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The Internalisation of Investment Treaties and the Rule of Law Promise

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1.1 Introduction

Over the past thirty years, international treaties for the promotion and protection of investment have proliferated, with over 3,000 such treaties concluded. The bulk of these treaties were concluded in the 1990s and 2000s, largely between developed and developing states.

In general structure, investment treaties provide special protections to foreign investors in host states, such as protections against discrimination, arbitrary treatment and uncompensated expropriation, as well as guarantees of fair and equitable treatment. The scope of coverage of these protections is broad. Generally speaking, the disciplines imposed by these treaties are applicable in respect of any measure attributable to the state in respect of a covered investment or investor, regardless of the subject matter of the measure (e.g. environment, public health, energy policy, etc.), regardless of the responsible organ of government and regardless of the sector of the investment. In addition, investment treaties establish specialised dispute settlement mechanisms. Under the treaties, foreign investors may bring claims for breach of the treaty against the host state before an international arbitration tribunal, generally without having to go first through the host state's domestic courts.

Traditionally, two theories have been advanced for how host states might benefit from entering into investment treaties. The first theory is that – by offering special protections to foreign investors – investment treaties help developing states attract foreign investment.[1]

[1] For an early statement of the justification, see Earl Snyder, 'Protection of Private Foreign Investment: Examination and Appraisal' (1961) 10 *International and Comparative Law Quarterly* 469, 92 (quoting Hartley Shawcross, one of the originators of the ill-fated Organisation for Economic Co-operation and Development [OECD] Draft Convention on the Protection of Foreign Property: 'The *quid pro quo* for the States' undertaking is, in fact, in the English vernacular, the provision of the quids, that the capital importing countries, in

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The second theory is that – by way of additional effect – investment treaties have positive effects on national governance in the host state. On this latter theory, because of a desire to avoid liability for breaches of investment treaties, developing states will internalise consideration of their international legal obligations into their governmental decision making, reform their decision-making processes, and thereby, over time, improve the rule of law not just for foreign investors but also for all those within their territories.[2] As Roberto Echandi has put it, the fear of arbitration by foreign investors should act as 'a deterrent mechanism' against short-term policy reversals and 'assist developing countries in promoting greater effectiveness of the rule of law at the domestic level'.[3] Or, as Stephan Schill has asserted, '[d]amages as a remedy sufficiently pressure States into complying with and incorporating the normative guidelines of investment treaties into their domestic legal order'.[4]

Such claims have not been based upon empirical evidence regarding the actual effects of investment treaties on state governance. Rather,

return for agreeing to abide by the generally recognized procedures of international law, will receive more private investment and with the capital, the benefits of the technical and commercial skills which go with them than would otherwise be the case'). See also Jeswald W. Salacuse, *The Law of Investment Treaties* (2nd ed., Oxford University Press, 2015), ch. 4.4(b); Jonathan Bonnitcha, Lauge N. S. Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017), 207; Beth A. Simmons, 'Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' (2010) 66 *World Politics* 12; Zachary Elkins, Andrew T. Guzman and Beth A. Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000', in Geoffrey Garrett, Beth A. Simmons and Frank Dobbin (eds.), *The Global Diffusion of Markets and Democracy* (Cambridge University Press, 2008), 220; Alan O. Sykes, 'Public versus Private Enforcement of International Economic Law: Standing and Remedy' (2005) 34 *Journal of Legal Studies* 631, 644. See generally, on credible commitment theory, Beth A. Simmons, 'Treaty Compliance and Violation' (2010) 13 *Annual Review of Political Science* 273, 276.

[2] See, for example, Salacuse, *The Law of Investment Treaties*, 113–14; Stephan W. Schill, 'International Investment Law and the Rule of Law', in Jeffrey Jowell, J. Christopher Thomas and Jan van Zyl Smit (eds.), *The Importance of the Rule of Law in Promoting Development* (Singapore Academy of Law, 2015) 81, 87–93; Rudolf Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2005) 37 *New York University Journal of International Law and Policy* 972; Susan D. Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2006) 19 *Pacific McGeorge Global Business and Development Law Journal* 337.

[3] Roberto Echandi, 'What Do Developing Countries Expect from the International Investment Regime?', in Jose E. Alvarez and Karl P. Sauvant (eds.), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press, 2011), 13.

[4] Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009), 377.

proponents of this theory have based their views upon the content of the obligations in investment treaties and assumptions about state behaviour. Kingsbury and Schill, for example, have argued that the obligation to provide fair and equitable treatment – found in almost all investment treaties – 'ought to prompt States to adapt their domestic legal orders to standards that are internationally accepted as conforming to the rule of law'.[5] Thus, they predict that the obligations contained in investment treaties will 'have effects over time on specific law and administrative practices within states', and that these improvements in governance will not only inure to the benefit of foreign investors but also 'indeed to others under national law'.[6] In other words, as a result of incorporating their investment treaty obligations into their dealings with foreign investors, host states can be expected to experience positive 'rule of law' spillover effects with regard to governance in the host state generally, such that improvements to the rule of law will be felt by all within the host state, not only covered foreign investors.[7] We refer, henceforth, to this theory of the possible effects of investment treaties on national governance as the 'rule of law thesis'.[8]

[5] Benedict Kingsbury and Stephan W. Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) *NYU School of Law Public Law Research Paper No. 09–46*.

[6] *Ibid*. For a similar view, see also Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study' (2015) 25 *European Journal of International Law* 1147, 1161.

[7] See also Michael Reisman and Robert D. Sloane, 'Indirect Expropriation and Its Valuation in the BIT Generation' (2004) 75 *British Yearbook of International Law* 115, 117 (arguing that investment treaties will compel states with weak regulatory capacity to develop 'an effective normative framework' which includes, *inter alia*, 'impartial courts, an efficient and legally restrained bureaucracy, and the measure of transparency in decision'); Celine Tan, 'Reviving the Emperor's Old Clothes: The Good Governance Agenda, Development and International Investment Law', in Stephan W. Schill et al. (eds.), *International Investment Law and Development: Bridging the Gap* (Edward Elgar, 2015), 147, 158–61 (saying, *inter alia*, that 'the language of good governance, its associated rule of law narrative and their relationship to development outcomes have been used to justify the normative and institutional evolution of law and policy in [the area of international investment law]'). José Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9 *Santa Clara Journal of International Law* 15–16 (providing an overview of the argument underlying the rule of law thesis).

[8] The scholarship advancing the 'rule of law' thesis uses the term without definition, although, as noted in the text, some have stressed notions of due process, effectiveness, transparency, non-arbitrariness and accountability. The general literature on the rule of law is vast. For an overview of different definitional approaches to the rule of law, see, for example, Rachel Kleinfeld, 'Competing Definitions of the Rule of Law', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Brookings Institution Press, 2010), 31; Kevin E. Davis and Michael J. Trebilcock, 'The Relationship between Law and

Over the past fifteen years, there has been a significant amount of empirical research on the impact of investment treaties on foreign direct investment (the findings of which have yielded little consensus).[9] In contrast, we still know little about the effects of investment treaties on governance. Despite the rule of law thesis implicitly underlying much of the investment treaty discourse, and despite anecdotal indications that 'the signature of international investment agreements by states was generally not followed by regulatory or institutional changes at the domestic level to enable states to meet their newly acquired commitments',[10] empirical studies examining the veracity of this claim have been rare. Mavluda

Development: Optimists versus Skeptics' (2008) 56 *American Journal of Comparative Law* 895; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004). See also United Nations, 'Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels, Report of the Secretary General', UN Doc A/66/749 (16 March 2012), at para 2:

> [T]he rule of law [i]s a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

[9] See, for example, Josef C. Brada, Zdenek Drabek and Ichiro Iwasaki, 'Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis' (2020) *Journal of Economic Surveys* 34; Lauge N. S. Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' (2010) *Yearbook on International Investment Law and Policy* 539; UNCTAD, The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014 (2014) *UNCTAD IIA Issue Note*; Simmons, 'Bargaining over BITS, Arbitrating Awards: The Regime for Protection and Promotion of International Investment', 12 and 29–30; Todd L. Allee and Clint Peinhardt, 'Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions' (2010) 54 *International Studies Quarterly* 1; Peter Eger and Valeria Merlo, 'The Impact of Bilateral Investment Treaties on FDI Dynamics' (2007) 30 *World Economy* 1536; Andrew Kerner, 'Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties' (2009) 53 *International Studies Quarterly* 73; Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2004) 33 *World Development* 1567; Jason W. Yackee, 'Do Investment Treaties Work – In the Land of Smiles?', in Julien Chaisse and Luke Nottage (eds.), *International Investment Treaties and Arbitration Across Asia* (Brill, 2017), 83.

[10] Andrea Saldarriaga and Kendra Magraw, 'UNCTAD's Effort to Foster the Relationship between International Investment Law and Sustainable Development', in Stephan W. Schill et al. (eds.), *International Investment Law and Development: Bridging the Gap* (Edward Elgar, 2015), 132.

Sattorova's work on the impact of investment treaties on host state governance is a notable exception.[11] The purpose of this book is to contribute towards filling this gap.

Three assumptions about state behaviour underlie the rule of law thesis. The first assumption is that states make policy choices to seek to comply with their international treaty obligations. The second assumption is that – out of this desire to comply – states internalise their international investment obligations and that these obligations are taken into account in governmental decision making. The third assumption is that this desire to comply with investment treaty obligations ultimately will become operationalised in the host state's general dealings with all addressees of its legal and regulatory system.

The rule of law thesis, moreover, is rooted in a traditional view about the way in which the international legal order functions. On this view, states affirmatively seek to comply with their international treaty obligations[12] either because it is in their self-interest to do so (they would not have consented to the treaty otherwise)[13] or because they benefit from the reciprocity of compliance.[14] Further, when states are tempted not to comply, the argument goes, they face the threat of sanctions, which in

[11] Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States* (Hart, 2018). See also Christine Coté, 'Is It Chilly Out There? International Investment Agreements and Government Regulatory Autonomy' (2014) 16 *AIB Insights* 14; Jason W. Yackee, 'Do Investment Promotion Agencies Promote Bilateral Investment Treaties?' (2013) *Yearbook on International Investment Law and Policy* 529 (examining the awareness of investment treaties among national providers of political risk insurance); Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 *International Review of Law & Economics* 107, 108 (carrying out a quantitative empirical analysis as to the impact of BITs on domestic governance); Josef Ostřanský and Facundo Pérez Aznar, 'Investment Treaties and National Governance in India: Rearrangements, Empowerment, and Discipline' (2021) 34 *Leiden Journal of International Law* 373.

[12] As Louis Henkin famously put it: 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'. Louis Henkin, *How Nations Behave* (Columbia University Press, 1979), 47. See, for example, Harold H. Koh, 'Why Do Nations Obey International Law?' (1996) 106 *Yale Law Journal* 2599.

[13] Abram Chayes and Antonia H. Chayes, 'On Compliance' (1993) 47 *International Organization* 175, 179–84; Kal Raustiala and David G. Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 58 *International Organization* 277 (arguing that compliance is a sign that states join agreements with which they know they can comply).

[14] Robert O. Keohane, 'After Hegemony: Cooperation and Discord in the World Political Economy' (1984) 61 *International Affairs* 290; Simmons, 'Treaty Compliance and Violation', 275; Harold K. Jacobson and Edith Brown Weiss, 'A Framework for Analysis', in Edith Brown Weiss and Harold K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press, 1998), 1, 2.

turn provides a coercive incentive to comply and deters violations in the future.[15] International relations literature explains this traditional international law approach through a 'rational choice' theory of the state. Rational choice theory considers the state to be rational, which is understood to mean that when setting policies and taking decisions, the state undertakes a cost–benefit analysis of alternative actions and their consequences, and that it chooses the action which maximises its preferences.[16] Given the benefits of compliance and the costs of violation alluded to above, a rational choice model predicts that states, on balance, gain more from compliance, and as such, expects them, for the most part, to internalise their obligations and comply with them.[17]

There are good reasons to be sceptical of the assumptions underlying the rule of law thesis. First, the rational choice theory on which it is based simply does not reflect the complexities of governance. Indeed, empirical studies on compliance with international law carried out in recent years illustrate how inconsistent compliance is and highlight the many domestic and international factors that can impede it.[18] Such impediments are amplified in developing countries, where, as established in the law and development literature, low regulatory capacity, and/or the absence of a well-developed regulatory governance model, serve as a further hindrance to the internalisation of international obligations into governmental decision making.[19]

Second, internalising international investment obligations into the myriad processes of government is markedly demanding. The pervasive presence of foreign investment throughout national economies is such that a wide range of entities and persons for whom the state is internationally responsible may take measures of one kind or another with respect to a foreign investment or investor. This wide range of entities and persons is reflected in the wide range of actors that have taken measures giving rise to investment treaty arbitrations. According to a study of investor–state

[15] Jacobson and Brown Weiss, 'A Framework for Analysis', 2.

[16] Duncan Snidal, 'Rational Choice and International Relations', in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds.), *Handbook of International Relations* (SAGE Publications, 2013), 85.

[17] Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press, 2008); Robert O. Keohane, 'Rational Choice Theory and International Law: Insights and Limitations' (2002) 31 *Journal of Legal Studies* 307.

[18] See, for example, Oona A. Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 72 *University of Chicago Law Review* 469.

[19] Michael J. Trebilcock and Mariana M. Prado, *Advanced Introduction to Law and Development* (Edward Elgar, 2014).

treaty disputes by Zoe Williams, examining 584 arbitration cases from 1990 to 2014, 61 per cent of cases were triggered primarily by administrative measures; 26 per cent were triggered by legislative measures alone; and 11 per cent were related to judicial decisions.[20] Moreover, the economic sectors of the underlying investments in these disputes ranged across all aspects of the host economies, from investments in extractive industries to banking to construction to agriculture to the provision of public services (energy, water services, etc.) to manufacturing, transport and telecommunications.[21]

In this introductory chapter, we develop a framework for thinking about the internalisation of international treaty obligations in governmental decision making that attempts to take account of the complexities of governance. In so doing, we lay out a typology of processes whereby international investment treaty obligations may be internalised and identify factors that may affect whether and to what extent international investment law is internalised by the state. This framework serves as the background for the main body of the book in which we present case studies addressing whether and how a select group of governments in Asia internalise international investment treaty obligations in their decision-making processes: India, Indonesia, Myanmar, Republic of Korea, Singapore, Sri Lanka, Thailand and Viet Nam.[22] These case studies serve as a foundation for testing our theoretical framework by empirically examining whether and to what extent these governments take investment treaty obligations into account in their governmental decision-making processes and whether such internalisation has had spillover effects on governance in the state more generally.

The organisation of this introduction is as follows. Section 1.2 begins by setting out the principal research questions with which we are concerned

[20] Zoe P. Williams, 'Risky Business or Risky Politics: What Explains Investor State Disputes?', unpublished dissertation, Hertie School of Governance (2016), 42.

[21] *Ibid.*, at 40–41. Using the World Bank sectoral classification system, Williams noted disputes across at least fifteen different sectors: oil, gas and mining (25%); electric power and other energy (14%); construction (7%); banking and finance (6%); manufacturing (6%); agricultural, forest and fisheries (6%); telecommunications (6%); transportation (5%); water and waste management (4%); food and beverage (3%); other services (3%); real estate (3%); hospitality/tourism (3%); healthcare and pharmaceuticals (2%); media (2%); other (3%); and unknown (2%).

[22] The authors of these country-specific case studies are Dafina Atanasova (Singapore), Jonathan Bonnitcha (Myanmar), Sachinta Dias (Sri Lanka), Younsik Kim (South Korea), John Lumbantobing (Indonesia), Prabhash Ranjan (India), Tran Viet Dung (Viet Nam) and Teerawat Wongkaew (Thailand).

in order to clarify the scope of our inquiry. We additionally set forth a definition of 'internalisation' in the context of our thinking about the role of investment treaties in governmental decision making. Section 1.3 situates the project in the existing theoretical and empirical literature on the role of international law in state behaviour. Section 1.4 builds on the literature to set out a framework for exploring the internalisation of international investment treaties by governments. In Section 1.4, we operationalise the concept of internalisation and offer a typology of the kinds of internalisation processes that states may adopt. In Section 1.5, we consider factors that may impact the internalisation of investment treaty obligations and the extent to which governments take those obligations into account in their decision making. Section 1.6 provides an introduction to the case studies that make up the core of this volume, addressing the issues of case selection and methodology.

1.2 Definitions, Research Questions and Scope

For investment treaties to improve governmental administration, the obligations contained within them must have an effect on the decision-making processes of government. They must be 'internalised' into the domestic regulatory system. Such internalisation is a foundational assumption to the claim of the rule of law thesis that investment treaties will improve domestic governance. Yet, as mentioned earlier, there are reasons to be sceptical about the degree of internalisation actually present in government and the role of international obligations in governmental decision making.

We define 'internalisation' as referring to the formal and informal processes by which the state's international legal obligations are taken into account in governmental decision making. Our focus, within government, is on the executive, the public bureaucracy and the legislature. In setting this definition, we note two main decision-making situations in which governments may take international law into account. The first situation is when the government implements international law as a domestic law or regulation. In this situation, the government naturally considers international law because the international obligation forms the subject matter of the governmental measure. The second situation is when the government adopts a measure on a matter of domestic law or regulation, which is itself not directly related to international law. In this circumstance, while the government may take into consideration whether the adopted measure is in line or in tension with its international legal obligations, such

consideration is in a sense 'elective' as the international obligation does not form the subject matter of the measure. Our study focuses on this second situation. That is, we are interested in the question of whether governments take international investment obligations into account when they are considering an original domestic measure (e.g., considering whether to issue or revoke a license, adopt a new financial regulation, etc.).

It is important to note how our understanding of 'internalisation' differs from the related concepts of 'implementation' and 'compliance'. In our understanding, compliance refers to the level of agreement or conformity between a state's behaviour and the requirements of an international obligation. Asking about compliance asks a question about an end result and whether a state has *actually adhered to* the international obligation.[23] Internalisation, in contrast, and as we use it, refers to the processes whereby the government considers its existing international legal obligations in its decision-making processes. Importantly, our definition of internalisation does not suppose that the state will always decide matters in accordance with its apparent international investment treaty obligations. To adopt such a definition of internalisation would be to conflate the concept with a kind of compliance. Moreover, while it may be true that the internalisation of international legal obligations increases the likelihood that the government will act in conformity with its obligations, this is by no means always the case. As discussed further below, an international obligation may be one of a number of (political, economic, organisational, etc.) considerations in the decision-making process, and governments may ultimately – in the 'battle of the norms' – decide in line with other competing norms or interests.[24] Internalisation, thus, may be a factor that influences compliance but is conceptually distinct.[25]

We also distinguish our conception of internalisation from 'implementation'. Implementation is typically understood as the adoption of international law into domestic law, its purpose being to give domestic legal effect to international law, making it enforceable before domestic courts by citizens.[26] Implementation is also understood as carrying

[23] Jacobson and Brown Weiss, 'A Framework for Analysis', 4.

[24] See Julia Black, 'New Institutionalism and Naturalism in Socio-Legal Analysis: Institutionalist Approaches to Regulatory Decision Making' (1991) 19 *Law and Policy* 51.

[25] States may have high levels of compliance with an international obligation which are unrelated to internalisation if the state's behaviour is already treaty-compliant.

[26] Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009), 131.

out obligations under the treaty and undertaking positive enactments required by the treaty.[27] After the adoption and ratification of a treaty, implementation represents the stage when international obligations are integrated into domestic law through enactment of domestic legislation or regulation.[28] Not only is implementation conceptually different from our conception of internalisation, it is also a poor fit for an inquiry regarding investment treaties. Whereas certain treaties require or imply the need to take domestic regulatory or legal action under their terms,[29] in the case of investment treaties similar action is not required. Governments rather are expected to refrain from certain actions in order to implement and comply with their obligations.

In adopting this conception of internalisation, we position our research as an attempt to identify specific processes for the operation of investment treaties on governmental decision making in a complex regulatory environment (in which states may be taking a variety of steps in order to make their economies attractive to investment). Our research thus attempts to isolate in this environment the impact of investment treaty obligations on the processes of governmental decision making. By way of distinction, this research is interested in the institutional effects of investment treaties, the institutional processes. We do not, therefore, consider questions regarding the subjective awareness of investment treaty obligations by individual decision makers, nor the psychological internalisation of investment treaty commitments. Similarly, the research we pursue is not interested in questions of 'socialisation' but, rather, internalisation as an institutional matter.

[27] See Gerald Staberock, 'Human Rights, Domestic Implementation', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011). We acknowledge that broad approaches to the term implementation, commonly found in the public policy literature, would consider implementation as covering any activity for realising a policy and would share much in common or would be almost identical to our concept of internalisation. However, the common use of the term in international law is much more limited and, as noted, is limited to the act of giving domestic legal effect to an international obligation.

[28] Depending on the local legal system, to be enforceable in domestic courts, treaties can either be automatically internalised into the domestic legal system or must be adopted through domestic law or regulations. Implementation covers the latter case, that is, when certain domestic laws or regulations must be adopted.

[29] By way of example, the Framework Convention on Tobacco Control requires states to undertake certain implementing measures that will reduce demand for tobacco through legislation, regulation or policies. See WHO Framework Convention on Tobacco Control (2003), 2302 UNTS 166, Art. 7.

To this end, our research addresses three main questions:

- First, *descriptive*: whether and if so in what ways do governments internalise investment treaty obligations into their decision-making processes?
- Second, *explanatory*: what are the factors that affect whether governments internalise international investment obligations in their decision making?
- Third, *inferential*: to the extent that there is evidence that states have internalised international investment treaty obligations into governmental decision making, is there evidence that this has led to improvements in regulatory practices more generally, that is, the positive spillovers suggested by the rule of law thesis?

1.3 Internalisation in the International Legal Literature

We conceptualise our understanding of internalisation against a background of existing legal literature: (1) the liberal international school, which blurs the distinction between the international and the national and opens up the black box of the state; (2) the law and development literature, which addresses the role of law in bringing about good governance and development in low- and middle-income countries; and (3) the empirical legal scholarship, which examines the impact of international law through empirical investigations.

Traditional international law has devoted little attention to the question of how or whether international legal obligations are internalised or considered in the decision-making processes of governments. With respect to the question of how international law impacts domestic law, most scholarship has explored questions of 'compliance' or 'implementation', proceeding on the underlying yet unspoken assumption that governments internalise their international legal obligations and take them into account in their decision making (even though there may ultimately be forces or reasons which result in non-compliance).

Classic international law treats the state as a unitary actor, without delving into internal state dynamics. The classical literature has argued that states comply with international obligations because it is in their self-interest to do so (they would not have consented to the treaty otherwise)[30]

[30] Chayes and Chayes, 'On Compliance', 179–84; Raustiala and Victor, 'The Regime Complex for Plant Genetic Resources' (arguing that compliance is a sign that states join agreements with which they know they can comply).

or because they benefit from the reciprocity of compliance.[31] Further, classical realist theory asserts that when states are tempted not to comply, the threat of sanctions provides a coercive incentive to comply, and deter violations in the future.[32]

The classical approach, to which the rule of law thesis seems to owe much, rests on a 'rational choice' theory of the state. The rational choice theory considers the state to be rational, which is understood to mean that in making decisions, the state undertakes a cost–benefit analysis of alternative actions and their consequences, and that it chooses the action, which maximises its preferences.[33] Given the benefits of compliance and the costs of violation, a rational choice model predicts that states, on balance, will gain more from compliance, and as such, assumes that, for the most part, states will take their international obligations into account and comply with them.[34]

Moving away from classical, realist paradigms, liberal international legal theory exposes the fiction of the unitary state model and opens up the 'black box' of the state.[35] The work of scholars such as Harold Koh and Gregory Shaffer examines the impact of *domestic preferences and dynamics* on the international behaviour of a state.[36] Rather than seeing the state as a unitary actor with one unified interest (as realist theories of the state have), liberal theory emphasises that the state is 'disaggregated' into different, and at times competing, actors and interests.[37] This literature recognises

[31] Keohane, 'After Hegemony'; Simmons, 'Treaty Compliance and Violation', 275; Jacobson and Brown Weiss, 'A Framework for Analysis', 2.

[32] George W. Downs, David M. Rocke and Peter N. Barsoom, 'Is the Good News about Compliance Good News about Cooperation?' (1996) 50 *International Organization* 379, 386.

[33] Snidal, 'Rational Choice and International Relations'.

[34] Beth A. Simmons, 'International Law', in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds.), *Handbook of International Relations* (SAGE Publications, 2013), 352.

[35] Andrew Moravcsik, 'Taking Preferences Seriously: Liberalism and International Relations Theory' (1997) 51 *International Organization* 513; Peter Gourevitch, 'The Second Image Reversed: The International Sources of Domestic Politics' (1978) 32 *International Organization* 881; Jeffrey T. Checkel, 'Norms, Institutions and National Identity in Contemporary Europe' (1999) 43 *International Studies Quarterly* 83; Jeffrey W. Legro, 'Which Norms Matter? Revisiting the "Failure" of Internationalism' (1997) 51 *International Organization* 31; Kenneth Schultz, 'Domestic Politics and International Relations', in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds.), *Handbook of International Relations* (SAGE Publications, 2013), 478.

[36] Harold H. Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181; Gregory C. Shaffer, *Transnational Legal Ordering and State Change* (Cambridge University Press, 2012).

[37] Moravcsik, 'Taking Preferences Seriously'; Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *American Journal of International Law* 205; Robert D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42 *International Organization* 427.

the important impact of domestic factors, structures and actors – such as surrounding social and political discourses or behavioural factors – on the manner or extent by which international obligations become internalised within the state by the government as well as within society.

Within this realm, Koh's work on the *transnational legal process* defines the transnational legal process as 'the theory and practice of how public and private actors – nation states, international organisations, multinational enterprises, non-governmental organisations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce and ultimately, internalise rules of transnational law'.[38] Through this transnational legal process, states internalise international law not only into their domestic *legal* system but also more broadly into their domestic practices, values or processes. In other words, the internalisation process is not limited to legal means but may also be of a social or political nature.[39] It is also not only limited to state actors, but both (domestic and transnational) state and non-state actors have a role in the internalisation process.[40]

Shaffer's work on 'transnational legal orders' and 'state change'[41] follows a similar logic, which emphasises the role of domestic factors on state behaviour. In Shaffer's view, domestic dynamics are the most important factors in understanding the impact of international rules on the state: 'Arguably, the most important determinant of state change is the affinity of the transnational legal reform efforts with the demands and discursive frames of

[38] See Koh, 'Transnational Legal Process', 183–84.

[39] Koh, 'Why Do Nations Obey International Law?', 2656–67 (saying that 'Political internalisation would include, for example, acceptance and adoption of the norms by the political elite, and social internalisation, exists when a norm acquires so much public legitimacy that there is widespread general obedience to it'. See also Jean Frédéric Morin and Edward R. Gold, 'An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries' (2014) 58 *International Studies Quarterly* 781, 783 (discussing the role of 'socialisation', i.e. the process of internalisation of principles, beliefs, and norms by which international or foreign rules are adopted within a state).

[40] Examples of studies that have followed this approach: Amichai Cohen, 'Bureaucratic Internalization: Domestic Governmental Agencies and the Legitimization of International Law' (2005) 36 *Georgetown Journal of International Law* 1079, 1081 (examining internalisation in bureaucracies); Galit A. Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford University Press, 2012) (demonstrating the role of internal dynamics within the World Bank and domestic legal and political constraints on the internalisation of World Bank policies in borrowing countries). See also David Bach and Andrew Newman, 'Transgovernmental Networks and Domestic Policy Convergence' (2010) 64 *International Organization* 505 (discussing the diffusion of ideas within the state).

[41] Shaffer, *Transnational Legal Ordering and State Change*.

domestic constituencies and elites in light of domestic configurations of power and the extent of change at stake'.[42] Thus, domestic demands, domestic power struggles and domestic culture 'shape how transnational legal norms are received and implemented in practice', and '[s]ometimes they lead to the rejection of transnational law'.[43] Goodman and Jinks take a constructivist approach, arguing that the internalisation of international law into national behaviour is a result of 'patterns of acculturation', or a process of socialisation of social pressures on the state.[44] Jacobson and Weiss similarly observe that: 'The social, cultural, political, and economic characteristics of the countries clearly influence implementation and compliance'.[45] In the international investment regime specifically, Williams likewise argues that domestic factors are the main reason for investor–state disputes.[46]

The global administrative law literature similarly moves away from sharp distinctions between international and national law. One of global administrative law's main insights is that many legal and normative activities take place in a global administrative space, which blurs the distinction between the international and national.[47] The acts of national government officials or regulatory agencies in dealing with the state's international obligations,[48] and questions about the impact of

[42] Gregory C. Shaffer, 'The Dimensions and Determinants of State Change', in Gregory C. Shaffer (ed.), *Transnational Legal Ordering and State Change* (Cambridge University Press, 2012), 37, 43.

[43] *Ibid*.

[44] Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke Law Journal* 621.

[45] Jacobson and Brown Weiss, 'A Framework for Analysis', 7.

[46] Williams, 'Risky Business or Risky Politics'. See also N. Jansen Calamita, 'Are Investments in Water Different? Sectoral Economics, Investment Treaty Architecture, and the Role of Governance', in Julien Chaisse (ed.), *Governance of the Global Sanitation and Water Services Market* (Cambridge University Press, 2016), 27 (observing the role of domestic regulatory capture in disputes involving water privatisation concessions); Alison E. Post, *Foreign and Domestic Investment in Argentina: The Politics of Privatized Infrastructure* (Cambridge University Press, 2014) (observing the role of domestic constituents in the developments of disputes with foreign investors during Argentina's financial crisis); Cédric Dupont, Thomas Schultz and Merih Angin, 'Political Risk and Investment Arbitration: An Empirical Study' (2016) 7 *Journal of International Dispute Settlement* 136.

[47] Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15, 37.

[48] Benedict Kingsbury and Megan Donaldson, 'Global Administrative Law' in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011) (explaining that global administrative law is concerned with situations in which 'domestic regulatory agencies or officials may be charged by treaties and other international governance arrangements to take regulatory decisions in pursuance of an internationally agreed objective').

international law on domestic governance,[49] thus fall within this global administrative scope.

Within the law and development literature, there is a strong current of opinion arguing that law is a tool for promoting development in low- and middle-income countries, and that the rule of law and good governance are preconditions for such development.[50] While this premise has served to underlie much international development policy,[51] other accounts in the law and development literature note that a central 'uncertainty' remains 'about the validity of basic assumptions underlying efforts to promote legal reform', and that 'given what is at stake for inhabitants of developing countries', this uncertainty is 'unsettling'.[52] Trebilcock, Davis and others give reason to be sceptical of optimistic claims as to the power of law to trigger reform, most notably due to the challenges posed by economic,

[49] Examples of global administrative law literature examining the impact of international law on domestic governance include Richard B. Stewart, 'The Global Regulatory Challenge to US Administrative Law' (2005) 37 *New York University Journal of International Law and Politics* 695; Daphne Barak-Erez and Oren Perez, 'Whose Administrative Law Is It Anyway? How Global Norms Reshape the Administrative State' (2013) 46 *Cornell International Law Journal* 455; Andrew Edgar and Rayner Thwaites, 'Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law' (2018) 19 *Melbourne Journal of International Law* 24; Joel P. Trachtman, 'International Legal Control of Domestic Administrative Action' (2014) 17 *Journal of International Economic Law* 753. Notable examples of recent work examining the intersection of international law and the public administration in particular include, Paul Mertenskötter and Richard B. Stewart, 'Remote Control: Treaty Requirements for Regulatory Procedures' (2018) 104 *Cornell Law Review* 165 (demonstrating how recent trade agreements prescribe specific procedures for domestic administrative decision making); Jon S. T. Quah, *The Role of the Public Bureaucracy in Policy Implementation in Five ASEAN Countries* (Cambridge University Press, 2016) (examining the role of the public bureaucracy in policy implementation, including the implementation of ASEAN treaties); Hao Duy Phan, 'The Effects of ASEAN Treaties in Domestic Legal Orders: Evidence from Viet Nam' (2019) 17 *International Journal of Constitutional Law* 205 (illustrating the effects of ASEAN treaties on administrative procedures for the implementation of ASEAN treaty obligations in Viet Nam).

[50] See, for example, Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Brookings Institution Press, 2010); Kenneth W. Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institution Press, 2006). For an overview of the history of the study of law and development, see Davis and Trebilcock, 'The Relationship between Law and Development', 4. See also Stephan W. Schill, Christian J. Tams and Rainer Hofmann, 'International Investment Law and Development: Friends or Foes?', in Stephan W. Schill et al. (eds.), *International Investment Law and Development: Bridging the Gap* (Edward Elgar, 2015), 19–20; Trebilcock and Prado, *Advanced Introduction to Law and Development*.

[51] Tan, 'Reviving the Emperor's Old Clothes', 150–1.

[52] Davis and Trebilcock, 'The Relationship between Law and Development', 4, 6.

political and/or cultural obstacles.[53] This study seeks to contribute to this scholarship by empirically investigating (1) whether there is evidence that governments in a select group of countries in Asia have internalised investment treaty obligations into their decision-making processes; (2) what factors have affected whether these governments have internalised international investment obligations in their decision making; and (3) whether there is evidence in these case studies that treaty internalisation has led to governance reforms more generally, that is, the positive spillovers suggested by the rule of law thesis.

In the past decade, international legal scholarship has taken what Shaffer and Ginsburg identify as an 'empirical turn'.[54] Empirical studies now focus on the effects and effectiveness of international law and aim to explain variations. Empiricism has emerged in diverse fields of international law, including human rights (e.g. Simmons' empirical study on the effects of international human rights law on domestic politics),[55] international humanitarian law,[56] international trade law[57] and international environmental law.[58] In international investment law, empirical work has focused largely on the *economic* impact of investment treaties. Notable studies on the impact of investment treaties on FDI flows to host countries include, among others, work by Yackee,[59] Neumayer and Spess,[60] and Sauvant and

[53] *Ibid*. See also Trebilcock and Prado, *Advanced Introduction to Law and Development*, 45–62; Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development', in David M. Trubek and Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006), 253; Michael J. Trebilcock and Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar, 2008).

[54] Gregory C. Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 *American Journal of International Law* 1.

[55] Simmons, *Mobilizing for Human Rights*.

[56] See, for example, James D. Morrow, 'When do States Follow the Laws of War?' (2007) 101 *American Political Science Review* 559, 566.

[57] See, for example, Andrew Guzman and Beth A. Simmons, 'To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization' (2002) 31 *Journal of Legal Studies* 205; Chad P. Brown, 'Participation in WTO Dispute Settlement: Complaints, Interested Parties and Free Riders' (2005) 19 *World Bank Economic Review* 287; Gregory C. Shaffer, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation' (2006) 5 *World Trade Review* 177; Judith Goldstein, Douglas Rivers and Michael Tomz, 'Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade' (2007) 61 *International Organization* 37.

[58] See, for example, Helmut Breitmeier, Oran R. Young and Michael Zürn, *Analyzing International Environmental Regimes: From Case Study to Database* (MIT Press, 2006).

[59] Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment?'

[60] Neumayer and Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?'

Sachs.[61] Bonnitcha, Poulsen and Waibel review existing studies.[62] Others have examined whether an increase in FDI actually promotes growth in host states,[63] or whether investment treaties are more effective at attracting FDI in certain sectors (such as work by Busse and others on the extractive sector,[64] work by Colen and Guariso,[65] and Danzman).[66]

Compared to the work on the economic impact of investment treaties, empirical research on the impact of investment treaties on national governance is sparse. Scholars such as Bonnitcha[67] and Calamita[68] have flagged this absence. That said, a notable exception is the recent important work by Sattorova, who has developed an empirical argument with respect to investment treaties and national governance.[69] Further work

[61] Karl P. Sauvant and Lisa E. Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (Oxford University Press, 2009).

[62] Bonnitcha, Poulsen and Waibel, *The Political Economy of the Investment Treaty Regime*, 155–66 See also Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance'; Jonathan Bonnitcha, 'Foreign Investment, Development and Governance: What International Investment Law Can Learn from the Empirical Literature on Investment' (2012) 7 *Journal of International Dispute Settlement* 31.

[63] Laura Alfaro, Areendam Chanda, Sebnem Kalemi-Ozcan and Selin Sayek, 'Does Foreign Investment Promote Growth? Exploring the Role of Financial Markets on Linkages' (2010) 91 *Journal of Development Economics* 242; Eduardo Borensztein, José R de Gregorio and Jongwha Lee, 'How Does Foreign Investment Affect Economic Growth?' (1998) 45 *Journal of International Economics* 115; Frederick van der Ploeg, 'Natural Resources: Curse or Blessing?' (2011) 49 *Journal of Economic Literature* 366.

[64] Matthias Busse, Jens Königer and Peter Nunnenkamp, 'FDI Promotion through Bilateral Investment Treaties: More than a BIT?' (2010) 146 *Review of World Economics* 147.

[65] Lisabeth Colen and Andrea Guariso, 'What Type of FDI Is Attracted by BITs?', in Johan F. M. Swinnen, Jan Wouters and Olivier De Schutter (eds.), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge, 2012), 138; Lisabeth Colen, Damian Persyn and Andrea Guariso, 'Bilateral Investment Treaties and FDI: Does the Sector Matter?' (2016) 83 *World Development* 193.

[66] Sarah B. Danzman, 'Contracting with Whom? The Differential Effects of Investment Treaties on FDI' (2016) 42 *International Interactions: Empirical and Theoretical Research in International Relations* 452.

[67] Jonathan Bonnitcha, 'Assessing the Impacts of Investment Treaties: Overview of the Evidence' (IISD Report 2017).

[68] N. Jansen Calamita, 'The Rule of Law, Investment Treaties, and Economic Growth: Mapping Normative and Empirical Questions', in Jeffrey Jowell, J Christopher Thomas and Jan van Zyl Smit (eds.), *The Importance of the Rule of Law in Promoting Development* (Singapore Academy of Law, 2015), 103.

[69] Sattorova, *The Impact of Investment Treaty Law on Host States*. See also Ginsburg, 'International Substitutes for Domestic Institutions', 119–20; Côté, 'Is It Chilly Out There?'; Christine Côté, 'A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment', unpublished PhD Thesis, London School of Economics and Political Science (2014).

in this vein includes Ginsburg's 2005 article on 'Bilateral Investment Treaties and Governance'.[70]

Finally, while some recent empirical work has begun to address the intersection of international law and public administration, there has been little work addressing how, if at all, government officials internalise international law when they take decisions regarding original, domestic measures. Exceptions in this regard include work on decision making in the executive branch in the United States[71] and in New Zealand.[72] We are not aware of any similar studies involving Asian or developing states.

1.4 A Typology of Internalisation Processes and Mechanisms

How does a government attempt to internalise its international obligations in its decision-making processes? What are the processes through which this happens?[73] An empirical inquiry into the abstract notion of internalisation is impossible without clear indicators which operationalise the term. To that end, we distinguish between three broad types of institutional processes of internalisation: informational, monitoring and remedial (Figure 1.1). We would expect to observe at least one of these processes in a state that seeks to internalise its international obligations. Although the focus of our present inquiry is on international investment law, the typology we set out below may be of value to inquiries regarding the internalisation of international law in any field.

Given our interest in the processes of governmental decision making, we take a governance rather than a black letter law approach. In our view, a narrow, black letter law approach would hardly capture the reality of

[70] Ginsburg, 'International Substitutes for Domestic Institutions' 119–20.

[71] See, for example, Neomi Rao, 'Public Choice and International Law Compliance: The Executive Branch Is a "They", Not an "It"' (2011) 96 *Minnesota Law Review* 194; Rebecca Ingber, 'Interpretation Catalysts and Executive Branch Legal Decisionmaking' (2013) 38 *Yale Journal of International Law* 359; Kevin L. Cope, 'Congress's International Legal Response' (2015) 113 *Michigan Law Review* 1115; Daphna Renan, 'The Law Presidents Make' (2017) 103 *Virginia Law Review* 805; James P. Pfiffner, 'Decision Making in the Obama White House' (2011) 41 *Presidential Studies Quarterly* 244.

[72] Dan Moore, 'Engagement with Human Rights by Administrative Decision-Makers: A Transformative Opportunity to Build a More Grassroots Human Rights Culture' (2017) 49 *Ottawa Law Review* 131; Arla Marie Kerr, 'Untapped Potential: Administrative Law and International Environmental Obligations' (2008) 6 *New Zealand Journal of Public and International Law* 81.

[73] See Peter J. May, 'Policy Design and Implementation', in B. Guy Peters and Jon Pierre (eds.), *The SAGE Handbook of Public Administration* (SAGE Publishing, 2012), 279 (addressing the role of policy design in carrying out and implementing policies).

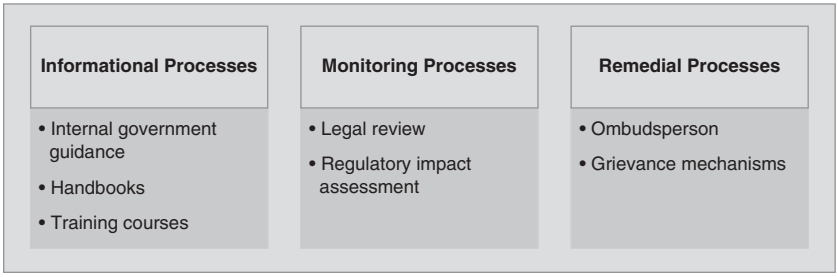

Figure 1.1 Examples of informational, monitoring and remedial internalisation processes and mechanisms

how governments run their affairs and would provide very few insights regarding the possible effects of investment treaties on national governance. We are thus interested not only in formal, legally binding laws and rules but also informal (legally non-binding) norms, practices and processes, through which the government manages its affairs.[74]

We set out our typology in the following subsections.

1.4.1 Informational Processes

By 'informational processes', we refer to processes that diffuse information and communicate the state's international legal obligations to relevant domestic actors.[75] For example, higher executive or administrative bodies might issue internal guidance, policies or instructions to guide officials as to the application of international obligations. Such processes might include a handbook or a manual, or a training course that informs government officials of the existence and content of the international obligations and seeks to improve knowledge within ministries, agencies or local authorities.[76] Informational processes attempt to internalise the state's international obligations *ex ante* – before or during the process of decision making.

[74] See Thomas G. Weiss and Rorden Wilkinson, *International Organization and Global Governance* (Taylor & Francis, 2013).

[75] See, for example, OECD, *Policy Framework for Investment* (OECD Publishing, 2015), 35. The OECD sets out a checklist on effective compliance with investment treaties, which includes the following point: 'What efforts are made to communicate to government agencies the implications of IIAs for their areas of responsibility (e.g., implementation guides)?'.

[76] See, for example, Government of Colombia, Ministerio de Comercio, Industria y Turismo, *Conozca los Compromisos y Obligaciones en Materia de Inversion de Colombia* (2009); Government of Colombia, Ministerio de Comercio, Industria y Turismo, *ABC de los*

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1.4.2 Monitoring Processes

By 'monitoring processes', we refer to processes such as a governmental process by which officials screen proposed policies for consistency with international obligations. For example, the regulatory impact assessments (RIAs), which many OECD states have recently introduced,[77] require government officials to assess whether a proposed regulation is consistent with and complies with the state's international obligations,[78] including, specifically, its international trade and investment obligations.[79] Another example might be a requirement to consult relevant governmental legal experts regarding the compliance of proposed measures with international obligations,[80] or any *ex ante* (legal) review of

Acuerdos Internacionales de Inversion (undated); Government of Peru, Ministerio de Economia y Finanzas, *Guía de Compromisos en los Acuerdos Internacionales de Inversión y Prevención de Controversias Internacionales de Inversión en Perú* (2013). See generally N. Jansen Calamita, 'Investment Treaties and Governance Project Concept Paper: An Investment Treaty Handbook for APEC Economies', *NUS Centre for International Law Working Paper* 19/04 (February 2019) (surveying handbooks and other materials used by governments to disseminate information about investment treaty obligations within government). See also Melissa A. Poole, 'International Instruments in Administrative Decisions: Mainstreaming International Law' (1999) 30 *Victoria University Wellington Law Review* 91; Jürgen Friedrich and Eva J. Lohse, 'Revisiting the Junctures of International and Domestic Administration in Times of New Forms of Governance: Modes of Implementing Standards for Sustainable Development and Their Legitimacy Challenges' (2008) 2 *European Journal of Legal Studies* 49, 54–55 (describing how the Brazilian Secretary for Agriculture and Fisheries enacted an internal administrative directive which determines that the development of fisheries and aquaculture should follow the international code of conduct for responsible fisheries).

[77] See OECD, *Introductory Handbook for Undertaking Regulatory Impact Analysis* (OECD Publishing, 2008); OECD, *Regulatory Impact Assessment*, OECD Best Practice Principles for Regulatory Policy (OECD Publishing, 2020).

[78] Government of Canada, Treasury Board of Canada Secretariat, *Guidelines on International Regulatory Cooperation and Cooperation* (2007).

[79] Robert Basedow and Céline Kauffmann, 'International Trade and Good Regulatory Practices Assessing the Trade Impacts of Regulation', *OECD Regulatory Policy Working Papers*, vol. 4 (OECD Publishing, 2016). The European Union's 'Better Regulation Toolbox' requires the government officials in charge of a proposed regulation to screen it against the EU's international trade and investment obligations and to assess its compatibility. See European Commission, *Better Regulation Toolbox*, https://ec.europa.eu/info/sites/info/files/better-regulation-toolbox_2.pdf. See also OECD, *Policy Framework for Investment* (OECD Publishing, 2015), 116.

[80] That is the case, for example, in Canada. See Government of Canada, *Guidelines on International Regulatory Cooperation and Cooperation* in Section 3.1. See also Basedow and Kauffmann, 'International Trade and Good Regulatory Practices', 26 (providing the example of Germany where, if a proposed regulation has an impact on international trade obligations, the government official in charge of the proposed regulation must involve the Ministry of Foreign Affairs and Trade).

decisions or actions within the government for conformity with international obligations.[81]

1.4.3 Remedial Processes

Remedial processes are designed to correct or defend the state's compliance with its international obligations.[82] For example, states might create an ombudsperson that reviews a final administrative regulation for consistency with international obligations or resolves problems with foreign investors before they become formalised disputes.[83] Alternatively, states might adopt an early warning system to address investment grievances and consider the state's position under its international obligations.[84] Such processes are *ex post* – after a decision has already been made.

1.4.4 Cross-Cutting Characteristics of Internalisation Measures and Processes

Within the typology of measures that we have identified, further refinements are possible regarding processes of internalisation. In the following subsections, we highlight four main cross-cutting characteristics (Figure 1.2). We distinguish between them for analytical purposes, though in practice they may overlap.

1.4.4.1 Specific versus Adapted Processes of Internalisation

Conceptually, a particular measure or process of internalisation may have been designed specifically for investment treaty obligations or it may

[81] See Government of Canada, *International Trade Agreements and Local Government: A Guide for Canadian Municipalities*, www.international.gc.ca/trade-agreements-accords-commerciaux/ressources/fcm/complete-guide-complet.aspx?lang=eng. See also Koh, 'Why Do Nations Obey International Law?', 2656 (defining legal internalisation as occurring when 'an international norm is internalised into the domestic legal system through executive action, judicial interpretation, legislative action or some combination of the three … Legislative internalisation occurs when domestic lobbying embeds international law norms into binding domestic legislation or even constitutional law …. ').

[82] See, for example, OECD, *Policy Framework for Investment* (OECD Publishing, 2015), 116; OECD, *Best Practice Principles in Regulatory Policy: Regulatory Enforcement and Inspections* (OECD Publishing, 2014).

[83] OECD, *Best Practice Principles in Regulatory Policy*, 28.

[84] For example, Peru's *Sistema de Coordinación y Respuesta del Estado en Controversias Internacionales de Inversión* (SICRECI), established by Ley No. 28933 (2006) (and modified by Ley No. 29213 (2010)) and the Dominican Republic's *División de Prevención, Solución de Controversias e Inversión*, established by Resolución del 22 de Agosto de 2012.

Cross-cutting Characteristics	Informational Processes	Monitoring Processes	Remedial Processes
Specific	Training course for government officials on investment treaties.	Legal review for consistency of decision, policy or law with the state's investment treaty obligations.	Grievance mechanism designed to address complaints by foreign investors.
Adapted	Training course for government officials on public international law, including on investment treaties.	Legal review for consistency of decision, policy or law with the state's international legal obligations, including its investment treaty commitments.	Grievance mechanism generally available for complaints by the public against the administration.
Ad Hoc	Training course held periodically, or when the opportunity or need arises.	Legal review carried out on a case-by-case basis, or when the need or opportunity arises.	Decision to set up a committee to review a grievance when a particular complaint is raised.
Consistent	Training course held regularly for government officials.	Legal review carried out on all draft decisions, policies or laws.	A standing ombudsperson institution.
Formal	A government guidance document or policy setting out binding directions.	Legal review is part of the regular institutional process within the government.	A law or policy establishing a grievance mechanism.
Informal	Materials to promote awareness of state's investment treaty commitments.	'Corridor discussions' with the legal advisor when the need arises.	Internal government discussions or negotiations regarding investor's concerns.

Figure 1.2 Examples of cross-cutting characteristics of internalisation measures

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have been originally designed for a different purpose and later have been adapted for use with regard to investment treaty obligations. An example of a specific process would be the creation of informational handbook on investment obligations, or the creation of an early warning system or process for regulating intra-government coordination in the event of a foreign investor grievance.

In contrast to specific processes, adapted processes are designed for a different purpose but are then applied to investment treaty commitments; for example, a process by which government legal advisors review prospective measures for general legality (which comes to include review for compatibility with investment treaty commitments, alongside other legal commitments). Likewise, RIAs, which monitor for *any* impacts of proposed measures, also assess the impact of the proposed regulation on investment law obligations (alongside other international and domestic legal obligations). Such processes are created or available for the review of adherence with a different (sometimes broader) category of norms than investment treaty obligations.

1.4.4.2 Ad Hoc versus Consistent Processes of Internalisation

The consistency of a process of internalisation may vary from one country to another or within a particular country as among different internalisation measures. An example of an *ad hoc* process of internalisation might be a short-term informational campaign on investment treaty obligations for government officials or an episodic training programme, which does not occur on a consistently recurring basis. Examples of consistent processes, by contrast, can be found in well-established processes for the internal assessment of the compatibility of new legislation or new regulation with investment treaty obligations, or in regularised training programmes within government.

1.4.4.3 Formal versus Informal Processes

As observed earlier, we think that a narrow, black letter law approach to internalisation would hardly capture the reality of how governments run their affairs, and would provide few insights regarding the effect of investment treaties on national governance, and how international obligations are considered. When conceptualising processes of internalisation, therefore, we seek to capture the range of both informal (legally non-binding) and formal (legally binding) rules, norms and practices, through which the government manages its affairs.

Informal processes may manifest themselves as processes that are undertaken without a legal obligation to do so. Such informal processes may become institutionalised over time, such as when a process becomes a matter of government convention or custom that is not dependent upon individual actors or groups of actors, for example established, informal channels of communication among agencies.[85] Informal measures might also include handbooks, education, training, etc., which, although serving as an informational resource for officials about the state's obligations, are informal inasmuch as the materials do not prescribe binding practices or processes. Formal processes, on the other hand, are established through legally binding norms, such as a regulation establishing procedures for coordinating the exchange of information within government regarding potential investment treaty claim[86] or a requirement that an RIA be conducted with respect to prospective government measures.

1.4.4.4 Principle versus Practice

Finally, in observing processes for internalisation, it warrants noting that evidence of the existence of a formal process does not mean that it is followed in practice. A state may adopt formal processes of internalisation, which are not used, whether as a result of bureaucratic intransigence, lack of awareness or lack of capacity. Similarly, informal processes, such as governmental conventions, may be recognised in principle but fail in practice to operate in whole or in part. While the existence of a process is a necessary condition for its possible effect on decision making, its existence in itself does not indicate the actual effect that it will have in practice.

1.4.5 Locating Internalisation in Governmental Decision Making

In the preceding section, we have set out a typology of measures and processes which framework operationalises the concept of internalisation as

[85] As highlighted in the law and development literature, while Western legal models assume the centrality of law, in some developing countries, law plays a less central role, with most governmental and social interaction and control being informal. Such informal processes appear to be particularly significant in certain Asian countries. See Tom Ginsburg, 'Does Law Matter for Economic Development? Evidence from East Asia' (2000) 34 *Law and Society Review* 829.

[86] For example, Peru's 'early warning' system for addressing potential investor–state disputes is established and operates by virtue of Ley No. 28933 (2006) (and modified by Ley No. 29213 (2010)). The systems in the Dominican Republic and Colombia are similarly established by formal legal instrument. See Dominican Republic, Resolución del 22 de Agosto de 2012 (establishing the *División de Prevención, Solución de Controversias e Inversión*).

an observable phenomenon of government. In this section, we consider where within government the internalisation of international obligations is likely to be observed.

Looking at the issue from a governance perspective, we see that decision making occurs across the entire state network of government, often at identifiable nodes. Decisions may be taken within different branches of government (executive, legislative and judicial), at different levels of government (central, regional/state and local) and sometimes across branches and across levels. In addition, within each branch of government, there may be nodes along the hierarchy: for example, between central and local levels of government, between ministries and the public administration (bureaucracy), between high-level and mid-level bureaucrats within administrative authorities or agencies, and, in federal states, between the federal and state governments.

Considering the issue from the perspective of international law, as noted earlier, international legal doctrine treats the 'state' as a unified entity such that the acts or omissions of all the state's organs, as personified in its officials, are regarded as acts or omissions of the state for the purposes of international responsibility.[87] States thus incur international responsibility for actions taken by every branch of government, at every level of government, whether national or sub-national,[88] as well as by non-state actors exercising governmental authority[89] or acting under governmental direction or control.[90]

The wide range of entities and persons capable of taking measures for which the state is internationally responsible is amplified by the nature of investment treaties and foreign investment. The pervasive presence of foreign investment throughout national economies is such that a wide range of entities and persons may take decisions of one kind or another with respect to or impacting upon a foreign investment or investor. Moreover, the broad scope of investment treaty obligations means that virtually all aspects of the host's economy and regulatory system will be subject to the investment treaty's disciplines, regardless of sector of investment and regardless of the type of government measure. As a result, for states with investment treaty portfolios, virtually all decisions across government branches and levels with respect to a

[87] International Law Commission, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) Art. 4, comment (5).
[88] *Ibid*., Art. 4 and comment (1).
[89] *Ibid*., Art. 5.
[90] *Ibid*., Art. 8.

foreign investor or investment are likely to be of a kind for which the host state may be legally responsible.

That said, it does not follow that all governmental decision makers are equally likely to take decisions that implicate obligations under an investment treaty. As noted previously, according to a study of investor–state treaty disputes by Williams, examining 584 arbitration cases from 1990 to 2014, 61 per cent of cases were triggered primarily by administrative measures, whether taken at the level of central, regional or local government; 26 per cent were triggered by legislative measures alone; and 11 per cent were related to judicial decisions.[91] Moreover, the economic sectors of the underlying investments in these disputes ranged across all aspects for the host economies, from investments in extractive industries to banking to construction to agriculture to the provision of public services (energy, water services, etc.) to manufacturing, transport and telecommunications.[92]

Building upon this evidence, and the role of administrative or executive decision making in the governance of the modern state, our emphasis in this study is largely focused on the executive and the public administration (although the legislature and the judiciary are also considered in the case studies). To the extent that states may be observed to have internalised their investment treaty obligations, we would expect those processes of internalisation to be found most likely with respect to decision making by the government actors whose decisions are most likely to affect foreign investors and their investments and who are most likely to have direct contact with them – the executive branch of government and its administration.

[91] Williams, 'Risky Business or Risky Politics', 42. These findings are similar to those developed in an earlier, smaller scale study by Jensen and Caddel. Looking at the distribution of investment treaty disputes as of September 2013, Jensen and Caddel found that 48 per cent of investor claims had been based upon measures originating in the executive branch of central government. An additional 38 per cent of claims had been based on measures originating at the sub-national level, by state-owned or controlled entities or by other agencies. The balance of claims was based upon measures taken by the legislative and judicial branches. See Jeremy Caddel and Nathan M. Jensen, *Columbia FDI Perspectives*, No. 120 (28 April 2014).

[92] Williams, 'Risky Business or Risky Politics', 40. Using the World Bank sectoral classification system, Williams noted disputes across at least fifteen different sectors: oil, gas and mining (25%); electric power and other energy (14%); construction (7%); banking and finance (6%); manufacturing (6%); agricultural, forest and fisheries (6%); telecommunications (6%); transportation (5%); water and waste management (4%); food and beverage (3%); other services (3%); real estate (3%); hospitality/tourism (3%); healthcare and pharmaceuticals (2%); media (2%); other (3%); and unknown (2%). *Ibid*., 41.

We note, however, that like the state itself, the executive is not a unified decision maker but rather comprised of a wide variety of decision-making nodes and that variations in internalisation among those nodes are likely. Thus, for example, while the ministry charged with negotiating free trade agreements for the government can be expected to evidence a high awareness of the obligations contained in the investment treaties it is charged with negotiating, and to consider them in its decision making, the situation is likely to be different in other ministries or at sub-national levels of government.

1.5 Factors Impacting Internalisation

Inasmuch as international legal theory has opened up the 'black box' of the *state*, it has not accounted for the specific factors and dynamics influencing the work of the executive and the bureaucracy. This is an important omission. Bureaucracies are complex organisations that seldom function in a regular and predictable manner, with many factors influencing bureaucratic effectiveness.[93] This is even more so in host developing states that lack developed regulatory infrastructures, and must deal with significant political, economic and cultural challenges.[94]

Traditional theories of international law, as noted previously, have assumed that the state will internalise international law. The public administration and public policy literature, antithetically, elaborates on the complexity of the regulatory process and the many factors that influence its success or failure.[95] Moreover, the law and development literature highlights the daunting challenges that developing countries must overcome in adopting legal or regulatory reform. Davis and Trebilcock thus stress that our 'expectations about the impact of such reforms should be modest'.[96]

In what follows, we set out a framework for understanding the factors that may affect the internalisation process or the adoption of internalisation measures, drawing on insights from the public policy, international relations, and law and development literature. This model is designed to collect sometimes disparate strands of scholarship and to provide a roadmap for the empirical inquiry carried out in the case studies. While much of this literature is focused on implementation or compliance, its

[93] Søren C. Winter, 'Implementation', in B. Guy Peters and Jon Pierre (eds.), *The SAGE Handbook of Public Administration* (SAGE Publications, 2012), 255.
[94] Davis and Trebilcock, 'The Relationship between Law and Development'.
[95] Winter, 'Implementation'.
[96] Davis and Trebilcock, 'The Relationship between Law and Development', 6.

insights are equally instructive for the question of internalisation. To this end, while we take a generous approach, addressing many of the factors mentioned in the literature, we do not take an *a priori* position regarding the relative importance of any factor. Moreover, depending on the case, factors may overlap or weigh differently in their relative importance. This categorisation serves analytical purposes.

We organise our thinking about the factors that may affect internalisation into three main categories.[97] The first category encompasses elements with respect to the context of public administration in the state. The second category subsumes elements related to the state's broader national context. The third category concerns the international context, namely the state's investment treaty commitments and the presence of claims thereunder. We outline these categories and elements in Figure 1.3.

1.5.1 Public Administration Context

1.5.1.1 Internalisation Strategy?

The public policy literature stresses the importance of a policy design, or policy strategy, that is, a clearly planned set of measures or processes – be they instruments, designated actors or allocation of resources – for achieving the policy goal.[98] In operationalising our conception of internalisation above, we outlined our distinction among broad types of processes of internalisation: informational, monitoring and remedial. We recall that typology here because the presence or absence, as well as the character and operation, of such processes will obviously bear upon the internalisation of the state's investment treaty commitments.

1.5.1.2 Bureaucratic Culture

While the liberal international legal scholarship has opened up the 'black box' of the state, it still treats the government and bureaucracy as a 'black box', assuming that it translates international law inputs into outputs.[99] Yet, as James Wilson asserts in his seminal work on bureaucracy, 'organisation

[97] Most of the literature we draw upon focuses on compliance. Although compliance goes further than internalisation as it refers to whether a state actually has adhered to the international obligation, see Jacobson and Brown Weiss, 'A Framework for Analysis', 4, this work provides insight into factors that influence state behaviour, and as such is relevant for the question of internalisation.

[98] May, 'Policy Design and Implementation', 279.

[99] James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (Basic Books, 1989), 23.

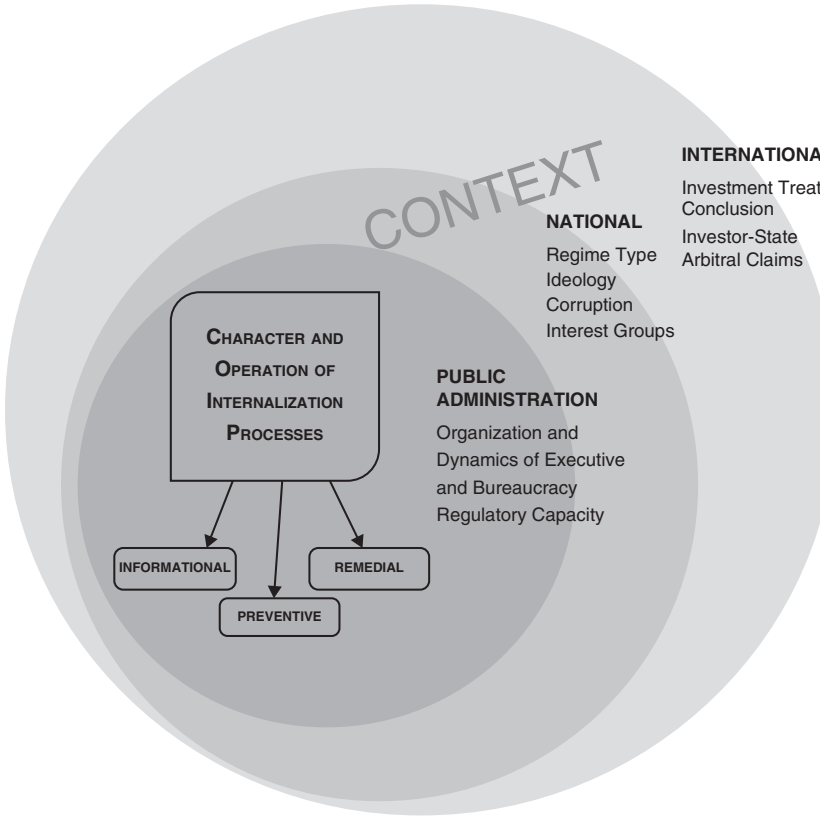

Figure 1.3 Model of factors impacting internalisation

matters'![100] The dynamics of *organisational* and *inter-organisational processes* are very important[101] and may impact internalisation. For example, according to the public policy theory on 'complexity of joint action', implementation is negatively related to the number of actors, the diversity of their interests, and the number of decision and veto points.[102] Contemporary

[100] *Ibid.*, 14–28.

[101] Laurence J. O'Toole, 'Interorganizational Relations and Policy Implementation', in B. Guy Peters and Jon Pierre (eds.), *The SAGE Handbook of Public Administration* (SAGE Publications, 2012), 292.

[102] Winter, 'Implementation', 259; Jeffrey L. Pressman and Aaron B. Wildavsky, *Implementation: How Great Expectations in Washington Are Dashed in Oakland; Or, Why It's Amazing That Federal Programs Work at All, This Being a Saga of the Economic Development Administration as Told by Two Sympathetic Observers Who Seek to Build Morals* (University of California Press, 1974).

administrations tend to be structurally complex, with a proliferation of inter-organisational (between ministries, agencies, sub-national governments and agencies, civil society, commercial groups, target groups, etc.) connections.[103] International obligations – often requiring increased collaboration between national ministries, agencies and sectors, as well as with international agencies and partners – add an additional layer of complexity to the inter-organisational process.[104] Thus, internalisation is likely to depend upon processes for coordination and coherence among different levels of government and jurisdictions.[105]

In developing countries, these challenges are even more profound, and bureaucratic culture may pose a significant impediment. As Trebilcock and Prado conclude: 'The frailties and failures of public administration in many developing countries have long been documented'.[106] Indeed, Dam argues that cultural and social factors (in the administration and elsewhere) are of critical importance in determining legal institutions and the success of reform.[107] And Putnam, in his seminal comparison of Northern and Southern Italian attitudes to the rule of law, has demonstrated how social and cultural attitudes can impact the effectiveness of legal institutions.[108]

1.5.1.3 Regulatory Capacity

The importance of regulatory capacity and resources to implement and comply with international treaties (or any policy for that matter) is widely

[103] O'Toole, 'Interorganizational Relations and Policy Implementation'.

[104] Kenneth I. Hanf, 'American Public Administration and Impacts of International Governance' (2002) 62 *Public Administration Review* 158.

[105] OECD, *Policy Framework for Investment* (OECD Publishing, 2015), 19, 115–24. Quite often such processes for coordination or coherence may be lacking or applied inconsistently. As observed by Wilson, bureaucracies will 'positively resist any effort to set forth their policies in the form of clear and general rules', and 'bureaucratic action is sometimes regular and predictable, but just as often it is irregular and unpredictable'. See Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It*, xvii–xviii. Aware of this challenge, the OECD Best Practice Principles in Regulatory Policy sets out guidance to countries on how to ensure coordination between national and international rules. See also Jurgen Friedrich and Eva J. Lohse, 'Revisiting the Junctures of International and Domestic Administration in Times of New Forms of Governance: Modes of Implementing Standards for Sustainable Development and Their Legitimacy Challenges', 83 ('the degree of institutional organization, the density of domestic regulation of the matter and the underlying legal culture of a particular legal order may lead to different degrees and different ways of implementation').

[106] Trebilcock and Prado, *Advanced Introduction to Law and Development*, 133.

[107] Dam, *The Law-Growth Nexus*.

[108] Robert D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press, 1993).

recognised in the public policy and law and development literature.[109] In numerous studies, limited regulatory capacity and limited economic and human resources in developing countries have been shown to play an important role in the failure to implement and enforce laws and regulations.[110] Internalisation thus can be undermined by lack of personnel, inadequate training, lack of technical expertise, lack of regulatory infrastructure, and so on.

Kaufmann and Kraay, for example, demonstrate how costly it is to operate legal or regulatory institutions, to train and retain staff and to disseminate information about the law.[111] Similarly, Bach and Newman demonstrate how regulatory capacity affects the enforcement of international insider trading rules.[112] Using Brazil as her case study, McAllister highlights how Brazil's failure to enforce environmental law is a story of regulatory agencies chronically beset by underfunding and understaffing.[113] Regulatory approaches that succeed in developed countries may be inadequate or unworkable in the developing world, where the capacity to enforce basic components of laws may be lacking.[114]

In a similar vein, Chayes' and Chayes' work on 'managerial compliance' has stressed how a lack of state capacity is a barrier to compliance.[115] As noted, the public administrations in developing countries often lack technical, financial or other capacities, which in turn impact their capability to effectively internalise international obligations. Empirical studies in diverse fields of international law – such as environment[116] or human

[109] Winter, 'Implementation'; Trebilcock and Prado, *Advanced Introduction to Law and Development*, 56–7.

[110] Lesly K. McAllister, *Making Law Matter: Environmental Protection and Legal Institutions in Brazil* (Stanford University Press, 2008); Jorge Nef, 'Environmental Policy and Politics in Chile: A Latin-American Case Study', in O. P. Dwivedi and Dhirendra K. Vajpeyi (eds.), *Environmental Policies in the Third World: A Comparative Analysis* (Greenwood Press, 1995), 141; Stephen P. Mumme, 'Environmental Policy and Politics in Mexico', in Uday Desai (ed.), *Ecological Policy and Politics in Developing Countries: Economic Growth, Democracy, and Environment* (State University of New York Press, 1998), 183.

[111] Daniel Kaufmann and Aart Kraay, 'Growth without Governance', *World Bank Policy Research Working Paper* 2928 (2013).

[112] Bach and Newman, 'Transgovernmental Networks and Domestic Policy Convergence'.

[113] McAllister, *Making Law Matter*.

[114] *Ibid*.

[115] Abram Chayes, Antonia H. Chayes and Ronald B. Mitchell, 'Managing Compliance: A Comparative Perspective', in Edith Brown Weiss and Harold K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press, 1998), 39.

[116] Simmons, 'Treaty Compliance and Violation', 286.

rights[117]– have illustrated these problems in practice. Corruption has also been identified as eroding capacity and having a significant impact on compliance with international obligations.[118] Whether subsumed within consideration of regulatory capacity or treated independently, corruption likely stands as a factor affecting internalisation.[119]

Finally, in the field of investment law, Williams has observed a positive link between regulatory capacity and investment disputes, and found that the lower the income and level of development (taken as a proxy for low state capacity), the higher the likelihood that the state will face an investment treaty dispute.[120] This is an especially suggestive finding given that in contrast to other international regimes (e.g. WTO, ILO, World Bank, IMF, IAEA and many more),[121] the investment treaty regime lacks coordinated institutional support for regulatory capacity building, arguably undermining domestic internalisation of investment treaty obligations.[122]

1.5.2 National Context

The internalisation of investment treaties may not only be influenced by the public administration context within which a policy is developed but also by broader national factors. In Shaffer's view, domestic dynamics are the most important factor in understanding the impact of international

[117] Wade M. Cole, 'Mind the Gap: State Capacity and the Implementation of Human Rights Treaties' (2015) 69 *International Organization* 405, 405–6.

[118] Nathan W. Freeman, 'Domestic Institutions, Capacity Limitations, and Compliance Costs: Host Country Determinants of Investment Treaty Arbitrations, 1987–2007' (2013) 39 *International Interactions* 54. Freeman relies on the following indicators: the 'Law and Order' and 'Corruption' variables from the International Country Risk Guide (ICRG); the 'Rule of Law' and 'Control of Corruption' variables from the Worldwide Governance Indicators (WGI) Project; and Transparency International's Perceptions of Corruption Index (CPI). See PRS Group, *International Country Risk Guide*, www.prsgroup.com/explore-our-products/international-country-risk-guide/; *Worldwide Governance Indicators*, https://info.worldbank.org/governance/wgi/; and Transparency International, *Corruption Perspectives Index*, www.transparency.org/en/cpi/2020/index/nzl.

[119] Dupont, Schultz and Angin, 'Political Risk and Investment Arbitration' (examining the correlation between the rule of law and corruption with investment treaty claims).

[120] Williams, 'Risky Business or Risky Politics'.

[121] See examples in Moshe Hirsch, 'Developing Countries', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2017).

[122] Capacity-building activities do take place with respect to investment treaties of course, but in an uncoordinated, ad hoc way by a variety of disparate actors, including NGOs, international organisations, developed states, international law firms and academic institutions.

rules on the state.[123] Thus, domestic demands, domestic power struggles and domestic culture 'shape how transnational legal norms are received and implemented in practice', and '[s]ometimes they lead to the rejection of transnational law'.[124] Jacobson and Brown Weiss similarly state that: 'The social, cultural, political, and economic characteristics of the countries clearly influence implementation and compliance'.[125]

One notable element of the domestic context that may impact the extent to which states internalise and comply with their international obligations are national elites or other powerful interest groups.[126] This finding corresponds with the insight of liberal theory that the state is 'disaggregated' into different, and at times competing, actors and interests.[127] The work of Williams supports this observation in the investment treaty regime, finding that treaty violations are often a result of domestic interest group pressure.[128]

In addition to interest groups, the research on compliance suggests that political factors such as regime type and ideology of the ruling government may also impact the way in which a state internalises its international treaty obligations. For example, there is support in the literature for the theory that democracies comply better with their international obligations in general,[129] as well as studies asserting that democracies

[123] Shaffer, 'The Dimensions and Determinants of State Change', 37: 'Arguably, the most important determinant of state change is the affinity of the transnational legal reform efforts with the demands and discursive frames of domestic constituencies and elites in light of domestic configurations of power and the extent of change at stake'.

[124] *Ibid.*, 43.

[125] Jacobson and Brown Weiss, 'A Framework for Analysis', 7.

[126] See, for example, Xinyaun Dai, *International Institutions and National Policies* (Cambridge University Press, 2007); Simmons, 'Treaty Compliance and Violation', 286; Shaffer, 'The Dimensions and Determinants of State Change', 43 (noting how the implementation of international environmental obligations can lead to a backlash from commercial groups who are adversely affected by environmental regulations, leading in turn to treaty violation); Patrick Bernhagen, 'Business and International Environmental Agreements: Domestic Sources of Participation and Compliance by Advanced Industrialized Democracies' (2008) 8 *Global Environmental Politics* 78 (arguing that greater inclusion of NGOs and business in policymaking leads to better compliance).

[127] Moravcsik, 'Taking Preferences Seriously'; Slaughter Burley, 'International Law and International Relations Theory'; Putnam, 'Diplomacy and Domestic Politics'.

[128] Williams, 'Risky Business or Risky Politics'. See also Calamita, 'Are Investments in Water Different?'; Post, *Foreign and Domestic Investment in Argentina*.

[129] Simmons, 'Treaty Compliance and Violation', 280. See also Todd Landman, *Protecting Human Rights: A Comparative Study* (Georgetown University Press, 2005) (examining the compliance of democracies with human rights treaties).

comply better with their investment treaty obligations specifically.[130] On the other hand, leftist governments have historically been more likely to expropriate the property of foreign investors.[131] Similarly, governments with strong nationalist ideologies may be more likely to resist complying with international legal restraints than governments of different political leanings.[132] The number of veto players within government also may play a role in internalisation. Some studies, for example, assert that presidential systems – likely due to the small number of veto players – are more likely to violate investment treaties.[133] At the same time, a smaller number of key decision makers may also suggest a smaller group within which effective internalisation is necessary. In the same vein, internalisation may well be more challenging in federal or decentralised states – with a multiplicity of decision makers – rather than in unitary states.

In thinking about these factors, it warrants bearing in mind that the effects of political factors can be particularly pronounced in developing countries. Important insights from the law and development field highlight how crucial political factors and competing political ideologies and interests can be for the successful adoption of legal or regulatory reforms in developing countries.[134] In a series of case studies on reforms in Russia, China, Latin America and the Middle East, Carothers and others have shown how the success of reform has often depended upon political conditions, such as support by political elites, or a change from authoritarian to democratic regime.[135]

1.5.3 International Context

1.5.3.1 Investment Treaties: Treaty Conclusion

The rule of law thesis posits that entering into investment treaties will lead states to internalise these international commitments into their

[130] Nathan M. Jensen, Noel P. Johnson, Chia yi Lee and Hadi Sahin, 'Crisis and Contract Breach: The Domestic and International Determinants of Expropriation' (2020) 15 *The Review of International Organizations* 869; Carl H. Knutsen, 'Democracy, Dictatorship and Protection of Property Rights' (2011) 47 *Journal of Development Studies* 164.

[131] Quan Li, 'Democracy, Autocracy, and Expropriation of Foreign Direct Investment' (2009) 42 *Comparative Political Studies* 1098.

[132] Chayes, Chayes and Mitchell, 'Managing Compliance', 39.

[133] Knutsen, 'Democracy, Dictatorship and Protection of Property Rights'.

[134] See, for example, Kleinfeld, 'Competing Definitions of the Rule of Law', 55–6 ('achieving rule of law ends requires political and cultural, not only institutional, change'); David Kennedy, 'The "Rule of Law", Political Choices and Development Common Sense', in David M. Trubek and Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006), 95.

[135] Carothers, *Promoting the Rule of Law Abroad*.

governmental decision making.[136] In other words, the fear of arbitration by foreign investors should act as 'a deterrent mechanism' against short-term policy reversals and 'assist developing countries in promoting greater effectiveness of the rule of law at the domestic level'.[137] In organising our model of factors impacting internalisation, we include the conclusion of investment treaties as a potential factor leading to internalisation. We acknowledge our scepticism that the simple conclusion of investment treaties is likely to give rise to the development of significant internalisation processes. Nevertheless, we recognise the possibility and, given the claims of the rule of law thesis, consider it important to include in the basic outline of our model.

1.5.3.2 Investment Treaties: Arbitral Claims

Investor–state disputes under an investment treaty may act as a trigger for awareness within the government about the saliency of investment treaties. Large awards, high legal costs, and what is often perceived as an intrusion into state sovereignty, can serve to put investment treaties on the radar. The role of claims in the adoption of investment treaties and in their drafting has already been the subject of significant work. Aisbett and Poulsen have shown, for example, that officials in many developing states acted with a kind of 'bounded rationality' in entering into investment treaties, ignoring readily available information about investment claims involving other countries until they themselves were hit by a claim.[138] Similarly, a study by Manger and Peinhardt has shown how investment treaty claims against capital-exporting states have led those states to more precise drafting of successive investment treaties, moving from vague to elaborate rules in an effort to minimise future litigation risks.[139] In the present study, we expect that if investment treaties are serving as mechanisms for governmental reform, investment treaty claims will trigger government awareness and increase the likelihood that the state will develop internalisation processes.

[136] See, for example, Salacuse, *The Law of Investment Treaties,* 113–14; Schill, 'International Investment Law and the Rule of Law', 87–93; Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law'; Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law'.

[137] Echandi, 'What Do Developing Countries Expect from the International Investment Regime?', 13.

[138] Lauge N. S. Poulsen and Emma Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65 *World Politics* 273.

[139] Mark S. Manger and Clint Peinhardt, 'Learning and the Precision of International Investment Agreements' (2017) 43 *International Interactions* 920.

1.6 The Case Studies

In the preceding sections, we have conceptually mapped the three main institutional processes or mechanisms through which internalisation would be expected to take place: informational, monitoring or remedial mechanisms. We have also identified some cross-cutting characteristics of these mechanisms, such as whether they are general or specific, ad hoc or consistent, and whether they are formal or informal. Finally, we have sought to flag factors that may impact whether, or the extent to which, internalisation measures are adopted and investment treaties are internalised.

This framework serves as the background for the main body of the book in which we present case studies addressing whether and how a select group of governments in Asia internalise international investment treaty obligations in their decision-making processes. These case studies serve as a foundation for testing our theoretical framework by empirically examining whether and to what extent these governments take investment treaty obligations into account in their governmental decision-making processes, and whether such internalisation has had observable spillover effects on governance in the state more generally.

An empirical assessment of internalisation in individual countries is the only way to develop the evidence necessary to determine the effect of investment treaties on national governance. To that end, the chapters which follow contain qualitative country case studies of eight Asian countries: India, Indonesia, Myanmar, Republic of Korea, Sri Lanka, Singapore, Thailand and Viet Nam. In preparing these case studies, the authors have drawn upon semi-structured interviews conducted with senior- and mid-level government officials and investment lawyers, and the analysis of primary and secondary legal materials. In addition, because the authors are based in the countries about which they are writing, or have deep experience in these countries, they are able to draw upon their own detailed background knowledge of investment governance in the country. We are not aware of any similar empirical studies.

With respect to case selection, the choice of these eight countries for case studies rests on several considerations. The first is principled. The subject of our inquiry – the impact of investment treaties on governance – dictates a primary interest in developing countries, as it is their governance in particular which investment treaties are purported to improve. Thus, six of our eight case studies cover developing countries of different sizes: India, Indonesia, Myanmar, Sri Lanka, Thailand and Viet Nam.

The inclusion of two developed countries (the Republic of Korea and Singapore) provides comparative context that is valuable in understanding the range of factors which affect the internalisation process and the commonality of certain challenges raised by investment treaties, even for the governments of developed economies. In this regard, we note that we have excluded China from the present study due to its magnitude and complex provincial and administrative structure. China itself might form the basis for a single study.

The second driver for covering these eight states is opportunistic. In undertaking an empirical study of the impact of investment treaties on decision making in national governments, we have proceeded on the premise that, in order to be successful, the case studies should be undertaken by locally based authors with knowledge of the laws and government structures of the subject countries. Further, we have looked to authors who are able to gain access to government officials and other stakeholders for the purpose of developing evidence through interviews and other sources. In this respect, the inclusion of countries in this study has depended upon finding the right author for each country covered, rather than deciding *a priori* that certain countries must be included. While admittedly this has introduced a degree of serendipity into our case study selection, we do not believe that it impacts upon the value of the work. In the end, this project does not seek to draw broad conclusions about the impact of investment treaties 'in Asia'. Rather, it seeks to develop a theoretical framework for analysing investment treaty internalisation in government generally and to use that framework to develop an empirical understanding of internalisation in eight Asian countries.

Finally, we have chosen to focus on case studies in Asia, and to work with scholars based in Asia, given our position at the National University of Singapore and the mission of the Centre for International Law which is, *inter alia*, to advance international law research and capacity in the Asia-Pacific region.