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Pursuing and Reimagining the International Rule of Law through International Investment Law

Abstract:

In challenging times for international law, the international rule of law as a connecting thread of 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, I argue that assessing ‘rise’ or ‘decline’ motions in this sphere warrants a nuanced approach that should recognize 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 recognizing the specificities of interaction between the international and national spheres, arbitrators can reinvigorate the legitimacy of the international rule of law through international investment law – benefitting thus the future of both.

Key words

international rule of law; international investment law; investor-state arbitration; fair and equitable treatment; legitimacy of international law

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 doubters.’¹ Prominently, the strong declaratory commitment of states towards upholding the rule of law has been expressed in a number of oft-mentioned UN documents.² The states, to sum up the general narrative, reaffirm ‘solemn commitment [...] to an international order based on the rule of law’³ and profess that ‘respect for and promotion of

¹ Hurd 2014, p. 39. See similarly Kumm 2003, pp. 21-22.

² See particularly the 2005 World Summit Outcome document, UN Doc. A/RES/60/1 (2005), at paras. 11, 21, 119, 134; UNGA Res. 64/116 - The rule of law at the national and international levels, UN Doc. A/RES/64/116 (2010), at Preamble and paras. 2-3; and generally UNGA Res. 67/1 - Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/RES/67/1 (2012). See for a brief overview also Keith 2015, pp. 406-7.

³ UNGA Res. 67/1, para 1.

the rule of law and justice should guide all [state, UN and international organization] activities and accord predictability and legitimacy to their actions'.⁴

Yet, the international rule of law requirements and specific contexts in which they arise remain disputed both within the UN framework⁵ and more generally.⁶ Seeking clarity about these issues goes beyond an academic endeavour. The perceived international rule of law crisis calls for clear(er) categories so to ascertain trends and developments, examine the intensity and proportions of the crisis, and determine what can be done about it.⁷

In light of this, it makes sense to distinguish what specific international rule of law *requirements* might be under pressure, and in which *contexts* this is the case. Contexts would be the relationships that are (or should be) subject to the international rule of law, thus providing the concept's full scope of coverage. Combining the specific requirements with different contexts better reflects the multifaceted nature of the international rule of law. It can also suggest that positive developments and problems might occur in parallel, even within the same subject-matter areas.

This article focuses on international investment law as an excellent illustration of the above-mentioned theses. 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 concerning the commitment of states towards the rule of law. One is a powerful dispute settlement and enforcement mechanism, something often highlighted as problematic for the international rule of law elsewhere. The second feature is that this mechanism is (most) often used to impose and enforce universally recognized formal rule of law requirements, particularly through the ubiquitous standard of 'fair and equitable treatment' (FET). The third and final argument is that the same enforcement mechanism and the intermeshing of internationally imposed rule of law requirements with the national legal frameworks also creates numerous challenges. These challenges can, if left unaddressed, potentially delegitimize or even deconstruct the international investment protection system.

In terms of structure, Section 2 delineates the common core of the international rule of law *content* and differentiates three different *contexts* of its operation – 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 rule of law. Section 4 illustrates the two features that can be seen as distinctly positive developments in rule of law terms, which have been briefly addressed above. Joined together,

⁴ *Ibid.*, para 2.

⁵ See in this sense most recently Arajärvi 2018.

⁶ See for some of the controversies McCorquodale 2016, p. 278 and Aust and Nolte 2014, p. 51, as well as materials cited therein.

⁷ See generally Krieger and Nolte 2016.

these features can make more effective the states' proclamations of adherence to the rule of law at 'both the international and national levels'.⁸

Section 5 argues, however, that there is little room in international investment law for complacency or self-congratulatory narratives. Specifically, and focusing here on the FET standard decision-making, arbitrators should carefully adapt the interpretation and application of the international rule of law principles to the state-individual context, or otherwise risk both further backlash and missed opportunities to enhance the national rule of law beyond the confines of a specific case. Section 6 concludes.

2 Defining the 'international rule of law'

What features should the international legal order possess to be in accordance with the rule of law and how should international legal subjects behave to be rule of law-compliant? A straightforward answer is difficult, no less so because of the readiness to invoke the rule of law in many different contexts.⁹ 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.¹⁰

For one, the international rule of law can be understood as a far more political and/or theoretical concept than most of its national counterparts, which have a much clearer legal force.¹¹ National rule of law requirements, having a long history, operate at the level of domestic legal orders and essentially aim to constrain the arbitrary exercise of governmental power.¹² The lack of a hierarchically dominant sovereign and a correspondingly central constitution for the world order almost necessarily make the international rule of law a different phenomenon.¹³ Duly taking into account the sometimes proclaimed superior, 'constitutional' status of the UN Charter,¹⁴ the fact remains that UN is *a* as opposed to *the* player in the global legal arena,¹⁵ with its judicial organ (the ICJ) commanding authority that remains deeply limited by its non-compulsory general jurisdiction,¹⁶ and with ample possibilities for different regimes of international law to proliferate without necessarily forming a coherent and/or hierarchical system.¹⁷ 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*.¹⁸

⁸ 2005 UN World Summit Outcome, para 134.

⁹ This ubiquitous invocation of the (international) rule of law is often noted in literature. See on this McCorquodale 2016, p. 278; Kumm 2003, p. 22; Tamanaha 2004, pp. 2-4; Higgins 2009, p. 1334.

¹⁰ See in that sense Watts 1993, pp. 16 and 22; see also McCorquodale 2016, p. 291.

¹¹ As noted, for example, by Watts 1993, p. 16 and also Aust and Nolte 2014, p. 51.

¹² See for an overview Loughlin 2010, pp. 333-37 and authors cited therein; see also Tamanaha 2004, pp. 118-22.

¹³ A well-known account is offered in Franck 1988, pp. 706-707. See also Tamanaha 2004, p. 129 and Higgins 2009, p. 1334.

¹⁴ Among others, see an overview of the issue in Doyle 2009.

¹⁵ *Ibid.*, p. 132 ('Weak as it was and is, the UN "constitution" of 1945 still authorizes more than the members are now prepared to cede'). Similarly Higgins 2009, pp. 1330-31.

¹⁶ Higgins 2009, p. 1333 ('...the absence of a compulsory recourse to the Court falls short of a recognizable 'rule of law' model.')

¹⁷ See generally Simma and Pulkowski 2006, in addition to the well-known ILC Report on Fragmentation 2006.

¹⁸ In that sense Kennedy 2009, pp. 37-42. See also Franck 1988, pp. 711 and 753-57.

Among other implications, this also means that the requirements of the international rule of law need to be, to the extent possible, theoretically put together from different sources. The *legal* - as opposed to political and/or aspirational - significance of these requirements will be hard to ascertain outside the specific contexts in which they are invoked or applied. But this somewhat inductive task is arguably worthwhile because the aspirational ideal of the international rule of law is so widely and ardently shared.¹⁹ States worldwide consistently and vocally profess to *want* the rule of law at the global level,²⁰ and that sentiment is shared by international organizations,²¹ courts,²² NGOs,²³ and academia.²⁴

The next sub-section will thus first ascertain a common core of international rule of law requirements that can be distilled from various international sources and the doctrine, before proceeding on to different *relationships* in which these requirements arise.

2.1 The international rule of law requirements – a common core

For the present purposes, it suffices to note a considerable level of consensus that the core international rule of law requirements are primarily *formal* in nature, with *substantive* rule of law obligations - primarily those reflected in the broader corpus of human rights - remaining a more disputed element that is on a firmer ground only in certain contexts.

Generally, the rule of law definitions are almost always positioned between the formal (thin) and substantive (thick) poles.²⁵ The formal conceptions put forward the compliance of legal rules with certain system-internal requirements, without passing judgment on the *substance* of those rules. 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.²⁶ Substantive conceptions use these requirements as a starting point, but 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.²⁷ Apart from those substantive definitions that focus on a singular aspect,²⁸ more holistic visions usually revolve around the respect for the broader or narrower corpus of human rights.²⁹

¹⁹ In that vein also Kumm 2003, p. 21; Tamanaha 2004, pp. 128-9.

²⁰ See the various statements to that effect in *supra* note 2.

²¹ For example, Aust and Nolte 2014, pp. 51 and 57 and examples cited therein.

²² See, for example, on the ICJ and promotion of the international rule of law Tomka 2013.

²³ A prominent example being the document Raoul Wallenberg Institute and the Hague Institute for the Internationalisation of Law (HIIL) 2012.

²⁴ See Watts 1993, p. 45; Crawford 2003, pp. 10 and 12; Chesterman 2009, p. 67; Hurd 2014, p. 39; Tomka 2013, p. 4.

²⁵ See in that sense Tamanaha 2004, p. 91 and Craig 1997, p. 468.

²⁶ See generally Raz 1979 and Fuller 1969, pp. 33-94.

²⁷ Although, to note, formal concepts are themselves necessarily based on at least *some* substantive considerations, such as moral autonomy (Craig 1997, p. 482).

²⁸ For a brief overview, see Tamanaha 2004, pp. 65-71.

²⁹ See for example, Venice Commission Report 2011, paras 41 and 59-61 and also Bingham 2011, p. 66-67.

A survey of ICJ practice, international instruments, other documents (such as NGO positions) and relevant doctrine shows a considerable level of agreement that the international rule of law requires:

1. supremacy of international law and respect for obligations under it;³⁰
2. non-arbitrary behaviour;³¹
3. clarity, consistency and predictability in the promulgation and application of law;³²
4. equality of subjects before international law;³³
5. peaceful settlement of disputes, including through impartial adjudicative processes;³⁴
6. respect for due process of law and procedural fairness.³⁵

This implies that the less controversial requirements are essentially formal in nature. Formality has an arguable advantage of certain normative ‘neutrality’ that allows wide(r) support,³⁶ and in that sense ‘thinness’ of the definition might be a ‘worthy price to pay’.³⁷ A predominantly formal understanding also generally accords with the comparative national understandings of the rule of law requirements,³⁸ although not completely. A comparative overview of the rule of law definitions also shows inclusion of at least some human rights into the ‘core’ rule of law requirements,³⁹ sometimes also at the international level.⁴⁰ However, as inclusion of human rights can blur the still often emphasized distinction between them and the rule of law and human rights,⁴¹ as well as bearing in mind the controversy that this inclusion still generates,⁴² the remainder of this article focus on the largely formal requirements identified above. These represent the most extensive level of states’ consensus

³⁰ As put forward in, for example, UNGA Res. 64/116, para 2; UNGA Res. 67/1, para 31; ICJ, *Nuclear Tests (New Zealand v. France)*, Judgment of 20 December 1974, p. 473, para 49. <https://www.icj-cij.org/files/case-related/58/058-19741220-JUD-01-00-EN.pdf>. Accessed 20 September 2018; In doctrine, see similarly Bishop 1961, p. 553; Nollkaemper 2009, pp. 76-77; McCorquodale 2016, pp. 281-82; Kanetake 2016, pp. 20-21.

³¹ See Chesterman 2008, p. 342; Crawford 2003, p. 7; Bishop 1961, p. 553; Nollkaemper 2009, pp. 76-7; McCorquodale 2016, pp. 281-82; Reinisch 2016, pp. 291-292. In the context of the state-individual relationship, the ICJ has made a well-known pronouncement in ICJ, *EletronicaSicula S.P.A. (ELSI)*, Judgment of 20 July 1989, p. 76, para 128. <https://www.icj-cij.org/files/case-related/76/076-19890720-JUD-01-00-EN.pdf>. Accessed 20 September 2018.

³² A recent affirmation being ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, pp. 663-64, para 66. <https://www.icj-cij.org/files/case-related/103/103-20101130-JUD-01-00-EN.pdf>. Accessed 20 September 2018; See similarly Raoul Wallenberg Institute and HIIL 2012, pp. 26-28; Chesterman 2008, p. 342; McCorquodale 2016, p. 284.

³³ Among many other documents and authors, see UNGA Res. 67/1, para 2; Chesterman 2008, p. 342; Reinisch 2016, pp. 291-92; Keith 2015, pp. 411-13; Raoul Wallenberg Institute and HIIL 2012, p. 32.

³⁴ UNGA Res. 64/116, Preamble; UNGA Res. 67/1, paras 3 and 4; Raoul Wallenberg Institute and HIIL 2012, pp. 28-30; Crawford 2003, pp. 7-8; McCorquodale 2016, pp. 281-82; Tomka 2013, p. 2.

³⁵ As noted by, among others, Aust and Nolte 2014, pp. 60 and 67; Crawford 2003, pp. 7-8; Nollkaemper 2009, pp. 76-77.

³⁶ In that sense Watts 1993, p. 22; Aust and Nolte 2014, p. 51.

³⁷ Chesterman 2008, p. 360.

³⁸ An excellent overview in the European context is offered in Venice Commission Report 2011, para 41.

³⁹ *Ibid.* See also Keith 2015, p. 408.

⁴⁰ See Report of the Secretary-General - The Rule of Law and Transitional Justice in Conflict and Post-conflict societies, UN Doc. S/2004/616 (2004), para 6; but see also serious doubts about this effort in Chesterman 2009, p. 68.

⁴¹ This distinction is often discussed, but in the international context see McCorquodale 2016, p. 283; UNGA Res. 67/1, para 5. See also Palombella 2016, p. 5;

⁴² Chesterman 2009, p. 68.

currently possible.⁴³ Moving forward, the next section suggests the different contexts in which the international rule of law operates, providing an insight into how investment regime fits into the increasingly complex picture of the international rule of law.

2.2 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.⁴⁴ The above-mentioned requirements of the international rule of law arise in more diverse contexts. As is noted in doctrine, there are at least three sets of relevant relationships: 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.⁴⁵

The state-state context dominated the discourse for a long time, especially in areas such as the external actions of states and the use of force.⁴⁶ Many scholarly efforts aim to identify the basic requirements of the rule of law between sovereign states,⁴⁷ and prominent proclamations of the concept primarily focus on the rule of law requirements as a way of securing a peaceful framework of their cooperation.⁴⁸ Yet, the post-Cold War developments increasingly made the state-state relations just one of the relevant international rule of law contexts.⁴⁹ The state-individual relationship - sometimes referred to as the ‘internationalized’ rule of law⁵⁰ - spans and connects international and national levels. The international rule of law came into full-on interaction with the exercise of states’ internal regulatory power.⁵¹ International human rights regime(s), some being in place for almost six decades now, might offer the best example,⁵² but international investment law is seen in that light as well.⁵³

Finally, the relationship between the individual and the international legal order has been a ground-breaking development in international law. Although the individual as the subject of international law is sometimes contested,⁵⁴ in a number of contexts the individual is indeed for all intents and purposes a bearer of both rights and obligations under international law,

⁴³ As most recently noted by Arajärvi 2018, p. 9.

⁴⁴ See for a recent discussion generally Palombella 2016; see also Tamanaha 2004, pp. 92-99.

⁴⁵ See generally Chesterman 2009, pp. 68-69 and in particular detailed discussion in Kanetake 2016, pp. 16-17. State-state level can also be understood to be a part of the broader category of the relationships between the state and supra-national subjects *external* to the state, such as international organizations; notwithstanding also a special context of the rule of law *within* international organizations.

⁴⁶ See the discussion in Kanetake 2016, p. 16; Bishop 1961, p. 553; Hurd 2014, pp. 39-40.

⁴⁷ As noted in particular by Waldron 2006, pp. 20-24; see also McCorquodale 2016, p. 279.

⁴⁸ See, for example, Charter of the United Nations Art. 2 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’ (Paulus 2012, para 24).

⁴⁹ For a recent discussion see Krieger and Nolte 2016, pp. 8-10.

⁵⁰ See generally Nollkaemper 2009 for more on ‘internationalized’ as opposed to ‘international’ rule of law.

⁵¹ *Ibid.*, 75 ([...] international law influences and often even determines the domestic rule of law.); see also Kanetake 2016, p. 11; Van Harten and Loughlin 2006, p. 122.

⁵² See in particular Kanetake 2016, pp. 17-18.

⁵³ *Ibid.*; see also generally Van Harten and Loughlin 2006.

⁵⁴ See Roberts 2017, pp. 141-144, for some comparative international law insights on this topic.

and able to appear before international courts and tribunals in different roles.⁵⁵ As noted, international criminal law is a particularly prominent example.⁵⁶

A holistic understanding of the structural complexity of the international rule of law helps elucidate the ways in which particular phenomena support or endanger it. With this more complex but also more nuanced picture in mind, it is possible to ascertain the place and role of the investment law regime.

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

The international investment regime exhibits close connection to all three of the above-mentioned contexts. The regime is a vast network of mostly bilateral international agreements containing open-textured and appealingly formulated standards of how to treat eligible foreign investors. These standards are coupled with a very potent enforcement regime manifested in investor-state dispute settlement (hereinafter ISDS) mechanisms which allow the affected investors to directly sue the host states under international law and to efficiently enforce the potentially resulting (and sometimes financially staggering) awards.⁵⁷

States thus 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)⁵⁸ and provide those same entities with directly enforceable international legal rights and a procedural standing (individual - international law aspect). At the same time, the constraints imposed through investment agreements have been analogized to the rule of law requirements, providing a strong legitimising narrative of the regime.

There is an often-mentioned proposition that international investment protection aims to secure the rule of law for foreign investors.⁵⁹ The role of international (investment) law is on occasion asserted not just to reinforce but to 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.⁶⁰ 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*'.⁶¹

⁵⁵ For discussion of prominent examples see generally Ziegler 2009 and Popovski 2014; see also Keith 2015, pp. 405-406.

⁵⁶ Kanetake 2016, pp. 17-18; see generally Popovski 2014 and also Higgins 2009, pp. 1335-36.

⁵⁷ See generally Van Harten and Loughlin 2006, pp. 127-131.

⁵⁸ To note, the behaviour of the state in situations that involve aliens is generally restrained by, at least, the international minimum standard (Aust and Nolte 2014, pp. 59-66). However, in by far the most situations and to the extent that foreign investments are implemented through domestic companies in the domestic legal framework, the jurisdiction and regulatory autonomy of the state would not necessarily be any different than in comparison to domestic entities (see McLachlan 2009, pp. 102-103).

⁵⁹ '[R]ule of law-based advocacy is widespread in academic, practitioner, policy, and popular literature on investment arbitration' (Van Harten 2010, p. 627; see also materials cited therein). See also, among many others, Guthrie 2012, p. 1160 and Ortino 2013, p. 443.

⁶⁰ As put forward by oft-cited Crawford 2003, pp. 7-8.

⁶¹ Rivkin 2013, p. 328 (emphasis added). See similarly Guthrie 2013, p. 1167.

One of the critical features of this ‘supranational’ rule of law is the avoidance of interaction with the domestic rule of law mechanisms,⁶² helping thus to preserve the apparent neutrality of the employed precepts.⁶³ The pre-existing domestic legal framework is often perceived as insufficient – thus securing the rule of law is a primary function of an investment treaty.⁶⁴ As is often argued, the desire to remove the investor-state relationship from the possible vagaries of both diplomatic protection and the domestic rule of law primarily inspired the creation and eventual burgeoning of the investment regime.⁶⁵ More generally, states are required to ‘conform their behaviour to rule of law standards’⁶⁶ and should not be allowed to ‘misregulate’.⁶⁷ The *ADC v. Hungary* tribunal noted that ‘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.’⁶⁸

The link between the investment regime and the international rule of law as understood in this article should be clear. However, the claims about the pivotal role of this regime in enforcing the international rule of law should certainly not be taken at face value, as both positive aspects and considerable challenges can be identified in parallel.

4 The positive international rule of law aspects

There are two crucial aspects through which the investment regime furthers the international rule of law, sometimes to an extent hardly equalled elsewhere. 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 mechanism that is sometimes described as causing ‘envy’ in other branches of international law.⁶⁹ Secondly, these assumed obligations, and in particular those stemming from the ‘core’ standard of FET, largely mirror the formal rule of law requirements enumerated above by 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’.⁷⁰ Importance of the

⁶² See in particular on this Alvarez 2009, p. 974.

⁶³ Hirsch 2015, p. 151.

⁶⁴ A good overview of such narratives is offered by Guthrie 2013, and in particular p. 1166. See similarly Dolzer and Schreuer 2012, p. 25.

⁶⁵ For more on the history and *ratio* of the regime, see remarks in Dolzer and Schreuer 2012, pp. 235-36; Reinisch 2016, pp. 291-92; Schwebel 2008, p. 6; Kumm 2003, p. 26; as well as thorough critical treatment in Miles 2013.

⁶⁶ Schill 2009, p. 364. See also Guthrie 2013, p. 1194.

⁶⁷ Carvalho 2016, p. 20.

⁶⁸ *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 October 2006, para 423. <https://www.italaw.com/sites/default/files/case-documents/ita0006.pdf>. Accessed 20 September 2018.

⁶⁹ Dolzer 2014, p. 1.

⁷⁰ See for an overview of such arguments Sattorova 2018, pp. 21-26; see similarly Van Harten and Loughlin 2006, p. 139.

investment regime for the international rule of law is tangible, and must not be overlooked in broad assessments of its current state. The focus will first be on the enforcement aspect, before turning to the substantive obligations.

4.1 Enforcement of international obligations

Acceptance of binding dispute settlement mechanisms and the power to enforce international legal obligations have often been put forward as important rule of law problems. The lack of a central sovereign and the often-rueed limited reach of binding dispute settlement mechanisms indicate that the respect for the international rule of law was (too) often just a matter of states' good will.⁷¹ The refusals of states to comply with the decisions of international adjudicative bodies, although not overly frequent, do contribute to these sceptical accounts.⁷² Calls for more opt-ins to binding dispute settlement mechanisms remain a constant feature in the UN context.⁷³

In addition, the problematic history of foreign investment protection adds importance to the currently existing regime. 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 as 'gunboat diplomacy'.⁷⁴ The rule-based settlement of investment disputes through third party adjudicators thus bears some clear advantages. While there might exist a tendency to overemphasize the extent to which the disputes are truly 'de-politicized',⁷⁵ there would seem to be little interest in returning this sphere into the domain of power politics.⁷⁶

To note, the investment regime certainly does 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 faces much more powerful constraints,⁷⁷ 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.⁷⁸ Due to these features, the investment regime has sometimes been hailed as one of the 'most progressive developments [...] in the last fifty years'.⁷⁹

International investment law sphere exhibits a massive acceptance of international arbitral jurisdiction by states (with claims, as noted, lodged by non-state entities directly) and

⁷¹ See in that sense Shaw 2014, pp. 800-801; Keith 2015, p. 415; Raoul Wallenberg Institute and HIIL 2012, pp. 30-31; Watts 1993, pp. 36-37 and 43-44; Tamanaha 2004, pp. 128 and 130-131; McCorquodale 2016, pp. 289-290.

⁷² See Krieger and Nolte 2016, p. 14 and, for a more positive outlook, Higgins 2009, p. 1332.

⁷³ Examples include UNGA Res. 64/116, Preamble; and UNGA Res. 67/1, para 31.

⁷⁴ An overview can be found, for example, in Miles 2013, pp. 17-70.

⁷⁵ See on this recently Gertz, Jandhyala and Poulsen 2018.

⁷⁶ See in this sense, for example, recent reform (as opposed to deconstructive) efforts of states described in Roberts 2018.

⁷⁷ Primarily bearing in mind here, of course, Chapter VII of the UN Charter.

⁷⁸ A good overview of the reasons is offered by Van Harten and Loughlin 2006, pp. 122 and 133-37.

⁷⁹ Schwebel 2008, p. 4.

a high rate of compliance with the awards.⁸⁰ 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.⁸¹ Notably, ICSID Convention Article 54 (1) 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 ICSID Convention Article 27(1) such rejection allows for the re-launch of diplomatic protection by the investor's home state.⁸² As the experience of Argentina shows, non-compliance can prove both costly and ultimately unsuccessful.⁸³

A strong enforcement regime exists outside the ICSID framework as well.⁸⁴ Almost universally, the recognition, enforcement, and recourse against non-ICSID investment awards are governed by the New York Convention⁸⁵ and the almost identically worded nationally adopted versions of the UNCITRAL Model Law 1985/2006.⁸⁶ Despite broader grounds for recourse than in the ICSID Convention Article 52 (1), the merits generally remain beyond review.⁸⁷ 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'.⁸⁸ The closer look at enforcement of awards under the New York Convention shows that it is indeed a largely automatic process in most situations.⁸⁹ Whether under ICSID or otherwise, the recognition and enforcement has been described as practically compulsory.⁹⁰

The investment regime thus exhibits both a high level of state commitment to binding international dispute settlement and the remarkable power to enforce the results of such settlement. Taking the respect for international obligations and the existence of a third party adjudicative mechanisms as relevant benchmarks, international investment law is one of the bigger success stories of international law. However, this in itself might not necessarily be positive without caveats, as the obligations thus enforced might theoretically conflict with other international rule of law benchmarks. However, leaving aside for the moment some issues with the rule of law aspects of ISDS (addressed in section 5 below), the relevant obligations, and in particular the ubiquitous FET standard, are themselves in line with the remaining international rule of law requirements.

⁸⁰ See primarily on this Mistelis and Baltag 2008.

⁸¹ As regulated by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 159 (1966) (ICSID Convention) Art. 52 (1) (dealing with limited recourse against awards). See commentary in Schreuer C et al. 2009, pp. 898-906.

⁸² As extensively discussed by Schreuer C et al. 2009, pp. 414-30.

⁸³ See for an overview Allen and Overy report, <http://www.allenoverly.com/publications/en-gb/Pages/Argentina-settles-five-investment-treaty-awards.aspx>. Accessed 20 September 2018.

⁸⁴ Ortino 2012, p. 35.

⁸⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38 (1959) (New York Convention).

⁸⁶ See Blackaby N et al. 2015, paras 11.40-11.124.

⁸⁷ *Ibid.*

⁸⁸ Van Harten and Loughlin 2006, p. 135.

⁸⁹ *Ibid.*, pp. 135-137. Similarly Ortino 2012, p. 35.

⁹⁰ In that sense Landau 2009, p. 196.

4.2 Imposing the rule of law requirements – the FET standard

While there are other important provisions, most notably the prohibition of uncompensated expropriation,⁹¹ the FET standard offers perhaps the best example for the interlinkage of investment protection and the rule of law. It has become the preeminent standard invoked by foreign investors,⁹² and the one bringing most success to them.⁹³ The FET standard and its sub-principles are very likely to be found in almost all existing (and prospective) ISDS disputes.⁹⁴ 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.⁹⁵

The FET standard, mainly through ISDS jurisprudential developments, is now widely considered to embody certain key rule of law requirements.⁹⁶ 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.⁹⁷

A number of authors argue along similar lines.⁹⁸ Investment awards, to give some examples, emphasize requirements for the host states to provide stability and consistency,⁹⁹ respect domestic legality,¹⁰⁰ provide procedural due process¹⁰¹ and behave transparently.¹⁰²

⁹¹ On which see Reinisch 2016, p. 293.

⁹² Bonnitca 2014, p. 144; Dolzer and Schreuer 2012, p. 130.

⁹³ Dolzer and Schreuer 2012, pp. 98, 101 and 130.

⁹⁴ See generally *ibid.*, pp. 133-34.

⁹⁵ In that sense see Dolzer 2005, p. 964; Schill 2010, p. 151.

⁹⁶ See generally Schill 2010 and Vandevelde 2010; see also Reinisch 2016, p. 292.

⁹⁷ Schill 2010, pp. 159-160 and 171.

⁹⁸ See in particular Vandevelde 2010; Guthrie 2013, p. 1165; and Rivkin 2013, p. 19.

⁹⁹ 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). <https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf>. Accessed 20 September 2018; and *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007, para 250. <https://www.italaw.com/sites/default/files/case-documents/ita0695.pdf>. Accessed 20 September 2018.

¹⁰⁰ 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’). https://www.italaw.com/sites/default/files/case-documents/ita0353_0.pdf. Accessed 20 September 2018; 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. <https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf>. Accessed 20 September 2018; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award of 12 October 2005, para 178. <https://www.italaw.com/sites/default/files/case-documents/ita0565.pdf>. Accessed 20 September 2018.

¹⁰¹ 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 (‘a court procedure which does not

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).¹⁰³

Leaving aside for the moment the process of further interpretation and application of these rule of law requirements, and the sometimes criticized way in which these became embedded in jurisprudence,¹⁰⁴ 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 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’.¹⁰⁵ This could, in turn, help ‘[give] the rule of law legal significance beyond its appeal as an aspirational principle’.¹⁰⁶

4.3 The positive aspects - some concluding remarks

In sum, a powerful international enforcement mechanism has been put into the service of securing respect for some of the basic rule of law requirements. This synergy 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. Remembering Thomas Franck’s influential account, a ‘demonstrable lineage’ of a rule/institution can extensively contribute to its ‘symbolic validity’, enhancing its legitimacy and the resulting compliance pull.¹⁰⁷ 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.¹⁰⁸ 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’¹⁰⁹ and actually maintaining a coherent link between rules and reality,¹¹⁰ ultimately also speaks against the narratives of decline in international rule of law or at the very least requires their careful nuancing.

comply with due process is in breach of the duty [to provide FET]’.

<https://www.italaw.com/sites/default/files/case-documents/ita0728.pdf>. Accessed 20 September 2018.

¹⁰² *Tecmed v. Mexico*, para 154; *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para 309. <https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf>. Accessed 20 September 2018; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, para 99. <https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf>. Accessed 20 September 2018.

¹⁰³ EU-Canada Comprehensive Economic and Trade Agreement (adopted 30 October 2016, entered into force provisionally 21 September 2017) (CETA) Art. 8.10 (2).

¹⁰⁴ 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 Trinh 2014, p. 91).

¹⁰⁵ 2005 World Summit Outcome, para 25 (a). See similarly UNGA Res. 67/1, paras 7, 8 and 12.

¹⁰⁶ Aust and Nolte 2014, p. 66.

¹⁰⁷ Franck 1988, p. 726.

¹⁰⁸ See *ibid.*, pp. 705-707 and 712 on legitimacy/self-interest tension.

¹⁰⁹ *Ibid.*, p. 712.

¹¹⁰ *Ibid.*, pp. 737-741.

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 form and to the image and appeal of the international rule of law. The next section looks at some of these challenges.

5 The challenges (and opportunities)

Investment law and ISDS 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 (some of) these challenges. A special emphasis is on the somewhat less discussed substantive decision-making issues, such as the interaction of international and national rule of law in the state-individual context.

5.1 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. Put briefly, the crux of criticisms revolves around the alleged inability of ISDS to conform to a number of rule of law ideals.¹¹¹ Whether concerning the procedural rule of law, transparency of the proceedings, arbitrators' impartiality, or structural deficiencies that hamper harmonious jurisprudence, the debate and 'backlash' have increasingly led to reform proposals.¹¹² The proposed structural reforms to the regime, primarily in terms of introducing an appellate level of review,¹¹³ or substituting the existing arbitral mechanisms with an Investment Court System as advocated by the EU,¹¹⁴ have certainly gained in prominence recently. Important initiatives are underway under the auspices of UNCITRAL, International Law Association (ILA), and Institut de Droit international (IDI). The process before Working Group III (Investor-State Dispute Settlement Reform) of UNICTRAL perhaps gained most public prominence, and is potentially also farthest reaching. Bringing together numerous states and other stakeholders as participants and observers, the Working Group is tasked with identifying concerns and discussing

¹¹¹ See on this Sattorova 2018, pp. 125-136; see also for an overview, for example, the contributions to Waibel M et al. 2010.

¹¹² Concerning the issue of transparency, some of these proposals materialized in the form of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 54 ILM 751 (2015) (Mauritius Convention) and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 52 ILM 1303 (2012).

¹¹³ See recently on this Calamita 2017.

¹¹⁴ See for the details of the Investment Court System proposal http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf. Accessed 20 September 2018.

potentially sweeping systemic, structural and procedural reforms of the regime.¹¹⁵ Importantly, the Working Group has concluded that concerns regarding inconsistent interpretations of treaty provisions, multiple uncoordinated proceedings, inconsistency and incorrectness of awards, independence and impartiality of arbitrators, disclosure and challenge mechanisms, diversity of decision-makers, mechanisms for constituting tribunals, and costs and duration of proceedings,¹¹⁶ are all sufficiently strong to warrant developing further reforms.¹¹⁷ The broad range of concerns illustrates well that the above international rule of law advantages of ISDS cannot serve to overshadow numerous practical issues. In terms of reforms themselves, the future work of the Working Group will certainly be under close attention. Developments such as introducing a widely accepted standing investment court would certainly fundamentally change the structure and perception of ISDS as it exists now.

Similar concerns have also inspired work by ILA and IDI. ILA Committee on the Rule of Law and International Investment Law, in addition to substantive issues (discussed briefly in the following section) also has a mandate to examine the procedural issues of ISDS such as the independence and impartiality of arbitrators, procedural fairness, equality of arms and access to justice, and the adequacy of annulment and set-aside procedures.¹¹⁸ Following ILA Sydney Conference in 2018, the Committee has issued a report that contains an extensive theoretical and comparative study of rule of law benchmarks, providing thus the foundation for further work in this area.¹¹⁹ Another important initiative is the work of the 18th Committee of the IDI on Equality of Parties before International Investment Tribunals.¹²⁰ A recent Report of the Committee on this topic, authored by Campbell McLachlan,¹²¹ contains an in-depth look at the function, implications, procedural issues and desirable measures to secure and promote the equality of parties in investment arbitration,¹²² and with an overarching goal of ‘assist in the progressive development of fair procedures for the resolution of international investment disputes, whether by arbitration or within a standing international tribunal.’¹²³ The Report contains a wide range of recommendations that should, in line with IDI practice, also soon be formulated in a form of a resolution.¹²⁴ Equally relevant in these reform efforts should be the awareness of these parallel tracks and potential synergies. As noted by UNCITRAL Working Group III regarding its future work, special care is warranted to ensure coordination with other organizations and with multiple tracks of

¹¹⁵ See most recently UNCITRAL, Draft report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session, UN Doc. A/CN.9/964 (2018) paras 2 (on Group’s mandate), 6-9 (on members and observers); see generally for an analysis of states’ preliminary positions see Roberts 2018.

¹¹⁶ UNCITRAL Working Group III Draft Report, paras 40, 53, 63, 90, 98, 108, 123, 127, and 133.

¹¹⁷ *Ibid.*, paras 135-142 on the next steps of this process.

¹¹⁸ ILA, ILA Committee on the Rule of Law and International Investment Law Committee Description (available at <http://www.ila-hq.org/index.php/committees>, accessed 14 December 2018), p.2.

¹¹⁹ ILA, ILA Committee on the Rule of Law and International Investment Law Committee Sydney Conference 2018 Report (available at <http://www.ila-hq.org/index.php/committees>, accessed 14 December 2018).

¹²⁰ See <http://www.idi-iil.org/en/commissions/page/2/>, accessed 10 December 2018.

¹²¹ McLachlan 2018.

¹²² *Ibid.*, para 23.

¹²³ *Ibid.*, para 22.

¹²⁴ *Ibid.*, paras 28-29 and 318-319.

ongoing reform.¹²⁵

To be sure, it is almost impossible to overestimate the importance of these topics. Various reforms proposals have sparked voluminous academic literature, and the trend is certainly not abating. If, as is sometimes suggested, investor-state dispute settlement is ‘the’ very factor that matters for investment protection,¹²⁶ its maintenance in a manner that is acceptable to all key stakeholders should remain a priority. The focus of the rest of this article, however, is not on these issues. This is partially because of the well-tread nature of the discussions. Another reason, however, is that regardless of the likelihood of success of the structural and procedural reform proposals, the question of how *substantive* decision-making should look like remains open.

5.2 Criticism and reform of ISDS – substantive issues

Interpreting the investment protection standards, and in particular the FET standard, as embodying rule of law requirements also opens new questions. The concept of the rule of law remains contested,¹²⁷ and the requirements embodied in the FET are claimed to provide insufficiently specific guidance for resolving disputes.¹²⁸ At the same time, numerous potential factual and legal scenarios that can arise in ISDS call for preserving the discretion of arbitrators and case-specific flexibility.

However, an overly free hand of investment arbitrators in interpretation and application of relevant provisions can also tarnish the appeal of the international rule of law. If decision-making is perceived by states and investors as inconsistent, overly broad or insufficiently reasoned, the recourse to lofty concepts such as the (international) rule of law can eventually lose meaningful impact on legitimacy.

Such concerns can propel both ‘system-external’ and ‘system-internal’ reform efforts.¹²⁹ One of the important academic initiatives to take stock of the substantive investment obligations and their relationship with the rule of law is the above-mentioned work of the ILA Committee on the Rule of Law and International Investment Law. With its mandate to examine both the substantive content of the treaty standards, and the impact of those standards on the rule of law in the host states,¹³⁰ the work of the Committee could in future lead to proposing improvement to treaty language in order to clarify obligations and better capture the balance of interests at stake, as well as to better take into account specificities of specific host states when interpreting the provisions.¹³¹

¹²⁵ UNCITRAL Working Group III Draft Report, paras 19 and 140.

¹²⁶ As noted, among many others, by Wälde 2005, p. 190.

¹²⁷ See, in addition to the discussion above, also Bonnitcha 2014, p. 164.

¹²⁸ Alvarez 2016, p. 565.

¹²⁹ ‘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 more in Schill 2014.

¹³⁰ ILA Committee on the Rule of Law and International Investment Law Committee Description, pp.1-2.

¹³¹ *Ibid.*, 2-3.

Reforms in practice are also underway. Whilst jurisprudential coherence and perceived correctness of awards could also be fostered through future structural reforms, improvements are already sought by the re-negotiation (or ‘re-calibration’) of investment treaties. With the aim of further specifying the meaning and content of employed concepts, some of these efforts are highly visible and can impact future treaties more broadly.¹³² The extent of the realized reforms should perhaps not be overestimated. The clarification of the open-textured standards such as FET¹³³ has still so far produced relatively limited results, arguably leaving the door open for further suggestions on rethinking the reasoning process and the interrelationship with other sources of rules.¹³⁴ This, of course, if the ‘new generation’ investment agreements drafts become binding at all. Notably, a very strong majority of ISDS claims continues to be lodged under the ‘old generation’ investment agreements of the 1990s and before.¹³⁵

In that light, the possibilities remain open for further ‘internal’ refinement of substantive decision-making, particularly in the sphere of applying *international* rule of law precepts in conjunction or opposition with pre-existing *national* rule of law notions. Within this ‘internationalized’ (state-individual) rule of law context, 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.

5.3 Substantive decision-making between international and national rule of law

The state-individual relationship is one of the focal points of the investment regime, with an own set of distinct issues. The international rule of law precepts are not applied here to some sort of *terra nullius* where the rule of law played little to no role before, or is in a nascent state. Investment arbitrators make determinations in scenarios which are also deeply embedded within the national legal frameworks and could be amenable to at least nominally pre-existing domestic rule of law commitments.

While the eligible investors are, for the purposes of investment law, given a partial international law subjectivity,¹³⁶ their investments are for nearly all other intents and purposes largely indistinguishable from the purely domestic ones. As such, the foreign-owned business entities and their assets also face national law in its entirety.¹³⁷ On a practical level, host state decision-makers are primarily guided in their everyday behaviour towards foreign investors by the domestic (administrative, constitutional, criminal) law, and not necessarily by the provisions of investment agreements.¹³⁸

Put simply, the rule of law requirements that investment law imposes are certainly no novelty to host states, and it would be a considerable normative *faux pas* for the arbitrators to

¹³² See for the most recent overview Titi 2018.

¹³³ On these efforts see generally Kurtz 2012 and Wouters, Duquet and Hachez 2013.

¹³⁴ A brief overview of these developments can be found, for example, in Ortino 2013b, pp. 158-160 and Paporinskis 2015, pp. 668-670.

¹³⁵ See <http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia>. Accessed 20 September 2018.

¹³⁶ See on this generally Douglas 2004.

¹³⁷ See similarly on the general submission of foreign investors and investments to national law Sasson 2017, pp. 7 and 246-247.

¹³⁸ See discussion in McLachlan 2009, p. 107.

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.¹³⁹ Combined obligations existing beyond the investment agreements are usually more specific and developed in terms of rule of law requirements imposed upon the host state decision-makers.¹⁴⁰ Investment provisions, and FET in particular, essentially and substantially overlap with these obligations.¹⁴¹ For example, they ‘overlap substantially with the rights protected in human rights treaties’,¹⁴² have cognates in other international commitments of the state,¹⁴³ as well as in constitutional obligations.¹⁴⁴

It is unlikely that a host state did not already have a domestically or internationally sourced obligation to treat the investor and its investment non-arbitrarily, non-discriminatorily, predictably and transparently. The extent to which individual states 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’.¹⁴⁵ But the fact remains that the ‘internationalized’ rule of law aspect of the investment regime clashes with an area where there is often ample domestic and other international law at play. Both the investor and the host state could have expected these other sources of law to be at least equally, if not primary, relevant for the life of an individual investment. Whilst the empirical research is still somewhat scarce, existing research of investors’ attitudes seems to point to a similar conclusion.¹⁴⁶

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 by investment tribunals. As the cause of action is the international standard embodied in the 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.¹⁴⁷

Unlike concerning some important jurisdictional questions,¹⁴⁸ 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. As noted by Jarrod Hepburn in his recent extensive survey of

¹³⁹ As noted, for example, by Ehandi 2011, p. 14.

¹⁴⁰ See in that sense Watts 1993, p. 16 and Hepburn 2017, p. 16 and in particular text in note 21. Some further examples are also discussed in Guthrie 2013, p. 1165; Kingsbury and Schill 2009, p. 10.

¹⁴¹ In an affirmative light for IIL more broadly, this is noted by Brower and Schill 2008, p. 489.

¹⁴² Similarly affirmatively, see Brower and Blanchard 2014, p. 758.

¹⁴³ Kingsbury and Schill 2009, pp. 10 and 18.

¹⁴⁴ See in particular Boisson de Chazournes and McGarry 2014.

¹⁴⁵ Paulsson 2008, p. 220.

¹⁴⁶ See for a recent comprehensive study British Institute of International and Comparative Law 2015, especially pp. 6 and 11. See also Sattorova 2018, pp. 65-70 and 90-102 and Yackee 2011, pp. 399-400.

¹⁴⁷ ‘[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.’ (Douglas 2009, p. 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 March 2007, para 74. <https://www.italaw.com/sites/default/files/case-documents/ita0546.pdf>. Accessed 20 September 2018.

¹⁴⁸ See on this Kjos 2013, p. 298 and Dolzer and Schreuer 2012, pp. 291-93.

existing decisions, the approaches of investment tribunals vary considerably.¹⁴⁹ 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 recognized the contributory role of domestic law in assessing the breaches of the ‘often nebulous’ FET standard.¹⁵⁰

To be clear, it is largely beyond doubt that investment arbitrators have no explicit 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 prevent the regulatory autonomy of states from becoming an excuse for unhindered *fiat* towards investors. 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.¹⁵¹ As per VCLT Article 27,¹⁵² national law cannot justify a breach of an international obligation by the host state,¹⁵³ and a breach of national law cannot per se entail a breach of the FET standard.¹⁵⁴ 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 Article 31(3)(c) but, as ISDS jurisprudence itself shows, is by no means a mandatory path for the tribunals.¹⁵⁵

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 their attempt to engage too deeply with domestic, presumably democratically enacted law might fuel further backlash. The recent language of the CETA investment protection provisions would indicate a similar homage to a strict dualism between the international investment law and national law worlds.¹⁵⁶

Yet, there are at least two reasons why 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.

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 reasoning¹⁵⁷ and the perception of due respect for the regulatory autonomy of the host state.¹⁵⁸ In an effort to avoid seeing the FET standard as ‘a malleable tool of ex post facto

¹⁴⁹ See generally Hepburn 2017, and in particular pp. 13-39.

¹⁵⁰ *Ibid.*, pp. 39-40. See somewhat similarly regarding expropriation pp. 58 and 67-68.

¹⁵¹ Among many similar arguments, see Schill 2010, p. 163; and Hepburn 2017, p. 16.

¹⁵² Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1980) (VCLT).

¹⁵³ See in the ISDS context Igbokwe 2006, 299; as well as McLachlan 2009, pp. 114-115 and materials cited therein.

¹⁵⁴ See on this Schill 2010, pp. 163 and 167; Hepburn 2017, pp. 32-33 and materials cited therein.

¹⁵⁵ See for an overview of the heterogeneous approaches to VCLT in ISDS Trinh 2014, pp. 8-31 and Weeramantry 2012, paras 3.52-3.69 and 5.04-5.31.

¹⁵⁶ CETA Art. 8.31 (2).

¹⁵⁷ The need for persuasiveness is particularly prominent in ISDS due to a wide range of potentially affected stakeholders (see generally Landau 2009; as well as Kingsbury and Schill 2009, pp. 43-44).

¹⁵⁸ 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.’ (Reisman 2000, p. 366).

control of host states' measures based on the arbitrators' personal conviction and understanding about what is fair and equitable',¹⁵⁹ there should 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 in accordance with due process can only benefit from an examination how *its own enacted (and presumably internalized) provisions relating to due process* were followed through in the case at hand.¹⁶⁰ Likewise, it can only further help to explain why even if these domestic obligations 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 considerations of compliance with domestic law. But structuring the reasoning of arbitrators in this way can have a powerful disciplining effect. Investment cases can cut deeply into the critical national policy issues or cause budget-straining financial detriment. Every effort should thus be made to secure that 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.¹⁶¹

But there is a further reason for this engagement with other sources, as it can lead towards the improvement of the domestic rule of law. Investment arbitrators are generally detached from the domestic institutional constraints and/or political pressure, and have a powerful enforcement mechanism at their disposal. No less importantly, investment awards often have a high public profile and can serve as focal points of public debate. Investment tribunals may thus be uniquely positioned to elucidate the potential deficiencies in the national (rule of) law mechanisms or in practice. This, in turn, can provide guidance for the host states so to rectify the identified problems, avoid future disputes, and enhance the level of the national rule of law for the benefit of both foreign and domestic stakeholders. There are indications that the overall narrative in investment protection has been moving towards justifying its existence as being beneficial to the national rule of law and good governance more generally.¹⁶² If this is to become a reality, the reasoning and argumentative process of investment tribunals should be properly adapted.

Proposals made above are certainly not beyond the capabilities of investment arbitrators, nor are illustrative examples lacking in practice. Investment tribunals have on numerous occasions proven themselves capable of thoroughly and persuasively examining the (breaches of) domestic and international legal obligations of the host state, as well as national practice and secondary sources such as domestic court jurisprudence and academic commentary.¹⁶³ In some situations, the identified breaches of obligations existing beyond

¹⁵⁹ Schill 2010, p. 157.

¹⁶⁰ See similarly, among others, Bjorklund 2005 on 'sequential review' of domestic and international law in denial of justice cases.

¹⁶¹ See similarly Paulsson 2008, p. 232 and Bjorklund 2005, p. 871.

¹⁶² For a recent overview see Sattorova 2018, pp. 1-9.

¹⁶³ See on engagement with domestic jurisprudence and academic commentary, for example, paras 110-114, 127 and 136 of *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. <https://www.italaw.com/sites/default/files/case->

investment treaties have proven decisive in finding a breach of the relevant investment provisions.¹⁶⁴ Conversely, compliance and enforcement of the state of its domestic law and international obligations has also sometimes proven decisive in rejecting investors' claims.¹⁶⁵ In all the cases cited, the thoughtful and extensive reasoning of the awards offers numerous potential insights for the host state as to what can be done to (if necessary) further improve the national rule of law.

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.¹⁶⁶ But in every challenge lies an opportunity. To focus on one, by properly adapting the application of the international rule of law 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.

6 Conclusion

Currently, international law and order seem to be facing new challenges 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 article 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.

Duly taking account of the unsettled contours, the international rule of law 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

documents/italaw4457.pdf. Accessed 20 September 2018. See likewise extensive engagement with domestic court jurisprudence in paras 427-479 of *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award of 14 December 2017. <https://www.italaw.com/sites/default/files/case-documents/italaw9440.pdf>. Accessed 12 December 2018.

¹⁶⁴ See on careful examination of domestic insolvency law, for example, with a clear identification of national rule of law deficiencies and a finding of liability the *Dan Cake v. Hungary* award above. On similar finding of breaches of domestic and non-investment international law that directly led to a finding of liability, see also *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL Arbitration Rules 1976, Final Award of 15 December 2014. <https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf>. Accessed 10 December 2018.

¹⁶⁵ See in earlier jurisprudence, for example, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award of 13 November 2000. <https://www.italaw.com/sites/default/files/case-documents/ita0481.pdf>. Accessed 10 December 2018. See more recently *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award of 18 September 2018. https://www.italaw.com/sites/default/files/case-documents/italaw9955_0.pdf. Accessed 12 December 2018.

¹⁶⁶ 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.

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 legitimized 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 criticized 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 existence and legitimacy – and with it, at least partially, the legitimacy and continuous existence of the international rule of law. Likewise, 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. 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.

Looking towards the future, 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 international rule of law. Perhaps even more pressingly, 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 such opportunities.

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