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State Capitalism and International Investment Law – An Introduction

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I. INTRODUCTION

International economic law (IEL) and international investment law (IIL) were shaped as separate disciplines in the era of the dominance of the system of market capitalism. Both serve the freedom of movement of capital. The prevalence of the market and the retreat of the government in international economic law assume an ideology that may be described as capitalist or liberal. This is not of course an ideology that all states participating in the international economic system would necessarily subscribe to. But the implied ideological dominance of the system of market capitalism, as well as the trust in the system, has since been receding. The 'backlash' against international investment law is now commonplace and a symptom of the overall loss in faith in the institutions of global capitalism.[1] The backlash-related discussion in international investment law has been very productively transformed into a reform debate.[2] The backlash against, as well as the willingness to reform IIL has been expressed

[1] See M Waibel et al. (eds), *The Backlash Against Investment Arbitration. Perceptions and Reality* (Zuidpoolsingel, Kluwer Law International, 2010); M Langford, D Behn and OK Fauchald, 'Backlash and State Strategies in International Investment Law', in T Aalberts and T Gammeltoft-Hansen (eds), *The Changing Practices of International Law* (Cambridge, CUP, 2018) 70. This backlash derives from mounting tension in recent years due mostly to certain historical path-dependencies in the field; see generally G Dimitropoulos, 'The Conditions for Reform: A Typology of "Backlash" and Lessons for Reform in International Investment Law and Arbitration' (2019) 18 *The Law and Practice of International Courts and Tribunals* 413.

[2] The reform discussion process is prominently taking place within Working Group III (WGIII): Investor-State Dispute Settlement Reform of the United Nations Commission on International Trade Law (UNCITRAL), the workings of which are made available online at: www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html (accessed 1 August 2019). On the academic side, the Academic Forum on ISDS has the purpose of providing a venue for academics to exchange views, explore issues and options, test ideas and solutions, and hopefully make a constructive contribution to the ongoing discussions on possible reform of ISDS, in particular to discussions in the context of UNCITRAL's WGIII; see Academic Forum on ISDS, *Statement of Purpose* (CIDS – Geneva Center for International Dispute Settlement, 12 March 2018), www.cids.ch/images/Documents/ISDS-AcademicForum/Academic_Forum_ISDS_Statement_of_Purpose.pdf.

by governments and other stakeholders in both the Southern and the Northern hemispheres.[3]

IIL has been exposed to a different type of challenge by an ideologically opposing paradigm of 'state capitalism'.[4] State capitalism has been labelled as 'one of the most politicized and sensitive developments in the international investment regime'.[5] State capitalism is reshaping the foundations of IEL and the protection of Sovereign Investments, under International Investment Agreements (IIAs), and may potentially pose challenges to the system of investor-state dispute settlement (ISDS). State capitalism attempts to redefine the relationship between the state and the market suggesting a new political economy of IIL – and IEL, broadly speaking. Sovereigns increasingly operate in the international economic order via domestic institutions such as state-Owned Enterprises (SOEs)[6] and Sovereign Wealth Funds (SWFs),[7] hence reshaping IEL

[3] See WM Reisman, 'The Empire Strikes Back: The Struggle to Reshape ISDS', White and Case International Arbitration Lecture (The Lamm Lecture) (February 16, 2017), ssrn.com/abstract=2943514. Professor Reisman suggests that in large part the reaction against the 'Great Compact' of the contemporary international investment system has been spearheaded by the originally capital-exporting countries that have now found themselves also at the capital-importing end.

[4] I Bremmer, 'State Capitalism Comes of Age: The End of the Free Market' (2009) 88 *Foreign Affairs* 40; N Ferguson, 'We're All State Capitalists Now' (2012) 9 *Foreign Policy*; L-Wen Lin and CJ Milhaupt, 'We are the (National) Champions: Understanding the Mechanisms of State Capitalism in China' (2013) 65 *Stanford Law Review* 697; M Du, 'China's State Capitalism and World Trade Law' (2014) 63 *ICLQ* 409.

[5] LNS Poulsen, 'Investment treaties and the globalisation of state capitalism: opportunities and constraints for host states', in R Echandi and P Sauve (eds), *Prospects in International Investment Law and Policy* (Cambridge, CUP, 2013) 73, 90.

[6] On SOEs, see, among many, K Haywood, The Treatment of State Enterprises in the WTO and Plurilateral Trade Agreements, Commonwealth Secretariat Emerging Issues Briefing Note (March 2016), available at thecommonwealth.org/sites/default/files/inline/StateOwned%20EnterprisesTPP1008.pdf; M Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration' (2016) 31 *ICSID Review* 24; Y Shima, 'The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey', OECD Working Papers on International Investment, 2015/01 (2015), available at dx.doi.org/10.1787/5js7svp0jkns-en; I Willemyns, 'Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?' (2016) 19 *Journal of International Economic Law* 657; J Ya Qin, 'WTO Regulation of Subsidies to State-Owned Enterprises (Soes) – a Critical Appraisal of the China Accession Protocol' [2004] *Journal of International Economic Law* 863; J Nakagawa, 'The Emerging Rules on State Capitalism and their Implications for China's Use of SOEs', in L Toohey, C Picker and J Greenacre (eds), *China in the International Economic Order: New Directions and Changing Paradigms* (Cambridge, CUP, 2015) 112; J Chaisse, '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, OUP, 2016) 233.

[7] On SWFs, see the Generally Accepted Principles and Practices (Santiago Principles), International Working Group of Sovereign Wealth Funds (October 2008), available at www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf; IMF, Sovereign Wealth Funds, available at www.imf.org/external/pubs/ft/gfsr/2007/02/pdf/annex12.pdf; M Burgstaller, 'Sovereign Wealth Funds and International Investment Law', in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge, CUP, 2011) 163–186; J Wang, 'State Capitalism and Sovereign Wealth Funds: Finding a "Soft" Location in International Economic Law', in CL Lim (ed), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (Cambridge, CUP, 2016), 405; F Bassan (ed), *Research Handbook on Sovereign Wealth Funds and International Investment Law* (Cheltenham, Elgar, 2015); G Kratsas and J Truby,

in a bottom-up way. While the institutions of state capitalism are in the process of redefining the relationship between the state and the market, a different question persists: is the current system of international investment law positively, negatively or neutrally predisposed towards state capitalism and its institutions?

II. PLURALISING THE INTERNATIONAL INVESTMENT REGIME

IIL has been developed in the second half of the twentieth century as colonial law was being replaced by the domestic laws of the newly emerging independent states. IIL was part of the new liberal world order that was in the process of being developed in the post-World War II era. The liberal world order assumed that capital would flow from private investors of the North and West into the developing countries of the South and East; it also assumed that the economies of the South and East would transition towards the market economy system and privatise government-owned assets and enterprises to private investors of the North and West. However, a paradigm shift is observed in recent times. This archetypical understanding underpinning the foundations of IIL is no longer in place. New actors, as well as different ways of mobilising capital emerged in the global economy.

A. Actors

State capitalism is based on a relatively different economic paradigm in comparison to what is assumed by IEL. State capitalism appears in high-income economies and developing economies alike.[8] One may argue that IEL assumes the market as the driving force of liberalisation, whereby the state holds the backseat.[9] Nevertheless, this conception does not go unchallenged. According to Josef Ostřanský, state capitalism in IIL is a story of (re)organisations and transformations of the world economy, since modern IIL has always been state capitalism. In this vein, distinguishing between 'normal' or 'liberal' capitalism and the 'new' state capitalism may be misleading. IIL has developed in the twentieth century as a facet of the internationalisation, legalisation and judicialisation of economic relations. Indeed, the intellectual history of IIL, critical

'Regulating Sovereign Wealth Funds to Avoid Investment Protectionism' [2015] *Journal of Financial Regulation* 95; W Yin, 'Regulating the State Capitalism: Is There an Optimal Regulatory Model for Sovereign Wealth Fund Investment?' (2020) 54(1) *Journal of World Trade* 155.

[8] K Kim, 'Locating new 'state capitalism' in advanced economies: an international comparison of government ownership in economic entities' (2021) 28(3) *Contemporary Politics* 285.

[9] See generally D Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (New Jersey, Princeton University Press, 2018); G Shaffer, 'How Do We Get Along? International Economic Law and the Nation-State' (2019) 117 *Michigan Law Review* 1229. See also P Muchlinski, *Multinational Enterprises and the Law*, 3rd edn (Oxford, OUP, 2021) for the well-known comprehensive account of the instruments used to regulation MNEs at the national, regional and multilateral levels.

state theory, and global political economy, all reveal how and why the state has always been the main driving actor and factor for the growth of IIL as a neoliberal form of capitalism.[10]

China is the most striking example, but not the only one. The BRICS countries (Brazil, Russia, India, China, and South Africa), for example, have developed in very different ways from other developing nations, and sometimes are also closer when it comes to their foreign and international economic policy to northern and western countries. Moreover, the South and East of the world is currently in a direct competitive relationship to the West and North of the world when it comes to investment opportunities and the promotion of their own interests abroad,[11] be it in other countries in the South and East, or the West and North. Countries in the South, such as Brazil, are now on the outward side of investment, and interested in protecting their investors doing business abroad. States in the Gulf Region and other emerging markets such Vietnam are competing on both the inward and the outward side of investment. The world economic order of the twenty-first century is now being reshaped based on the new premises of polycentricity and pluralism: the emerging markets of the South and East are not only recipients, but also exporters of capital; global capital exportation is streamlined both towards the southern and the northern hemisphere; foreign investment is not solely based on private capital, but also on public money invested by institutional investors, such as pension funds, SWFs, national oil companies (NOCs) and various other types of SOEs or State-Controlled Entities (SCEs).

As argued by Leonardo Borlini and Stefano Silingardi in this volume, the regulation of SOEs in international investment law and international trade law appears to be inarticulate and unbalanced; ergo, no concrete answers are provided to key normative questions pertaining, for instance, to the coverage of SOEs under IIAs; national security carve-outs; Article XVII of the General Agreement on Tariffs and Trade (GATT 1994) and subsidies disciplines. As a result, the commercial and political challenges posed threaten the balance between liberal market and institutional innovation.[12]

The overall strategies of capital accumulation and mobilisation are different. National policies, such as the One-Belt-One Road (OBOR) Initiative and China's Go Global strategy, give rise to even more complex issues when it is state enterprises that are given incentives to invest overseas. Chinese state capitalism is indeed the par excellence case study of tensions to the liberal international economic order.[13] Qingxiu Bu traces the main rationale underlying the OBOR

[10] See ch 2, in this volume. For a class analysis of state capitalism, see N Sperber, 'Servants of the state or masters of capital? Thinking through the class implications of state-owned capital' (2021) 28(3) *Contemporary Politics* 264.

[11] This is particularly the case in Asian countries; see Asian Development Bank, Asia 2050: Realizing the Asian Century (2011), www.adb.org/publications/asia-2050-realizing-asian-century, 1.

[12] See ch 1, in this volume.

[13] For a historical perspective regarding the emergence of state capitalism in China, see the contributions in B Naughton and K Tsai (eds), *State Capitalism, Institutional Adaptation and the*

in China's overcapacity and cautions that international standards of transparency and equal opportunity go hand-in-hand with effective global governance.[14] Ming Du explains how reforms in China since 1992 aimed at balancing between ensuring the market competitive capacity of SOEs and the maintenance of then Chinese Communist Party (CCP) control over them.[15] Jiangyu Wang analyses the actors, rules and processes of state capitalism in China and discusses whether Chinese state capitalism goes against the letter and spirit of IEL; whether effective rules for SOEs are in place under IEL; and whether the operation of Chinese state capitalism somehow prevents the establishment of such rules. In this context, he emphasises the lack of international regulation of state capitalism and argues that the future development of China's state capitalism model will determine whether it undermines the liberal world order.[16] In this context, Ming Du also explains how Chinese SOEs have access as claimants in ISDS under both the so-called Broches test and customary international law on attribution for the purposes of international responsibility.[17]

State capitalism may also be about establishing higher standards of conduct for its actors. The chapter authored by Sebastian Mantilla Blanco in this volume addresses the due diligence standards of conduct pertinent for SCEs. To this end, it first distinguishes between due diligence of SCEs and due diligence duties of states in respect of activities of their owned or controlled SCEs. The analysis then turns to soft law and hard law corporate social responsibility (CSR) instruments and their impact on the adjudication of investment claims involving SCEs. Indeed, the assessment of SCE's due diligence may pose challenges (compared to private operators), substantive investment protection standards, as is evidenced by a discussion regarding illegality objections or claims for violation of substantive investment protections such as full protection and security (FPS) and fair and equitable treatment (FET).[18] In a similar vein, Bianca Nalbandian's chapter in this volume situates sovereign investors vis-à-vis the risks of the occurrence of financially disruptive events caused by climate change ('green swan risks'). She concludes that fiduciary duty theories, in the context of trust law schemes and

Chinese Miracle (Cambridge, CUP, 2015), identifying the roots of a well-thought set of institutional design. For an institutional analysis, see BL Liebman and CJ Milhaup (eds), *Regulating the Visible Hand?: The Institutional Implications of Chinese State Capitalism* (Oxford, OUP, 2015). Furthermore, see the contributions taking stock of an integration process that allowed China to gradually integrate the international economic order, covering trade, financial and monetary aspects, competition and intellectual property, in L Toohey, CB Picker and J Greenacre (eds), *China in the International Economic Order* (Cambridge, CUP, 2015).

[14] See ch 12, in this volume.

[15] See ch 8, in this volume. See also J Kurlantzick, *State Capitalism – How the Return of Statism in Transforming the World* (Oxford, OUP, 2016) for a political economy perspective of the global shift towards state capitalism in several countries, including China.

[16] See ch 4, in this volume.

[17] See ch 8, in this volume. *cf* J Chaisse, 'State Capitalism on the Ascent: Stress, Shock, and Adaptation of the International Law on Foreign Investment' [2018] *Minnesota Journal of International Law* 342, 386; B Nalbandian, 'State Capitalists as Claimants in International Investor-State arbitration' (2021) 81 *QIL Zoom-out* 7.

[18] See ch 9, in this volume.

public pension funds which encompass a duty of care and a duty of loyalty, long-term investment mandates and self-regulatory frameworks, such as the Santiago Principles and the One Planet Summit Initiative, are only moderately effective in tackling sustainability issues.[19]

B. Layers

Before being transferred onto the international realm, state capitalism was created domestically. In fact, state capitalism has a long history in domestic politics, but found an expression in actual practice with the opening up of China. State capitalism in the sphere of international investment law has taken shape through the active involvement of China in the international economic system. State capitalism became a domestic ideological-political-legal paradigm, being transferred onto the international plane. It has accordingly developed a domestic layer, an international layer, and middle layers with different mixes of domestic/international and capitalism and statism/paternalism, which is both domestic and international: grounded in domestic law, but with an international outlook.

i. The International Layer

Under the international investment law system that was developed in the twentieth century, there are no general international obligations for market access to foreign investors, and no general obligation to admit foreign investments into the economy of a state. The typical BIT does not grant a right of admission to the potential host state market to a foreign investor, or any other type of pre-entry protection for foreign investment. According to Article 2(1) of the Model BIT of Germany (2005), for example:[20]

> Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting State and admit such investments *in accordance with its legislation* (emphasis added)

Indeed, IIAs typically defer admission and establishment to the requirements of the host state's legislation regarding market access.[21] Accordingly, it is generally up to domestic law and institutions to decide whether a foreign investment and investor should be admitted to the domestic market in the first place, as well as the appropriate mechanisms for control of foreign investment. Nevertheless, there are some IIAs which grant market access to prospective investors. These BITs grant a right of admission, which is limited in scope, and is usually based

[19] See ch 13, in this volume.

[20] See also UK Model BIT (2005, 2006) art 2(1); China Model BIT art 2(1).

[21] R Dolzer, U Kriebaum and C Schreuer, *Principles of International Investment Law,* 3rd edn (Oxford, OUP, 2022) 132–145.

on a national treatment clause.[22] In this vein, Michail Dekastros demonstrates why it is necessary to always distinguish between 'Limited Entry' BITs (where host states undertake best efforts obligations to promote investments, but do not guarantee admission) and 'Liberalisation' BITs (which do provide pre-establishment rights) when analysing market access for state capitalists.[23]

The rights for sovereign investors under IIAs are also combined with treaty-based exceptions designed to safeguard national security interests of host states of sovereign investments. At the same time, national security carveouts hold a noticeable place in the multilateral trade regime, governed primarily by Article XXI GATT 199, Article XIV^{bis} of the General Agreement on Trade in Services (GATS), and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). In this context, and given the organic links between trade and investment, Panagiotis Delimatsis and Olga Hrynkiv in this volume engage into a thorough analysis of trade and investment case law and argue that cross-fertilisation between trade and investment adjudicators could foster the coherent application of security exceptions under both regimes in cases involving sovereign investors.[24]

ii. The Domestic Layer

IEL, and IIL more specifically, has entered a new era of unilateralism.[25] There are multiple types of unilateralism that stand in a continuum between unilateral liberalisation of trade and investment as in the classical trade era, and 'aggressive unilateralism' on the other.[26] National security unilateralism is on the rise. Under the foreign trade policy of the Trump administration, the world witnessed a new era of '*trade wars*',[27] discussed in terms of unilateralism as well, and

[22] A good example is Art 3(1) of the US Model BIT of 2004: 'Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, expansion, management, conduct, operation, and sale or other disposition of investments in its territory'. Also, see C Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties' (2011) 10(3) *Chinese Journal of International Law* 531, 546–550.

[23] See ch 5, in this volume.

[24] See ch 10, in this volume.

[25] See J Chaisse and G Dimitropoulos, 'SEZs in International Economic Law: Towards Unilateral Economic Law' (2021) 24(2) *Journal of International Economic Law* 229, where the authors identify four types of unilateralism: Classical unilateralism; Embedded unilateralism; Environmental unilateralism; and National Security unilateralism.

[26] See also for this differentiation J Bhagwati, 'Introduction: The Unilateral Freeing of Trade versus Reciprocity', in J Bhagwati (ed), *Going Alone: The Case for Relaxed Reciprocity in Freeing Trade* (Cambridge, MA, MIT Press, 2002).

[27] See generally A van Aaken, CP Bown and A Lang, 'Special Issue: Trade Wars' (2019) 22 *Journal of International Economic Law* 4. According to one account, '[a] trade war is when a nation imposes tariffs or quotas on imports and foreign countries retaliate with similar forms of trade protectionism'; see K Amadeo, 'Trade Wars and Their Effect on the Economy and You: Why trade wars are bad and nobody wins', *The Balance*, www.thebalance.com/trade-wars-definition-how-it-affects-you-4159973.

referred to as '*Trump unilateralism*'.[28] The justification for this type of unilateralism was the protection of national security interests of the US.[29] Similarly, a number of states have developed doctrines largely (and explicitly) shaped by national security unilateralism.[30] China's OBOR initiative is also fundamentally driven by national security motives since China is developing this strategy, in part, to address potential external threats to its national security.[31]

In the current phase of intense political and economic contestation of the BIT system and, more specifically, international investment arbitration, countries have started placing regulatory emphasis on the investment pre-entry stage. This has led to an explosion of domestic investment laws. Depending on the political preferences as well as the economic needs of countries, different types of domestic legislative frameworks have been developed. Certain frameworks are meant to attract state capital. Investment promotion laws are mostly to be found in the South and East. A great number of countries are now introducing restrictions on FDI. The most common FDI restrictive legislative and regulatory frameworks are: (a) foreign equity limitations; (b) investment screening mechanisms (ISMs); (c) restrictions on the employment of foreigners as key personnel; (d) operational restrictions, eg restrictions on branching, capital repatriation or land ownership.[32] ISMs, in particular, are on the rise.[33]

While screening mechanisms have existed since the 1970s, there has been a tendency to create new or tighten existing ones.[34] Screening is almost always based on national security grounds of review, either as the primary factor or as one among others, and invariably the most prominent one. In fact, third-state control is one of the key factors in the 2019 European Union's (EU)

[28] See generally HH Koh, 'Trump Change: Unilateralism and the "Disruption Myth" in International Trade: Epilogue to the Yale Symposium on Trade Law Under the Trump Administration' (2019) 44 *Yale Journal of International Law Online* 96; MJ Baltz, 'What lies beneath the 'tariff man'? The Trump administration's response to China's 'state capitalism' (2022) 28(3) *Contemporary Politics* 328.

[29] See generally A Roberts, HC Moraes and V Ferguson, 'Toward a Geoeconomic Order' (2019) 22(4) *Journal of International Economic Law* 655. See also for the view of a leading figure of the Trump administration, RE Lighthizer, 'Trump's Trade Policy Is Making America Stronger', (2020) 99(4) *Foreign Affairs*, www.foreignaffairs.com/articles/china/2020-07-20/trumps-trade-policy-making-america-stronger.

[30] See, eg, UK Department for Business, Energy and Industrial Strategy, 'National Security and Infrastructure Investment Review (Green Paper)' (2017), assets.publishing.service. gov.uk/government/uploads/system/uploads/attachment_data/file/652505/2017_10_16_NSII_Green_ Paper_final.pdf.

[31] See J Slawotsky, 'The National Security Exception in US-China FDI and Trade: Lessons from Delaware Corporate Law' (2018) 6(2) *The Chinese Journal of Comparative Law*.

[32] See OECD, FDI Regulatory Restrictiveness Index, www.oecd.org/investment/fdiindex.htm.

[33] According to UNCTAD, 24 countries have ISMs. These are Australia, Austria, Belgium, Canada, China, Finland, France, Germany, Hungary, Iceland, India, Italy, Japan, Latvia, Lithuania, Mexico, New Zealand, Norway, Poland, the Republic of Korea, the Russian Federation, South Africa, the UK and the US: UNCTAD, Investment Policy Monitor No 22: Special Issue – National security-related screening mechanisms for foreign investment an analysis of recent policy developments, unctad.org/system/files/official-document/diaepcbinf2019d7_en.pdf, 92–93.

[34] See generally G Dimitropoulos, 'National Security: The Role of Investment Screening Mechanisms', in J Chaisse, L Choukroune and S Jusoh (eds), *Handbook of International Investment Law and Policy – Volume I* (Singapore, Springer, 2020) 507.

FDI Screening Regulation analysed in this volume by Konstantina Georgaki. As she explains, the FDI Screening Regulation covers extra-EU (foreign direct and portfolio) investment and intra-EU (direct and portfolio) investments, and while it is ownership-neutral, its adoption was rather the response to the proliferation of sovereign investments and the security concerns they may pose.[35]

According to UNCTAD there are three main types of ISMs: sector-specific, cross-sectoral, and entity-specific.[36] The first category of mechanisms focuses on sectors such as utilities, energy, telecommunication, transportation, media and financial industries that are viewed as important for national security purposes.[37] The second category of cross-sectoral legislation allows for screening in all sectors.[38] Legislation of the third category focuses on the destination of the investment, rather than the investor as the screening mechanisms of the previous two categories do. These legislative frameworks single out domestic companies, usually state-owned and operating in sectors that are perceived as sensitive from a national security point of view, and allow for the review of foreign acquisitions for these entities.

Manu Misra's chapter focuses on foreign investments in critical infrastructure and argues that the relevant ISMs may be conceptually understood as a reflection of the lack of trust in international relations theory. Perhaps contrary to conventional wisdom, Manu Misra explains why ISMs are expressive of legitimate concerns over technology-related security risks and have minimal impact on FDI flows. Moreover, the function of ISMs is essentially an executive political one, since they are all about trust towards the SCE and its home state, especially in the case of critical infrastructure projects.[39]

ISMs could also prima facie be at odds with the pre-establishment commitments undertaken in 'Liberalisation BITs'. As Michail Dekastros argues, it is only the specific regulatory concerns regarding government ownership of SWFs and respective host states' national security issues that distinguish SWFs from non-sovereign investors. He analyses how and why host states have provided regulatory responses to the proliferation of SWFs' investments, mainly via the establishment of ISMs and posits that ISMs could violate admission rights under specific type BITs.[40]

[35] See ch 6, in this volume.

[36] UNCTAD, Investment Policy Monitor No 22: Special Issue – National security-related screening mechanisms for foreign investment an analysis of recent policy developments, unctad.org/system/files/official-document/diaepcbinf2019d7_en.pdf, 93.

[37] Under the new Investment Law No 1 of 2019 of Qatar, for example, which applies exclusively to foreign investors, foreign investors are prohibited from investing in banks and insurance companies unless the Council of Ministers allows such an investment. Article 4(a) Investment Law No 1 of 2019 'Regulating the Investment of Non-Qatari Capital in Economic Activity'.

[38] The Committee on Foreign Investment in the US process is a characteristic example of such a legislative framework.

[39] See ch 7, in this volume.

[40] See ch 5, in this volume.

iii. The New Intermediate Layer(s)

A new layer that has been brought to the surface in the era of state capitalism is that of the use of domestic institutions for the purposes of promoting international investment. The most characteristic of these institutions are Special Economic Zones (SEZs) and International Commercial Courts (ICommCs).

SEZs represent a new compromise between the state and the market. While SEZs may be viewed as promoters of trade and investment liberalisation, they only allow this within the confines of a limited jurisdiction and under the strict supervision of powerful government agencies for a given period of time.[41] SEZs rely on proactive government intervention.[42] They are almost invariably governed by very powerful government entities, which are separate from ordinary domestic agencies. These may have different degrees of independence from the central and local government, and enjoy different degrees of powers reaching from construction and operation to regulation in the SEZ.

ICommCs, such as the Abu Dhabi Global Markets (ADGM) Courts and the Singapore International Commercial Court (SICC),[43] are intermediate institutions of state capitalism, closely intertwined with seminal projects of the latter, such as OBOR. As explained by Georgios Dimitropoulos and Mohammed Al-Ahmadani, ICommCs operate without *domestic* institutional complementarities, but with the potential of establishing international institutional complementarities and accommodating claims against SOEs themselves. ICommCs, as institutions of a new variety of state capitalism, appear thus bound to proliferate and interconnect.[44]

III. IS STATE CAPITALISM AN OXYMORON?

Are the two worlds of state and capitalism compatible? Is state capitalism an oxymoron? The same question was raised some time ago when policymakers in the UK, US and elsewhere, influenced by the insights of cognitive psychology and behavioural economics, started developing regulatory responses identified

[41] See generally on SEZs, J Chaisse and X Ji, 'The Pervasive Problem of SEZs for International Economic Law: Tax, Investment, and Trade Issues' (2020) 19 (4) *World Trade Review* 567; DZ Zeng, 'The Past, Present, and Future of Special Economic Zones and Their Impact' (2021) 24 (2) *Journal of International Economic Law* 259.

[42] According to Ginsburg, 'Paradoxically, […] SEZs may be most effective in an environment in which a strong central government is seeking to gather information about the policy effects of liberalization'; T Ginsburg, 'Special Economic Zones: A Constitutional Political Economy Perspective', in J Basedow and T Kono (eds), *Special Economic Zones: Law and Policy Perspectives* (Tuebingen, Mohr Siebeck, 2015) 119, 127.

[43] Generally on ICommCs, see G Dimitropoulos, 'The Design of International Commercial Courts: From Organizational Hybridity to Functional Interoperability', in S Brekoulakis and G Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication* (Cambridge, CUP, 2022) 251.

[44] See ch 11, in this volume.

as 'nudges' that go beyond traditional command-and-control interventions and incentives. Policy makers, instead, identify cognitive biases that humans are subject to in order to propose appropriate responses by the regulator.[45] The response is usually a 'nudge',[46] that is, a light form of regulatory control which purports to maintain people's freedom of choice, such as disclosure of better, different, smart or more information, warnings, debiasing through procedural and substantive law and, above all, altering legal default rules.[47] Nudges are thus opposed to command-and-control regulation: they allow for freedom of choice and incentives, as the desired behaviour is not induced with the use of financial prompts.

The combination of the need for regulation with the preservation of the freedom of choice has been described as 'libertarian paternalism' as the political philosophy of nudging. Libertarian paternalism is 'an approach that preserves freedom of choice but that authorizes both private and public institutions to steer people in directions that will promote their welfare'.[48] Libertarian paternalism justifies legal interventions that both increase individuals' economic welfare by freeing them from the limitations of their cognitive biases, and second, change individuals' behaviour without limiting their choices. Libertarian paternalism is the result of the marriage of choice preservation and regulation.[49]

Whether state capitalism is viewed as an oxymoron depends on one's view of the relationship between the state and the market in the international economic regime. The interplay between market and the state may be seen as what has shaped the modern political economy more than any other concept. In the international plane, the power of the state is expressed in the concept of sovereignty. The balance between the state and the market has oscillated between the two poles post-WWII, and in the years leading up to the dominance of the market until the financial crisis. The two main post-war milestones in the shaping of this relationship have been the efforts to establish a New International Economic Order (NIEO) and the Washington Consensus.[50]

[45] CR Sunstein, C Jolls and RH Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471; R Korobkin and TS Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 *California Law Review* 1051; A Alemanno and A-L Sibony (eds), *Nudge and the Law: a European Perspective* (Oxford, Hart Publishing, 2015).

[46] RH Thaler and CR Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven, Yale University press, 2008); CR Sunstein, *Why Nudge: The Politics of Libertarian Paternalism* (New Haven, Yale University Press, 2014).

[47] See, eg, C Jolls, and CR Sunstein, 'Debiasing through Law' (2006) 35 *Journal of Legal Studies* 199.

[48] CR Sunstein and RH Thaler, 'Libertarian Paternalism Is Not an Oxymoron' (2003) 70 *Chicago Law Review* 1159.

[49] G Mitchell, 'Libertarian Paternalism Is An Oxymoron' (2005) 99 *Northwestern University Law Review* 1245.

[50] UN General Assembly Resolution 3201(S-VI) Declaration on the Establishment of a New International Economic Order (1 May 1974). On the NIEO, see among many, RW Cox, 'Ideologies and the New International Economic Order: reflections on some recent literature' (1979) 33(2) *International Organization* 257; A Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge, CUP, 2012) 208–211.

In a similar vein, one may question whether the inclusion of provisions on competitive neutrality in international trade and investment agreements is necessary and/or advisable. Focusing on flawed attempts to incorporate competitive neutrality in regional trade agreements, such as the US – Mexico – Canada Agreement (USMCA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Rob Howse traces ideological bias against state enterprises and cautions against such an approach and emphasises on need to properly apply the principle of non-discrimination to tackle protectionist practices.[51]

IV. CONCLUSION

The variety of actors and the multicentricity prompted in new international investment law because of state capitalism has led to the development of new layers in the international investment regime. Domestic law started being relevant again more recently with the rise of investment control mechanisms. Mostly countries in the West have developed ISMs to control inward investment flows from countries in the South and East, while countries from certain regions have already had a longstanding tradition of controlling foreign investment flows. At the same time, SOEs have drawn attention not only because of China's policy as a global actor, but also because of their role to boost financial recovery after the global Covid-19 pandemic.[52] In short, liberal capitalism has given way to a new model of capitalism in international economy: State capitalism.

The relationship between the state and the market has not been stable in the years of the recent development of IIL. The rise of new powers and actors gave rise to a certain contestation of the old equilibrium. State capitalism tried to redefine this. This led to the development of new institutions at the international and the domestic level of governance. Hence, state capitalism is not an oxymoron. It does not radically change the foundations and structures of international investment law. It is an effort to redefine the relationship between the market and the state. Against this backdrop, the present edited volume offers a fresh and timely look into the fundamentals of state capitalism, focusing in particular on its actors and processes, the contextual elements that surround it and the new political economy that comes with it. Contributions in this volume engage with the conceptual analysis offered in the introduction to reflect on the status and evolution of the actors of state capitalism and reflect on the scope and adequacy of the existing international legal order to harness potential distortions and unfair commercial practices at the political and market level. One should warn against the rise of national security unilateralism and offer a careful look at

[51] See ch 3, in this volume.

[52] *cf* B van Apeldoorn and N de Graaff, 'The state in global capitalism before and after the Covid-19 crisis' (2022) 28(3) *Contemporary Politics* 306.

the existing judicial interpretations, focusing on the types of tests, checks and balances that are needed to ensure that markets remain unaffected by unfair protectionist attempts.

It is in this spirit that focus should be had on state capitalism as a form of recalibration of IEL and IIL that takes into account the needs of a market economy and the role that the state is bound to play to pursue non-economic objectives. Ergo, the new law and political economy framework of IIL is one that is pushed more towards the state without abandoning the market framework, in which economic activity takes place. The new political economy of IIL is more deferential to the state. In addition, the new political economy is more plural; it adds new actors and new layers into the overall structure of the international investment regime.