided in the constitutions¹ of the host economy. Many of the constitutions stipulate that foreign investments and investors are protected in the same way as native investments and investors (national treatment).² They also tend to provide protection of property, as well as guarantees against impairment of contractual rights.³

Protection of foreign investments can also be found in forms of domestic law other than the constitution, such as the laws, regulations and administrative decrees. As Table 1 demonstrates, 11 of the 22 jurisdictions have special laws regulating foreign investment, whilst others do not. Australia, Canada, China, Russia and Turkey are among these having special foreign investment laws. In Australia, the Foreign Acquisitions and Takeovers Act 1975 (the FATA) and its implementing regulations have been promulgated to regulate foreign acquisition and takeovers of Australian companies.⁴ In Canada, the law governing foreign direct investment activities is the Investment Canada Act.⁵ Foreign investment in China is primarily governed by Sino-Foreign Equity Joint Venture Law, Sino-Foreign Contractual Joint Venture Law and the Wholly Foreign Owned Enterprises Law.⁶ In Russia, the two basic laws governing foreign investment are the Federal Law on Foreign Investment in the Russian Federation and the Federal Law on Investment Activity in the Russian Federation.⁷ In Turkey, foreign direct investment is governed by the Foreign Direct Investment Law (Table 1).⁸ It can be seen that it is not only developing states that have adopted special regimes for foreign investment; developed states such as Australia, Canada and Greece have taken the same course of action. There seems to be no clear-cut distinction between developed and developing states in this regard.

¹ In the case of Macau, the 'Constitution' is the Basic Law of Macau Special Administrative Region of the People's Republic of China.

² For example, the Peruvian Constitution states that 'National and foreign investments are subject to the same terms'. The US Constitution prohibits state and local governments from discriminating against resident aliens, except in the case of the exercise of political rights or employment as a public officer. See Article 63 of the Peruvian Constitution; US Report, section on 'General standard of treatment of foreign investment and investors'.

³ The Charter of Fundamental Rights and Freedoms of Czech Republic, for example, guarantees the right to property for everyone, including foreign investors. On the other hand, the contracts clause in the US Constitution prohibits the state or local government from impairing the obligation of contracts. See the Czech Report, section I (on the framework and hierarchy of foreign investment laws and treaties); US Report, section on 'investment contracts' (citing Art 1, s 10 of the US Constitution).

⁴ Australia Report, section I.

⁵ Canada Report, section I.

⁶ China Report, section I.

⁷ Russia Report, section I.

⁸ Turkey Report, section I.

B. Applicable International Treaties

So far, there has been no comprehensive agreement on a global scale on foreign investment, in sharp contrast to the area of international trade, where the World Trade Organization (WTO) agreements provide the general legal framework for world trade regulation. There are nevertheless some specialised multilateral investment treaties, such as the International Centre for Settlement of Investment Disputes (ICSID) Convention and the Multilateral Investment Guarantee Agency (MIGA) Convention, which focus on certain aspects of investment protection. The General Agreement on Trade in Service and the Trade Related Investment Measures Agreements under the regime of the WTO, and New York Convention are also very important for protection of foreign investments. Among the 22 jurisdictions, 20 are WTO members (excluding Ethiopia and Russia); 20 ratified the ICSID Convention (except Canada, and Ethiopia); 21 are parties to the New York Convention (excluding Ethiopia); and 22 are MIGA member states. In other words, these multilateral agreements are playing important roles in regulating and facilitating foreign investment in these jurisdictions, as they do in the rest of the world (Table 1).

However, the most important instrument for investment protection continues to be bilateral investment treaties (BITs).⁹ It is not surprising that all the 22 jurisdictions have concluded BITs; together, the number has reach 1355, nearly half of the total number of BITs in the world (Table 1). Six of the jurisdictions are among the top ten signatories of the world.¹⁰ Germany leads the league table, followed by China (2nd), the UK (4th), Italy (6th) France (7th) and South Korea (10th).¹¹ Other international investment-related agreements ('other IIAs', as termed by the UNCTAD reports), such as free trade agreements (FTAs), have gained significance in investment protection.¹² For example, Canada, China, France, Germany, the UK, the US and Korea have all concluded at least one new IIA between November 2009 and May 2010.¹³ It should nevertheless be noted that such IIAs tend to focus on investment liberalisation and investment promotion, rather than providing a full set of investment protection provisions typically found in BITs.¹⁴ They therefore tend to be complementary to rather than substitutes for BITs.

⁹ According to the statistics of United Nations Conference on Trade and Development (UNCTAD), the total number of BITs rose to 2,750 at the end of 2009. See UNCTAD, *World Investment Report 2010*, 81.

¹⁰ See UNCTAD/WEB/DLAE/IA/2009/8, 'Recent Developments in International Investment Agreements (2008-June 2009)', IIA Monitor No 3 (2009), available at: http://www.unctad.org/en/docs/webdiaeia20098_en.pdf.

¹¹ *Ibid.*

¹² UNCTAD statistics show that, by the end of 2009, 2,894 double taxation treaties (DTTs) and 295 other IIAs have been concluded, making the total number of IIAs reaching 5939. See UNCTAD, *World Investment Report 2010*, 81.

¹³ UNCTAD and OECD, 'Third Report on G20 Investment Measures' (Geneva and Paris, 14 June 2010), 7.

¹⁴ It is noted, however, that most of Canada's FTAs (eg the North American Free Trade Agreement and the FTAs with Chile and Jordan, but not the European Free Trade Area FTA and the Costa Rica FTA) include investment chapters that are just like Canada's BITs.

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Table 1: Legal Framework Compared in the 22 Jurisdiction

Jurisdiction	Special FI law	International treaties		International treaties vs. domestic law			Transparency	
		BITs	Multilateral agreements	Transformation	Incorporation	Partial incorporation	Public access	Public consultation
Argentina	✓ (Foreign Investment Law, law 21382 of 1976)	59	ICSID, New York Convention, MIGA, WTO		✓		✓ (Official Gazette, Congress's website)	✓ (public hearings and comments)
Australia	✓ [Foreign Acquisitions and Takeovers Act 1975 (Cth) (the FATA)]	23	ICSID, New York Convention, MIGA, WTO	✓			✓ (Australasian Legal Information Institute)	✓ (parliamentary committee system at federal and state levels)
Canada	✓ (Investment Canada Act)	28	New York Convention, MIGA, WTO, NAFTA	✓		(customary or automatically incorporated)	✓ (Access to Information Act, Privacy Act, Official Gazette)	✓ (public hearing, consultation, and Parliamentary committee system at federal and state levels)
China	✓ (EJCL, CJVL, WFEL, etc)	130	ICSID, New York Convention, MIGA, WTO, FTAs	✓			✓ (State Council Gazettes, Official Websites)	✓ (public hearing, expert consultation and congress discussions)
Croatia	×	59	ICSID, New York Convention, MIGA, WTO		✓		✓ (Official Gazette)	✓
Czech Republic		83	ICSID, New York Convention, MIGA, WTO, and the ECT		✓		✓ (law on free access to information)	/
Ethiopia	✓ (Investment Proclamation, etc)	30	MIGA, COMESA, IGAD		✓		✓ (National Gazette, EIA website)	/
France		102	ICSID, New York Convention, MIGA, WTO, and the ECT			EU law has direct effect.	✓	✓

Table 1: continued

Jurisdiction	Special FI law	International treaties		International treaties vs. domestic law			Transparency	
		BITs	Multilateral agreements	Transformation	Incorporation	Partial incorporation	Public access	Public consultation
Germany		139	ICSID, New York Convention, MIGA, WTO, ECT	✓		(customary law and general principles of public international law)	✓ (Official Gazette)	✓ (public hearings, expert consultation, etc)
Greece	✓ (Legislative Decree 2687/1953)	44	ICSID, New York Convention, MIGA, WTO, ECT	✓		EU law has direct effect	✓ (Government Gazette (Efimerida tis Kyverniseos))	/
Italy		95	ICSID, New York Convention, MIGA, WTO, ECT	✓		EU law has direct effect	✓ (the national Official Journal etc)	✓
Japan		16	ICSID, New York Convention, MIGA, WTO, ECT			✓ (self-executing treaties directly applicable)	✓ (government's website)	✓
South Korea	✓ (Foreign Investment Promotion Act)	94	ICSID, New York Convention, MIGA, WTO		✓		✓ (Official Gazette, internet)	✓
Macau		2				✓ (direct effect depends on the treaty itself)	✓ (Official Bulletin)	✓
Peru	✓ (Legislative Decree No 662 and Decree No 757)	29	WTO, ICSID, MIGA, New York Conventions, WTO,		✓		✓ (Official Gazette)	/
Portugal		51	ICSID, New York Convention, MIGA, WTO, ECT		✓		✓ (publication as a condition for validity)	✓

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Table 1: continued

Jurisdiction	Special FI law	International treaties		International treaties vs. domestic law			Transparency	
		BITs	Multilateral agreements	Transformation	Incorporation	Partial incorporation	Public access	Public consultation
Russia	✓ (The Law on Investment Activity and the Law on Foreign Investments)	67	ICSID, New York Convention, MIGA		✓		✓ (Official Gazette, internet)	✓
Singapore		41	ICSID, New York Convention, MIGA, WTO		✓		✓ (Government Gazette and database)	
Slovenia	✓ (Promotion of Foreign Direct Investment and Internationalisation of Enterprises Act)	38	ICSID, New York Convention, MIGA, WTO, ECT		✓		✓ (Official Gazette, internet)	✓
Turkey	✓ (Foreign Direct Investment Law)	80	ICSID, New York Convention, MIGA, WTO		✓		✓ (Official Gazette and internet)	✓
UK		105	ICSID, New York Convention, MIGA, WTO, and the ECT	✓		EU law has direct effect.	✓ (Official Gazette and internet)	✓ (a comprehensive system)
USA		40	ICSID, New York Convention, MIGA, WTO,			✓ (self-executive directly applicable)	/	/
Total	11	1355		7	11	3		

II. The Relationship between International Treaties and Domestic Laws

To establish the legal framework for foreign investment protection, it is necessary to investigate the relations between domestic and international norms existing within the framework. Without indulging in a lengthy discussion on relevant theories, suffice it to

remind that there are different theories on such relationship, including dualism, monism and 'a third approach, being somewhat a modification of the dualist position'.¹⁵ Another classification is between 'transformation' and 'incorporation' approaches. In practice, it is not always so easy to classify a jurisdiction as falling squarely within one of categories. Whilst the dualist theory may still represent the legal reality of the world, the Kelsenian monist theory seems to have been gaining ground with international law making more and more significant inroads into domestic legal systems.¹⁶ In this regard, international investment law provides a significant example, as it is increasingly impacting domestic law and policy makings.

Most of the 22 jurisdictions have express rules on the relationship between international law and domestic law in their constitutions. The exceptions are China, Japan and the UK, which does not have such constitutional rules or even a written constitution. With respect to the hierarchy between international treaties and domestic laws, most of the constitutions recognise the supremacy of the constitution. In general, the legal hierarchy goes from higher to lower as follows: the constitution, international treaties and national laws.¹⁷ However, there are exceptions and complications. The Supreme Court of Japan, for instance, considers that certain types of treaties, such as the peace treaties and treaties modifying territories, are superior to the constitution.¹⁸ The Constitution of Argentina gives primacy of integration and human rights treaties over other treaties.¹⁹ Under Peruvian laws, the hierarchy of international treaties depends on the status of the legal entity approving the treaties.²⁰ Consequently, the hierarchy of the laws goes from higher to lower as follows: constitution, international treaties approved by congress, national law, international treaties approved by the president.²¹

In cases of conflict between international treaties and domestic laws, most states provide that international treaties shall prevail. However, in the US a treaty has the same status as a federal law, and a subsequently enacted federal law can supersede a treaty for domestic purposes, even though the treaty may still be binding as a matter of international law. The same applies to Germany, where international treaties are conceived as federal statutes within the domestic hierarchy. International treaties may be abrogated or amended by subsequent federal statutes, even though it might trigger international responsibility from an international law perspective. German constitution nevertheless requires subsequent statutes being interpreted and applied in utmost conformity with previous international treaties, unless the legislator's intention to deviate from a previous treaty is explicit and unquestionable.

As Table 1 shows, many jurisdictions do not recognise 'direct effect' of international treaties within the domestic legal system. Thus in states such as the UK, Germany, China, Australia, Canada and Greece, foreign investors cannot directly invoke international trea-

¹⁵ See, eg MN Shaw, *International Law*, 5th edn (Cambridge, Cambridge University Press, 2003) 121–24.

¹⁶ A Cassese, *International Law*, 2nd edn (Oxford, Oxford University Press, 2005) 216–17.

¹⁷ In Argentina, for instance, treaties prevail over internal laws, but not provisions of the Federal Constitution. See the Argentina Report, section I.

¹⁸ Japan Report, section I.

¹⁹ Argentina Report, section I.

²⁰ Peru Report, section I.

²¹ *Ibid.*