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Contribution to the national rule of law as a legitimating factor for international investment law – is it the potential or the outcome that matters?

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I Introduction

'Legitimacy crisis' seems to be a common description of international investment law (IIL) today. 'Crisis' rightfully denotes a sense of uneasiness and turbulence surrounding the investment regime, and 'legitimacy' leaves open the many possibilities to claim what exactly is 'wrong'. The concept of legitimacy in international law remains controversial and insufficiently defined,[1] its unsettled contours thus allowing different understandings of what the investment regime lacks and needs. Provided, of course, that international investment protection is considered worthy of survival in the first place – a consideration itself depending to a large extent on the perceptions of legitimacy.

The contribution to the rule of law at both the national and international levels provides one of the crucial legitimating narratives of investment regime's 'value' to States and other stakeholders. It can serve to counter other allegations of illegitimacy, and ultimately provide sufficient justification for the current investment protection paradigm. Time seems to be opportune for discussing this topic. As recently noted by Mavluda Sattorova, there has been an upsurge in presenting international investment agreements (IIAs) as 'catalysts of governance reforms in host States, providing the investment treaty regime with another raison d'etre and justifying its recent strides.'[2] Yet, both the contribution of IIL to the rule of law in host States and regime's own adherence to the rule of law precepts are seriously questioned. Focusing on the former,[3] it has been claimed that the evidence of IIL actually contributing to rule of law and good governance is scarce,[4] or that IIAs can actually be detrimental to the rule of law in the host

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1 Chris A Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34 OJLS 729, 730-731; Thomas Schultz, 'Legitimacy Pragmatism in International Arbitration: A Framework for Analysis' in Jean Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration* (Wolters Kluwer 2019, forthcoming), available at: https://www.ssrn.com/abstract=3175905.

2 Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart 2018) 9.

3 For the latter, see the critique of procedural aspects of ISDS from the rule of law viewpoint in 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).

4 See in particular Sattorova (n 2) Ch. 3.

State.[5] Rule of law promotion has even been called a 'rhetorical strategy […] [that] falls well short of a viable and ongoing strategy of legitimation.'[6] In a period when reform efforts are on the increase, what could these controversies mean for IIL?

In light of the complexity of legitimacy debates, for present purposes the aim is to avoid the 'temptation to offer a totalizing account'[7] and rather focus on a specific issue of whether and how the contribution to the rule of law at the national level could legitimize IIL from the perspective of States as (at least formal) masters of the investment regime. Specifically, I argue three things in this chapter. Firstly, the *social* legitimacy of IIL among States can be increased due to the *moral* legitimacy of its contribution to the national rule of law – as the rule of law is a moral-political value that is widely shared among the host States participating in the regime. Secondly, IIL should not be necessarily expected to produce an outcome in terms of an actual increase in the level of the national rule of law, however that level is measured. Rather, the *potential* for such an improvement should suffice to provide legitimacy enhancement. Thirdly, to create such a potential, investment arbitrators should thoroughly and systematically engage with domestic rule of law issues during substantive decision-making; whilst the structure of ISDS should be reformed so as to allow consistent jurisprudence concerning a particular host State in question.

A number of preliminary remarks are warranted. Firstly, unless specifically mentioned, this chapter will not address the relationship between IIL and the *international* rule of law issues.[8] Rather, I focus on the national rule of law, in the sense of rule of law principles, rules and mechanisms existing domestically and applying to all those individuals and entities that are under the jurisdiction of the host State. Secondly, 'rule of law' is here understood in its negative and formal/'thin' variety, as requiring predictability, consistency, non-arbitrariness, due process, non-discrimination and transparency.[9] As also discussed in section III, for a number of practical and conceptual reasons this excludes from the present discussion certain substantive/'thicker' understandings that require the existence of specific substantive rights and values.[10]

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[5] Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 International Review of Law and Economics 107.
[6] David Schneiderman, 'International Investment Law's Unending Legitimation Project' (2017) 49 Loy.U.Chi.L.J. 229, 246.
[7] Schultz (n 1) 16.
[8] This is, however, something I have addressed elsewhere – see Velimir Živković, 'International Rule of Law Through International Investment Law - Strengths, Challenges and Opportunities', KFG Working Paper Series No. 16, June 2018, available at: https://ssrn.com/abstract=3180585.
[9] See Jan Wouters, 'The Contribution of International Trade and Investment Law to the Rule of Law - Introduction' 4-6 (forthcoming/on file with the author).
[10] See ibid, 8-9.

Thirdly, the starting assumption is that the investment regime will continue to exist in the present or sufficiently similar form for the foreseeable future, thus making its legitimation a desirable goal. Whilst duly noting the body of literature that calls for either radical reconstruction or outright abandonment of IIL based on different legitimacy concerns,[11] I rather focus here on a less sweeping yet perhaps more realistic prospect of helping to legitimate a presumably *pro futuro* existing regime.[12] Fourthly, the focus of this chapter is on decision-making on the merits and specifically under the most prominent substantive provisions of investment treaties, namely the 'fair and equitable' treatment, prohibition of uncompensated expropriation, and full protection and security. This is so both for the reasons of economy of length and in light of particular relevance of these provisions for the rule of law issues, as further addressed below. Finally, I do not deal with other potential avenues of legitimating IIL, most prominently its contribution to increased foreign direct investment flows and the de-politicization of investment disputes.[13] These remain important for future research, but addressing them would take the discussion far beyond the topic of this volume.

This chapter proceeds as follows. Section II defines the relevant notions of legitimacy, the subject whose viewpoint is adopted and the object being legitimized. Section III discusses the legitimating potential of the notion of the rule of law in light of its widespread and largely uncontroversial appeal. Section IV discusses the substantive-decision making and a *potential* for rule of law enhancement as a basis of legitimacy, as IIL can be seen to impose commonly aceepted rule of law requirements upon the participating host States. Section V, on the other hand, discusses some available data on whether there is an *actual* enhancement of the rule of law, as another (and potentially complementary) basis of legitimacy. Noting that clear evidence of actual enhancement seems to be lacking for now, I further argue in section VI that a potential for enhancement should still suffice as a basis of legitimation. However, to help consistently create and maintain this potential, further improvements to different aspects of IIL remain desirable. Section VII concludes.

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[11] See in that sense recently M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) and David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Palgrave 2013).

[12] Incidentally, as noted by Schultz, it seems to be a more difficult effort to try and provide investment protection with justification in legitimacy terms than to criticize its aspects (Schultz (n 1) 16).

[13] For a recent extensive overview of literature on (uncertain) effect of investment agreements on foreign investment flows see Jason Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017) Ch. 6; more generally on foreign investment (law) and development, see contributions to Olivier De Schutter, Johan Swinnen and Jan Wouters (eds), *Foreign Direct Investment and Human Development* (Routledge 2013). On de-politicization see the classic positive argument in Ibrahim Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 ICSID Review 1. For a much more sceptical view, see for example Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2 Trade, Law and Development 19.

II 'Legitimate' – what, for whom, and how?

The appeal and the peril of the notion of 'legitimacy' lies in its open-textured character. In a broad sense, legitimacy tells us whether something is *justified*.[14] Whilst necessarily simplifying complex philosophical discussions for the present purposes, it can be said that determining if something is 'legitimate' requires stating first the relevant criteria for making such an assessment. Furthermore, the object of such legitimation should be made clear and, no less importantly, the subject whose perspective is being taken in the process. As noted by Thomas Shultz, the varied understandings of 'legitimacy' offer many possible starting points, but it is thus all the more important to clearly state the task that the concept of legitimacy is meant to perform, its specific definition for that purpose, and the relevant actors which are taken into account.[15]

The object discussed here is the regime of international investment law, commonly understood as an interlocked network of international investment agreements, whose largely similar provisions are enforced and further interpreted through investor-Stated dispute settlement (ISDS) so as to create a 'common law of investment protection, with a substantially shared understanding of its general tenets.'[16] The legitimating subjects, those whose perspective of IIL is taken into account, are the States participating in the regime as parties to the IIAs and (almost always) as respondents in investment disputes. Among a growing number of other relevant stakeholders, I focus here on States as the formal masters of the treaties that comprise the backbone of IIL, as it makes sense to focus on the 'relevant actors who can change the regime in question'.[17] Whilst other actors can certainly influence the development of IIL, the States through their treaty conclusion/change/termination powers remain the ultimate controllers of the regime's destiny.[18] To note, it is here presumed that States (through their relevant branches) act in good-faith towards the national rule of law, i.e. that its improvement is

[14] See in that sense the second meaning of the term, as defined by the Oxford Dictionary at https://en.oxforddictionaries.com/definition/legitimacy; as well as discussion in Schultz (n 1) 13-14.
[15] Schultz (n 1) 19-20.
[16] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (1st edn, OUP 2007) para 1.50 and more generally paras 1.48-1.56 and 3.83-3.103. See in that sense also, and among many others, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 33 and generally Jeswald W Salacuse, 'The Emerging Global Regime for Investment' (2010) 51 Harv.Int'l L.J. 427. For a good succinct overview of the regime, see Jan Wouters, Sanderijn Duquet and Nicolas Hachez, 'International investment law: The perpetual search for consensus' in De Schutter, Swinnen and Wouters (n 13) and on 'multilateralization' tendencies Rafael Leal-Arcas, 'Towards the Multilateralization of International Investment Law' (2009) 10 JWIT 865.
[17] Schultz (n 1) 20. As also noted by Bonnitcha, Poulsen and Waibel (n 13), beliefs of States (through their officials) can have 'important political ramifications for the regime' (234).
[18] See similarly David Schneiderman, 'Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?' (2011) 2 JIDS 471, 476 and 481.

something that is deemed desirable.[19] Whilst this might not always be the case in practice, presuming otherwise would be a rather cynical approach to the subject-matter and would hardly allow any meaningful legitimacy discussion.

The question is then the relevant understanding of 'legitimacy'. Even just within the sphere of international law, legitimacy has many meanings.[20] There is little need (or possibility) to expound these different understandings in detail. Rather, it is necessary to choose particular notions of legitimacy which are fit for the 'job' of examining IIL and the (national) rule of law. For this, I specifically use the *concepts* of moral and social legitimacy, and the substance and outcome as *bases* of legitimacy, as identified and discussed by Chris A. Thomas in his oft-cited article on 'The Uses and Abuses of Legitimacy in International Law'.[21] Thomas provides perhaps the most cogent (whilst relatively succinct) overview of the common uses of 'legitimacy' in international law discourse.[22] At the same time, and as explained below, the understanding of these categories makes them particularly suited for the topic of this chapter.

As differentiated from *legal*[23] legitimacy, *moral* legitimacy signifies a moral obligation to submit to or support a certain action, rule, actor or system.[24] Moral legitimacy thus involves the issues of political authority, 'right to rule' and the many different senses in which something can be seen as morally justified – regardless of legal validity.[25] In particular, this legitimacy is 'central to the description and evaluation of the exercise of power through law', and features in the discussions on, respectively, the basis of obligation in international law; the evaluation of existing international legal institutions; and providing competing normative justifications for action – as for example in the case of humanitarian interventions.[26]

Social legitimacy, on the other hand, is based on the '*belief* that action, rule, actor or system is morally or legally legitimate'[27] and is thus an empirical concept that does not in itself contain a normative ought. A certain form of a pre-adopted notion of legal or moral legitimacy is required as a basis for that belief, but it then becomes a different (and factual) matter to what extent a phenomenon is believed by certain subjects to conform to that notion and whether it

[19] See on this also section III below.
[20] Thomas (n 1) 733.
[21] Thomas (n 1).
[22] See for a similar recognition of Thomas' overview, as well as the heterogeneity of different potential starting positions, Schultz (n 1) 9-10 and Schneiderman 'Unending Legitimation Project' (n 6) 234-235.
[23] 'Legal legitimacy' is 'a property of an action, rule, actor or system which signifies a legal obligation to submit to or support that action, rule, actor or system' (Thomas (n 1) 735) and is often conflated with legal validity. To the extent that a binary answer might not always be clear (as in some areas of international law), there is a possibility to talk about varying degrees of legal legitimacy (Thomas (n 1) 738).
[24] Thomas (n 1) 738.
[25] ibid 738-740.
[26] ibid 740-741 and materials cited therein.
[27] ibid 741 (emphasis added).

actually does conform to it in practice.[28] This has important implications for compliance, as increased distance between legal/moral legitimacy and social legitimacy negatively affects the stability and effectiveness of a legal system.[29]

For the purposes of this chapter, the topic of examination is how IIL can become more socially legitimate to participating States, by demonstrating its particular moral claim to legitimacy. Or, in other terms, how States should find IIL more acceptable through believing that IIL both embodies and pursues in practice a particular moral-political value – the improvement of the national rule of law.

But how to demonstrate the pursuit of this particular value? This is where the *bases* of legitimacy become relevant. Bases are the specific features of the phenomena whose legitimacy is assessed. The common distinction is between process-, substance-, and outcome-based legitimacy.[30] Process or procedural legitimacy, in its broadest sense, deals with how power is conferred and exercised, with particular emphasis on the source from which it derives, and to the level of adherence to specific procedures (or sometimes rituals) in exercising that power.[31] The substantive aim for which these various procedures exist and are (more or less) followed is, however, not of primary relevance. This is why also for the purposes of this chapter, process legitimacy is not among the examined categories.[32]

The focus is rather on substantive- and outcome-based legitimacy. *Substantive* legitimacy focuses on the substance of decision-making which is seen as in accordance with specific values, and thereby desirable.[33] For example, it is deemed to exist when 'the membership values the organization and generally implements collective decisions because they are seen to implement the members' values'.[34] With a clear link to moral legitimacy, the values put forward as relevant can include justice, human rights and global welfare, but indeed also the rule of law as a value distinct from the particular procedures by which it might be manifested. On the other hand, *outcome* (or output) based legitimacy 'judges the object seeking legitimation in terms of a given set

[28] ibid 741-742. See also similarly Bonnitcha, Poulsen and Waibel (n 13) 233.
[29] Thomas (n 1) 742. See similarly Thomas M Franck, 'Legitimacy in the International System' (1988) 82 AJIL 705, 705-707 and 712; and Bonnitcha, Poulsen and Waibel (n 13) 233-234.
[30] See in that sense Rüdiger Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 6 and Thomas M Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 17-18.
[31] Thomas (n 1) 749-750.
[32] Although see on this aspect concerning IIL, for example, Nigel Blackaby and Caroline Richard, 'Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?' in Michael Waibel et al. (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010).
[33] See somewhat similarly Bonnitcha, Poulsen and Waibel (n 13) 233 on normative legitimacy as demonstrating *desirability* or *appropriateness* of legal rules and institutions.
[34] Ernst Haas, *When Knowledge is Power: Three Models of Change in International Organizations* (University of California Press 1990) 87.

of *outcomes* that are considered desirable'.[35] In that sense, even the procedurally or substantively satisfactory decision-making would thus still have to be 'validated on the basis of [its] practical consequences.'[36] Thomas here provides an example (WTO) and a particularly relevant remark:

> For the WTO, for instance, it is arguable that much of its moral and social legitimacy (such as it is) derives from the claims that its rules have successfully increased global welfare through reducing trade barriers. *The boundaries of outcome-based legitimacy are occasionally blurred by a failure to distinguish between legitimacy based on actual, measurable outcomes and legitimacy based on potential outcomes*.[37]

Herein lies the crux of the issue. Provided that (promoting) the rule of law at the domestic level is indeed a moral-political value or ideal that can make IIL more socially legitimate to States, the question is how the investment regime should manifest its pursuit of this ideal? Two options are conceivable in that sense. One would be that IIL, primarily through investment awards, demonstrates decision-making that creates the *potential* for such enhancement. The other option, based on outcome legitimacy, would be that IIL can actually be shown to increase the level of the rule of law domestically. Ideally, IIL would do both. But if this not the case, should the potential itself suffice?

I argue in this chapter that the *potential* to enhance the rule of law should indeed be the (more) relevant legitimating factor. Whilst the actual rule of law improvement is certainly desirable, insisting on it is not justified in the IIL context. As will be further elaborated in section VI, actual increase in the rule of law is dependent on too many factors extrinsic to IIL itself and is therefore not a suitable benchmark. But, as will be further argued, even the creation of the potential for enhancement is not a given in IIL and is subject to a number of conditions. Further reforms of the regime therefore remain needed. Before that, it is worth focusing on the appeal of the rule of law itself in order to show its legitimating potential.

III The appeal of the rule of law

What makes the national rule of law a promising prospect for IIL's legitimation efforts? The very concept of the rule of law enjoys an almost unquestioned appeal among States and many other stakeholders, both for its intrinsic value and for a more instrumental role in attracting investments and promoting economic development. Its power thus lies in being well-attuned to

[35] Thomas (n 1) 752 (emphasis added).
[36] ibid 751-752.
[37] ibid 752 (emphasis added)

the moral orientation and sensitivities of a particular audience.[38] There is a broad consensus of different actors that the rule of law is a fundamental concept, so much so that it is often taken for granted.[39] On both national and international level, the rule of law is seen as an essential feature of a legal order properly so called,[40] in addition to being described as an 'unqualified human good'.[41]

Focusing specifically on the domestic level, there is little doubt that the *idea* of the rule of law is both central to the operation of the modern State and widely adopted comparatively, often in constitutional or quasi-constitutional instruments.[42] And it is at this domestic level that (at least nominally) the principles, rules and structural mechanisms for securing the rule of law are most developed.[43]Although sometimes these principles and mechanisms might be nothing more than cynical dead letters, in many jurisdictions they are actually put to practice, accompanied by long historical development, jurisprudence and volumes of academic commentary.[44]

States also profess agreement about the necessity of the domestic rule of law through various international treaties and declarations.[45] Perhaps most visibly in the UN context, States have in 2005, 2010, 2012 and most recently 2015 reiterated their strong commitment to the rule of law at the national (and international) level,[46] leaving little doubt that as a *value* the rule of law presents a common denominator worldwide.

In addition, international documents, legal and economic literature often emphasizes the instrumental side of the concept and its critical relevance for attracting investment and furthering economic development.[47] A (re-)affirmation of the commitment to the rule of law by host States

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[38] Shultz (n 1) 14.
[39] Arthur Watts, 'The International Rule of Law' (1993) 36 German Y.B.Int'l L 15, 15; Simon Chesterman, '"I'll Take Manhattan": The International Rule of Law and the United Nations Security Council' (2009) 1 HJRL 67, 67. Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 3; Wouters (n 9) 4.
[40] Timothy Endicott, 'The Impossibility of the Rule of Law' (1999) 19 OJLS 1, 1-2.; Mortimer Sellers, 'An Introduction to the Rule of Law in Comparative Perspective' in Mortimer Sellers and Tadeusz Tomaszewski (eds), *The Rule of Law in Comparative Perspective* (Springer 2010) 1-2.
[41] Edward P Thompson, *Whigs and Hunters: The Origin of the Black Act* (Pantheon Books 1975) 266.
[42] As noted by Tamanaha – 'there appears to be widespread agreement, traversing all fault lines, on one point, and one point alone: that the "rule of law" is good for everyone' (Tamanaha (n 39) 1); see also Venice Commission Report on the Rule of Law (CDL-AD(2011)003rev) paras 30-33, available at: http://www.venice.coe.int; and Sellers (n 40) 4.
[43] Watts (n 39) 16.
[44] See generally Martin Loughlin, *Foundations of Public Law* (OUP 2010) 312-341 and Tamanaha (n 39) 118-122.
[45] See for European examples Venice Commission Report (n 42) paras 17-29 and Watts (n 39) 19, and more generally 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.
[46] 2005 World Summit Outcome document (A/RES/60/1) para 134 ; UNGA Resolution 64/116 - The rule of law at the national and international levels (A/RES/64/116) Preamble; 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); and UNGA Resolution 70/1 - Transforming our world: the 2030 Agenda for Sustainable Development (A/RES/70/1) paras 2-3. See also generally Wouters (n 9) 1-3.
[47] 2005 World Summit Outcome (n 46) paras 11, 21 and 25; 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*

should ideally calm investor fears and secure their confidence.[48] As summarized by UNCTAD, to increase inward foreign investment and achieve development, '[t]he creation of participatory, transparent and accountable governance systems that promote and enforce the rule of law is critical […]'.[49]

Yet, the mere appeal to the rule of law does not make its meaning clear, as this notion is 'more easily invoked than understood'.[50] Specific rules by which the rule of law is manifested in a particular legal order differ, usually as a result of specific historical trajectories.[51] Theoretically, the understandings of the concept range from 'rule *by* law' in the sense of fig-leafing arbitrary power with legal instruments, over 'thinner'/formal understandings, to 'thicker' ones that infuse the notion of the rule of law with various substantive values, such as social and economic human rights.[52] As noted in the introduction, the concept of the rule of law for the purposes of this chapter is 'thin' or formal concept of the rule of law – focusing on clarity, predictability, non-arbitrariness, non-discrimination, due process and transparency.[53] This might require some justification, as it is often noted that a formal conception of the rule of law 'offers no guarantee that it will change the life of society members for the better' and that 'having clear and general rules for the sake of having them does not make sense, unless these rules are good in themselves'.[54]

The focus on formal understanding by no means attempts to understate these controversies, which themselves go deep into the philosophical foundations of the rule of law ideal. Rather, it is justified by two somewhat more practical reasons. One is that the discussion of what is 'good' law for the purposes of the rule of law, or as Joseph Raz put it the 'complete social philosophy',[55] is of a degree of complexity and historical pedigree that would make it hardly manageable within the scope of this contribution. And that is so even without discussing the relation of this 'good' law to the values and norms embodied in the international investment

(Singapore Academy of Law 2015) 9; Adriaan Bedner, 'An Elementary Approach to the Rule of Law' (2010) 2 HJRL 48, 60; Tamanaha (n 39) 2; Christopher M Ryan, 'Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law' (2008) 29 U. Pa. J. Int'l L. 725, 741. See however for some critical perspectives also Wouters (n 9) 3-4, in particular materials in fns 12-17.

[48] Ryan (n 47) 741.

[49] UNCTAD, *World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge* (UNCTAD 2008) 150. See similarly Olivier De Schutter, Johan Swinnen and Jan Wouters, 'Introduction: foreign direct investment and human development' in De Schutter, Swinnen and Wouters (n 13) 23-24.

[50] Watts (n 39) 15. See similarly Tamanaha (n 39) 3-4.

[51] Watts (n 39) 16; Jowell (n 47) 8.

[52] For an overview, see Chs. 7 and 8 of Tamanaha (n 39); see similarly Wouters (n 9) 4-11 (in particular on a somewhat related distinction between 'negative' and 'positive' understandings) and Bedner (n 47) 65.

[53] Wouters (n 9) 6.

[54] ibid, 8 and in particular fns 37-40.

[55] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 211.

regime itself.[56] The second reason is that a formal understanding of the rule of law, with due caveats about certain specificities, presents a suitable common denominator among different legal systems.[57] As much as national understandings of the rule of law can be further infused with substantive values and goals, the formal understanding is the common core and foundation which makes it possible to engage in a dialogue both between different national systems, and those systems and IIL.[58] In that sense, it remains possible to discuss the rule of law and issues such as promotion of the variety of human rights as separate (although usually related) ideals.[59]

To sum up, States worldwide profess the desirability of the rule of law domestically and are in sufficient agreement at least about its basic formal features. As Tamanaha argues, 'even in the case of cynical paeans on its behalf […] adherence to the rule of law is an accepted measure worldwide of government legitimacy.'[60] This widespread agreement suggest that the national rule of law presents a desirable moral-political value for States. If IIL is seen as contributing to it, it is reasonable to assume that this can help enhance its social legitimacy among the participating States and help further stabilize this area of international law. The expectation is that:

> [o]ver time, these authorities and institutions [of the host States] will experience improved governance and a heightened respect for the rule of law. Thus, as the Minister of Finance of Uruguay explained in a private conversation with a journalist when his country ratified its BIT with the United States, "We are not signing this treaty for *them* [i.e. the United States], we are signing it for *us*."[61]

Provided thus that the 'contribution to the national rule of law → enhanced legitimacy' link is taken as a realistic prospect, the notion of 'contribution' becomes particularly relevant. Whilst inevitably simplifying, it is possible to envision two meanings of this notion, or rather two types of contribution. One is the *potential* for improving the national rule of law through State participation in IIL. The second is the *actual* increase in the level of the national rule of law as a result of this participation. The following two sections address these respectively, before discussing why the potential for rule of law improvement should (if certain conditions are met)

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[56] This remains, however, an important topic that is increasingly tackled in investment law literature. See, for example, Nicolás Perrone, 'Neoliberalism and economic sovereignty. Property, contracts, and foreign investment' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2016); and David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (CUP 2008).
[57] See above all different country studies in Pietro Costa and Danilo Zolo (eds), *The Rule of Law: History, Theory and Criticism* (Springer 2007) as well as Tamanaha (n 39) 94-99 and 118-122, Sellers (n 39) and Venice Commission Report (n 42) para 41; see also Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' (2016) 65 ICLQ 277, 283-284; Jowell (n 47) 8; Bedner (n 47) 50, 54, 58.
[58] See similarly Chesterman (n 39) 69 and McCorquodale (n 57) 283.
[59] See in that sense Gianluigi Palombella, 'The Rule of Law at Home and Abroad' (2016) 8 HJRL 1, 5; I have also addressed this issue in Živković (n 7) 11-12.
[60] Tamanaha (n 39) 3.
[61] Salacuse, 'The Emerging Global Regime' (n 16) 444 (emphasis in the original).

be the more normatively relevant legitimating factor for IIL.

IV Legitimacy through substance of decision-making and potential contribution to the national rule of law

International investment law can potentially contribute to the national rule of law as the key provisions of IIAs that form its backbone have been consistently understood, interpreted and applied as embodying formal rule of law requirements that align with those shared by domestic legal orders worldwide. IIAs contain binding international obligations, further refined in case law, to treat a sub-class of entities under host State jurisdiction in accordance with the rule of law precepts. These substantive obligations are accompanied by a powerful dispute settlement and enforcement mechanism that can create a strong incentive for both *ex ante* and *ex post* compliance. Finally, the combination of substantive obligations and the enforcement mechanism *can* induce 'spill-over' effects that result in an enhanced rule of law-compliant treatment of domestic individuals and entities. This, in turn, can bring broader benefits for the national rule of law.

To briefly illustrate, there is a widespread agreement that IIA provisions and the ISDS mechanism are there to make sure that host States act in accordance with the rule of law.[62] As noted by James Crawford, when applying the international legal provisions of IIAs, 'the criterion of liability is […] more or less indistinguishable from the standards of the rule of law'.[63] This is particularly the case concerning the three most commonly invoked protections under the investment treaties – fair and equitable treatment standard (FET standard), prohibition of uncompensated expropriation, and the standard of full protection and security. The FET standard is perhaps most often associated with the rule of law, as ISDS jurisprudence has generally refined its rather opaque wording into requirements that correspond well with the formal rule of law requirements – such as stability and predictability, legality, due process, transparency, and protection of legitimate expectations.[64] Whilst the FET standard has been

[62] José E Alvarez, '"Beware: Boundary Crossings" – A Critical Appraisal of Public Law Approaches to International Investment Law' (2016) 17 JWIT 171, 227 ('of course, the investment regime is intended to compel governments to respect the rule of law …'); see similarly Van Harten (n 3) 627 and materials cited therein; 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; N Jansen Calamita, 'The Rule of Law, Investment Treaties, and Economic Growth: Mapping Normative and Empirical Questions' 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* (Singapore Academy of Law 2015) 122.

[63] James Crawford, 'International Law and the Rule of Law' (2003) 24 Adel L Rev 3, 13.

[64] See 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) 159-60 and 171. See similarly Peter Behrens, 'Towards the Constitutionalization of International Investment Protection' (2007) 45 Arch.Völkerrechts 153, 175. For some prominent examples in jurisprudence see *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005) para 274 ('stable legal and business environment is an

applied to a bewildering array of different factual scenarios, the rule of law provides 'the unifying theory behind [it].'[65]

A similar connection to the rule of law exists concerning the prohibition of uncompensated expropriation. As is noted, this protection 'guarantees respect for property rights as an aspect of the rule of law and an essential prerequisite for market transactions.'[66] IIA provisions dealing with direct and indirect expropriation, themselves exceedingly uniform,[67] aim to secure a non-arbitrary and ordered approach to potential takings of property. In particular, in addition to the key requirement of prompt, adequate and effective compensation, IIAs usually require the existence of a public purpose for the taking, non-discrimination and observance of due process during expropriation.[68] All of these requirements can be closely associated with what the rule of law compliant behaviour would require.

Finally, full protection and security (FPS) is another commonly invoked standard of protection that has clear links with perhaps the most basic rule of law requirement – absence of arbitrary use of physical force by either the government or the individuals among themselves. To note, FPS is sometimes equated with the FET standard,[69] and/or is deemed to also encompass *legal* as well as *physical* protection of investments.[70] Be that as it may, it is certain that the main requirement for the host State under this standard is to provide the investments protection and security from physical harm.[71] As noted by Bedner, the protection of person and property from physical assault has for a long time been understood to be one of the very core functions of the rule of law, and continues to shape the modern understandings as well.[72]

Taken together, these main substantive provisions of IIAs, as further refined in jurisprudence, present a rather well-rounded set of rule of law requirements imposed on the host

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essential element' of FET); *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) para 154 (host States must use 'the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments'); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) para 653 ('a court procedure which does not comply with due process is in breach of the duty [to provide FET]'.

[65] Kenneth J Vandevelde, 'A Unified Theory of Fair and Equitable Treatment' (2010-2011) 43 N.Y.U. J. Int'l L. & Pol. 43, 49.

[66] Stephan W Schill, 'International Investment Law and the Rule of Law' 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) 90.

[67] Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (CUP 2014) 229-230.

[68] Dolzer and Schreuer (n 16) 99-100; see for example Article 6: Expropriation and Compensation of the 2012 US Model BIT (available at: https://www.state.gov/documents/organization/188371.pdf).

[69] Dolzer and Schreuer (16) 161 and materials cited therein.

[70] See, for example, *CME Czech Republic B.V. v. The Czech Republic*, Partial Award (13 September 2001) para 613.

[71] Dolzer and Schreuer (n 16) 160-166; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 309-314.

[72] Bedner (n 47) 51 and materials cited therein.

State – a State which presumably already formally adheres to these requirements through its own legal order. Taking this back to the discussion of the bases of legitimacy in section II, such alignment of requirements would present a substance-oriented basis for legitimacy, as IIL as a regime would be seen to further the rule of law-compliant behaviour that participating States themselves share as an important value.

IIL decision-making could in that sense garner general support from the host States. However, to create a realistic chance of host States actually taking serious note of the IIL-imposed rule of law requirements and/or acting upon their application in specific awards, a further strong incentive is necessary. It does not seem plausible that, for example, declaratory findings of host State liability would on its own lead to serious thinking about bolstering the domestic rule of law in the future.[73]

But investor-State arbitration is far from being a weak enforcement tool. ISDS as a mechanism to incentivize compliance with IIA requirements has features that have made it the 'envy' of other international law regimes.[74] In the first place, the remedy of choice in investment awards are damages, whose amounts have in some cases been staggering and record-setting in the field of international dispute settlement.[75] Furthermore, the possibility of either recourse against ISDS awards or their review at the national level is very limited, or even completely excluded.[76] Whether under ICSID or otherwise, the recognition and enforcement has been described as practically compulsory.[77] With all of this taken into account, the ability of IIL to exert compliance with its rules has been described as in many ways unprecedented.[78]

In summary, IIL does not only put forward the requirements for the host State to obey the rule of law, but has powerful 'teeth' to incentivize compliance. The question that then arises,

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[73] See similarly on the limited possibility of UN Human Rights Council (as opposed, for example, to European Court of Human Rights) to ensure compliance with its findings in Mathew Davies, 'Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations' (2010) 35 Alternatives 449.

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

[75] Whilst the vast majority of damages awards certainly does not reach these heights, the obvious example is the award of slightly above USD 50 billion in the *Yukos* case (*Yukos Universal Limited v Russian Federation*, PCA Case No AA 227, Final Award (18 July 2014)).

[76] Within the ICSID framework, the grounds for challenging an award are limited (see Article 52 (1) of the ICSID Convention and commentary in Christoph Schreuer et al., *The ICSID Convention: A* Commentary (2nd ed, CUP 2009) 898-906. The possibilities for challenge and review at the national level are non-existent in the ICSID framework (see Article 54 (1) of the Convention). Enforcement challenges before local courts remain possible against awards enforced under the New York Convention, but even in those situations he merits generally remain beyond review and the oversight conducted by the national courts is largely non-intrusive (see Nigel Blackaby et al., *Redfern and Hunter on International Arbitration - Student Version* (6th edn, OUP 2015) paras 11.40-11.124 and Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 EJIL 121, 135).

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

[78] Van Harten and Loughlin (n 76) 122 and 133-37. See similarly Schill 'International Investment Law and the Rule of Law' (n 66) 96.

however, is if and how this creates at least a potential contribution to the *national* rule of law? In the end, the States may be particularly careful to treat foreign investors well, without extending this to domestic nationals which have no IIL protection and no access to ISDS.[79] But such a narrower impact on the rule of law-compliant behaviour has been held in doctrine to be rather implausible. As summarized by Reinisch:

> In the long run, the argument goes, it will not be tenable that only foreign investors benefit from the investment standards inspired by the rule of law, but the usually constitutional law-based requirement of equal treatment will push towards all (including domestic) actors enjoying the same level of treatment that is based on the rule of law.[80]

In essence, such 'spill-over' towards domestic nationals would be an actual outcome that would further strongly reinforce the legitimacy claims of IIL. However, is there evidence for such a development actually occurring? As the next section discusses, this does not seem to be the case. Further deliberation is thus required as to what this means in legitimacy terms.

V Actual enhancement of the national rule of law attributable to IIL

At the outset, it should be noted that empirical research on how IIL affects the national rule of law is relatively scarce.[81] This is an important caveat, as future research might make some of the arguments made here considerably obsolete, if not outright wrong. For the time being, *faute de mieux,* it is the existing state of research that shapes the discussion.

One strand of research in this field deals with what can be termed the *institutional* impact of IIL (and particularly ISDS) on the national rule of law. In brief, the question is whether the fact that investor-State arbitration takes high-profile disputes out of national courts negatively affects the development of these courts, as well as the general desire to improve the rule of law domestically.[82] In perhaps the most-often cited (if now somewhat dated) study in this field, Tom Ginsburg examined whether the IIAs present a 'complement' to domestic courts that helps them develop, or rather a 'substitute' that aims merely to cure deficiencies in domestic dispute-settlement for the benefit of foreign investors only.[83] Ginsburg evaluated (preliminarily)[84] the

[79] See on this Sattorova (n 2) Ch. 3 and discussion in the following section.
[80] 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 2016) 295; see similarly Rudolf Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2006) 37 N.Y.U. J. Int'l L. & Pol. 953, 971 and Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2010) 114.
[81] See on the relative scarcity of available studies concerning impacts of investment treaties on national rule of law and governance Bonnitcha, Poulsen and Waibel (n 13) 168, 172 and 179.
[82] See for an overview Guthrie (n 62) 1167-1175.
[83] Ginsburg (n 5) 118-119.
[84] See on limitations of methodology ibid 120.

effects of BIT adoption on subsequent institutional quality in 13 countries, finding eventually that

> [w]hile BIT adoption is far from the best predictor of changes in governance, it is noteworthy that for the Rule of Law variable in particular, BIT adoption leads to subsequent *declines* in quality, controlling for other factors. This suggests that, under certain circumstances, the presence of international alternatives might undermine the quality of the local legal system.[85]

Certain findings also indicate that investment treaties might help autocratic regimes to survive longer, as multinational companies relinquish their pressure on the government to reform.[86] Such 'institutional' strand of research is, however, not the main focus of the present section. This is not only because findings such as Ginsburg's have been countered both empirically[87] and more doctrinally,[88] and do have to be understood in the context of the limited sample. It is also because they do not address whether the host States more generally 'learn' from IIL and ISDS in order to enhance the domestic rule of law. Even if the courts do not have the potential benefit of resolving particular investment disputes, this does not exclude the possibility that both the courts and the remainder of the host State apparatus do internalize the particular rule of law requirements stemming from IIL and act in accordance with them.

Other qualitative studies have focused more specifically on how much governmental officials actually know about investment treaty obligations and related jurisprudence, and how it affects their decision-making. Interestingly, two important studies focusing (among other) on different levels of government in the same country - Canada - produced considerably different findings. According to Christine Côté,[89] health, safety, and environment regulation officials at the national level in Canada had a low level of awareness concerning investment treaty obligations and the risk of foreign investor claims under them.[90] However, research by Van Harten and Scott seems to indicate that at least a considerable number of officials of the province of Ontario do have a considerable level of knowledge about treaty obligations, and that the Ontario trade

[85] Ginsburg (n 5) 121 (emphasis in the original).
[86] See generally Soumyajit Mazumder, 'Can I stay a BIT longer? The effect of bilateral investment treaties on political survival' (2016) 11 Rev Int Organ 477.
[87] See Jan Peter Sasse, *An Economic Analysis of Bilateral Investment Treaties* (Gabler Verlag 2011) 155-176.
[88] See primarily Susan D Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2007) 19 Global Business & Development Law Journal 337, 365-370.
[89] Christine Côté, 'A Chilling Effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment' (2014) (PhD thesis on file at London School of Economics and Political Science), available at http://etheses.lse.ac.uk/897/, accessed 20 October 2018.
[90] see ibid, Ch. 7.

ministry was quite involved in reviewing different national policy proposals vis-à-vis these obligations.[91]

Perhaps the most specific and up-to-date insights can be gathered from a recent book on the topic by Mavluda Sattorova. Whilst covering a broader spectrum of themes, Sattorova also presents the results of empirical research that examined to what extent IIAs and ISDS impact 'good governance' in host States. Notably, the understanding of good governance for Sattorova is akin to a formal set of rule of law requirements, emphasizing transparency, predictability, stability, procedural fairness and due process.[92]

Part of Sattorova's findings is formed by the insights from author's own interviews with government officials dealing with foreign investment in five countries (Kazakhstan, Nigeria, Turkey, Ukraine and Uzbekistan), while the other part is derived from analysis of national legislation and policy documents in a number of other States, including Brazil and Peru.[93] To sum up the findings, bearing again in mind the sample size and its limits, it cannot be plausibly claimed that IIL actually enhances good governance in the host States. State officials know little, if anything, about IIA obligations, even when their countries participated in ISDS and lost claims to investors.[94] Those same officials thus understandably do not see IIL as a particularly important driver of governance reform.[95] Reforms that do get enacted by such states in connection to foreign investment protection are usually aimed at preventing future investment disputes, and not necessarily towards rule of law enhancement for everyone.[96] Many of these reforms cannot be attributed to the influence of IIL at all but rather to the unrelated pressure of international financing bodies.[97] With some exceptions (such as in the case of Peru), 'the claim that international investment law purportedly transforms governance in host states is belied by the emerging evidence'.[98]

This finding adds to the previous contentions in doctrine that it might be far too optimistic to assume that regulators are actually aware of international law obligations and that these obligations meaningfully influence their future behaviour.[99] It might thus be the case that IIL does not in practice do much for the national rule of law, as it is simply not sufficiently taken

[91] Gus Van Harten and Dayna Nadine Scott, 'Investment treaties and the internal vetting of regulatory proposals: a case study from Canada' (2016) 7 JIDS 92.
[92] Sattorova (n 2) 25.
[93] ibid 61-65.
[94] ibid 65-70.
[95] ibid 90-93.
[96] ibid 84-87.
[97] ibid 77-79.
[98] ibid 101.
[99] See on this specifically concerning ISDS Kyla Tienhaara, 'Regulatory chill and the threat of arbitration: A view from political science' in Chester Brown and Kate Miles (eds), *Evolution in International Investment Law and Arbitration* (CUP 2012) 610-611 and materials cited therein. See also Bonnitcha, Poulsen and Waibel (n 13) 168 and 241-242.

into account.[100] Whilst one should hope for more empirical research, for the time being it is worth discussing if the lack of actual evidence for enhancing domestic rule of law means that no legitimacy benefits should be drawn whatsoever for IIL in this area. As the next section argues, this should not be the case.

VI Potential vs. outcome – a 'win' for the former, but with conditions

VI.1. Problems in focusing on the actual rule of law enhancement

In assessing to what extent the national rule of law enhancement is suitable to improve the legitimacy of IIL in States' view, the focus should be on *substance* and *potential* outcome rather than on the empirically questionable actual effect 'on the ground'. This is so for at least three reasons.

Firstly, the very measuring of the national rule of law levels remains notoriously difficult, if not prone to misuse.[101] The different potential conceptualisations of the 'rule of law' make it more difficult to link empirical results with any particular phenomena. As noted by Calamita, 'a diverse range of conceptualisations and operational meanings for measurable "rule of law" variables makes general assessment of the literature difficult and attempts to map these social science findings back onto legal theory even more so.'[102] To this one should add the complexity of linking a concrete rule of law improvement to a concrete IIA and/or ISDS award. Such linking might be outright impossible without access to deliberations within the State governmental apparatus – deliberations which often remain confidential or simply beyond easy measuring.[103] Demanding the proof of an actual rule of law improvement might in that sense be unrealistic, apart from the potential situations where States themselves indicate that certain reforms are a result of a particular IIA and/or ISDS award.[104]

Secondly, and perhaps even more importantly, even if obtaining such a proof was theoretically and practically straightforward, it is highly debatable if it would be fair to expect such verifiable improvement to occur. This is because whether rule of law requirements imposed

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[100] Bonnitcha, Poulsen and Waibel (n 13) 172.
[101] See above all the contributions to Sally Engle Merry, Kevin E Davis and Benedict Kingsbury (eds), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law* (CUP 2015). See also Bonnitcha, Poulsen and Waibel (n 13) 171-172.
[102] Calamita (n 62) 120.
[103] Tienhaara (n 99) 608-609; Bonnitcha, Poulsen and Waibel (n 13) 172.
[104] Such openly recognizable IIA-induced reforms do sometimes happen. For an example, see Omar T Mohammedi, 'International Trade and Investment in Algeria: An Overview' (2010) 18 Michigan State Journal of International Law 375, 401-405.

by an IIA and/or concretised in an ISDS award are acted upon by the host State remains dependent on a plethora of factors that are extrinsic to IIL itself. Whether there are mechanisms in the host State to seriously deal with the potential rule of law deficiencies identified in an ISDS award, whether there is a proactive attitude towards rectifying these deficiencies, and whether there is an actual capacity for improvement are all issues independent of IIAs and investment arbitrators. Put briefly, if and how the State will 'process' the award and its findings is something that depends on the host State itself. Whilst some countries do have the mechanisms in place to examine the lessons learned and potential future impacts from IIA obligations/investment awards, some countries simply do not.[105]

Finally, investment disputes – despite their often high profile and the fact that their numbers vary drastically from State to State – are generally not an everyday occurrence for host States.[106] Their overall impact on enhancing the domestic rule of law might in that sense be limited - as opposed to, for example, thousands of cases a State might be facing before the European Court of Human Rights.[107] Lacking sheer numbers, the actual impact of particular cases might depend heavily on the subject matter, interests at stake, and the amount of the eventually awarded compensation. The author's own experience with investment claims in South-East Europe would suggest that apart from certain limited media coverage at the time of the award, ISDS cases remain mostly known to the relatively tight-knit community of lawyers. These are either State-employed or in the private sector, but there are no developed institutional mechanisms for distributing this knowledge and awareness towards relevant decision-makers.[108]

In summary, and again reiterating the potential impact of future empirical research, insisting that IIL should in all situations actually contribute to the national rule of law in order to be considered legitimate would set a somewhat unrealistic bar. The focus should rather be on the substance of requirements imposed on the host State and the potential for a rule of law enhancement that comes from these requirements. What should suffice is that a State *can* improve its domestic rule of law if it proactively and in good faith rectifies certain rule of law deficiencies identified in a particular ISDS award or through aiming to comply *ex ante* with IIA

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[105] Sattorova (n 2) 90-100. For a proposal on a normative framework for a careful monitoring of investment agreements at the domestic level in terms of their human rights and human development effects, see also Olivier De Schuter, 'The host state: Improving the monitoring of international investment agreements at the national level' in De Schutter, Swinnen and Wouters (n 13).

[106] As suggested by UNCTAD data, the number of cases experienced by States as respondents varies from 1 to 60 (Argentina having the highest number) (http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry, accessed 15 August 2018). For a significant number of countries, investment claim is thus an event only occurring every few years.

[107] Certain countries, such as Romania, Russia, Turkey and Italy each face several thousand applications, as visible from the most up-to-date figures (https://www.echr.coe.int/Pages/home.aspx?p=reports&c, accessed 20 June 2018).

[108] For some similar anecdotal evidence, see also Bonnitcha, Poulsen and Waibel (n 13) 244.

requirements. But this possibility is *not* a given in IIL, and depends on certain conditions that will be discussed in the following section.

VI.2. Conditions for creating the rule of law-enhancing potential

If IIL is to be credibly create a potential for domestic rule of law improvement, it must provide the host States with as much clarity as possible concerning the rule of law requirements in IIA provisions; a sufficiently consistent and predictable case-law; and, particularly relevantly, sufficiently detailed reasoning of investment awards that engages with the domestic legal order and its pre-existing rule of law norms and mechanisms. These three conditions will be addressed briefly in turn.

More generally, understanding the investment protection standards along the lines of rule of law requirements still leaves many issues open. Even limiting the discussion to relatively uncontroversial formal requirements, these are claimed to provide only general guidance for the resolution of specific cases.[109] While this generality might be welcome or even necessary in light of potentially vastly different factual scenarios of individual cases, too much 'arbitral activism' in defining what specific sub-principles of the rule of law require might leave the states in the dark considering *ex ante* compliance, as well as cause other legitimacy concerns.

One path to improve this aspect is through the re-negotiation (or 're-calibration') of investment treaties in order to further clarify the meaning of employed concepts. Some of the more recent treaties contain the codification of refinements arising from ISDS jurisprudence, while some opt for more innovative steps.[110] However, the amount of reform should not be overestimated, as the wording of even some very recent IIAs remains rather general.[111] This, of course, if the 'new generation' investment agreements become binding at all, something which is not always the case. Notably, the majority of ISDS claims continues to be lodged under the 'old generation' investment agreements of the 1990s and before.[112]

In that light, the decision-making of investment tribunals requires special attention. This is so both from a more structural and a more substantive aspect.

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[109] José E Alvarez, 'Is Investor-State Arbitration "Public"?' (2016) 7 JIDS 534, 565.
[110] See generally Jürgen Kurtz, 'The Shifting Landscape of International Investment Law and its Commentary' (2012) 106 AJIL 686 and Wouters, Duquet and Hachez (n 16).
[111] See for example 2017 Argentina-Qatar BIT (available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/5383, accessed 10 August 2018). See more generally 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; and Martins Paparinskis, 'International Investment Law and the European Union: A Reply to Catharine Titi' (2015) 26 EJIL 663, 668-670.
[112] See http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia, accessed 20 June 2018.

As for the former, there has been an increasing amount of examination and criticism of the structural features of ISDS ever since the sharp increase of investment cases brought the regime into the spotlight. Without delving extensively into this broad topic,[113] the crux revolves around the alleged inability of ISDS to conform to a number of rule of law ideals.[114] A prominent issue is the 'atomized' structure of formally independent investment tribunals applying different IIAs, thus jeopardizing consistent jurisprudence. This, in turn, can cause unpredictability that hinders reliable guidance for the future.[115] For example, if a State's behaviour on the same facts is found to be IIA-compliant by one (set of) tribunal(s), and in breach by other(s),[116] this simultaneous legality/illegality severely hampers the possibility to acquire rule of law lessons *pro futuro*. With this in mind, the proposed structural reforms to the regime, primarily in terms of introducing an appellate level of review,[117] or substituting the existing arbitral mechanisms with an Investment Court System as advocated by the EU,[118] have certainly gained in prominence recently. These proposals have sparked voluminous academic literature, and the trend is certainly not abating. Whilst their destiny is at this moment uncertain, enhanced consistency of jurisprudence would help support the position that States can get clear guidance as to what is expected from them.

Finally, there is a certain 'ISDS-internal' way of enhancing the claim to legitimacy through potentially improving the domestic rule of law. Institutional mechanisms can be put in place to ensure that States get consistent guidance. But it is a different matter how that guidance itself, i.e. the substance of investment awards, should look like in order to allow the host States to potentially remedy the identified rule of law failings. To make this possible, the reasoning of investment awards should systematically and thoroughly engage with the domestic legal order

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[113] See for an overview, for example, the contributions to Michael Waibel et al. (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer 2010).
[114] See on this Sattorova (n 2) 125-136 and generally Reinisch (n 80).
[115] On inconsistency of case law as a threat to legitimacy see in particular Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2004-2005) 73 Fordham Law Review 1521 and more recently Jürgen Kurtz, 'Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014).
[116] A classic example are the opposing awards based on the same set of events in *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award (3 September 2001) (finding very limited breach and no damages awarded) and *CME Czech Republic B.V. v. The Czech Republic*, Final Award (14 March 2003) (finding Czech Republic broadly in breach and liable to pay roughly 270 million USD). Similar situation is occurring with a string of recent claims against Spain, all arising from a same change of regulatory framework for renewable energy investments, and with opposing awards already surfacing (see http://investmentpolicyhub.unctad.org/ISDS/CountryCases/197?partyRole=2, accessed 23 August 2018).
[117] See recently on this N Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18 JWIT 585.
[118] See for the details of the Investment Court System proposal http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf, accessed 20 June 2018.

and its rule of law mechanisms, even if domestic law is treated as fact and even if this might not in the end be determinative for the outcome of the dispute. As this might present a critical point for sustaining the legitimating effort through domestic rule of law enhancement, it is warranted to discuss this particular condition in a bit more detail.[119]

As a general matter, in applying the rule of law requirements found in IIA provisions discussed above, investment arbitrators are not entering some sort of pre-existing legal vacuum. On the contrary, they 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. As a matter of course, 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.[120] IIAs themselves usually do not contain the only or the most developed set of rule of law commitments obliging the particular host State.[121] States usually already have extensive international commitments to secure the rule of law domestically,[122] with which investment provisions essentially and substantively overlap,[123] as they also often overlap with constitutional obligations.[124] Therefore, 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 state apparatuses in individual countries actually attempt and/or manage to comply with their pre-existing obligations is, of course, often problematic – but this is exactly the sphere in which IIL can help enhance its legitimacy.

To do this, however, a strong effort must be made to relate the reasoning of the award to the host State's own legal order. To avoid seeing IIA provisions as 'a malleable tool of ex post facto control of host states' measures based on the arbitrators' personal conviction and

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[119] For a more extensive discussion, see Živković (n 7) 24-30.
[120] 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) 107.
[121] Roberto Echandi, 'What Do Developing Countries Expect from the International Investment Regime?', in Jorge José E Alvarez et al. (eds.), *The Evolving International Investment Regime: Expectations, Realities, Options* (OUP 2011) 14; see in that sense also Watts (n 39) 16 and Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017) 16 and in particular text in note 21.
[122] Guthrie (n 62) 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.
[123] 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; Kingsbury and Schill (n 122) 10 and 18.
[124] See in particular Laurence Boisson de Chazournes and Brian McGarry, 'What Roles Can Constitutional Law Play in Investment Arbitration?' (2014) 15 JWIT 862.

understanding about what is fair and equitable',[125] there should exist a cogent and context-specific attempt to explain if and why the host state legal framework and/or compliance with it were (in)sufficient to meet the requirements embodied in an IIA provision. 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 internalized) 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 the rule of law would require.

It should be noted that in assessing a breach of a substantive IIA provision 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.[126] Domestic law is likely to feature as a fact,[127] whilst other international law obligations can also be taken into account during the interpretation process.[128] The actual practice as to the relevance of domestic law for the reasoning and outcome of investment awards varies considerably.[129]

But even if the ultimate determination of the existence of a breach of an investment protection obligation might not depend on the engagement with the domestic legal order, it can and should contribute to making sure that the open-textured rule of law requirements were not applied in an overly cursory and/or opaque manner, which eventually leaves little for the host State to build upon in terms of both avoiding a future ISDS claim and benefitting other stakeholders in the State itself.

VII Conclusion

It is sometimes claimed that international investment law is in an 'unending legitimation project'.[130] With its globe-spanning provisions, powerful enforcement mechanisms and potentially record-setting awards in terms of damages, there is certainly a considerable need for

[125] Schill 'Fair and Equitable Treatment' (n 64) 157.
[126] ibid 163; Hepburn (n 121) 16; 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 120) 114-115 and materials cited therein. As is well-established, and per Article 27 of the Vienna Convention on the Law of Treaties 1980, national law cannot justify a breach of an international obligation by the host state, and a breach of national law cannot *per se* entail a breach of an IIA standard, in particular FET (Hepburn (n 121) 32-33 and materials cited therein).
[127] Hepburn (n 121) 104-111.
[128] See on this in the ISDS context J Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012), paras 3.52-3.69 and 5.04-5.31.
[129] See above all Hepburn (n 121), in particular 13-39 (regarding the FET standard) and 41-68 (regarding expropriation).
[130] Schneiderman 'Unending Legitimation Project' (n 6).

IIL to be also seen as legitimate (as opposed to only legal) if the aim is to secure the stability of the regime.

This chapter, in line with the broader topic of this volume, has examined the contribution to the national rule of law as a potential legitimating factor for IIL in the eyes of States. The rule of law generally, and on the national level as well, is a widely appealing moral-political value. Seeing IIL as helping further this value on the national level can make it *morally* legitimate in the eyes of States, and consequently increase the regime's *social* legitimacy – i.e. its acceptance among those same States as formal masters of the regime. This, however, leads to a discussion of the relevant bases of legitimacy, specifically *substantive* and *outcome*-based legitimacy – should the *substance* of IIL provisions and awards based on them suffice for this legitimacy enhancement, or is the actual, palpable outcome required in terms of improved domestic rule of law?

IIL can create the potential for improving the domestic rule of law, as its provisions and case law tend to require behaviour that aligns with the formal rule of law precepts shared by States worldwide. Yet, the current empirical research provides scant support for the proposition that IIL has actually influenced domestic decision-makers in a way that leads to the increase of the national rule of law. Thus, the potential and the outcome do not seem to go hand in hand in the sphere of IIL. If a choice of a relevant legitimating basis needs to be made (at least in normative terms), the substantive decision-making and the potential should be seen as more relevant. This is because expecting or demanding an actual outcome does not seem justified in light of the fact that a number of critical factors (the reaction of States to awards, the very number of ISDS cases) remains largely outside the sphere of IIL itself. Simply put, it would not be fair to judge IIL on something it cannot affect.

But there are issues that are within the sphere of IIL proper, or rather the conditions that the regime should meet so to create the potential for domestic rule of law enhancement in the first place. Host States should have as much clarity as possible as to what IIAs, as further interpreted in ISDS case-law, require from them; this also implies that case-law itself must strive towards consistency and predictability – at the very least in cases involving the same factual scenarios. But no less importantly, investment awards should systematically and thoroughly engage with the domestic legal order and its rule of law mechanisms. Whilst this may not result in formally establishing a breach of a relevant standard, it can still result in enhancing the reasoning and persuasiveness of awards. It is that same thoroughness of reasoning that can help the State rectify the identified rule of law failings, potentially benefitting the domestic individuals and enterprises as well.

The above conditions suggest the need for further reform in IIL. Different efforts are underway in that sense, with outcomes still being unclear. What is perhaps clearer is that contribution to the national rule of law has promise as a legitimating factor. But the appeal of the rule of law cannot suffice to do all the work. Considerable effort from different stakeholders remains warranted to fully show the IIL's rule of law-enhancing potential and garner the accompanying legitimacy benefits.