RULE OF LAW IN THE EMERGING

DEVELOPMENT AGENDA:

ON FINDING THE OPTIMAL

ROLE FOR INVESTMENT

TREATIES

Timothy J. Feighery*

My sinceIa /R9 11 T9n110 0 40125 0 0V4ON

rule of law is a goal in and
of itself, "a key principle in the achievement of other development objectives, and as an over-arching theme in the creation of an ena-bling environment for sustainable development."' I want to focus on the aspect of the proposition that looks to rule of law in creating an "enabling environment for sustainable development" via the encour-agement of foreign direct investment.
We must begin with the term rule of law. It is a term we are all familiar with and, speaking for myself when I use it, I have a general sense of what it means; however, at the same time, I would be hard

* Tim Feighery is a partner in the Washington D.C. office of Arent Fox LLP and heads
the firm's international arbitration and dispute resolution practice group. He represents both sovereign states and private parties in a wide variety of contexts, including international invest-ment, concession and commercial disputes, and maritime boundary disputes. Prior to joining Arent Fox, Tim served as Chairman of the United States Foreign Claims Settlement Commission upon nomination by President Obama and confirmation by the U.S. Senate. He has also served as an Attorney Advisor in the Office of the Legal Advisor at the U.S. Department of State, where he defended U.S. interests in international arbitration and foreign investment disputes. From 2003 to 2004, Tim was a Deputy Special Master for the September 11 th Victim Compensa-tion Fund of 2001, and prior to that Tim worked for the United Nations, where he served as Chief of Section of the Legal Services Branch of the UN Compensation Commission in Geneva, which was established to address claims arising out of Iraq's 1990 invasion and occupation of Kuwait. Tim has also worked in private has

298 SOUTHWESTERN JOURNAL OF INTERNA TIONA L LA W

pressed to give you a precise definition. Let me begin, then, by offer-ing a definition of this term to enable us to have a common framework for thinking about the issue at hand.
The World Justice Project defines "rule of law" as a system in which the following four universal principles are upheld:
1) The government and its officials and agents as well as individuals
and private entities are accountable under the law.
2) The laws are clear, publicized, stable, and just; are applied
evenly; and protect fundamental rights, including the security of persons and property.
3) The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
4) Justice is delivered timely by competent, ethical, and indepen-
dent representatives and neutrals who are of sufficient number,
have adequate resources, and reflect the makeup of the communi-
ties they serve.2

I am going to come to the proposition at hand: That the rule of law creates an enabling environment for sustainable development with this definition in mind, and with a particular focus on certain le-gal underpinnings that encourage-or purport to encourage-foreign direct investment, often a key source of investment and sustainable development for developing nations. This is particularly the case for fragile states that have recently emerged from, or are trying to emerge from, conflict, with the added advantage (or often curse) of being nat-ural-resource rich.

With respect to encouraging foreign direct investment, emerging states are often urged by international organizations, sovereign friends, non-governmental organizations, and international law firms to commit wholesale to the investor-state dispute settlement system (ISDS). In my experience, this urging is made regardless of the state of the domestic rule of law in a developing country; indeed, it is of-fered as a way of plugging the gap-providing a system of law that will encourage foreign investment without having to wait for the develop-ment of adequate domestic laws and legal capacity. For this reason, the invitation to the ISDS can be very attractive to developing coun-tries as

OPTIMAL ROLE FOR INVESTMENT TREATIES

The ISDS may broadly be defined as an international law-based system that is founded mostly on thousands of bilateral investment treaties (BITs) and some multilateral investment-related treaties that protect, on a reciprocal basis, the investors of each state when they make investments in other states. To a lesser extent, ISDS can and does include contracts and domestic laws.

At the heart of the investment treaty regime is a commitment on
the part of the state-parties to consent to arbitrate disputes that may arise out of these investments. By this system, sovereigns agree to privatize the dispute resolution process for covered investments. In this way, foreign investors are protected against the traditional home field advantage that sovereigns may enjoy via their national court sys-tems: Disputes are presented in a neutral forum, before independent arbitrators appointed by the parties themselves, and pursuant to the law designated by both parties. Importantly, the ISDS has the addi-tional benefit of de-politicizing investment disputes between states.

But does this system help establish, or enhance, the rule of law in developing countries? When singularly comparing the ISDS to

300 SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW

judicial expertise. This can be particularly problematic in countries whose income is dominated by a single revenue source, and where foreign investments in that revenue source are covered by investment
treaties.
There is also the criticism that investment treaties can frustrate a sovereign's ability to regulate in response to changing information and circumstances. A rather stark example often pointed to is Phillip Morris's 2010 claim against Uruguay under the Uruguay-Switzerland BIT. In this claim, Phillipaim, Philm

domijngins and sg)aim,

whose criticsim, nue

be can

to

2015] OPTIMAL ROLE FOR INVESTMENT TREATIES 301

its domestic laws that relate to investment-its administrative law, its commercial law, its judicial code, and even its criminal code-it is in a better position to properly consider offers of investment treaties made by foreign governments, and indeed better able to seek out those trea-ties it wishes to conclude.
The international community has a substantial role to play in bet-ter assisting developing countries-and in particular fragile states-by advocating a balanced approach that does not make domestic rule of law secondary to international commitments via investment treaties. Emerging states should be advised of the need for careful and strate-gic consideration of the nature of the commitments they may be enter-ing into. In the meantime, there is no better way to attract foreign investment than by a stable legal framework that is on a steady march to realizing the rule of law principles set forth by the World Justice