

ORIGINAL ARTICLE

# Domestic Investment Laws and State Capitalism

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## Abstract

State capitalism and the liberal economic order have had an antagonistic relationship. While the international economic law rules have sought to reduce the role of the state in the economy, state-controlled entities have more recently increased in size and importance – both domestically, as well as internationally. In this connection, the article analyses the effects of state capitalism’s expansion simultaneously with the domestic investment law of States. The article analyses the underlying principles of state capitalism in an effort to answer the question of whether domestic laws promoting investment – as defined in the special issue – are positive, negative, or neutral to state capitalists. The article further interprets the trends spawned by the propagation of the liberal international economic order as states realize their development targets and envisage to actively contribute to the regulation of international trade and cross-border transactions globally.

**Keywords:** Economic globalization; international economic order; investment screening mechanisms; state capitalism

## 1. Introduction

State capitalism as a political and economic system puts Liberal International Order (LIO) to the test.<sup>1</sup> The broad internationalization of the post-war era and the rapid globalization in the 1990s have led to attempts at striking a balance between domestic and international law.<sup>2</sup> Domestic law (at least, certain aspects thereof) has paved the way for increased involvement of globalization in the field of international economic law. The manifestation of LIO has involved a range of developments, from attempts to abolish state capitalism to a tendency – in the long term – to compromise with state capitalism. In this connection, domestic and foreign affairs share a far more complicated relationship than the LIO had previously contemplated and emphasized.<sup>3</sup>

State capitalism is inherently linked to the State.<sup>4</sup> The state plays an integral role in controlling the capital and organizing the nation’s economic activities, which has become a global paradigm

<sup>1</sup>J. Chaisse and G. Dimitropoulos, ‘Domestic Investment Laws and International Economic Law in the Liberal International Order’, this special issue. See generally I. Bremmer (2009) ‘State Capitalism Comes of Age: The End of the Free Market’, *Foreign Affairs* 88(3), 40; See also N. Ferguson, ‘We’re All State Capitalists Now’, *Foreign Policy*, 9 February 2012, <https://foreignpolicy.com/2012/02/09/were-all-state-capitalists-now/> (accessed 18 April 2022); L.-W. Lin and C.J. Milhaupt (2013) ‘We are the (National) Champions: Understanding the Mechanisms of State Capitalism in China’, *Stanford Law Review* 65(4), 697; M. Du (2014) ‘China’s State Capitalism and World Trade Law’, *International & Comparative Law Quarterly* 71, 409.

<sup>2</sup>See e.g., C. Bian (2021) ‘Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors through Induced Reciprocity’, *Journal of World Investment & Trade* 561; J. Chaisse (2018) ‘State Capitalism on the Ascent: Stress, Shock, and Adaptation of the International Law on Foreign Investment’, *Minnesota Journal International Law* 27(2), 339, 345–347.

<sup>3</sup>See e.g., K. Szarzec, W. Nowara, and B. Tolteben (2020) ‘State-Owned Enterprises as Foreign Direct Investors: Insights from EU Countries’, *Post-Communist Economies* 33(5), 517; See Bian, *supra* n. 2, 561.

<sup>4</sup>A. Nölke (2014) ‘Introduction: Toward State Capitalism 3.0’, in A. Nölke (eds.), *Multinational Corporations from Emerging Markets*, *International Political Economy Series*. Palgrave Macmillan.

of economic organization.<sup>5</sup> State capitalism includes states' control either directly or through public corporations – referred to as State-Owned Enterprises (SOEs).<sup>6</sup> SOEs have begun operating internationally and have significant economic influence across borders through Sovereign Wealth Funds (SWFs).<sup>7</sup> In addition, SOEs may receive preferential treatment in some instances.<sup>8</sup> State capitalism is the result of domestic laws as well as the catalyst for the development of domestic investment laws.<sup>9</sup> Due to the advancement of sophisticated means in promoting foreign investment, it is now critical to understand the effects of developing state capitalism simultaneously with the domestic investment law of the state.

The advent of domestic investment laws, along with other kinds of domestic regulation of foreign investment, marks a larger shift from international to domestic in International Economic Law (IEL).<sup>10</sup> The article argues that this domestication process, in general, relies on a view of the international political economy that is divergent from the conception of the LIO. Also, the drive toward domestication does not always imply a rejection of the ideals of IEL. In this connection, the article analyses the underlying principles of state capitalism with a focus on whether domestic laws in promoting investment, as defined in this special issue, are positive, negative, or neutral to state capitalists.

Against this background, the article proceeds in four sections. Section 2 examines the role of domestic investment law in state capitalism and outward investment to show that state capitalism does not always imply a rejection of the ideas of IEL. Section 3 discusses state capitalism and inward investment, focusing on the examples of France and Germany because the 'domestication' process also comprises screening laws and general legal instruments regulating foreign investment flows. Section 4 highlights the dual relationship between state capitalism and domestic investment laws: state capitalism is regulated by domestic investment laws; on the other side, domestic investment laws can positively impact the internationalization of state capitalism. Section 5 draws the main lesson that state capitalism is by no means a phenomenon which is limited to emerging economies; in fact, the interplay between investment laws and international economic law concerning state capitalism is complex. While IEL during LIO has generally aimed at reducing the role of the state in the economy, SOEs have more generally

<sup>5</sup>J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue; I. Alami, A.D. Dixon, and E. Mawdsley (2021) 'State Capitalism and the New Global D/development Regime', *Antipode* 53(5), 1294, <https://onlinelibrary.wiley.com/doi/10.1111/anti.12725ry.wiley.com/doi/10.1111/anti.12725> (accessed 18 April 2022).

<sup>6</sup>On State Owned Enterprises, See M. Feldman (2016) 'State-Owned Enterprises as Claimants in International Investment Arbitration', *ICSID Review – Foreign Investment Law Journal* 31(1), 24–35; See also J. Chaisse (2016) 'Untangling the Triangle: Issues for State-Controlled Entities in Trade, Investment and Competition Law', in J. Chaisse and T.-y. Lin (eds.), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita*. Oxford Scholarship Online, 233–257.

<sup>7</sup>M. Burgstaller (2011) 'Sovereign Wealth Funds and International Investment Law', in C. Brown and K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration*. Cambridge University Press; J. Wang (2016) 'State Capitalism and Sovereign Wealth Funds: Finding a "Soft" Location in International Economic Law', in C. Lim (ed.), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah*. Cambridge University Press; F. Bassan (2015) *Research Handbook on Sovereign Wealth Funds and International Investment Law*. Edward Elgar Publishing.

<sup>8</sup>M. Büge et al. 'State-Owned Enterprises in the Global Economy: Reason for Concern?', *VoxEU*, 2 May 2013, <https://voxeu.org/article/state-owned-enterprises-global-economy-reason-concern> (accessed 18 April 2022).

<sup>9</sup>P. Schwartz (2013) 'Capitalism, International Investment Law and the Development Conundrum', *Law and Development Review* 6, 217.

<sup>10</sup>Domestic investment laws are specialized legislations that have been enacted by national legislatures to attract/encourage and/or facilitate investments in their respective countries. J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue; see also J. Hepburn (2018) 'Domestic Investment Statutes in International Law', *American Journal of International Law* 112(4), 658; G. Dimitropoulos (2020) 'National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform', *Journal of World Investment & Trade* 21(1), 71; S. Puig and G. Shaffer (2018) 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law', *American Journal of International Law* 112(3), 361.

increased in size and importance both domestically and internationally. In this respect, the article shows that the relationship between domestic investment laws and state capitalism is two-fold: on the one hand, state capitalism is disciplined and shaped by domestic investment laws which may take the regulatory form of a number of constraints; on the other hand, by creating ‘national champions’, domestic investment laws contribute to the internationalization of state capitalism.

## 2. The Role of Domestic Investment Laws in State Capitalism

State capitalism is typically defined as an economic system in which the government, through SOEs, engages in commercial and economic activities.<sup>11</sup> Global trade has been steadily decreasing since 2012, and global FDI has continued to fall since 2016. COVID-19 has further added fuel to this fire and exacerbated these issues leading to ‘de-globalization’.<sup>12</sup> In this respect, states are increasingly leaning towards a domestic mechanism for foreign trade and investment regulation. The emerging vision of state capitalism is the core focus of this article, and in this section, the article begins by examining the rise and expansion of state capitalism, focusing on how SOEs and SWFs have become major development actors.

After acknowledging the risks of state capitalism in section 2.1, section 2.2 further discusses the contemporary reflections on state capitalism by examining two major case studies – Vietnam and China respectively. Vietnam’s case study shows Vietnam as a typical social-economic country that has tried to reform to reflect a dialectic relationship between domestic and international law to complement LIO; for instance, Vietnam has concluded several Free Trade Agreements, such as CPTPP, RCEP, EU–Vietnam, and Bilateral Investment Treaties with North Macedonia, Morocco, Turkey, and others.<sup>13</sup> China’s case study shows that China in Africa as a projection of domestic capitalism.

### 2.1 The Main Vehicles of State Capitalism: State-Owned Enterprises and Sovereign Wealth Funds

SOEs and SWFs are becoming mainstream instruments mostly from emerging economies to invest in the North and the South.<sup>14</sup> The SOEs means of production are managed and organized with a capitalistic ideology. There is no ‘unanimously accepted definition of SOE’. It has often been described as ‘any commercial enterprise predominantly owned or controlled by the state or by state institutions, with or without separate legal personality’.<sup>15</sup> For instance, the Chinese government practised ‘state capitalism’ by controlling a significant number of powerful SOEs, particularly in critical and important industries, either directly or indirectly. SOEs are important governance mechanisms because they are legalized forms of corporatization with political, economic, and social value.<sup>16</sup> SOEs could play a variety of important roles in a nation’s economy, such as addressing market failures, providing public goods, funding infrastructure, smoothening

<sup>11</sup>J. Chaisse and G. Dimitropoulos, ‘Domestic Investment Laws and International Economic Law in the Liberal International Order’, this special issue.

<sup>12</sup>Ibid.

<sup>13</sup>UNCTAD (2021) ‘Investment Policy Hub’, UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/229/viet-nam> (accessed 18 April 2021).

<sup>14</sup>J. Chaisse and G. Dimitropoulos, ‘Domestic Investment Laws and International Economic Law in the Liberal International Order’, this special issue.

<sup>15</sup>K.-H. Böckstiegel (1984) *Arbitration and State enterprises: Survey on the National and International State of Law and Practice*. Kluwer.

<sup>16</sup>I. Thynne (2021) *State-Owned Enterprises: Structures, Functions, and Legitimacy*. Oxford Research Encyclopaedia of Politics; L. Catá Becker (2019) ‘Systemic Constraints and the Human Rights Obligations of States and State-Owned Enterprises’, Working Paper No.1/1, 2 January 2019, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3309066](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3309066) (accessed 22 April 2022).

business and employment cycles, providing public utilities at affordable rates, supporting national security, and promoting industrialization.<sup>17</sup>

However, the operation of SEOs extraterritorially is viewed with significant suspicion at times. They may be criticized in certain situations, particularly where the goals of state ownership are misunderstood or viewed as illegitimate. Moreover, there may exist a perception that their preferential standing domestically coupled with sovereign privileges internationally, may confer a competitive advantage even in their foreign operations. Aside from competitive neutrality concerns, certain SOE aims and objectives may be viewed as endangering vital security interests of host nations.<sup>18</sup> SOEs have now shifted their focus to the global economy due to reduced trade and investment obstacles, along with advancements in transportation and communication technology.<sup>19</sup>

On the other side, SWFs can be described as public 'pools of investment' capital invested in other countries primarily controlled by the central bank or the state itself. These investments can increase and diversify revenue sources when nations intend to maintain a surplus of foreign exchange reserves.<sup>20</sup> In the domestic scenario, SWFs function as international investment and savings vehicles which impact currency rates, inflation, and economic development. Internationally, in terms of generating liquidity and allocating financial resources, SWFs provide considerable benefits to the global capital markets.<sup>21</sup> SWFs could use their portfolios to achieve political in addition to financial objectives.<sup>22</sup> Similarly, SWFs attract considerable criticism for their general lack of transparency and political capture.

The potential interactions between SWFs' mission and ownership are particularly interesting as the investment charters usually state that the fund seeks to maximize financial returns for the benefits of long-term public policies. However, as discussed by some authors, the quasi-public nature of these funds means that 'they are exposed to political influences, often with more short-term goals.'<sup>23</sup> It is shown that SWFs with greater involvement of political leaders are associated with investment strategies to favour short-term economic policies goals at expense of longer-term maximization of returns.<sup>24</sup>

Domestic investment laws crucially influence the risk-return perspective of the SWF investments.<sup>25</sup> Usually, the host states have no way of ascertaining the motivations of the investing entity in investing. Consequently, SWF investments in vital industries are heavily regulated, driven by geopolitical concerns of foreign governments assuming control over the host state, eventually undermining national security.<sup>26</sup> On the other hand, SWF channels are often used

<sup>17</sup>K. Szarzec, Á. Dombi, and P. Matuszak (2021) 'State-Owned Enterprises and Economic Growth: Evidence from the Post-Lehman Period', *Economic Modelling* 99, 105490.

<sup>18</sup>OECD (2019) *OECD Business and Finance Outlook 2019: Strengthening Trust in Business*. OECD Publishing Paris, <https://doi.org/10.1787/af784794-en> (accessed 18 April 2022).

<sup>19</sup>A. Cuervo-Cazurra et al. (2014) 'Governments as Owners: State-Owned Multinational Companies', *Journal of International Business Studies* 45, 919.

<sup>20</sup>J. Chaisse, D. Chakraborty, and J. Mukherjee (2011) 'Emerging Sovereign Wealth Funds in the Making: Assessing the Economic Feasibility and Regulatory Strategies', *Journal of World Trade* 45(4), 837.

<sup>21</sup>I.I. Mihai (2013) 'The Evolution of Sovereign Wealth Funds and their Influence in the Global Economy. The Case of China', *Theoretical and Applied Economic* 20(5), 93.

<sup>22</sup>A. Dyck and A. Morse (2011) 'Sovereign Wealth Fund Portfolios', Chicago Booth Research Paper No.11-15; MFI Working Paper No. 2011-003; Rotman School of Management Working Paper No. 1792850.

<sup>23</sup>Ibid. S. Bernstein, J. Lerner, and A. Schoar (2013) 'The Investment Strategies of Sovereign Wealth Funds', *Journal of Economic Perspectives* 27(2), 220.

<sup>24</sup>Ibid.

<sup>25</sup>D. Darcey, M. du Jeu, and T.S. Coleman (2010) 'Managing a Sovereign Wealth Fund: A View from Practitioners', in U.S. Das, A. Mazarei, and H. van der Hoorn (eds.), *Economics of Sovereign Wealth Funds – Issues for Policymakers*. International Monetary Fund.

<sup>26</sup>J. Chaisse (2015) 'Demystifying Public Security Exception and Limitations on Capital Movement: Hard Law, Soft Law and Sovereign Investments in the EU Internal Market', *University of Pennsylvania Journal of International Law* 37(2), 583; L.C. Becker (2009) 'Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment', *Georgetown Journal of International Law* 41, 2.

for targeting the resource-rich countries, for primary investments. Domestic institutions, such as SOEs and SWFs, are reshaping the international order in a bottom-up manner.<sup>27</sup> Regardless of the risks as discussed above, the next section explores the positive side of state capitalism.

## 2.2 The New Faces of State Capitalism

Despite the significant risks associated with state capitalism, one particularly successful area is infrastructure investment and project implementation. A report issued by the World Bank notes that 83% of investments in infrastructure projects in 2017 were sponsored by government-sponsored entities and SOEs.<sup>28</sup> Likewise, a 2016 report written by KPMG for the Global Infrastructure Hub emphasized that '[e]ssentially, governments are starting to recognize that it is the public sector that needs to energize projects and that, to date, they have relied far too much on the private sector to achieve their economic, social and environmental objectives'.<sup>29</sup> The report goes on to state: 'Ever since the rise of privatization and public-private partnership models in the 1980s, most governments have operated under the assumption that the private sector outperforms the public sector when it comes to procuring and delivering infrastructure. But this can no longer be taken for granted.'<sup>30</sup>

The shift relating to the role of the state implies a strategic adjustment by partially embracing its role as promoter, supervisor, and owner of capital. The 2017 World Bank report underlines that 'East Asia Pacific accounts for up to half of global public and private investments, with China alone accounting for a quarter.'<sup>31</sup> China has systematically relied upon SOEs and policy banks to establish Sino-centric global production networks.<sup>32</sup> Another example is Vietnam, which remains a one-party state system under the Communist Party of Vietnam (CPV). The CPV leadership holds absolute power in deliberating strategic issues at the country and enterprise level, which leaves little room for bottom-up participation and grassroots contributions.<sup>33</sup> Against this background, this section examines two nations – Vietnam and China for the reasons mentioned above to show the relationship between state capitalism and domestic investment laws and how both nations interact with the LIO using domestic laws.

### 2.2.1 The Tedious Domestic Reform(s) of State Capitalism: A Case Study of Vietnam

Vietnam has been a socialist economy since 1986 with the growth of SOEs.<sup>34</sup> However, over the years, there has been demand for restructuring SOEs to promote equitization.<sup>35</sup> The complexity of corporate structures and the diversity of stakeholders in Vietnam have made reforming and

<sup>27</sup>J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue.

<sup>28</sup>See Alami et al., supra n. 5.

<sup>29</sup>KPMG, 'Foresight – Ten Emerging Trends in 2016', KPMG, January 2016, <https://assets.kpmg/content/dam/kpmg/pdf/2016/01/foresight-emerging-trends-2016.pdf> (accessed 18 April 2022).

<sup>30</sup>Ibid.

<sup>31</sup>Ibid., 43.

<sup>32</sup>L.C. Becker (2009) 'Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State Owned Enterprises and the Chinese Experience', *Transnational Law & Contemporary Problems* 19, 1; S. Schindler and J. Miguel Kanai (2021) 'Getting the Territory Right: Infrastructure-Led Development and the Re-Emergence of Spatial Planning Strategies', *Regional Studies* 55(1), 40–51. China's policy banks are three government-backed banks that have been established since 1994 as the primary channels of financing the major infrastructure projects in China. They are the Chinese Development Bank (CDB), the Agricultural Development Bank of China (ADBC), and the China Export Import Bank; The China Bond Team, 'China Insights – Policy Banks', *Eurizon SLJ Asset Management*, 29 April 2021, [www.eurizonsljcapital.com/china-policy-banks/](http://www.eurizonsljcapital.com/china-policy-banks/) (accessed 18 April 2022).

<sup>33</sup>Q. Truong and C. Rowley (2014) 'Vietnam: Post-State Capitalism', *The Oxford Handbook of Asian Business Systems*, <https://philarchive.org/archive/TRUVPC> (accessed 18 April 2022).

<sup>34</sup>E. Marquit, 'Vietnam's socialist market economy', *Peoples World*, 18 July 2003, <https://peoplesworld.org/article/vietnam-socialist-market-economy/> (accessed 18 April 2022).

<sup>35</sup>H.M. Knutsen and D.T. Khanh (2020) 'Reforming State-Owned Enterprises in a Global Economy: The Case of Vietnam', in A. Hansen, J.I. Bekkevold, and K. Nordhaug (eds.), *The Socialist Market Economy in Asia*. Palgrave Macmillan, Singapore: Springer, [https://doi.org/10.1007/978-981-15-6248-8\\_5](https://doi.org/10.1007/978-981-15-6248-8_5) (accessed 18 April 2022).

restructuring SOEs protracted and challenging. Despite the impact of COVID-19, Vietnam has accumulated an FDI stock value of US\$382 billion across 32,915 projects, with foreign investors from more than 109 countries investing in the country.<sup>36</sup> Even with the global fall in FDI, Vietnam has witnessed an increase in GDP of 2.21%.<sup>37</sup> Going forward, Vietnam's investment attractiveness could be supplemented by its participation in multiple regional and global trade agreements.<sup>38</sup> As mentioned earlier, Vietnam has signed the CPTPP, RCEP, EU–Vietnam, and Bilateral Investment Treaties with North Macedonia, Morocco, Turkey, and others.<sup>39</sup> Its noteworthy membership with the Association of the Southeast Asian Nations (ASEAN) and the World Trade Organization (WTO) has acted as a fillip to Free Trade Agreements.<sup>40</sup>

SOE reform in Vietnam has been hindered by complex domestic laws on SOEs. Vietnam has not taken a position on SOEs in its negotiations for a modern Free Trade Agreement other than its commitment to the World Trade Organization. Only two FTAs, i.e., ASEAN–Australia and New Zealand; and ASEAN–China, have partially and briefly incorporated SOEs and competition discipline regulations.<sup>41</sup> In Vietnam, SOEs perform multiple significant economic and social roles, such as generating employment and promoting social stability.<sup>42</sup> However, these roles will be considerably constrained under the CPTPP, which will restrict the possibilities for SOEs to obtain financing or preferential treatment from the government.<sup>43</sup> Under the CPTPP, all SOEs must be transparent and disclose additional information concerning their operations.<sup>44</sup> With the additional need to promote fair competition between SOEs and foreign companies, SOEs are further constrained.<sup>45</sup>

These conditions put intense pressure on Vietnam's SOEs to reform their operations, management, and assessment.<sup>46</sup> Vietnam fares poorly economically when compared to other member countries of the CPTPP with a per capita income of around US\$2,500, while the average income of other member countries is about US\$30,000.<sup>17</sup> However, Vietnam's unique status as the only non-market economy participating in the CPTPP also advances a central rule-making goal. Such a goal is to codify disciplines that restrain state capitalism that is not covered by the WTO.<sup>47</sup>

However, the 2020 Law of Foreign Investment signifies a milestone as, for Vietnam, it was the first time to shift from the positive list to the negative list approach to market access.<sup>48</sup> Decree 31

<sup>36</sup>A. Deshmukh (2021) 'FDI in Vietnam: A Year in Review and Outlook for 2021', *Vietnam Briefing*, 17 February 2021, [www.vietnam-briefing.com/news/fdi-in-vietnam-year-in-review-and-outlook-for-2021.html/](http://www.vietnam-briefing.com/news/fdi-in-vietnam-year-in-review-and-outlook-for-2021.html/) (accessed 18 April 2022).

<sup>37</sup>Ibid.

<sup>38</sup>Ibid.

<sup>39</sup>See Investment Policy Hub, *supra* n. 13.

<sup>40</sup>Dezan Shira & Associates, 'Vietnam's Free Trade Agreements – Opportunities for your Business', *Vietnam Briefing*, 31 March 2021, [www.vietnam-briefing.com/news/vietnam-free-trade-agreements-opportunities-for-your-business.html/](http://www.vietnam-briefing.com/news/vietnam-free-trade-agreements-opportunities-for-your-business.html/) (accessed 18 April 2022).

<sup>41</sup>K. Przemyslaw, M. Büge, M. Sztajerowska, and M. Egeland (2013) 'State-Owned Enterprises: Trade Effects and Policy Implications', OECD Trade Policy Papers, No. 147, Paris: OECD Publishing, <https://doi.org/10.1787/5k4869ckqk71-en> (accessed 18 April 2022).

<sup>42</sup>N.H. Hoang and T.Q. Hoan (2019) 'Vietnam and the CPTPP: Achievements and Challenges', ISEAS Perspective 41, [www.iseas.edu.sg/images/pdf/ISEAS\\_Perspective\\_2019\\_41.pdf](http://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2019_41.pdf) (accessed 18 April 2022).

<sup>43</sup>Ibid.

<sup>44</sup>SOE divestment a priority in CPTPP era', *Vietnam Investment Review*, 30 January 2019, [www.vir.com.vn/soe-divestment-a-priority-in-cptpp-era-65586.html](http://www.vir.com.vn/soe-divestment-a-priority-in-cptpp-era-65586.html) (accessed 17 April 2022).

<sup>45</sup>M. Khor, 'The New CPTPP Trade Pact is Much Like the Old TPP', *Inter Press Service*, 7 March 2018, [www.ipsnews.net/2018/03/the-new-cptpp-trade-pact-is-much-like-the-old-tpp/](http://www.ipsnews.net/2018/03/the-new-cptpp-trade-pact-is-much-like-the-old-tpp/) (accessed 18 April 2022).

<sup>46</sup>See N.H. Hoang and T.Q. Hoan, *supra* n. 38.

<sup>47</sup>M. Solís, 'Why Vietnam will shape the future of the TPP', *Brookings*, 19 May 2017, [www.brookings.edu/blog/order-from-chaos/2017/05/19/why-vietnam-will-shape-the-future-of-the-tpp/](http://www.brookings.edu/blog/order-from-chaos/2017/05/19/why-vietnam-will-shape-the-future-of-the-tpp/) (accessed 18 April 2022); As for how the new Asian regionalism has emerged amid the Third Regionalism and contributed to the New Regional Economic Order, which reinvigorates the role of developing countries in shaping international trade norms; see general P.L. Hsieh (Forthcoming 2022) *New Asian Regionalism in International Economic Law*. Cambridge University Press.

<sup>48</sup>Pasha L. Hsieh, 'New Investment Rulemaking in Asia: Between Regionalism and Domestication', this special issue. In trade agreements, the parties can inscribe their commitments and exceptions in their schedules according to two different techniques – using a positive list or a negative list. Positive list means that a trade partner has to explicitly list the sectors

stipulates the implementation of the new law by introducing the negative lists, which include the Prohibited List and the Market Entry List.<sup>49</sup> Such domestic reforms have developed in line with Vietnam's commitments under the CPTPP and the EU–Vietnam FTA. In this case, the practice of Vietnam has contributed to the new trend of ‘domesticating’ in IEL as defined in this special issue, and such cross-fertilization between national and regional investment regimes also ensures the parallel development of the two regimes.<sup>50</sup> Now, we move to the case of China.

### 2.2.2 *The Internationalization of State Capitalism: Chinese Investment in Africa*

China's interest in contributing to infrastructure development in resource-rich African economies is well documented. The pattern has typically involved the Chinese SOEs building infrastructure as part of a wider package negotiated with the African host government. A closer examination of the Botswana case in this section highlights the diversity and complexity of Chinese engagement in the infrastructure sector. Botswana provides an illuminating perspective on China's changing role in the infrastructure sector in Africa with its robust regulatory environment and a strong commitment to accountability and transparency practices.

According to the Chinese Embassy, 16 Chinese SOEs are operating in Botswana, 13 of which are top construction companies awarded the construction contractor top-grade granted by the Public Procurement and Asset Disposal Board (PPADB). The general practice is for the government of Botswana to initially propose a project. Subsequently, both the Chinese government and the Export–Import (Exim) Bank of China assess the project and decide on the terms of the loan.<sup>51</sup> Putting aside some individual problems, Chinese engagement in this sector has substantially lowered the cost of infrastructure projects and created new employment opportunities in Botswana. The success of Chinese SOEs in penetrating the infrastructure in Botswana can be analysed by examining the mode of entry, the role of government support, and the low-cost bidding strategy utilized by Chinese SOEs.<sup>52</sup>

As for the modes of entry, Chinese construction companies usually apply three different strategies. First, most Chinese SOEs begin projects in Botswana in conjunction with the Chinese government, which aids such projects during the project period. By doing so, they are better prepared to tender for local government projects and beat the traditional players of the market substantially in terms of price. Second, national SOEs that win a tender for a large-scale construction project sub-contract the work to a medium-sized Chinese construction firm. Through this sub-contracting process, and with the support of the bigger SOEs, these smaller firms gradually establish a foothold in the industry. Third, some employees of SOEs occupying managerial positions typically start their construction firms after acquiring expertise from previous projects and sub-contracting the work they accumulate to bigger Chinese SOEs. Another key success factor is the low bidding price offered by Chinese SOEs due to a low-profit-margin strategy. Such a strategy usually undercuts other competitors.<sup>53</sup>

Chinese policy banks are state-owned instruments that enable the internationalization of Chinese capital. The goals of these institutions are, however, overwhelmingly commercial.<sup>54</sup> Even the AIIB, which initially sparked much debate on China's challenges to global finance rules, has increasingly entered co-financing deals with other multilateral institutions while

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in which it undertakes market access and national treatment commitments. Under the negative list, all sectors that are not listed are, by default, open to foreign service suppliers under the same conditions as for domestic service suppliers; see general European Commission, ‘Positive and Negative Listing’ (*European Commission*), <https://trade.ec.europa.eu/access-to-markets/en/content/positive-and-negative-listing> (accessed 18 April 2022).

<sup>49</sup>P.L. Hsieh, ‘New Investment Rulemaking in Asia: Between Regionalism and Domestication’, this special issue.

<sup>50</sup>J. Chaisse and G. Dimitropoulos, ‘Domestic Investment Laws and International Economic Law in the Liberal International Order’, this special issue.

<sup>51</sup>A.Y. Chen (2009) ‘China in Africa Project: China's Role in Infrastructure Development in Botswana’, Occasional Paper 44 SAIIA, [www.voltairenet.org/IMG/pdf/China\\_s\\_Role\\_in\\_Botswana.pdf](http://www.voltairenet.org/IMG/pdf/China_s_Role_in_Botswana.pdf) (accessed 18 April 2022).

<sup>52</sup>Ibid.

<sup>53</sup>Ibid.

<sup>54</sup>K.P. Gallagher and A. Irwin (2015) ‘China's Economic Statecraft in Latin America: Evidence from China's Policy Banks’, *Pacific Affairs* 88(1), 99–121.

adopting many of their standards.<sup>55</sup> The case of Chinese investment in Africa shows that the relationship between state capitalism and domestic investment laws is twofold: state capitalism is regulated by domestic investment laws; however, domestic investment laws can positively impact the internationalization of state capitalism.<sup>56</sup>

### 3. State Capitalism and Inward Investment

Within the broader theme of this special issue, a nation's investment law framework can be seen to be the primary regulator of foreign trade and investment; it may comprise specialized laws applicable to foreign investors such as investment promotion, facilitation, screening laws, and general legal instruments regulating foreign investment flows.<sup>57</sup> Investment screening laws establishing foreign investment screening mechanisms have become widespread amongst foreign control mechanisms. Most Western countries are introducing investment screening mechanisms to control inward investment flows from emerging economies.<sup>58</sup> The recent adoption and reform of investment screening laws can be attributed to the involvement and the rise of SOEs and SWTs in the international economy.<sup>59</sup>

Apart from investment screening mechanisms, there are soft laws that impact foreign investment promotion/facilitation directly and indirectly. Such soft laws undoubtedly form part of the broader legislative framework of a country and are not necessarily designed specifically to promote and/or facilitate foreign investment. Under the circumstances, this section will focus on the investment screening laws and soft laws employed by states to discuss the effects of state capitalism on the host states.

#### 3.1 Screening Foreign Investment: The New EU Framework

The Treaty on the Functioning of the European Union plays a central role in foreign and SOEs' investments.<sup>60</sup> Article 64 of the Treaty allows EU member states to frame their laws to deal with foreign investments in their respective territories.<sup>61</sup> Article 65 of the Treaty allows member states to impose restrictions on investments by State-Controlled Entities (SCEs) in the EU in the interest of maintaining public order and safety.<sup>62</sup> The new role of the EU concerning foreign investment screening can be understood through the EU Foreign Direct Investment Screening Regulation, which has been applicable since 11 October 2020. Following this regulation, foreign investments in the EU are subject to tighter screening.<sup>63</sup> The new regulation requires establishing

<sup>55</sup>A. De Jonge (2017) 'Perspectives on the emerging role of the Asian Infrastructure Investment Bank', *International Affairs* 93(5), 1061–1084.

<sup>56</sup>See Alami et al., *supra* n. 5.

<sup>57</sup>A.E.A. Garzón (2020) 'From State-Controlled Enterprises to Investment Screening: Paving the Way for Stricter Rules on Foreign Investment', *Transnational Dispute Management (TDM)* 6, [www.transnational-dispute-management.com/article.asp?key=2775](http://www.transnational-dispute-management.com/article.asp?key=2775) (accessed 18 April 2022) (Looking at investment screening laws and relevance of domestic legislation in determining legal status of SCEs). For a detailed discussion, see J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue.

<sup>58</sup>According to UNCTAD, at least 11 countries have introduced new laws for the screening of foreign investment since 2011, while 41 significant amendments in 15 jurisdictions have taken place during the same time, and even more are forthcoming; see UNCTAD, 'World Investment Report: SEZs', UN 2019, 94. J. Chaisse and G. Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order', this special issue.

<sup>59</sup>See B.J. Cohen (2009) 'Sovereign Wealth Funds and National Security: The Great Tradeoff', *International Affairs* 85(4), 713–731.

<sup>60</sup>Z.T. Chan and S. Meunier (2021) 'Behind the Screen: Understanding National Support for a Foreign Investment Screening Mechanism in the European Union', *Review of International Organizations*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3726973](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3726973) (accessed 2 October 2022).

<sup>61</sup>Consolidated Version of the Treaty of Functioning of European Union [2008] OJ C115/13, art 64.

<sup>62</sup>*Ibid*, art 65.

<sup>63</sup>P.M. Gadocha (2020) 'Assessing the EU Framework Regulation for the Screening of Foreign Direct Investment – What Is the Effect on Chinese Investors?', *Chinese Journal of Global Governance* 6(1), 36.



an information-sharing system between the European Commission and the EU member states.<sup>64</sup> Understandably, as a result, member states tighten their respective FDI screening frameworks even though the European Commission has explicitly stated that this is not the aspired result.<sup>65</sup> Since both the Commission and other member states can comment on a member state's investment screening mechanism, an inevitable result will be an increase in the duration of the review periods. It is also possible that an increased number of investments will be subject to investment screening if EU member states continue to tighten their FDI regimes.

The EU has historically been one of the most attractive destinations for FDI in the world.<sup>66</sup> The principle of free movement of capital has always found a place in most EU member states' foreign investment screening laws. However, with the introduction of the recent EU Foreign Direct Investment Screening Regulation, more and more member states are becoming wary of foreign state capitalism and are thus tightening their screening laws. For example, while Germany's foreign investment control framework has been very liberal to date, it has recently started tightening the same in the name of national security concerns. Investments from non-EU states, specifically those from Chinese investors, have also led member states to rethink their liberal approach to foreign investment control. For instance, Germany tried stalling a Chinese investor's request to take over Osram's light bulb unit Ledvance.<sup>67</sup>

### 3.2 The Rise of Soft Laws and State Capitalism

The OECD Guidelines on Corporate Governance of State-Owned Enterprises have been drafted to ensure good governance of state-owned enterprises. The guidelines were initially introduced in 2005. In 2014, after observing changing circumstances and realizing the necessity to implement the guidelines by drawing lessons from the last ten years, amendments were formally introduced in 2015.<sup>68</sup> The OECD guidelines have set international standards with the purpose to ensure transparency and accountability in SOEs, establishing a level playing field for private businesses and SOEs, and professionalizing the state as an owner. These guidelines aim to strike a proper balance between passive ownership and excessive control.<sup>69</sup> The guidelines have been widely adopted and implemented since 2015.<sup>70</sup>

The Santiago Principles were drafted by the International Working Group of SWFs and welcomed by the IMF's International Monetary Financial Committee in 2008, which consists of 24 general accepted practices and principles voluntarily endorsed by IFSWF members. The Santiago Principles promote transparency, good governance, accountability and prudent investment

<sup>64</sup>K. Alert, 'New EU Foreign Direct Investment Regulations Take Effect', *Kirkland & Ellis*, 29 October 2020, [www.kirkland.com/-/media/publications/alert/2020/10/new-eu-foreign-direct-investment-regulations-take-effect.pdf](http://www.kirkland.com/-/media/publications/alert/2020/10/new-eu-foreign-direct-investment-regulations-take-effect.pdf) (accessed 18 April 2022).

<sup>65</sup>See also G. Dimitropoulos (2020) 'National Security: The Role of Investment Screening Mechanisms', in J. Chaisse, L. Choukroune and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*. Springer, 507.

<sup>66</sup>UNCTAD (2018) *World Investment Report 2018: Investment and New Industrial Policies*. Geneva: United Nations Publication, [https://unctad.org/system/files/official-document/wir2018\\_en.pdf](https://unctad.org/system/files/official-document/wir2018_en.pdf) (accessed 18 April 2022).

<sup>67</sup>Reuters Staff, 'Germany stalls Osram unit sale to Chinese buyers: WirtschaftsWoche', *Thomson Reuters*, 27 October 2016, [www.reuters.com/article/us-osram-licht-m-a-idUSKCN12R1PW](http://www.reuters.com/article/us-osram-licht-m-a-idUSKCN12R1PW) (accessed 18 April 2022).

<sup>68</sup>OECD (2015) *OECD Guidelines on Corporate Governance of State-Owned Enterprises*. Paris: OECD Publishing, <https://doi.org/10.1787/9789264244160-en> (accessed 18 April 2022).

<sup>69</sup>The layout of the guidelines is following: 'The Guidelines presented in the first part cover the following areas: (I) Rationales for State's State Ownership; (II) The State's Role as an Owner; (III) State-Owned Enterprises in the Marketplace; (IV) Equitable Treatment of Shareholders and Other Investors; (V) Stakeholder Relations and Responsible Business; (VI) Disclosure and Transparency, and (VII) The Responsibilities of the Boards of State-Owned Enterprises. In the second part, the Guidelines are supplemented by annotations that contain commentary on the Guidelines and are intended to help readers understand their rationale'; see OECD, supra n. 62.

<sup>70</sup>From the survey of 31 countries, 2/3rd of them have duly maintained transparency and ensured public disclosure. 2/3rd of them were professionalising the company management, and 1/2 of them ensured equitable treatment of shareholders and investors; OECD (2020) *Implementing the OECD Guidelines on Corporate Governance of State-Owned Enterprises: Review of Recent Developments*. Paris: OECD Publishing, <https://doi.org/10.1787/4caa0c3b-en> (accessed 18 April 2022).

practices.<sup>71</sup> The guidelines specifically focus on the latter part. For the same, it has been recommended that funds disclose their investment criteria and the relevant financial data to gain the trust of foreign countries. It will ensure healthy competition in the financial market. The guidelines represent an excellent example of transnational norms aimed at reassuring the recipient country as they are carefully designed to resolve all the concerns.<sup>72</sup> The principles are expected to have a comprehensive implementation and adoption by different countries as they are internationally accepted rules. Implementing the Santiago Principles will help bypass the stringent EU or US mechanisms for SWFs. From this perspective, soft laws in relation to SWFs, such as the Santiago principles, can positively affect the regulation of state capitalism, in turn contributing to the LIO as the rise of state capitalism is traditionally viewed as an opposing ideological paradigm.

#### 4. State Capitalism, Domestic Investment Laws, and the Liberal International Order

As discussed above, state capitalist actors have gained a significant chunk of the market share both locally and internationally due to considerable financing capacities. SOEs get financial assistance, fiscal incentives, regulatory privileges, and immunity that their privately held competitors do not get.<sup>73</sup> Discriminatory government market access or buying practices frequently enhance these advantages. These privileges are usually a product of state capitalism that exploits open free markets while safeguarding essential features of local production. It mobilizes governmental resources and forces knowledge transfer through joint ventures between international and domestic firms. It exercises control over major businesses and subsidizes their international expansion and growth. This results in distorted market competition and an uneven playing field for state-owned and private entities.<sup>74</sup> Therefore, certain competition law principles come into play. The ‘state-owned’ status could result in lowering or raising prices, the possibility of unfair advantages due to direct or indirect subsidies, and the possibility of anti-competitive issues.<sup>75</sup> In this sense, state capitalism may hamper the LIO.

Alternatively, in countries with economies driven by state capitalist principles, domestic laws carefully organize and strengthen state capitalism. In these countries, optimism vis-à-vis state activities in the economy are fuelled by the need to ensure the state’s power in the country and beyond.<sup>76</sup> China’s SOEs’ success in Botswana is another case showing how the state uses domestic investment laws to internationalize SOEs. As a matter of fact, Chinese legislation is silent on the differential treatment applied between the SOEs and private companies. Against this background, this section examines the relationship and complex interaction between state capitalism, domestic investment laws, and LIO.

##### 4.1 State Capitalism and Domestic Investment Laws

State capitalism is regulated by a broad range of domestic investment laws, which, over the years, have supported the rise and influence of SCEs in the global economy. The domestic ‘ecosystem’

<sup>71</sup>IFSWF, ‘Santiago Principles’, [www.ifswf.org/santiago-principles-landing/santiago-principles](http://www.ifswf.org/santiago-principles-landing/santiago-principles) (accessed 18 April 2022).

<sup>72</sup>Ibid. The following areas are covered: ‘legal framework, objectives, and coordination with macroeconomic policies; – institutional framework and governance structure; – investment and risk management framework.’

<sup>73</sup>Investment incentives are a central element in facilitative domestic regulations which raise several legal issues, see A. Gourgourinis, ‘Domestic Investment Incentives in International Trade Law’, this special issue.

<sup>74</sup>D.A. McCarthy, ‘State Capitalism and Competitive Neutrality’, APCAC US–Asia Business Summit, 2 March 2012, <https://2009-2017.state.gov/e/eb/rls/rm/2012/181520.htm> (accessed 18 April 2022).

<sup>75</sup>J. Chaisse (2016) ‘Untangling the Triangle: Issues for State-controlled Entities in Trade, Investment, and Competition Law’, in J. Chaisse, T.-Y. Lin (eds.), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita*. Oxford University Press, 233–258.

<sup>76</sup>J. Ahrens, H.W. Hoen, and M.C. Spechler (2016) ‘State Capitalism in Eurasia: A Dual-Economy Approach to Central Asia’, in M. Brusis, J. Ahrens, and M.S. Wessel (eds.), *Politics and Legitimacy in Post-Soviet Eurasia*. London: Palgrave Macmillan, 47–71.

for state capitalism comprises this legislative and regulatory framework.<sup>77</sup> The framework surrounding state capitalism may include specialized legislation specifically aimed at foreign investors. However, it could also include broader legislative instruments that impact the foreign investment flows.<sup>78</sup>

#### 4.2 State Capitalism and Liberal International Order

In the wake of the Second World War, a new system known as LIO arose in international relations, based on political liberalism, economic liberalism, and liberal internationalism.<sup>79</sup> The LIO was based on the free market, security cooperation, and liberal democratic principles. The globalization of economics, culture, society, and the law has played an important part in the post-Second World War LIO.<sup>80</sup> Globalization can be defined as a process of ‘de-nationalization’, or the growing integration of markets, politics, and the law as well as peoples and individuals.<sup>81</sup>

IEL, as it developed over the past years, is a reflection of LIO. WTO, NAFTA, investment treaties, and FTAs concluded since the mid-90s have fundamentally diminished the state’s role in the economy. A variety of sources such as international, regional, and national law informs international investment regulation,<sup>82</sup> aside from economic theories and realities. They are derived from various legal and regulatory areas, blurring the traditional distinctions between public and private law. In this respect, this section demonstrates the legal status of state capitalism in international investment law specifically.

##### 4.2.1 International Investment Law and State Capitalism

State capitalism has given rise to new and complex challenges in investment treaties and investment arbitration.<sup>83</sup> Due to the increased involvement of SOEs in cross-border investment, the complexity of applying the law and regulating these entities has also increased. However, the problems posed by such entities are not limited to law but also manifest themselves in the form of political and economic challenges, which then highlight the gaps in existing legislation. One of the key economic concerns is that such interference by the state in the global market would inevitably affect the market forces negatively.<sup>84</sup>

Furthermore, investment decisions would no longer be based on economic and financial reasons but would have a political colour.<sup>85</sup> Due to the politicization of decision-making and the opaque nature of SOEs, any investment by them would always attract reasonable suspicion

<sup>77</sup>J. Chaisse and G. Dimitropoulos, ‘Domestic Investment Laws and International Economic Law in the Liberal International Order’, this special issue.

<sup>78</sup>The investment flows are categorized into four main categories being commercial loans, official flows, foreign direct investment, and foreign portfolio investment. See UNCTAD (2015) *World Investment Report 2015: Reforming International Investment Governance*. Geneva: United Nations Publication, <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245>, (accessed 18 April 2022); see general, J. Chaisse and G. Dimitropoulos, Domestic Investment Laws and International Economic Law in the Liberal International Order, this special issue.

<sup>79</sup>K.-C. Chan (2020) ‘Elephant in the Room: On the Notions of SCEs in International Investment Law and International Economic Law’, *Transnational Dispute Management* (TDM) 6, [www.transnational-dispute-management.com/article.asp?key=2768](http://www.transnational-dispute-management.com/article.asp?key=2768) (accessed 18 April 2022).

<sup>80</sup>L.C. Becker (2006) ‘Economic Globalization Ascendant: Four Perspectives on the Emerging Ideology of the State in the New Global Order’, University of California, *Berkeley La Raza Law Journal* 17, 1.

<sup>81</sup>J. Chaisse and G. Dimitropoulos, Domestic Investment Laws and International Economic Law in the Liberal International Order, this special issue.

<sup>82</sup>Ibid.

<sup>83</sup>See Kai-Chieh Chan, supra n. 73; see J. Chaisse, supra n. 2.

<sup>84</sup>See Recruitment, ‘State-Owned Assets Supervision and Admin. Comm’n of the State Council’, SASAC, 28 June 2004, <http://en.sasac.gov.cn/nl461859/cl463576/content.html> (accessed 18 April 2022).

<sup>85</sup>See R.J. Gilson and C.J. Milhaupt (2011) ‘Economically Benevolent Dictators: Lessons for Developing Democracies’, *American Journal of Comparative Law* 59(1), 227.

in the host country.<sup>86</sup> This politicization would further lead to protectionist reactions – as host states will try to ‘protect’ their market sovereignty – and create a legal challenge in international investment arbitration.<sup>87</sup> The national security exception, which allows states to prohibit certain investments from government-controlled bodies, could also be invoked repeatedly and hence hinder free trade.<sup>88</sup> A close proximity between the governments and the private sector would also expose investments and related decisions to fraud, corruption, and abuse of power. Therefore, state capitalism poses unprecedented challenges in international investment arbitration.

#### 4.2.2 *The Question of Legal Standing of SOEs before ISDS*

The rise of SOEs has given rise to some pertinent questions on the legal standing of the entities.<sup>89</sup> In Investor–State Dispute Settlement (ISDS), investors from one party are allowed to seek financial compensation as a remedy from another state entity in a binding arbitration if the other has failed to fulfil its obligation under a treaty.<sup>90</sup> Investor–state arbitration has not only allowed investors to sue the host governments for injury but also directly challenge government measures, policies, and actions that seem to violate the provisions of the investment treaty signed between the two.<sup>91</sup> One of the key legal issues includes the question of jurisdiction. In *Ceskoslovenska Obchodni Banka, A. S. (CSOB) v. The Slovak Republic (Slovakia)*, an ICSID tribunal explicitly ruled that the investor–state dispute was within the jurisdiction of the centre and within the competence of the tribunal.<sup>92</sup> This case expanded the scope of application of BITs as well as the jurisdiction of ICSID. This was followed by a more functional approach in *Tulip v. Turkey Award*, which ruled that mere ownership of a corporate entity by the state cannot trigger the presumption of statehood but can only be a relevant factor while determining attribution.<sup>93</sup> We now move to the discussion of the impact of domestic laws on legal standing.

#### 4.2.3 *The Impact of Domestic Laws on Legal Standing*

As set forth in Art. 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),<sup>94</sup> the establishment of ‘attribution of conduct to the state is a necessary condition for substantiating the subjective element of the responsibility of the state for internationally wrongful acts.’<sup>95</sup> A treaty claim may be substantiated owing to sovereign conduct affecting the performance of a contract stipulated between a SOE and foreign investors.<sup>96</sup> The *Vivendi v. Argentina I Ad Hoc Committee* remarked that the attribution of conduct of political

<sup>86</sup>M.C. Jensen (1986) ‘Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers’, *American Economic Review* 76(2), 323.

<sup>87</sup>J. Chaisse and C. Bellak (2015) ‘Navigating the Expanding Universe of Investment Treaties-Creation and Use of Critical Index’, *Journal of International Economic Law* 18(1), 79.

<sup>88</sup>G. Sacerdoti (2013) ‘BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity’, *ICSID Review – Foreign Investment Law Journal* 28(2), 351–382.

<sup>89</sup>M. Pargendler et al. (2013) ‘In Strange Company: The Puzzle of Private Investment in State-Controlled Firms’, *Cornell International Law Journal* 46, 569.

<sup>90</sup>OECD (2004) *Fair and Equitable Treatment Standard in International Investment Law*. OECD Working Papers on International Investment, Paper No. 3. OECD Publishing, <http://dx.doi.org/10.1787/675702255435> (accessed 18 April 2022).

<sup>91</sup>J.W. Salacuse (2010) ‘The Emerging Global Regime for Investment’, *Harvard International Law Journal* 52, 427, 446.

<sup>92</sup>*Ceskoslovenska Obchodni Banka v. Slovak Republic*, ICSID Case No. ARB/97/4, Award (December 29, 2004), 13 ICSID Rep. 183 (2008).

<sup>93</sup>*Tulip Real Estate Investment v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award (March 10, 2014).

<sup>94</sup>International Law Commission (2001) ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries’, UN GAOR 56th Session Supp 10, ch 4, UN Doc A/56/10 (ARSIWA).

<sup>95</sup>C. de Stefano (2022) ‘Attribution of Conduct to a State’, *ICSID Review – Foreign Investment Law Journal* 37, 20–50.

<sup>96</sup>See also *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (formerly Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic) (Vivendi I)*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2003), para. 110.

subdivisions is characterized by the very same legal mechanism pertaining to the attributability rules applicable to state organs.<sup>97</sup>

Investment tribunals usually look at the degree of control the state has on a corporation. If a corporate entity is heavily controlled by the state, only then are its acts attributable to a particular state. This line of reasoning was followed in *CSOB v. Slovakia*, where the tribunal ruled that what mattered was the nature of activities being carried out and not their purpose. The decision in *Hrvatska Elektroprivreda (HEP) v. Slovenia*, further held that SOEs could also make claims as qualified investors before investment tribunals.<sup>98</sup> The decision in *Tulip v. Turkey Award* was an important decision regarding the legal standing of SOEs, as it held that ownership of a corporate entity by the state cannot trigger the presumption of statehood but can only be a relevant factor while determining attribution.<sup>99</sup> The decision in *Electrabel v. Hungary Decision on Jurisdiction Applicable Law and Liability* also supported this stance, holding that being state-owned or state-controlled cannot be the sole ground for determining attributability.<sup>100</sup> Over the years, the investment tribunals have set a standard of review for such claims at the jurisdictional level itself, while also respecting the limits placed by sovereign states on their consent to international arbitration.<sup>101</sup>

There is no substantial impact of domestic law on SOEs before investment tribunals. As held in the case of *CSOB v. Slovakia*, the concept of 'national' in Article 25(1) of the ICSID Convention is not to be restricted to privately owned entities but also to companies that might have government control and influence, whether wholly or partially.<sup>102</sup> The relevant factor while determining the legal standing is, therefore, whether the entity in question was involved in commercial activities or activities which are governmental in nature. Therefore, the tribunals have expanded the scope of the ICSID Convention to allow SOE access to international arbitration, limited to acts that are commercial in nature.

However, in *Global Trading v. Ukraine*, the tribunal also looked at the BIT apart from the ICSID Convention.<sup>103</sup> It further held that there is no specific methodology for the chronology of how the two are to be looked at. However, if the activities of the concerned SCE were commercial in nature, they would come under the jurisdiction of ICSID. Therefore, the judgments given by the tribunal only indicate one thing – the atmosphere in international investment arbitration is favourable towards SCEs, and the investment arbitration landscape has shaped itself according to these entities.<sup>104</sup> Such close examination indicates how state capitalism is interacting and shaping the ILO.

## 5. Conclusion

The article analyses the underlying principles of state capitalism and their specific contributions to the transition from the use of international to domestic legal instruments for the regulation of cross-border trade and investment flows. It further interprets the trends spawned by the propagation of the Liberal International Economic Order as states realize their development targets and vision to actively contribute to the regulation of international trade and cross-border transactions

<sup>97</sup>Ibid., para 16.

<sup>98</sup>*Hrvatska Elektroprivreda v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Treaty Interpretation, TT 6-15 (12 June 2009).

<sup>99</sup>*Tulip Real Estate Investment v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, para. 289 (10 March 2014).

<sup>100</sup>*Electrabel v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, para. 7.95 (30 November 2012).

<sup>101</sup>*Telenor Mobile Communications v. Hungary*, ICSID Case No. ARB/04/15, Award, para. 97 (13 September 2006).

<sup>102</sup>*Ceskoslovenska Obchodni Banka v. Slovak Republic*, ICSID Case No. ARB/97/4, Award (29 December 2004), 13 ICSID Rep. 183 (2008).

<sup>103</sup>*Global Trading Resource Corp. v. Ukraine*, ICSID Case No. ARB/09/11, Award, para. 46 (1 December 2010).

<sup>104</sup>See Julien Chaisse, *supra* n. 2.

globally. The article shows that state capitalism is by no means a phenomenon limited to emerging economies. The interplay between domestic and international in IEL concerning state capitalism is a complex issue. The process of domestication seems to be the means; in other words, states worldwide have started using the means of domestic law to achieve the goals of IEL.<sup>105</sup>

Domestic legal regimes have undergone radical transitions in an effort of states to accommodate incoming foreign investments with greater ease. The domestic laws on SOEs have influenced state capitalism, with some countries limiting development, while others create a system entirely driven by state capitalism. The relationship between state capitalism and domestic investment laws is twofold: state capitalism is regulated by domestic investment laws; on the other sides, domestic investment laws can positively impact the internationalization of state capitalism.

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<sup>105</sup>G. Dimitropoulos, 'The Right to Hospitality in International Economic Law: Non-Discrimination and Dispute Settlement in Domestic and International Economic Law', this special issue.