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Velimir Živković

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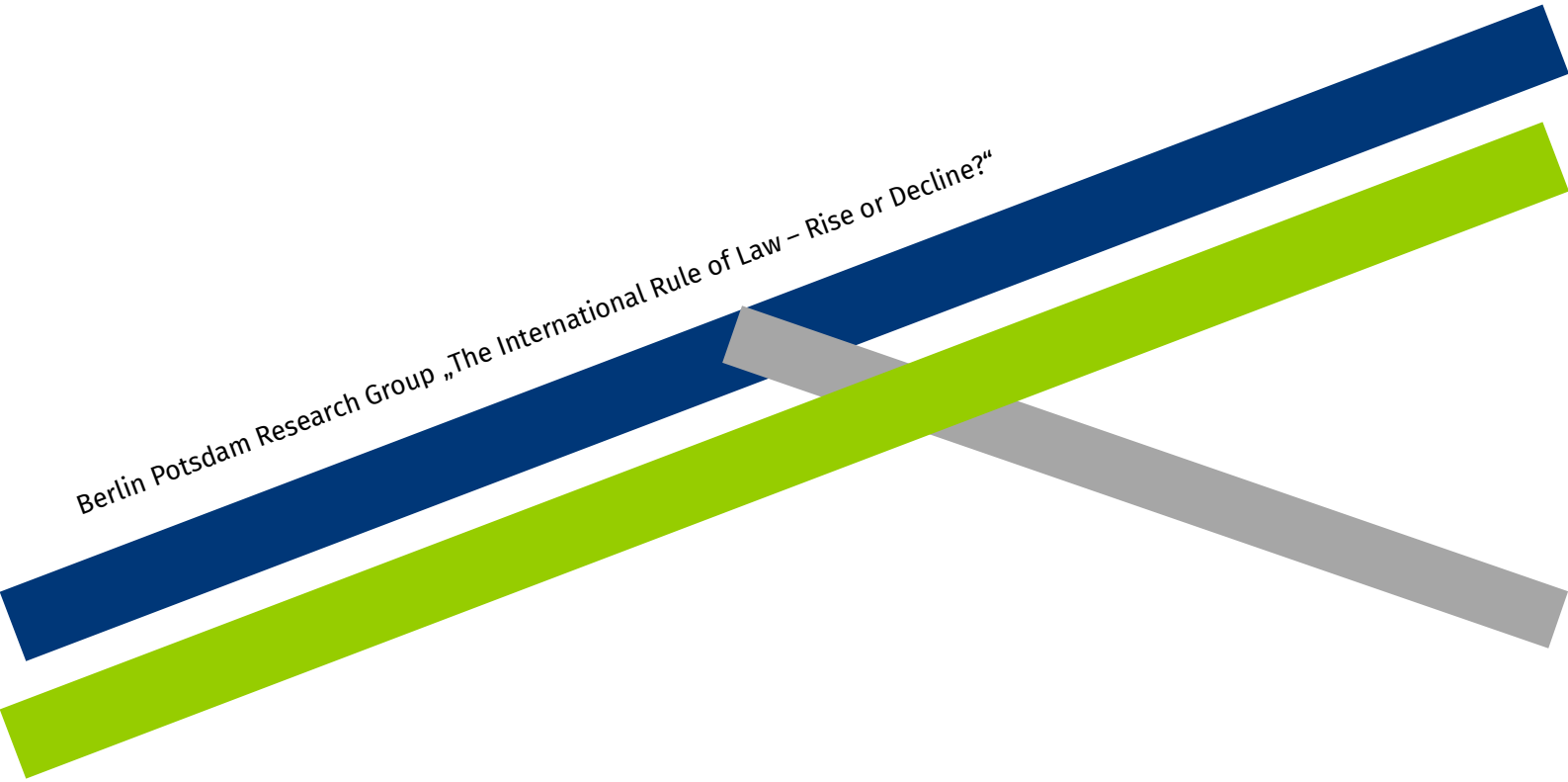

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International Rule of Law through International Investment Law – Strengths, Challenges and Opportunities

Velimir Živković[1]

Abstract:

In challenging times for international law, there might be a heightened need for both analysis and prescription. The international rule of law as a connecting thread that goes through the global legal order is a particularly salient topic. By providing a working understanding of the content and contexts of the international rule of law, and by taking the regime of international investment law as a case study, this paper argues that assessing 'rise' or 'decline' motions in this sphere warrants a nuanced approach that should recognise parallel positive and negative developments. Whilst prominent procedural and substantive aspects of international investment law strongly align with the international rule of law requirements, numerous challenges threaten the future existence of the regime and appeal of international rule of law more broadly. At the same time, opportunities exist to adapt the substantive decision-making processes in investor-State disputes so to pursue parallel goals of enhancing rule of law at both international and national levels. Through recognising the specificities of interaction between international and national sphere, arbitrators can further reinvigorate the legitimacy of international rule of law through international investment law – benefitting thus the future of both.

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> Indeed it is not too much to say that [...] the role of international law is to reinforce, and on occasions to institute, the rule of law internally.[2]
>
> James Crawford

1. Introduction

Defining the 'international rule of law' and discussing its contemporary challenges is a complex task. The international rule of law is often invoked and commands a broad appeal. Much like the rule of law in general, it is largely a 'charmed concept, essentially without critics or dissenters.'[3] The strong declaratory commitment of States towards upholding the rule of law has been expressed, *inter alia*, in a number of prominent UN documents.[4] The States, to sum up the general narrative, reaffirm 'solemn commitment [...] to an international order based on the rule of law'[5] and profess that 'respect for and promotion of the rule of law and justice should guide all [State, UN and international organization] activities and accord predictability and legitimacy to their actions'.[6] These broad commitments notwithstanding, the exact requirements imposed by the international rule of law and specific contexts in which these requirements arise remain disputed and elusive both within the UN framework[7] and more generally.[8] In light of recent global developments, there are reasons to seek clarity beyond just the (perhaps academic) desire for conceptual neatness. For one, the intensifying debates on the perceived international rule of law crisis necessitate clear(er) categories so to ascertain trends and developments.[9] There is a need to examine the intensity and proportions of the crisis in different spheres, and ask questions such as 'whether we are overestimating or underestimating international law'.[10] For some, the role of international law

[2] James Crawford, 'International Law and the Rule of Law' (2003) 24 Ade L Rev 3, 8.

[3] Ian Hurd, 'The International Rule of Law: Law and the Limit of Politics' (2014) 28 Ethics & International Affairs 39, 39. See similarly Mathias Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) 44 Va.J.Int'l L. 19, 21-22.

[4] See particularly the 2005 World Summit Outcome document (A/RES/60/1) paras 11, 21, 119, 134; UNGA Resolution 64/116 - The rule of law at the national and international levels (A/RES/64/116) Preamble and paras 2-3; and generally UNGA Resolution 67/1 - Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (A/RES/67/1).

[5] UNGA Resolution 67/1 (n 4) para 1.

[6] ibid, para 2.

[7] See in this sense most recently Arajärvi N, 'The Rule of Law in the 2030 Agenda' (2017) Hague J Rule Law (forthcoming).

[8] McCorquodale R, 'Defining the International Rule of Law: Defying Gravity?' (2016) 65 ICLQ 277, 278; Helmut P Aust and Georg Nolte, 'International Law and the Rule of Law at the National Level' in Michael Zürn, Andre Nollkaemper and Randy Peerenboom (eds), *Rule of Law Dynamics in an Era of International and Transnational Governance* (CUP 2014), 51.

[9] See generally Heike Krieger and Georg Nolte, 'The International Rule of Law - Rise or Decline? Points of Departure', KFG Working Paper Series, No. 1, October 2016, available at: https://ssrn.com/abstract=2866940.

[10] ibid 5.

scholars is to 'carefully analyze to what extent, and for what reasons, the international rule of law may thus have become an endangered species, and how to protect it.'[11]

In light of the vast areas now regulated by international law, it makes sense to distinguish what specific international rule of law requirements might be under pressure, and in which contexts. Relatedly, elucidating the relationships that are (or should be) regulated by the international rule of law helps to map out the concept's full scope of coverage. This allows for all relevant areas to be taken into account in assessing broader 'rise' or 'decline' trends. Combining the specific requirements and different contexts in which they operate can better reflect the multifaceted nature of the international rule of law. It can also suggest that positive developments and challenges might occur in parallel, even within the same areas of the international legal order.[12]

This article focuses on international investment law as a regime of public international law[13] that illustrates the above-mentioned issues remarkably well. Three main arguments are put forward. Firstly, international investment law is a prominent example of the structural complexity of the international rule of law as it reaches beyond the State-State level into both the internal regulatory sphere of States and the relationship between the individual and the international legal order. Secondly, the investment law regime arguably manifests (at least) two positive features in terms of making the States' international commitments to the rule of law a more tangible reality. One is that the regime exhibits a powerful dispute settlement and enforcement mechanism, something often highlighted as marring the international rule of law in other areas. The second is that this mechanism is (most) often used to impose and enforce universally recognised formal rule of law requirements, particularly through the ubiquitous standard of 'fair and equitable treatment' (FET). Third and final argument is that, while duly noting the positive aspects, that same enforcement mechanism and the intermeshing of internationally imposed rule of law requirements with the national legal framework create numerous challenges. These can, if left unaddressed, potentially delegitimise or even deconstruct the international investment protection system. In particular, the lack of readiness to adapt the interpretation and application of the *international* rule of law requirements to the national legal context might result in a missed opportunity to enhance the *national* rule of law – something that investment arbitrators, perhaps somewhat unexpectedly, might be in a good position to do.

From the international rule of law viewpoint, international investment law can thus illustrate the complex nature of 'rise' and 'decline' and the need for more nuanced and regime-specific assessments. From the more internal, investment-specific perspective, the understanding of investment protection regime as a tool to enforce the international rule of law can also suggest ways in which both arbitral reasoning *de lege lata* and treaty-making *de lege ferenda* can be enhanced. To present the above arguments, this article proceeds as follows.

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[11] Andreas Zimmerman, 'Times Are Changing – and What About the International Rule of Law Then?' *EJIL: Talk!,* 5 March 2018, https://www.ejiltalk.org/times-are-changing-and-what-about-the-international-rule-of-law-then/.

[12] See somewhat similarly Christian J Tams, 'Decline and crisis: a plea for better metaphors and criteria' *EJIL: Talk!,* 7 March 2018, https://www.ejiltalk.org/decline-and-crisis-a-plea-for-better-metaphors-and-criteria/.

[13] With some dissenting voices, there is a rather clear agreement in literature that investment law presents a distinct regime of international law that is more than a sum of its mostly bilateral 'parts'. See generally Jeswald W Salacuse, 'The Emerging Global Regime for Investment' (2010) 51 Harv.Int'l L.J. 427; and Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009).

Section 2 delineates, to the extent possible, the common core of the international rule of law *content* and differentiates three different *contexts* of its operation. Briefly, the concept is here understood as primarily setting out formal requirements or meta-values that should characterize the whole legal framework of public international law, as well as the behaviour of those subject to it.[14] The distinction is then made between the three different contexts or levels of operation of the international rule of law – State-State, State-individual and individual-international law.

Section 3 outlines the investment law regime as a part of the international rule of law structure which spans along all these contexts, while noting also the common self-legitimising narrative that presents the regime as a tool for securing that eligible foreign investors will be treated in accordance with the international (or perhaps rather 'internationalized') rule of law. Section 4 illustrates two features that can be seen as distinctly positive developments in terms of international rule of law. First is the remarkably powerful dispute-settlement and enforcement mechanism which binds sovereign States across the globe. The second feature, focusing here in particular on the ubiquitous FET standard obligation, is the fact that this powerful mechanism has been used to enforce critical rule of law requirements such as non-arbitrariness, non-discrimination, due process and transparency. Joined together, these features can make more effective the proclamations of adherence to the rule of law at 'both the international and national levels'.[15]

Section 5 argues that, however, there is little room in international investment law for complacency or self-congratulatory narratives. Specifically, and focusing here again on the FET decision-making, arbitrators should realise that the interpretation and application of the international rule of law principles imposed on individual host States needs to be carefully adapted to the State-individual context, lest it lead to twofold negative developments. Firstly, it can continue to fuel backlash against investment law that could eventually threaten or eliminate the above noted positive rule of law features. Equally, it can present a major missed opportunity to use the unique position of investment arbitrators to enhance the national rule of law beyond the confines of the case at hand. Section 6 offers some concluding thoughts.

2. 'International rule of law'

What features should the international legal order possess to be in accordance with the rule of law? Relatedly, how should the States behave so to be in line with the international rule of law? As even a cursory glance at the relevant literature can attest, finding sufficiently unambiguous answers for these questions is difficult, despite (or perhaps because of) the above-mentioned readiness to invoke (international) rule of law in many different contexts.[16] For one, the international rule of law can be understood as a far more political and theoretical (as opposed to

[14] See in that sense Arthur Watts, 'The International Rule of Law' (1993) 36 German Y.B.Int'l L. 15, 16 and 22 and McCorquodale (n 8) 291.

[15] 2005 UN World Summit Outcome (n 4) para 134.

[16] McCorquodale (n 8) 278; Kumm (n 3) 22; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 2-4; Rosalyn Higgins, 'The Rule of Law: Some Sceptical Thoughts' in Rosalyn Higgins, *Themes and Theories* (OUP 2009) 1334.

positively legally binding) concept than most of its national counterparts.[17] National rule of law requirements operate at the level of domestic legal orders, essentially aiming to constrain the arbitrary exercise of governmental power.[18] The requirements are usually found in (written or unwritten) constitutions or legislative instruments of comparable strength, enforced and further refined through the practice of national courts, and often benefit from the volumes of accumulated academic commentary.[19] The lack of a hierarchically dominant central sovereign and a correspondingly accepted constitution for the world order almost necessarily make the international rule of law a different phenomenon.[20] Duly taking into account the sometimes proclaimed superior, 'constitutional' status of the UN Charter,[21] the fact remains that UN is *a* as opposed to *the* player in the global legal arena,[22] with its judicial organ (the ICJ) commanding authority that remains deeply limited by its non-compulsory general jurisdiction,[23] and with ample possibilities for different regimes of international law to proliferate without necessarily forming a coherent and/or hierarchical system.[24] Global *constitutionalism* remains a fertile and growing academic field, but not the one in which breaths are being held for a speedy adoption of an universal, explicit and legally binding global *constitution*.[25]

Among other implications, this also means that the requirements of the international rule of law need to be, to the extent possible, pieced together from different sources. The *legal* (as opposed to political) significance of these requirements will be hard to ascertain in general or in advance for every possible factual scenario. But this somewhat inductive task is arguably worthwhile because the aspirational ideal of the international rule of law is so widely shared.[26] States worldwide consistently and vocally profess to *want* the rule of law at the global level,[27] and that sentiment is shared by international organisations,[28] courts,[29] NGOs,[30] academia.[31] As much as the concept might

[17] Watts (n 14) 16; Aust and Nolte (n 8) 51; Simon Chesterman, 'Rule of Law' in *Max Planck Encyclopedia of Public International Law* (July 2007) para 46.

[18] See for an overview Martin Loughlin, *Foundations of Public Law* (OUP 2010) 333-337 and authors cited therein.

[19] See generally Loughlin (n 18) 312-341 and Tamanaha (n 16) 118-122.

[20] See in that sense a well-known account in Thomas M Franck, 'Legitimacy in the International System' (1988) 82 AJIL 705, 706-707. See also Tamanaha (n 16) 129 and Higgins (n 16) 1334.

[21] See on this Michael W Doyle, 'The UN Charter – A Global Constitution?' and Bardo Fassbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009).

[22] Doyle (n 21) 132 ('Weak as it was and is, the UN ''constitution'' of 1945 still authorizes more than the members are now prepared to cede'). See similarly Higgins (n 16) 1330-1331.

[23] Kenneth J Keith, 'The International Rule of Law' (2015) 28 LJIL 403, 415; Higgins (n 16) 1333.

[24] See generally Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 483. See also Tamanaha (n 16) 132.

[25] David Kennedy, 'The Mystery of Global Governance' in in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009), 37-42 noting in particular that 'those most enthusiastic about constitutional metaphors [...] propose a constitutional interpretation not only as a discovery but also as a project.' (40). See also Franck (n 20) 711 and 753-757.

[26] Kumm (n 3) 21; Tamanaha (n 16) 128-129.

[27] See the various statements to that effect in n 4 *supra*.

[28] See for example Aust and Nolte (n 8) 51 and 57 and examples cited therein.

[29] See, for example, on the ICJ and promotion of the international rule of law Peter Tomka, 'The Rule of Law and the Role of the International Court of Justice in World Affairs', Inaugural Hilding Eek Memorial Lecture, 2 December 2013, available at: http://www.icj-cij.org/files/press-releases/9/17849.pdf.

[30] See for example Raoul Wallenberg Institute and the Hague Institute for the Internationalisation of Law, *Rule of Law: A Guide for Politicians* (2012).

often seem nebulous, its appeal and the (expressed) commitment to it warrant the efforts to ascertain its content and determine the contexts in which it operates. As suggested in the introduction, this might be even more necessary in turbulent times for international law.

For the purposes of this article, the next sub-section will first ascertain a common core of international rule of law requirements that can be distilled from various international sources and the doctrine. This should provide a working answer as to *how* those who are subject to the international rule of law should behave. The sub-section that follows thereon focuses on different *relationships* in which these requirements arise. It distinguishes three different contexts or sets of relations in which the international rule of law operates, while bearing in mind that the context also to an extent influences the content of the concept and/or the importance of specific requirements.

a) The international rule of law requirements – a common core

Discussing what rule of law requires in general, the international/national level distinction notwithstanding, could draw upon the volumes of writings which go outside the confines of this paper. It is sufficient here to tread upon a rather common ground. In brief, a sufficient consensus about the core of the international rule of law requirements can be found about them being primarily *formal* in nature, with *substantive* rule of law obligations (primarily those reflected in the broader corpus of human rights) remaining a disputed element that is on a firmer ground only in certain contexts.

The existing definitions of the rule of law in general are almost always positioned somewhere between the formal (thin) and substantive (thick) poles.[32] The formal conceptions suggest that the legal rules should comply with certain system-internal requirements, without passing judgment on the *substance* of those rules. Substantive ones go beyond by linking the existence of the 'proper' rule of law with the protection of specific values and/or the existence of specific guaranteed rights. This essentially requires 'good' as opposed to just 'general, prospective and consistent' laws.[33]

Formal understandings thus focus more on the 'mechanical' aspects of the law. In the well-known formal accounts of Joseph Raz and Lon Fuller, this requires prospective, general, clear, public and relatively stable law – coupled with the independent judiciary that can conduct judicial review.[34] Going beyond these formal requirements as starting points, substantive conceptions add the

[31] Watts (n 14) 45; Crawford (n 2) 10 and 12; Simon Chesterman, '"I'll Take Manhattan": The International Rule of Law and the United Nations Security Council' (2009) 1 Hague J Rule Law 67, 67; Hurd (n 3) 39; Tomka (n 29) 4.

[32] See in that sense Tamanaha (n 16) 91 and Paul P Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) 12 Public Law 467, 468.

[33] This delineation is admittedly somewhat artificial as, for example, formal concepts are themselves necessarily based on at least *some* substantive considerations, such as moral autonomy (Craig (n 32) 482).

[34] See generally Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) and Lon L Fuller, *The Morality of Law* (rev edn, Yale University Press 1969) 33-94.

requirements for particular rights or values to be protected.[35] Apart from those conceptions that focus on a singular substantive aspect,[36] more holistic visions usually revolve around the respect for the (broader or narrower) corpus of human rights.[37] An influential account in that vein is the one by Tom Bingham, for whom '[t]he law *must* afford adequate protection of fundamental human rights',[38] or otherwise it loses much of its virtue.[39] While recognizing the problems of trying to universalise human rights,[40] Bingham argued that a sufficiently clear core of rights can still be identified.[41]

With this in mind, the survey of ICJ practice, international instruments, other documents (such as NGO positions) and the most relevant doctrine shows a general agreement that the international rule of law requires:

- supremacy of international law and respect for obligations under it;[42]
- non-arbitrary behaviour;[43]
- clarity, consistency and predictability in the promulgation and application of law;[44]
- equality of subjects before international law;[45]
- peaceful settlement of disputes through impartial adjudicative processes;[46]

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[35] Allan C Hutchinson, 'The Rule of Law Revisited: Democracy and Courts' in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (Hart 1999), 199.

[36] For a brief overview, see Tamanaha (n 16) 65-71.

[37] See for example, Venice Commission Report on the Rule of Law (CDL-AD(2011)003rev) paras 41 and 59-61, available at: http://www.venice.coe.int, accessed 1 February 2017; see also McCorquodale (n 8) 280.

[38] Tom Bingham, *The Rule of Law* (Penguin 2011) 66 (emphasis added); see similarly McCorquodale (n 8) 293-294.

[39] Bingham (n 38) 67.

[40] ibid 67-68.

[41] ibid 68-84.

[42] UNGA Resolution 64/116 (n 4) para 2; UNGA Resolution 67/1 (n 4) para 31; *Nuclear Tests (New Zealand v France)*, *Judgement*, I.C.J. Reports 1974, p. 457, para 49; William W Bishop, 'The International Rule of Law' (1961) 4 Mich.L.Rev. 553, 553; André Nollkaemper, 'The Internationalized Rule of Law' (2009) 1 Hague J Rule Law 74, 76-77; McCorquodale (n 8) 281-282; Machiko Kanetake, 'The Interfaces Between the National and International Rule of Law: A Framework Paper' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2016), 20-21.

[43] Simon Chesterman, 'An International Rule of Law?' (2008) 56 AJIL 331, 342; Crawford (n 2) 7; Bishop (n 42) 553; Nollkaemper (n 42) 76-77; McCorquodale (n 8) 281-282; August Reinisch, 'The Rule of Law in International Investment Arbitration' in Photini Pazartzis et al. (eds), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Hart Publishing 2016) 291-292. In the context of the State-individual relationship, the ICJ has made an early relevant pronouncement on the prohibition of arbitrary behaviour in *Colombian-Peruvian asylum case, ICJ Judgment of November 20th, 1950, I.C.J. Reports 1950,* p. 266, 284 and more recently in *ElettronicaSicula S.P.A. (ELSI), Judgment*, *I.C.J. Reports 1989*, p. 15, para 128.

[44] Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 13, para 45; Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J Reports 2010, p. 639, paras 66 f. Specifically on ICJ's efforts to keep consistency of its own jurisprudence, see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, para 53;

Raoul Wallenberg Institute and HIIL (n 30) 26-28; Chesterman 'An International Rule of Law?' (n 43) 342; McCorquodale (n 8) 284; Reinisch 'The Rule of Law' (n 43) 291-292.

[45] UNGA Resolution 67/1 (n 4) para 2; Chesterman 'An International Rule of Law?' (n 43) 342; Reinisch 'The Rule of Law' (n 43) 291-292; Raoul Wallenberg Institute and HIIL (n 30) 32.

[46] UNGA Resolution 64/116 (n 4) Preamble; UNGA Resolution 67/1 (n 4) paras 3 and 4; Raoul Wallenberg Institute and HIIL (n 30) 28-30; Chesterman 'An International Rule of Law?' (n 43) 342; Crawford (n 2) 7-8; Bishop (n 42) 553; McCorquodale (n 8) 281-282; Kanetake (n 42) 20-21; Tomka (n 29) 2.

- respect for due process of law and procedural fairness.[47]

This implies that the less controversial requirements are essentially formal in nature.[48] Formality has an arguable advantage of certain normative 'neutrality' that allows wide(r) support,[49] and in that sense 'thinness' of the definition might be a 'worthy price to pay'.[50] A predominantly formal understanding also generally accords with the comparative national understandings of the rule of law requirements,[51] but not completely. Although defining the international rule of law in a predominantly formal fashion can consciously exclude the broader corpus of human rights from the universal definition so to help achieve consensus,[52] this by no means resolves the involved complexities and uncertainties.

After all, comparative overview of the rule of law definitions also shows inclusion of (at least some) human rights into the 'core' rule of law requirements.[53] Particularly importantly, there have been prominent attempts to make explicit the status of human rights as universally required through the international rule of law. A widely-noted UN definition provided by the then General Secretary Kofi Annan includes, apart from several formal principles, the requirement of consistency of all promulgated laws with international human rights standards.[54] It has, however, been described as 'almost certainly go[ing] beyond what states would actually implement.'[55] Without going deeper into these debates, three remarks are warranted in the context of this article.

Firstly, as is noted, the formal rule of law/human rights dichotomy might be somewhat misleading in the first place, as some of the formal requirements (and prominently right to impartial adjudication and due process) are also considered to be fundamental human rights.[56] In that sense, the focus is rather moved to other rights, in particular those of social and economic nature. Their inclusion into a general definition of the international rule of law for present purposes is, however, questionable. It might also lead to an unwelcome blurring of the (still often emphasised) distinction between the rule of law and human rights,[57] their evident interrelatedness notwithstanding.[58] Finally, including a broad spectrum of human rights in the general

[47] Aust and Nolte (n 8) 60 and 67; Crawford (n 2) 7-8; Nollkaemper (n 42) 76-77.

[48] As noted, a 'thin, formal definition of the rule of law, including mainly procedural requirements, seems to reflect current public international law' (Clemens A Feinäugle, 'The UN Declaration on the Rule of Law and the Application of the Rule of Law to the UN: A Reconstruction From an International Public Authority Perspective' (2016) Go. J.I.L. 157, 181 and materials cited therein).

[49] Watts (n 14) 22; Aust and Nolte (n 8) 51.

[50] Chesterman 'An International Rule of Law?' (n 43) 360.

[51] Venice Commission Report (n 37) para 41; see also McCorquodale (n 8) 280-281.

[52] Chesterman "I'll Take Manhattan"' (n 31) 69; see similarly Arajärvi (n 7) 9.

[53] Venice Commission Report (n 37) para 41 and in particular Bingham (n 38) 67-84; see also McCorquodale (n 8) 280-281.

[54] UN Secretary-General Report 'The Rule of Law and Transitional Justice in Conflict and Post-conflict societies' (S/2004/616) para 6.

[55] Chesterman "I'll Take Manhattan" (n 31) 68; see also Aust and Nolte (n 8) 51.

[56] McCorquodale (n 8) 282 and 293. See also on prohibition of arbitrary treatment as being at the heart of international human rights norms *Ahmadou Sadio Diallo* (n 44) para 66.

[57] ibid 283; Gianluigi Palombella, 'The Rule of Law at Home and Abroad' (2016) 8 Hague J Rule Law 1, 5; 2005 World Summit Outcome (n 4) para 16 and 24 (b); UNGA Resolution 64/116 (n 4) Preamble; UNGA Resolution 67/1 (n 4) para 5.

[58] The Universal Declaration of Human Rights 1948 (UNGA Resolution 217 A), Preamble; 2005 World Summit Outcome (n 4) para 119; UNGA Resolution 64/116 (n 4) Preamble; UNGA Resolution 67/1 (n 4) para 5.

understanding might be unwarranted in light of the structural complexity of the international rule of law, which will be discussed in the next sub-section. The substantive 'thickening' of requirements, especially in terms of human rights obligations, might occur at different rates in specific contexts and areas, and the understanding of what international rule of law requires might generally broaden over time.[59]

In light of this, the further examination of the content of international rule of law and its interrelationship with the regime of international investment law will focus on the largely formal requirements identified above.[60] The issues relating to human rights not encompassed in those requirements will be also be duly noted where relevant. Before proceeding to the specifics of investment protection, however, it is also warranted to note the different contexts in which the international rule of law operates, thus allowing a better sense of how the investment regime fits into the increasingly complex picture of the rule of law in the global legal order.

b) The contexts/relationships in which the international rule of law operates

The domestic rule of law, with some important caveats, exists to constrain the power of the State towards the individuals and entities under its jurisdiction, being also the set of underlying principles that prevents the emergence of simple and unhindered rule *by* law.[61] The often different nature of interactions occurring in the international legal order mean that the above summarised requirements of the international rule of law arise in different contexts. As argued by a number of authors, there are at least three sets of relevant relationships/contexts:
1) State-State relationships; 2) the relationship of the State and individuals/non-State entities under its jurisdiction and 3) directly between the level of international institutions/international law and the individual.[62]

The first, most traditional, context dominated the discourse for a long time. Often implicitly, the discussion of the rule of law at the international level revolves around horizontal State-State relations and their 'billiard ball' collision of (external) actions and interests, particularly in the spheres such as the use of force.[63] Many scholarly efforts have been put towards trying to identify the basic requirements that should allow the existence of the rule of law between sovereign

[59] Aust and Nolte (n 8) 49; see somewhat similarly Watts (n 14) 21.

[60] Not in the least because, as suggested by Arajärvi (n 7) 9, this is perhaps the most extensive level of consensus currently possible among States, at least in the UN context.

[61] See for a recent discussion Palombella (n 57); as well as Tamanaha (n 16) 92-99.

[62] See generally Chesterman "I'll Take Manhattan" (n 31) 68-69 and in particular detailed discussion (and also visual representation of these relationships) in Kanetake (n 42) 16-17. To clarify, State-State level can also be understood to be a part of the broader category of the relationships between the State and subjects *external* to the State, such as international organizations. Likewise, there is a separate context of rule of law issues *within* international organizations themselves – notably within the UN, on which see Feinäugle (n 48).

[63] Kanetake (n 42) 16; Bishop (n 42) 553; Hurd (n 3) 39-40.

States,[64] and many of the famous (even if implicit) proclamations of the concept primarily focus on the rule of law requirements as a way of securing a peaceful framework of their cooperation.[65] Although the signs can certainly be seen earlier,[66] the post-Cold War developments in particular made the State-State relations just one of the relevant international rule of law contexts.[67] The State-individual relationship - sometimes referred to as subject to the 'internationalized' rule of law[68] - spans and connects international and national levels and becomes increasingly prominent as international organisations and adjudicative bodies engage with the (previously off-limit) *internal* affairs of States. In addition to setting out how a State should act beyond its borders, the international rule of law increasingly came into full-on interaction with the exercise of regulatory power of States over individuals and entities under its jurisdiction.[69] International human rights regime(s), some being in place for almost six decades now, might offer the best example.[70] Yet, other important manifestations of the 'internationalised' rule of law can be seen, not in the least in the form of international investment law.[71]

Finally, the relationship between the individual and the international legal order has been a ground-breaking development in international law. Although the elevation of an individual to the level of the subject of international law sometimes remains debated and contested,[72] and is still confined to specific regimes, it is hardly deniable that (e.g.) in a number of contexts the individual is for all intents and purposes a bearer of both rights and obligations under international law, and able to appear before international courts and tribunals in different roles.[73] Apart from, again, aspects of human rights regimes and investment protection (which will be addressed below),[74] a particularly prominent example is the burgeoning of international criminal law since the 1990s through the establishment and operation of different courts and tribunals aimed to prosecute individuals accused of war crimes and crimes against humanity.[75]

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[64] Jeremy Waldron, 'The Rule of International Law' (2006) 30 Harv.J.L.& Pub.Pol'y 15, 20-24; McCorquodale (n 8) 279.

[65] See, for example, Article 2 of the Charter of the United Nations as the 'legal expression of an "international community" that has left the state of nature and aspires to establish the rule of law in international affairs' (Andreas Paulus, 'Article 2' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) para 24).

[66] See some early anticipation of going beyond State-State level in Bishop (n 42) 570.

[67] Krieger and Nolte (n 9) 8-10.

[68] See generally Nollkaemper (n 42).

[69] Nollkaemper (n 42) 75 ('[...] international law influences and often even determines the domestic rule of law.'); Kanetake (n 42) 11; Krieger and Nolte (n 9) 5-7; Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 EJIL 121, 122.

[70] Kanetake (n 42) 17-18.

[71] ibid; see generally also Van Harten and Loughlin (n 69).

[72] See in particular for the different State approaches to this question in Anthea Roberts, *Is International Law International?* (OUP 2017) 141-144.

[73] See generally Katja S Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights' (2009) 9 *Human Rights Law Review* 288;

Vesselin Popovski, 'The Building of the international rule of law through the work of International Criminal Tribunals' in Charles Sampford and Ramesh Thakur (eds), *Institutional Supports for the International Rule of Law* (Routledge 2014); Kanetake (n 42) 16-22.

[74] But see generally on this aspect Van Harten and Loughlin (n 69) 127-131.

[75] Kanetake (n 42) 17-18; Popovski (n 73); Tamanaha (n 16) 131; Higgins (n 16) 1335-1336.

Thus, a holistic understanding of the structural complexity of the international rule of law is warranted when discussing the ways in which particular phenomena support or endanger it. Also, as suggested previously, the change of contexts impacts both the content of the international rule of law and the level of emphasis which is put on certain elements. Whilst States certainly cannot secure *human* rights to other States,[76] this substantive element features prominently in the State-individual context in those States bound by different human rights regimes. Likewise, States are unlikely to need to make sure that other States are treated with due process, but in operation of international organizations, and in procedures involving trials of individuals, such a requirement assumes paramount importance.[77]

With this more complex but also more nuanced picture in mind, it is possible to turn to the role of the investment law regime within it. As discussed in the next sections, this regime is deeply intertwined with the three above-mentioned contexts, and the international rule of law promotion is often put forward as one of its main legitimising factors.

3. International investment law as a tool to enforce the international rule of law

Different aspects of the investment regime exhibit close connections to all three of the above-mentioned international rule of law contexts. In brief, investment law is characterised by a vast network of mostly bilateral international agreements that contain wide-reaching, open-textured and appealingly formulated standards on how the host State is to treat eligible foreign investors. Critically, this is coupled with a very potent enforcement regime (investor-State dispute settlement, hereinafter ISDS) which allows the affected investors to directly sue the host States under international law, generally eliminates the diplomatic protection/power politics interference of the investor's home state, and allows for an efficient enforcement of the resulting (sometimes financially staggering) awards.[78]

Therefore, States mutually establish binding international law obligations (State - State aspect) that constrain their behaviour towards entities that would otherwise for the most part fall under their regular jurisdiction (State - individual aspect)[79] and provide those same entities with directly enforceable international legal rights and a procedural standing (individual - international law aspect). At the same time, the constrains imposed through the provisions of investment agreements have widely been analogised to the rule of law requirements. So much so, that perhaps

[76] Watts (n 14) 21.

[77] Charles T Kotuby and Luke A Sobota, General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes (OUP 2017) 157; Ziegler (n 73) 303-305.

[78] See generally Van Harten and Loughlin (n 69) 127-131.

[79] To be sure, the behaviour of the State in situations that involve aliens would certainly not be unrestrained, if for nothing else then due to the operation of the international minimum standard (see on this, for example, Aust and Nolte (n 8) 59-66). However, to the extent that foreign investments are implemented through domestic companies and operate within the domestic legal framework, the jurisdiction and regulatory autonomy of the State would not necessarily be any different in comparison to domestic entities, if not for the existence of the investment agreements (see Campbell McLachlan, 'Investment Treaty Arbitration: The Legal Framework' in Albert Jan van den Berg (ed), *50 Years of the New York Convention*, ICCA Congress Series, Volume 14 (Kluwer Law International 2009) 102-103).

the dominant narrative in doctrine and jurisprudence suggests that the investment regime exists in the first place to secure that foreign investors are treated in accordance with the (international) rule of law. As outlined below, drawing upon this international rule of law-promoting role is a strong legitimising narrative for the whole system.

There is, as noted, a broad agreement that international investment protection aims to secure the rule of law for foreign investors.[80] If a State fails to respect the rule of law, financial liability will likely come its way.[81] For James Crawford, the role of international (investment) law is on occasion not just to reinforce but actually *institute* the rule of law domestically - absence of arbitrary conduct, judicial independence and non-retrospectivity are all 'standards' of the rule of law present in investment agreements so to potentially discipline a host State.[82] As summarized by David Rivkin, himself an investment arbitrator and counsel, '[investment] [a]rbitrators have developed a *supranational rule of law* that has helped to create *uniform standards for acceptable sovereign behavior*.'[83]

One of the critical features of this 'supranational' rule of law is the avoidance of interaction with (or reliance on) the domestic rule of law mechanisms,[84] which should help preserve the apparent neutrality of the employed investment law-based rule of law precepts.[85] An investment agreement is sometimes seen as 'necessary' due to the pre-existing domestic legal framework being perceived as insufficient – thus securing the rule of law is a primary function of an investment treaty.[86] As is often argued, the desire to remove the investor-State relationship from the perceived vagaries of both diplomatic protection and the domestic rule of law primarily inspired the creation and eventual burgeoning of the investment regime.[87]

There are also suggestions that the host States should bring their practice and law in line with the expectations which are considered inherent to investment treaty provisions. In the oft-cited separate opinion in *International Thunderbird Gaming*, Thomas Wälde suggested that preventing the '[a]buse of governmental powers [...] is at the core of the *good-governance standards embodied*

[80] As noted, 'rule of law-based advocacy is widespread in academic, practitioner, policy, and popular literature on investment arbitration' (Gus Van Harten, 'Investment Treaty Arbitration, Procedural Fairness and the Rule of Law' in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 627 and materials cited therein). See on this, among many others, Benjamin K Guthrie, 'Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law' (2012-2013) 45 N.Y.U. J. Int'l L. & Pol. 1151, 1160 and Federico Ortino, 'The Investment Treaty System as Judicial Review' (2013) 24 Am.Rev.Int'l Arb. 437, 443.

[81] José E Alvarez, ''Beware: Boundary Crossings'' – A Critical Appraisal of Public Law Approaches to International Investment Law' (2016) 17 JWIT 171, 227.

[82] Crawford (n 2) 7-8.

[83] David W Rivkin, 'The Impact of International Arbitration on the Rule of Law' (2012 11th Clayton Utz Sydney University International Arbitration Lecture), available at: http://www.globalarbitrationreview.com/, 2 (and similarly at 14) (emphasis added). See similarly Guthrie (n 80) 1167 and authors cited in Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study' (2015) 25 EJIL 1147, 1164.

[84] José E Alvarez, 'Contemporary Foreign Investment Law: An ''Empire of Law'' or the ''Law of Empire''?' (2008-2009) 60 Ala.L.Rev. 943, 974.

[85] Hirsch M, Invitation to the Sociology of International Law (OUP 2015), 151.

[86] Guthrie (n 80) 1166. See similarly Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 25.

[87] Dolzer and Schreuer (n 86) 235-236; Reinisch 'The Rule of Law' (n 43) 291-292; Stephen M Schwebel, 'A BIT about ICSID' (2008) 23 ICSID Review 1, 6; Kumm (n 3) 26.

in investment protection treaties.'[88] An investment award should thus have as its ultimate goal a 'good-governance signal' for the host State.[89] In a similar vein, UNCTAD noted that the increased number of arbitrations may motivate the host States to 'improve domestic administrative practices and laws in order to avoid future disputes.'[90] More generally, States are required to 'conform their behaviour to rule of law standards that *enable market forces to unfold*'[91] and should not be allowed to 'misregulate'.[92] As the *ADC v. Hungary* tribunal emphasised, 'while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. [...] the rule of law, which includes [investment protection] obligations, provides such boundaries.'[93]

From a birds-eye perspective, the links between the investment regime and the international rule of law as understood here are clear. However, the claims about the pivotal role of this regime in enforcing the international rule of law and justifying its prolonged existence by drawing upon the concept's appeal should certainly not be taken at face value. In particular with a view towards assessing the state of play more generally, it is warranted to dissect the different aspects of international investment law. As illustrated in the next sections, investment regime exhibits procedural and substantive features that are positive as concerning the international rule of law and that can in that sense justify the continuing operation of the investment protection system. At the same time, progressive evolution remains a necessity. In particular, full awareness about the implications of the 'internationalised' rule of law that arbitrators are securing is necessary so as to avoid further backlash and to fully realise the regime's rule of law enhancing potential at the national level.

4. The positive international rule of law aspects

Bearing in mind the rule of law requirements noted in section 2 above, it is possible (at least within the confines of this article) to highlight two crucial aspects through which the investment regime furthers the international rule of law, sometimes arguably to an unprecedented extent. Firstly, through ISDS and the framework for enforcement of investment awards, the investment regime potently secures the respect for the assumed international obligations through a unique mechanism that is sometimes even described as causing 'envy' in other branches of international law.[94] Secondly, the assumed obligations, and in particular those stemming from the 'core' standard of FET, largely mirror the formal rule of law requirements enumerated above by

[88] *International Thunderbird Gaming Corporation v. The United Mexican States* (Separate Opinion of Thomas Wälde of 1 December 2005) para. 13 (emphasis added). See also paras 14-15.

[89] ibid para 123.

[90] UNCTAD, Investor-State Dispute Settlement and Impact on Investment Rulemaking (UNCTAD 2007), ix.

[91] Schill 'The Multilateralization of IIL' (n 13) 364 (emphasis added). See also Guthrie (n 80) 1194.

[92] Patrick Carvalho, Investor-State Arbitration and the Rule of Law: Debunking the Myths (The Center for Independent Studies 2016) 20.

[93] ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16 (Award of the Tribunal of 2 October 2006) para 423.

[94] Rudolf Dolzer, 'Perspectives for investment arbitration: consistency as a policy goal?' (2014) 11 Transnational Dispute Management, 1.

demanding non-arbitrariness, predictability, non-discrimination and due process in host State behaviour. Whilst the focus of the investment protection remains on providing these international rule of law benefits to a select eligible class of foreign investors, the ever-increasing globalization of the world economy, the turbulent history of investment protection that international investment law aims to supersede, and the potential spill-over effects into domestic rule of law enhancement indicate that this is not an isolated, easily ignored 'neck of the woods'.[95] Importance of the investment regime for the international rule of law is tangible, and must not be overlooked in broad assessments of its current state. With this in mind, the focus will first be on the enforcement aspect, before turning to the substantive FET obligations.

a) Enforcement of international obligations

To fully appreciate the importance of investment dispute settlement and enforcement mechanisms, both the broader context of international law enforcement and the specific history of foreign investment protection are of relevance. As for the former, the degree of acceptance of binding dispute settlement and the power to enforce international legal obligations have for a long time been put forward as the key problems for the international rule of law. The well-known lack of a central sovereign, and the often-rued limited reach of binding dispute settlement mechanisms, all indicate that the respect for the international rule of law was (too) often just a matter of States' good will.[96] In some critical instances, breaches of key rule of law requirements these remained outside the reach of the binding dispute settlement mechanisms and open to contrary interpretations of those involved – questioning the very existence of the rule of law at the international level.[97] The recent and less recent refusals of States to comply with the decisions of international adjudicative bodies, although perhaps remaining a seldom occurrence, do contribute to these sceptical accounts.[98] Not surprisingly, calls for more States to opt into binding dispute settlement commitments remain a constant feature of the various rule of law proclamations in the UN context.[99]

More narrowly, the problematic history of foreign investment protection adds importance to the regime as it exists now. For a long time, the issues of protection of foreign investments and alien property deeply involved the home States of investors/aliens, and often resulted in diplomatic struggles, political interference, sanctions and, most severely, military interventions (sometimes referred to 'gunboat diplomacy').[100] Compared to the dangers of diplomatic and military escalation, the rule-based settlement of investment disputes and the overwhelming involvement of third party adjudicators bears some clear advantages. While there might exist a tendency to overemphasise

[95] See for an overview of such arguments Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart 2018) 21-26; see similarly Van Harten and Loughlin (n 69) 139.

[96] See in that sense Malcolm N Shaw, *International Law* (7th ed, CUP 2014) 800-801; Raoul Wallenberg Institute and HIIL (n 30) 30-31; Watts (n 14) 36-37 and 43-44; Tamanaha (n 16) 128 and 130-131.

[97] McCorquodale (n 8) 289-290.

[98] See Krieger and Nolte (n 9) 14 and, for a more positive outlook, Higgins (n 16) 1332.

[99] UNGA Resolution 64/116 (n 4) Preamble; UNGA Resolution 67/1 (n 4) para 31.

[100] See for an overview Kate Miles, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital (CUP 2013) 17-70.

the extent to which the disputes are truly 'de-politicised', there would seem to be little interest in returning this sphere completely into the domain of power politics.[101]

To note, the investment regime certainly did not single-handedly prevent the excesses of gunboat diplomacy, nor is it a unique phenomenon in the growing 'judicialisation' of international relations. However, while the use of force today certainly faces much more powerful constraints,[102] and the sheer amount of international adjudicative bodies rose sharply in the previous three decades, the extent of acceptance of ISDS and its ability to exert compliance with investment awards is in many ways unprecedented.[103] Due to these features, the investment regime has sometimes been hailed as one of the 'most progressive developments [...] in the last fifty years'.[104]

The sphere of international investment law exhibits a massive acceptance of international arbitral jurisdiction (with claims, as noted, lodged by non-State entities directly) and a high rate of compliance with awards.[105] The most pertinent features are the provisions on recognition and enforcement of awards rendered under the International Centre for Settlement of Investment Disputes (ICSID) and the rather limited possibilities of recourse against the awards within that framework.[106] Notably, Article 54 (1) of the ICSID Convention dispenses with the possibility for the national courts to review ICSID awards. The informal option of rejecting to comply always remains, but by virtue of Article 27(1) of the ICSID Convention such rejection allows for the re-launch of diplomatic protection by the investor's home State.[107] As the experience of Argentina shows, non-compliance can prove both costly and ultimately unsuccessful.[108]

A strong enforcement regime persists even outside the ICSID framework.[109] Almost universally, the recognition, enforcement, and recourse against non-ICSID investment awards are governed by the New York Convention 1958 and the almost identically worded nationally adopted versions of the UNCITRAL Model Law 1985/2006.[110] Despite broader grounds for recourse than in the ICSID Convention Article 52 (1), the merits generally remain beyond review.[111] In practice, the oversight conducted by the national courts is largely non-intrusive. As Van Harten and Loughlin note, the 'piggybacking of investment treaties on the enforcement structure of international commercial arbitration both fragments and restricts judicial supervision of investment arbitration.'[112] The closer

[101] See in this sense, for example, recent reform (as opposed to deconstructive) efforts of States through UNICTRAL, summarized in Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (A/CN.9/930).

[102] Primarily bearing in mind here, of course, Chapter VII of the UN Charter.

[103] Van Harten and Loughlin (n 69) 122 and 133-137.

[104] Schwebel (n 87) 4. As Van Harten and Loughlin further note, 'no other system of international adjudication does what investment treaties do to restrain state action [...]' ((n 69) 149).

[105] See primarily Loukas Mistelis and Krina Baltag, 'Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices' (2008) 19 Am.Rev.Int'l Arb. 319.

[106] ibid. See also Article 52 (1) of the Convention (dealing with limited recourse against awards) and commentary in Christoph Schreuer et al., *The ICSID Convention: A Commentary* (2nd ed, CUP 2009) 898-906.

[107] See on this extensively Schreuer et al. (n 106) 414-430.

[108] See for an overview http://www.allenovery.com/publications/en-gb/Pages/Argentina-settles-five-investment-treaty-awards.aspx.

[109] Federico Ortino, 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures' (2012) 3 JIDS 31, 35.

[110] See Nigel Blackaby N et al., *Redfern and Hunter on International Arbitration - Student Version* (6th edn, OUP 2015) paras 11.40-11.124.

[111] ibid.

[112] Van Harten and Loughlin (n 69) 135.

look at enforcement of awards under the New York Convention shows that it is indeed a largely automatic process in most situations.[113] Whether under ICSID or otherwise, the recognition and enforcement has been described as practically compulsory.[114]

The investment regime thus exhibits both a high level of State commitment to binding international dispute settlement and the remarkable power to enforce its results. Taking thus the respect for international obligations and the existence of a third party adjudicative mechanism to enforce this respect as the relevant international rule of law benchmarks, international investment law is certainly one of the bigger success stories in international law. However, this aspect in itself might not necessarily be an unqualified positive development overall, as the obligations thus enforced might be problematic from the viewpoint of other international rule of law benchmarks mentioned above. Leaving aside for the moment some issues with the rule of law aspects of ISDS (which will be addressed in section 5 below), it is possible to note that the enforced obligations contained in investment agreements, and in particular the ubiquitous FET standard, are themselves strongly in line with the remaining international rule of law requirements. As discussed in the next section, at least at the level of general principles, obligations imposed on the host States align neatly with those rule of law precepts espoused by these very States at both the international and domestic level.

b) Imposing the rule of law requirements – the FET standard

As has been noted in section 3, the whole regime of investment law is often perceived and/or promoted as a tool to secure that the host States behave in accordance with the (international) rule of law requirements. While there are certainly other important provisions that merit attention, most notably the prohibition of uncompensated expropriation,[115] the FET standard offers perhaps the best example for present purposes. It has become the preeminent standard invoked by foreign investors,[116] the one bringing most success to them,[117] and the one directly connected to rule of law considerations.[118] The FET standard and its sub-principles are very likely to be found in almost all existing (and prospective) ISDS disputes.[119] It has emerged as a core investment law concept with a potential to reach deeper into the regulatory sphere of States than any other standard.[120]

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[113] ibid, 135-137. Similarly Ortino 'Legal Reasoning of International Investment Tribunals' (n 109) 35.

[114] Toby Landau, 'Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration' in in Albert Jan van den Berg (ed), *50 Years of the New York Convention*, ICCA Congress Series, Volume 14 (Kluwer Law International 2009) 196.

[115] Reinisch 'The Rule of Law' (n 43) 293.

[116] Jonathan Bonnitcha, Substantive Protection under Investment Treaties: A Legal and Economic Analysis (CUP 2014) 144; Dolzer and Schreuer (n 86) 130.

[117] Dolzer and Schreuer (n 86) 98, 101 and 130.

[118] See on this in particular Stephan W Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010).

[119] See generally Dolzer and Schreuer (n 86) 133-134.

[120] Rudolf Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2004-2005) 37 N.Y.U.J.Int'l Law & Pol. 954, 964; Schill 'Fair and Equitable Treatment' (n 118) 151.

The FET standard, mainly through ISDS jurisprudential developments, is now widely considered to embody certain key rule of law requirements.[121] In an oft-cited summary, Stephan Schill identifies seven sub-clusters of rule of law requirements that emerged in FET jurisprudence, all of which 'also figure prominently as sub-elements or expressions of the broader concept of the rule of law in domestic legal systems':

> (1) the requirement of stability, predictability, and consistency of the legal framework; (2) the principle of legality; (3) the protection of legitimate expectations; (4) procedural due process and denial of justice; (5) substantive due process and protection against discrimination and arbitrariness; (6) transparency; and (7) the principle of reasonableness and proportionality.[122]

A number of authors argue along similar lines.[123] Investment awards, to give some examples, emphasise requirements for the host States to provide stability and consistency,[124] respect domestic legality,[125] provide procedural due process[126] and behave transparently.[127] These developments have also been codified (with some clarifications and limitations) in recent 'new generation' investment agreements, such as the Canada-EU Comprehensive Economic and Trade Agreement (CETA), whose FET standard provision now explicitly refers to denial of justice, fundamental breach of due process, manifest arbitrariness, targeted discrimination, and abusive treatment as constituting a breach.[128]

Leaving aside for the moment the process of further interpretation and application of these rule of law requirements, and the sometimes criticised way in which these became embedded in jurisprudence,[129] such general-level concretisations of the FET standard effectively translate the declaratory rule of law commitments of States into palpable requirements whose breach can entail

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[121] See generally Schill 'Fair and Equitable Treatment' (n 118); Kenneth J Vandevelde, 'A Unified Theory of Fair and Equitable Treatment' (2010- 2011) 43 N.Y.U.J.Int'l Law & Pol. 43; and Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Kluwer Law International 2012). See also Crawford (n 2) 7-8 and Reinisch 'The Rule of Law' (n 43) 292.

[122] Schill 'Fair and Equitable Treatment' (n 118) 159-160 and 171.

[123] See in particular Vandevelde (n 121); Guthrie (n 80) 1165; Rivkin (n 83) 19.

[124] Often cited examples include *CMS Gas Transmission Company v. The Republic of Argentina,* ICSID Case No. ARB/01/8 (Award of 12 May 2005) para 274 ('stable legal and business environment is an essential element' of FET); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic,* ICSID Case No. ARB/02/1 (Decision on Liability of 3 October 2006) para 124; *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey,* ICSID Case No. ARB/02/5 (Award of 19 January 2007) para 250.

[125] See, for example, *Gami Investments, Inc. v. The Government of the United Mexican States,* UNCITRAL (Final Award of 15 November 2004) para 91 ('a government's failure to implement or abide by its own law in a manner adversely affecting a foreign investor may but will not necessarily lead to a violation'); similarly *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2* (Award of 29 May 2003) para 154; *Noble Ventures, Inc. v. Romania,* ICSID Case No. ARB/01/11 (Award of 12 October 2005) para 178.

[126] For example, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICSID Case No. ARB/05/16 (Award of 29 July 2008) para 653 noting that 'a court procedure which does not comply with due process is in breach of the duty [to provide FET]'.

[127] *Tecmed v. Mexico* (n 125) para 154; *Saluka Investments BV v. The Czech Republic,* UNCITRAL (Partial Award of 17 March 2006) para 309; *Metalclad Corporation v. The United Mexican States,* ICSID Case No. ARB(AF)/97/1 (Award of 30 August 2000) para 99.

[128] Article 8.10 (2) of CETA.

[129] Bearing here in mind the questionable (over-)reliance of investment arbitrators on *de facto* precedent as a tool in interpreting (among others) the FET standard (see Hai Y Trinh, *The Interpretation of Investment Treaties* (Brill/Nijhoff 2014) 91).

costly consequences. Both the FET standard and investment law more generally are thus on the frontlines of realizing the proclaimed aspirations towards a 'transparent, stable and predictable investment climate with [...] respect for [...] the rule of law'.[130] This could thus help '[give] the rule of law legal significance beyond its appeal as an aspirational principle'.[131]

c) The positive aspects - some concluding remarks

Taken together, the above-mentioned procedural and substantive aspects indicate that a powerful international enforcement mechanism has been put into the service of securing respect for some of the basic rule of law requirements. The synergy of the two aspects gives credibility to the above-mentioned descriptions of international investment law as a rule of law enhancer, and can provide a key foundation for its legitimacy. To use Thomas Franck's distinction, a 'demonstrable lineage' of a rule/institution can extensively contribute to its 'symbolic validity', enhancing its legitimacy and the resulting compliance pull.[132] Anchoring its mission within the lineage of (international) rule of law can secure the enduring appeal of the investment regime and ISDS in face of the potentially significant detriments to (financial or reputational) self-interest of States.[133] At the same time, this can provide legitimacy-enhancing benefits for the very concept of international rule of law itself. Every manifestation of its requirements being more than 'dead letters'[134] and actually maintaining a coherent link between rules and reality,[135] ultimately also speaks against the narratives of decline in international rule of law or at the very least requires their careful nuancing.

The invocation of and reliance on the international rule of law as a legitimacy-conferring tool does not, however, somehow bestow a free pass on investment arbitrators in terms of their decision-making. On the contrary, it comes with a price tag of seemingly increasing expectations – themselves based on the rule of law - concerning the functioning of ISDS and the quality of justice that investment arbitrators are dispensing. To the extent that these expectations remain insufficiently fulfilled, there are challenges to both the prolonged existence of the investment regime in this (or any) form and to the image and appeal of the international rule of law. The next section turns towards these challenges, with a particular emphasis on the sometimes underappreciated interaction between the international and national visions of the rule of law in a concrete case – and the opportunities to use the power of ISDS in an arguably more normatively satisfying way.

[130] 2005 World Summit Outcome (n 4) para 25 (a). See similarly on promoting the rule of law, domestic rule of law and development in UNGA Resolution 67/1 (n 4) paras 7, 8 and 12, as well as Kumm (n 3) 25-26.

[131] Aust and Nolte (n 8) 66.

[132] Franck (n 20) 726.

[133] See ibid 705-707 and 712 on legitimacy/self-interest tension.

[134] ibid 712.

[135] ibid 737-741.

5. The challenges (and opportunities)

The power of the dispute settlement and enforcement mechanism, coupled with the legitimacy-appealing resort to substantive international rule of law requirements makes the investment regime a sharp State-disciplining 'sword'. It is, however, a double-edged one. Investment law and ISDS themselves face scrutiny and criticism due to the perceived rule of law deficiencies that question their foundation, current operation and future tenability. Limiting (and inevitably simplifying) the issues to the two main features discussed above, both the ISDS as a mechanism and its rule of law-promoting output are subject to far-reaching criticism. This section will address these challenges, but with a special emphasis on the somewhat less discussed substantive decision-making issues, in particular the interaction (and friction) of international and national rule of law in the State-individual context.

a) Criticism and reform of ISDS – structural and procedural issues

There has been an increasing amount of examination and criticism of the structural and procedural features of ISDS ever since the sharp increase of investment cases brought the regime into the spotlight. Without delving extensively into this broad topic,[136] the crux revolves around the alleged inability of ISDS to *itself* conform to a number of rule of law ideals.[137] Whether concerning the procedural rule of law (in particular the transparency of the proceedings), arbitrators' impartiality, or structural deficiencies that hamper harmonious jurisprudence, the debate and 'backlash' have increasingly led to high-profile reform proposals.[138] The proposed structural reforms to the regime, primarily in terms of introducing an appellate level of review,[139] or substituting the existing arbitral mechanisms with an Investment Court System as advocated by the EU,[140] have certainly gained in prominence recently. These proposals have sparked voluminous academic literature, and the trend is certainly not abating.

To be sure, it is almost impossible to overestimate the importance of these topics. If, as is sometimes suggested, the investment arbitration is *the* very factor that matters for investment protection,[141] its maintenance in a manner that is acceptable to all key stakeholders (and States in particular) should remain a priority. This is so from the perspective of both investment law and

[136] See for an overview, for example, the contributions to Michael Waibel et al. (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010).

[137] See on this Sattorova (n 95) 125-136.

[138] Some of these materialized more tangibly, notably in the field of transparency, with the instruments in force such as the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

[139] See on the unsuccessful attempts to introduce an appellate mechanism within ICSID Barry Appleton, 'The Song is Over: Why It's Time to Stop Talking About an International Investment Arbitration Appellate Body' (2013) 107 ASIL Proceedings 23. See also recently N Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18 JWIT 585.

[140] See for the details of the Investment Court System proposal http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf, accessed 1 February 2018.

[141] Thomas W Wälde, 'The "Umbrella" Clause in Investment Arbitration. A Comment on Original Intentions and Recent Cases' (2005) 6 JWIT 183, 190.

international rule of law more broadly, lest the latter loses one of its most potent State-disciplining tools. The focus of the rest of this article, however, will not be on these issues. This is partially because of the well-thread nature of the discussions. Another reason, however, is that regardless of the likelihood of success of the reform proposals (which is at this point rather uncertain) these reforms still leave open the question of how *substantive* decision-making should look like. The application of the international rule of law principles to State behaviour raises a different set of important issues that are arguably no less relevant legitimacy-wise.

b) Criticism and reform of ISDS – substantive issues

Rather unsurprisingly, understanding the investment protection standards (in particular the FET standard) along the lines of rule of law requirements does not by itself resolve a number of issues. Not only is the concept of the rule of law itself contested,[142] but even the rather uncontroversial requirements embodied in the FET are claimed to provide insufficiently specific guidance for the resolution of investor-State disputes.[143] With numerous potential factual scenarios, it is questionable to what extent the discretion of arbitrators can be reined in by narrowing down the content of the applied rule of law requirements. It could result in losing a desirable level of case-specific flexibility. At the same time, an overly free hand of investment arbitrators in imprinting the meaning to these requirements, particularly in the light of the non-existent structural mechanisms to secure jurisprudential coherence, can also tarnish the notion and appeal of the international rule of law. If the decision-making is perceived by States and investors as inconsistent, overly broad or insufficiently reasoned, the recourse to lofty principles such as the (international) rule of law can eventually lose any meaningful impact in legitimacy terms.

Such concerns can propel both the 'system-external' and 'system-internal' reform efforts concerning substantive decision-making.[144] Whilst jurisprudential coherence can also be fostered through the structural reforms mentioned above, improvements are also sought by the re-negotiation (or 're-calibration') of investment treaties, with the aim to further specify the meaning of employed concepts and thereby provide stronger contours to future decision-making. Some of these efforts (mentioned above) are highly visible and can be impactful for future treaty conclusion, but the extent of the realised reforms should not be overestimated. The clarification of the open-textured standards such as FET[145] has so far produced limited results, arguably leaving the door open for further suggestions on rethinking the reasoning process and the interrelationship with other sources of rules.[146] This, of course, if the 'new generation' investment

[142] See, in addition to the discussion above, also Bonnitcha (n 116) 164.

[143] José E Alvarez, 'Is Investor-State Arbitration "Public"?' (2016) 7 JIDS 534, 565.

[144] 'System-internal' would refer to efforts of arbitrators to improve decision-making *de lege lata*, while 'system-external' efforts would include *de lege ferenda* reforms by different stakeholders. See similarly Stephan W Schill, 'The Sixth Path: Reforming Investment Law from Within' (2014) 11 Transnational Dispute Management.

[145] See generally Jürgen Kurtz, 'The Shifting Landscape of International Investment Law and its Commentary' (2012) 106 AJIL 686 and Catharine Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 26 EJIL 639.

[146] Federico Ortino, 'Refining the Content and Role of Investment 'Rules' and 'Standards': A New Approach to International Investment Treaty Making' (2013) 28 ICSID Review 152, 158-160; Martins Paparinskis, 'International

agreements become binding at all, something which is not always the case.[147] Notably, the majority of ISDS claims continues to be lodged under the 'old generation' investment agreements of the 1990s and before.[148]

In light of the still predominantly broad provisions of the investment treaties, even with the link to the rule of law requirements duly accounted for, the possibilities remain open for a further refinement of the substantive decision-making processes. Bearing in mind the themes discussed here, a particularly salient topic is the intersection of the professed application of the *international* rule of law precepts with the pre-existing *national* rule of law notions. It is within this 'internationalised' (State-individual) rule of law context that there are both serious challenges and considerable opportunities to reimagine the role that the international rule of law can and should play through investment awards.

c) Substantive decision-making between international and national rule of law

The State-individual relationship is, as noted above, one of the focal points of the investment protection regime. At the same time, imposing and applying the rule of law requirements here encounters issues not necessarily found in other (State-State, individual-international order) contexts. Simply put, the international rule of law is not being applied to some sort of *terra nullius* where the rule of law played little to no role before, or is in a nascent state. On the contrary, arbitrators are making determinations on legal situations which are also deeply embedded within the national legal frameworks and could be amenable to (at least formally) pre-existing domestic rule of law commitments. While the eligible investors are, for the purposes of investment law, given a partial international law subjectivity,[149] their investments are for nearly all other intents and purposes largely indistinguishable from purely domestic ones. As such, the foreign-owned business entities and their assets also face national law in its entirety. In a vast majority of situations, host State decision-makers are at least formally primarily guided in their everyday behaviour towards foreign investors by domestic (administrative, constitutional, criminal) law, and not necessarily by the provisions of investment agreements. As noted by Campbell McLachlan:

The function of the international law standards enshrined in investment treaties is *not to replace host state law*. Rather it is to provide the fundamental protections of international law, in cases *where the host state legal system has failed to secure such protections itself*.[150]

Investment Law and the European Union: A Reply to Catharine Titi' (2015) 26 EJIL 663, 668-670; Miles (n 100) 305-307.

[147] See on the still uncertain efforts of India to recalibrate its investment obligations Priti Patnaik, 'Deconstructing India's Model Bilateral Investment Treaty' *The Wire*, 16 September 2016, available at: https://thewire.in/66558/deconstructing-indias-model- bilateral-investment-treaty/, accessed 1 February 2018; similarly, a new Norwegian model BIT, touted as progressive in many regards, has not yet even been adopted as a template. See on this Maksim Usynin, 'PluriCourts and NGOs Discuss the Norwegian Model BIT' *PluriCourts Blog*, 24 August 2015, available at: http://www.jus.uio.no/pluricourts/english/blog/maksim-usynin/2015-08-24-bit-model- norway.html, accessed on 1 February 2018.

[148] See http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia, accessed 10 February 2018.

[149] See on this generally Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2004) 74 BYIL 151.

[150] McLachlan (n 79) 107.

To put it somewhat bluntly, the rule of law requirements that investment law can impose on the host States are certainly no novelty to these countries, and it would seem to be a considerable normative *faux pas* for the investment arbitrators to ignore this. The FET provisions, to continue with this example, are certainly not the only or even the most developed set of commitments that oblige the host States to respect the rule of law.[151] Combined obligations existing beyond the investment agreements are usually more specific and developed in terms of obligations imposed upon the host State decision-makers, [152] as these States usually already have extensive international commitments to secure the rule of law domestically.[153] Investment provisions, and FET in particular, essentially and substantially overlap with these protections.[154] For example, they 'overlap substantially with the rights protected in human rights treaties',[155] have cognates in other international commitments of the State,[156] as well as in constitutional obligations.[157] In practical terms, the chances are that a host State in dispute will be at least partially democratic,[158] and will likely have a sufficiently advanced legal system where true *lacunae* rarely occur.[159]

Therefore, it is highly unlikely that a host State did not *already* have a domestically or internationally sourced obligation of some sort to treat the investor and its investment non-arbitrarily, non-discriminatorily, predictably and transparently. The extent to which State apparatuses in individual countries actually attempt and/or manage to comply with their pre-existing obligations can indeed, to put it charitably, be problematic. Sometimes the national rule of law obligations do resemble the 'lofty eloquence of the constitutions of banana republics of yore'.[160] But the fact remains that the 'internationalised' rule of law aspect of the investment regime clashes with an area where both the investor and the host State could have expected that the host State obligations beyond the investment treaty will usually be the ones of primary

[151] 'IIAs rarely include standards of treatment and protection that are not already provided by the host countries' domestic laws and regulations at the time of the negotiation' (Roberto Echandi, 'What Do Developing Countries Expect from the International Investment Regime?' in Jose E. Alvarez et al. (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (OUP 2011) 14).

[152] See in that sense Watts (n 14) 16 (arguing that the domestic rule of law notions and mechanisms are far more developed than international ones in any case) and somewhat similarly Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017) 16 and in particular fn 21.

[153] Guthrie (n 80) 1165; Benedict Kingsbury and Stephan W Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law', IILJ Working Paper 2009/6, 10; Jasper Krommendijk and John Morijn, '"Proportional" by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 423 and 447.

[154] Charles N Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2008-2009) 9 Chi.J.I.L. 471, 489.

[155] Charles N Brower and Sadie Blanchard, 'What's in a Meme? The Truth about Investor- State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States' (2014) 52 Colum.J.Transnat'l L. 689, 758.

[156] Kingsbury and Schill (n 153) 10 and 18.

[157] See in particular Laurence Boisson de Chazournes and Brian McGarry, 'What Roles Can Constitutional Law Play in Investment Arbitration?' (2014) 15 JWIT 862; see also Krommendijk and Morijn (n 153) 423.

[158] Jason W Yackee, 'Controlling the International Investment Law Agency' (2012) 53 Harv.Int'l L.J. 391, 420 and materials cited therein.

[159] Hege E Kjos, Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law (OUP 2013) 193-195.

[160] Jan Paulsson, 'Unlawful Laws and the Authority of International Tribunals' (2008) 23 ICSID Review 215, 220.

relevance. Whilst the empirical research is still somewhat scarce, existing research of investors' attitudes seems to point to a similar conclusion.[161]

The critical friction point is when a dispute does arise and the international rule of law principles as embodied in the FET standard formally become primarily or even exclusively relevant. Even if up to that point both the investor and the host State were focused on the domestic legal order and its mechanisms, this will not necessarily be given decisive (or even considerable) weight. As the cause of action is the international standard embodied in an international treaty, the applicable law considerations imply that international law (and in the first place the text of the treaty itself) is the basis upon which the decision is to be rendered.[162] Unlike regarding the existence of an investment and jurisdictional questions,[163] in decision-making on the merits municipal law is in no way guaranteed to be relevant as either law or (as is more likely) a fact – and often is not.[164] As noted by Jarrod Hepburn in his recent extensive survey of existing decisions, the approaches of investment tribunals indeed vary considerably.[165] Some tribunals explicitly denied the relevance of domestic law (as a fact) for assessing an FET standard breach, others failed to deal with it without explicit explanation, whilst a number of them recognised the contributory role of domestic law in assessing the breaches of the 'often nebulous' FET standard.[166]

In some situations, arbitral awards somewhat puzzlingly engage with the national (rule of) law regarding some of the contentious issues, whilst ignoring them concerning others. In *Genin v. Estonia*, for example, the arbitral tribunal did a thorough examination of relevant substantive provisions regarding banking licences,[167] but none whatsoever concerning the proper due process of their revocation,[168] or concerning the *prima facie* problematic response of Estonian courts to the whole ordeal.[169] In *Al-Bahloul v. Tajikistan*, the tribunal crucially (and rightly) had recourse to pertinent Tajikistani laws to complement its assessment of the behaviour of Tajikistani courts which was allegedly in breach of due process.[170] And yet, when assessing the behaviour of

[161] See, for example, a recent comprehensive study in British Institute of International and Comparative Law/Hogan Lovells, *Risk and Return: Foreign Direct Investment and the Rule of Law* (BIICL 2015), especially at 6 and 11. See also UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* (UNCTAD 2009) 13-14; Sattorova (n 95) 65-70 and 90-102; Jason W Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2011) 51 Va.J.Int'l L. 397, 399-400.

[162] '[t]he law applicable to the issue of liability for a claim founded upon an investment treaty obligation is the investment treaty as supplemented by general international law.' (Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 39). See also *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 (Decision on Annulment of 21 Mart 2007) para 74 ('the *lex causae* [...] based on a breach of the BIT is international law').

[163] See on this Kjos (n 159) 298; Dolzer and Schreuer (n 86) 291-293; Douglas 'The International Law of Investment Claims' (n 162) 52-69.

[164] Indeed, as suggested by Rudolf Dolzer, the effect of investment protection is the 'unavoidable' creation of separate law for foreign investors, which deeply impacts domestic legal systems but is inherently indifferent to issues relating to host State nationals (Dolzer (n 120) 955-958).

[165] See also generally Hepburn (n 152), and in particular 13-39.

[166] ibid 39-40. See somewhat similarly regarding expropriation 58 and 67-68.

[167] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2 (Award of 25 June 2001), paras 62; 352-356; 359-363.

[168] ibid, paras 357-358 and 364.

[169] ibid, para 94 in conjunction with paras 13-18; also paras 313-315.

[170] *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008) (Partial Award on Jurisdiction and Liability of 2 September 2009) paras 221-231.

Tajikistani administration concerning the issuance of relevant gas and oil exploration permits, there is a complete lack of any reference to the domestic legal (e.g. administrative law) framework, and the analysis rather relies on tribunal's view what behaviour could be deemed reasonable based on the factual circumstances.[171]

To be clear, it is largely beyond doubt that investment arbitrators in these situations have no *legal obligation* to formally engage with domestic law or non-investment obligation arising from other international commitments of the host State. At the end of the day, they are there to enforce international (rule of) law and make sure that a generally acknowledged scope of regulatory autonomy cannot be an excuse for the unhindered *fiat* of the host State towards foreign investors.[172] The FET remains an autonomous, international standard, that is not to be formally equated or tied to the host State's or any other domestic understanding of the rule of law requirements.[173] From a strictly legal point (as per VCLT Art. 27), national law cannot justify a breach of an international obligation by the host State,[174] and a breach of national law cannot *per se* entail a breach of the FET standard.[175] Likewise, the taking into account of other international obligations of the host State, at least at the level of interpretation of investment treaty provisions, is a possibility envisioned in the commonly-discussed VCLT Art. 31(3)(c) but, as ISDS jurisprudence itself shows, is by no means a mandatory path for the tribunals.[176]

An argument can also be made that, from the viewpoint of democratic legitimacy, this is exactly as it should be. Investment tribunals have their own set mandates within the confines of the relevant treaties, and any form of their attempt to engage too deeply with domestic (often presumably democratically enacted) law might just further fuel the existing backlash. Investment treaties are thus a form of a 'safe zone' within which the tribunals can undisputedly have their say – and the recent rather strong language of CETA would indicate a similar homage to a strict dualism between the international investment law and national law worlds.[177]

At the same time, there are at least two reasons why from the viewpoint of international rule of law and the specific context of State-individual relationships there might be a need for investment arbitrators to systematically engage with national law and non-investment international obligations in their substantive reasoning, even if these sources are treated as facts.

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[171] ibid, paras 182-189.

[172] As noted, different ways of achieving the rule of law do not imply is absolute relativity (Jeffrey Jowell, 'The Rule of Law: A Practical and Universal Concept' in Jeffrey Jowell, J Christopher Thomas, Jan van Zyl Smit (eds*), Rule of Law Symposium 2014: The Importance of the Rule of Law in Promoting Development* (Bingham Centre for the Rule of Law/Singapore Academy of Law 2015) 8). See similarly *ADC v. Hungary* (n 93) paras 423-424; Schill 'Fair and Equitable Treatment' (n 118) 154.

[173] Schill 'Fair and Equitable Treatment' (n 118) 163; Hepburn (n 152) 16.

[174] See in the ISDS context Virtus C Igbokwe, 'Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations' (2006) 23 J.Int'l Arb. 267, 299; McLachlan (n 79) 114-115 and materials cited therein.

[175] Schill 'Fair and Equitable Treatment' (n 118) 163 and 167; Hepburn (n 152) 32-33 and materials cited therein.

[176] See for an overview of the heterogeneous approaches to VCLT in ISDS Trinh (n 129) 8-31 and J Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) paras 3.52-3.69, 5.04-5.31.

[177] Article 8.31 (2) of CETA, after paragraph (1) affirms the exclusive applicability of international law to investor-state disputes, states that: '[t]he Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party. […] the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. […].'

The first one is that applying the discretion-laden international rule of law requirements without taking due and systematic account of the already existing provisions which relate to the legal situation that is under scrutiny negatively affects both the persuasiveness of reasoning[178] and the perception of due respect for the regulatory autonomy of the host State.[179] Unless the arbitrators want to risk the FET standard being seen as 'a malleable tool of ex post facto control of host states' measures based on the arbitrators' personal conviction and understanding about what is fair and equitable',[180] there should (depending on the circumstances of each case) exist a cogent effort to investigate and explain if and why the host State legal framework and/or compliance with it were (in)sufficient to meet the international rule of law criteria. Persuasiveness of determining if, for example, the host State acted with due process in a specific situation can only benefit from an examination how *its own enacted (and presumably internalised) provisions relating to due process* were followed through in the case at hand. Likewise, it can hardly detract from the persuasiveness to explain why even if these were fully obeyed with, the relevant host State legal framework is not up to the par with what international rule of law would require.

The ultimate determination of the existence of a breach of an investment protection obligation might not depend on this. But structuring the reasoning of arbitrators in that sense can have a powerful disciplining effect. It can and should contribute to making sure that, in cases that can cut deeply into the critical national policy issues or cause budget-straining financial detriment, the open-textured international rule of law requirements were not applied without extensive engagement with national law (or without in-depth reasoning more generally) just because there was no clear legal obligation to do so. As noted by Jan Paulsson:
[…] one should have faith that a fully and judiciously motivated decision, reached after a painstaking ascertainment of the sources of national law, will be accepted by thoughtful nationals as wholly legitimate. If that is not so, why should one have higher hopes for perceptions of the way an international tribunal applies international norms, like "fair and equitable treatment," which, in the view of detractors, are nebulous and therefore ultimately arbitrary?[181]

But for the aim of the rule of law at both 'national and international levels', the importance of engagement with and reference to national rule of law framework does not end here. Rather, as a second reason, with their detached position from domestic political pressure, a powerful enforcement mechanism at their disposal, and an increasingly high profile of investment awards which can become focal points of public discussion, investment arbitrators may be uniquely positioned to elucidate the potential flaws and deficiencies in the national (rule of) law mechanisms or in the compliance with them in practice. This, in turn, can provide guidance for the host States so to rectify the identified deficiencies, avoid future disputes, and enhance the level of the national rule of law for the benefit of both foreign and domestic stakeholders. There are

[178] The need for persuasiveness is particularly prominent in ISDS due to a wide range of potentially affected stakeholders (see generally Landau (n 114) as well as Kingsbury and Schill (n 153) 43-44 and Ortino 'Legal Reasoning of International Investment Tribunals' (n 109) 32).

[179] Regulatory autonomy itself being based on the 'basic postulate of public international law [that] every territorial community may […] within certain basic limits prescribed by international law, organize its social and economic affairs in ways consistent with its own national values.' (W Michael Reisman, 'The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of Its Threshold' (2000) 15 ICSID Review 362, 366).

[180] Schill 'Fair and Equitable Treatment' (n 118) 157.

[181] Paulsson (n 160) 232.

indications that the overall narrative in investment protection has been moving towards justifying its existence as beneficial to national rule of law and good governance more generally.[182] If this is to become a reality, the reasoning and argumentative process of investment tribunals should be properly adapted to the concerns identified above.

To be sure, this rule of law enhancing role with a potentially wider reaching effect is not beyond the capabilities of arbitrators, nor is it an unknown occurrence in existing ISDS practice. To take one illustrative example, the award in *Dan Cake v. Hungary*[183] demonstrates how thoroughly the investment tribunals can engage with the domestic rule of law whilst applying 'detached' international rule of law benchmarks – and at the same time create possibilities for a proactive host State to learn and reform the deficiencies. In its thorough and piercing analysis of a deeply problematic decision of the Budapest Metropolitan court which caused an FET breach claim by the Claimant, the *Dan Cake* tribunal engaged with domestic legislation, court practice and academic commentary in an extensive and persuasive manner to reach an ultimate conclusion that that 'the Court simply did not *want*, for whatever reason, to do what was *mandatory*.'[184] Although the tribunal applied a strictly international standard to eventually establish a denial of justice and an FET standard breach,[185] this by no means prevented it from offering a rule of law criticism *from the perspective of Hungarian law itself* that provides clear guidelines on how to reform the relevant aspects of the legislation and/or court practice so to avoid similar problems and future claims. Such potential reform would unlikely be limited just to foreign investors – a modification of the relevant aspects of insolvency law and practice would likely be applied across the board and benefit domestic actors as well.

To briefly conclude on this part, the international investment law regime faces deep-reaching challenges based on the rule of law issues in its structural, procedural and substantive decision-making aspects. The future of reform efforts is uncertain, and recent developments indicate that in some contexts *better* ISDS might be replaced with *no* ISDS at all.[186] But in every challenge lies an opportunity. To focus on one, by properly adapting the application of the international rule of lw requirements to the domestic context through deeper engagement with the national (rule of) law, opportunity exists to both more persuasively ground the ultimate determinations and to offer possibilities for the national rule of law enhancement.

[182] Sattorova (n 95) 1-9.

[183] *Dan Cake (Portugal) S.A. v. The Republic of Hungary*, ICSID Case No. ARB/12/9 (Decision on Jurisdiction and Liability of 24 August 2015).

[184] ibid, para 14 (emphasis in the original).

[185] ibid, para 117.

[186] The most pertinent recent example being the decision of the Court of Justice of the European Union in *Slovak Republic v. Achmea B.V.* (Case C-284/16), finding an intra-EU investor-State arbitration clause as non-compliant with EU law and opening the door for the effective end of intra-EU ISDS.

6. Conclusion

'May you live in interesting times', tells an oft-quoted, yet apparently apocryphal Chinese curse. The times for the international law and order are indeed interesting, and seemingly become more so with every passing week. The reactions of international lawyers point towards a deep reassessment of what (if anything?) the international rule of law still has to offer, the broad declarative support for it notwithstanding. This paper has aimed to contribute to these debates from the perspective of the relationship between the international rule of law and international investment law, and to suggest that assessments of both phenomena need to remain nuanced – there are indeed both strengths and challenges, as well as opportunities in this sphere.

To have a clearer picture of the indicators of how international rule of law fares, and how it relates to individual regimes, this paper has offered a working understanding of what is the content of the international rule of law and what are the contexts in which it operates. Duly taking account of the unsettled contours, the concept can least controversially be seen as requiring a set of formal precepts – supremacy of the law; non-arbitrariness; consistency, clarity and predictability; equality before the law; peaceful settlement of disputes; and due process. The international rule of law can further be seen as operating at the State-State; State-individual; and the individual-international law level.

If these lenses are then directed towards international investment law, three broad arguments can be put forward. Firstly, investment regime is intertwined with all three contexts of the international rule of law and is, furthermore, often explicitly legitimised by those within the regime as a tool to enforce the international rule of law precepts. Secondly, taking the identified rule of law requirements as benchmarks, international investment law exhibits at least two positive features. The dispute settlement and enforcement mechanism, which is an element whose strength is often criticised in the context of international law more broadly, is here both powerful and widespread. And that same mechanism is often used, mostly through the standard of fair and equitable treatment, to enforce upon the host States some of the basic requirements which correspond to the ones identified as required by the international rule of law.

Thirdly, however, the recourse to the international rule of law as both a source of substantive principles and a legitimising factor has a boomerang effect in that international investment law itself needs to bear a rule of law scrutiny. The numerous criticisms, debates and reform proposals attest to the need to improve the structural and procedural aspects of the regime so to maintain its legitimacy and, ultimately, existence – and with it, at least partially, the legitimacy and continuous existence of the international rule of law. The focus in this paper, however, has not primarily been on these often discussed (and certainly important) points. Rather, it was on the substantive requirements. An argument has been made that juxtaposing open-textured international rule of law requirements with domestic legal systems can, depending on the adaptability of investment arbitrators, either fuel further backlash against the regime or provide new opportunities for enhancing both the legitimacy of the international rule of law and the quality of its domestic counterpart.

Rigidly formalistic insistence on the autonomous nature of international rule of law requirements embodied in investment protection provisions and a lack of systematic engagement with the national legal rules which are otherwise applicable to investor-State relationships might cause further resentment and lead to a missed opportunity to realise distinct broader rule of law benefits for the host States. The decision-making process should systematically and thoroughly engage with the existing national legal framework, even though the ultimate decision on the existence of a breach of a relevant investment protection standard may not formally depend on it. Such an approach can help enhance the national rule of law beyond the confines of an individual case and beyond the piecemeal protection of an individual investor.

The times for international (rule of) law seem bound to remain interesting. With that in mind, there is certainly a need for a careful assessment of what are the benchmarks, relationships and pressure points that should guide the assessment of the 'rise' and 'decline' motions in this sphere. But perhaps even more, there is a need to identify the opportunities to reinvigorate the international rule of law and its legitimacy in the operation of different international law regimes. In the current global climate, it is questionable if either the international rule of law or the investment regime can afford to miss using any such opportunity.

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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WZB Wissenschaftszentrum Berlin für Sozialforschung