Chapter 1.8
National Law Governing Foreign Investment

by Frank Emmert

I. Introduction

On the basis of the territorial jurisdiction of the host state over anything and anyone within their territory, the rights and obligations of natural persons and legal entities entering from abroad are primarily determined by the laws of the host state. The host state has the right to regulate who can come in and under what conditions, and the host state has the right to regulate how these foreign persons, including foreign investors, have to behave and how they can and cannot pursue their business interests, while in the host state.

Immigration laws of the host state determine the criteria for entry by foreign natural persons. These laws detail the types of visas available (such as tourist, business, student, or work visas), the requirements for obtaining these visas, and the duration of stay permitted. Immigration laws also outline the conditions under which a visa might be extended or converted into a different type.

Corporate and commercial laws of the host state determine whether and how foreigners can incorporate legal entities in the host state, respectively whether and how foreign corporations themselves can do business in the host state. Each country has specific laws that govern the formation, registration, and operation of business entities. These laws specify the types of business structures available (such as corporations, partnerships, or limited liability companies), the process for incorporation, the requirements for corporate governance, filing requirements, and the obligations of directors and shareholders.

Many countries have specific legislation aimed at foreign investors. These laws can include provisions related to the minimum capital required, possible and restricted sectors for investment, local content requirements, and any restrictions on foreign ownership or control. They might also offer incentives like tax breaks or grants to attract foreign investment. The terms for a specific investment may or may not be negotiable and subject to an investor-state agreement that may override certain elements otherwise applicable under national law.[1] Once a foreign investor is established, market access and competition or antitrust laws regulate the conduct of enterprises doing business in the host state to ensure fair competition and prevent cartels and monopolization by dominant firms.

Trade laws may include regulations on importing and exporting goods and services, which are crucial for foreign businesses that operate in global markets. Trade laws also cover tariffs, trade barriers, and compliance with international trade agreements. In addition to import duties and export taxes, customs laws and regulations govern what items may be brought into the country and are crucial for foreigners at points of entry. Customs regulations help manage the security of the state

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[1] For details see Ivar Alvik, *Investor-State Contracts*, in Markus Krajewski & Rhea T. Hoffmann, *Research Handbook on Foreign Direct Investment*, Edward Elgar 2019, pp. 271-298, as well as Chapter 1.9 on investor-state contracts.

and the health and safety of its citizens by controlling the importation – and sometimes the exportation – of potentially harmful substances or protected items.[2]

Protecting intellectual property (IP) is vital for foreign businesses wherever they go around the globe. Local IP laws and international agreements can influence how patents, trademarks, and copyrights are registered, protected, and enforced in the host country.[3]

Foreigners with income generated in the host country, or in some cases globally, are most likely subject to local tax laws. This includes corporate tax rates, sales tax (or value-added tax), payroll taxes, and other relevant fiscal obligations. Transparency and reporting requirements regarding production levels, operational data, and financial details, may be in place to ensure tax compliance. Tax treaties between the home country and the host country may affect these considerations, for example treaties for the avoidance of double taxation.[4]

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2 If the host state is one of the 166 member countries of the World Trade Organization (WTO), the host state's provisions on import and export duties and any specific market access rules are part of their concessions schedules. This makes them publicly accessible via the WTO, and provides guarantees against unilateral changes. Importantly, the WTO agreements on trade in goods (GATT), services (GATS), and intellectual property rights (TRIPs), also provide far reaching protections against discrimination via most-favored nation treatment and national treatment obligations. These elements of non-discrimination, transparency and legal certainty are important guarantees for international businesses and investors with regard to trade in goods and services. For more information see https://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm, as well as Chapter 3.10 on Investment Law and Trade Law.

3 In addition to the Trade-Related Intellectual Property Rights (TRIPs) agreement that is part of the WTO membership package, the World Intellectual Property Organization (WIPO) administers a total of 26 treaties for the protection or all kinds of intellectual property rights, including patents, trademarks, copyright, the rights of creatives in literary and artistic works, and many more (see https://www.wipo.int/portal/en/). An assessment of the intellectual property commitments made by countries under consideration is an essential element of due diligence prior to any investment decision. For details, see Chapter 3.9 on Investment Law and Intellectual Property Rights.

4 The Organization for Economic Cooperation and Development (OECD) maintains a comprehensive list of tax treaties between its member countries and many non-member countries. Their database includes details on bilateral agreements that aim to avoid double taxation and prevent tax evasion (see https://www.oecd.org/en/topics/policy-issues/tax-treaties.html). The UN also provides resources related to international tax standards and treaties, including those focused on double taxation. They offer publications and databases that can be useful for researching tax treaties (see https://treaties.un.org/). Subscription-based legal databases like LexisNexis, Westlaw, or Bloomberg BNA provide detailed records of tax treaties, including full texts and analyses of the agreements. For comprehensive analysis of the treaty commitments of a particular country it may be indispensable, however, to consult with the national tax authorities and/or international tax law firms and consulting firms. In particular, if a prospective investment is significant for the host country, corporate income tax rates, for example in special economic zones designed to attract investment, tax credits and tax holidays, accelerated depreciation terms, exemptions and rebates on value-added tax or sales tax, exemptions or reductions in customs duties or import taxes, reductions in withholding tax rates on dividends, interest, and royalties, as well as procedural and other elements of the national tax system, may be negotiable and included in an investor-state contract, in combination with stability clauses that guarantee a particular tax advantage for a certain time or even protect against any future changes that would negatively impact the investment.

Foreign businesses must comply with the financial regulations of the host country, including those governing banking, credit, and capital markets. These rules can affect how companies raise funds, manage their finances, and report their financial performance. Insurance regulations may stipulate the kind of assets or conduct that needs to be insured, and provide the rules for the licensing, solvency, and operational conduct of insurance companies. Anti-corruption and transparency laws are aimed at preventing bribery and ensuring fair competition, often influenced by international standards like the Extractive Industries Transparency Initiative (EITI).[5]

Foreign businesses bringing employees or hiring employees in the host state must comply with local labor regulations, including those concerning hiring procedures and decisions, wages, working conditions, and workers' rights. Foreign investors, in particular, may be subject to rules and

[5] https://eiti.org/. For additional detail see, for example, Aliya Tskhay, *Global Norm Compliance: A Study on the Implementation of the Extractive Industries Transparency Initiative*, 2020; as well as Shirley Tang, Daniel W. Elfenbein & Tatenda Pasipanodya, *Symbolic Gestures or Social Impact? The Extractive Industries Transparency Initiative, Corruption Perceptions, and Political Participation in Africa*, Bocconi University Management Research Paper 2024; and Beate Sjåfjell, Carol Liao & Aikaterini Argyrou (eds.), *Innovating Business for Sustainability: Regulatory Approaches in the Anthropocene*, Edward Elgar (2022), in particular chapters 7 and 13.

In this context, the *U.S. Foreign Corrupt Practices Act* should also be mentioned. The FCPA, enacted in 1977, has two main provisions. First, the *Anti-Bribery Provisions* make it illegal for U.S. persons and businesses, as well as certain foreign issuers of securities and foreign nationals or entities acting while in U.S. territory, to bribe foreign government officials to obtain or retain business. The law targets corrupt payments made directly or indirectly, through intermediaries, to any foreign official, political party, or candidate for the purpose of influencing any act or decision in their official capacity to assist in obtaining or retaining business. In other words, American entities will be punished by their own government if they pay bribes abroad. Second, the *Accounting Provisions* require companies listed in the United States (those that have issued securities registered in the U.S. or are required to file reports with the Securities and Exchange Commission, SEC) to meet certain accounting provisions. These include maintaining accurate books and records that reflect all transactions and maintaining an adequate system of internal accounting controls. Companies must also ensure that their financial statements are not misleading and provide a true and fair view of the company's financial condition. By requiring companies to keep detailed and accurate records, the provisions aim to prevent the concealment of bribery and corrupt practices. Enforcement of the FCPA is jointly handled by the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). Violations of the FCPA can lead to severe penalties, including fines, disgorgement, and even imprisonment for individuals involved in bribery.

While U.S. law and enforcement records in this respect may well be the strictest of any country, several other countries have in recent years adopted similar rules. In a number of cases, this was initiated after the countries ratified the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention; OECD/LEGAL/0293, available at https://legal-instruments.oecd.org/en/instruments/OECD-LEGAL-0293). Contrary to the title of the Convention, it does not cover only one-off business transactions but all aspects of international business. Somewhat inspired by the OECD Convention, the United Nations (UN) drafted the 2003 UN Convention Against Corruption (UNTS Vol. 2349, p. 41, Doc. A/58/244, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY-&mtdsg_no=XVIII-14&chapter=18), which has been ratified by 191 countries as of September 2024.

For additional information see, for example, Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention against Corruption*, Ind. Int'l & Comp. L. Rev. (2013), Vol. 23, No. 1, pp. 1-33.

restrictions regarding the employment of foreigners, which might require work permits or a showing of specific qualifications not available in the local labor market.[6]

Depending on the business type, there may be significant environmental regulations to comply with, including those related to pollution control, waste disposal, emissions, and resource usage. Extractive industries are typically subject to a host of specific laws and regulations, including requirements of licensing or concessions, specific environmental regulations, royalty and taxation laws, as well as health and safety regulations. In some countries, there are laws in place to ensure local communities are consulted and can provide consent for projects, often referred to as Free, Prior, and Informed Consent (FPIC).[7] In many countries, natural resource use is specifically regulated to prevent over-extraction, and there may be requirements for the reclamation and rehabilitation of mining sites after extractive operations are terminated. Compliance with these laws is crucial to avoid legal penalties and support sustainable operations. Land use regulations dictate the use of agricultural land and practices, including crop restrictions and land conservation measures. Zoning laws determine what types of buildings and activities are allowed in particular areas. Building codes govern the standards for building safety, accessibility, and design. In some countries, there are restrictions on foreign ownership of land and real property. Utilities providing electricity, gas, or water, are often subject to “universal service” or “common carrier obligations,” and may be subject to price controls. In the transportation sector, the investor may find regulations that govern the operation of transport facilities, including vehicle safety standards and maintenance requirements, as well as laws and regulations governing the use of public transport services and facilities.

With the ever increasing global emphasis on data security and privacy, understanding and complying with local data protection regulations is crucial, especially for businesses that handle personal information. The European Union, for example, has set a very high bar for data protection and privacy with its General Data Protection Regulation (GDPR).[8] As the most comprehensive and

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[6] In most cases, the only way for a potential investor to gain a comprehensive understanding of the labor laws and related requirements of a particular country is to work with specialized local law firms and consulting firms. As outlined above, in note 4???, if an investment is significant for the host state, the investor may be able to negotiate favorable terms for the employment of expatriates and/or include certain guarantees and stability clauses in an investor-state contract.

[7] For more information see Jane Hofbauer, *Free, Prior and Informed Consent (FPIC)*, in Christina Binder, Manfred Nowak, Jane A Hofbauer, Philipp Janig (eds.), *Elgar Encyclopedia of Human Rights* (2022); Laurence Klein, María Jesús Muñoz-Torres & María Ángeles Fernández-Izquierdo, *A Comparative Account of Indigenous Participation in Extractive Projects: The Challenge of Achieving Free, Prior, and Informed Consent*, Elsevier (2023); as well as Fanny Pulver, *The Implementation of Free, Prior and Informed Consent and Indigenous Peoples' Rights under the OECD Guidelines for Multinational Enterprises: An Analysis of the Regulatory Framework and OECD National Contact Point Cases*, 2022.

[8] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). The official text is available at https://eur-lex.europa.eu/eli/reg/2016/679/oj. For additional information see the EU's Complete Guide to GDPR Compliance at https://gdpr.eu/, as well as Lukas Feiler, Nikolaus Forgó & Michaela Nebel, *The EU General Data Protection Regulation (GDPR): A Commentary*, 2nd ed. 2021; and Stephen Robert Massey,

advanced piece of legislation on the subject, the GDPR has influenced many legislative projects beyond the EU.[9]

Last but not least, host states are likely to have a variety of sector-specific laws and administrative regulations to protect markets, like telecommunications, and consumers, for example with regard to healthcare, e-commerce, cybersecurity, labeling and packaging, product safety in general, and food safety in particular.

Understanding these laws and regulations and ensuring compliance is crucial for foreign investors as they plan their entry strategies and operational setups in different countries. It often necessitates partnering with local legal experts and consulting with local lawyers and industry associations to ensure full compliance and to navigate the complexities of local regulatory environments effectively. However, even if an investor has done their due diligence at the time the main investment is made and the operations are launched, compliance is an ongoing requirement, and investors are frequently confronted with changes in the local laws of the host state that may impact the feasibility and profitability of their investment in important ways.

On the one hand, the host state generally retains its sovereign right to legislate and regulate and may well act in pursuit of the public interest when environmental- or consumer laws or health and safety regulations are updated. On the other hand, the host state may make use of its sovereign rights in ways that unnecessarily or unfairly burden individual investors or foreigners in general.

Ultimate GDPR Practitioner Guide, 2nd ed. 2020; and Brendan Quinn, *Data Protection Implementation Guide: A Legal, Risk and Technology Framework for the GDPR*, 2021.

9 The European Union's General Data Protection Regulation (GDPR) has had a significant influence on data protection and privacy laws worldwide. Since its implementation in May 2018, several countries have either revised existing laws or introduced new regulations that align closely with the GDPR's standards. Examples include the *United Kingdom* (although the UK is no longer a member of the EU, it has incorporated the GDPR into its national law as the UK GDPR, combined with the Data Protection Act 2018); *Japan* (Japan's Act on the Protection of Personal Information (APPI) was amended to strengthen data protection and align more closely with GDPR, facilitating an adequacy decision from the EU that allows for the free transfer of data between the EU and Japan); *South Korea* (South Korea's Personal Information Protection Act (PIPA) has been updated in ways that reflect GDPR principles, which also helped it receive an adequacy decision from the European Commission); *Brazil* (the Lei Geral de Proteção de Dados (LGPD), enacted in August 2020, closely mirrors the GDPR in its comprehensive approach to data protection and includes similar principles such as consent, data subject rights, and severe penalties for non-compliance); *Canada* (while Canada's Personal Information Protection and Electronic Documents Act (PIPEDA) predates the GDPR, recent discussions and proposed reforms aim to align more closely with GDPR standards to maintain its adequacy status with the EU); *Australia* (while not directly modeled on the GDPR, recent amendments to the Privacy Act and ongoing discussions suggest a move towards more stringent data protection measures influenced by GDPR principles); *India* (the Personal Data Protection Bill, which is still in the legislative process as of the fall of 2024, incorporates several GDPR-like features, including data subject rights, data minimization, and stringent consent requirements); *Kenya* (the Data Protection Act, 2019, bears similarities to the GDPR, including rights for data subjects and obligations for data controllers and processors); *Thailand* (the Personal Data Protection Act (PDPA), effective from June 2021, is Thailand's first comprehensive data protection law and shares many principles with the GDPR); *South Africa* (the Protection of Personal Information Act (POPIA), which came into full effect in July 2021, also aligns with GDPR in several respects, including conditions for lawful processing and the rights of data subjects), and several others.

The very premise of international investment law is the protection of foreign investors against unfair or overly burdensome interferences with their investment by host state public authorities. By contrast to one-off international business transactions, in particular individual import-export or sales contracts, investments are typically characterized by their longer time-frame and the commitment of larger amounts of money. This usually implies that foreign investors need a significant degree of stability in the regulatory environment and market conditions over several years in order to recover their investment and earn a profit. The time-frame will often exceed the tenure of any specific leadership in the host state and may indeed include not only changes in government but even changes in constitutional and other fundamental structures.

As outlined in other chapters of the present volume, investors rely on several mechanisms to secure their rights and interests over the lifetime of an investment. The most prominent mechanisms are provided by multilateral investment agreements and bilateral investment treaties with minimum standards of treatment or protection, and provisions giving the investors the right to pursue compensation in proceedings before specialized arbitration tribunals, in case these standards are breached.

In the absence of treaties between home states and host states, and sometimes in addition to the protection provided by such treaties, investors frequently enter into investment contracts with the host state government. These are explained in more detail in Chapter 1.9.

The third potential source of protection for foreign investors is actually the domestic law of the host state itself. This will be further explored in the remaining parts of this chapter.

II. Investor Protection via Administrative Laws and Procedures

Administrative laws and procedural requirements in a host state can provide significant protection to foreign investors by ensuring a transparent, fair, and predictable legal environment. These protections help to mitigate risks associated with governance and legal uncertainties, which are critical concerns for foreign investors.

Administrative laws that enforce transparency in government actions, such as clear rules on how decisions are made and rights to access government-held information, help ensure that investors can operate in a predictable regulatory environment. Transparency reduces the risk of arbitrary decisions and corruption, which can adversely affect investment.

Many countries commit to providing fair and equitable treatment to foreign investors through their administrative procedures. This principle is often enshrined in international treaties like those administered by the WTO, requiring that foreign investors receive treatment no less favorable than that accorded to domestic investors (national treatment), and that investors from one country receive treatment not less favorable than that accorded to any other foreign investors (most-favored nation treatment).[10] Whether based on international treaty obligations or not, domestic procedural

[10] Examples of treaties providing for national treatment and MFN include the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), the European Union (EU) Treaties, the North American Free Trade Agreement (NAFTA) and its successor, the United States-Mexico-Canada

requirements that prevent discrimination against foreign entities help create a level playing field. Laws that prohibit differential treatment based on nationality, for example, ensure that foreign investors can compete fairly in the local market.

Administrative laws that secure property rights and outline clear, legal processes for expropriation – including compensation requirements – are vital for investor confidence separately from substantive guarantees of private ownership. These laws protect investors from non-commercial risks like nationalization or confiscation without adequate compensation. Similarly, clear and efficient licensing and permitting processes help reduce bureaucratic hurdles and prevent delays in project implementation. When these processes are governed by strict legal frameworks that discourage arbitrary denial of permits or licenses, they protect investors and facilitate smoother operations.

Local administrative laws often include provisions for due process, allowing foreign investors the right to be heard by administrative review bodies, to receive a fair hearing, and to appeal adverse decisions. These procedural safeguards are crucial for protecting the interests of investors against unjust or prejudicial treatment by government authorities. Regulations that provide clarity on the application of laws and how changes in laws are handled also contribute to a stable legal environment. Provisions that require advance notice of regulatory changes or transitional periods before new regulations take effect can help investors manage and adapt to legal shifts. Administrative laws that emphasize adherence to the rule of law[11] ensure that all actions by governmental bodies are based on legal authority, and not on whims or discretion. This consistency in applying the law further reassures investors about the reliability and fairness of the business environment.

Last but not least, national laws and regulations providing for access to national courts do provide a measure of protection for foreign investors and will be discussed in Part IV.

Agreement (USMCA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Energy Charter Treaty (ECT, see Chapter 3.13???), and the majority of all bilateral and multilateral investment treaties (IIAs), for example, Article 3 of the 2008 German Model BIT, as well as Articles 3 and 4 of the 2012 U.S. Model BIT. Most BITs and IIAs can be found at https://investment-policy.unctad.org/international-investment-agreements. Interestingly, the WTO Agreement on Trade-Related Investment Measures (TRIMS Agreement) only provides for national treatment and does not require MFN treatment.

11 For discussion of the concept of rule of law and its implications see, in particular, Frank Emmert, *Market Economy, Democracy, or Rule of Law? What Should Be Prioritized to Promote Development?*, in Epiney/Haag/Heinemann (eds.), Challenging Boundaries – Essays in Honor of Roland Bieber, Baden-Baden 2007, pp. 104-116, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341435 and https://www.researchgate.net/publication/259672405_Market_Economy_Democracy_or_Rule_of_Law_What_Should_Be_Prioritized_to_Promote_Development_in_EpineyHaagHeinemann_eds_Challenging_Boundaries_-_Essays_in_Honor_of_Roland_Bieber_Nomos_Baden-Baden_2007_pp.

III. Substantive Protections in National Law

Beyond administrative and procedural safeguards, the rights and obligations of foreign investors in a given host state, and the ways their investment is protected or not in that host state, are determined by a number of substantive guarantees typically spread out over several sources of law. At the top of the hierarchy of norms is the constitution of the host state and, within that constitution, the bill or catalog or chapter on fundamental human rights.[12] Many constitutions guarantee the right to own and enjoy property, which can be invoked by foreign investors to protect their investments. This includes protection against unlawful expropriation or confiscation without just compensation. Investors often rely on constitutional provisions that require expropriation to be for a public purpose and that provide for fair and prompt compensation in such cases. Some constitutions explicitly protect against arbitrary state actions, including nationalization or seizure of private businesses without lawful grounds. Foreign investors may invoke such protections if their assets are threatened by nationalization without following proper legal procedures or providing adequate compensation.

Constitutions frequently guarantee the right to due process, which ensures that foreign investors receive fair treatment in legal and administrative proceedings. This includes access to courts, the right to be heard, the right to a fair trial, and protection against arbitrary or unlawful actions by the state. Procedural fairness ensures that any legal or regulatory actions against the investor must follow established legal procedures. The constitutional right to access justice includes the ability to bring legal claims, challenge administrative actions, and seek remedies in domestic courts. This guarantees that foreign investors can defend their rights under national law and seek redress for grievances. Some constitutions provide broader protections for legal certainty, ensuring that the legal and regulatory framework governing businesses is stable and predictable. Foreign investors may rely on this to challenge sudden or retroactive changes in laws or regulations that harm their investment. In general, constitutional prohibitions on ex post facto laws protect investors from being penalized or having their rights diminished based on retroactive legal changes. This is particularly important in regulatory environments where laws may change after investments have been made.

Many constitutions provide guarantees of equality before the law and non-discrimination. Foreign investors may invoke these provisions to claim that they are entitled to the same legal protections and treatment as domestic investors, preventing discriminatory actions or policies based on nationality.

[12] Almost all countries nowadays have a written constitution with a chapter on fundamental rights, or a catalog of human rights, that includes protections against arbitrary restrictions of personal freedom and private property. Even countries that do not have a written constitution as such, like the United Kingdom, typically have statutory protections or adhere to international treaties providing similar levels of protection. Exceptions are few and far between and include countries like Cuba, North Korea, and Venezuela, that subscribe to a primacy of collective ownership of property and means of production. For a foundational discussion of private property as a human right see Aharon Barak, *Constitutional Human Rights and Private Law*, Rev. Const. Stud. 1996, Vol. 3, No. 2, pp. 218-281.

Some constitutions implicitly or explicitly protect the freedom to enter into contracts. Foreign investors can rely on this principle to ensure that their contractual agreements are recognized and enforced by the courts and protected from arbitrary interference by the state. Many constitutions protect the right to engage in work or conduct lawful business activities. These provisions can provide a legal foundation for foreign investors to operate businesses and defend their rights against arbitrary restrictions on their activities.

In some jurisdictions, constitutional provisions protect the free movement of capital, including the ability to transfer capital across borders. This protection is particularly important for foreign investors who wish to repatriate profits or move investments between jurisdictions.

Some constitutions explicitly or implicitly recognize the right to intellectual property protection. Foreign investors who hold patents, trademarks, or copyrights may invoke these rights to safeguard their intellectual assets from unauthorized use or state interference.

Constitutional protections of privacy and confidentiality may extend to business activities, protecting foreign investors from unlawful surveillance, disclosure of confidential information, or breaches of data protection laws. In some cases, foreign investors may rely on constitutional guarantees of free speech and expression, especially in industries like media, telecommunications, or any sector where communication is key to their business model. These guarantees protect against arbitrary censorship or government interference, for example, in retaliation against critical media reporting.

Beyond constitutional provisions, investor can also rely on ordinary legislation to seek protection or compensation in various scenarios related to their investments. Ordinary laws typically provide detailed regulatory frameworks that can be particularly relevant in specific sectors, and they often complement constitutional protections. Many countries have specific investment laws designed to attract and protect foreign investors. These laws can offer guarantees against expropriation, assure the repatriation of profits and capital, and provide for fair and equitable treatment. Investors can invoke these provisions when they believe their rights under these laws have been violated. Contract laws are central to commercial activities. Investors will rely on these laws to enforce agreements and seek remedies for breaches. This includes contracts with local partners, suppliers, or even host governments. To protect their physical and intellectual property rights, investors may also call on local property laws. These laws govern the acquisition, use, and disposal of property and provide mechanisms for compensation or redress in case of illegal seizure or infringement. Tax laws are crucial for understanding the fiscal obligations and benefits available to foreign investors. Disputes over tax assessments or disagreements about the application of tax laws can often be addressed through administrative appeals or in court. Foreign investors employing local staff must comply with local labor laws, which cover wages, working conditions, and workers' rights. Investors may need to invoke these laws to defend against claims of unfair labor practices or to navigate disputes with employees. Compliance with local environmental regulations is crucial. Investors may need to invoke these laws either defensively, to respond to accusations of environmental damage, or proactively, to challenge unfair applications of environmental laws that affect their operations. To ensure a level playing field, foreign investors may invoke competition laws if they face unfair practices like monopolies or cartels that distort the market conditions under which they operate. In

cases of financial distress, foreign investors should be able to rely on local bankruptcy laws to protect their investments, navigate insolvency procedures, or recover debts. Other commercial and business laws encompass a wide range of legislative measures that regulate business operations, including licensing, compliance, advertising, and consumer protection. Investors might rely on these laws to challenge restrictive or discriminatory practices. Last but not least, administrative and regulatory laws and regulations govern interactions with government agencies and the public administration. Investors might use them to appeal or challenge administrative decisions that affect their investments, such as denials of permits or licenses. This will be further elaborated in the next section.

IV. Remedies at the National Level

To pursue remedies within the host state's legal system, foreign investors typically have access to a variety of procedural avenues. These procedures are designed to ensure that disputes are resolved fairly and efficiently, taking into account both local legal norms and international investment principles.

Before taking a matter to court, foreign investors often must exhaust administrative remedies. This involves challenging decisions made by government agencies or officials at higher administrative levels or through designated review bodies. Before taking matters to the next administrative level, investors might engage directly with regulatory authorities to seek specific administrative relief or adjustments to regulatory actions that impact their investments. This is particularly promising if the administrative decisions at issue involved discretionary elements and/or if they may have been based on incomplete factual information. The main advantages of these internal administrative remedies are their low cost and short delays.

If the administrative remedies do not yield satisfactory results,[13] investors can file lawsuits in domestic courts to seek damages, enforce contracts, or obtain injunctions against unlawful government actions. This involves formal litigation, where both parties present their case, and a judicial decision is rendered. If the decision is unfavorable, investors may be able to appeal their case to the next higher judicial level. In cases where the investor's rights may be infringed by laws or actions that are unconstitutional, investors can challenge these in court, seeking declarations or injunctions. These kind of remedies can often be taken all the way to the highest or supreme court of the host state. Obvious disadvantages are the higher cost and long delays involved in multi-level litigation.

[13] Investors and their local counsel will need to verify whether the pursuit of administrative remedies tolls the statute of limitations, effectively extending the deadline by which a legal action must be commenced. When it is said that pursuing an administrative remedy tolls the statute of limitations, it means that the clock on the statute of limitations stops running while the administrative process is ongoing. This is typically to ensure that the claimant has adequate time to seek judicial review or additional remedies once the administrative process is concluded, without losing the right due to the expiration of the statute of limitations. Conversely, if pursuing an administrative remedy does not toll the statute of limitations, the clock continues to run regardless of the administrative proceedings. In such cases, the claimant must be vigilant about the time limits for filing a legal action and may need to proceed with initiating judicial remedies even while administrative reviews are still in progress, to avoid missing the limitation deadline.

In some cases, investors can pursue alternative dispute resolution (ADR) mechanisms at the national level. Mediation is a voluntary process that involves a neutral third party helping the investor and the host state reach a mutually acceptable settlement. It is less formal and often faster than litigation and it does not preclude litigation or arbitration in case the mediation process does not yield a mutually satisfactory result.[14] Although investor-state arbitration is usually conducted before international tribunals and pursuant to international rules such as those provided by the International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL), it is also possible to conduct an arbitration procedure in front of national arbitrators and pursuant to national rules. The disadvantage of national arbitration procedures is that any awards will also need to be enforced pursuant to national rules and procedures, whereas an international award will normally be enforceable pursuant to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.[15] As will be elaborated in Chapter 5.1.8, Article V of the New York Convention provides only very limited grounds for a contracting state to deny recognition and enforcement of an award, whereas national law may be more expansive in this regard.

V. Potential Shortcomings of National Protections for International Investors

International investors who face unlawful expropriation or unfair treatment in a host state and seek remedies through local systems may encounter several potential shortcomings. These challenges can significantly impact the effectiveness and fairness of the recourse available.

1. Potential Procedural Problems

From a procedural perspective, foreigners, and in particular foreign investors, may face challenges with regard to standing in procedures challenging government decisions. Navigating the legal and administrative procedures in a foreign jurisdiction can be complex and confusing, especially for investors unfamiliar with the local legal culture and language. Even if standing is not an issue, foreign investors will have to work with local counsel to bring any claims and qualified local counsel willing and able to stand up their government may be hard to find. Host state administrative bodies will be part of the government hierarchy and this may render administrative remedies more of an obstacle than a solution. Even judicial bodies in many countries are – de iure or de facto – not entirely independent from the executive branch of government, which could influence decisions in cases involving state interests or state-owned enterprises. Moreover, judicial processes in many countries may suffer from inefficiency, lengthy delays, and backlogs, which can exacerbate the difficulties for investors trying to resolve disputes promptly and effectively.[16]

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[14] For more on investor-state mediation, see Chapter 5.3.

[15] The Convention and the contracting states are available at https://www.newyorkconvention.org/english, as well as https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards. For more information, see Chapter 5.1.8.

[16] Over some 40 years of research and practice, I have come to the conclusion that the courts in 9 out of 10 countries around the world cannot really be trusted to provide a fair and lawful remedy to any party within a reasonable time in 95% or more of all cases. This statement may sound extreme but aside of the fact that foreigners, minorities, and certain other plaintiffs that do not exactly reflect the mainstream of a particular

2. Potential Merit Issues

Even if the procedures available in a particular host country are reasonably accessible and efficient, they may not be fair. Local courts or administrative bodies may exhibit bias in favor of the host state or domestic interests, particularly in politically sensitive cases involving foreign investors. Corruption within the judiciary or administrative bodies can severely impact the fairness and effectiveness of the remedy process, leading to unjust outcomes and eroding trust in the legal system. Host state legal systems may also lack transparency, making it difficult for foreign investors to understand how decisions are made and what legal precedents or rules are being applied. Whether this is due to a lack of resources and skills on behalf of judges and decision-makers to provide persuasive reasons for their decisions, or whether it is due to bias, conflicts of interest, or straight-out corruption, it can and will undermine the impartiality – or at least the perception of impartiality – necessary for fair adjudication.

Moreover, state officials and judges generally have to apply the law as adopted or amended by the host state legislature or leadership. Thus, even if certain changes in the local law that purport to better protect the environment or other public interests, are unnecessarily or unfairly infringing on legitimate interests of the foreign investor(s), the administrative review panels and courts will have little choice but to apply the new rules. Even judges of appellate or constitutional courts may not have the authority to set aside executive orders or legislative measures in cases of conflict with constitutional provisions, let alone international treaty obligations.[17]

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society are often treated less favorably even in judicial proceedings, the main problem is getting an effective remedy within a reasonable time. Lawyers in more countries than I care to count have regularly assured me that any attorney worth their mettle can always delay a case by ten years or more with procedural interventions and appeals. I have personally seen a case lingering in Italian courts for no less than 27 years and I was recently informed of a case that spent a total of 38 years in court in India. It is not hard to believe that these kind of matters can get extreme, in particular, if the plaintiff is a foreign multinational with presumably deep pockets, and the defendant is a host state government presumably defending the national interest, even if that may be more the interest of the ruling elite. For more on this subject see my workshop on Global Failure of Justice Systems, delivered annually from 2015 to 2021 at Tulane University, available at https://www.researchgate.net/publication/307882136_Global_Failure_of_Justice_Systems_-_Causes_and_Consequences_-_Workshop_at_Tulane_University_22nd_International_Legislative_Drafting_Institute_25_June_2016. See also Frank Emmert, *Global Failure of Justice Systems: Causes, Consequences, and Remedies*, in David Marcello (ed.), *International Legislative Drafting Guidebook*, Carolina Academic Press 2020, at pp. 57-69.

[17] Before a national judge or court can apply an international treaty to set aside a national administrative decision or a legislative act, several preconditions must typically be met. These conditions stem from both the principles of international law and the specific legal frameworks of the respective country. The international treaty must have been properly *ratified* or acceded to by the state. This is a fundamental requirement, as only treaties that have been formally ratified according to the constitutional and legal procedures of the country become binding and can potentially be applied by its courts. Depending on the legal system of the country (monist or dualist), the treaty may need to be explicitly *incorporated* into national law through implementing legislation. In monist systems, ratified treaties automatically become part of national law. In dualist systems, however, additional domestic legislation is usually required to give effect to treaties domestically. Unfortunately, the large majority of countries adheres to the dualist approach. The problem with that approach is that the national implementing legislation may be late or even non-existent, even

3. Potential Quantum Concerns

There are several reasons why international investors may be concerned about quantum – the determination of the amount of compensation or damages awarded – when bringing their investment disputes before national courts of the host country. Investors are primarily concerned with ensuring that any compensation awarded adequately covers the full extent of their losses. This includes not only direct damages but also indirect losses such as lost profits, opportunity costs, and other consequential damages. National courts might have different approaches or legal limitations that restrict the scope of recoverable damages compared to international arbitration forums. The methods and standards used to calculate damages in national courts can differ significantly from those typically applied in international arbitration. National courts may apply local standards for valuation that do not align with international norms or the investor's expectations based on those norms. National courts may also lack the extensive experience that specialized international arbitration tribunals have in dealing with complex financial and economic analyses related to large-scale investment disputes. This lack of experience can lead to uncertainties in how damages are assessed and awarded. Concerns about the impartiality of national courts, particularly in disputes involving the host government or state-owned entities, can make investors wary. There is a perceived risk that national courts might favor the state, impacting the fairness in the assessment and awarding of damages. In other words, national courts may shy away from larger damage awards because they perceive them as unduly burdensome for the host state. Changes

though a treaty has been duly ratified; in other cases, the national implementing legislation may be incomplete or even incorrect, with regard to at least some treaty obligations. Still, in dualist countries, the judiciary can only apply the implementing legislation, no matter how imperfect it may be. Another condition is that the national legal system has to recognize the *supremacy* of international law over conflicting national laws. This principle allows international treaties to prevail in cases where there is a conflict between the treaty and national legislation or administrative decisions. In many countries, there is no automatic supremacy of international treaties; instead, a *lex posterior* approach will often grant overriding authority to the latest in time rule or law. As a consequence, if a national law is adopted that limits or contradicts a treaty, the national law enjoys supremacy. Furthermore, the provisions of the international treaty must be *self-executing* – the European Union speaks of *direct effect* – meaning they are unconditional, as well as clear and precise enough to be applied directly by judges without needing further legislative action. Not all treaty provisions are self-executing; some may require implementing legislation to detail how they should be applied. Next, the issue at hand must be *justiciable*, meaning it is appropriate for resolution in a court of law. Additionally, the party bringing the case must have the legal *standing* to do so, often requiring them to demonstrate a direct interest in the outcome or having suffered a legal wrong. In many legal systems, and under numerous international treaties, individuals also have to exhaust available domestic remedies before a national (supreme) court can apply an international treaty to overturn a decision or act. This principle ensures that the state has the opportunity to address grievances under its own laws before being subjected to international standards. Finally, even if a treaty is enjoying supremacy and direct effect, and all procedural and other requirements are met, the application of the international treaty often *cannot contravene fundamental principles or rights enshrined in the national constitution*. Courts often need to balance treaty obligations against constitutional mandates, especially when they involve fundamental rights or state sovereignty. For detailed analysis see, for example, James Crawford, *Brownlie's Principles of Public International Law*, Oxford Univ. Press, 9th ed. 2019, in particular Chapter 3. Relations of International and National Law, pp. 45-104; as well as Richard Gardiner, *Treaties*, Oxford Univ. Press 2023, in particular Chapter 5. Bringing Treaties Home, pp. 105-171.

in national legal frameworks or shifts in economic policy can also affect the assessment of damages. For example, new regulations or legal interpretations adopted after the initiation of the dispute could potentially influence how quantum is calculated. Overall, investors seek predictability and consistency in the resolution of disputes, which are more reliably found in international arbitration given its standardized practices and principles for damage calculation. National courts, with varying legal traditions and practices, might offer less predictability. Last but not least, even if a national court awards an adequate quantum of damages, the enforceability of such judgments can be problematic, especially if the ruling requires significant financial compensation from the state. The practical difficulties in enforcing these judgments can lead to further financial losses and legal costs for the investor.[18]

4. Potential Enforcement Problems

Enforceability of domestic judicial decisions in the host state presents specific concerns for foreign investors that can significantly impact their decision to invest and their strategies for managing risk. After an investor obtained a favorable decision on compensation, which is often a hard won battle involving many steps, including appeals, enforcement often requires yet another round of litigation, or at least another judicial decision. However, even at this stage, decisions involving large investments or significant national interests may be susceptible to political interference, which can influence the enforcement of judgments. The degree of judicial independence from political or other external influences is a critical factor. A lack of independence can affect the fairness and impartiality of enforcement actions, particularly in politically sensitive cases. This is particularly concerning in cases where the host state or its agencies are parties to the dispute. Inefficiencies within the judicial system of the host country, such as procedural delays, backlogs, and slow enforcement processes, can significantly delay the enforcement of court decisions. This delay can lead to additional costs and diminished value of the awarded remedies. Corruption in the judiciary can undermine the enforcement process. Bribes or undue influence can lead to non-enforcement or selective enforcement of judgments, especially those unfavorable to powerful local interests or the state itself. Resource constraints within the judicial and enforcement systems can hinder the execution of decisions. Limited financial resources, inadequate staffing, or lack of technical expertise can all contribute to ineffective enforcement. Frequent changes in laws, regulations, or procedures related to enforcement can create uncertainty and affect the ability of investors to rely on judicial decisions. If a decision is embarrassing for the host state government, there may be a risk of retaliatory legal or administrative actions by the host state against the investor, particularly if the judicial decision impacts significant national interests or key industries. The broader context of international relations between the investor's home country and the host state can also influence enforcement. Diplomatic tensions can sometimes spill over into legal processes, affecting the enforcement of judgments. Finally, although may generally seize assets wherever they may be found, where enforcement of a domestic decision requires action in another jurisdiction (e.g., seizure of assets located abroad), the recognition and enforcement of these judgments by foreign courts can be problematic, depending on bilateral or multilateral treaties and the legal principles of the foreign jurisdiction. By

[18] For additional discussion, see Chapter 5.1.5.

contrast, states are generally reluctant to refuse the recognition and enforcement of foreign arbitral awards under the New York Convention because they have to avoid a reputation of untrustworthiness, which would cost them dearly in their commercial and trade relations, far beyond the investment context.[19]

VI. Conclusions

The courts in many countries do not exactly have a stellar reputation when it comes to rendering fair and enforceable judicial decisions within a reasonable time frame, in particular if large amounts of money are at stake and the plaintiff is a foreign multinational going against state authorities and state coffers. Procedural issues, such as the need to engage local counsel, add further cost and unpredictability. As a result, international investors usually dispense with this option and go straight to investor-state arbitration at the international level.

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[19] Russia is an example on point, since it is one of the few states that has occasionally refused to recognize and enforce a foreign arbitral award, in particular where politically connected oligarchs were involved (an example from August 2024 is the decision of the Russian Supreme Court in *C. Thywissen GmbH v NS Bread Products*). As a consequence, many international companies are nowadays avoiding doing business in Russia altogether, or they demand to be paid in advance. For additional discussion, see also Chapter 5.1.8.