Comparative and International Investment Law: Prospects for Reform – An Introduction

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Contemporary international investment law and arbitration are facing challenges which have been labelled as the ‘backlash’ against international investment law.¹ In response, the backlash-related discussion has been very productively transformed into a reform debate in international organizations² and academia.³ The present Special Issue of the Journal of World Investment & Trade on ‘Comparative and International Investment Law: Prospects for Reform’ includes contributions from scholars and practitioners in international law, comparative law, and international economic law that deal with the backlash and take different viewpoints, as well as sometimes different stances, regarding the future direction of the reform process. All the contributions follow though a similar methodological approach; they tap into a rather underutilized resource of the investment law regime: domestic investment law and policy. The articles look at the domestic level of investment governance

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1 Michael Waibel and others (eds), *The Backlash Against Investment Arbitration. Perceptions and Reality* (Kluwer 2012).

2 The reform discussion process is prominently taking place within Working Group III: Investor-State Dispute Settlement Reform of the United Nations Commission on International Trade Law (UNCITRAL); see <http://uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html> accessed 1 February 2019.

3 The Academic Forum on ISDS has the purpose of providing a venue for academics to exchange views, explore issues and options, test ideas and solutions, and hopefully make a constructive contribution to the ongoing discussions on possible reform of ISDS, in particular to discussions in the context of UNCITRAL's Working Group III; see Academic Forum on ISDS, Statement of Purpose (CIDS – Geneva Center for International Dispute Settlement, 12 March 2018) <https://cids.ch/images/Documents/ISDS-AcademicForum/Academic_Forum_ISDS_Statement_of_Purpose.pdf> accessed 1 February 2019.

from a comparative perspective, and examine the mutual interplays between domestic and international investment laws with a view to reform in the field.

The idea of this Special Issue is thus to bring the study of domestic legal systems and developments in domestic-level investment governance into the study of international investment law and its reform.⁴ The reason to do so is twofold: first, the contemporary backlash movement manifests itself as a partial rejection of international investment law; second, domestic investment law and policy operates very often as a substitute to international investment law. Despite this supplementary function of the domestic governance framework, this does not necessarily operate in opposition to international investment law. It rather adopts some of the basic values of the latter, and retains some of its most important principles. Paying, thus, closer attention to domestic law developments has become vital in order to help address the deficiencies of the contemporary system of international investment law and arbitration, as well as help design the future international investment regime.

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All of the articles in this Special Issue conceptualize the mutual interplay between international and domestic investment laws, as well as make proposals for the reform of international investment law. Accordingly, Steven Ratner looks into how international investment law and domestic investment law influence one another, identifying a relationship of co-dependency and 'interoperability' between them. This relationship includes a 'downstream' flow from the international to the national and an 'upstream' flow from the domestic to the international. The author acknowledges that the modalities of influence between the two bodies of investment law remain generally unexplored in international legal theory, and applies theories of international law compliance to trace the ways in which international investment law can affect the content of domestic investment law. It then proposes a set of six pathways by which domestic law can influence the content of international investment rules. Very importantly, the author concludes that the overall investment law regime will not tolerate significant discrepancies between the international and the domestic levels of investment law, and he explains the importance of this dynamic relationship for reform of the investment regime.

4 This provides, in a way, for a more institutional dimension of projects on the study of comparative public law in international investment law. On a comparative approach to international investment law see also Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010).

While the article of Steven Ratner observes the interrelationship between domestic and international investment law from the vantage point of international law and international relations, the article of Peter Lindseth follows the inverse approach by adopting a more comparative law approach to the study of investment law. The article explains how theoretical understandings of the backlash against international investment law and arbitration can benefit from examining similar dynamics in supranational governance more generally, and identifies two main features that are very characteristic of both systems: the delegation of regulatory power to agents beyond the State; and the persistence of constitutional legitimacy in State-level principals. In such cases, the 'agency-cost problem', namely the danger of the agents showing increased autonomy at the expense of the principals, is aggravated by the support for either a system of 'agents without principals' or for a system of 'principal-agent inversion' within the investment law regime. In both scenarios, the 'power-legitimacy nexus' – namely the essential linkage between the agent's power and its ultimate sources of legitimacy – breaks. This explains the backlash, but also makes clear the need for reform as well as the direction that the reform process has to follow. The reform process should focus on greater transparency in terms of opening up proceedings, publishing awards, or requiring adjudicators to be more explicit in articulating the principles they rely upon to support their decisions by, for example, resorting more often to the proportionality principle. Moreover, more political controls have got to be introduced in the context of international investment law, such as political institutions for the governance of investment treaties, as well as separation-of-power-safeguards.

After the conceptualization of the interrelationship between international and domestic/comparative investment law by the first two contributors, the remaining articles delve into more specific aspects of this relationship. The article by Georgios Dimitropoulos shows how the growing tendency among States to terminate their international investment agreements and/or replace them with domestic laws may be understood as a reclamation of national sovereignty vis-à-vis international institutions. The article then develops a typology of moves to reassert sovereignty in international investment law, distinguishing an 'isolationist reassertion', from an 'international reassertion', and in turn from a 'domesticating reassertion'. The article claims that analysis of international investment law and its reform needs to be informed by research into domestic systems of governance in order to better conceptualize the ways in which international law principles are implemented alongside and through the use of domestic legal instruments, but also in order to help inform the reform process of international investment law. It also identifies the ways in which domestic and international law co-exist and mutually influence each

other with a view to the substantive and procedural law reform of the investment regime; it identifies changes at the level of power where decisions are made, as well as substantive law and institutional changes.

The last two articles of the Special Issue keep the focus on the specific aspects of the relationship between international and domestic/comparative investment law, and pay particular attention to developments in two different regions of the world: Asia and Latin America. The focus on Asia and Latin America is due to the push that the laws and policies produced in these two parts of the world have exercised on the legitimacy as well as the development of domestic and international investment law. Developments in outward investment in Asia have led to considerable reforms in domestic investment laws, mostly in the West; developments in domestic investment laws in Latin America reveal new pathways of dealing with the crisis of international investment law without necessarily repudiating its basic principles and institutions.

Lizzie Knight and Tania Voon analyze international and domestic investment law in the areas of digitalization and national security, and focus on the role of China in the shaping of the field. The article shows how domestic law in China has repercussions for investment laws and policies in other parts of the world, mostly in the West, as well as for international investment law. The authors discuss the security exception in international law and turn their attention to recent domestic investment laws, mostly in the United States, Canada and Australia, that make foreign direct investment (FDI) flows subject to domestic review mechanisms for national security. This new wave of laws has been set in motion by Chinese outward investment. According to the article, the continued expansion of security as a basis for rejecting investment applications threatens economic integration; moreover, allowing international tribunals to review these decisions by ruling on this exception could be counter-productive. The authors claim that alternatives exist at both the domestic and international levels. Domestically, a focus on evidence-based assessments and the imposition of conditions may mitigate security concerns. Internationally, guidelines and principles stipulated by international institutions should guide the assessments of investment agencies. The article also suggests that further reform in international law may be necessary to accommodate the national security concerns of States.

While the article by Knight and Voon shows how domestic (Chinese) investment law exercises its impact on foreign domestic laws (United States, Canada, Australia) and international investment law, the last article shows how domestic law and policy in Latin America has reacted to the crisis of international investment law. Mélida Hodgson takes a comparative perspective to the co-development of domestic and international investment law in Latin America in recent years. Being the prime example of domestic response to international

investment law, the author discusses reform initiatives by Latin American States in the last two decades that are the result of the dissatisfaction of the majority of these States with the current shape of international investment law and arbitration, and examines how these States have been trying to gain control over their investment arbitration experience. The author identifies three levels in which this has been undertaken: the bilateral, the regional, and the supra-regional. The article then discusses the reforms in substantive and procedural investment law coming out of Latin America, and offers thoughts on the prospects of the reform movement in Latin America. In dispute resolution, the exclusion, limitation, or regionalization of investment arbitration have been identified as a largely common trend of the reform efforts. When it comes to substantive investment law, the author identifies five trends: the effort towards a tightened definition of an 'investor' in order to ensure that only true foreign investors making a measurable commitment to the host State's economy are protected; the circumscribing of important discrimination provisions, such as the Fair and Equitable Treatment (FET) standard, to customary international law; the limiting of certain investor protections that could interfere with the States' right to regulate; the refusal to protect investors that may have engaged in corruption; and, finally, the imposition of corporate social responsibility obligations on investors. Overall, the article makes the very interesting observation that the most characteristic idea originating in the Latin American reform movement is not that of a wholesale rejection of international investment law – as many would think – but rather that of an effort to regionalize investment law.

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The overall idea of this Special Issue is to bring the comparative law methodology into the study of international investment law, namely to compare domestic systems in order to draw general conclusions on the international investment regime; but also the other way around, namely to explore how international investment law (and arbitration) has been and should be influencing domestic investment laws. Two main lessons may be drawn from the articles of this Special Issue, one methodological, and one substantive. First, the reform discussion needs to be informed by the study of systems of domestic investment law and policy. The study of domestic investment laws becomes as important as the new field to be developed, that of comparative investment law.

Second, comparative analysis of domestic investment laws shows that the reform discussion needs to move beyond its procedural confines and also include reform in substantive law as well as the institutions governing the investment law regime at the international and the domestic levels of

governance. Substantive domestic investment law reform – the comparative analysis shows – oscillates between a tendency to revert to ideas from the past, such as the adoption of the minimum standard of protection in place of the FET standard, and a tendency to innovate, with the inclusion, for example, of new substantive obligations for foreign investors such as corporate social responsibility obligations. Moreover, adjudication may not be any more a sufficient way to manage the investment law regime; (domestic and international) institutions of governance may have become necessary in this area given the increasing complexity of FDI flows. International organizations and scholars need to take these points into account in the design of the future investment law regime.

All in all, the articles show the clear tendency of domestic and international policy-makers to rewrite the rules of international investment law. The rules that are currently being developed are often informed from the bottom, namely from the domestic governance level, rather than the top. A mutual exchange and information process should then take place – also within international organizations like the United Nations Conference on International Trade Law (UNCITRAL): domestic regimes should inform and reform the international, and the international regime should help reshape domestic investment laws. It is hard to tell at this time how the mutual exchange process will conclude; this makes it all the more important to take all aspects of the ‘inform and reform process’ into account – namely both the procedural and the substantive – as well as utilize all available methodologies to help inform the process, namely the comparative and the international.