

CURRENT ISSUES IN RULE OF LAW AND TRADE AND DEVELOPMENT

Investment Treaties, Foreign Investment and the Rule of Law

Research Assoc. Professor N. Jansen Calamita
Centre for International Law
National University of Singapore

Rule of Law Conditions Can Promote Economic Growth

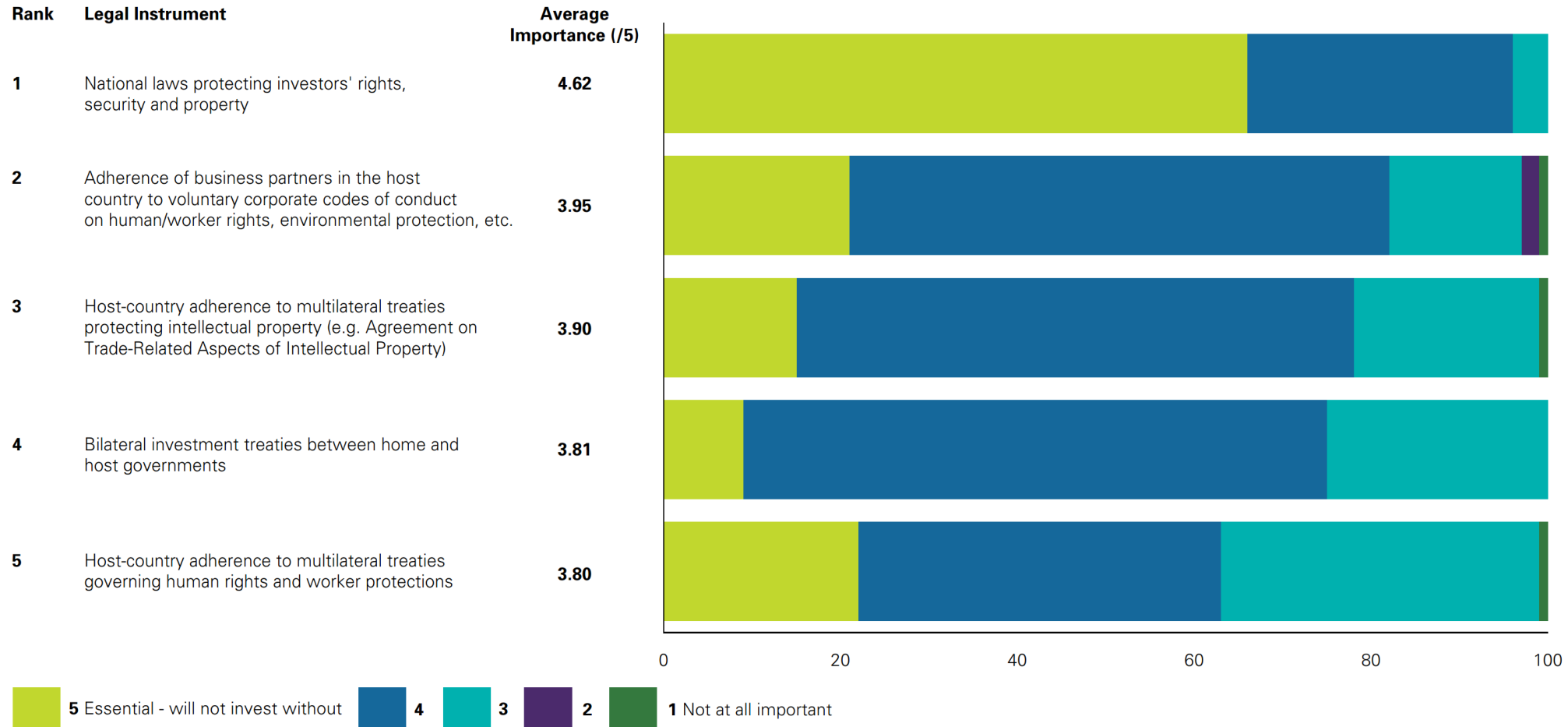
- Not a novel observation

“In all mercantile transactions the great object should be certainty: and therefore it is of more consequence that a rule should be certain, than whether the rule is established in one way or the other, Because speculators then know what ground to go upon.”

- *Vallejo v. Wheeler* (1774) 1 Cowp 143, 155 (Lord Mansfield).
- Consistently confirmed through empirical studies.

Host State Rule of Law Conditions and Foreign Direct Investment Flows

On a scale of 1 to 5, indicate the degree of importance to your FDI decisions of each of the following types of legal instruments:



Source: NJ Calamita et al., *Risk and Return: Foreign Direct Investment and the Rule of Law* (2015).

Global Competition for FDI

“[H]igh rates of foreign direct investment inflows have been associated with rapid economic growth.”

- Jeffrey Sachs, Special Advisor to UN Secretary General Kofi Annan, *The End of Poverty: How We Can Make It Happen in Our Lifetime* (London 2005), p. 356

The Role of Investment Treaties

- Approx. 3,000 in force.
- Contain guarantees by host states with respect to the treatment of foreign investment. Guarantees apply independently of domestic standards.
- Provide an enforcement mechanism -- outside and apart from the host state's judicial system -- whereby investors may bring claims directly against the host state for breach of its treaty obligations.
 - Usually through arbitration pursuant to the ICSID Convention.

The Classic Investment Treaty Narrative

“The quid pro quo . . . is, in fact, in the English vernacular, the provision of the ‘quids,’ that the capital importing countries in 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.”

- Hartley (Lord) Shawcross (1961).

Do the “Quids” Actually Follow the “Quo”?

- Variable, but fairly consistent, correlation between investment treaties on inward flows of investment.
- **No consensus on causation.**
- Methodological limitations of econometric studies.
 - Poor quality of FDI data.
 - Persistent problems of endogeneity.
 - General inability to account for differences in the structure and content of investment treaties.

Do Investment Treaties Improve Rule of Law Conditions in the States which Sign Them?

- Intuitive assumption by many is that it does.
 - “Damages as a remedy sufficiently pressures States into complying with and incorporating the normative guidelines of investment treaties into their domestic legal order.”
- Statements like this lack empirical foundation and misunderstand the nature of government decision-making.
- States are not unitary decision-makers.
- State action often departs from what would be expected in a rational-choice model for a variety of reasons.

Do Investment Treaties Improve Rule of Law Conditions in the States which Sign Them?

- A question that can only be examined through further research on the ground level, in case-by-case studies.
- New project 2017-19 at Centre for International Law to address this issue: “Governing with Investment Treaties.”