

BEYOND INVESTMENT PROTECTION: AN EXAMINATION OF THE POTENTIAL INFLUENCE OF INVESTMENT TREATIES ON DOMESTIC RULE OF LAW

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* J.D., 2013, New York University School of Law. My deepest thanks to all those who have contributed to this article: Professor José Alvarez for his comments on an earlier version of the article; Senior Notes Editors Matthew Hartz and Lisa Sweat for their outstanding suggestions; Senior Executive Editor Casey Downing for offering a thorough and insightful perspective on the support for my arguments; my notes committee members—Jessica Borowick, Jeff Oakley, Casey O'Connor-Willis and Alex Stein—for their invaluable assistance in shaping the article. Finally, special thanks to the giants on whose shoulders I stand—my parents and grandparents. All errors remain my own.

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I. INTRODUCTION

This article addresses an intersection between two of the goals pursued by states in the modern world: economic development and the rule of law. Although there is an ongoing debate regarding the efficacy and desirability of foreign direct investment (“FDI”) in many states, there can be no doubt that FDI has emerged as a primary method by which states attempt to stimulate economic development.¹ At the international level, the most important tools governing foreign investment are bilateral investment treaties (“BITs”). These treaties do many things, but at their core, they are attempts to ensure that host states treat foreign investment predictably and according to defined rules. That is, they are attempts to ensure that investments are treated in accordance with the rule of law.² Their content therefore reflects certain rule of law values. Such content raises the question of whether and how BITs influence the rule of law more broadly—across domestic legal systems of signatory states in general. Does the influence of

1. *See generally* FOREIGN INVESTMENT IN DEVELOPING COUNTRIES (H.S. Kehal ed., 2004) (investigating the importance and impact of FDI); FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS (Olivier De Schutter, Johan Swinnen & Jan Wouters eds., 2013).

2. For a more detailed discussion of the nature and purpose of BITs, see *infra* text accompanying notes 65–71.

BITs carry beyond the area of foreign investment into other areas of domestic law? If so, do BITs serve as models that spur growth of the rule of law?³ Or do they stand as obstacles that discourage and dis-incentivize legal reform and growth?⁴

In order to address these questions, this article proceeds as follows. Section II lays the foundation for further discussion, briefly describing the BIT regime, defining the rule of law, and making a case for a better understanding of the relationship between the two. Section III presents the two prevailing models of the relationship between BITs and general domestic rule of law. Section IV explores the limitations of these models in light of conclusions drawn from academic literature on how the rule of law develops. Section V endeavors to present a more comprehensive picture of the mechanisms through which BITs might influence domestic rule of law, including a version of the aforementioned models, but looking to additional mechanisms as well. The article then closes with a brief conclusion. There is no additional section that offers a definitive answer to the question of whether BITs help or harm the quality of domestic rule of law. The absence is because the core conclusion of this Note is that such influence depends heavily on the specific legal, political, and social contexts of individual countries. There is therefore no single answer to the question of whether BITs influence—for better or worse—domestic rule of law. The inquiry is necessarily case specific. The goal of this Note, therefore, is to assist in laying a foundation for such inquiries.

3. For arguments in favor of this position, see Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MC-GEORGE GLOBAL BUS. L.J. 337 (2006) (describing the role of investment treaty arbitration in incentivizing FDI and promoting rule of law); Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107, 119 (2005) (using empirical analysis to evaluate whether BITs actually improve rule of law).

4. For arguments in favor of this position, see Ginsburg, *supra* note 3, at 122–23 (arguing that BITs may also impede the development of rule of law); MARK HALLE & LUKE ERIK PETERSON, INVESTMENT PROVISIONS IN FREE TRADE AGREEMENTS AND INVESTMENT TREATIES: OPPORTUNITIES AND THREATS FOR DEVELOPING COUNTRIES 23 (UNDP Discussion Paper, 2005), available at http://asia-pacific.undp.org/practices/poverty_reduction/publications/P1070.pdf (analyzing the restraints BITs may place on other lawmaking processes).

II. FRAMING THE ISSUE: THE NECESSITY OF UNDERSTANDING BITS' INFLUENCE ON THE LEGAL SYSTEMS OF HOST STATES.

A. *Overview of the BIT Regime*

Bilateral investment treaties form the backbone of the international legal regime governing foreign investment. Unlike other areas of international law—trade, for example—investment between states is not covered by a large multilateral agreement.⁵ Instead, it is governed primarily by what has been called a “web”⁶ of individual BITs, each concluded between two sovereign states.⁷ This web has grown dramatically over the last several decades; it now encompasses over 2,600 individual treaties concluded between 180 countries.⁸ Although there is some variation in the details, the vast majority of these treaties are substantially similar in both structure and content.⁹

The core purpose of BITs is to protect investments made by nationals of one signatory state in the territory of the other signatory state. Accordingly, most BITs prohibit the expropriation of investments except in limited circumstances.¹⁰ Among the constraints on expropriation is that it must be accompa-

5. There are exceptions: NAFTA, a regional trade agreement, and the Energy Charter Treaty, which regulates cooperation in the energy market. Both contain investment protection chapters similar in content to BITs. See RUDOLPH DOLZER & CHRISTOPH SCHREUER, *Principles of International Investment Law* 15 (2d ed. 2012) (describing sectoral and regional trade treaties). Consequently, they are the same as BITs for the purposes of this article, and are treated as interchangeable. Although the two treaties are multilateral, they are certainly not the sort of global multilateral agreement common in other areas of international law such as trade, human rights, etc.

6. Tarcisio Gazzini, *Bilateral Investment Treaties*, in *INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS* 99, 100 (Tarcisio Gazzini & Eric DeBrabandere eds., 2012).

7. *Id.* For a more thorough discussion of the history, structure, and content of BITs, as well as their role in international law, see generally DOLZER & SCHREUER, *supra* note 5; ANDREAS LOWENFELD, *INTERNATIONAL ECONOMIC LAW* (2d ed. 2002); KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* (2010).

8. JOSÉ E. ALVAREZ, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT* 29 (2011).

9. See VANDEVELDE, *supra* note 7, at 5 (“The content of most BITs follows a typical pattern. Similar provisions appear in more or less the same order in nearly every BIT.”).

10. See DOLZER & SCHREUER, *supra* note 5, at 99–100.

nied by “prompt, adequate, and effective” compensation.¹¹ BITs also prohibit a range of actions that stop short of expropriation but are nonetheless prejudicial to investors. These prohibitions reflect the fact that once an investor has sunk a significant amount of capital into a project, the balance of power between the investor and the host state swings dramatically in favor of the latter. Therefore, BITs typically require that investments be treated on a non-discriminatory basis. This is assessed both by reference to domestic investors (national treatment) and investors from other countries (most-favored-nation).¹² These two relative standards are joined by several absolute standards—*i.e.* standards not measured with respect to third parties. Perhaps the most notable is the requirement of “fair and equitable treatment.”¹³ The precise content of this obligation is a hotly contested issue, in both the academic community and the chambers of arbitral tribunals. In its various permutations, fair and equitable treatment demands that states act in a predictable and non-arbitrary fashion, in good faith, transparently, and/or in keeping with due process of law.¹⁴ This article will return to the standard of fair and equitable treatment in section V(A)(1).

In addition to the perceived need to protect investors from specific prejudicial actions taken by the host state, BITs reflect an overarching concern that when a host state does act wrongfully, investors will not have an adequate forum in which to present their case and seek a remedy. Without a BIT, investors likely face an untenable choice between challenging the host state in its own courts and waiting for their grievance to

11. *E.g.*, 2012 U.S. Model Bilateral Investment Treaty art. 6 [hereinafter 2012 U.S. Model BIT], *available at* <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>. The “prompt, adequate, and effective” standard has a long history in international law, and for reasons relating to that history is not used by all BITs. However, the point here is simply that BITs in general do not permit expropriation unless it is accompanied by compensation deemed proper under one standard or another.

12. *E.g.*, 2012 U.S. Model BIT, *supra* note 11, arts. 3–4; *see also* DOLZER & SCHREUER, *supra* note 5, at 198–99, 206. These non-discrimination provisions typically apply to treatment once the investment is established. However, in some BITs, they also apply to the conditions placed on entry into the country (*i.e.* the establishment of the investment). *Id.*

13. *E.g.*, 2012 U.S. Model BIT, *supra* note 11, art. 5; *see also* DOLZER & SCHREUER, *supra* note 5, at 130.

14. DOLZER & SCHREUER, *supra* note 5, at 145–60.

be addressed through diplomatic processes.¹⁵ Accordingly, one of the key features of BITs is the ability of investors to submit claims that the host state has breached a BIT obligation to an international arbitral tribunal.¹⁶ Such claims may generally be submitted directly, without any requirement that the investor exhaust local remedies.¹⁷ Many BITs name the International Center for the Settlement of Investment Disputes (ICSID) as the forum of choice, while others allow ad-hoc arbitration under the U.N. Commission on International Trade Law (UNCITRAL) rules.¹⁸ Claims brought pursuant to these provisions have already generated a significant body of case law. The dispute resolution provisions of BITs will be discussed further in section V(B).

B. *The Broader Ramifications of BIT Signature*

The ubiquity of BITs means that their practical consequences for signatory states are highly important to the global community. States, scholars, and practitioners seek to understand not only the nuances of states' substantive obligations under BITs, but also the broader political and economic ramifications of BIT signature. Because BIT obligations fall almost entirely on the host state, the discussion tends to focus on the practical implications of BIT signature for capital-importing states.

First, a significant body of literature considers the economic implications of BITs.¹⁹ BITs are often described as "grand bargains," whereby capital-importing states agree to abide by BITs' substantive protections for investors, in the hope their commitment will persuade investors that the coun-

15. *See id.* at 235.

16. *E.g.*, 2012 U.S. Model BIT, *supra* note 11, art. 24; *see also* DOLZER & SCHREUER, *supra* note 5, at 235–37.

17. ALVAREZ, *supra* note 8, at 45.

18. *See* DOLZER & SCHREUER, *supra* note 5, at 238–43. Whereas ICSID is a full-fledged arbitration institution, the UNCITRAL Arbitration Rules are simply a set of rules that can be applied by an *ad hoc* panel.

19. *See, e.g.*, KARL P. SAUVANT & LISA E. SACHS, *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS* (2009); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67 (2005); Jennifer L. Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, 6 REV. INT'L ORGS. 1 (2011).

try is safe and stable, and thus attract additional investment.²⁰ This hope of encouraging investment is stated explicitly in the preambles of many BITs.²¹ Nevertheless, BITs do not affirmatively require investment between signatory states.²² This has led many scholars to explore whether BITs do in fact stimulate investment. The evidence is mixed. A considerable number of studies suggest that BITs do lead to increased investment.²³ Other studies are more skeptical.²⁴ Even assuming BITs do encourage investment, there remains the question of whether the investment they attract is beneficial to the host state. This question, too, receives significant attention, particularly through the lens of sustainable development.²⁵

20. Salacuse & Sullivan, *supra* note 19, at 75–77 (2005) (“[A] BIT between a developed and a developing country is founded on a grand bargain: a *promise* of protection of capital in return for the *prospect* of more capital in the future.”).

21. See, e.g., U.S. 2012 Model BIT, *supra* note 11, pmbl. (“[A]greement on the treatment to be accorded [] investment will stimulate the flow of private capital and the economic development of the Parties.”).

22. See Salacuse & Sullivan, *supra* note 19, at 95 (“No language in a BIT binds a source country to encourage its investors and companies to invest abroad.”).

23. See, e.g., SAUVANT & SACHS, *supra* note 19 (presenting multiple chapters on the influence of BITs on FDI that, taken together, suggest that BITs do increase FDI inflows in some contexts while in other contexts the evidence is insufficient to support such a conclusion); Yoram H. Haftel, *Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries*, 17 REV. INT’L POL. ECON. 348 (2010) (arguing that BITs do promote investment, but only when they are mutually ratified); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567 (2005) (arguing that a greater number of BITs leads to increased FDI inflows); Salacuse & Sullivan, *supra* note 19 (arguing that BITs have succeeded in promoting investment); Tobin & Rose-Ackerman, *supra* note 19 (arguing that BITs do promote investment, but only under certain circumstances).

24. See, e.g., ALVAREZ, *supra* note 8 at 350 (“Empirical studies have not uniformly supported the proposition that the conclusion of BITs or FTAs encourages greater FDI flows than would otherwise occur.”); Mary Hallward-Driemer, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit . . . and They Could Bite* (World Bank Policy Research Working Paper No. 3121, 2003) (arguing that the effect of BITs on FDI is minimal).

25. See, e.g., Liesbeth Colen et al., *Foreign Direct Investment as an Engine for Economic Growth and Human Development*, in FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT, *supra* note 1, at 70 (exploring the relationship between FDI and “human development”); Liesbeth Colen & Andrea Guariso, *What Type of Foreign Direct Investment is Attracted by Bilateral Investment Treaties?*,

Second, the rise of BITs has led to a conversation about the political consequences of BIT signature.²⁶ One concern is that BIT obligations may unduly restrict a state's ability to regulate for the protection of public health or the environment.²⁷ For example, changes in laws regulating tobacco products can raise allegations of BIT violations.²⁸ A related concern is that obligations under BITs may conflict with human rights obligations.²⁹ Criticisms of these negative consequences of BIT signature have been loud and persistent, leading to changes in the content of some BITs.³⁰

In short, the practical consequences of BIT signature matter. They matter not only from an academic perspective, but also from a human perspective. The economic effects of BIT

in id., at 138 (suggesting that BITs are more effective in attracting FDI to certain sectors than others); HALLE & PETERSON, *supra* note 4 (discussing the potential benefits and risks of FDI for developing economies).

26. See generally ALVAREZ, *supra* note 8, at 340–427 (discussing critiques of the BIT regime); ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW (2012) (presenting a method of reconciling investor protection with concern for public interests such as human rights and the environment).

27. See, e.g., INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, INVESTMENT TREATIES & WHY THEY MATTER TO SUSTAINABLE DEVELOPMENT: QUESTIONS & ANSWERS 15 (2012), available at http://www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf; Andrew Friedman, *Flexible Arbitration for the Developing World: Piero Foresti and the Future of Bilateral Investment Treaties in the Global South*, 7 B.Y.U. INT'L L. & MGMT. REV. 37 (2010) (discussing the challenge under a BIT to a South African law designed to correct economic imbalances created during the apartheid era).

28. See generally Valentina Sara Vadi, *Reconciling Public Health and Investor Rights: The Case of Tobacco*, in HUMAN RIGHTS IN INTERNATIONAL LAW AND ARBITRATION 452 (Pierre-Marie Dupuy et al. eds., 2009).

29. See, e.g., HUMAN RIGHTS IN INTERNATIONAL LAW AND ARBITRATION, *supra* note 28 (discussing investor-state arbitral tribunals' recognition, or lack thereof, of states' human rights obligations); Ryan Suda, *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 73 (Oliver de Schutter ed., 2006) (discussing the intersections between BITs and human rights).

30. See ALVAREZ, *supra* note 8, at 163 (describing changes to the U.S. 2004 Model BIT that reflect a greater recognition of host states' interest in human development); UNCTAD, BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING 142 (2007) (“[A] growing number of countries emphasize in their BITs that *investment protection [] must not be pursued at the expense of other legitimate public concerns*. To that end, more recourse is made to treaty exceptions, thereby safeguarding the right of the host country to enact regulations . . .”).

signature matter to the millions of people who, as a result, enjoy more or less economic opportunity and a higher or lower standard of living. The political consequences matter to those who will see their communities and societies changed for better or worse by the pressures BITs place on their government's regulatory policies. This concern for the practical consequences of BIT signature is proper. It is, however, incomplete.

For all the focus on the economic and political ramifications of BIT signature, the influence of BITs on the legal systems of host states receives comparatively little attention.³¹ The potential legal consequences of BIT signature deserve fuller exploration, for two reasons.

First, the quality of a state's legal system is highly important to both the state and its citizens, just as economic development and political sovereignty are important. The capacity and efficiency of a legal system are relevant considerations, but perhaps the most important issue is the extent to which a legal system respects the rule of law. The rule of law is first and foremost important in its own right—a “universal human good” that protects societies against the arbitrary and extralegal exercise of coercive government authority.³² It also carries instrumental value. High levels of the rule of law are often said to be attractive to foreign investors, implicating the BIT goal of encouraging investment flows.³³ Outside the investment context,

31. There are a handful of notable exceptions. *See, e.g.*, Franck, *supra* note 3; Ginsburg, *supra* note 3; HALLE & PETERSEN, *supra* note 4; Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (Pub. Law & Legal Theory Research Paper Series: Working Paper No. 09-46, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466980.

32. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91, 137–38 (2004); *see also* Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT'L L. 99, 104 (2004) (reviewing “deontological” justifications for the rule of law).

33. *See* Kristen E. Boon, “Open for Business”: *International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law*, 39 N.Y.U. J. INT'L L. & POL. 513 (2007) (addressing efforts to build the rule of law as a foundation for economic growth in post-conflict states); Daniels & Trebilcock, *supra* note 32, 100–02 (2004) (reviewing “instrumental” justifications for the rule of law); Bruce A. Markell, *A View from the Field: Some Observations on the Effect of International Commercial Law Reform Efforts on the Rule of Law*, 6 IND. J. GLOBAL LEGAL STUD. 497 (1999) (arguing that the stability and certainty of a country's legal system is a factor in the decision to invest there); Joseph J. Norton,

the rule of law can support social and economic development and protect human rights.³⁴

Second, there are close structural and substantive ties between BITs and the rule of law in domestic legal systems that suggest interaction between the two. As this Note will show, BITs are a method of ensuring that foreign investment is treated in accordance with the rule of law.³⁵ Their existence can thus be seen in part as a response to perceived deficits in the rule of law in many states. Therefore, BITs and domestic rule of law are linked in a very fundamental way. Before turning to this linkage in greater detail, however, it will be useful to briefly define “the rule of law.”

C. *Defining the Rule of Law*

Particular care should be taken when discussing the rule of law, as the concept is subject to a variety of divergent definitions and usages. While many academics urge that the phrase ‘rule of law’ should have a narrowly limited meaning,³⁶ it has, through “promiscuous”³⁷ usage, become synonymous in popular vernacular with justice or good governance.³⁸ Even within

Encouraging Capital Flows and Viable Dispute Settlement Under the Monterrey Consensus, 10 L. & BUS. REV. AM. 65 (2004) (arguing that the quality of a country’s legal infrastructure is relevant to FDI flows). *But see* Thomas Carothers, *The Problem of Knowledge*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 15 (2006) (arguing that while the conventional wisdom is appealing in theory, there is little empirical evidence in support of it); Okezie Chukwumerije, *Rhetoric Versus Reality: The Link Between the Rule of Law and Economic Development*, 23 EMORY INT’L L. REV. 383 (2009) (taking the view that rule of law development may spur economic development, but only as part of a much broader set of reforms).

34. See Karin Astrom, *Vulnerable Groups and Access to Justice: A Human Rights Imperative for International Engagement*, in RULE OF LAW PROMOTION: GLOBAL PERSPECTIVES, LOCAL APPLICATIONS 231 (Bergling et al. eds., 2009) (providing a case study of the human rights implication of rule of law development); Jane Stromseth, *Post-Conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach*, 49 WM. & MARY L. REV. 1443 (2008) (describing the role of the rule of law in promoting security).

35. See *infra* text accompanying notes 66–69.

36. See Joseph Raz, *The Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 211 (2009) (arguing for a narrow conception of the rule of law that does not encompass democracy, justice, or rights).

37. *Id.*

38. Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 332–33 (2008).

the academic community, there is significant debate over what the rule of law encompasses. A full discussion of the concept's meaning would take a volume in its own right. This section merely provides a brief overview before adopting an operative definition of the rule of law to be used throughout the Note.

Conceptions of the rule of law are typically grouped into two distinct categories: formal and substantive.³⁹ Formal conceptions are, at their core, relatively simple. The rule of law is fulfilled when a "government in all its actions is bound by rules fixed and announced beforehand."⁴⁰ Such a constraint on the arbitrary exercise of government authority creates a stability that allows persons to plan their behavior.⁴¹ One of the most notable formal models of the rule of law is that of Lon Fuller. In *The Morality of Law*, Fuller lays out eight principles that can be used as guidelines for a legal system's adherence to the rule of law. Together, these principles give slightly more definition to the general goal of constraining arbitrary government power:

1. Decisions should be made according to rules—not in an arbitrary or ad-hoc manner;
2. Rules should be publicized, or at least made available to the people expected to observe them;
3. Rules (legislation) should not be retroactive;
4. Rules should be understandable;
5. Rules should not contradict each other;
6. Rules should not require people to take steps beyond their capabilities;
7. Rules should not change so frequently that people are unable to plan their behavior based on the rules; and
8. There should not be a significant disconnect between the way rules are drafted and the way they are enforced in practice.⁴²

Fuller's eight principles do not state what the content of any given legal rule must be. Instead, they focus solely on the

39. For an excellent table laying out various conceptions of the Rule of Law, see TAMANAHA, *supra* note 32, at 91.

40. Raz, *supra* note 36, at 210 (citing F.A. Hayek, *THE ROAD TO SERFDOM* 54 (1944)).

41. See TAMANAHA, *supra* note 32, at 93.

42. LON L. FULLER, *THE MORALITY OF LAW* 39, 41–42 (1969).

way in which legal rules are applied. They are therefore “substantively empty.”⁴³ This is a defining characteristic of formal conceptions of the rule of law. As Joseph Raz points out, it is entirely possible for a legal regime to be morally reprehensible and unjust, yet still adhere to a formal conception of rule of law.⁴⁴ For example, it is theoretically possible that a set of discriminatory laws could fulfill each of the above principles.⁴⁵ Under formalist conceptions, therefore, the rule of law is not synonymous with the overall quality of a legal system. It is merely one piece of the puzzle, along with justice, capacity, efficiency, and the like.⁴⁶

Unlike formal conceptions, substantive conceptions of the rule of law do specify (to some degree) what content laws must include.⁴⁷ This does not require rejecting the principles of formal rule of law, but rather adding to them.⁴⁸ In essence, substantive conceptions add content (substance) to the framework (form) established by formal conceptions. There is no one universal vision of what content is required. A substantive conception could require that laws not violate basic human rights⁴⁹ or natural justice.⁵⁰ Alternatively, it could require that a government establish and enforce laws protecting a particu-

43. TAMANAHA, *supra* note 32, at 94.

44. See Raz, *supra* note 36, at 211 (“A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.”).

45. See *id.*; see also Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 7 (2008) (“On Fuller’s account, the Rule of Law does not require anything substantive: for example, it does not require that we have any particular liberty. All it requires is that the state should do whatever it wants in an orderly, predictable way . . .”).

46. Raz, *supra* note 36, at 211.

47. TAMANAHA, *supra* note 32, at 102.

48. See *id.* (“[S]ubstantive versions of the rule of law incorporate the elements of the formal rule of law, then go further, adding on various content specifications.”).

49. See Chesterman, *supra* note 38, at 340 (“Promotion of the rule of law . . . has thus sometimes been seen . . . as a means of advancing human rights . . .”).

50. See TAMANAHA, *supra* note 32, at 110 (describing the view set out by T.R.S. Allan).

lar set of property rights.⁵¹ It could also require certain due process rights and procedural protections for persons interacting with a legal system.⁵²

While formal conceptions of the rule of law tend to dominate academia, popular usage of the phrase “rule of law” (by development practitioners, politicians, the media, etc.) more frequently looks beyond the formal view.⁵³ Consider the following statement:

The rule of law is routinely prescribed these days for what ails the post-Communist world. The new democracies of Central and Eastern Europe, particularly Russia, are advised to develop a stable property regime, a reliable means of contract enforcement, and an impartial judiciary. The market economies of East Asia, particularly China, are urged to implement the rule of law in the civil and political rights area as well as in the economic domain.⁵⁴

This statement illustrates the way in which the rule of law can be used to encompass substantive ideals such as Western-style property rights, as well as civil and political rights, none of which are required by a formal conception of the rule of law.

This Note adopts the formal view of the rule of law. Indeed, later sections refer repeatedly to several of Fuller’s principles. For (at least) two reasons, the formal conception is a more useful tool for assessing the relationship between BITs and domestic rule of law. First, substantive conceptions of the rule of law encompass normative judgments about the content of laws and legal systems.⁵⁵ Their value-laden nature thus

51. See *id.* at 91 (noting an “individual rights” view of the rule of law that can incorporate property, contract, and privacy rights, along with autonomy).

52. See Waldron, *supra* note 45, at 7–8 (setting out a “procedural” conception of the rule of law that goes beyond the “structural” requirements of the formal conception).

53. See *id.* at 9 (“[M]ost scholars would say it is the [view of the rule of law] organized around predictability and the determinacy of legal norms” that is most influential. However, “the popular and political deployments of the rule of law” tend to emphasize different concerns, most notably the actual administration of justice.).

54. John C. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT’L L. & COM. REG. 71, 71 (1998).

55. See TAMANAHA, *supra* note 32, at 102.

makes it difficult to draw comparisons across countries that may not share the same value systems.⁵⁶ Consequently “a definition that is applicable and acceptable across cultures and political systems will necessarily be a formal one.”⁵⁷ Because formal conceptions are substantively empty, they are more suitable for making global comparisons.⁵⁸ While there may be times when the values encompassed by a substantive conception are (or should be) universal, using such an approach in this Note would run the risk of exporting Western institutions and ideals that are themselves imperfect or biased.⁵⁹

Second, the difference between a formal and substantive conception may be quite meaningful in practice. For example, it may be the case that BITs are highly effective at improving the stability of legal rules (using the formal conception), but utterly ineffective at making such rules correspond more closely to international rights standards (an issue closely related to a substantive conception). Conversely, it may be the case that BITs lead to increased respect for property rights (a substantive concern), but are utterly ineffective at increasing the stability of legal rules (a formal concern).⁶⁰ To avoid conflating formal and substantive concerns, the scope of this article is limited to a formal conception of the rule of law. Subsequent use of the phrase “rule of law” should be read as referring to a formal conception, unless otherwise noted.

D. *The Kinship between BITs and the Rule of Law*

Using the preceding discussion of the rule of law as a guide, it becomes easy to see how individual BITs and the BIT regime as a whole implicate the concept of the rule of law. Indeed, both the content of and justifications for BITs are in-

56. See *id.* at 94 (discussing the broader applicability of formal conceptions).

57. Chesterman, *supra* note 38, at 342.

58. See TAMANAH, *supra* note 32, at 94 (“This substantively empty quality [of formal conceptions of the rule of law] has been identified by theorists, and by the World Bank and other development agencies, as what renders it amenable to universal application.”).

59. See Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD* 31, 51–52 (Thomas Carothers ed., 2006).

60. It is not my intention to suggest that BITs *in fact* play these roles; the examples are merely hypothetical, intended to illustrate the potential divergence between formal and substantive effects.

extricably bound up in the rule of law. First, the content of BITs embodies key rule of law values. Recall that fair and equitable treatment requires that governments act in a predictable and non-arbitrary manner with respect to covered investments.⁶¹ It therefore promotes rule of law prohibitions on arbitrary decisions, retroactivity of laws, and unpredictable legal requirements.⁶² Provisions allowing recourse to investor-state arbitration ensure that obligations are enforceable—taking the necessary first step toward ensuring that legal rules are enforced in a way consistent with their drafting.⁶³ Finally, certain BITs require that laws pertaining to covered investments be published, a requirement that satisfies Fuller’s principle of publication.⁶⁴ One could easily continue through the list of BIT provisions and identify additional rule of law values.

Perhaps more importantly, however, the very existence of the BIT regime evinces a concern for ensuring the presence of the rule of law. One of the core purposes of BITs is to provide a stable and predictable legal framework for investment.⁶⁵ This goal is stated explicitly in the preamble of early U.S. BITs, which read: “[investment protections are] desirable in order to maintain a stable framework for investment.”⁶⁶ It has also

61. See *supra* text accompanying notes 11–12; see also Kingsbury & Schill, *supra* note 31, at 10–16 (describing how the various requirements of the fair and equitable treatment standard “embody several elements of the basic requirements for law as adumbrated in Lon Fuller’s ‘inner morality of law.’”).

62. See FULLER, *supra* note 42, at 41–42 (describing types of “legal excellence toward which a system of rules must strive.”).

63. See *id.* (describing the failure to enforce laws as they are written as a failure of the rule of law). Enforcement of rules is a precondition—a rule cannot be enforced according to its terms where it is not enforced at all.

64. E.g., 2012 U.S. Model BIT, *supra* note 11, art. 10; see also FULLER, *supra* note 42, at 43 (observing that there may be a moral duty to publish laws).

65. See ALVAREZ, *supra* note 8, at 99–100 (noting that, toward the primary goal of protecting American investors abroad, the 1987 U.S. Model BIT “sought to establish a regulatory framework for FDI that would be relatively *transparent, stable, predictable* and secure . . .” (emphasis added)); JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 109 (2010) (“The primary motives behind the rapid expansion of international investment treaties were the desire of investors from capital-exporting states to invest safely and securely abroad and the need to create a *stable legal framework* to facilitate and protect those investments.” (emphasis added)).

66. U.S. Model BIT of 1987 pmbl., reproduced in ALVAREZ, *supra* note 8, at 95 (emphasis added). The 2012 Model BIT expresses the same sentiment in slightly different words. See 2012 U.S. Model BIT, *supra* note 11, pmbl

become a common refrain in support of the expansive BIT regime, with proponents arguing that investment agreements are intended to “make the regulatory framework for FDI in host countries more transparent, stable, predictable and secure.”⁶⁷

A stable and predictable legal system is a hallmark of the rule of law.⁶⁸ Accordingly, “[p]romoting the rule of law with respect to foreign investment may be regarded as the primary function of a BIT.”⁶⁹ That a BIT is necessary to ensure investments are treated according to the rule of law suggests that the pre-BIT legal framework—relying on the legal system of the host state—does not fully satisfy the rule of law.⁷⁰ Accordingly, BITs serve as instruments for introducing the rule of law into contexts where it is otherwise lacking.⁷¹ They do so not

(“Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards”)

67. UNCTAD, *WORLD INVESTMENT REPORT 2003: FDI POLICIES FOR DEVELOPMENT* xvi (2003), available at http://unctad.org/en/Docs/wir2003light_en.pdf.

68. See Waldron, *supra* note 45, at 7 (“On Fuller’s account . . . [a]ll [the rule of law] requires is that the state should do whatever it wants in an orderly, predictable way . . .”). While Waldron adds to Fuller’s formalistic definition, he does not reject this principle. See also Raz, *supra* note 36, at 210 (noting that Hayek’s definition—“that government in all its actions is bound by rules fixed and announced beforehand”—captures the core of the rule of law).

69. VANDEVELDE, *supra* note 7, at 2–3. Vandeveld goes even further than the typical focus on stability and predictability, arguing that BITs embody six core principles—access, reasonableness, security, nondiscrimination, transparency, and due process—the latter five of which are “elements of the concept of the rule of law.” *Id.*

70. Cf. DOLZER & SCHREUER, *supra* note 5, at 109 (noting that investors rely on the stable and predictable framework created by a BIT because they cannot count on the domestic laws of the host state to remain unchanged, or doubt that legal protections will be enforced on behalf of foreign investors). In other words, investors rely on BITs to create stability and predictability—hallmarks of the rule of law—where it is otherwise lacking in domestic regimes.

71. See Eric Gillman, *Legal Transplants in Trade and Investment Agreements: Understanding the Exportation of U.S. Law to Latin America*, 41 GEO. J. INT’L L. 263 (2010) (discussing the transmission of law through trade and investment agreements). The historical development of the BIT regime tends to support this view. Early BITs were concluded almost entirely between a developed state and a developing state. More recently, BITs have been concluded between developing states. See Salacuse & Sullivan, *supra* note 19, at 74–75 (describing the history of the BIT regime). Whether accurate or not, devel-

through bottom-up reforms of domestic legal systems, but through the top-down imposition of an independent international legal regime, complete with substantive obligations, procedural rules, and a mechanism for resolving disputes.

In short, BITs embody a full-fledged legal regime aimed at ensuring foreign investment is treated in accordance with the rule of law. Yet the role of the rule of law in supporting investment is only a small facet of its broader value to a society.⁷² Therefore, it is worth asking whether BITs, through their interaction with the rule of law in the investment sector, in fact reach beyond the narrow bounds of investment protection and influence the rule of law more generally in signatory states. That is, do BITs have any effect on the overall quality of the rule of law in the general domestic legal systems of the states that sign them?

III. EXISTING MODELS OF INTERACTION BETWEEN BITs AND DOMESTIC RULE OF LAW

The mechanisms by which BITs may influence broader domestic rule of law have not received a significant amount of attention within academic literature. However, two general views exist. The first can be called the complement model, and the second the substitute model. The distinction between the two theories is largely outcome-based: The complement model sees BITs as having a (potentially) positive influence on domestic rule of law;⁷³ the substitute model sees the influence of BITs as largely negative.⁷⁴

A. *The Complement Model*

The complement model posits that BITs increase interaction between foreign investors and the judicial system of the

oping states are often perceived as having less stable legal systems and governments. The fact that few BITs have been concluded between developed, industrialized states might be attributed to the fact that states do not perceive a need for them—*i.e.* they believe that the legal systems of their fellow developed states already adequately conform to the rule of law.

72. See *supra* text accompanying notes 32–34.

73. See Franck, *supra* note 3, at 366 (arguing that there is evidence that BITs promote the rule of law, and at the very least, do not harm it).

74. See Ginsburg, *supra* note 3, at 121 (“[F]or the Rule of Law variable in particular, BIT adoption leads to subsequent *declines* in quality . . .”).

host state.⁷⁵ Increased interaction in turn drives improvement in the rule of law.⁷⁶ This model therefore presents two separate relationships that must be assessed.

First, given that most BITs allow investors to avoid domestic courts through international arbitration, the claim that BITs increase interaction between investors and host state courts is somewhat counter-intuitive. However, the complement model argues that while BITs provide investors an “escape clause” from domestic courts for some claims, they nonetheless increase the overall involvement of foreign investors in domestic legal systems.⁷⁷ Susan Franck identifies three ways in which this occurs. First, some BITs provide investors the option to litigate claims against the host state in domestic courts.⁷⁸ Not all BITs are equal in this respect—some prohibit investors from pursuing *both* domestic courts and arbitration through a fork in the road clause.⁷⁹ Nonetheless, investors can still choose domestic courts over arbitration. Second, an arbitral proceeding may be accompanied by other legal proceedings. Domestic courts may be necessary to enforce awards rendered by arbitral tribunals, and have a limited power of review over ad-hoc tribunals established under the UNCITRAL rules.⁸⁰ Finally, the jurisdiction of arbitral tribunals is limited to claims arising under a BIT. Any claims arising under domestic law must be pursued in domestic courts.⁸¹

Assuming that BITs do increase the interaction between foreign investors and host state judicial systems, the complement model then argues that such interaction builds the rule of law.⁸² Several mechanisms make this possible. First, the quality of a host state judicial system matters to investors who

75. See Franck, *supra* note 3, at 368 (discussing the “symbiotic relationship” between investment treaty administration and national courts, leading to increased confidence in investment dispute resolution).

76. See Ginsburg, *supra* note 3, at 119.

77. See Franck, *supra* note 3, at 368.

78. *Id.*

79. *E.g.*, U.S. 2012 Model BIT, *supra* note 11, art. 26(2)(b).

80. See Franck, *supra* note 3, at 370; see also Gillman, *supra* note 71, at 285; Norton, *supra* note 33, at 76 (noting that foreign investors pursuing international arbitration against a host state must still rely on host state domestic courts for enforcement of awards).

81. Franck, *supra* note 3, at 370.

82. *Id.*

must rely on it—at least in part—for dispute resolution.⁸³ This creates an incentive for investors to push for reform, and for host states to initiate reform in order to attract investors. Second, where investors have a choice between domestic courts and international arbitration, domestic courts may compete with tribunals to attract claims.⁸⁴ This competition may drive improvement in domestic courts. Finally, courts may learn from the experience of resolving investment claims.⁸⁵

B. *The Substitute Model*

Whereas the complement model argues that BITs are capable of promoting domestic rule of law, the substitute model views BITs as detrimental to the development of judicial institutions and rule of law in the host state. Both models share the same assumption—that the presence of foreign investors in the judicial system of the host state is beneficial to rule of law development. The models diverge, however, with respect to their views on whether BITs encourage or discourage such interaction. The substitute model posits that BITs have an overall negative effect on the level of interaction between investors and host state courts.⁸⁶

Proponents of the substitute model focus on the ability of investors, pursuant to the investor-state arbitration clauses of BITs, to “detour” around domestic legal systems, leaving the domestic institutions marginalized.⁸⁷ The effect is to remove key players from the domestic system—players who otherwise would have encouraged rule of law reform.⁸⁸ Such investor-

83. See Norton, *supra* note 33 at 76 (2004) (“In reality, the effectiveness of the judicial system and judiciary is an important element that foreign investors always consider before undertaking their projects.”).

84. See Ginsburg, *supra* note 3, at 119 (“[O]ne might imagine that there is a form of regulatory competition among institutions. International arbitration, for example, can spur domestic courts to compete for the business of resolving commercial disputes and thus improve their quality.”).

85. See *id.* (rejecting the proposition that “courts internalize the benefits of adjudication”).

86. *Id.* at 121.

87. See HALLE & PETERSON, *supra* note 4, at 23 (“BITs and FTAs provide foreign investors with the means of detouring around . . . allegedly dysfunctional local institutions.”).

88. See Franck, *supra* note 3, at 366 (describing the substitute model); Ginsburg, *supra* note 3, at 119 (same). See also Ronald J. Daniels, Defecting on Development: Bilateral Investment Treaties and the Subversion of the

driven reform efforts could be either direct, with the investor affirmatively pressing for reform before or after entry, or indirect, with states competing to attract investment by proactively making changes to their legal systems.⁸⁹ Without a need to rely on host state courts, foreign investors—who likely possess the political capital to have their demands heard—no longer have an incentive to demand reform.⁹⁰ Thus, part of the opportunity cost of concluding a BIT is lost rule of law reform.

A strong version of the substitute model posits that such a dynamic may actually lead to deterioration in the rule of law, rather than simply a lack of growth.⁹¹ According to this argument, “[j]udicial quality is a political outcome that requires a political coalition to establish and maintain.”⁹² Foreign investors are key parts of that political coalition.⁹³ Removing investors from domestic institutions, therefore, also removes their influence and ability to maintain institutional quality.

Two mechanisms are implicit in the substitute argument. The first is that investors advocate growth-inducing changes to domestic legal systems. This presumably occurs through particularly powerful investors lobbying host governments, either directly or through their home state government, or through the inclusion of demands for reform in investment contract negotiations.⁹⁴ The second mechanism envisions investors exerting

Rule of Law in the Developing World 24–25 (Mar. 23, 2004) (unpublished manuscript), *available at* <http://www3.unisi.it/lawandeconomics/stile2004/daniels.pdf> (describing investors’ decreased incentive to advocate for legal reform where a BIT allows them to exit a domestic legal system).

89. See Daniels, *supra* note 88, at 26 (arguing that if investors were unable to circumvent domestic legal systems, they would be more interested in the quality of such systems, and countries would compete to attract investment by providing legal systems favorable to investors). Such an investor-friendly system could encompass not only the rule of law values of stability, predictability, and transparency, but also the substantive content of laws.

90. See HALLE & PETERSON, *supra* note 4, at 24 (“The ramifications of these special dispute procedures, with their special avenues for foreign investors, may be negative in human development terms.”).

91. See Ginsburg, *supra* note 3, at 119.

92. *Id.*

93. *Id.*

94. See *id.* (referring to the “political coalition” that drives institutional growth). For a discussion of how investors negotiate with host states regarding the content of legal regimes, see John Hewko, *Foreign Direct Investment in Transitional Economies: Does the Rule of Law Matter?*, 11 E. EUR. CONST. REV. 71 (2002).

an indirect influence on legal institutions as domestic courts compete for their business. The ease with which foreign investors can escape to the greener pastures of investor-state arbitration leaves domestic courts with “insufficient incentives to compete with the global alternatives.”⁹⁵

C. *The Limits of the Complement and Substitute Models*

The complement and substitute models form the basis for what is thus far the most comprehensive effort to ascertain the influence of BITs on domestic rule of law. A 2005 study by Tom Ginsburg measures the change in several dimensions of domestic governance and institutional quality at set intervals after a country signs a BIT, compared to countries that did not sign a BIT during the same period.⁹⁶ Rule of law is one of the dimensions of governance measured by the study.⁹⁷ The study finds that signing a BIT is a statistically significant predictor of later declines in the rule of law.⁹⁸ In fact, BIT signing appears to have a greater effect on the rule of law than on other governance measures.⁹⁹ The study thus suggests that BITs are, on

95. Ginsburg, *supra* note 3, at 122–23.

96. *Id.* at 120–22.

97. The Rule of Law indicator used in Ginsburg’s study is borrowed from the World Governance Indicators (WGI). *See id.* at 114. The WGI are a set of indicators that rate countries on six aspects of governance: voice and accountability, political stability and absence of violence/terrorism, government effectiveness, regulatory quality, rule of law, and control of corruption. Each indicator is itself an aggregation of other measures. These measures are collected from four types of sources: surveys (such as the Business Enterprise Environment Survey), ratings produced by NGOs (such as the Freedom House ratings), ratings produced by commercial services (such as Political Risk Services’ International Country Risk Guide), and ratings produced by governments and inter-governmental organizations (such as the Asian Development Bank’s Country Policy and Institutional Assessments). Data is available beginning with the year 1996, and currently covers over 200 countries. *See* Daniel Kaufmann et al., *The Worldwide Governance Indicators: Methodology and Analytical Issues*, 2, 29 (World Bank Dev. Research Grp., Working Paper No. 5430, 2010), available at http://www.brookings.edu/~media/research/files/reports/2010/9/wgi%20kaufmann/09_wgi_kaufmann.pdf.

98. Specifically, after controlling for GDP per capita, democracy, and political stability, the study finds that countries that signed BITs in 1995–96 displayed significantly lower scores on the Rule of Law metric in 2000. *See* Ginsburg, *supra* note 3, at 121.

99. None of the other dependent variables considered (government effectiveness, regulatory quality, and corruption control) were found to have a statistically significant relationship with BIT adoption. *Id.* at 122.

the whole, detrimental to the general levels of rule of law in the countries that sign them.

The study, however, is not dispositive of the questions asked by this article. Instead, it represents only an initial step in an ongoing conversation. This is so for two reasons. First, the results of the study should be approached with caution. The rule of law is notoriously difficult to measure, as Ginsburg himself explains elsewhere in great detail.¹⁰⁰ Part of the difficulty flows from disagreement about the definition of “rule of law.”¹⁰¹ The metric adopted by the study—the World Governance Indicators’ Rule of Law indicator—was designed to be a compromise between purely formal and heavily substantive conceptions of the Rule of Law.¹⁰² However, a look at the components of the aggregate indicator reveals a substantial number that go well beyond a formal conception of the rule of law, representing certain substantive viewpoints.¹⁰³ As discussed above, substantive elements represent value judgments that make it difficult to properly compare the rule of law across countries. The influence of substantive conceptions of the rule of law may be exaggerated by the WGI’s use of perception-based data; such data opens the door to the subjective biases of the persons and organizations that create the rating. The WGI have been criticized both for over-representing the perspective of the business community,¹⁰⁴ and for under-repre-

100. See Tom Ginsburg, *Pitfalls of Measuring the Rule of Law*, 3 HAGUE J. ON RULE L. 269, 272 (2011) (discussing the structures, social attitudes, and traditions that amount to the rule of law).

101. See *supra* text accompanying notes 36–41.

102. See Kaufmann et al., *supra* note 97, at 4 (“We . . . seek to navigate between overly broad and narrow definitions . . .”).

103. The indicator includes, for example: respect for “traditional” property rights; protection of intellectual property; access to land and water; and the role of the informal economy. Additionally, the indicator reflects a heavy reliance on the degree to which private actors, rather than the government, adhere to legal order, through an emphasis on levels of crime. See Daniel Kaufmann et al., *Governance Matters VIII: Aggregate and Individual Governance Indicators 1996-2008* 77–78 (World Bank Policy Research Working Paper No. 4978, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424591.

104. Kurtz and Shrank argue that the WGI’s reliance on commercial risk rating services creates a business-centric view of the rule of law. This in turn gives a certain tint to what qualifies as a “good” or effective legal system, potentially favoring less regulated environments. See Carmen R. Apaza, *Measuring Governance and Corruption through the Worldwide Governance Indicators*:

senting the views of the people of the countries in question.¹⁰⁵ This is not to say that the Rule of Law indicator taken from the WGI is necessarily inaccurate; rather, it represents one particular view of the Rule of Law that is not universally accepted, and indeed conflicts with the view adopted by this article.

Second, even if the study's results are perfectly accurate—that is, even if BITs do have an overall negative influence on the rule of law—the conclusion has a high level of generality. It does not reveal whether all BITs have an equal influence on the rule of law. Nor does it reveal whether particular BIT provisions have a greater influence than others. It does not establish whether some BIT provisions have a positive influence on the rule of law while others have a negative influence, or conversely that it is not individual provisions that matter, but a factor related to the BIT as a whole.¹⁰⁶ To ask these questions is essentially to ask *how* BITs influence the domestic rule of law in signatory states. It is in this respect that this article hopes to progress the conversation on BITs and the rule of law.

The complement and substitute models—the models that form the core of existing scholarship regarding the influence

Critiques, Responses, and Ongoing Scholarly Discussion, 42 PS: POL. SCI. & POL. 139, 141–42 (2009) (describing a 2007 study by Kurtz & Shrank, and presenting Kaufmann et al.'s rebuttal). Cf. Amanda Perry-Kessaris, *Finding and Facing Facts about Legal Systems and Foreign Direct Investment in South Asia*, 23 LEGAL STUD. 649 (2003) (noting in a study of similar indicators that each has inherent biases).

105. Ivanyna and Shah find considerable differences between perceptions of governance based on a survey that includes citizen opinions and the WGI rankings. This leads them to conclude that “all available composite indexes of governance [including the WGI]. . . fail to capture how citizens perceive the governance environment and outcomes in their own countries.” MAKSYM IVANYNA & ANWAR SHAH, *CITIZEN-CENTRIC GOVERNANCE INDICATORS: MEASURING AND MONITORING GOVERNANCE BY LISTENING TO THE PEOPLE AND NOT THE INTEREST GROUPS* 1, 11 (Discussion Paper No. 2009-27, 2009), *available at* <http://www.economics-ejournal.org/economics/discussionpapers/2009-27>. This critique seems somewhat overstated, as the WGI do include citizen opinions for some countries by using data from Afrobarometer, Latinobarometro, and the Gallup World Poll. See Kaufmann et al., *supra* note 97, at 29. It may be safer to say that domestic voices are underrepresented in the WGI, rather than absent.

106. My intent here is not to criticize Tom Ginsburg's study. Much the opposite, the study is a fine example of the attention to BIT–rule of law interaction this article calls for. Rather, my intent is to note the limitations of the study—unavoidable in a single article—and attempt to build on them.

of BITs on rule of law—are inadequate explanations of the mechanisms by which BITs might influence domestic rule of law. Inadequate does not mean wrong. Indeed, this article will later argue that, in particular instances, either model might explain part of the interaction between BITs and domestic rule of law. Instead, the assertion that the models are inadequate means that they are both under-inclusive and under-supported.

The complement and substitute models are under-inclusive in that they do not account for the full variety of mechanisms through which BITs might influence domestic rule of law. Despite the opposing conclusions of the two models, they share a view of the mechanism by which BITs would influence the rule of law. In both models, the rule of law is promoted by investors who push for legal reform. The motivation for investors to push reform is provided by the necessity of engaging with the host country's legal system.¹⁰⁷ Accordingly, it is either because of or in spite of a BIT's dispute resolution provision that investors engage with the host state's legal system, indirectly driving changes in the rule of law. However, BITs are more than their dispute resolution provisions. This article argues in section V, *infra*, that there are several additional mechanisms by which BITs might influence domestic rule of law.

Second, the complement and substitute models are both under-supported. Both models rest on quite logical arguments. It is not unreasonable to suppose that the arbitration provisions of BITs may hurt the rule of law by allowing actors who would otherwise push for reform to escape domestic legal systems.¹⁰⁸ However, the argument rests on common sense and little more. Leading descriptions of the substitute model do not ground the model in any theory or evidence that would suggest investors *do* actively promote judicial reform, much less that they are successful in doing so.¹⁰⁹ Likewise, the argument made by the complement model—that despite arbitration provisions, BITs increase the contact between foreign investors and the judicial systems of host states—is *prima facie* reasonable. Yet it is not based in any theory or evidence that

107. See Norton, *supra* note 33, at 76.

108. See HALLE & PETERSON, *supra* note 4, at 24 (making this argument); see also Ginsburg, *supra* note 3, at 120–21 (same).

109. See HALLE & PETERSON, *supra* note 4, at 23–24.

such contact would be beneficial.¹¹⁰ This does not mean that support for these positions does not exist, or that the assertions are inaccurate. Rather, the point is that both models as they currently stand are insufficiently linked to the broader field of scholarship.

In short, the complement and substitute models, as developed in existing literature, do not take sufficient account of the wealth of existing scholarship regarding the nature of the rule of law and how it develops. Accordingly, this article will now turn to that literature, attempting to distill a foundational understanding of how the rule of law develops (or degenerates) that will then be used to critique the complement and substitute models. Such an understanding will also serve as a basis for discussing additional mechanisms by which BITs may influence domestic rule of law.

IV. THE RULE OF LAW AND HOW IT DEVELOPS

A. *The Limits of Our Current Knowledge*

Efforts to promote the rule of law abroad—particularly in developing and post-conflict states—have become a popular activity in the international community. A large group of actors is engaged in this task, including government agencies, international organizations, NGOs, and private business organizations.¹¹¹ That the rule of law is so heavily emphasized is hardly surprising, given that it is seen as necessary to a variety of ends, not least among them the protection of human rights and economic development.¹¹²

110. See Franck, *supra* note 3, at 366–68; Norton, *supra* note 33, at 76.

111. See PER BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA: INTERNATIONAL SUPPORT 7 (2006) (providing an introduction to the major players in the rule of law development field); Walter Dellinger & Samuel P. Fried, *Promoting the Rule of Law Abroad: How the U.S. Legal and Business Communities Can Help*, WORLD POL'Y J., Summer 2003, at 79 (describing the role of private actors in rule of law promotion).

112. See Katherine Erbeznik, *Money Can't Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries*, 18 IND. J. GLOBAL LEGAL STUD. 873, 874 (2011) (“The rule of law is often touted as a panacea for problems facing the developing world. It is thought to obviate violent conflicts and allay post-conflict turmoil. It also is attributed with the power to accelerate economic development and protect human rights.”); see also Samuel L. Buford, *International Rule of Law and the Market Economy – An Outline*, 12 S.W.J.L. TRADE AM. 303, 303 (2006) (arguing that “[t]he rule of law is an indispensa-

It is natural, therefore, to look to these efforts and the scholarship that guides them in order to better understand how the rule of law develops. Unfortunately, such lessons are somewhat less apparent than one might hope. As Thomas Carothers, one of the leading voices in the rule of law development field, puts it: “Aid providers know what endpoint they would like to help countries achieve—the Western-style, rule-oriented systems they know from their own countries. Yet they do not really know how countries that do not have such systems attain them. That is to say they do not know what the process of change consists of and how it might be brought about.”¹¹³ Other scholars echo this lament.¹¹⁴ Nonetheless, it is possible to glean some lessons from current practice.

B. *Building the Rule of Law—Practical Perspectives*

Because the process by which the rule of law develops is poorly understood, the standard approach is to copy the institutions of countries with high adherence to the rule of law and replicate them in the target country.¹¹⁵ Under such an “institutional transplant” model, institutions act as proxies for the rule of law.¹¹⁶ The model presupposes that the rule of law is intricately bound up with the institutions that support it; thus, recreating successful institutions is seen as a means of recreating

ble foundation for a market economy, which provides an essential environment for the creation and preservation of wealth, economic security, and well-being, and the improvement of the quality of life.”).

113. Carothers, *supra* note 33, at 21.

114. See Wade Channell, *Lessons Not Learned About Legal Reform*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 137, 148–49 (Thomas Carothers ed., 2006) (arguing that it is a mistaken assumption that “the processes of legal changes are well understood.”); see also Erbeznik, *supra* note 112, at 874 (noting that despite the emphasis on promoting the rule of law, there is no blueprint for doing so).

115. See Carothers, *supra* note 33, at 21 (describing the standard approach to rule of law promotion as one in which “a country achieves the rule of law by reshaping its key institutions to match those of countries that are considered to have the rule of law”).

116. See Richard J. Sannerholm, *Rule of Law After War: Ideologies, Norms and Methods for Legal and Judicial Reform* 39, 51–52 (Doctoral Dissertation, Orebro University, 2009) [hereinafter Sannerholm, *After War*] (noting that the most common approach to international rule of law reform is the “transplant” or “transfer” model).

the rule of law.¹¹⁷ This transplant of institutions is pursued primarily through three strategies.¹¹⁸

The first and simplest strategy is to build the physical capacity of foreign legal systems. In some environments, building the rule of law may first require building courthouses or purchasing equipment.¹¹⁹ Beyond this basic need, the second strategy focuses on building the capacity of judicial systems, but at the level of human capital, rather than physical capital. Hosting seminars, workshops, and conducting training programs for foreign judges are common strategies.¹²⁰

An example of the heavy importance placed on judicial training by rule of law reformers is provided by the work of the International Legal Assistance Consortium (ILAC), a collective of NGOs aimed at promoting the rule of law.¹²¹ In 2003, ILAC published a report recommending steps for reconstructing the rule of law in Iraq after the U.S.-led invasion. The report cites training jurists as a crucial element of building the rule of law, and international training programs for Iraqi judges figure prominently among its recommendations.¹²² A focus on judiciaries is not limited to NGOs—it is also a central part of pro-

117. See Richard Z. Sannerholm, *In Search of a User Manual: Promoting the Rule of Law in Unruly Lands*, in *RULE OF LAW PROMOTION: GLOBAL PERSPECTIVES, LOCAL APPLICATIONS* 189, 195 (Bergling et al. eds., 2009) [hereinafter Sannerholm, *User Manual*] (“The primary tool, or the most favoured method, for promoting rule of law in crisis states is to transplant and borrow laws and institutions, and to influence the reform process in a certain direction.”).

118. There are, of course, numerous strategies for promoting the rule of law; this is not intended to be an exhaustive list. However, it is the opinion of the author that the bulk of international legal reform efforts fall into one of the categories listed here.

119. See Sannerholm, *After War*, *supra* note 116, at 201.

120. See Allison Fayle, *ABA International Rule of Law Initiatives*, 14 *PUB. LAW.* 10, 11 (2006).

121. See *Why ILAC*, INT’L LEGAL ASSISTANCE CONSORTIUM, <http://www.ilac.se/about-2/why-ilac/> (last visited Apr. 12, 2013).

122. INT’L LEGAL ASSISTANCE CONSORTIUM, *ILAC REPORT: IRAQ*, AUGUST 2003, at 10, 14–15 (2003), available at http://www.ilac.se/download/reports_documents/mission-reports_documents/Iraq_Report_2003.pdf.

grams funded by the U.S. government¹²³ and the European Union.¹²⁴

The third strategy for recreating successful legal institutions abroad is to directly advocate legal and policy reform with the governments of developing and post-conflict states. This advocacy can take a variety of forms. The American Bar Association (ABA), for example, provides technical assistance and advice to governments in the process of re-drafting laws.¹²⁵ Government-funded programs may play a similar role.¹²⁶ If a government is not already amenable to reform, actors with enough cachet can use their influence to encourage it.¹²⁷ Conversely, actors with less access to the target government may choose to encourage reform through funding local NGOs.¹²⁸

C. *Building the Rule of Law – Academic Perspectives*

The institutional transplant model has inspired a series of critiques from scholars who note its spotty record. On its own, they argue, it has failed to consistently promote the rule of law.¹²⁹ They offer several reasons this may be the case. These factors offer guidance for how the rule of law may be promoted more successfully going forward.

First, institutional transplant fails to promote the rule of law when it is imposed from the outside without consideration

123. See David M. Mednicoff, *Legalism Sans Frontieres? U.S. Rule-of-Law Aid in the Arab World* 10 (Carnegie Paper No. 61, 2005) (discussing programmatic efforts by the U.S. government to build the rule of law abroad, focusing on judiciaries).

124. See Katerina Novotna, *Laboratory of the International Community? Role of International Organizations in the Re-establishment of the Rule of Law in Kosovo*, 104 AM. SOC'Y INT'L L. PROC. 588, 588 (2010) (describing the work of the European Union Rule of Law Mission in Kosovo).

125. See Fayle, *supra* note 120, at 1.

126. See Novotna, *supra* note 124, at 588–89 (discussing the advising function of the European Union Rule of Law Mission in Kosovo).

127. See Dellinger & Fried, *supra* note 111, at 80 (arguing that the private sector should use its influence with foreign governments to help promote the rule of law).

128. See Sannerholm, *After War*, *supra* note 116, at 208. See also Scott Wilson, *Law Guanxi: MNCs, State Actors, and Legal Reform in China*, 17 J. CONT. CHINA 25, 35 (2008) (describing how multinational corporations have used NGOs to encourage legal reform in China).

129. Carothers, *supra* note 33, at 21–22; Erbeznik, *supra* note 112, at 878.

of the political and social environment of the target country.¹³⁰ Failing to account for these factors means that local stakeholders often offer little support for—and sometimes actively oppose—reforms. Without such support, efforts to build the rule of law will fail.¹³¹

This lack of support can be expressed in multiple ways. Some authors have focused on the “will to reform.”¹³² Reforms fail, they argue, because key government officials and political elites have no desire to reform. To support reform, therefore, it is necessary to convince these elites to support change.¹³³ A related argument holds that important interests may lack the will to reform because of the incentive structure of the current system. Some actors—government agencies, business interests, etc.—benefit from a lack of rule of law, and will therefore resist change out of self-interest.¹³⁴ Modifying these structures is a lengthy process—much more difficult than simply amending laws.¹³⁵

Other scholars look beyond the interests of political elites to the interests of society at large. Both Frank Upham and Gary Goodpaster criticize reform efforts that fail to consider the existing (often informal) social mechanisms for structuring action and resolving disputes. Attempts to transplant Western institutions risk displacing the existing structures, creating resistance to the new institutions.¹³⁶ When efforts to build the

130. “Something is missing from the development diagnosis and plan, at least as far as law and legal system reforms go. There are social structural factors that explain why rule of law does not ‘take’ and become an infrastructural support for economic growth and development.” Gary Goodpaster, *Law Reform in Developing Countries*, 13 *TRANSNAT’L L. CONTEMP. PROB.* 659, 661 (2003). The problem with past efforts, argues Goodpaster, is that they have failed to take into account the underlying political nature of the rule of law. See also Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* 7–8 (Carnegie Endowment Democracy and Rule of Law Project Working Paper No. 30, 2002) (criticizing conventional efforts to promote the rule of law for their inattentiveness to the legal and political context of law).

131. See Carothers, *supra* note 33, at 21–22 (stating that institutional transplant fails largely because of local resistance).

132. *Id.* at 22.

133. Erbeznik, *supra* note 112, at 879.

134. Carothers, *supra* note 33, at 22–23.

135. See Erbeznik, *supra* note 112, at 881 (describing the difficulty of institutional change).

136. Goodpaster, *supra* note 130; Upham, *supra* note 130.

rule of law through institutions are not considered legitimate by society, they will not stick.¹³⁷

In sum, these critiques tell us that the rule of law is much more than the result of technocratic decisions about the structure of a legal system, or the knowledge of its judges. Instead, there are significant political and social components of the rule of law.¹³⁸ Efforts at reform that focus on institutional change will not be effective unless such changes are supported by local stakeholders, or at least consistent with the culture of the target country. Therefore, the institutional transplant model is not inherently incorrect, but will be ineffective without local political and social buy-in.

A second line of critique asserts that we understand very little about how various facets of the rule of law interact. Carothers states that “rule-of-law aid providers . . . do succeed in helping produce change in some specific areas. When they do, however, they often do not really know what effects those changes will have on the overall development of the rule of law in the country.”¹³⁹ This critique gets to the very heart of this article’s inquiry. Even if BITs have a meaningful effect on the rule of law in the investment sector, does this effect translate at all to the rule of law across society at large? Carothers, for one, argues that there is no evidence to support the idea that such an effect does transfer.¹⁴⁰ Amanda Perry-Kessaris agrees that far too little is known about these relationships, and calls for greater attention to the issue from the World Bank and the international community.¹⁴¹

In short, building the rule of law is a poorly understood process. Current aid and development efforts focus primarily

137. See Sannerholm, *User Manual*, *supra* note 117, at 191 (“For rule of law reform to be effective it has to be perceived as legitimate, both in terms of end goals and the actions taken by international actors.”).

138. See Erbeznik, *supra* note 112, at 879; Goodpaster, *supra* note 130, at 662.

139. Carothers, *supra* note 33, at 23.

140. Carothers states that the idea that reforming commercial law will lead to wider rule of law growth is attractive, yet “is not grounded in any systematic research and represents a typical example in the rule-of-law world of an appealing hypothesis that is repeated enough times until it takes on the quality of a received truth.” *Id.* at 23–24.

141. See Amanda Perry-Kessaris, *Enriching the World Bank’s Vision of International Legal Systems and Foreign Direct Investment*, in *RULE OF LAW PROMOTION: GLOBAL PERSPECTIVES, LOCAL APPLICATIONS* 271 (Bergling et al. eds., 2009).

on two mechanisms: building the capacity of judicial systems, most notably by training judges, and encouraging or aiding top-down legal and policy reform.¹⁴² Such efforts, however, are unlikely to be successful standing alone. Rather, they must be supported by local stakeholders.¹⁴³ This requires tailoring reform efforts to the political and social culture of the target country to build legitimacy and support for the rule of law.

D. *Testing and Critiquing the Complement and Substitute Models*

The following section addresses how the complement and substitute models fare in light of the scholarship discussed in the section immediately prior, along with the nature and definition of the rule of law discussed in Section II.

1. *Investor Contact is Not Necessarily Positive*

Both the complement and substitute models envision that the rule of law is built when foreign investors have increased contact with the legal system of the host state. For the complement model, BITs increase contact, potentially promoting the rule of law;¹⁴⁴ for the substitute model, BITs decrease contact, harming the rule of law.¹⁴⁵ The overview of rule of law reform efforts in section IV(b) supports the idea that corporations and business interests can be involved in efforts to promote the rule of law.¹⁴⁶ However, it does not support the assumption that all foreign investor involvement in a legal system will necessarily have a positive effect. It only shows that investors can play a positive role under some circumstances.

To begin, the influence of investors on the rule of law could be absolutely neutral. For example, it may be more beneficial to simply encourage a host government to redraft one or two relevant laws than to encourage wholesale reform.¹⁴⁷

142. See Sannerholm, *After War*, *supra* note 116, at 201.

143. See Goodpaster, *supra* note 130, at 662.

144. See Ginsburg, *supra* note 3, at 118.

145. See *id.* at 118–19.

146. See Dellinger & Fried, *supra* note 111, at 79 (“Firms from every sector . . . have promoted the rule of law internationally to increase the transparency of regulatory environments, eliminate corruption, enforce commercial contracts, and ensure access to dispute resolution mechanisms and courts.”); see Wilson, *supra* note 128, at 35 (describing the rule of law promotion activities of MNCs operating in China).

147. Hewko, *supra* note 94, at 72.

This limited action seems likely to have an equally limited effect on the rule of law. Similarly, while Walter Dellinger and Samuel Fried note how businesses can promote rule of law reform, their article is in fact a call for businesses to be *more* involved in such efforts.¹⁴⁸ The implication is that many investors currently pay very little attention to rule of law reform.

Moreover, both the complement and substitute models fail to envision that the influence of foreign investors on the rule of law could actually be negative. Hellman et al. find that “[i]n misgoverned settings, rather than importing higher standards of governance, FDI firms would appear to magnify the problems of state capture and procurement kickbacks. . . .”¹⁴⁹ To the extent this is true, it reverses the operation of both models: Increased contact between investors and host-state legal systems is detrimental to the rule of law.

It seems likely that reality is complicated, and that all of the above are true in various circumstances. Foreign investors can play a role in promoting the rule of law, but they can also have neutral or negative effects. Both the complement and substitute models, therefore, are overly optimistic about the role played by investors. Accurately assessing such a role requires a more case-specific analysis.

2. *Investors Encouraging Reform Will Not Necessarily Lead to Successful Reform*

Both the complement and substitute models also conflict with what we know about how the rule of law develops. As discussed above, both models envision that the rule of law develops when investors push for legal and policy reform.¹⁵⁰ Because they are (or are not) forced to rely on domestic judicial systems in the host state, investors do (or do not) have an incentive to promote such reform. By focusing on this mechanism, the complement and substitute models both adhere to a central tenet of the institutional transplant theory of building the rule of law, which places an emphasis on judicial capacity

148. Dellinger & Fried, *supra* note 111, at 80.

149. Joel S. Hellman et al., *Far from Home: Do Foreign Investors Import Higher Standards of Governance in Transition Economies?*, 21 (Aug. 2002) (World Bank Working Paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=386900.

150. Ginsburg, *supra* note 3, at 119.

and top-down reform.¹⁵¹ However, section IV(c) showed that the institutional transplant model is, standing alone, an inadequate explanation of how the rule of law develops.¹⁵² Efforts at reform will only be successful when they take into account the political and social dynamic in the host country.¹⁵³ Put another way, foreign investors can expend as many resources encouraging reform as they like, but this will not promote the rule of law unless the reforms are supported and perceived as legitimate by local stakeholders.

Predicting when conditions will align so that rule of law reform efforts are supported by local political and social currents would be difficult to do on anything except a case-by-case basis. This difficulty exposes one of the limitations of the complement model. Even if its assumption about increased investor-court contact is correct, the model only identifies a situation in which a BIT *can* promote the rule of law. However, it cannot predict when a BIT will have such an effect. There are

151. See *supra* text accompanying notes 115–118.

152. See Goodpaster, *supra* note 130, at 661.

153. *Id.* at 662. This point is made most persuasively with respect to BITs by Ronald Daniels, whose work represents a notable exception to the general lack of attention to the role of domestic interests in BIT/rule of law interaction. Daniels emphasizes the importance of the interests of political elites to rule of law development. See Daniels, *supra* note 88, at 15. He goes on to make a variant of the substitute argument: that the interests of political elites will generally favor BITs that allow investors to escape from the domestic legal regime, because such an agreement allows the elites to attract foreign investment to their country without the need to face the costs of broader domestic legal reform. See *id.* at 24–26. The suggestion is compelling, although the relevant political elites would likely balance the cost of rule of law reform against the expected cost of BIT signature—*i.e.* the cost of litigating claims and paying awards against the state, discounted by the likelihood of such claims and awards. Given the explosion of BIT claims over the last decade and a half, such costs may be substantial. See ICSID, THE ICSID CASELOAD—STATISTICS 7–10 (2013), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>. Moreover, where political actors do not internalize the financial costs of their decisions, the relevant costs of both options are likely to be reputational. This may result in a different outcome than a balancing of financial costs alone, depending on the political environment of the country. Nonetheless, Daniels' argument suggests an additional possibility for BIT/rule of law interaction: At least under some circumstances, the interests of domestic political elites may not only frustrate investors' attempts at reform once initiated, but may also lead to outcomes that decrease investors' incentives to press for reforms in the first instance.

simply too many variables left unaddressed: Will the investor push for reform? If so, does the effort have the political and social backing necessary for it to stick?

The substitute model makes the same assumption—that investors' efforts to encourage reform drive rule of law growth. Consequently, it has the same weakness as the complement model. Not every investor allowed to flee the domestic judicial system for the comfortable waters of investor-state arbitration represents lost rule of law reform. There is no guarantee that, had the investor remained in the domestic system, any attempt to promote reform would have been successful.¹⁵⁴ In this respect then, research surrounding how the rule of law develops does not disprove either the complement or substitute model. However, it reveals a significant limitation of each, and again indicates that an accurate assessment of the effect of a BIT on the rule of law may only be possible on a case-by-case basis.

3. *Dispute Resolution and Judicial Systems Are Not the Only Relevant Mechanisms*

Both the complement and substitute models focus heavily (if not exclusively) on dispute resolution aspect of BITs. According to the substitute model, a BIT harms the rule of law because it contains a provision that gives investors recourse to investor-state arbitration for certain investment disputes.¹⁵⁵ The effect of this access to arbitration is to allow investors to avoid domestic courts in the host state.¹⁵⁶ When investors can rely on an international body to resolve investment disputes, supporters of this model reason, they have little incentive to encourage reform in the host state.¹⁵⁷ Thus, it is the investor-

154. Notably, Daniels' view of the mechanisms by which investors drive reform partially ameliorates the concern about obstruction of reform efforts by domestic interests. Daniels suggests that reforms may be driven not only by investors directly, but also (in the absence of a BIT) by political elites in an attempt to capture a greater share of global investment flows. See Daniels, *supra* note 88, at 25–26. To the extent the latter is true, the interests of political elites will not pose an obstacle to reform; however, other domestic interests may, including commercial actors and political groups not in power. Additionally, reforms may still be frustrated by inconsistent social norms. See *supra* notes 136–137 and accompanying text.

155. See, e.g., U.S. 2012 Model BIT, *supra* note 11, art. 24.

156. HALLE & PETERSON, *supra* note 4, at 23.

157. Franck, *supra* note 3, at 366.

state arbitration provision of a BIT in particular that has a deleterious effect on the rule of law.

For the complement model as well, dispute resolution is the key concept—it is despite the arbitration provision of a BIT that investors interact with courts in the host state.¹⁵⁸ It is then because the investors must make use of domestic courts (as dispute resolution mechanisms), that they have incentive to promote rule of law reform.¹⁵⁹

By focusing so heavily on the dispute resolution aspect of BITs, both models fail to consider other potential mechanisms of interaction between BITs and the rule of law. Recall the various conceptions of the rule of law discussed in section II(c). At the core of most definitions of the rule of law is the idea that government exercise of authority should be constrained by clear and prospective rules, in order that persons can plan their behavior.¹⁶⁰ This concept clearly encompasses dispute resolution and the courts, but is not limited to such areas. It applies equally to legislative and administrative actions. Consider also Fuller's eight principles.¹⁶¹ They apply just as much to legislative and administrative action as to judicial action.

Consequently, the complement and substitute models fall into the same trap as the institutional transplant theory that has been criticized for an over-emphasis on judicial mechanisms.¹⁶² By focusing on dispute resolution, the models essen-

158. *See id.* at 368 (describing potential mechanisms of interaction between investors and domestic courts).

159. *See* Ginsburg, *supra* note 3, at 119 (noting that foreign investors are crucial players in the political coalitions necessary to establish judicial quality).

160. Raz, *supra* note 36, at 210.

161. These principles are: 1) Decisions should be made according to rules—not in an arbitrary or ad-hoc manner; 2) Rules should be publicized, or at least made available to the persons expected to observe them; 3) Rules (legislation) should not be retroactive; 4) Rules should be understandable; 5) Rules should not contradict each other; 6) Rules should not require persons to take steps beyond their capabilities; 7) Rules should not change so frequently that persons are unable to plan their behavior based on the rules; 8) There should not be a significant disconnect between the way rules are drafted and the way they are enforced in practice. FULLER, *supra* note 42, at 39, 41–42.

162. *See, e.g.,* Carothers, *supra* note 33, at 20 (criticizing the tendency of rule of law aid practitioners to overemphasize courts—to the extent that rule of law reform and judicial reform are used interchangeably); Stephen

tially reduce BITs to their investor-state arbitration provisions. While investor-state arbitration plays a central role in the operation of a BIT, there is much more at work in a BIT than providing for arbitration. The question that must be asked, therefore, is whether any of the other provisions contained in BITs influence a host-state government's action in a way that promotes the rule of law. The next section of this article presents a variety of pathways through which BITs may influence domestic rule of law—including but not limited to their dispute resolution provisions. It begins by surveying three substantive BIT obligations that embody rule of law values, then addresses mechanisms by which those provisions might influence the domestic rule of law. It then turns to dispute resolution, and finally, to the general influence of BITs as a whole.

V. MECHANISMS OF BIT-RULE OF LAW INTERACTION

A. *Individual Provisions*

1. *Fair and Equitable Treatment*

One of the core requirements of a typical BIT is that covered investments must be accorded fair and equitable treatment.¹⁶³ Allegations that a state has violated this obligation are the most frequently raised claims in investor-state arbitration.¹⁶⁴ The fair and equitable treatment standard is somewhat flexible, and there is considerable debate regarding its precise contours.¹⁶⁵ However, at its core, it embodies several rule of law values.

Commentators typically divide the obligation to provide fair and equitable treatment into several facets or sub-elements, including predictability, consistency, transparency, and

Golub, *A House Without a Foundation*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 105, 117–18 (Carothers ed., 2006) (arguing that considering the judiciary to be central to rule of law reform is a questionable assumption); Goodpaster, *supra* note 130, at 688 (noting that one response to failed reforms would be to focus on the whole government, rather than just the judiciary).

163. See, e.g., U.S. 2012 Model BIT, *supra* note 11, art. 5(1) (“Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”).

164. DOLZER & SCHREUER, *supra* note 5, at 130.

165. *Id.* at 139.

non-arbitrariness.¹⁶⁶ Stephan Schill argues that these “sub-elements of fair and equitable treatment . . . can be understood as and united under the concept of the rule of law.”¹⁶⁷ Similarly, Kenneth Vandevelde has proposed a “unified theory” of fair and equitable treatment that views its elements as expressions of the rule of law.¹⁶⁸ Whether or not the fair and equitable treatment standard is entirely coterminous with the rule of law, at least some of its elements embody rule of law values, as the rule of law is understood in this article.

The overlap between the fair and equitable treatment standard and rule of law values is visible in the jurisprudence of arbitral tribunals. One of the most cited definitions of fair and equitable treatment was offered by the *Tecmed* tribunal:

[The fair and equitable treatment requirement of the investment agreement in question] . . . requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to *act in a consistent manner, free from ambiguity and totally transparently* in its relations with the foreign investor, so that it may *know before-*

166. See *id.* at 146–60 (grouping the facets of fair and equitable treatment into the categories of: stability, transparency, compliance with contractual obligations, procedural propriety and due process, good faith, and freedom from coercion and harassment); Stephan W. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 151, 154–60 (2010) (identifying the following sub-elements of fair and equitable treatment: stability, predictability, and consistency; legality; protection of legitimate expectations; administrative due process and denial of justice; protection against arbitrariness and discrimination; transparency; reasonableness and proportionality); VANDEVELDE, *supra* note 7, at 202–03 (“Tribunals applying the fair and equitable treatment standard have held that the standard embraces principles of reasonableness, consistency (in effect, the security of legitimate expectations), non-discrimination, transparency, and due process.”).

167. Schill, *supra* note 166, at 154; see also Kingsbury & Schill, *supra* note 31, at 11 (arguing that the core of the fair and equitable treatment standard embodies Fuller’s view of the rule of law).

168. See Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT’L L. & POL. 43, 49 (2010) (“[T]he awards issued to date [by arbitral tribunals] implicitly have interpreted the fair and equitable treatment standard as requiring treatment in accordance with the concept of the rule of law.”).

hand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations The foreign investor also expects the host State to *act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits* issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.¹⁶⁹

Other tribunals have either directly relied on this language or similarly found violations of fair and equitable treatment based on a lack of transparency and predictability.¹⁷⁰ The definition incorporates several of Fuller's principles of the rule of law. First, the requirement of consistency embodies the notion that rules should not change so frequently that parties are unable to plan their behavior around them.¹⁷¹ Second, the idea that the host state should not act in an ambiguous manner incorporates the principle that the rules applicable to a party should be understandable.¹⁷² Third, the requirement of transparency promotes the idea that rules should be publicized and made available to those expected to observe them.¹⁷³ Finally, the prohibition on arbitrary decision making directly corresponds to Fuller's first principle—that decisions should be made according to rules, not in an arbitrary manner.¹⁷⁴ In

169. *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award ¶ 154 (May 29, 2003) (emphasis added).

170. See, e.g., *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award ¶ 276 (May 12, 2005) (“[F]air and equitable treatment is inseparable from stability and predictability.”); *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB/(AF)/97/1, Award ¶ 99 (Aug. 30, 2000); *MTD Equity Sdn. Bhd. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, ¶ 114 (May 25, 2004) (quoting the *Tecmed* award). The MTD annulment committee criticized the emphasis on the expectations of the investor, but did not challenge the place of consistent, transparent, and non-arbitrary exercise of authority at the heart of the fair and equitable treatment standard. See DOLZER & SCHREUER, *supra* note 5, at 143.

171. FULLER, *supra* note 42, at 39–41. Note that Fuller's focus on the ability of parties to plan their behavior is linked to the concept of legitimate expectations invoked by the *Tecmed* tribunal.

172. *Id.*

173. *Id.*

174. *Id.*

short, the rule of law and fair and equitable treatment require much the same behavior, for the same purpose. The fair and equitable treatment standard is thus, at least in part, a requirement that states act in conformance with the rule of law.

2. *Effective Means*

Rule of law values are incorporated not only into the requirement of fair and equitable treatment, but also into what are known as effective means provisions. These provisions require that “[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations.”¹⁷⁵ Effective means provisions are not as commonplace as fair and equitable treatment provisions, occurring most notably in early U.S. BITs and the Energy Charter Treaty.¹⁷⁶

As applied by arbitral tribunals, “the [effective means] standard requires that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case.”¹⁷⁷ It is notable that the standard has also been interpreted to place obligations on states, not only with regard to the treatment accorded to foreign investors in particular cases, but also with respect to their legal system as a whole. This distinction is illustrated by the decision of the *AMTO* tribunal, which considered a claim that an investor’s difficulty in protecting its interests under Ukrainian bankruptcy law amounted to a violation of the effective means provision of the Energy Charter Treaty.¹⁷⁸ The tribunal noted the

175. U.S.-Argentina BIT art. 2 ¶ 6.

176. Energy Charter Treaty art. 10(12), Dec. 17, 1995, 2080 U.N.T.S. 95, available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf. In the 2004 and 2012 U.S. Model BITs, the effective means requirement appears in the preamble, rather than in the body of the treaty. See, e.g., U.S. 2012 Model BIT, *supra* note 11, pmbl.

177. *White Industries Australia Ltd. v. Republic of India*, Final Award, ¶ 11.3 (UNCITRAL) (Nov. 30, 2011) (citing *Chevron Corp. v. Republic of Ecuador*, Partial Award on the Merits, ¶¶ 241–70 (UNCITRAL) (Mar. 30, 2010)), available at <http://italaw.com/sites/default/files/case-documents/ita0906.pdf>. See generally Mavluda Sattorova, *Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct*, 61 INT’L & COMP. L. Q. 223 (2012) (describing the content of the effective means standard and its interpretation by arbitral tribunals).

178. *Limited Liability Company Amto v. Ukraine* Stockholm Chamber of Commerce Arbitration No. 080/2005, Final Award (Mar. 26, 2008).

existence of problems in the investor's particular case, but declined to find these sufficient to violate the effective means standard. Instead, the tribunal looked only to the quality of Ukrainian bankruptcy law in comparison to that of other countries and in light of the complexity of the subject matter, finding it sufficient to satisfy the effective means requirement.¹⁷⁹ Although the *AMTO* systemic approach is considered a narrow interpretation of the effective means standard, the focus on domestic legal systems as a whole makes the standard more likely to have implications for domestic rule of law in general.

The deficiencies in a legal system that amount to a failure to provide effective means can also be described as deficiencies in the rule of law. Indeed, tribunals and commentators have explicitly noted the overlap between the requirements of the effective means standard and rule of law values. "The fundamental criteria of an 'effective means' for the assertion of claims and the enforcement of rights . . . [are] law and the rule of law."¹⁸⁰ For example, long delays in processing claims filed with domestic courts have been held to violate the effective means standard. Such delay also violates the rule of law principle that there should not be a significant disjoint between the law as written and as applied.¹⁸¹ Undue delay amounts to a non-application of the law, by definition a difference between the law as written and as applied. Additionally, arbitrary decisions by courts may constitute a failure to provide effective means. The *Petrobart* tribunal found such a failure when presented with evidence that a government minister had written a domestic court in an (apparently successful) attempt

179. *Id.* §§ 85–89.

180. *Id.* § 87. See also José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 32 (2009) (arguing that the effective means provision is an opportunity for tribunals to apply customary international law standards of due process); J. Steven Jarreau, *Anatomy of a BIT: The United States – Honduras Bilateral Investment Treaty*, 35 U. MIAMI INTER-AM. L. REV. 429, 484 (2004) ("There must be a fair and impartial system through which a timely and reasoned determination may be rendered in order for the assertion of a claim to be effective.").

181. *Chevron*, Partial Award on the Merits (UNCITRAL) at ¶¶ 250–51 (finding that a 13 year delay in dealing with a claim constituted a failure to provide effective means); *White Industries*, Final Award (UNCITRAL) at ¶¶ 11.4.16–20 (finding that a 9 year delay in dealing with a claim constituted a failure to provide effective means).

to influence the outcome of a case.¹⁸² Such case-by-case executive influence over a court violates the first of Fuller's principles of the rule of law: that decisions be made according to rules, not in an arbitrary or ad hoc manner.¹⁸³

3. *Publication Requirements*

Another BIT provision that may influence domestic rule of law is a provision requiring that laws relevant to investments be publicly available. For example, the 2012 U.S. Model BIT provides that "[e]ach Party shall ensure that its: (a) laws, regulations, procedures, and administrative rulings of general application; and (b) adjudicatory decisions respecting any matter covered by this Treaty are promptly published or otherwise made publicly available."¹⁸⁴ Publication requirements receive very minimal attention in both scholarship and arbitral practice. This could be because states comply without incident or because states are already in the practice of publishing all laws, meaning that the publication requirement does not place any additional burden on their behavior. To the extent that the latter is not true, however, publication requirements have the potential to influence domestic rule of law.

Recall from the discussion of the nature of the rule of law in section II(c) that the rule of law requires the government to exercise authority in a consistent and predictable way that allows people to plan their actions.¹⁸⁵ In order for this to be possible, rules (*i.e.* statutes, regulations, etc.) must be publicized and available to the people expected to observe them. Consequently, both Fuller and Raz see the open availability of

182. *Petrobart Ltd. v. Kyrgyz Republic*, Stockholm Chamber of Commerce Arbitration No. 126/2003, Arbitral Award 75–77 (Mar. 29, 2005), <http://italaw.com/sites/default/files/case-documents/ita0628.pdf>.

183. FULLER, *supra* note 42, at 39–40.

184. U.S. 2012 Model BIT, *supra* note 11, art. 10 ¶ 1. *See also* U.S.-Argentina BIT, *supra* note 175, art. 2 ¶ 7 ("Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments."); Canada Model BIT of 2004, Art. 19 ¶ 1, <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> ("Each Party shall, to the extent possible, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.").

185. TAMANAHA, *supra* note 32, at 93.

laws as a key component of the rule of law.¹⁸⁶ A publicity provision, therefore, has the potential to support one component of the rule of law.

4. *Pathways for Spillover from Fair and Equitable Treatment and Effective Means Provisions to Domestic Rule of Law*

Given that BIT provisions embody rule of law values, the question becomes whether these values have any effect outside of the narrow application of the BIT to investment disputes. That is, do they spill over into domestic legal systems? Recalling the discussion of how the rule of law develops, this is a question that must be answered in light of the particular political, social, and legal circumstances of each BIT signatory. However, there are several mechanisms by which the substantive provisions of BITs might indeed have effects beyond the narrow confines of investment disputes, influencing domestic rule of law in signatory states.

The first opportunity for the substantive provisions of BITs to influence general domestic rule of law comes at the time of BIT signing, or even prior to it. BIT signature is often accompanied by a process of reform, as states attempt to ensure their domestic political and legal systems are in compliance with BIT obligations.¹⁸⁷ For example, Algeria has recently pursued reforms to its commercial law, especially in the area of commercial arbitration, and concluded a Trade and Investment Framework Agreement with the United States with the goal of concluding a BIT in the future.¹⁸⁸ A state may similarly undertake reforms once BIT signature is a more certain possibility or has already occurred.¹⁸⁹

186. See FULLER, *supra* note 42, at 39 (the second of Fuller's principles is that rules should be publicized or at least made available to those expected to observe them). See also Raz, *supra* note 36, at 214 (stating that one of the eight general principles of the rule of law is that "[a]ll laws should be prospective, open, and clear.").

187. See ALVAREZ, *supra* note 8, at 104, 141 ("BITs were often concluded only after [a less developed country] had demonstrated its commitment to free market principles through changes in local law.").

188. Omar T. Mohammedi, *International Trade and Investment in Algeria: An Overview*, 18 MICH. ST. U. COLL. L.J. INT'L L. 375, 401-05 (2010).

189. Although there is evidence that in the early years of the BIT regime many developing states simply acceded to the request capital-exporting states without fully comprehending the nature and extent of BIT obligations, global attention to these obligations has increased dramatically as the

Many of the steps taken to bring domestic systems into compliance with BIT obligations may have relevance outside the area of foreign investment. Indeed, it may be difficult to constrain these measures to investment law or to foreign parties. For example, the laws that must be made available pursuant to a publication requirement are unlikely to apply only to foreign parties. It is more likely that they will be laws of general scope for the establishment or operation of business entities in particular sectors—*i.e.* that they will be equally applicable to domestic parties. To the extent that governments increase the accessibility of these laws in response to or in anticipation of BIT signature, they promote rule of law values across the domestic system more broadly.¹⁹⁰ Similarly, compliance with effective means or fair and equitable treatment provisions may require changes to the procedural rules under which domestic courts or political bodies operate.¹⁹¹ Where it is practically or politically unfeasible to create special procedural rules for foreign investors—as one would suspect it often will be—domestic actors will also receive the benefit of these changes. This is especially true of effective means provisions. Where tribunals interpret the standard to focus on the quality of the legal system in general—either instead of or in addition to the treatment of investors in any individual case—effective means provisions essentially require states to provide not only foreign investors, but also domestic parties, with a legal system that corresponds to the basic demands of the rule of law.¹⁹²

BIT regime has expanded. Accordingly, it may be presumed that the majority of states that have signed BITs more recently did so with a meaningful—even if imperfect—understanding of the demands the treaties placed on their domestic political and legal systems.

190. See FULLER, *supra* note 42, at 39 (listing accessibility of laws as an element of the rule of law).

191. See Kingsbury & Schill, *supra* note 31, at 16–17 (arguing that compliance with the fair and equitable treatment standard may lead to changes in the general administrative practices of state agencies).

192. Compare *White Industries Australia Ltd. v. Republic of India*, Final Award, ¶ 11.3 (UNCITRAL) (Nov. 30, 2011), available at <http://italaw.com/sites/default/files/case-documents/ita0906.pdf> and *Chevron Corp. v. Republic of Ecuador*, Partial Award on the Merits, ¶¶ 241–70 (UNCITRAL) (Mar. 30, 2010) (establishing both a systemic and case-by-case requirement), with *Limited Liability Company Amto v. Ukraine* Stockholm Chamber of Commerce Arbitration No. 080/2005, Final Award (Mar. 26, 2008) (looking only at the quality of the system as a whole).

The degree to which BITs influence domestic rule of law in this manner will of course be subject to the lessons drawn in section IV regarding the way in which the rule of law develops. Shaping domestic legal systems to conform to international standards embodied in a BIT is an example of institutional transplant.¹⁹³ Institutional transplant is effective in promoting the rule of law only when it is supported by buy-in from domestic actors.¹⁹⁴ The interests and incentives that affect this buy-in cannot be presumed to be uniform between and within countries. Relevant considerations include: which elements of a government or society favor BIT signature, how broad that support is, and the extent to which any reforms depart from the prevailing legal culture.

The second opportunity for BITs to influence domestic rule of law comes once the BIT is in effect and invoked in investor state arbitration. Benedict Kingsbury and Stephan Schill have argued that a finding that a state has violated fair and equitable treatment provides a powerful incentive for affected agencies within the respondent state to push reforms that will bring the state into compliance and thus spread the rule of law values embodied in the fair and equitable treatment provision into the domestic system generally.¹⁹⁵ Although their argument focuses on fair and equitable treatment, its logic applies with equal force to other substantive BIT provisions that integrate rule of law values. Moreover, the incentive for reform is not limited to states that have found themselves on the losing end of arbitral decisions. Because of the similarity in the content of most BITs, one state may take notice when others are found to have violated BIT obligations, and act preemptively to avoid a similar fate.¹⁹⁶ Like the pre-BIT reforms discussed above, the resulting changes to domes-

193. Note that the transplant here is of particular standards, not the wholesale borrowing of institutions.

194. See *supra* text accompanying notes 128–137.

195. Kingsbury & Schill, *supra* note 31, at 16–17.

196. Although awards issued by investor-state arbitral tribunals do not create binding precedent, they tend to have persuasive value in later disputes. See Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 461–62 (2010) (describing the persuasive value of arbitral awards). This tendency toward *jurisprudence constante* allows a state to look at awards issued under other BITs and make informed predictions about its own BIT obligations.

tic laws and policies may affect domestic actors just as much as foreign investors. Like pre-BIT reform, changes made in this fashion resemble the institutional transplant method of rule of law promotion. They are therefore subject to the same opportunity structures imposed by the local political and legal context.¹⁹⁷

Third, Kingsbury and Schill suggest two mechanisms by which the rule of law values embodied in BIT provisions may influence domestic rule of law via incorporation into broader normative standards. International institutions involved in broad legal and economic reform projects (going beyond the scope of a BIT) will give advice based on international standards. These standards may be shaped by the vast jurisprudence created by the BIT regime.¹⁹⁸ Additionally, even without international organizations playing a role, BIT content may inform the development of domestic legal systems through “general normative seepage.”¹⁹⁹ A common feature of these two mechanisms is that neither requires the country in question to be involved in investor-state arbitration, or even to have signed a single BIT.

Both mechanisms are also subject to the conclusion reached above, that changes to domestic rule of law are heavily dependent on the social and political environment of the country in question.²⁰⁰ The advice (backed sometimes by the compulsive power of the purse) given by international organizations is in the same category as investor-driven efforts to promote reform. Both are efforts by an external actor to suggest change. To the extent that the success of investor-driven efforts rests on domestic buy-in,²⁰¹ the same will be true of reforms promoted by international organizations. Indeed, organization-driven attempts to promote the rule of law have been the primary targets of the critique that reforms will not succeed without domestic legitimacy.²⁰² Normative seepage

197. See *supra* text accompanying notes 187–194.

198. Kingsbury & Schill, *supra* note 31, at 16–17.

199. *Id.* at 16.

200. See *supra* text accompanying notes 130–138.

201. See *supra* section IV(d)(2).

202. See Goodpaster, *supra* note 130, at 659–62 (assessing the weaknesses of World Bank and Asian Development Bank positions on rule of law development); Upham, *supra* note 130, at 1 (critiquing the model advocated by the World Bank and similar organizations).

appears to depend on a similar process. For states engaged in reform to proactively (or even subconsciously) align their policies with international norms, there must be political support for such a move—either through a perception that the norms are legitimate and desirable, or that they are in the interest of those with the power to enact them.²⁰³

Finally, each of the mechanisms above is discussed in a way that suggests that BITs have the potential to exert a positive influence on domestic rule of law; however, the effect need not be positive. It is also possible that BITs will harm domestic rule of law. The BIT regime is often criticized for the vagueness of BIT standards and the inconsistency with which they are applied by arbitral tribunals.²⁰⁴ This vagueness and inconsistency is antithetical to several of Fuller's requirements: that decisions not be made in an arbitrary or ad-hoc manner, that rules be understandable, and that rules (in this case as interpreted by tribunals) not change so frequently as to make it difficult to plan behavior around them.²⁰⁵ Thus, it may be argued that the BIT regime, at the international level, does not conform to the rule of law.²⁰⁶

These deficiencies at the international level may impede the development of the rule of law at the domestic level. First, where states are in fact responsive to BIT obligations, attempting to bring their domestic systems into compliance, inconsistent interpretations of BIT obligations present a moving target

203. See Sannerholm, *User Manual*, supra note 117, at 191 ("For rule of law reform to be effective it has to be perceived as legitimate, both in terms of end goals and the actions taken by international actors."); see also Erbeznik, supra note 112, at 879 (focusing on the lack of a "will to reform" among elites as an explanation for the failure of rule of law reforms).

204. See, e.g., Stephan W. Schill, *Public Law Challenge: Killing or Rethinking International Investment Law?*, in *FDI PERSPECTIVES: ISSUES IN INTERNATIONAL INVESTMENT* 185, 185 (Karl P. Sauvant & Jennifer Reimer eds., 2d ed., 2012) (due to inconsistent decisions and a lack of transparency, some "view investment treaty arbitration as a threat to public law values, such as democracy and the rule of law").

205. See FULLER, supra note 42, at 41.

206. See Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2 *TRADE L. & DEV.* 19, 35–41 (2010). This article does not take a position on the extent to which the BIT regime fails to embody the rule of law. A full discussion would require an article in itself. It is enough for now to say that persistent criticisms exist on this ground and that they are not entirely baseless.

for reform. This creates the risk that the content of reforms will fluctuate, reducing the predictability of the legal system for all actors. Second, reform is not the only possible response to arbitral decisions. It is also possible that losing an arbitral case will give rise to dissatisfaction with the BIT on the part of a state. Frustration with unexpected or inconsistent arbitral interpretations of a BIT—a result of vague standards—can only heighten this discontent. The sense of discontent may in turn reduce support for the BIT and any related reforms. That is, it may reduce the domestic buy-in that is necessary for BITs to exert a positive influence on domestic rule of law. In its most extreme form, this dissatisfaction with the BIT regime can lead states to reject it altogether as illegitimate.²⁰⁷

B. *Dispute Resolution*

In addition to the substantive provisions described above, the dispute resolution mechanisms contained in BITs have the potential to influence—in either a positive or negative manner—domestic rule of law. The preceding section argues that the complement and substitute models paint an incomplete picture of the potential interaction between BITs and domestic rule of law. However, this does not mean they are incapable of explaining at least part of the interaction. The core lesson to be taken from the preceding section is that one cannot say in the abstract which model is correct. Instead, that question must be assessed with respect to the particular social, political, and legal contexts of individual countries. Variation in these contexts can mean that in one country, BITs reduce the incentive and ability of investors to promote legal reform, while in a different country the opposite is true. It may equally be the case that in another context, neither model is relevant.

The factors that cut one direction or the other cannot be reduced to a finite list, but a few key considerations are worth noting. First, is the legal system of the country in question susceptible to outside pressure? If not, both models are simply

207. The denunciation BITs and ICSID membership by three Latin American states provides an example. Bolivia, Ecuador, and Venezuela have formally denounced the ICSID Convention. *Venezuela's ICSID Test*, THE LAWYER, Feb. 6, 2012. In addition, Ecuador has terminated several of its BITs. *Ecuador Terminates Investment Treaties with UK, Germany, More Could Follow*, BBC MONITORING LATIN AMERICA – POLITICAL, Sept. 16, 2010.

inapplicable, as the amount of pressure for reform exerted by foreign investors will have no impact on rule of law.

Second, what are the particular reform measures for which investors push (or would push)? As noted above, not all pressure for legal reform necessarily promotes the rule of law.²⁰⁸ This may be particularly true where investors push for Western style systems that upset traditionally accepted institutions, decreasing the stability and predictability of the legal system for many citizens, and even perhaps reducing domestic actors' confidence in the legal system.²⁰⁹ Third, which other actors—both domestic and international—support legal reforms, and which actors oppose it?²¹⁰

C. *General Influence*

BITs are not concluded in a vacuum, nor are they enforced in one. As discussed above, BIT signature is often preceded or accompanied by reforms intended to bring a state's institutions into compliance with BIT obligations.²¹¹ However, these reforms often go far beyond BIT obligations. Once a country has chosen a course of opening to additional foreign investment, BITs are often concluded as signaling devices that enable the country to make a credible commitment to investors.²¹² Thus, BITs are often only one element of much broader economic, political, and legal reforms. For example, Mexico's involvement in NAFTA has been part of a much longer process of reform.²¹³ Since NAFTA was concluded, Mexico has undergone several reforms that extend rule of law protections to the domestic sphere in general, including constitutional reforms designed to increase the independence of the judiciary.²¹⁴

Where BITs are bound up in larger development and economic reform movements, a country's experience with a BIT

208. See *supra* section IV(d)(2).

209. Goodpaster, *supra* note 130 at 661–62; Upham, *supra* note 130 at 7–8.

210. See Carothers, *supra* note 33, at 21–22; Goodpaster, *supra* note 130, at 661–62.

211. See *supra* text accompanying notes 187–191.

212. Salacuse, *supra* note 196, at 444.

213. Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 U.C.L.A. L. REV. 35, 39–40 (2003).

214. *Id.*

may color its view of the rest of the reform package. These experiences have been far from universally positive. Consider the reaction across Latin America to arbitral decisions holding states liable for violations of BITs—leading several states to announce their intention to terminate BITs and/or withdraw from the ICSID Convention.²¹⁵ Consider also the criticism of NAFTA Chapter 11 in light of arbitral claims filed against the three member states—even where the claims were rejected on the merits by tribunals.²¹⁶ The nervous reaction of states to these claims are considered to have been a major factor behind changes to the U.S. BIT program expressed in the 2004 Model BIT.²¹⁷

Where these negative reactions to the BIT regime occur in states engaged in a process of economic, political, or legal reform, and the BIT is seen as an element of the broader reform plan, it is foreseeable that the (real or perceived) bad experience with the BIT could reduce the political will of the country's leaders to embrace further reforms—including rule of law reforms. Such reforms will not stick unless supported by the political and social currents of the target country.²¹⁸ Thus, if a BIT inspires an adverse reaction to the process of economic and legal reform, it may indirectly harm efforts to promote the rule of law. As with the other mechanisms, whether changing views of broader reform policies as a result of a country's experience with its bilateral investment treaties ultimately harms or promotes the rule of law must be determined by ref-

215. See VANDEVELDE, *supra* note 7, at 73–74; ALVAREZ, *supra* note 8, at 347–49.

216. See, e.g., John B. Fowles, *Swords into Plowshares: Softening the Edge of NAFTA's Chapter 11 Regulatory Expropriations Provisions*, 36 CUMB. L. REV. 83, 83–85 (2005) (describing several of the popular criticisms of NAFTA); Jenny Harbine, *NAFTA Chapter 11 Arbitration: Deciding the Price of Free Trade*, 29 ECOLOGY L.Q. 371 (2002) (expressing concern about governments' ability to pass environmental regulations in the wake of several Chapter 11 claims); Naveen Gurudevan, *An Evaluation of Current Legitimacy-Based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process*, 6 SAN DIEGO INT'L L.J. 399, 402 (2005) (introducing some of the criticisms of Chapter 11).

217. Detlev Vagts, *Foreword*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY xxiii, xxv (Michael Waibel et al. eds., 2010) (noting that NAFTA cases, particularly the *Methanex* case that was rejected on the merits, caused concern for the signatory states and led to changes to the U.S. 2004 Model BIT).

218. Carothers, *supra* note 33, at 21–22; Erbeznik, *supra* note 112, at 878; Goodpaster, *supra* note 130, at 661.

erence to the particular circumstances of the individual country.

VI. CONCLUSION

In review, this article has presented the following arguments. First, given the way in which both the justification for and content of BITs implicate rule of law values, it is worth asking whether and how these instruments influence rule of law outside of the investment sphere. Second, existing answers to this question fail to account for the full range of pathways by which BITs may have such an influence, and the way in which the rule of law responds to political, legal, and social context. Finally, a more comprehensive effort to assess the effect of BITs on domestic rule of law should consider the spillover effects of several substantive BIT obligations, the role of dispute resolution, and also the general influence of the BIT as a whole.

Ultimately, there is no single answer to the question of whether BITs influence domestic rule of law, no single answer to the question of whether any such influence is positive or negative, and no single answer to the question of how such influence occurs. The conclusion that the influence of BITs on domestic rule of law is not a binary proposition suggests that a comprehensive analysis of the relationship between BITs and the rule of law will be complex and difficult to apply. Despite such complexity, the conclusion also suggests that once the relationship between BITs and the rule of law in certain countries is better understood, BITs can be tailored to accentuate their positive influence on the rule of law, and to minimize their negative influence, as part of the ongoing evolution of international investment law.
