EXECUTIVE SUMMARY

Rethinking National Investment Laws

A study of past and present laws to inform future policy-making

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National investment laws are versatile policy instruments, which can serve a broad and varied set of functions. These laws vary widely across countries and have changed significantly over time. Investment laws have often been underestimated, sometimes even being mistaken for domestic versions of investment treaties.

This report provides a resource for policy-makers interested in reforming their countries' national investment laws. It consists of four sections: an introduction and three substantive sections. Section 2 charts how national investment laws have changed over time. Section 3 surveys contemporary investment laws, identifying seven main functions that these laws serve today. Section 4 looks to the future, articulating lessons from the past and providing a framework for policy-makers considering reforming their investment laws.

The report emphasizes three main findings.

1. Investment laws have changed over time and can be redesigned to meet new challenges and opportunities.

National investment laws have changed significantly over time in many countries. The earliest investment laws emerged in developing countries in the 1950s, and through the 1960s and 1970s, these laws were usually driven by domestic policy objectives. These objectives included bringing cohesion to inherited colonial-era laws, fostering more coordination between ministries, and implementing a country's development plan. As a result, the functions and content of investment laws varied widely.

In the 1980s, investment laws were reimagined as tools through which international standards, largely related to investment protection, could be brought into domestic law. Many developing countries rewrote their investment laws between 1980 and 2010, often in ways that aligned them more closely with investment treaties. The inclusion of tax incentives also became more prominent in these years. These shifts in function and content reflected a higher-level shift in policy objectives as states became more focused on the objective of attracting and promoting investment. International organizations also began issuing guidance for national investment laws, but their guidance differed: the World Bank recommended laws with content aligned with investment treaties, the United Nations Conference on Trade and Development recommended laws aligned with more developmentalist considerations, while the Organisation for Economic Co-operation and Development has been agnostic about the need for investment laws.

The trend of rewriting investment laws to incorporate investment treaty standards was widespread between 1980 and 2010 but never universal. Even among developing countries, there were a variety of approaches. A number of developed countries wrote or rewrote investment laws during these years, too; these laws focused on the admission and screening of inbound foreign investment only and were driven by domestic policy objectives, not international guidance or standards.

Since the 2000s, concerns about investment laws modelled on investment treaties have become more prominent. Such laws risk becoming disconnected from the wider national legal system and pose many of the same legal risks and policy concerns as old-style investment treaties. These concerns are leading to renewed interest in national investment laws and a growing diversity in practice. This report documents how countries have changed their investment laws in the past, with an eye to helping those policy-makers who are rethinking these laws today.

2. National investment laws are versatile domestic policy instruments and vary widely today.

Investment laws in force today vary widely in structure and content. Previous observers have sought to locate investment laws on a spectrum running from those laws that seek to **control** investment to those that seek to **facilitate** investment. However, it is important to move beyond a discussion of the policy **objectives** investment laws seek to achieve and to also explore the diverse **functions** that they perform. This is for three reasons. First, focusing only on the question of objectives overlooks the fact that investment laws govern a variety of issues that arise at different stages of the investment process. Second, focusing on objectives obscures the fact that laws that share similar high-level objectives, such as promoting or facilitating investment, can pursue those objectives in very different ways. Third, identifying and clarifying diversity in the functions of investment laws helps explain diversity in the **content** of these laws—an investment law that governs the admission and approval of new foreign investment will contain different provisions than an investment law that deals with the conferral of investment incentives.

Conceptually, then, we suggest it is useful to think about investment laws as involving a three-step inquiry that considers

1. the policy **objective(s)** that the law seeks to achieve (e.g., promoting sustainable investment, coordinating action across government);

2. the **function(s)** that the law serves (e.g., governing the admission and approval of new foreign investment); and
3. the structure and **content** of the law (e.g., whether the law applies to all investments or only foreign investments; whether the law deals with the amount of compensation owing in the event of an expropriation, etc.).

Each step in the inquiry entails a move from more general issues to more specific ones.

We organize our survey of investment laws by the function or functions the laws perform. Through our survey of 70 investment laws, we identify seven main functions of investment laws.

- **Governing the admission and approval of new foreign investment.** At least 60% of the laws we reviewed dealt with admission. A small minority of laws adopt a "positive list" approach in which foreign investment is permitted only in listed sectors. In contrast, others use a "negative list" approach in which foreign investment is allowed in all sectors except those listed. Among states adopting a negative list approach, there is variation in terms of which sectors are closed and in terms of the way investment approval is administered. Some entry regimes only certify compliance with stated regulatory requirements; in others, decision-makers have more discretion to make decisions about the desirability of an investment, including through screening of proposed investments in sectors that are open to investment in principle.
- **Conferring and administering investment incentives.** At least 80% of the investment laws we reviewed dealt with investment incentives, with a lot of diversity in sectors eligible for incentives, the value of incentives, and other design elements.
- **Facilitating investment.** A significant minority of investment laws deal with facilitation, understood in the specific sense of addressing practical impediments to investment. These provisions can confer power on an investment promotion agency or establish "one-stop shops" for approvals and permits relating to investments.
- **Guaranteeing legal protection to investment.** Roughly 70% of investment laws we reviewed guarantee legal protection to investors. The most commonly included protections are guarantees of compensation in the event of expropriation and guarantees of free transfers of funds relating to an investment. However, it remains uncommon for investment laws to provide the full range of protections commonly found in treaties. For example, fewer than 10% of laws include fair and equitable treatment provisions. Even among laws that include apparently similar protections, such as provisions on compensation for expropriation, there are important differences in the drafting of these provisions.
- **Establishing and/or specifying a system for managing investor–state disputes.** Almost 70% of the laws we reviewed dealt expressly with the settlement of investment disputes. They do so in a variety of ways. Some establish new national institutions designed to prevent or resolve investment disputes; others assert the primacy of domestic courts; others recognize the possibility of investor–state dispute settlement through international arbitration in principle, subject to a specific agreement providing consent; and, finally, some provide advance consent on behalf of the state to investor–state dispute settlement.

- **Specifying investors' obligations and responsibilities.** Investment laws are only one part of the domestic legal framework governing investment, and investors will ordinarily remain bound by laws of general application that relate to their activities: contract law, environmental law, corporate law, labour law, tax law, and so on. Some investment laws clarify that this is the case for the avoidance of doubt, while other investment laws highlight specific areas in which investors must comply with obligations under domestic law. Other investment laws go further, placing obligations on investors beyond what is contained elsewhere in the domestic legal framework.
- **Monitoring and oversight of foreign investment.** This function has received relatively little attention to date, in part because monitoring depends as much on bureaucratic practices as it does on powers conferred under a law. That said, some laws place obligations on investors to report to an investment agency (or some similar body), potentially envisaging that agency playing a role in overseeing and verifying compliance with domestic law.

3. There is no "off-the-shelf" model for the functions and design of an investment law. Appropriate design varies by context and by the function(s) policy-makers want the law to serve.

We provide a framework for policy-makers thinking about national investment laws. The framework neither recommends a specific design or legal content, nor does it assume that an investment law will be necessary or appropriate in all circumstances. Instead, the purpose of the framework is to encourage policy-makers to ask the right questions, the answers to which will depend on national context and policy objectives.

A Framework for Rethinking a National Investment Law

As a first step toward assessing whether to reform or adopt an investment law, countries should clarify the ultimate objective that the law aims to achieve. For most states, their ultimate objective will be to promote sustainable development. Disaggregating this ultimate objective may highlight other proximate objectives that are thought to contribute to realizing sustainable development. Such specific objectives might include

- encouraging investment in prioritized sectors, including by signalling to investors that investment in prioritized sectors is welcome;
- maximizing the benefits (and minimizing the costs) associated with investment for the domestic economy and for third-party stakeholders, such as local communities;
- ensuring that investment is appropriately regulated;
- affirming (or contesting) standards of investment protection contained in investment treaties;
- ensuring that investment doesn't jeopardize national security; and
- fostering greater coordination and consistency of action across government.

A challenge then arises in designing and drafting an investment law that is likely to assist in realizing abstract objectives of this sort. To help translate policy objectives into practice, we recommend that policy-makers focus on the *functions* that the law is intended to perform, and how these functions relate to their ultimate objective of promoting sustainable development, as well as proximate national policy objectives and priorities.

We provide a framework as a guide for internal discussion within government, to help policy-makers reflect on the functions their current law is serving and articulate the functions that they want a law to serve. In some contexts, it may be more appropriate for investment to be governed by a combination of laws of general application and sector-specific laws rather than an investment law. It is important to discuss these questions internally before deciding if a law is needed, and if so, deciding how to design the law.

A. Articulating and Evaluating Functions of the Current Investment Law

Any rethinking of investment laws must begin with clarity on their intended functions.

- What are the intended functions of our current investment law?
- Is our current investment law fulfilling its intended functions?
- Is our current investment law serving any unintended functions?
- Are the law's intended and actual functions still necessary or relevant in the current national and international context?
- For each function that is deemed still necessary and relevant, how does the investment law serve this function?

B. Articulating Desired Functions

There is no best practice or set of functions that investment laws "should" include; whether a particular function is relevant and necessary depends on country context.

- What functions do we want an investment law to serve?
- How does this relate to wider investment policy objectives?
- What do we expect our objectives to be in 5 years? In 10 years?

C. Comparing Policy Tools

An investment law is a domestic policy tool. It may be a useful tool, or it may not, depending on the context, other available tools, and the proximate policy objectives of a government.

- Is an investment law the appropriate instrument to perform a given function?
- Would some functions assigned to the investment law be better addressed through another instrument?
- Could the investment law temporarily fill a regulatory capacity gap for certain functions?

D. Designing an Investment Law to Serve Desired Functions

Questions of content and design should be considered only after the desired functions are clear. Cross-cutting questions to consider, regardless of desired functions, include the following:

- What is the scope of application of the law?
- How will the law interface with the country's laws/regulations of general application?
- What is the best institutional structure for the administration or enforcement of the investment law?

E. Considering Objectives, Implications, and Risks Associated With Specific Functions

If a government is considering keeping (or adding) a particular function in an investment law, then it is necessary to review different models and examine the risks and implications of each model. Much will depend on how wider policy objectives relate to the performance of any given function—for example, whether the purpose of establishing new rules to govern the admission and approval of foreign investment is to send a signal of openness to foreign investors, to drive domestic economic reform, to increase oversight over prospective investment that poses national security risks, or some combination of these and other objectives. Beyond tailored questions and considerations for each function, we identify common risks or implications:

- **Admission:** Some options, for instance, when approval is granted automatically after the expiry of a specified time period, may pose risks for countries with limited bureaucratic capacity to evaluate applications, especially if investment authorization intersects with environmental or other impact assessments.
- **Incentives:** Certain tax incentives create acute risks, including the risk of depleting public funds to support investment that would have occurred anyway. Incentives may be better placed in general tax law, and developments at the Organisation for Economic Co-operation and Development regarding a minimum global tax may create a need for rethinking or removing tax incentives.
- **Investment facilitation:** This raises few acute risks, but legislation may not be the appropriate tool to address practical impediments to investment, and doing so can come with costs. It can also be challenging to identify genuine impediments.
- **Legal protection for (foreign) investors:** Certain protections, such as stabilization or fair and equitable treatment provisions, raise acute risks, similar to old-style investment treaties, and there are additional risks of unintended interaction with contracts, treaties, and other laws.
- **Systems for managing investment disputes:** Certain approaches raise acute legal and financial risks, for instance, providing consent to international arbitration, and may also impact the role of the national judiciary.
- **Obligations on (foreign) investors:** These raise few acute risks but do raise practical challenges. The value of singling out certain types of obligations (environmental, labour, reporting) in an investment law rather than referring to other domestic laws can be questioned.
- **Monitoring and oversight of investment:** This raises few acute risks, but there may be challenges in regulatory and institutional design.

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