

Article

BITs and Pieces of Property

Amnon Lehavi[†] & Amir N. Licht^{††}

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I. INTRODUCTION

Property sets out the ways in which society allocates, governs, and enforces rights and duties among persons with respect to resources. The boundaries of property are constantly changing. They influence and are influenced by social, economic, and political shifts. Nowadays, in view of ever-intensifying foreign investments and other cross-border ventures, the institution of property may face its greatest challenge ever: the transition from a largely

[†] Yale Law School, LL.M., J.S.D.; Senior Lecturer and Director of Real Estate Studies, Radzyner School of Law, Interdisciplinary Center (IDC) Herzliya; Visiting Professor, Faculty of Law, University of Toronto (Fall 2010).

^{††} Harvard Law School, LL.M., S.J.D.; Professor, Radzyner School of Law, IDC Herzliya. For their helpful comments and insights, we thank Vicki Been, Peter Behrens, Amara Bekele, David Dana, Christian Kirchner, Russell Korobkin, Steve Munzer, Katharina Pistor, Mariana Prado, Michael Reisman, Jordan Siegel, David Schneiderman, Michael Trebilcock, Eric Zolt, and the participants of the 2009 symposium on Institutional Aspects of Foreign Direct Investment at IDC Herzliya, the 2009 Property Works in Progress Symposium at the University of Colorado, Boulder, and the faculty workshops at the Faculty of Law, University of Toronto, and the UCLA School of Law.

domestic legal construct into one that accommodates globalization.

Bilateral investment treaties (BITs) appear to offer an ideal solution for the protection of foreign investors' property rights in the broad range of assets that BITs typically consider to be "investments": land, chattels, intellectual property, securities, intangibles, and so forth. BITs regularly include certain standards for the protection of foreign investments, such as "fair and equitable treatment," and provide investors with standing in international law and direct claims vis-à-vis the host country. The alleged promise of BITs lies in reducing uncertainty and enhancing the credibility of states' commitments to protect property rights.

"Explosion" is a term often used to describe the growth trend in the number of BITs.¹ The numbers are staggering even to people familiar with the field; no fewer than 2,676 BITs had been concluded by the end of 2008, and virtually every country has been a party to at least one agreement of this type.² If everybody has them, then one might think that BITs must be doing something quite beneficial. As we point out in this Article, however, BITs may do a lot,³ but their effect on securing cross-border property rights is far from clear.

Our main source of skepticism regarding the ability of BITs to systematically promote the protection of property rights beyond property law's traditional boundaries lies in our argument that the notion of property is significantly more complex than first meets the eye. The gradual move to what we term "property discourse" to protect foreign investment under a BIT regime consequently may become complex and uncertain. This Article breaks ranks from conventional wisdom by identifying the intricacies of BIT property protection and pointing to heterogeneity as a central feature of property. Unlike the paradigm that seems to guide the creation of BITs, which emphasizes certainty and credibility, we argue that once property jurisprudence is introduced into BITs, the complex features of property law follow.

We demonstrate the ways in which property rights and duties regularly

1. See, e.g., U.N. CONFERENCE ON TRADE & DEV., THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES, at 2, U.N. Doc. UNCTAD/DIAE/IA/2009/5, U.N. Sales No. E.09.II.D.20 (2009) (referring to "an explosive growth of international investment agreements (IIAs)").

2. *Id.*

3. BIT scholarship has more than its fair share of puns. Apparently, they are irresistible, and we can only admit to the same weakness as our title already betrays. See, e.g., Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 349 (Karl P. Sauvant & Lisa E. Sachs eds., 2009) [hereinafter EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT]; Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655 (1990); Jennifer L. Tobin & Marc L. Busch, *A BIT is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements*, 62 WORLD POL. 1 (2010); Jennifer Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, REV. INT'L ORG. (forthcoming), available at <http://www.springerlink.com/content/c7h3723546652211/fulltext.pdf>; Matthias Busse, Jens Königer & Peter Nunnenkamp, *FDI Promotion Through Bilateral Investment Treaties: More than a BIT?* (Kiel Inst. World Econ., Working Paper No. 1403, 2008), available at <http://www.ifw-members.ifw-kiel.de/publications/fdi-promotion-through-bilateral-investment-treaties-more-than-a-bit/Kiel%20Working%20Paper%201403.pdf>.

implicate numerous, often heterogeneous parties, whose interests may be tightly intertwined in the same piece of property. In addition, the public aspect of property rules—touching on expropriation and regulation—is not entirely detached from the private law of property. Consequently, a property regime, with its *in rem* traits and cross-field effects, may be difficult to sustain when a specific BIT or a tribunal applying it takes out one piece of the puzzle to resolve an isolated investor-state dispute. We thus argue that to properly meet their goals, cross-border investment mechanisms must come to terms with the entire array of jurisprudential dilemmas that characterize property systems.

This Article is structured as follows. Part II reviews the development of the BIT movement and the theories that underlie their design as property-protecting mechanisms. In Part III, we identify a prominent phenomenon in the legal context of BITs, by which the evolving understanding and interpretation of treaty terms such as “investment,” “rights,” “protection,” or “expropriation” increasingly tilt these international mechanisms toward a general “property discourse”—i.e., the depiction of foreign investors’ interests as property rights that enjoy not only status as such within the host country’s legal system, but also a superior, quasi-constitutional status as extraterritorial legal norms, in case of insufficient protection by the host country. In other words, investors constantly look to ensure broader protection of their property rights through BITs by seeking to create their own property *lex specialis*. We argue, however, that the notion of property is too complex for such an aspiration. To demonstrate why this is so, Part III articulates the unique traits of property rights and shows that even when a property discourse is initially defined with a “public” viewpoint in mind (i.e., regulating the legal relationship between the private investor/owner and the relevant government), such a design is bound to influence and be influenced by the “private” aspect of property law (i.e., the set of norms that generally regulate *in rem* legal interrelations among private persons regarding the allocation, governance, and protection of rights and duties in assets). This means that the growing tendency toward a BIT property discourse will have broader implications than originally anticipated, leading to a complicated tension among BIT (international) property law, domestic property law, and other legal norms.

Part IV elaborates on what we refer to as the intricacies of BIT property protection, pointing to heterogeneity as a central notion that complicates the transfer of the property discourse from a locally based jurisprudence to an overarching, universal design concept that could govern the scope and content of BITs. We identify five different types of such heterogeneity: (1) cultural heterogeneity among societies in their approaches to the concept of property; (2) actor heterogeneity; (3) asset heterogeneity; (4) vertical heterogeneity, or fragmentation of property norms at supranational and domestic levels; and (5) horizontal heterogeneity of overlapping investment protection norms. Our analysis is supported by new empirical evidence on the relationship between culture and property rights protection. Specifically, in regressions of measures of property rights on countries’ cultural profiles derived from cross-cultural psychology, we find that the protection of property rights is enhanced by

cultural autonomy—a cultural orientation that emphasizes individuals’ uniqueness—and is attenuated by the opposite orientation, embeddedness, which views people as entities embedded in the collectivity. This effect is especially pronounced for intellectual property rights. Part V concludes with several policy implications for cross-border investments in view of the tension between the aspiration of BITs to provide security and stability and the inevitable complexity embedded in the concept of property.

II. THE EVOLUTION OF BITS

A. *BITs Today*

In order to fully appreciate the BIT phenomenon, one should consider its current scope even before addressing the origins and the typical content of BITs. This scope is nothing short of staggering. According to the statistics available in early 2010, there were 2,676 concluded BITs by the end of 2008.⁴

Figure 1 presents this trend during the past decade. Every country except Monaco is a party to at least one BIT.⁵ Many countries have dozens of BITs, and several countries have more than one hundred BITs or close to this number; Germany leads the pack with over 130 BITs.⁶ This corpus of BITs is a living body. During the last decade, between eight and fourteen BITs have been renegotiated every year, such that the share of renegotiated BITs is about five percent of their total number and is rising steadily. Some countries renegotiate their BITs in order to bring them in line with the European Union framework upon accession to the Union; other countries update their BITs in light of new model BITs.⁷ BITs are also denounced from time to time.⁸

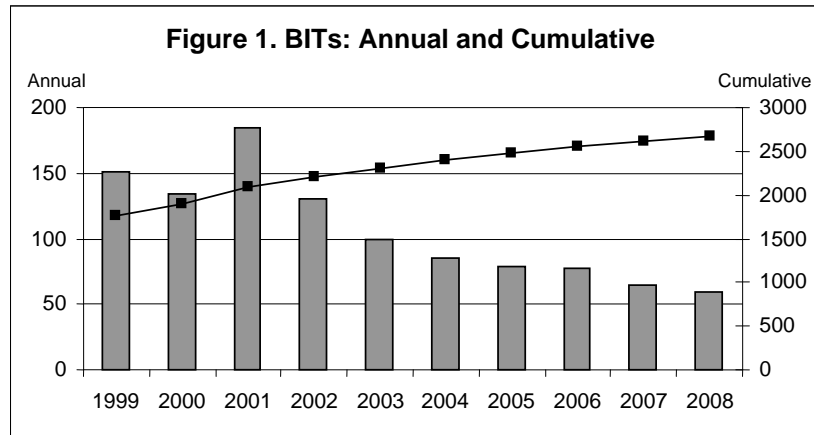
4. U.N. Conference on Trade & Dev., *Recent Developments in International Investment Agreements (2008-June 2009)*, at 2, U.N. Doc. UNCTAD/WEB/DIAE/IA/2009/8 (2009), available at http://www.unctad.org/en/docs/webdiaeia20098_en.pdf. This number accounts for new BITs (adding to the total), terminated and denounced BITs (subtracting from the total), and renegotiated BITs (replacing old BITs), as well as data adjustments in line with country reporting.

5. U.N. CONFERENCE ON TRADE & DEV., *supra* note 1, at 2.

6. U.N. Conference on Trade & Dev., *supra* note 4, at 2-3.

7. *Id.* at 5-6.

8. *Id.*



Source: U.N. Conference on Trade & Dev.⁹

Countries at all levels of economic development and in every corner of the world are parties to BITs. Importantly, BITs are not limited to developed-developing country dyads. Indeed, only forty-two percent of all BITs are between a developed country and a developing one. Over a quarter of all BITs have now been concluded between pairs of developing countries. China and India appear to be leading this trend of South-South integration through BITs. Another eight percent have been concluded between, on the one hand, developing countries and, on the other, countries in Southern and Eastern Europe and countries belonging to the Commonwealth of Independent States, which is made up of countries that were part of the Soviet Union or the Soviet Bloc. Some nine percent of BITs are between developed country dyads.¹⁰

BITs have transformed the global legal landscape of international investment. In light of their sheer number it would be safe to assume that BITs today cover most, though not all, of the cross-country channels of international investment.¹¹ Inasmuch as activity volume is an indicator of success, the BITs movement constitutes one of the most successful movements in the history of international law.

9. We are grateful to Amara Bekele from the U.N. Conference on Trade and Development (UNCTAD) for providing the data behind this chart. Letter from Amara Bekele, DIAE/UNCTAD, to authors (Feb. 2, 2010) (on file with authors).

10. U.N. Conference on Trade & Dev., *supra* note 4, at 3-5.

11. To our knowledge, only the network of double taxation treaties (DTTs), which totaled 2,805 by the end of 2008, surpasses BITs. *Id.* at 7. UNCTAD subsumes BITs and DTTs under the category of international investment agreements, or IIAs.

B. *From the Beginning*¹²

The origin of BITs is commonly traced to the first BIT signed in 1959 between Germany and Pakistan. As the standard story goes, numerous former colonies became independent countries in the wake of World War II and were almost invariably at a much lower level of economic development than former colonial countries. The latter countries also happened to be European, Western, or Northern. Shortly thereafter, during the 1950s, a number of developing countries embarked on a series of massive expropriations of assets and enterprises that had been funded and owned by foreign investors. Iran expropriated British petroleum assets in 1951, and Libya expropriated joint Libyan-American petroleum assets in 1955. In 1956, Egypt nationalized the Anglo-French-owned Suez Canal, and in 1959 Cuba nationalized an array of foreign commercial assets. With ebbs and flows, nationalizations and expropriations have been a recurring theme on the scene of international investment, reaching another peak during the 1970s¹³ and never truly disappearing to this day.¹⁴

BITs, according to this story line, were supposed to be the answer to these expropriations, aiming to allay foreign investors' concerns about losing their investment without appropriate compensation. BITs therefore implemented three measures: first, a commitment by host countries to extend a certain standard of treatment toward foreign investment, including a crucial commitment to compensate for expropriation; second, a direct right of action for individual and corporate investors against host states; and third, resolution of disputes by international arbitration, most often through the International Centre for Settlement of Investment Disputes (ICSID).¹⁵ This concise set of

12. This Subsection draws extensively from PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 617-20 (1995); Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT'L L.J. 491, 499-504 (2009); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 71-79 (2005); and Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 157-76 (2005).

13. The United Nations identified 875 distinct acts of governmental taking of foreign property in sixty-two countries between 1960 and 1974. See Don C. Piper, *New Directions in the Protection of American-Owned Property Abroad*, 4 INT'L TRADE L.J. 315, 330 (1979).

14. For a detailed account of a very recent, and colossal, expropriation by Chad, notwithstanding the involvement of the World Bank, see Scott Pegg, Briefing, *Chronicle of a Death Foretold: The Collapse of the Chad-Cameroon Pipeline Project*, 108 AFR. AFF. 311 (2009). In another recent episode of massive de facto expropriation, the Russian government from 2004 to 2008 used regulatory tactics to force

Royal Dutch Shell and its partners to sell a controlling stake in Sakhalin-2 [natural gas field] to [the national oil company] Gazprom and forced TNK-BP to give up its giant Kovykta gas field in East Siberia. By 2008, the share of state-owned companies in oil production had grown from about 27 percent to almost 40 percent of oil output.

Judith Thornton, *The Impact of Nationalization and Insecure Property Rights on Oil and Gas Developments in Russia's Asia Pacific* 6 (U. Wash. Dep't of Econ., Working Paper No. UWEC-2009-22, 2009), available at http://www.econ.washington.edu/user/thornj/Thornton_w_energyEdited_maps.pdf.

15. ICSID is by far the most popular arbitration framework of choice in BITs. A distant second is the U.N. Commission on International Trade Law (UNCITRAL). See Rafael Leal-Arcas, *Towards the Multilateralization of International Investment Law*, 10 J. WORLD INV. & TRADE 865, 874-

measures has had a dramatic effect on the legal regime pertaining to foreign direct investment (FDI). The measures changed the balance of power between host countries and foreign investors in favor of the latter. The measures have also been tremendously successful. They have been widely adopted, as noted above, and have also proven fairly resilient. While there is a certain degree of variation among BITs in the exact content and language of these measures, BITs tend to be similar in their substantive content and structure—virtually every BIT is premised on these three principles.¹⁶ The more recent trend of BIT renegotiation mostly aims to rephrase their language in light of a growing body of arbitral awards rather than to replace any of the three principles with anything substantively different.¹⁷

Vandevelde offers a slightly different historical account of BITs, which we find instructive. With regard to the post-World War II period, Vandevelde's account is largely in line with the conventional wisdom. However, he begins his analysis at an earlier point in time—specifically, in the Colonial Era, beginning in the late eighteenth century.¹⁸ In this era, countries signed broad treaties on friendship, commerce, and navigation (FCNs), in which investment protection was only one issue and not necessarily the primary one. The protection afforded to foreign investment was weak, as it relied on espousal, that is, the foreign investor's home country espousing the investor's grievance and addressing it through diplomatic channels or with military force. Quite obviously, this was an ineffective approach, as its actual implementation depended on the home- and host-countries' respective political agendas and military might, the investor's political leverage at home, and the scope of the investment, which had to be substantial to justify putting such an apparatus in motion. Against this backdrop, the three new elements that BITs introduced are best understood as means of creating a more effective regime of international investment protection.

FCNs, however, preceded the BIT movement in at least one important aspect essential to this Article. According to Vandevelde, "The post-war FCNs guaranteed 'equitable treatment' and the 'most constant protection and security' to property of foreign nationals and companies. Such property could not be taken without payment of just compensation."¹⁹ The "fair and equitable" standard—which is adopted by the vast majority of BITs as the primary standard for appropriate investment protection²⁰—traces its roots, according to

76 (2009).

16. See Lisa E. Sachs & Karl P. Sauvant, *BITs, DTTs, and FDI Flows: An Overview*, in EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra* note 3, at xxvii, xxxvii.

17. U.N. CONFERENCE ON TRADE & DEV., INTERNATIONAL INVESTMENT RULE-MAKING: STOCKTAKING, CHALLENGES AND THE WAY FORWARD, at 25, U.N. Doc. UNCTAD/ITE/IIT/2007/3, U.N. Sales No. E.08.II.D.1 (2008), available at http://www.unctad.org/en/docs/iteiit20073_en.pdf ("One major reason for these efforts is the wish of the contracting parties to update 'old' treaties by including 'modern' protection standards, such as those relating to national treatment and investor-State dispute settlement. In some cases, however, the contracting parties' intention is to clarify treaty provisions and to reassess the actual balancing of private and public interests in IIAs.")

18. Vandevelde, *supra* note 12, at 158-61.

19. *Id.* at 163 (footnotes omitted).

20. See Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INVESTMENT & TRADE 357, 359 (2005). For a thorough review, see U.N. Conference on Trade & Dev.,

several commentators, to the 1948 Havana Charter for an International Trade Organization.²¹ Article 11(2) of the Charter contemplated that foreign investments should be assured “just and equitable treatment.”²² Recently, however, a note by Kill argues that this concept dates further back to the 1919 League of Nations Covenant.²³ Identifying the lineage of this basic standard of treatment for foreign investment is important, as it underscores the fact that this standard is not just a technical term, but rather invokes very basic notions of propriety held by the framers of this regime. We return to this point below.²⁴

The history of BITs would not be complete if one considered nationalizations and expropriations merely as a series of isolated episodes in which host countries repudiated the property rights of foreign investors. There was logic—indeed, an ideology—in this movement. Following on the heels of the postcolonization stage, developing and socialist countries promoted a political platform that recognized a *right* to expropriate foreign assets. In two famous declaratory statements, the General Assembly of the United Nations in 1974 held that state sovereignty includes “the right to nationalization or transfer of ownership to its nationals”²⁵ and, shortly thereafter, the right “to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures.”²⁶ In conjunction with the prohibition on the use of force to collect debts or protect investment entailed by the United Nations Charter, this policy pushed developed countries to seek alternative mechanisms to protect their investments—to wit, bilateral investment treaties.²⁷ As Vandeveld notes:

BITs were negotiated principally between a developed and a developing country. . . . Typically, the agreement was drafted by the developed country and offered to the developing country for signature, with the final agreement

Fair and Equitable Treatment, U.N. Doc. UNCTAD/ITE/IIT/11 (Vol. III) (1999). For additional studies dealing with the fair and equitable criterion see also IOANA TUDOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* (2008); Barnali Choudhury, *Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law*, 6 J. WORLD INVESTMENT & TRADE 297 (2005); Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT’L LAW. 87 (2005); Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRIT. Y.B. INT’L L. 99 (1999); Catherine Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law*, in INTERNATIONAL INVESTMENT LAW: A CHANGING LANDSCAPE 73 (Org. for Econ. Co-operation & Dev. ed., 2005); Theodore Kill, Note, *Don’t Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations*, 106 MICH. L. REV. 853 (2008); Stephan W. Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law* (Inst. Int’l L. & Just., Working Paper No. 2006/6, 2006), available at <http://www.iilj.org/publications/documents/2006-6-GAL-Schill-web.pdf>.

21. Havana Charter for an International Trade Organization, Mar. 24, 1948, 62 U.N.T.S. 26.

22. *Id.* art. 29(2).

23. Kill, *supra* note 20, at 870 (noting that Article 23(e) of the Covenant calls on its members “to secure and maintain . . . equitable treatment for the commerce of all Members of the League”).

24. See *infra* text accompanying notes 65-66.

25. Vandeveld, *supra* note 12, at 167-68 (citing Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. GAOR, 6th Special Sess., Supp. No. 1 U.N. Doc. A/RES/3201 (May 1, 1974)).

26. Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/RES/3281 (XXIX) (Dec. 12, 1974).

27. Vandeveld, *supra* note 12, at 168-69.

reflecting only minor changes from the original draft. This persistent pattern added an ideological dimension to the agreements.²⁸

Realpolitik thus defeated *hoch Politik*. The need for capital, which could come only from rich countries, overcame developing countries' desire to assert their independence and distance themselves from their former colonizers. *Dependencia*—the battle cry of Latin American countries against dependency on the North—was abandoned.²⁹ The BITs movement subsequently broadened to include all types of country pairs, but the overriding ideology—namely, that property must be protected—has not changed and has only become more ingrained. In the final stage, in the 1990s and 2000s some leading capital-exporting countries—including the United States, the United Kingdom, Canada, Germany, and Switzerland—solidified their control over the terms of engagement in international investment, each introducing their own version of a “model BIT,” i.e., a standardized document aimed at setting up the content of all the dyadic BITs to which this country would be a party.³⁰

C. What BITs Do: Theory and Evidence

The question of what BITs do should have a straightforward answer in light of the preceding paragraphs: they facilitate international investment. A closer analysis reveals a more complex situation, however. In this Section we briefly deal with three distinct issues. First, what is the mechanism that BITs implement? Second, what effect should this mechanism bring about? Third, do BITs live up to this promise? As we will see, only the first question has a relatively clear answer.

As already noted, BITs have a fairly standard structure. By intention, BITs focus on international investment. They do not usually deal with other aspects of international relations, unlike their FCN predecessors, or even with other aspects of international economic relations, such as trade.³¹ According to a U.N. Conference on Trade and Development (UNCTAD) study,

28. *Id.* at 170-71.

29. *Dependencia* refers to a quasi-Marxist political economy school of thought that was prominent mostly in Latin America in the 1960s and 1970s. It holds that the global capitalism of the metropolitan centers of the developed world—the North—were responsible for the depletion of resources and economic underdevelopment in the South. The logical consequence was intense, principled rejection of foreign investment by multinational corporations. See generally Richard R. Fagen, *A Funny Thing Happened on the Way to the Market: Thoughts on Extending Dependency Ideas*, 32 INT'L ORG. 287 (1978); Gabriel Palma, *Dependency: A Formal Theory of Underdevelopment or a Methodology for the Analysis of Concrete Situations of Underdevelopment?*, 6 WORLD DEV. 881 (1978). For an application to Africa, see, for example, WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1972). For an explanation in the context of BITs, see Jason Webb Yackee, *Are BITS Such a Bright Idea? Exploring the Ideational Basis of Investment Treaty Enthusiasm*, 12 U.C. DAVIS J. INT'L L. & POL'Y 195, 209 (2005).

30. See generally ORG. FOR ECON. CO-OPERATION & DEV., INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS (2008) (offering scattered analyses of model BIT provisions).

31. See Sachs & Sauvant, *supra* note 16, at xxxvii. A different category of international agreements—namely, preferential trade and investment agreements (PTIAs) and economic integration agreements—may also deal with investment. For example, Chapter 11 of the North American Free Trade Agreement (NAFTA) implements an international investment regime largely similar to the regime that BITs implement. See U.N. CONFERENCE ON TRADE & DEV., *supra* note 1, at 61-75.

[BITs'] main provisions typically deal with the scope and definition of foreign investment . . . ; admission of investments; national and most-favored-nation treatment; fair and equitable treatment; guarantees and compensation in respect of expropriation and compensation for war and civil disturbances; guarantees of free transfer of funds and repatriation of capital and profits; subrogation on insurance claims; and dispute-settlement provisions, both State-to-State and investor-to-State. . . . [These] basic features of BITs, including their objectives, format and broad underlying principles, have changed little over the years.³²

Model BITs enhance this uniformity of the general structure even further, notwithstanding considerable variability in the details and language of particular BITs.

Scholarly theories pertaining to BITs began to appear only in the 1970s under the shadow of the *dependencia* ideology, developing countries' hostility toward multinational corporations (MNCs), and a track record of nationalizations, especially in extractive industries. It was under these conditions that the preeminent scholar Raymond Vernon in 1971 advanced the obsolescing bargain theory (OBT). Because host countries lacked the financial resources and technological ability to locate, develop, and market their natural resources, they found it necessary to accept the terms required by foreign MNCs as a condition for developing such extractive projects. Once a bargain was struck, however, Vernon predicted that the conditions underlying the initial host government-MNC bargain would deteriorate—that is, the bargain would “obsolesce.”³³ With the large capital investment now largely sunk, MNCs would be vulnerable to demands to adjust the terms of investment, to “creeping expropriation,” and eventually to wholesale nationalization. OBT's prediction that MNCs would renegotiate the original contract on less favorable terms or else face expropriation was backed by empirical reality during the 1970s.³⁴

The decline of outright expropriations in the late 1970s, followed by the debt crisis of developing countries in the 1980s and subsequently the collapse of the Soviet Bloc in 1989, have pushed OBT to the margins. A new neo-liberal policy has been advanced by international financial institutions, including the World Bank and the International Monetary Fund. These organizations have focused on implementing market-oriented structural reforms within developing countries—in particular, the protection of property rights—as a condition for aid. As a corollary, the attitude toward FDI has changed from hostility to hospitality. In due course, U.N. institutions such as UNCTAD, which in the past exhibited suspicion toward MNCs, also changed their tone to be more MNC-favorable. The ascendancy of neo-liberalism coincides with the surge in the signing of BITs from a handful a year to several dozen a year. The structuralist view of FDI, which focuses on the domestic institutional structure

32. U.N. Conference on Trade & Dev., *Bilateral Investment Treaties 1959-1999*, at 20, U.N. Doc. UNCTAD/ITE/IIA/2 (2000).

33. RAYMOND VERNON, *SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES* 47-53 (1971); see also THEODORE H. MORAN, *MULTINATIONAL CORPORATIONS AND THE POLITICS OF DEPENDENCE: COPPER IN CHILE* (1974) (providing a detailed account of Chilean nationalization of copper mining assets developed by foreign firms).

34. Stephen J. Kobrin, *Expropriation as an Attempt To Control Foreign Firms in LDCs: Trends from 1960 to 1979*, 28 INT'L STUD. Q. 329, 329-30 (1984).

of host countries, thus points out that host countries have less incentive and ability to renegotiate bargains in the present era than they had in the 1970s.³⁵ Such a view thus would predict the growing number of BITs to which host countries have become party.

It should be emphasized, however, that the structuralist approach does not negate OBT. In both views, host countries are bedeviled by their own rationality. In a standard rational expectations model, it is imperative for the host country and its leaders to act opportunistically and renege on the contract with the foreign investor. Furthermore, both theories share the new institutional economics' insight that institutions matter.³⁶ That is, in order to prevent the collapse of investment contracts, there needs to be a mechanism that will enable the host country to make a *credible* commitment (as opposed to a contractual undertaking, which, without more, may be inherently noncredible) not to expropriate the investment, either fully or partially. Even when wholesale expropriations have become a rarity—though definitely not extinct³⁷—policy changes and government intervention remain a significant source of political risk.³⁸ Such risk could materialize from seemingly innocuous legal or regulatory measures that cause a “death of a thousand cuts.”³⁹

In recent years, much attention has thus been paid to identifying and improving developing countries' domestic institutions, including the legal and regulatory environment, institutional strength, anticorruption measures, and crime reduction—often broadly referred to as “governance” or “the rule of law.”⁴⁰ UNCTAD recently stated that “policy and institutional determinants are especially important in developing countries, which are often characterized by weaker institutions and less consistent policies than developed countries.”⁴¹ BITs provide another such mechanism for dispelling the uncertainty that foreign investors face. BITs constrain the incentive to expropriate through a

35. See Lorraine Eden, Stefanie Lenway & Douglas A. Schuler, *From the Obsolescing Bargain to the Political Bargaining Model*, in *INTERNATIONAL BUSINESS AND GOVERNMENT RELATIONS IN THE 21ST CENTURY* 251 (Robert Grosse ed., 2005).

36. The image of Ulysses tying himself to the ship's mast so as not to heed the Sirens' call immediately comes to mind. On commitment mechanisms in general, see Kenneth A. Shepsle, *Discretion, Institutions, and the Problem of Government Commitment*, in *SOCIAL THEORY FOR A CHANGING SOCIETY* 245 (Pierre Bourdieu & James S. Coleman eds., 1991). On the centrality of institutions as commitment mechanisms, see Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England*, 49 *J. ECON. HIST.* 803, 808 (1989). On institutional commitment mechanisms in international investment, see Witold J. Henisz, *The Institutional Environment for Multinational Investment*, 16 *J.L. ECON. & ORG.* 334 (2000); and Witold J. Henisz & Oliver E. Williamson, *Comparative Economic Organization—Within and Between Countries*, 1 *BUS. & POL.* 261 (1999).

37. See *supra* note 14.

38. See generally EDWARD M. GRAHAM, *GLOBAL CORPORATIONS AND NATIONAL GOVERNMENTS* (1996); NATHAN M. JENSEN, *NATION-STATES AND THE MULTINATIONAL CORPORATION* (2006).

39. Jo Jakobsen, *Does Democracy Moderate the Obsolescing Bargain Mechanism?—An Empirical Analysis 1983-2001*, *TRANSNAT'L CORP.*, Dec. 2006, at 67, 71.

40. See *Governance and Anti-Corruption*, WORLD BANK, <http://www.worldbank.org/wbi/governance> (last visited Nov. 7, 2010), for links to research and publications focusing on governance and anticorruption.

41. U.N. CONFERENCE ON TRADE & DEV., *supra* note 1, at 12-13.

commitment to pay fair compensation,⁴² and they make this commitment credible by subjecting the host country to external, impartial arbitration. The latter element of surrendering sovereignty is the linchpin of the entire mechanism, as it erodes the host country's power over the foreign investor.⁴³ To cite UNCTAD again:

[A]nother reason for concluding [BITs] is that home countries may have doubts about the institutional quality in the host country; that is, the quality of domestic institutions protecting property rights and resolving disputes. [BITs], by placing dispute resolution outside the domestic system of host countries, may thus substitute for poor institutional quality.⁴⁴

BITs thus “may contribute to the coherence, transparency, predictability and stability of the investment frameworks of host countries.”⁴⁵

Do BITs work as advertised? That is, do BITs effectively engender higher flows of FDI between country pairs that have a BIT? This is an empirical question, to which the answer appears to be affirmative, though not decisively so. Studies that have looked into this question have improved in terms of methodology such that the more recent ones deserve more attention. An early study by UNCTAD examining BITs through the mid-1990s found a weak positive relationship between the number of BITs to which a country is party and FDI inflows.⁴⁶ That study already conjectured about the additional importance of the domestic institutional environment. However, studies from the early 2000s failed to find a robust significant correlation between BITs and FDI. Hallward-Driemeier found that BITs do not serve to attract additional FDI but may act more as a complement to, rather than a substitute for, good institutional quality and local property rights.⁴⁷ Likewise, Tobin and Rose-Ackerman argue that the number of BITs seems to have little impact on a country's ability to attract FDI, though it may positively impact investment in already-attractive countries.⁴⁸

42. Other typical provisions in BITs, such as a commitment not to hinder repatriation of funds, serve a similar objective.

43. Ramamurti thus distinguishes two “tiers” of country-investor interactions. In tier one, international organizations establish broad sets of rules, norms, and decision-making procedures that constrain tier-two interactions between MNCs and host countries. BITs belong in tier one. See Ravi Ramamurti, *The Obsolescing ‘Bargaining Model’? MNC-Host Developing Country Relations Revisited*, 32 J. INT'L BUS. STUD. 23 (2001).

44. U.N. CONFERENCE ON TRADE & DEV., *supra* note 1, at 16-17; see also Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107 (2005).

45. U.N. CONFERENCE ON TRADE & DEV., *supra* note 1, at 25. For an alternative theory of BITs as a commitment mechanism that focuses on cross-country competition to provide credible property rights protections required by direct investors, see Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 INT'L ORG. 811 (2006); and Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998).

46. U.N. CONFERENCE ON TRADE & DEV., *BILATERAL INVESTMENT TREATIES IN THE MID-1990S*, at 104-122 (1998).

47. Hallward-Driemeier, *supra* note 3.

48. Jennifer Tobin & Susan Rose-Ackerman, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties* (Yale Law Sch. Ctr. for Law, Econ. & Pub. Pol'y, Research Paper No. 293, 2005), available at <http://ssrn.com/abstract=557121>.

After these studies, there appeared a series of studies that found positive links between BITs and FDI. Some of the studies claimed to be causal, finding that having BITs actually increases FDI. Salacuse and Sullivan show that a host country that has concluded a BIT with the United States is more likely to increase its overall FDI among all Organization for Economic Co-operation and Development (OECD) countries than a country without such a BIT.⁴⁹ Egger and Pfaffermayr assert that BITs exert a positive effect on outward FDI of home countries to BIT partner host countries if the treaties are actually implemented, with a weaker effect for signing a treaty.⁵⁰ Grosse and Trevino report that FDI inflows were positively related to a greater number of BITs signed by Central and Eastern European countries, which they see as part of general institutional building.⁵¹ According to Neumayer and Spess, developing countries that sign more BITs with developed countries receive more FDI—an impact that was sometimes conditional on institutional quality (i.e., rule of law, absence of corruption, etc.).⁵² Büthe and Milner find a positive correlation between BITs and subsequent inward FDI into developing countries. Yet these authors emphasize that although BITs are not required for attracting FDI, the competitive dynamic “may mean that retaining the status quo of no or few BITs might become increasingly costly over time.”⁵³ In another study examining the signaling effects of BITs, Tobin and Rose-Ackerman conclude that the number of BITs a host country signs with high-income countries has a positive effect on FDI inflows, but that the increased popularity of BITs means that each extra BIT has a decreasing effect on inflows of FDI to the country that is party to the BITs.⁵⁴ Additional studies report findings in a similar vein.⁵⁵

A few recent studies cast some doubt on this apparent consensus, however. In a reexamination of Neumayer and Spess’s study, Yackee finds that the statistical relation of BITs and FDI is weaker than those found by the study’s authors, holds mostly for low-risk countries in opposition to theory, and in some cases is nonsignificant. Yackee further shows an opposite conditional relationship with domestic institutional quality than that found by Neumayer and Spess.⁵⁶ In a separate study, Yackee finds no direct correlation between

49. Salacuse & Sullivan, *supra* note 12, at 111.

50. Peter Egger & Michael Pfaffermayr, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, 32 J. COMP. ECON. 788 (2004).

51. Robert Grosse & Len J. Trevino, *New Institutional Economics and FDI Location in Central and Eastern Europe*, 45 MGMT. INT’L REV. 123 (2005).

52. Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567 (2005).

53. Tim Büthe & Helen V. Milner, *Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis*, in EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra* note 3, at 171, 214.

54. Tobin & Rose-Ackerman, *supra* note 3 (manuscript at 23).

55. See Peter Egger & Valeria Merlo, *The Impact of Bilateral Investment Treaties on FDI Dynamics*, 30 WORLD ECON. 1536 (2007); Kevin P. Gallagher & Melissa B.L. Birch, *Do Investment Agreements Attract Investment? Evidence from Latin America*, 7 J. WORLD INV. & TRADE 961 (2006); Kim Sokchea, *Bilateral Investment Treaties, Political Risk and Foreign Direct Investment*, 11 ASIA PAC. J. ECON. & BUS. 6 (2007); Busse et al., *supra* note 3.

56. Jason Yackee, *Do BITs Really Work? Revisiting the Empirical Link between Investment Treaties and Foreign Direct Investment*, in EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra* note 3, at 379.

investment decisions and BITs that afford increased legal protection in their international arbitration clauses. Yackee interprets these results to suggest that the case for formal (international) law may have been overstated and that noncontractual, informal obligations may be more important.⁵⁷ Aisbett replicates the strong positive correlation between BIT ratification and FDI inflows, but upon controlling for endogeneity, this relation becomes nonsignificant, suggesting that this relation is not driven by an effect from BITs.⁵⁸

III. THE INSTITUTIONAL CHALLENGES OF BITs: TOWARD A PROPERTY PARADIGM?

A. From “Investment” to “Property”

As Part II demonstrated, the chief institutional design principles behind the development of BITs as a cross-border legal mechanism were the *reduction of uncertainty* about property rights on the part of foreign investors and the *enhancement of credibility* of states’ commitments to preserve foreign investors’ legal rights. BITs were engineered to attain both of these goals through formal treaty recognition of investors’ rights and the subjection of states’ corresponding commitments to impartial international adjudication.

As mentioned, BITs were originally intended to support certain paradigmatic economic forms of foreign investment and to protect investors’ rights from potential infringements by host countries. The paradigmatic rights infringement focused on instances such as blunt measures of expropriation or nationalization of foreign investments; overt or covert regulatory discrimination against foreigners; allegedly neutral yet sweeping adverse regulation that severely impacts the present and future value of investments; and infringement of contracts for the provision of goods or services that had been signed directly between foreign investors and host governments. BITs, providing for both specific investment protection commitments and “umbrella clauses,”⁵⁹ were aimed at preventing or remedying these types of government conduct.

However, the economic and legal paradigms have been changing. These transformations confront BITs and similar cross-border treaties with new challenges that bring into question the extent to which these instruments can

57. Jason Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 LAW & SOC’Y REV. 805 (2008).

58. Emma Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation Versus Causation*, in EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra* note 3, at 395.

59. Many BITs include a provision by which “each Contracting Party shall observe any other obligation it has assumed with regard to investments by nationals or companies of the other Contracting Party in its territory.” This provision is regularly referred to as an “umbrella clause” because it creates “a separate obligation under the investment treaty, requiring the Contracting Parties to observe obligations the host State has assumed in its relations with nationals of the other Contracting Party.” Stephan W. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT’L L. 1, 4 (2009). The application of umbrella clauses has recently turned into a major point of contention, with differing opinions among tribunals, policymakers, and commentators about the function and scope of the clause—for example, whether it covers commercial obligations by states or only sovereign modes of conduct such as legislation, regulation, or the grant of licenses. *Id.* at 5-7.

fulfill their institutional role.

From an economic-financial perspective, foreign investments have boomed in recent decades,⁶⁰ with traffic going not only from West to East or North to South, but also coming in from what were once considered developing economies.⁶¹ But the changing landscape of foreign investment is not only *quantitative* but also *qualitative*. Consider the example of real estate: whereas in the past foreign investors sought to acquire land mainly to set up a specific predesignated project (e.g., a subsidiary manufacturing plant) and were thus considered a relatively isolated phenomenon in the local landscape, foreign investors are increasingly entering real estate markets as regular actors, often purchasing land for investment or real estate entrepreneurship in a way that is indistinguishable from domestic actors' investment.⁶² This phenomenon is even more abundant for foreign shareholding and equity participation in local businesses and firms, not only through mergers and acquisitions,⁶³ but also through portfolio investments, which are generally understood to fall within the definition of "investment" in BITs.⁶⁴ Thus, for nearly all states and purposes, foreign investors are currently part and parcel of local economies.

At the same time, foreign investors still look to BITs as potentially granting them a beneficial *lex specialis*. Thus, whereas "national treatment" clauses are designed to put foreign investors on equal footing with domestic actors, the "fair and equitable treatment" standard was explicitly developed as an international norm, separate from domestic laws.⁶⁵ This term is vague, and adjudicating tribunals consistently struggle to interpret it whenever foreign investors claim that an otherwise nondiscriminatory government measure nevertheless fails to meet the "fair and equitable treatment" standard.⁶⁶ Thus, the very idea behind this legal term unveils a tension between the economic

60. See, e.g., Jason Bush, *The Russian Towers Are Coming*, BUS. WK., Oct. 9, 2006, at 60; Jason Bush, *Ukraine: What Crisis?*, BUS. WK., Sept. 3, 2007, at 50; Roben Farzad, *Extreme Investing: Inside Colombia*, BUS. WK., May 28, 2007, at 50; *FDI in Chinese Real Estate Soared*, CHINA CHEMICAL REP., July 6, 2007, at 4; Erik Heinrich, *The Next Real Estate Boom*, CAN. BUS., Mar. 26, 2007, at 25-27; Andrew Morse, *Tokyo Property Lures Goldman*, WALL ST. J., Aug. 27, 2007, at A4.

61. See Steven R. Weisman, *A Fear of Foreign Investments*, N.Y. TIMES, Aug. 21, 2007, at C1 (describing growing fears in the United States over multi-billion dollar foreign investments coming from sovereign wealth funds in China, Russia, and Persian Gulf countries, and quoting American officials' concerns that these funds are politically involved and have nontransparent investment policies).

62. See, e.g., Bush, *Ukraine: What Crisis?*, *supra* note 60, at 50-51 (reporting a sixty percent price increase in one year in Kiev's real estate market following the foreign investment boom, and describing how powerful entrepreneurs quickly push forward projects in what is otherwise a bureaucracy-laden state).

63. For a current analysis of cross-border mergers and acquisitions figures and trends, see U.N. Conference on Trade & Dev., *World Investment Report: Transnational Corporations Agricultural Production and Development*, at 42-71, U.N. Doc. UNCTAD/WIR/2009 (2009), available at http://www.unctad.org/en/docs/wir2009_en.pdf.

64. *Id.* at 35-36.

65. U.N. Conference on Trade & Dev., *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, at 40-51, U.N. Doc. UNCTAD/ITE/IIA/2007/3 (2007), available at http://www.unctad.org/en/docs/iteia20073_en.pdf.

66. See, e.g., *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 131 (Oct. 3, 2006) (holding that "the fair and equitable standard consists of the host State's consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor").

globalization of local markets, on the one hand, and the now-reverse potential legal differentiation *in favor* of foreign investors by allegedly granting them an additional source of protection against government regulation that local investors do not enjoy.

Beyond this general challenge to the legal ordering of foreign investment, we identify in this Article another prominent phenomenon in the legal context of BITs. We argue that the evolving common understanding and interpretation of key treaty terms such as “investment,” “rights,” “protection,” or “expropriation” increasingly tilt these international mechanisms toward a general “property discourse.” Investors often look beyond host governments’ public commitments or contractual obligations to ensure broader protection of their “property rights” through BITs.

This is especially so since the term “investment” is typically defined in BITs as comprising a list of rights in *assets* that effectively encompass the entire range of objects of property rights: immovable, moveable, and intangible property; intellectual property; shares, stocks, futures, options, and other derivatives; licenses and permits; related property rights such as leases, mortgages, liens, and pledges; and, in some cases, even claims to debts.⁶⁷ Investors seek to have these rights to assets protected against all types of third parties, including domestic private actors that have a conflicting claim to the assets. In so doing, foreign investors turn not only to local property doctrines in the host country but also to BITs to protect their property rights more broadly. In this sense, investors aspire to be shielded by a kind of property *lex specialis* that would bind not only the host government but also other private actors that may have rival contentions to rights in these assets.

The property rights terminology and rhetoric uttered by investors has not fallen on deaf ears among tribunals dealing with BIT disputes. In a growing number of arbitral judgments, tribunals refer to investors’ rights in the types of assets that are included in the definition of “investment” as “property rights” and treat them as such for purposes of examining the issue of “expropriation” or other potential infringements.⁶⁸

Accordingly, tribunals frequently interpret treaty terms such as “expropriation” and “indirect expropriation” in a way that increasingly resembles the respective “takings” and “regulatory takings” doctrines in the United States.⁶⁹ Tribunals interpreting BITs have also drawn inspiration from

67. For examples of “investment” definitions in recent BITs, see U.N. Conference on Trade & Dev., *supra* note 65, at 72-74; Treaty Between the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, art. 1 [hereinafter U.S. Model BIT], available at <http://www.state.gov/documents/organization/38710.pdf>; Agreement Between Canada and _____ for the Promotion and Protection of Interests, art. 1 [hereinafter Canadian Model BIT], available at http://www.naftaclaims.com/files/Canada_Model_BIT.pdf. See also *infra* text accompanying notes 196-198 for further discussion of specific BITs.

68. See, e.g., *S. Pac. Props. (Middle E.) Ltd. v. Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, ¶¶ 160-68 (May 20, 1992), 32 I.L.M. 933, 967-69 (1993); *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 128 (Feb. 8, 2005), 44 I.L.M. 721, 740 (2005).

69. See, e.g., *Mexico v. Metalclad Corp.*, ICSID Case No. ARB(AF)/97/1, Judicial Review, ¶¶ 102-12 (May 2, 2001), 5 ICSID Rep. 236 (2001) (describing “indirect expropriation” as depriving the owner of a “reasonably-to-be-expected economic benefit,” thus using language similar to the

the jurisprudence of the “right to property” clauses in other supranational documents, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)⁷⁰ and the Inter-American Convention on Human Rights.⁷¹ Notably, the concept of proportionality, which is a keystone of the property jurisprudence of the European Court of Human Rights and the European Court of Justice, has increasingly influenced the analysis of arbitral tribunals deciding whether a host country has violated its BIT commitments by taking measures that adversely affect investments.⁷²

In some cases, references to property terminology and jurisprudence are explicit in the BIT itself. The 2004 U.S. model BIT defines whether an indirect expropriation has occurred⁷³ based almost verbatim on the three-prong test for regulatory takings developed by the U.S. Supreme Court in *Penn Central Transportation Co. v. City of New York*.⁷⁴ The U.S. model BIT refers to “(i) the economic impact of the government action . . . ; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.”⁷⁵ The 2004 Canadian model BIT uses similar language.⁷⁶

On its face, there seems to be nothing wrong with the movement of international investment jurisprudence toward a property discourse. To the extent that “constitutionalization” is gradually becoming a legitimate concept in international economic treaty law, since it allegedly reflects a credible commitment by countries to place external restraints on their sovereign powers,⁷⁷ property jurisprudence seems like an ideal candidate for defining the scope of protection for investments against potential infringements of BITs by signatory countries. Since nearly all countries have a property clause in their domestic constitutions,⁷⁸ the terminology and methodology of property discourse may allegedly aid both investors and countries in building

“reasonable expectation” notion advanced by the U.S. Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 125 (1978)); *Waste Mgmt., Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 155 (Apr. 30, 2004), 43 I.L.M. 967, 998 (2004) (referring explicitly to the term “regulatory taking” as typifying inquiries about indirect expropriation, while holding that the concept is not relevant in the present case).

70. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter Protocol to the European Convention on Human Rights].

71. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

72. See, e.g., *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003), 43 I.L.M. 133, 164 (2007) (discussing the “proportionality” test and referring to this doctrine in a number of cases decided by the European Court of Human Rights).

73. See U.S. Model BIT, *supra* note 67, at Annex B.

74. 438 U.S. 104 (1978).

75. U.S. Model BIT, *supra* note 67, at Annex B, § 4.

76. Canadian Model BIT, *supra* note 67, at Annex B.13(1).

77. Peter Behrens, *Towards the Constitutionalization of International Investment Protection*, 45 ARCHIV DES VÖLKERRECHTS [ARCHIVE PUB. INT’L L.] 153 (2007).

78. See generally A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES (1999) (collecting 104 property clauses in constitutions worldwide).

expectations, clearing up ambiguities, and promoting goals of certainty and credibility.

However, we argue that the notion of property is significantly more complex than first meets the eye. By extension, property rights and the protection thereof under a BIT regime may also become complex and uncertain, thereby actually undermining the original institutional design goals of BITs. Part IV elaborates on what we refer to as the intricacies of BIT property protection, pointing to heterogeneity as a central notion that makes difficult the transfer of the property discourse from a locally based jurisprudence to an overarching universal design concept that could govern the scope and content of BITs.

But before we address the different aspects of heterogeneity in the context of BIT property protection, it is essential more generally to explain the traits of property jurisprudence, especially the complex public/private interplay in property. These insights will lay the foundations for the discussion of BITs and property rights.

B. *The Dual Nature of Property Rights*

The embrace of property terminology to define the nature and scope of foreign investors' rights under BITs carries potentially significant jurisprudential implications. To understand why this is the case, this Section will briefly articulate in Subsection 1 the unique traits of property rights, as compared with contractual or obligatory ones. It will demonstrate that even when a property discourse is initially designed with a "public" viewpoint in mind—i.e., protecting a right holder's direct relationships vis-à-vis the government—such a design is bound to influence, and be influenced by, the "private" aspect of property law—i.e. the right holder's relationships with other potential right holders. As we then show in Subsection 2, this is the case not only in the interrelationship between public-constitutional law and private law in domestic property systems, but also in supranational mechanisms and institutions. This means that the growing tendency toward a BIT property discourse will have broader implications than originally anticipated, leading to a complicated tension between BIT (international) property law, domestic property law, and other sources of law on either the local or supranational level, as well as to a "horizontal" tension between property provisions in different BITs that apply to assets within the same host country.

1. *The Structure of Domestic Property Law*

Property law sets out the ways in which society allocates, governs, and enforces entitlements and obligations in resources and the human relationships around them.⁷⁹ Property regimes and the property rights that emanate from them are at their base the result of conscious decisions by states' authorized entities—in the case of a domestic property system—to designate resources as

79. Amnon Lehavi, *Mixing Property*, 38 SETON HALL L. REV. 137, 211 (2008).

objects of property and to create a certain set of entitlements and obligations in them.⁸⁰ The basic structure of property law therefore implicates not only the state/citizen relationship, but also the basic tenets of property relations among different private persons.

In this sense, one should not attribute “publicness” only to property relations between an individual and the state or to property rules stemming from broad-based constitutional provisions. Core issues in property also implicate decisionmakers’ institutional processes and substantive reasoning in matters of resource control among nonstate parties.⁸¹ To illustrate the ways in which state-based acts may alter otherwise “regular” property relations among private actors, consider, for example, statutes authorizing certain corporations, such as common carriers and public utilities, to nonconsensually assemble lands or rights-of-way in them;⁸² laws governing the involuntary private transfer of lands through adverse possession;⁸³ or laws limiting property owners from exercising an otherwise legally recognizable right of exclusion, such as statutes prohibiting discrimination against prospective tenants or patrons on certain grounds.⁸⁴

Property entitlements and obligations regarding both specific assets and more general categories of resources (land, chattels, intellectual property, etc.) regularly implicate numerous parties not only abstractly, but also in social and economic practice.⁸⁵ In this sense, property differs *qualitatively* from the design of legal regimes for contractual or obligatory rights.

Parties to contracts may differ from one another in power, size, and so forth, but they are, at least initially, identifiable voluntary parties that share some agreed-upon goals as provided for in the contract, even if disputes may later arise.⁸⁶ In contrast, the parties affected by a property right may not have any sort of privity or voluntary relationship among them, and are often complete strangers that find themselves *ex post facto* entangled in a clash over competing claims regarding the same asset. Beyond the fact that such parties are usually not enumerated and identifiable to one another in advance, they are also likely to be much more heterogeneous as a group of rights-bearers in their epistemological, cultural, and social attributes.⁸⁷

Therefore, the challenge faced by legal systems in designing property

80. See J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 202-03 (1997).

81. Amnon Lehari, *The Property Puzzle*, 96 GEO. L.J. 1987, 2004-07 (2008).

82. Amnon Lehari & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1710-11 (2007).

83. See generally THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 194-220 (2007).

84. See JESSE DUKEMINIER ET AL., *PROPERTY* 376-84 (6th ed. 2006).

85. Lehari, *supra* note 81, at 2004-07.

86. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544 (2003) (“[C]ontract law should facilitate the efforts of contracting parties to maximize the joint gains (the ‘contractual surplus’) from transactions [C]ontract law should do nothing else”); *id.* at 557 (“A contract has an intertemporal aspect: Parties agree today to do something tomorrow.”).

87. Amnon Lehari, *The Dynamic Law of Property: Theorizing the Role of Legal Standards*, RUTGERS L.J. (forthcoming 2011) (manuscript at 7-8) (on file with authors).

regimes is one of *simultaneously* delineating the borders of permissible-versus-impermissible government intervention with property rights, while at the same time defining the scope and nature of property rights vis-à-vis the entire spectrum of third parties. This duality vividly demonstrates the distinctive nature of property as a basis for *in rem* rights.

Accordingly, we argue that legal rules controlling governmental interventions with private property are not and cannot be hermetically sealed off from the private law of property. To be sure, the interface between the private and public realms in property is highly intricate and defies clear demarcation,⁸⁸ and we certainly do not argue that the law of governmental intervention with property should necessarily aspire for harmony with the law governing property relations among private parties in every doctrinal issue.⁸⁹ However, it would be safe to say, for example, that the law of takings—or “expropriation,” to use the BIT terminology—does have bearing on the way in which the different actors would broadly understand property entitlements and obligations in the private realm.

Examples of such ties between the public and private aspects of property in domestic legal systems are abundant, although every legal system creates its own type of interrelationship based on broad jurisprudential and normative considerations. For example, the public and legal outrage over the U.S. Supreme Court’s *Kelo v. City of New London* decision was vividly presaged in Justice O’Connor’s assertion in her dissent that “[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”⁹⁰ Justice O’Connor expressed a deep concern that the overbroad construction of “public use” to facilitate a condemn-and-transfer practice for economic development was not only a matter of governmental abuse, but one that may also undermine the fundamental understanding of what it means to be a property owner, including vis-à-vis other persons.⁹¹ In a number of cases, the U.S. Supreme Court has made explicit cross-references between the public law and private law of property. This has occurred, for example, in takings cases, in which the Court considered the power to exclude as “one of the most treasured strands in an owner’s bundle of property rights,”⁹² and similarly viewed rights of possession, control, and disposition as “valuable rights that inhere in the property”⁹³—thereby referring to the private, common-law jurisprudence of property rights.⁹⁴

It should be noted, however, that the demarcation of the public/private

88. Lehavi, *supra* note 81, at 2000-12.

89. *Id.* at 2017-18.

90. *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O’Connor, J., dissenting).

91. See, e.g., Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1879-84 (2007) (portraying a *Kelo*-type condemn-and-transfer use of the eminent domain power as contradicting popular conceptions about the overall morality of property rights).

92. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

93. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998).

94. See, e.g., *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (citing *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 185-86 (1988) (deciding a trademark law dispute)).

interface is far from clear or consistent in American jurisprudence. A prominent example concerns the famous *Shelley v. Kraemer* case, in which the U.S. Supreme Court invalidated a restrictive covenant signed and recorded by thirty property owners in a neighborhood in St. Louis that provided that the properties would be leased or sold to whites only.⁹⁵ The Supreme Court of Missouri, based on common law property principles, upheld the restrictive covenant.⁹⁶ The constitutional anchor that enabled the U.S. Supreme Court to invalidate this measure as an infringement of the Fourteenth Amendment's Equal Protection Clause⁹⁷ was to view the state judicial decrees upholding the restrictive covenants as constituting "state action."⁹⁸ In other words, according to the Court, by rendering a judgment upholding the covenant and employing the "full coercive power of government to deny the petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell," the state court's decision had implicated, and violated, the Equal Protection Clause.⁹⁹

By viewing judicial rulings in private law settings as "state action" that consequently implicate the Bill of Rights, the Court's decision in *Shelley* could have led to fuller-scale osmosis of public and private in property, including for purposes of the Fifth Amendment's Takings Clause.¹⁰⁰ If all private dealings that are litigated by the judicial system are viewed as implicating "state action" attributed to the court, then practically the entire field of property law becomes "constitutionalized." This has not happened to date, likely because the Supreme Court wishes to maintain a sphere of private activity that is not subject to constitutional scrutiny, even if the borders between "private" and "public" are often blurry and ambiguous.¹⁰¹ In developing its takings jurisprudence, the

95. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

96. *Id.* at 19-20.

97. U.S. CONST. amend. XIV, § 1.

98. *Shelley*, 334 U.S. at 14-16. Reasoning that "the action of state courts and judicial officers . . . is to be regarded as an action of the State," the Court concluded that . . . in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws. . . .

. . . . We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment.

Id. at 15, 20.

99. *Id.* at 19.

100. U.S. CONST. amend. V, § 4.

101. For a description of the aftermath of *Shelley*, in which the Court effectively narrowed the ruling to the specific facts of the case, and for a review of the literature on whether *Shelley* is based on sound legal theory, see Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 458-83 (2007). The issue of judicial involvement in the creation of "private" property law also relates to some extent to the question of whether it is possible to have a "judicial taking" in American jurisprudence, that is, if a judicial change in a common law property doctrine may be considered a "taking" of the losing side's property rights. See, e.g., *Hughes v. Washington*, 389 U.S. 290, 295-96 (1967) (Stewart, J., concurring) (discussing this dilemma regarding a prospective change in accretion rules); see also Burton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990). The issue of judicial takings was recently reviewed by the U.S. Supreme Court in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Protection*, 130 S. Ct. 2592 (2010).

Court has refrained from subjecting the entire spectrum of property, including common law elements, to the public realm. At the same time, however, as discussed above, it has not opted for entirely divorcing the “private” aspect of property from the “public” one.

Although other legal systems are different from the American one, and some will strike a different balance in the structural and normative interrelations between “public” and “private,” we argue that the introduction of a “property discourse” into a legal system carries major systematic implications, which go beyond the original paradigm that may have initially motivated such a move.

2. *Implications for Supranational Property Systems*

We now move to argue that the above-mentioned consequences of a “property discourse” at the domestic level also characterize the *supranational* level. Before addressing BITs, which are the focus of this Article, we take note of the implications of introducing a constitutional-type property provision in another prominent supranational context: Article 1 of the First Protocol to the European Convention on Human Rights¹⁰² and its interpretation by the European Court of Human Rights (ECHR).

Article 1 of the First Protocol to European Convention on Human Rights¹⁰³ has had an enormous impact on property law throughout Europe. Since under the Convention any resident of any of the forty-four European countries that have signed and ratified the Convention may file a claim against his or her country, the ECHR has heard thousands of cases dealing with Article 1 and has produced an extensive body of case law on the matter. In addition, many countries have formally internalized the First Protocol’s provisions in their own laws, such as through the United Kingdom’s Human Rights Act of 1998,¹⁰⁴ so that domestic courts also constantly engage in Article 1 analysis.

The property jurisprudence of the ECHR raises the question of whether the Court generally defers to domestic property law—aiming mainly at guaranteeing a minimal standard of the “rule of law” within its jurisdiction¹⁰⁵—or whether it is poised to create supranational unified concepts and doctrines, including in private law matters. This dilemma is illuminating for the issue of BITs because the European Convention on Human Rights’ jurisprudence similarly deals with the interrelationship among different layers of law that impact both the “public” and “private” spheres of property.

102. Protocol to the European Convention on Human Rights, *supra* note 70.

103. The first paragraph of Article 1 reads: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” The second paragraph states that “the preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest . . .” *Id.* art. 1.

104. Human Rights Act, 1998, c. 42, sch. 1, pt. 2, art. 1 (U.K.) (providing for the protection of property).

105. See Tom Allen, *Compensation for Property under the European Convention on Human Rights*, 28 MICH. J. INT’L L. 287, 292-94 (2007).

On the one hand, the ECHR has not hesitated to intervene in domestic property practices in matters concerning due process, such as denial of or excessive delays in payment of compensation for full-scale expropriation.¹⁰⁶ More substantially, the Court has also read into Article 1 principles of “fair balance” and “proportionality” with regard to both deprivations and regulations of property.¹⁰⁷ On the other hand, there have been cases in which the ECHR has been more ambiguous and cautious about intervening in domestic doctrines. In these cases, the Court has viewed the “fair balance” and “proportionality” requirements not as a single supranational blueprint, but as standards that must give substantial leeway to domestic rulemaking.¹⁰⁸

The Court’s decision in *J.A. Pye (Oxford) Ltd v. United Kingdom* is a case in point because it addresses what is basically a private law dispute over adverse possession.¹⁰⁹ The ECHR’s Grand Chamber, in a ten-to-seven vote, reversed its Section 4 Chamber’s ruling that the law of adverse possession of the United Kingdom violated the Convention.¹¹⁰ The Grand Chamber thus validated the House of Lords’s decision to grant judgment in favor of bad-faith squatters who occupied privately owned and registered land.¹¹¹

Concisely, the case dealt with adverse possession of registered private land that took place between 1984 and 1999, so that the applicable law was that preceding the now-in-force Land Registration Act of 2002.¹¹² The applicants, the former owners who had lost their case before the national courts, including the House of Lords, argued that the then-in-force English adverse possession law (the Land Registration Act of 1925¹¹³) violated Article 1.¹¹⁴

In November 2005, the ECHR’s Section 4 Chamber ruled that the case did engage the first paragraph of Article 1, and that although English adverse possession law may be deemed as serving a genuine public interest, the interference with the registered owners’ rights was disproportionate and thus in violation of Article 1.¹¹⁵ In August 2007, the Grand Chamber reversed, emphasizing the principle that, especially in complex legal matters such as land law and housing, the Court would respect the national legislature’s judgment

106. See Amnon Lehari, *The Global Law of the Land*, 81 U. COLO. L. REV. 425, 441-47 (2010).

107. For the application of the “fair balance” principle, see *Sporrong v. Sweden*, 52 Eur. Ct. H.R. (ser. A), ¶ 69 (1982) (reading the concept of “fair balance” into Article 1 as “inherent in the whole of the Convention” and “reflected in the structure of Article 1”). The “fair balance” and “proportionality” principles were specifically implemented in the context of compensation for the taking of property in *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A), ¶¶ 50, 54 (1986).

108. See YUTAKA ARAI-TAKAHASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* 149-64 (2002).

109. *J.A. Pye (Oxford) Ltd v. United Kingdom (J.A. Pye II)*, App. No. 44302/02 (Eur. Ct. H.R. Aug. 30, 2007), available at <http://echr.coe.int/echr/en/hudoc> (follow “HUDOC database” hyperlink, then search “Pye,” then follow link to case title).

110. *J.A. Pye (Oxford) Ltd v. United Kingdom (J.A. Pye I)*, App. No. 44302/02 (Eur. Ct. H.R. Nov. 15, 2005), available at <http://echr.coe.int/echr/en/hudoc> (follow “HUDOC database” hyperlink, then search “Pye,” then follow link to case title).

111. See *J.A. Pye II*, App. No. 44302/02, ¶¶ 71-85.

112. Land Registration Act, 2002, c. 9, §§ 96-98 (Eng. & Wales).

113. Land Registration Act, 1925, 15 & 16 Geo. 5, c. 21, § 75 (Eng. & Wales).

114. *J.A. Pye II*, App. No. 44302/02, ¶ 3.

115. *J.A. Pye I*, App. No. 44302/02, ¶¶ 49-76.

“as to what was in the general interest unless that judgment is manifestly without reasonable foundation.”¹¹⁶ The Grand Chamber noted that many of the Convention’s member states had “some form of mechanism for transferring title in accordance with principles similar to adverse possession in the common law systems,”¹¹⁷ but more broadly stressed that “[i]t is characteristic of property that different countries regulate its use and transfer in a variety of ways.”¹¹⁸

We will not delve into the debate over whether the *J.A. Pye* decision was correct. Two issues are particularly relevant, however, for the purpose of the present analysis.

First, the *J.A. Pye* decision illustrates the complexity of constructing and maintaining a property regime that involves different layers of law, especially on the national versus supranational levels, in view of the *in rem* nature of property rights. It is true that even within a national legal system, jurisdiction is divided among different branches of government and among different types or levels of government within the same branch, and that this fact also has bearing on the structure of property rights. But national legal systems include a clearer hierarchy of normative rules and decisionmaking processes, as well as institutional mechanisms that are able to cause systematic changes and revisions in property law, chiefly by generally applicable legislation. This comprehensive institutional structure is largely missing in cross-national institutions, even ones that are already well established, such as the ECHR or the Court of Justice of the European Union (ECJ), which oversees EU members’ compliance with EU treaties and other types of EU supranational rulemaking.¹¹⁹ In deferring to the United Kingdom’s domestic legislation, “especially in complex legal matters such as land law and housing,”¹²⁰ the ECHR in the *J.A. Pye* case seems to have recognized that a property regime, with its *in rem* traits and complicated cross-field effects, may be difficult to sustain when each extra-national court or tribunal could take out a “piece of the puzzle” and rearrange it to fit its specific mandate or interpretative tastes while effectively ignoring all the other elements in the property regime’s entire spectrum.

Second, the *J.A. Pye* case illustrates the way in which Article 1’s property clause is being applied not only to governmental expropriation, but also to national laws governing deprivation of possession and other types of property rights infringements among private persons. Thus, even when such a legal mechanism starts out as “public,” the unique dual nature of property rights may bring about a significant conceptual spillover between the areas traditionally classified as private or public.

It should be emphasized that the extent to which the supranational property clause will intervene in private law disputes is not inherent or

116. *J.A. Pye II*, App. No. 44302/02, ¶ 75.

117. *Id.* ¶ 72.

118. *Id.* ¶ 74.

119. See *Generation Presentation—Court of Justice of the European Union*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_6999/ (last visited Nov. 11, 2010).

120. *J.A. Pye II*, App. No. 44302/02, ¶ 75.

predetermined. The public/private interface varies among different types of domestic property systems and between various supranational systems, and may change even within a particular system over time.

At the same time, however, it seems almost inevitable that a “property discourse” will have some sort of broader-based influence on the relevant property regime, including in the private law realm. Thus, to the extent that current and future design principles of BITs turn to a property discourse to regulate the protection of cross-border investments, the BIT structure will have to come to terms with the entire array of jurisprudential dilemmas that typify a property system. We now turn to consider in detail the potential difficulties of such BIT property protection.

IV. THE INTRICACIES OF BIT PROPERTY PROTECTION

In the preceding Parts, we reviewed the development of the BIT movement, the theories that underlie the design of BITs as property-protecting mechanisms, and several property law features that challenge the notion of property in the context of BITs. We now move to conceptualize more systematically several factors that may call into question the universal applicability and effectiveness of the BITs regime as part of international law.

A. *Cultural Heterogeneity and the Concept of Property*

At the heart of the BIT regime lies the concept of the property, or “investment,” which is to be protected, if not by proscribing expropriation, then at least by adequate compensation. BITs define investment exceedingly capaciously, as Section C, *infra*, elaborates. But regardless of their type, BITs assume that this investment—the protected property—*belongs* to the investor. It cannot, or should not, be taken from her. This fundamental principle hides an implicit assumption that the investor’s title in the investment assets—her ownership and entitlement—is clear and well defined. In other words, while the investor’s title may be disputable as a normative matter, such that in certain circumstances the State may expropriate her property, her title is undisputed (perhaps even indisputable) as a positive matter, such that all societal actors know what belongs to whom.

This notion of well-defined and well-protected property rights is in no way limited to BITs. In fact, it underlies the broad structural reforms promoted by international financial institutions, sometimes referred to as “governance” or “institutional quality,” which Part II referred to in discussing the empirical evidence about BITs and FDI.¹²¹ This policy derives from the new institutional economics’ insight that formalizing property rights and providing them with effective protection through formal social (i.e., legal) institutions is essential for a thriving market economy, while the latter is essential for economic development. We do not intend in the present context to quarrel with new institutional economics or with some of the policy prescriptions that have been

121. See *supra* notes 40-45 and accompanying text.

derived from it. We will, however, suggest that at least in the BIT context, this line of reasoning may run into serious difficulties. In this Section, we theorize and advance some evidence for the proposition that “property” may be conceptualized and protected differently in different cultures.¹²²

Property is not only a legal concept; it is also a fundamental psychological factor. Since the time of William James, one of the founding fathers of modern psychology, psychologists have discussed the notion of property and how it relates to individual personality and development. More recently, the literature refers to this concept as “psychological ownership.”¹²³ The idea is “that that there is a ‘psychology of mine and property’ that attaches itself to objects.”¹²⁴ We argue that the contextual meaning of property extends further—from the individual level to the cultural level.

Our theoretical starting point is Markus and Kitayama’s seminal article, which coined the term “construals of the self” to show that the very notion of being a person, of a self, varies considerably across cultures.¹²⁵ Western cultures, they argue, referring primarily to North America and Western Europe, view the mature individual as an independent entity, whereas other cultures—mainly in Asia, Africa, and Southern and Eastern Europe—construe the self as interdependent. The healthy independent self is defined as one that can maintain integrity and clear boundaries across diverse social environments and can differentiate itself from significant others as part of the maturation process. In contrast, the interdependent self is characterized as a relational, interconnected self with fluid boundaries.¹²⁶ Crucially, such fluidity and contextuality of the self does not reflect instability or immaturity.¹²⁷ The major

122. In conducting this analysis we adopt the standard approach to two important questions, namely, (1) what is “culture”? and (2) whose cultures may be compared and deemed distinct? Although the definition of culture has been subject to recurring discussions, several social sciences, including anthropology, sociology, and psychology, generally agree that culture primarily consists of shared values, beliefs, symbols, and norms. With regard to the second question, it is common to treat nation-states as units of cross-cultural analysis notwithstanding the fact that cultural systems may develop in much smaller groups. For a short introduction, see PETER B. SMITH, MICHAEL HARRIS BOND & ÇİĞDEM KAĞITÇIBAŞI, UNDERSTANDING SOCIAL PSYCHOLOGY ACROSS CULTURES 30-33 (3d ed. 2006).

123. For a review, see Jon L. Pierce, Tatiana Kostava & Kurt T. Dirks, *The State of Psychological Ownership: Integrating and Extending a Century of Research*, 7 REV. GEN. PSYCHOL. 84 (2003).

124. *Id.* at 84.

125. Hazel Rose Markus & Shinobu Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, 98 PSYCHOL. REV. 224 (1991). For a recent review, see Steven J. Heine, *Cultural Psychology*, in HANDBOOK OF SOCIAL PSYCHOLOGY 1423-33 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 5th ed. 2010). See also Hazel Rose Markus & Shinobu Kitayama, *Cultures and Selves: A Cycle of Mutual Constitution*, 5 PERSP. PSYCHOL. SCI. 420 (2010).

126. Markus and Kitayama thus integrate insights that may be traced back to Max Weber and have prevailed in cultural and cross-cultural psychology for some time, especially with regard to individualism versus collectivism. For major contributions, see GEERT HOFSTEDE, *CULTURE’S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS* (2d ed. 2001); and HARRY C. TRIANDIS, *INDIVIDUALISM AND COLLECTIVISM* (1995). For further elaboration on differences within Western cultures, see Shalom H. Schwartz & Maria Ros, *Values in the West: A Theoretical and Empirical Challenge to the Individualism-Collectivism Cultural Dimension*, 1 WORLD PSYCHOL. 91 (1995).

127. See Tammy English & Serena Chen, *Culture and Self-Concept Stability: Consistency Across and Within Contexts Among Asian Americans and European Americans*, 93 J. PERSONALITY & SOC. PSYCHOL. 478 (2007) (showing that cross-cultural differences in self-concept are consistent and stable).

task of the interdependent self is not differentiation, but instead the maintenance of relationships, restraint, fulfillment of role obligations, and accounting for the thoughts, emotions, and behaviors of other people.

In the currently leading theory of cross-cultural dimensions by Schwartz, this fundamental difference maps onto a dimension of autonomy versus embeddedness.¹²⁸ According to Schwartz's theory, embeddedness represents a cultural emphasis on maintenance of the status quo, propriety, and restraint of actions or inclinations that might disrupt group solidarity or the traditional order. The opposite pole of autonomy describes cultures in which the person is viewed as an autonomous, bounded entity who finds meaning in his or her own uniqueness.

This distinction between an autonomous self, distinguished from other societal members by well-defined boundaries, and an embedded self, whose very societal existence is characterized by fluid, diffuse, and contextual relations with numerous others, is relevant to the legal realm.¹²⁹ Specifically, the notion of a person as a bounded social entity goes hand in hand with well-defined property rights and legal entitlements more generally. A cultural construal of the self as diffuse and contextual entails that legal entitlements, including entitlements to assets, will also be diffuse and less well defined. If in high-embeddedness cultures who and what one is may depend on context, then what one owns and the features of such ownership may also depend on context. The concept of property in such cultures may be fuzzy not because it is not fully developed; on the contrary, ownership would be fuzzy because the mature self who bears claims to property is fuzzy.

Thus far, there has been no empirical analysis of the relationship between culture and property rights. This paper is the first to do so, drawing on evidence about the closely related subject of the rule of law.¹³⁰ In its basic, narrow meaning, the rule of law implies that legal entitlements will be respected in most circumstances, irrespective of the context, because the ultimate source of guidance is what the law says. Respecting one's uniqueness and boundedness means that one's entitlements are also well defined. When a rule-of-law society provides people with a comprehensive set of rights and freedoms and effectively enforces them, it also gives concrete expression to cultural

128. See Shalom H. Schwartz, *A Theory of Cultural Value Differences and Some Implications for Work*, 48 APPLIED PSYCHOL. INT'L REV. 23 (1999). For a general overview of the subject, see SMITH ET AL., *supra* note 122, at 12-19.

129. The link between law and social relations is in itself not a novel idea. In modern legal writing, the conceptualization of property relations as a set of social relations dates back to the work of the legal realists in the early twentieth century, as well as to later writers in the critical legal studies school, such as Duncan Kennedy and Joseph Singer. See Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991). For a critical analysis of this writing, see Stephen R. Munzer, *Property as Social Relations*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36 (Stephen R. Munzer ed., 2001). Greg Alexander has recently constructed a broad-based progressive "social obligation" theory of property. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009). We leave a fuller discussion of Alexander's theory for another time.

130. The following passage draws on Amir N. Licht, *Social Norms and the Law: Why Peoples Obey the Law*, 4 REV. L. & ECON. 715, 738-39 (2008).

autonomy. In contrast, in high-embeddedness societies, respect for tradition, honoring elders, and obedience are salient values. The ultimate source of guidance about the right behavior may vary with context and cannot be rigid. In a study of some fifty countries, cultural emphasis on autonomy and de-emphasis on embeddedness emerges as a dominant factor that positively correlates with perceived levels of the rule of law in nations.¹³¹ This factor, moreover, was found to be causal; cultural orientations of autonomy versus embeddedness affect the level of the rule of law.¹³²

To more closely address the relations between cultural embeddedness versus autonomy and property rights, we exploit recently available comparative data on property rights protection to conduct a rigorous analysis of this issue.¹³³ In particular, as measures of property rights we utilize composite indices for physical property rights and intellectual property rights constructed by the Property Rights Alliance, an advocacy group inspired and led by Hernando de Soto.¹³⁴ The Appendix describes the data, presents the regressions, and discusses them more technically. Here we summarize the findings in a nontechnical way. Figures 2 and 3 depict graphically the relations between cultural embeddedness and the 2009 indices of physical and intellectual property rights protection, respectively. The dots represent country observations, and the sloping line represents the best linear relationship between each pair of variables. A clear negative association emerges, indicating that the more a country's culture emphasizes embeddedness values and de-emphasizes autonomy values, the less likely it is to protect property rights (in the way the latter are captured by the indices). The steeper slope for intellectual property rights protection in Figure 3 indicates that this association is stronger for this type of property.

131. Amir N. Licht, Chanan Goldschmidt & Shalom H. Schwartz, *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, 35 J. COMP. ECON. 659, 661 (2007). A similar effect was found for noncorruption and the praxis of democracy. *Id.*

132. Causality was assessed using instrumental variable regression analysis. In particular, this study shows that a grammar rule on pronoun drop license, which is linked to contextualization of subjects in speech, captures sufficient variability in autonomy/embeddedness to significantly predict governance. For further details and theoretical background, see Licht et al., *supra* note 131. See also Guido Tabellini, *Institutions and Culture*, 6 J. EUR. ECON. ASS'N 294 (2008) (adopting this empirical strategy). Anecdotally, Donald C. Clarke points out how this grammatical feature in Chinese obscures the identity of officials who may be responsible for sanctioning corporations. Donald C. Clarke, *How Do We Know when an Enterprise Exists? Unanswerable Questions and Legal Polycentricity in China*, 19 COLUM. J. ASIAN L. 50, 66, n.42 (2005).

133. The analysis is therefore limited to property rights protection. In addition, in the context of the public aspect of property law, see the collection of 104 property clauses in constitutions worldwide in VAN DER WALT, *supra* note 78.

134. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITAL TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000) (arguing that formalizing property rights is essential for utilizing capital).

Figure 2. Relation Between Cultural Embeddedness and Physical Property Rights

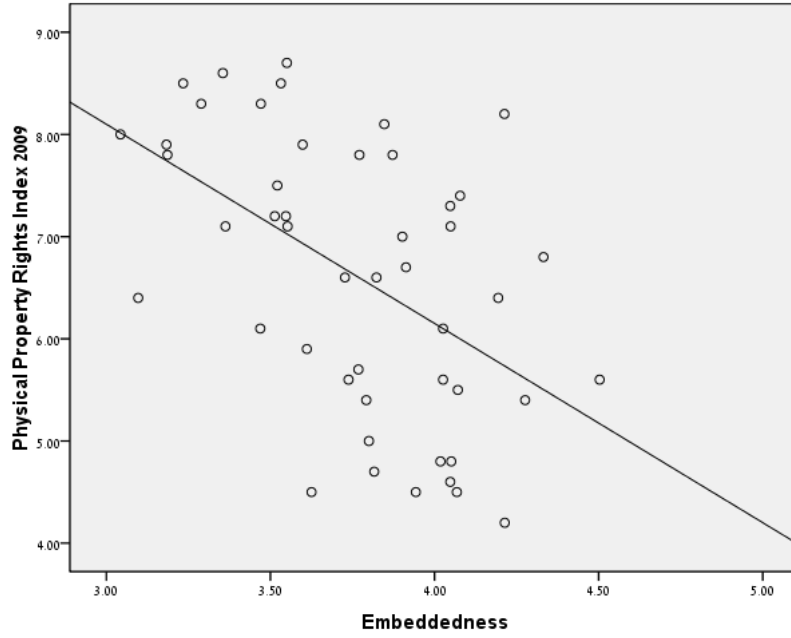
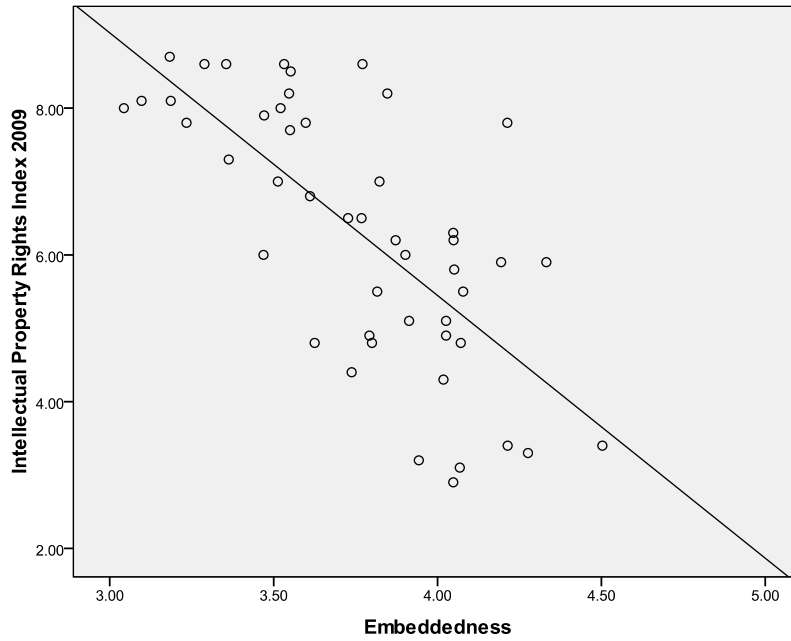


Figure 3. Relation Between Cultural Embeddedness and Intellectual Property Rights



While the association shown in the figures is clearly suggestive, the scattered dots in the graph indicate that in addition to inevitable measurement errors of these concepts, other factors may also be involved in the level of property rights protection. Moreover, the relations that the slopes suggest are merely correlational. They do not indicate the direction of causality—namely, whether cultural embeddedness actually *causes* lower levels of protection. To address both issues we use a regression analysis employing a previously developed basic specification,¹³⁵ which includes one cultural orientation from each of the three cultural dimensions distinguished by Schwartz¹³⁶ and two control variables, one each for British heritage and economic inequality. The British heritage variable captures, among other things, potential effects of having a common law system in most of the countries with such heritage, a factor that has been shown to have wide-ranging implications.¹³⁷ *Why* a British heritage would be linked to higher levels of legality is a question that has been relatively under-theorized, unfortunately.¹³⁸ We control for economic inequality to capture the effect of differences in economic power on respect or disrespect for property rights.¹³⁹

The regression results are striking. Embeddedness again emerges as a negative explanatory variable for both physical property rights protection and intellectual property rights protection, in line with our hypothesis.¹⁴⁰ In this setting, too, the results are more pronounced for intellectual property than for physical property. This may be the case because intellectual property is a more recent legal phenomenon. As a result, its informal social norms (e.g., copyright piracy), which are linked to cultural orientations,¹⁴¹ exhibit greater cross-country variability.

Similarly to the previously documented relations between cultural autonomy/embeddedness and the rule of law, the present regression results indicate that a country's fundamental societal orientation toward autonomy or embeddedness causally affects the degree to which its particular institutions protect property.¹⁴² These findings also shed light on a related question—

135. See Licht et al., *supra* note 131, at 671.

136. The dimensions are autonomy versus embeddedness, hierarchy versus egalitarianism, and harmony versus mastery. See Schwartz, *supra* note 128.

137. For a survey, see Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

138. For a theory that focuses on different patterns of colonial settlement, see Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001). For a recent analysis see Ronald J. Daniels, Michelle J. Trebilock & Lindsey D. Carson, *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, 59 AM. J. COMP. L. (forthcoming 2010), available at <http://comparativelaw.metapress.com/content/12117>.

139. The list of potentially relevant control variables for such a broad issue is especially lengthy and includes factors like economic development, societal fractionalization, and religion. Some of these factors raise additional problems because they may be mutually determined (endogenous) with the factors analyzed here. For a discussion and empirical analysis see Licht et al., *supra* note 131.

140. We defer discussion of other results to another time.

141. See Licht, *supra* note 130.

142. This proposition stems from the results in the two-step-least-squares regressions, which identify the influence of cultural embeddedness on property rights while isolating any (plausible) feedback effect from the level of property rights protection on cultural orientations.

namely, to what extent is the observed effect stable, or, put more generally yet, how stable are cultural orientations? Culture scholars agree that cultural values and orientations respond to and, to a degree, reflect contemporary socio-economic conditions, including the level of economic development, globalization, migration trends, and so forth. No culture is immune to the impact of these factors. At the same time, there is growing recognition that basic cultural stances may be highly stable.¹⁴³ The present analysis shows that whatever the (expected) effect of contemporary conditions on cultural autonomy/embeddedness, this cultural dimension has a stable core that exerts a strong influence on important policy outcomes such as the protection of property rights.

These findings thus link property, personhood, and culture in a psychological analytical framework. Property and ownership appear to be universal psychological constructs, whose content meanings are recognized similarly across cultures.¹⁴⁴ Control over material resources is among the factors comprising the value of power, which has been shown to be a universal motivational goal.¹⁴⁵ Insights from this research are now starting to inform legal discourse.¹⁴⁶ For example, the classic question as to whether first possession entitles one to ownership—decided in the affirmative in *Pierson v. Post*¹⁴⁷—is receiving empirical support.¹⁴⁸ Friedman and Neary aver that “children learn about ownership not only from adults, whose intuitions are in turn roughly consistent with the law, but also from their general experiences living in a culture in which ownership is closely linked with first possession.”¹⁴⁹ This echoes an old idea in anthropology, namely, that the social implications of property and ownership differ across cultures¹⁵⁰ (though they

143. See, e.g., Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LIT. 595, 597 (2000) (arguing that informal institutions are “pervasively linked with complementary institutions” such that the resulting institutions “have a lasting grip on the way a society conducts itself”).

144. See Ori Friedman & Karen R. Neary, *First Possession Beyond the Law: Adults’ and Young Children’s Intuitions about Ownership*, 83 TUL. L. REV. 679, 679-80 n.1 (2009) (citing DONALD E. BROWN, *HUMAN UNIVERSALS* (1991)).

145. See Shalom H. Schwartz, *Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries*, in 25 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1, 9, 28 (Mark P. Zanna ed., 1992); Shalom H. Schwartz, *Value Orientations: Measurement, Antecedents and Consequences Across Nations*, in *MEASURING ATTITUDES CROSS-NATIONALLY: LESSONS FROM THE EUROPEAN SOCIAL SURVEY* 169 (Roger Jowell et al. eds., 2009).

146. Margaret Radin has already related property and personhood in the legal literature as a conceptual matter. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). However, the link between property and psychology has not been addressed until recently. See Jeremy A. Blumenthal, “*To Be Human*”: *A Psychological Perspective on Property Law*, 83 TUL. L. REV. 609 (2009); Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757 (2009). For a recent law and psychology collaboration in the context of the “moral right” in copyright law, see Frederick Schauer & Barbara A. Spellman, *Artists’ Moral Rights and the Psychology of Ownership*, 83 TUL. L. REV. 661 (2009).

147. 3 Cai. 175 (N.Y. Sup. Ct. 1805).

148. See Ori Friedman, *First Possession: An Assumption Guiding Inferences About Who Owns What*, 15 *PSYCHONOMIC BULL. & REV.* 290 (2008); Ori Friedman & Karen R. Neary, *Determining Who Owns What: Do Children Infer Ownership from First Possession?*, 107 *COGNITION* 829 (2008).

149. Friedman & Neary, *supra* note 144, at 686.

150. For a review, see Floyd W. Rudmin, *Cross-Cultural Correlates of the Ownership of Private Property: A Summary of Five Studies*, *ANTHROGLOBE J.* (2006), <http://www.anthroglobe.info/>

may be a universal psychological construct at the individual level).

To put some contextual flesh on the regression findings, we invite readers to consider the stark differences between North American and North-East Asian cultures. The former (mostly in the United States) has been characterized as high on individualism or autonomy, the latter (mostly in China) as high on collectivism or embeddedness.¹⁵¹ These differences have historical roots that may go back to Aristotle and Confucius and have been linked to a variety of psychological factors, leading to the treatment of cultures as “systems of thought.”¹⁵² Markus and Kitayama thus point out that American culture emphasizes individual inalienable rights—for example, “life, liberty, and the pursuit of happiness”—while the Chinese culture emphasizes group harmony, as reflected in the Confucian tradition.¹⁵³

Consistent differences in conceptions of property may be observed in additional contexts. For instance, in 2007, China enacted its Property Rights Law of the People’s Republic of China after years of stormy debates.¹⁵⁴ Codes of civil law countries, most prominently Germany and Japan, explicitly influenced the drafting of the statute.¹⁵⁵ But this did not mean that China turned its back on its ideological and cultural heritage, nor that the adoption of Western formats and concepts dictated a particular substantive outcome. Thus, alongside the protection of individual property rights in Article 4, under which such rights “shall not be infringed by any institute or individuals,” the statute simultaneously includes the same protection for state and collective property rights.

The concept of collective property rights, which may sound like an oxymoron to legal purists in Western legal systems,¹⁵⁶ reflects deeply rooted

docs/rudminf_ownership_000000.htm (meta-analyzing findings of earlier anthropological studies on cultures around the world and concluding that “private ownership [is found] to be a positive correlate with agricultural subsistence, social stratification, social control based on law and religion, large populations and permanent settlements, patriarchal family norms, support of the aged, especially aged men, and economic practices of trade, money, debt, metallurgy, and war”).

151. See SMITH ET AL., *supra* note 122.

152. Richard E. Nisbett et al., *Cultures and Systems of Thought: Holistic Versus Analytic Cognition*, 108 PSYCHOL. REV. 291 (2001); see also Alan Page Fiske et al., *The Cultural Matrix of Social Psychology*, in HANDBOOK OF SOCIAL PSYCHOLOGY 915 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998); Kaiping Peng, Daniel R. Ames & Eric Knowles, *Culture and Human Inference: Perspectives from Three Traditions*, in HANDBOOK OF CULTURE AND PSYCHOLOGY 245 (David Matsumoto ed., 2001). The focus in these theories is on cultural approaches to ambiguity, contradiction, and related concepts. Although Alexander mentions the “Aristotelian notion that the human being is a social and political animal,” it appears that he refers to a different aspect in Aristotle. Alexander, *supra* note 129, at 760. This issue lies outside the scope of this Article.

153. Hazel Rose Markus & Shinobu Kitayama, *A Collective Fear of the Collective: Implications for Selves and Theories of Selves*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 568 (1994).

154. Zhonghua Renmin Gongheguo Wuquanfa (中华人民共和国物权) [Property Rights Law of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007), 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 291. An unofficial English version is available at <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/property-rights-law-of-the-peoples-republic-of-china.html>. See also Mo Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L.J. 317, 321 (2008).

155. Lehavi, *supra* note 106, at 437.

156. This is not to say that Western thought has not considered the potential advantages of collective ownership over private ownership in specific scenarios. Probably most prominent in this

views about the relations between persons and assets in China. Traditionally, households and clans held property collectively and intertemporally.¹⁵⁷ This concept, however, may also allude to China's more recent township and village enterprises (TVEs). In these entities, remnants from China's turbulent twentieth century, there are no property rights to speak of. Assets have been held collectively for the benefit of town and village residents and run by managers with no clear accountability. Naughton thus notes that "[t]he complexity of these arrangements has led some to describe TVE property rights as 'fuzzy.' In fact, the property rights were able to accommodate numerous stakeholders flexibly, adapt to an enormous range of situations, and often produce effective and entrepreneurial organizations."¹⁵⁸ It may be the case that in the particular institutional environment of government structure, TVEs provided security against expropriation by local governments.¹⁵⁹ In any event, the complete fuzziness of property rights within the TVEs has not prevented them from becoming China's major engine of growth, thus seemingly defying the link between well-defined, well-protected property rights and economic development, and, more generally, between the rule of law and development.¹⁶⁰ Moreover, this fuzziness of legal entitlements is not limited to standard property. Even corporations, which arguably are purely legal constructs, for a long time have not been fully recognized as entities in China, while families, which do not have a legal status as such, have been.¹⁶¹ As Donald Clarke has masterfully demonstrated, it is not even possible to know if a Chinese corporation exists, as Chinese courts and government agencies do not consider a statute to be necessary for the recognition of an organization's existence.¹⁶²

To recap, while a full discussion of general propositions on culture, the rule of law, and development greatly exceeds the scope of this Article,¹⁶³ it

respect is the work of Elinor Ostrom, the 2009 Nobel Prize laureate in economics, on common property regimes (CPRs). See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990). It should be emphasized, however, that Ostrom's analysis is based largely on utilitarian considerations, and that one of the building blocks of a successful CPR is that "individuals or households who have rights to withdraw resource units from the CPR must be clearly defined, as must the boundaries of the CPR itself." *Id.* at 90-91. Therefore, fuzziness and fluidness are not part of the package. The CPR is "exclusive property with respect to outsiders." Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Talks, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 181 (1998). For a depiction of the American property system as generally based on rights formalism and free market propensity, see Amnon Lehavi, *The Taking/Taxing Taxonomy*, 88 TEX. L. REV. 1235, 1242-55 (2010).

157. See Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1616-24 (2000).

158. BARRY NAUGHTON, *THE CHINESE ECONOMY: TRANSITIONS AND GROWTH* 122 (2007); see also Martin L. Weitzman & Chenggang Xu, *Chinese Township-Village Enterprises as Vaguely Defined Cooperatives*, 18 J. COMP. ECON. 121 (1994).

159. Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89, 107 (2003).

160. See Brett H. McDonnell, *Lessons from the Rise and (Possible) Fall of Chinese Township-Village Enterprises*, 45 WM. & MARY L. REV. 953 (2004); Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. INT'L L. & POL. 551 (2009).

161. See Ruskola, *supra* note 157, at 1623-45.

162. Clarke, *supra* note 132.

163. For a good treatment, see, for example, John K.M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, in *LAW AND DEVELOPMENT IN EAST*

stands to reason that the world of BITs should be influenced by such deeply rooted societal orientations. Societies' cultural orientations constitute their fundamental institutions.¹⁶⁴ They affect shared, implicitly held beliefs on what is right, legitimate, and desirable. Cultural orientations are therefore likely to shape views about ownership in property and what might constitute an infringement of property rights. They are also likely to shape views about what compensation in case of expropriation would be fair and equitable—a heavily value-laden concept—both in the eyes of countries party to BITs as well as in the eyes of arbitration tribunals.¹⁶⁵ Crucially, culture affects both personally held values and beliefs and more specific social institutions. There is no clear way to avoid its impact.¹⁶⁶ The fragmented structure of the BITs network and of arbitration-based dispute resolution will only exacerbate these differences.¹⁶⁷ Finally, because cultures are widely seen as very stable institutions, the relations we uncover in this Article suggest that BITs and other efforts to unify property regimes may face substantial hurdles.

B. Actor Heterogeneity

Another prominent and related feature that is instrumental to the feasibility of BIT-based property protection concerns the level of homogeneity among the actors on different sides of the border. Here, we do not refer to the overall cultural attributes of the respective societies, but more pointedly to the identity of the specific parties that are typically affected by the property norms regarding a certain kind of resource.

Concisely, our main argument here is that to the extent that the affected parties share an epistemological, social, and cultural common ground, there is a greater likelihood that supranational norms will have *in rem* validity, even if the respective domestic property systems are otherwise different from one another. This could be achieved in view of the fact that such actors are better able to identify, absorb, and act based on the potential implications of the additional layers of norms introduced by BITs. The same holds, moreover, when the parties are part of a bottom-up process of *creating* norms, practices, and other socio-legal mechanisms that could affect the way in which BIT cross-border norms are applied. In contrast, when those affected by the property norms are made up of more heterogeneous groups, the ability of the BIT mechanism to set up a property regime that promotes certainty declines dramatically.

AND SOUTHEAST ASIA 70 (Christoph Antons ed., 2003).

164. Licht, *supra* note 130, at 728.

165. Commentators have emphasized that the “fair and equitable” standard does not simply refer to the civil law concept of a remedy *ex aequo et bono*. See *supra* note 20 and sources therein; see also Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept*, 8 CHI. J. INT’L L. 621 (2008).

166. See Williamson, *supra* note 143.

167. For preliminary attempts to assess the performance of BIT arbitrations, reaching inconclusive results, see Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT’L L.J. 435 (2009); and Kathleen S. McArthur & Pablo A. Ormachea, *International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction*, 28 REV. LITIG. 559 (2009).

To understand the role of the actors' level of homogeneity, consider the *lex mercatoria*. This body of norms developed in Medieval Europe as a grassroots form of private ordering that connected merchants from different territories and was aimed at enabling traders to follow common norms and resolve disputes speedily.¹⁶⁸ Although there is some uncertainty about the historical origins and actual content of the *lex mercatoria*,¹⁶⁹ it is safe to say that during that period, a set of customary norms applying to the class of merchants evolved on a nondomestic basis and was practiced in various meeting places, typically in trade fairs across the continent. These fairs also became places for dispute resolution, with merchants themselves setting up and administering the tribunals.¹⁷⁰

The importance of the law merchant norms exceeded the contractual aspects of the transactions. In fact, the law merchant created the prominent legal and financial instruments of personal property that are known today. Although instruments such as letters of credit existed in earlier periods, the law merchant era introduced the practice of a documentary transfer of an intangible—the right to a debt—and, even more importantly, the evolution of the practice by which a trader who purchased the negotiable instrument (e.g., a bill of exchange) in good faith did so free of any prior interests of third parties in it, including those of the original parties to the sale transaction. The negotiable instrument thus acquired an independent status as an object of property, entitling its holder to a certain amount of money, such right being separated from the contractual rights and duties embedded in the original sale transaction.¹⁷¹

Moreover, besides some clear property norms that had been accepted throughout the trade community, the merchants also were aware of what we now call “incomplete” contractual and proprietary aspects of commercial relationships.¹⁷² Thus, the core of trade practices was the “good faith” principle.¹⁷³ The relative homogeneity of traders' commercial interests and social understandings across the continent allowed them to handle effectively such contingencies and ambiguities by consent or through the streamlined process of expert tribunals. Such cross-border conformity and efficiency gradually declined as national courts and legislatures took over commercial law.¹⁷⁴

Nowadays, with the growing globalization of economies, questions of cross-border organizational structures and choice strategies for substantive and procedural property norms reemerge in full force, both in BITs and in other contexts. The fact that merchants across borders still share substantial common

168. See, e.g., LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 7-21 (1983).

169. See Richard A. Epstein, *Reflections on the Historical Origins and Economic Structure of the Law Merchant*, 5 *CHI. J. INT'L L.* 1, 1-4 (2004).

170. See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 46 (2000).

171. *Id.* at 47-49.

172. Lehari, *supra* note 87, at 27-30.

173. TRAKMAN, *supra* note 168, at 7.

174. See, e.g., BRAITHWAITE & DRAHOS, *supra* note 170, at 46-47.

ground has led to numerous calls to recognize and validate a “New Lex Mercatoria,” which would have both contractual and proprietary supranational effects.¹⁷⁵ Dalhuisen suggests, for example, the creation of a new integrated system among professionals, in which the contemporary needs of cross-border finance and investment would be effectively met. Arguing that practices, custom, and general legal principles have taken root among professionals across much of the globe, Dalhuisen suggests that such a new structure could work even if it is not made up of a single coherent and closed legal system, but is rather committed to “legal dynamism, internationalization, and experimentation.”¹⁷⁶

To better address the reality of markets and financial instruments, the new law merchant should, *inter alia*, liberally accept the proprietary status of user, enjoyment, and income rights in movable assets, and also allow for trusts, floating charges, and finance sales to more freely operate in the *in rem* realm.¹⁷⁷ Moreover, new mechanisms for proprietary status, protection, and transfer should be designed specifically for each type of resource or product, based on the relevant trade norms and practices that apply to it. Being aware, however, of the fact that such innovative industry-driven property or property-like structures would also affect other kinds of third parties, and that certain realms of the law would remain domestic even in a new merchant law era, Dalhuisen calls, for example, for a reformulation of domestic bankruptcy laws, which would recognize these new proprietary forms and interests.¹⁷⁸

Without examining in detail the feasibility of a new *lex mercatoria*, it seems clear that there are better prospects for supranational property norms where the relevant recipients of the norms are relatively homogenous. Such actors would have a genuine interest in reaching common ground not only for the contractual aspects of professional dealings, but also for shaping the broader property contours by trying to bridge potential discrepancies between BIT provisions and domestic property doctrines.

Conversely, for heterogeneous parties, this task may prove overly ambitious. Consider the following case, implicating the 1993 BIT between Germany and Paraguay.¹⁷⁹ In the late 1990s, the government of Paraguay refused to apply its own land laws to transfer title of lands in the village of Palmital to 120 landless peasant families, who had been occupying for years an

175. For the renewed interest in the *lex mercatoria*, see, for example, Symposium, *The Empirical and Theoretical Underpinnings of the Law Merchant*, 5 CHI. J. INT'L L. 1 (2004).

176. JAN H. DALHUISEN, DALHUISEN ON TRANSNATIONAL AND COMPARATIVE COMMERCIAL, FINANCIAL AND TRADE LAW 30-33 (3d ed. 2007).

177. These rights, however, should be subject to protections for bona fide purchasers and sometimes also to protections for purchasers in the ordinary course of business for commoditized assets. *Id.* at vi, 20-25.

178. *Id.* at vii, 582-86.

179. Gesetz zu dem Vertrag vom 11. August 1993 zwischen der Bundesrepublik Deutschland und der Republik Paraguay über die Förderung und den gegenseitigen Schutz von Kapitalanlagen [Law on the Treaty of August 11, 1993 Between the Federal Republic of Germany and the Republic of Paraguay on the Promotion and Reciprocal Protection of Investments], Dec. 5, 1997, BGBl. II at 2080 (Ger.) [hereinafter Germany-Paraguay BIT].

estate of over 1,000 hectares (nearly 2,500 acres) that had been idle.¹⁸⁰ The refusal to apply these agrarian reform laws and either to force the landowners to sell the lands or to expropriate them was grounded in the fact that the land was owned by several German citizens and that the BIT among the two countries arguably prohibited the expropriation of rural property owned by Germans.¹⁸¹ The peasant families were forcibly evicted from the land, and their leaders were imprisoned.¹⁸² Later, the peasants, the owners, and the government of Paraguay reached an out-of-court settlement that allowed the peasants to remain on the land.¹⁸³ But at the same time, it seems that both on the formal (prior to settlement) and informal levels, the provisions of the BIT did not represent common ground among the different actors affected by the property norms applying to the asset. Local land rules were simply pushed to the side to make room for a property *lex specialis* for the owners, without considering the overall implications for the country's land regime. The implementation of country-wide agrarian land reform in lands owned by German citizens was effectively blocked due to the BIT.¹⁸⁴

Had the political economy considerations in such a scenario been different, so that local land law and policy prevailed (based, for example, on sincerely held values of justice and access to land that prevail in Paraguay among both residents and decisionmakers), the investor probably would have ended up suing for the BIT violation. In short, given the enormous cultural, economic, and legal heterogeneity among the relevant actors involved in this dispute, and the fact that such disparity was not initially bridged by systematically revising the property system in land to accommodate both local and supranational norms, the aspiration of the BIT to promote security and stability of property rights was doomed to fail.

C. Asset Heterogeneity

Another source of potential heterogeneity, which also touches to some extent on the issue of property actors, concerns the types of *assets* that are the object of property rights. Different types of assets diverge substantially in the ways that the corresponding property rights are constructed, allocated, and enforced. This in turn influences the ability of BITs to create property rights and duties that are distinct from domestic laws.

Consider, first, the case of land. Different rights and interests in land are inherently bound up in an exceptionally tight manner. As the above example of the land in the Paraguayan village of Palmital indicates, *the same tract of land* may implicate numerous right holders with competing claims to the asset.

180. For reports on this case, see UTE HAUSMANN & ROLF KÜNNEMANN, GERMANY'S EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS 15 (Ute Hausmann et al. eds., 2006), available at http://www.eed.de/fix/files/doc/eed_Germanys_extraterritorial_human_rights_06_eng.pdf; and *A German Privilege*, GERMAN-FOREIGN-POLICY.COM (Nov. 21, 2007), <http://www.german-foreign-policy.com/en/fulltext/56112>.

181. HAUSMANN & KÜNNEMANN, *supra* note 180, at 15.

182. *Id.*

183. *Id.*

184. *Id.*

These conflicts may touch not only on possession and use of the land (e.g., in the case of a landowner vis-à-vis a tenant), but also on other types of interests, such as easements and mortgages, as well as the interests of different circles of claimants and outside stakeholders, such as neighbors who may have a recognizable claim to prevent certain kinds of use and enjoyment of the land defined as nuisances under domestic law.¹⁸⁵

This means that even if we assume, *arguendo*, that it is normatively attractive to allow legal discrimination in favor of foreign investors in some legal realms, enforcing this policy through the BIT mechanism may often prove difficult.

Matters may be somewhat different for other types of assets. On the face of it, the technical feasibility of providing in a treaty that a patent owned by a foreign citizen cannot be taken through a compulsory license in the host country would seem to involve fewer direct stakeholders, although it might still indirectly impact would-be consumers of an end product that might have been developed using the protected technology.¹⁸⁶ Ownership in corporations poses a challenge of an altogether different scope. Whatever one's favorite metaphor for a corporation—a “nexus of contracts,” a “mediating hierarchy,” etc.¹⁸⁷—there is no denying that the interests of several stakeholder groups are closely intertwined in it. The *raison d'être* of the corporation is to pool together resources from various constituencies under a unified and separate legal umbrella.¹⁸⁸ The interaction between these heterogeneous interests is highly complex, making it difficult to isolate and assess only one of them.¹⁸⁹ This interaction, moreover, varies across national systems of corporate governance,¹⁹⁰ notwithstanding a general similarity of corporations as investor-oriented entities.¹⁹¹

In any case, it is clear that property poses a challenge for legal differentiation, one that is different from other types of legal rights. Compare this to the feasibility of creating legal differentiation in income taxation, such that, hypothetically, a foreign resident working in the host country would pay only twenty percent in tax for the same level of gross revenue for which a local

185. Lehavi, *supra* note 81, at 2004-05.

186. The United States is demanding from its trade partners more extensive protection for intellectual property rights than is conferred by the multilateral standards in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Such standards, which can be created by signing bilateral intellectual property agreements (BIPs), are known as TRIPS-plus. See Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791, 794-97 (2001).

187. See, e.g., Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 254 (1999); Melvin A. Eisenberg, *The Conception that the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 819 (1999).

188. See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 390 (2000).

189. For one example, see Henry T. C. Hu & Jay Lawrence Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321, 1364-65 (2007).

190. See, e.g., MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT (2003); Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 L. & CONTEMP. PROBS. 9 (1999).

191. See John Armour et al., *What is Corporate Law?*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 1-34 (2d ed. 2009).

resident pays thirty percent tax. This may be of course annoying to locals, but it is quite feasible as a matter of legal engineering. Property rights in assets present a different case. This is especially so when the different interests are embedded in the same physical resource, such as land, such that preferring the rights of the foreign investor to the asset based on the BIT would necessarily come at the expense of another (local) party, who loses her control and management *over the very same asset*.

But obviously, the issue of asset heterogeneity does not boil down simply to the issue of the technical feasibility of legal differentiation. In just about every legal system, the core justifications for protecting property rights may differ for different assets. The “bundle of rights” for land, chattels, intellectual property, shares, negotiable instruments, and so forth may be different, since society’s decisionmaking institutions may very well reach different conclusions when designing the basic structure of property for different resources, including different normative trade-offs between individual rights and the public interest.¹⁹² Various considerations of utility, ethics, egalitarianism, etc., may point to different normative choices of legal rules in land vis-à-vis intellectual property, for example. Accordingly, the legal boundaries of the “fair use” doctrine in copyrighted materials in the United States do not apply to the laws governing encroachments on private land.¹⁹³ Moreover, even when a country’s constitutional bill of rights refers generally to “property,” it seems clear at the outset that not all types of assets would be legally treated in the same way in property jurisprudence.¹⁹⁴ Accordingly, the attributes of culture, as analyzed in Section IV.B, *supra*, play a crucial role not only in explaining the differences among countries, but also those within a single legal system. For example, to the extent that a system recognizes that indigenous tribes’ cultures carry essential normative force that translates into increased constitutional protection for rights that reflect these cultural tenets, it is clear that this aspect of culture would have a strong impact on rights to land, but practically none, for example, on corporate shareholding.¹⁹⁵

BITs, however, are surprisingly agnostic on this issue. Take, for example,

192. Lehavi, *supra* note 81, at 2002.

193. For a discussion of such tension, see Timothy J. Brennan, *Copyright, Property, and the Right To Deny*, 68 CHI.-KENT L. REV. 675 (1993). For similarities and differences in the protection of property in land vis-à-vis intellectual property, compare Peter S. Menell, *Intellectual Property and the Property Rights Movement*, REGULATION, Fall 2007, at 36, with Richard A. Epstein, *A Response to Peter Menell: The Property Rights Movement and Intellectual Property*, REGULATION, Winter 2008, at 58.

194. Thus, for example, the constitution of post-Apartheid South Africa includes a special commitment to the just redistribution of land to correct past wrongs and to effect a genuine social transformation. For a comprehensive analysis, see GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY* 135-82 (2006). In comparison, South Africa seems to maintain a more “conventional” approach to property protection for rights in other types of assets. *See, e.g., First Nat’l Bank of S. Afr. Ltd. v. Comm’r, S. Afr. Revenue Serv.* 2002 (4) SA 768 (CC) (S. Afr.) (invalidating a statute that provided that a state tax lien would supersede the right of a lender to reserve ownership in chattels (in this case, motor vehicles) as security for its loan to the buyer).

195. For a famous case that defines certain aboriginal rights to land in Canada as relying directly on validating “practices, customs, and traditions which are integral to the distinctive aboriginal cultures of the group claiming the right,” see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 138 (Can.).

the provisions of the 2005 BIT between Germany and China,¹⁹⁶ two countries that are both powerful but nevertheless hold entirely different viewpoints on many issues, including in their property philosophy for landownership or intellectual property.¹⁹⁷ The nonexclusive definition of the term “investment” in Article 1 of the BIT includes: “(a) movable and immovable property and other property rights such as mortgages and pledges; (b) shares, debentures, stock and any other kind of interest in companies; (c) claims to money . . . ; (d) intellectual property rights . . . ; [and] (e) business concessions”¹⁹⁸ The BIT provisions regarding the protection of investment apply across the board and do not make a single reference to the potential differentiation among different types of assets in delineating the scope of protection for investments.

Time will tell whether BIT disputes will be resolved differently based on the type of resource at stake. If (although it seems unlikely) German investors were protected in similar terms based on the “fair and equitable treatment” clause or the “expropriation” article regardless of the type of investment they make in China, the effect of such arbitral jurisprudence on the diversity of property domestic regimes in China would go well beyond the specific disputes and might undermine the essentially different perspectives that Chinese decisionmakers hold on land, shares, chattels, or copyright. If, conversely, arbitral awards generally were to defer to the different policy considerations that govern the design of domestic property doctrines for different types of resources in Chinese law, the core goals of investor certainty and host government commitments might well be undermined for German investors, with potential implications for any of the approximately 130 BITs to which Germany is a signatory.¹⁹⁹

In view of the rapid proliferation of BIT disputes and the gradual switch toward a “property discourse” in resolving them, these questions regarding the heterogeneity of resources—which relate to one of the key design principles of BIT-making for countries such as the United States or Germany, i.e., a “one-size-fits-all” model BIT—may come under growing pressure and cast doubts on the ability of BITs to provide a stable legal regime for investors.

D. *Legal Norm Heterogeneity: Vertical*

Property is the subject of multiple layers of norms, of which BITs

196. Gesetz zu dem Abkommen vom 1. Dezember 2003 zwischen der Bundesrepublik Deutschland und der Volksrepublik China über die Förderung und den gegenseitigen Schutz von Kapitalanlagen [Law on the Agreement between the Federal Republic of Germany and the People’s Republic of China on the Encouragement and Reciprocal Protection of Investments], Aug. 3, 2005, BGBL. II at 732 (Ger.) [hereinafter Germany-China BIT].

197. For an analysis of China’s distinctive normative approach to property rights in land, see *supra* text accompanying notes 154-162.

198. Germany-China BIT, *supra* note 196, art. 1.

199. For a formal list of the BITs to which Germany is a signatory, see BUNDESMINISTERIUM FÜR WIRTSCHAFT AND TECHNOLOGIE, ÜBERSICHT ÜBER DIE BILATERALEN INVESTITIONSFÖRDERUNGS UND SCHUTZVERTRÄGE (IFV) DER BUNDESREPUBLIK DEUTSCHLAND [REVIEW OF BILATERAL PROMOTION AND PROTECTION AGREEMENTS OF THE FEDERAL REPUBLIC OF GERMANY] (Aug. 28, 2010) (Ger.), available at <http://www.bmwi.de/BMWi/Redaktion/PDF/B/bilaterale-investitionsfoerderungs-und-schutzvertraege-IFV,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>.

constitute only one layer. Thus, the boundaries of property rights, especially in land, may be blurred regardless of efforts by parties to BITs to delineate them with clarity. A BIT, or an adjudication applying it, that disconnects itself from other layers of property norms by looking to the provisions of the BIT alone may prove inefficient.

To illustrate the problem of vertical heterogeneity regarding the legal design of property norms, consider another dispute implicating the Germany-Paraguay BIT.²⁰⁰ In 2001, the Sawhoyamaxa Indigenous Community of the Enxet People submitted a petition to the Inter-American Commission on Human Rights, alleging that the government of Paraguay violated the American Convention on Human Rights, including the right to property.²⁰¹ The tribe argued that the government failed to recover part of the tribe's ancestral lands totaling over 14,000 hectares (about 34,600 acres) in line with the American Convention and with Paraguayan domestic legislation, both of which recognize the right of indigenous peoples to preserve their way of life in their traditional lands.²⁰² As a result, community members were living in inhumane conditions, resulting in a number of deaths due to lack of food and medical care.²⁰³ The government contended that the lands were formally owned by German citizens, and that the executive branch's efforts to expropriate the land were effectively blocked by the legislature because of the provisions of the Germany-Paraguay BIT.²⁰⁴

In March 2006, the Inter-American Court of Human Rights ruled in favor of the tribe.²⁰⁵ The Court reasoned that the enforcement of BITs does not allow a state to avoid its obligations under the American Convention on Human Rights, but rather that "their enforcement should always be compatible with the American Convention."²⁰⁶ The Court further reasoned that although it is "not a domestic judicial authority with jurisdiction to decide disputes among private parties," it is nevertheless competent to "analyze whether the State ensured the human rights of the members of the Sawhoyamaxa Community."²⁰⁷

In the Court's view, the government of Paraguay's recognition of the tribe's communal property rights to traditional lands remains "meaningless in practice if the lands have not been physically . . . surrendered because the adequate domestic measures necessary to secure effective use and enjoyment of said right . . . are lacking."²⁰⁸ The Court thus ordered the state to "adopt all legislative, administrative and other measures necessary to formally and physically convey to the members of the Sawhoyamaxa Community their

200. Germany-Paraguay BIT, *supra* note 179.

201. American Convention on Human Rights, *supra* note 71, art. 21.

202. Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 146, ¶¶ 116-124 (Mar. 29, 2006).

203. *Id.* ¶¶ 73(61)-(74).

204. *Id.* ¶ 137.

205. *Id.* ¶ 248.

206. According to the Court, the American Convention "is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States." *Id.* ¶ 140.

207. *Id.* ¶ 136.

208. *Id.* ¶ 143.

traditional lands, within three years.”²⁰⁹

The *Sawhoyamaxa* case vividly demonstrates the complicated, multilayered structure of property law (in land, in this case), involving international, national, and sub-national norms and institutions. This array includes (1) an international human rights convention and its corresponding international tribunal; (2) a cross-border bilateral treaty with its distinctive arbitral forum; (3) general provisions in the Paraguayan Constitution and national legislation about the recognition of traditional tribal rights and commitment to land restitution; (4) the conventional land law of Paraguay with its titling system and property rights that emanate from it; and (5) tribal norms, institutions and practices of sub-society groups. All of these property layers are tied up in the same physical asset in a highly complicated and multidirectional manner.²¹⁰

At the same time, this case illustrates the pitfall of isolating one layer of norms, which is within the mandate of the adjudicative tribunal or is otherwise considered as particularly prominent, while effectively ignoring the vertical complexity of property. We argue that there is an inherent tension in the Inter-American Court of Human Rights’s statement in *Sawhoyamaxa* that it is “not a domestic judicial authority with jurisdiction to decide disputes among private parties,”²¹¹ but that it is nevertheless competent to analyze whether Paraguay ensured the human rights of the tribe, and that the court is thus capable of ordering the transfer of all lands within three years.²¹²

In this case, the BIT claim was on the losing side, but the jurisprudential difficulty would be the same if the BIT were to trump other property layers. More generally, the Court’s intervention in this matter dramatically upset the Paraguayan land regime by effectively holding that traditional tribe interests supersede formal registered rights under Paraguayan land law. Yet the Court explicitly ignores, in the name of lack of jurisdiction, the major jurisprudential considerations that are inherently involved in such a fundamental change.²¹³ It effectively disregards the numerous layers of interests and categories of stakeholders that are physically inseparable from one another due to the unique traits of land, and that must be comprehensively dealt with so as to effectively rearrange the overall property bundle in land.

In this case, beyond the general jurisprudential problem that we point to, the BIT simply failed to provide the German landowners with the security that they and others might have envisioned following the signing of the BIT between the countries. Thus, the nature of property rights is such that their boundaries may often be blurred notwithstanding efforts on behalf of parties to BITs to delineate them with clarity. In this sense, BITs may simply prove overly ambitious as a matter of legal design.

209. *Id.* ¶ 248(6).

210. Lehavi, *supra* note 106, at 452-55.

211. *Sawhoyamaxa Indigenou Cnty.*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 146, ¶ 136.

212. *Id.* ¶ 215.

213. *Id.* ¶ 136.

E. *Legal Norm Heterogeneity: Horizontal*

Yet another type of potential heterogeneity that may result from the structure of supranational instruments such as BITs is one that we label “horizontal” heterogeneity of legal norms. While BITs were originally intended to increase certainty and stability, extra-national rules and decisions do not necessarily mean more uniformity in the law. In fact, BITs may exacerbate unwarranted differentiation. Since a single country is typically a signatory to dozens of different BITs, and each of these BITs may include different procedural and substantive provisions about the protection of investments and property rights in relation thereto, the result may be “normative over-fragmentation” of the property regime within the host country.²¹⁴

The problem of normative over-fragmentation can be acute, as, for example, in the case of land. This is because the already complicated web of intertwined rights and interests pertaining to the same asset is further fragmented when people seek to enjoy their *lex specialis* as foreign residents pursuant to BITs. And with the ever-growing phenomenon of foreign investment in real estate for the purposes of investment and speculation, with investments flowing in various, often counterintuitive directions,²¹⁵ no one can anticipate how many different BIT-specific land law provisions will plausibly be said to apply to the same tract of land in a specific place at a given time.

Consider a hypothetical scenario in which a piece of land is located in Country A. The land is owned by a citizen of Country B; the tenant leasing the land for commercial purposes is a citizen of Country C; the landowner’s mortgagor is a financial institution registered in Country D; the tenant’s secured creditor for purchased machinery items that are fixed to the ground is a resident of Country E; an easement holder on the land (e.g., the holder of right of passage on it) is a resident of Country F. A conflict arises when a resident of Country G claims that he is the true owner of the land but his rights have been taken away from him by a series of fraudulent deeds until the land ended up in the hands of the current landowner. Such conflicting property claims are a highly complicated matter in a regular domestic dispute. But when each one of the stakeholders in such a scenario argues that his rights deserve distinctive, stronger protection based on the provisions of the BIT between his country and Country A, the host country, the problem of horizontal over-fragmentation may become prohibitive.

A recent case decided by the ECJ illustrates the problem of fragmentation in the BIT context. Although it is essentially a “vertical” conflict, since it deals with the relationships between EU treaty provisions and a series of BITs signed between individual EU members and third countries, it attests to the fact that the BIT system is highly fragmented and thus legally fragile “horizontally” as well.

In March 2009, the ECJ ruled in favor of the Commission of the

214. Lehari, *supra* note 106, at 460-63.

215. See Weisman, *supra* note 61; see also *supra* text accompanying note 61.

European Communities (the Commission) in an action against Sweden,²¹⁶ with a practically identical case being decided on the same date against Austria.²¹⁷ Concisely, Sweden is a signatory to seventeen different BITs with non-EU members. Each of these BITs contains a clause under which each party guarantees to the investors of the other party “without undue delay, the free transfer, in freely convertible currency, of payments connected with an investment.”²¹⁸ The Commission took the view that these BITs were capable of impeding the applications of restrictions on movements of capital and on payments that the Council of the European Union might adopt as safeguard measures, and required Sweden to take steps to eliminate the incompatibilities concerning the provisions on such transfers contained in the various BITs. Interestingly, the Council has not yet adopted such safeguard measures, which it is authorized to take under Articles 57(2), 59, and 60(1) of the Treaty Establishing the European Community.²¹⁹

Sweden argued that since no such safeguard measures have been taken yet, requiring it to repudiate the BIT provisions vis-à-vis the third countries would not only be unnecessary, but would also create enormous legal uncertainty in other areas of members’ activity, especially since EU member states altogether have entered into more than a thousand BITs with non-EU countries, with each BIT containing comparable clauses on transfers.²²⁰ The ECJ, however, ruled in favor of the Commission, reasoning that the time involved in renegotiating a BIT and the unavailability of other international law mechanisms, such as suspension of the BITs, require Sweden to take immediate steps to eliminate the incompatibility so as to facilitate such potential EU safeguard measures.²²¹

Again, although this case originated in the “vertical” supremacy of the European Union over member states’ individual BITs, it raises broader concerns as to what one might view as the “illusion of certainty” in BITs. The horizontal fragmentation of BITs is particularly troubling when commitments are deemed to create property or quasi-property rights that come on top of domestic property rights for foreign investors.

Since current research demonstrates that incoherence between BIT provisions to which a country is party with different countries is the rule rather than the exception,²²² the proliferation of BITs may both undermine the ability of host countries to sustain a coherent property system and increase uncertainty among investors. This problem is especially acute when the conflict arises in

216. Case C-249/06, *Comm’n of the Eur. Cmities. v. Sweden* (Mar. 3, 2009), http://curia.europa.eu/jcms/jcms/j_6/ (enter “C-249/06” in “Case no” field, then follow link to “Judgment”).

217. Case C-205/06, *Comm’n of the Eur. Cmities. v. Austria* (Mar. 3, 2009), http://curia.europa.eu/jcms/jcms/j_6/ (enter “C-205/06” in “Case no” field, then follow link to “Judgment”). Germany, Lithuania, Hungary, and Finland joined Austria and Sweden as “interveners” (interested third parties) because the outcome would likely affect them as well. *Id.*

218. Case C-249/06, *Sweden*, ¶ 3.

219. Treaty Establishing the European Community arts. 57(2), 69, 60(1), Dec. 24, 2002, 2002 O.J. (C 325) 33.

220. Case C-249/06, *Sweden*, ¶¶ 18-22.

221. *Id.* ¶¶ 39-46.

222. U.N. CONFERENCE ON TRADE & DEV., *supra* note 17, at 56-61.

private law disputes involving multiple property claims—including BIT-based claims—to the same asset. To the extent that the BITs system continues to operate in the current fractured manner, the phenomenon of “horizontal heterogeneity” will increasingly present the parties with these major institutional and jurisprudential challenges.

Should the BIT system continue to operate in its current fractured manner? One might believe that notwithstanding its swollen dimensions, the BIT system may be taking only its first steps and will eventually converge toward one widely agreed-upon version. The model BIT trend mentioned above²²³ may lend support to such a belief. The evidence that property and property rights are intimately linked to national cultural emphases on autonomy versus embeddedness suggests otherwise, however.²²⁴ Even if the formal legal texts reach uniformity, policymakers, courts, and other societal institutions in different countries may apply these texts in a way that is consistent with their cultural beliefs. Moreover, beyond the basic text of the BITs, countries’ formal laws, too, are linked to cultural orientations,²²⁵ such that full convergence is simply impossible.

Finally, the analysis in the preceding two sections must not be mistaken for a claim against legal pluralism. Legal pluralism, especially in international law contexts, refers to the reality in which a particular phenomenon may be subject to normative prescriptions coming from several sources, some of which may be formal and some informal (e.g., social norms or customary law).²²⁶ One can readily observe that legal pluralism may introduce complexity and a fair degree of ambiguity to the overall normative regime pertaining to such phenomena. Prominent commentators in fact welcome this situation, or at least maintain that it is unavoidable in a global legal environment and therefore should be accommodated.²²⁷ Legal pluralism has also been invoked in connection with BITs to suggest that normative pressure from sources other than BITs may prevent the original bargain from becoming obsolete.²²⁸ We tend to agree with these observations. We assert, however, that against this legally pluralistic backdrop, BITs fail to achieve the objective of dispelling uncertainty for the reasons we have elaborated.

223. See *supra* text accompanying notes 7 and 30.

224. See *supra* Section IV.A.

225. See Amir N. Licht, Chanan Goldschmidt & Shalom H. Schwartz, *Culture, Law, and Corporate Governance*, 25 INT’L REV. L. & ECON. 229 (2005) (linking investor rights to cultural harmony in Schwartz’s model); Jordan I. Siegel, Amir N. Licht & Shalom H. Schwartz, *Egalitarianism and International Investment I* (Sep. 19, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=899082> (linking laws granting rights to the sick, elderly, and unemployed to cultural egalitarianism).

226. For general discussions, see Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 301 (2007); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); and William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963 (2004).

227. See Berman, *Global Legal Pluralism*, *supra* note 226; Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999 (2004).

228. Yackee, *supra* note 57, at 810-12.

V. CONCLUDING REMARKS

Where does our analysis of the tension between the aspiration of BITs to provide security and stability to foreign investors and the inevitable complexity embedded in the concept of property lead in terms of policy implications for cross-border investment protection?

Since fragmentation poses a problem, one rather straightforward answer advanced in the literature has been that the international law on cross-border investment should aspire to more harmony. Several scholars thus have called for the development of a multilateral agreement on investment (MAI), which could also build on the considerable experience of the World Trade Organization (WTO) in the context of transnational trade law.²²⁹ Others, troubled by the alleged inconsistency among different awards handed down by ad hoc tribunals working under the auspices of ICSID and other venues, have called for the promotion of a more harmonious interpretation of treaty provisions across different BITs.²³⁰ Some writers have advocated for an institutional reorganization of cross-border dispute resolution, for instance, through the creation of “an independent, permanent appellate body with the authority to review awards rendered under a variety of investment treaties.”²³¹

The foregoing analysis leads us to conclude that although fragmentation poses a challenge to international investment, it cannot be readily solved by crafting harmonization mechanisms that would simultaneously disregard the root causes of the various facets of heterogeneity that we have identified in this Article. Drafting a multilateral agreement on investment or setting up an appellate tribunal would not solve the jurisprudential problem posed by BIT-based property rights, which form but one layer in an entire array of property rights and duties pertaining to a given asset located in a given host country. In this respect, one can learn a few lessons from the recent ECHR’s decision in the *J.A. Pye* case,²³² in which the Court realized that Convention-based intervention in the context of domestic adverse possession law would have a dramatic impact on the fundamentals of English private law. Recognizing the complexity of “legal matters such as land law” was thus not only a matter of conventional judicial deference, but rather reflected a broader-based institutional and jurisprudential inquiry into the complicated relationship between overlapping layers of legal ordering and the complex construction of

229. For views advocating a switch to a multilateral agreement, see, for example, Leal-Arcas, *supra* note 15; and Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT’L L. 496 (2009).

230. See Anne van Aaken, *Fragmentation of International Law: The Case of International Investment Law*, in 17 FINNISH Y.B. INT’L L. 91 (2006). Other authors, however, have been less concerned about the practical effects of such incoherence in tribunal awards. See, e.g., Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT’L L. 475 (2008). Similarly, the history of ICSID and in particular the history of the term “investment” may reflect a drafting decision to leave room for differing interpretations. See Julian Davis Mortenson, *The Meaning of “Investment”: ICSID’s Travaux and the Domain of International Investment Law*, 51 HARV. INT’L L.J. 257 (2010).

231. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1524 (2005).

232. See *supra* text accompanying notes 109-120.

property systems.²³³ The Court thus seems to have realized that imposing a certain “supranational” content to a *specific* provision in the English adverse possession law, without regard to the broader implications that this would have on English land law, would run the risk of undermining land law’s *overall structure*.

Moreover, to the extent that the definition of “investment” in international treaties continues to be practically all-inclusive, a mechanical harmonization would only exacerbate the problem by subjecting different types of resources, whose domestic legal ordering may be based on fundamentally different normative and institutional underpinnings, to a “universal” set of rules. Imposing a one-size-fits-all property jurisprudence to illuminate the meaning of “fair and equitable treatment” or of “expropriation” for land, intellectual property, chattels, or shares would create prohibitive constraints on each one of the host countries, be it “Northern” or “Southern.”

More generally, there may be an underappreciated virtue to the dyadic nature of investment treaties that goes beyond the conventional evolutionary explanation pointing to the high costs of negotiating a multilateral treaty.²³⁴ It may very well be that since foreign investments, and the set of rules that apply to them, integrate into otherwise domestic property systems, a bilateral treaty may create an opportunity for both countries to recognize and address potential cultural, social, and political heterogeneities between the two societies and their respective legal systems. The inability of model BITs drafted by prominent Western countries *ex ante* to clear away ambiguities and uncertainties that would arise during the ongoing implementation of a BIT—the explosion of formal investor-state disputes attesting to this latter fact²³⁵—may therefore lead to a recognition of the limits of cross-border property protection.

With this in mind, how should the property jurisprudence of international investment proceed from here? One possible option would be to move to a functional, category-based approach of defining the legal rights and duties of foreign investors and signatory states based on the level and scope of *heterogeneity versus homogeneity* in the different attributes of property systems, as discussed in detail in Part IV.

For example, to the extent that a certain resource is typified by having a large and indefinite number of heterogeneous actors that are strongly affected by any change or intervention in the property regime, the interpretation of terms such as “fair and equitable treatment,” as well as the more general aspirations toward cross-BIT congruence, should be more modest. In such

233. *J.A. Pye II*, App. No. 44302/02, ¶ 75 (Eur. Ct. H.R. Aug. 30, 2007), available at <http://echr.coe.int/echr/en/hudoc> (follow “HUDOC database” hyperlink, then search “Pye,” then follow link to case title).

234. See, e.g., Ryan J. Bubb & Susan Rose-Ackerman, *BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment*, 27 INT’L REV. L. & ECON. 291, 293-97, 307-09 (2007); cf. Mortenson, *supra* note 230.

235. Until April 1998, only fourteen cases had been brought before ICSID. Since the late 1990s, however, the number of cases has increased dramatically. At the end of 2008, the cumulative number of known treaty-based cases had reached 317, involving at least seventy-seven governments. U.N. CONFERENCE ON TRADE & DEV., *supra* note 17, at 33-35; U.N. Conference on Trade & Dev., *supra* note 63, at 34.

cases, the foreign investment generally should be governed by the rules of the host country's property system, differentiating the foreign investor only when she herself has been singled out by the host country, such as by being deprived of "national treatment" or of due process of law in a case involving an investment-specific regulation. Conversely, property systems that are more susceptible to harmonization due to long-standing cross-border similarities among affected actors regarding norms and practices of resource control may be more appropriate for efforts toward multilateralism, cross-BIT interpretation of treaty terms, and unified jurisdictional dispute-resolution. Land law may represent the former type of cases. Negotiable instruments and certain intangibles may lean toward the latter. Corporate governance and intellectual property rights may occupy a middle ground. But this is just a rough call. We leave the endeavor of delineating the full spectrum of BIT property protection along the heterogeneity-homogeneity scale for future research.

APPENDIX: CULTURE AND PROPERTY RIGHTS PROTECTION

This Appendix conducts a short-form empirical analysis of the relationship between culture and property rights protection. We take advantage of recently available data on property rights protection to extend the analysis by Licht, Goldschmidt, and Schwartz of culture and social norms of governance—namely, the rule of law, noncorruption, and democratic accountability.²³⁶ Here, we describe the new data on the dependent variable and briefly overview our cultural independent variable. Readers who are interested in a more detailed exposition of the theory and analytical framework are referred to this study.

The property rights data comes from the International Property Rights Index (IPRI) 2009 Report.²³⁷ The IPRI is produced by the Property Rights Alliance. The IPRI is a long-term project that seeks to improve property rights systems around the world by showing the relationship between a strong property rights system and a country's economic wellbeing.²³⁸ The IPRI is a cross-country, comparative, composite index comprising three sub-indices, each of which is also composite. These sub-indices cover the following subjects: legal and political environment (LP), physical property rights (PPR), and intellectual property rights (IPR). We focus on the latter two indices. The PPR combines data on protection of physical property rights, registering property, and access to loans; the IPR combines data on protection of intellectual property rights, patent protection, and copyright piracy.²³⁹

The methodology of composite indices is widely used in economics.²⁴⁰ In the present context, one might be concerned that the policy inclination of the Property Rights Alliance would bias the index and, consequently, the results. Such concern is unfounded for two reasons. First, a good deal of the data subsumed in these indices consists of objective facts. For instance, in the PPR index, one of the items is the number of days required to register property in a country. In the IPR index, one of the items is the scope of membership in intellectual property treaties. Second, since we seek to examine the link between property rights protection and culture, which is a normative social institution, that the indices may reflect a certain policy is actually an advantage.

Our primary explanatory variable is countries' cultural orientations, as operationalized by Schwartz in particular, on the dimension of embeddedness versus autonomy. We also use data for orientations on the other two dimensions in the Schwartz model: hierarchy (versus egalitarianism) and harmony (versus mastery). Orientation scores are the average importance of the value items that represent each orientation, using a sample of fifteen thousand

236. Licht et al., *supra* note 131. To use a metaphor from intellectual property terminology, the present analysis resembles a patent of addition in that it makes an innovative step forward but one that depends on the "parent" patent.

237. PROPERTY RIGHTS ALLIANCE, INTERNATIONAL PROPERTY RIGHTS INDEX (IPRI) 2009 REPORT, available at <http://www.internationalpropertyrightsindex.org>.

238. *Id.* at 3.

239. See *id.* at 15-17 for a detailed discussion of the data and methodology.

240. For a detailed discussion, see Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Measuring Governance Using Cross-Country Perceptions Data*, in INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION 52 (Susan Rose-Ackerman ed., 2006).

respondents in over fifty countries. Crucially, the analyses are at the country (culture) level, not the individual level—individuals are unaware of the societal average value emphases.²⁴¹ We use the basic specification from Licht et al.'s article, which includes one cultural orientation from each of the three Schwartz dimensions and two control variables—one each for British heritage and economic inequality. We control for possible influence of British heritage by coding if the country had been under British rule as a colony, mandate area, etc. We control for economic inequality as measured by the Gini coefficient. The instrumental variable for embeddedness in the Two-Step-Least-Squares (2SLS) regressions is the grammatical rule on pronoun drop license in the country's official or main language.²⁴²

Table A1 presents the regressions. The results are striking. Embeddedness exhibits a strong, negative coefficient as an explanatory variable for both PPR protection and IPR protection. This result holds fully in the 2SLS regressions, indicating that the relation of cultural embeddedness to property rights protection is causal, i.e., that a country's fundamental societal orientation toward autonomy or embeddedness affects the degree to which its particular institutions protect property rights (as the latter is operationalized by the IPRI). Interestingly, the results are more pronounced for intellectual property than for physical property. This may be the case because intellectual property is a relatively recent legal phenomenon, such that informal social norms (e.g., regarding copyright piracy), which are linked to cultural orientations, exhibit greater cross-country variability. That the R-squared values are higher for intellectual property than for physical property is consistent with this idea.

241. See Schwartz, *supra* note 128; Shalom H. Schwartz, *Mapping and Interpreting Cultural Differences around the World*, in *COMPARING CULTURES: DIMENSIONS OF CULTURE IN A COMPARATIVE PERSPECTIVE* 43 (Henk Vincken, Joseph Soeters & Peter Ester eds., 2004); Shalom H. Schwartz, *A Theory of Cultural Value Orientations: Explication and Applications*, 5 *COMP. SOC.* 137 (2006). The cultural scores used here are available in Licht et al., *supra* note 131, 684-85 tbl. A.3.

242. See Licht et al., *supra* note 131, for further details.

Table A1. Regressions of Property Rights Protection on Culture and Other Factors

	(1)	(2)	(3)	(4)
Dependent variable	PPR	PPR	IPR	IPR
Regression method	OLS	2SLS	OLS	2SLS
Embeddedness	-0.45*** (-3.22)	-1.03** (-2.50)	-0.58*** (-6.39)	-0.91*** (-3.31)
Hierarchy	-0.15 (-0.94)	-0.03 (-0.16)	-0.24** (-2.22)	-0.15 (-0.99)
Harmony	-0.01 (-0.07)	-0.19 (-0.70)	-0.09 (-0.62)	-0.17 (-0.94)
British heritage	0.34* (1.99)	0.33 (1.64)	0.30* (2.72)	0.33** (2.44)
Economic inequality	-0.29** (-2.20)	-0.07 (-0.33)	-0.31*** (-3.53)	-0.18 (-1.32)
F-statistic	8.86***	6.51***	29.91***	16.60***
Observations	41	35	41	35
R-squared	0.55	0.51	0.81	0.74

Dependent variables: PPR = physical property rights; IPR = intellectual property rights.

Standardized beta coefficients are presented. The t-statistics are in parentheses.

***, **, * significant at 1%, 5%, 10%, respectively.

Table A2. List of Sample Countries with Culture and Property Rights Data

Argentina	Greece	Philippines
Australia	Hong Kong	Poland
Austria	Hungary	Portugal
Bolivia	India	Russia
Brazil	Indonesia	Singapore
Bulgaria	Ireland	Slovakia
Canada	Israel	Slovenia
Chile	Italy	Spain
China	Japan	Sweden
Cyprus	Macedonia	Switzerland
Czech Republic	Malaysia	Taiwan
Denmark	Mexico	Turkey
Estonia	Nepal	United Kingdom
Finland	Netherlands	United States
France	New Zealand	Venezuela
Germany	Norway	Zimbabwe