# INTERNATIONAL LAW ASSOCIATION

# SYDNEY CONFERENCE (2018)

## RULE OF LAW AND INTERNATIONAL INVESTMENT LAW


*Members of the Committee*

Professor August Reinisch (Austria): *Chair:*
Professor Andrea Bjorklund (USA): *Co-Rapporteur:*
Professor Andreas R Ziegler (Switzerland): *Co-Rapporteur:*

Professor Jose Alvarez (American)
Dr Vladimir Balas (Czech Republic)
Professor Fabio Bassan (Italian)
Dr Giani Bitenov (HQ)
Dr Marc Bungenberg (German)
*Alternate:* Professor Jorn Griebel
Mr Pedro Silveira Campos Soares (Brazilian)
Dr Manjiao Chi (Headquarters)
Professor Charles-Emmanuel Cote (Canadian)
Dr Anna De Luca (Italian)
Professor Arnaud de Nanteuil (French)
*Alternate:* Dr Claire Crepet-Daigremont
Ms Valentina Dimitriou (Cypriot)
Professor Mathias Forteau (French)
*Alternate:* Dr Daniel Mueller
Professor Moshe Hirsch (Israel)
Dr Ursula Kriebaum (Austrian)
*Alternate:* Professor Christoph Schreuer
Dr Svetlana Krupko (Russian)
Dr Marcin Menkes (Polish)
Judge Gustaf Moller (Finnish)
*Alternate:* Dr Maria Pohjanpalo
Professor Giuditta Cordero Moss (Norwegian)
Dr Patricia Nacimiento (German)
*Alternate:* Dr Friedrich Rosenfeld
Professor Junji Nakagawa (Japan)
*Alternate:* Mr Koji Nishimoto
Chantal Ononaiwu (Caribbean)
*Alternate:* Justice Anthony Gafoor
Dr Federico Ortino (British)
Dr Martins Paparinskis (British)
Dr Yannick Radi (Netherlands)
Professor Dr. Marco Antonio Ribeiro Tura (Brazilian)
Dr Christian Riffel (New Zealand)
Professor Stephan Schill (German)
*Alternate:* Dr Steffen Hindelang
Professor Engela Schlemmer (South African)
Ms Katia Yannaca-Small (Hellenic)
*Alternate:* Dr Catharine Titi


## I. INTRODUCTION

The primary objective of the ILA Committee on the Rule of Law and International Investment Law ('the Committee') is to assess the manner in which the rule of law intersects with international investment law.[1] The Committee's mandate is to study rule-of-law implications of international investment law for both substantive and procedural matters.[2] In this regard, the Committee plans to look both at the way "substantive protections found in investment treaties attempt to ensure government decision-making based on the rule of law", and at the way "investment arbitration itself operates in a manner that is consistent with the rule of law."[3] This requires a solid understanding of the rule of law itself. As one commentator has succinctly stated, "the rule of law is easy to pontificate about, but not so easy to define".[4] For this reason, the new ILA Committee is devoting considerable attention to the difficulty of defining the multifaceted aspects of the concept of the rule of law, which have often developed with particular socio-legal connotations in domestic law and in other international law contexts, such as "prééminence du droit, état de droit, la primauté de droit" (the three French versions have slightly different meanings)[5], Rechtsstaatlichkeit, and the rule of law.[6]

---

[1] The ILA Committee on the Rule of law and International Investment Law was established by the ILA Executive Council in 2015.

[2] See mandate of the ILA Committee on the Rule of Law and International Investment Law, available in the description of the committee at http://www.ila-hq.org/index.php/committees.

[3] Ibid.

[4] Lord Neuberger, *Arbitration and the Rule of Law* (Hong Kong, 2015).

[5] See Ursula Kriebaum, "Rule of Law Notions in Human Rights Law", pp. 3-4 [hereinafter Kriebaum]. Much of this interim report is based on reports prepared by committee members on the rule of law as it intersects with or is used by various international organizations. Those reports are available on the ILA website: http://www.ila-hq.org/index.php/committees.

Our study takes place against the backdrop of a lively debate on the notion of the rule of law as it is used in different national legal systems.[7] At the same time one is faced with the difficult problem of ascertaining whether there can be agreement on the content of the rule of law that can be used in an international context as a benchmark to assess international investment law and investor-State dispute settlement. "[T]he term itself continues to remain open-ended, contested as well as burdened with conflicting normative assertions: while it conjures community as well as insists on authority and emphasizes rule-boundedness as well as promises enforceability, it does not say very much outright as to its stakeholders and its constituents, those who give it legitimacy and those who are affected by it."[8] This is particularly the case now given what appears to be an ever-expanding list of elements which have been deemed implicit within the rule of law.[9] Moreover, there are definitions of the term which conflict with others and there have been complaints of "ideological abuse and general overuse".[10] As a result, some academics have questioned whether the term has become meaningless.[11] In an attempt to bring at least some clarity, some distinguish between two types of the rule of law: "thin" and "thick", also referred to as "formal" and "substantive" rule of law respectively.[12] Given these disparities, the ILA Committee has first embarked on exploring the different meanings of the concept of rule of law. The literature on the topic is vast; the following paragraphs provide a short overview.

That the "rule of law" does not have a clear, universally accepted meaning and may be particularly responsive to different cultures is widely accepted.[13] In common law traditions the concept of rule of law, building on the work of Dicey, who stressed the supremacy of law over governmental power, equality before the law, and the enforcement of the law through the courts,[14] often emphasizes procedural protections, such as access to justice and the right to a fair trial.[15] In contrast, other legal cultures focus more on the (formal) legality of state action, such as the Kelsenian concept of the "Rechtsstaat."[16]

Different aspects of the rule, and why agreement on its content and scope can be hard to achieve, can be illustrated by three French translations of rule of law: *état de droit*, *pre-eminence du droit* and *principe de légalité*. *Etat du droit* has been understood by some to mean the supremacy of laws, a formalistic approach that could mean "rule *by* law" rather than "rule *of* law".[17] The third notion tends to overlap with the other two.

---

[6] See R. Grote, "Rule of Law, Rechtsstaat and 'Etat de droit'", in C. Starck (ed.), *Constitutionalism, Universalism and Democracy* (Nomos, 1999) pp. 269-306; G. Palombella, "The Rule of Law and its Core", in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Hart, 2009) pp. 17-42. T. Bingham, *The Rule of Law* (Allen Lane, 2010).

[7] See generally B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge 2004); H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983), vol. 1.; T.R.S. Allan, Constitutional Justice: A Liberal Theory of the Rule of Law (Oxford 2001); P. Craig, *Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework* (Ashgate/Dartmouth, 2005); J. Waldron, *The Law* (Routledge, 1990); D. Dyzenhaus, *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart, 1999); Bingham, (n. 1); I. Flores and K. Himma (eds..), *Law, Liberty, and the Rule of Law* (Springer, 2013).

[8] P. Zumbansen, "The Rule of Law, Legal Pluralism, and Challenges to a Western-centric View: Some Very Preliminary Observations", TLI Think! Paper 47/2016, p. 4.

[9] Lord Bingham, "The Rule of law" (2007) 66:1 Cambridge Law Journal.

[10] D. von der Pfordten, "On the Foundations of the Rule of Law and the Principle of the Legal State/Rechtsstaat" in J.R Silkenat, J. Hickey Jr & P/ Barenboim, eds, *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, Ius Gentium: Comparative Perspectives on Law and Justice at 16.

[11] R. H. Fallon Jr, "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) 97:1 Columbia Law Review; J. Shklar, "Political Theory and The Rule of Law" in A. Hutchinson & P. Monaham, eds, *The Rule of Law: Ideal or Ideology* (1987).

[12] B. Tamanaha, *On the Rule of Law: History, Politics, Theory.* (Cambridge, 2004).

[13] See United Nations General Assembly, The Rule of Law at the National and International Levels, A/RES/69/1, 18 December 2014, para. 9 ("Calls, in this context, for dialogue to be enhanced among all stakeholders with a view to placing national perspectives at the centre of rule of law assistance in order to strengthen national ownership, while recognizing that rule of law activities must be anchored in a national context and that States have different national experiences in the development of their systems of the rule of law, taking into account their legal, political, socioeconomic, cultural, religious and other local specificities, while also recognizing that there are common features founded on international norms and standards.").

[14] A.V. Dicey, *An Introductions to the Study of the Law of the Constitution* (London: Macmillan, 1885)) Pt II, at 172, 177-78, 208.

[15] S. Beaulac, "The Rule of Law in International Law Today", in Palombella and N. Walker (n. 6), pp. 197-204.

[16] H. Kelsen, Pure Theory of Law (University of California Press, 2d ed., 1970).

[17] Kriebaum, at 3. See generally Société française pour le droit international, *L'Etat de droit en droit international* (Pedone 2008); L. Heuschling, *Etat de droit, Rechsstaat, Rule of Law* (Dalloz, 2002).

*État de droit* is used far less often than *prééminance du droit*. *État de droit* tends to be used to emphasize the fundamental importance of courts and the fair administration of justice in a democratic society rather than as a guiding principle for the interpretation of rights guaranteed by the Convention.[18]

More broadly, rule of law concepts appear to converge on a number of points, such that Professor Chesterman was able to conclude his comparative survey by suggesting that the "elements of the core definition may be summarized as a government of laws, the supremacy of the law, and equality before the law."[19]

It is hard to find a single institutional formula that captures all of the nuances of rule of law. Leading international advocates for rule-of-law conditionality use complex indices, some of which borrow variables from other indices that partly overlap.[20] Further, it seems that legal and judicial reform must be context-dependent: "Whether in the form of multilevel constitutionalism, global administrative law or other [approaches], socio-cultural factors in accordance with regional preferences must be acknowledged in the structure and substance of law."[21]

A society where there is merely adherence to explicit and valid laws will be said to have the formal, or "thin," rule of law. This type of rule of law is not to be equated with democracy or "good law".[22] Although it "measures the legal order against the presence or absence of observable criteria that have been decided beforehand," those criteria are not rigid.[23] In other words, there is no list of principles or rights or duties that *must* be present in order for a legal system to be said to be operating in compliance with the formal rule of law. Proponents of this "thin" rule of law assert

> that it avoids or at least mitigates charges of cultural imperialism in transplanting vast bodies of substantive law, as well as universalistic conceptions of appropriate institutions and processes, to developing country contexts where distinctive social, cultural, and historical conditions may render such universalistic prescriptions inappropriate.[24]

In contemporary society where decolonisation and anti-colonialist sentiment have gained sway in academia and law, the benefits of this model of the rule of law could be argued to outweigh the disadvantages, particularly from a Third World Approaches to International Law perspective.[25]

In contrast, the substantive rule of law has at its core a moral fabric. It "measures the outcomes of a particular set of rules against standards such as justice or fairness".[26] The former Secretary General of the United Nations (UN), Kofi Annan, described the rule of law as

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law,

---

[18] Kriebaum, at. 4.
[19] S.Chesterman, "An International Rule of Law", 56 *American Journal of Comparative Law* 331, 342 (2008).
[20] Marcin Menkes, "Rule of Law in International Monetary and Financial Law", p. 17 [hereinafter Menkes]. ("For instance, a hybrid RoL Index presented by a "nonpartisan, non-profit think-tank", the Center for Financial Stability, consists of five variables: Protection of Property Rights, Burden of Government Regulation, Efficiency of Legal Framework in Settling of Disputes, Efficacy of Corporate Boards, and Strength of Investor Protections.[20] Here, however, the first four elements are quantified by the *Global Competitiveness Report* and the last is taken from the World Bank/International Finance Corporation's *Doing Business*.") The indices themselves may contain ideological flaws, and there is growing criticism that they contain mis-guided efforts to "export" the rule of law inappropriately. K. Davis et al., *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford 2012).
[21] *Id*., p. 17.
[22] J. Raz, "The Rule of Law and its Virtue" in *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979).
[23] R.J. Daniels & M. Trebilcock, "The Political Economy of Rule of Law Reform in Developing Countries" (2004) 26 *Michigan Journal of International Law* 99, 105.
[24] *Ibid.*
[25] M. Mutua & A. Anghie, "What is TWAIL?", in *Proceedings of the Annual Meeting (American Society of International Law)* Vol 94 (2000).
[26] Daniels & Trebilcock, (n. 23), at 106.

> separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[27]

This definition would thus be classified as substantive rule of law. On this notion, formal rules are generally only relevant to the degree that they facilitate the attainment or maintenance of "the good". Supporters of the thick rule of law assert that it is a means by which common social values may be entrenched. They further argue that without it dictatorial regimes may claim their oppressive actions to be legally valid provided they comply with the black-letter law.

Both formulations of the rule of law have their critics.[28] Many would agree that the thin form of the rule of law is the minimum requirement for a legal system to be deemed just. Others, such as Daniels and Trebilcock, assert that although the thin rule of law is a necessary component of a just legal system, it is not sufficient. Moreover, the very idea that the rule of law must fall into one of these two categories has also been criticized; thus alternative theories, some a combination of the two, have been put forth.[29] We do not propose in this report to resolve these long-standing debates. For our purposes – that is to say, how rule-of-law principles intersect with international investment law – we can identify some general principles. For our purposes, we suggest that, either on an explicit or implicit interpretation, the "thick" rule of law can encompass the "thin".[30] As such, it is our position that the concepts of "thin" and "thick" rule of law are not mutually exclusive and, as Rijpkema suggests, may even be complementary.[31]

Further to discussions at our first meeting in Johannesburg in 2016, it was agreed that prior to focusing on the broad agenda set by the Committee, it was necessary to develop an understanding of the concept of the 'rule of law' that could be used to analyze, and assess normatively, international investment law and investor-state dispute settlement. In light of the difficulties of defining such a concept even in the context of a single legal order alluded to above, and the impossibility, under these circumstances, of starting with a top-down definition of the concept that would be broadly accepted across domestic legal systems and international legal regimes, the Committee chose to adopt a bottom-up approach and to make use of comparative methodology. The idea in taking this approach was to assess what the concept of the rule of law meant in a variety of domestic legal orders as well as in the context of a variety of international legal regimes and to determine on a comparative basis to what extent common elements, or recurring clusters of analysis, existed that were considered to form part of the concept of the rule of law in the legal orders analyzed.

The purpose of this approach is not to determine the existence of general principles of law in the sense of Article 38(1)(c) of the Statute of the International Court of Justice (ICJ Statute); instead, its goal is more modest, namely to develop a working concept of the 'rule of law', which can serve as a conceptual framework for the Committee's analysis of the interactions of international investment law and investor-state dispute settlement with the rule of law. This has the advantage that the relatively strict methodologies for determining in a convincing and broadly accepted fashion the existence of a general principle of law as understood by Article 38(1)(c) of the ICJ Statute, namely the analysis of a sufficient number of domestic and international regimes that are representative of the membership of the international community, do not need to be adhered to.[32]

---

[27] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General* (United Nations, 2004).

[28] For criticism of the thick concept see Raz, (n. 22); Fallon, (n. 11) at 54; R. Teitel, "Global Rule of Law: Universal and Particular" in A. Sajó, ed, *Human Rights with Modesty: The Problem of Universalism* (Martinus Nijoff Publishers, 2004) at 231; for criticism of the thin concept see D. H Cole, "'An Unqualified Human Good': E.P. Thompson and the Rule of Law'" (2001) 28 Journal of Law and Society 177,. 187; F. Upham, "The Illusory Promise of the Rule of Law" in Sajó (n. 26), at 280.

[29] P. Rijpkema, "The Rule of Law: Beyond Thick and Thin" (2013) 32 Law and Philosophy 793; R. Peerenboom, "Varieties of rule of law: an introduction and provisional conclusion" in *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian countries, France and the US* (Routledge, 2004) 1; J. Wouters & N.Hachez, *Transitional Societies and the Rule of Law: A Benchmarks Approach*, Working Paper 47 (Leuven Centre for Global Governance, 2010).

[30] Tamanaha, (n. 7); J. Møller & S. Skaaning, "Systematizing Thin and Thick Conceptions of the Rule of Law" (2012) 33:2 Justice System Journal 136.

[31] Rijpkema, (n. 29)

[32] This is important in particular given the difficulties – which were also faced by the Committee despite its broad membership basis – to have access to and assess in sufficient breadth and depth the understanding of legal concepts, rules and principles in legal systems beyond the classical canon of comparative legal analysis, which consists mainly of several

At the same time, even if it falls short of meeting the methodological rigor necessary for claiming that the concepts and its sub-elements qualify as general principles of law, this comparative methodology was considered as acceptable by the members of the Committee for the more modest approach of developing a conceptual framework for the understanding of the 'rule of law' that is sufficiently reflective of the understanding of the concept in the international community, and that hence has the potential to produce meaningful results when applied to international investment law and investor-state dispute settlement. In particular, the combination of analyzing the concept of the rule of law both in domestic and international legal regimes should help to ensure that the conceptual framework developed on this basis is acceptable as an analytical category to a much greater number of actors than any top-down definition developed in the specific context of one particular international or domestic legal regime and not necessarily transposable to a different context. Nor could such a restricted notion serve as the normative yardstick to assess international investment law and investor-state dispute settlement for all actors concerned.

On the practicalities of implementing this approach, it was decided to undertake a preliminary assessment of the understanding of the concept of the rule of law through a survey of various domestic and international legal regimes on the basis of a questionnaire that was drafted and distributed to ILA country representatives entitled "Domestic Rule of Law Questionnaire" ("the questionnaire"). This questionnaire addressed both the general conceptual approaches to the concept of the rule of law, asked for the sub-elements this concept is understood to mean in the legal order concerned, and asked specifically for the impact the concept of the rule of law has had on the settlement of disputes, both between private commercial actors, and in relations between private and public actors, through arbitration. This brief report shares the results of that survey, and also includes summaries of committee member reports on the rule of law as it intersects with or is used by various international organizations.

The report proceeds in the following order. First, a brief description of the questionnaire is given. Second, on the basis of responses to the questionnaire we outline similarities and differences of the rule of law generally, and outline similarities and differences in the rule of law as it relates to arbitration in the various domestic jurisdictions. Third, other considerations raised by the research will be noted. The report then shifts to examining the "international rule of law" and highlights the role it plays in various international institutions such as the United Nations and the International Monetary Fund. This section also includes summaries of two reports addressing broader-picture questions related to the international rule of law, and its interaction with investment law. Finally, the report concludes with a summary and section on areas for potential future consideration by the Committee. It is hoped that this report will assist the Committee in understanding the degree to which investment arbitration, both domestic and international, is conducted harmoniously (or not) with the rule of law.

## II. DOMESTIC RULE OF LAW

The questionnaire was distributed to all then-existing committee members in January 2017 and subsequently sent to new members. Responses were received from members representing 15 countries or regions: Austria, Brazil, the Caribbean Community[33], China, Finland, France, Germany, Ghana, Italy, Japan, Kazakhstan, New Zealand, Norway, Poland and South Africa.[34] The questionnaire was comprised of 20

---

legal systems in Europe and North America and often has an inbuilt Eurocentric bias. Even though the Committee could rely on reports from outside this canon, including for example the People's Republic of China, Ghana, Brazil, the Caribbean, and Kazakhstan, the choice of these legal orders is driven by the Committee's membership, rather than a priori methodological considerations, and therefore cannot be presented as representing the entire international community and their respective understandings under domestic law of the concept of the rule of law.

[33] The Caribbean branch represents a region of countries that do not all follow the same legal tradition. The responses attempt to capture what the concept of the rule of law means in the Commonwealth Caribbean, which encompasses those countries that apply the common law. Some of the responses also refer to how the concept has been understand in the context of Caribbean Community (CARICOM) law, as evidenced by decisions of the Caribbean Court of Justice, which has compulsory and exclusive jurisdiction to interpret and apply the Revised Treaty of Chaguaramas establishing the Caribbean Community, including the CARICOM Single Market and Economy.

[34] Responses to questionnaires were completed by: Ursula Kriebaum (Austria) Marco Antonio Ribeiro Tura and Emílio Mendonça Dias da Silva (Brazil), Chantal Ononaiwu (Caribbean), Manjiao Chi (China), Gustaf Möller and Maria Pohjanpalo (Finland), Arnaud de Nanteuil (France), Friedrich Rosenfeld and Patricia Nacimiento (Germany), Julia Selman-Ayetey (Ghana), Anna De Luca (Italy), Junji Nakagawa (Japan), Gani Bitenov (Kazakhstan), Christian Riffel (New Zealand), Giuditta Cordero-Moss (Norway), Marcin Menkes (Poland) and Engela Schlemmer (South Africa). These responses are available on the Committee website for those seeking more detailed information.

questions (18 initially, with two added after initial responses were received) concerning the relationship between the rule of law and the following:

(i) various aspects of the legal system;
(ii) municipal laws on arbitration; and
(iii) the intersection of international investment law and domestic law.

Both the questionnaire and a chart comparing a summary of the responses are attached as Annexe 1 and Annexe 2 respectively.

## DOMESTIC RULE OF LAW AS A GENERAL CONCEPT

### *Similarities in the general concept of the rule of law*

The responses indicated that all fifteen countries have some form of the rule of law within their system of governance, though none were described by respondents as "thick" or "thin". In fact, the Chinese response explicitly opined that it did not fully meet the standard of either thick or thin conceptions[35], while the Ghanaian report noted significant challenges to the procedural rule of law, particularly in criminal proceedings.[36] Traits reported in some of the responses to the questionnaire may reasonably be said to place the practice of the rule of law into one category or the other. For example, reported features of the rule of law in Germany suggest it is most closely aligned with the thick rule of law, a finding which is supported by the literature.[37] In contrast, Japan appears to have both thin and thick conceptions of the rule of law.[38] The reported responses are broadly in tandem with the results of the 2017-2018 Rule of Law Index which found that those with the strongest degree of the rule of law were countries in North America and Western Europe,[39] though one should question whose definition of "strongest" was applied. The Rule of Law Index also noted the overall score for more than a third of the countries profiled fell from their 2016 results.[40] This finding is reflected in some of the responses to our questionnaire which cited examples of both blatant and subtle violations of the rule of law.

Another common feature of the countries studied, with the exceptions of China and New Zealand, is that their courts – to varying degrees – are empowered to declare legislation incompatible with the constitution and thus void. For example, despite Brazil's having a system of legislative supremacy, the judiciary has the power to declare a law void if it violates non-derogable constitutional principles. In Finland, similar declarations are possible in relation to a substantive case, but cannot be made *"in abstracto"*. The response on Japan lamented the "generally passive attitude" of its Supreme Court to undertaking constitutional review and noted that "since its inception in 1947, the Supreme Court has rendered only 15 judgments that found domestic laws unconstitutional as such, and 12 judgments that found domestic laws unconstitutional as applied".[41] In the CARICOM, the Caribbean Court of Justice has held that under the Revised Treaty of Chaguaramas it has the power to review acts of Member States and the Community to determine whether they are in accordance with the rule of law, which is a fundamental principle accepted by all Members of the Community.[42]

Similarly, all responses indicated the separation of powers as a feature of their state, though the degree of separation seemed to vary. This is not unusual given that the principle of the separation of powers may be viewed as a spectrum on which some states have more dependence than others.[43] The Japanese response, for example, noted that rules of judicial procedure are partly drafted by the legislature. By comparison, Austria indicated a strict separation of powers within its constitutional framework and noted the fact that "public officials may not perform double functions" as an example of that approach.[44]

Except for China, the responses indicated that independence of the judiciary and the principle of legality, principles commonly associated with the rule of law, featured in their nation's governmental design. Relatedly, all others aside from Kazakhstan indicated that the doctrine of legitimate expectations and the

---

[35] *China Response*, p. 10.
[36] *Ghana Response*, pp. 3-4.
[37] Grote (n. 6).
[38] J.O. Haley & V. Taylor, "Rule of Law in Japan" in *Asian Discourses of Rule of Law: Theories and implementation of rule of law in twelve Asian countries, France and the US* (Routledge, 2004) at 446.
[39] Rule of Law Index, 2017-2018, World Justice Project < https://worldjusticeproject.org/our-work/wjp-rule-law-index>.
[40] *Ibid.*
[41] *Japan Response*, p.2.
[42] *Caribbean Response*, p. 3; TCL v. Guyana [2009] CCJ 5 (OJ) [27].
[43] D. Haljan, *Constitutionalising Secession*, (Hart, 2014) at 311.
[44] *Austria Response*, p.2.

principle of proportionality, arguably elements of the rule of law, could be found either explicitly or implicitly within their legal systems. The Kazakh response suggested that proportionality as understood under Article 5 of the TEU is not part of the Kazakh legal system.[45] While legitimate expectations as such are not part of the Kazakh legal order, a number of principles set out in the Enterpreneurial Code could be viewed cumulatively as analogous to that doctrine.[46]

The responses from Brazil, the Caribbean Branch, France, Finland, Ghana, Kazakhstan, New Zealand, Norway, Italy, and Poland, either explicitly or implicitly, indicate that the constitution acted as a restraint on the legislature due to rule of law principles. This restraint is not necessarily expressed overtly or imposed in the same manner; in some states it might be part of the fundamental expectations of what it means to have a government in an "*Etat de droit*", while in others restraints are more specifically expressed.

*Differences in the general concept of the rule of law*

Although all fifteen states had some form of the rule of law, the length of time that the principle had been applied within jurisdictions differed – in some cases widely. In Japan, for example, the term "rule of law" was only used for the first time in 1997 and first inserted into the Constitution in 1999. In comparison, the principle most closely associated with the rule of law in Germany, *Rechtsstaat*, has been around since the eighteenth century.[47]

Whilst all other responses explained their country's approach to the rule of law in terms which most would accept fell within a broad understanding of the concept, what is being applied in China under the banner of "rule of law" "is construed and understood differently from that at the international level."[48] This is perhaps on account of the magnitude of power held by the Communist Party of China ("CPC"). At the 4th Plenary Meeting of the 18th CPC National Committee held in 2014, the CPC indicated its intention "to build the socialist rule of law". Uniquely, it explicitly stated this would be done "with Chinese characteristics".[49] Notably, this was the very first time that the CPC asserted the rule of law should also apply to the CPC. Yet, given that accountability of the CPC is not required by any law, it was suggested "this utterance merely represents a political declaration of the CPC rather than creates a legal obligation on the CPC".[50] Besides, Chinese administrative organs can only be challenged in court for specific administrative acts, while many other administrative acts, such as adopting and implementing certain rules and regulations, cannot be challenged by legal means. China was also distinct in that out of the fifteen countries, it was the only one where the highest court of the land has no power to review the constitutionality or legality of any laws.

The response from Austria was the only one to note that, despite having the principle of legitimate expectations, there was no ban on retrospective application of law. In fact, the response noted that "the amount of case law on legitimate expectations has increased in the field of tax law, social security law and pension law" as a result of frequent amendments.[51] Additionally, Austria was unique in that the principle of legality does not bind the federal government when it is acting commercially or fulfilling other non-governmental functions.

## DOMESTIC RULE OF LAW IN RELATION TO ARBITRATION

*Similarities in the rule of law relating to arbitration*

The litmus test for arbitrability across most of the respondent countries was that the subject of arbitration had to relate to economic interests or be a matter where the parties are entitled to engage in settlement proceedings. The response to whether there is a distinction between public arbitrations (generally speaking, those involving public entities which might or might not involve public law matters) and private arbitrations (those between private entities)[52] in their respective jurisdictions was equally split with Brazil, the

[45] *Kazakhstan Response*, p. 4.
[46] *Ibid.*
[47] P. Costa, "The Rule of Law: A Historical Introduction" in P. Costa & D. Zelo, (eds,), *The Rule of Law History, Theory and Criticism* (Springer, 2007) at 87.
[48] *China Response*, p. 1.
[49] *Id*. at 3.
[50] *China Response*, p. 3.
[51] *Austria Response*, p. 8.
[52] We recognize that these distinctions are imperfect and not used uniformly in all jurisdictions. The question was deliberately broad to encourage the reporting of multiple types of distinctions. For a scholarly treatment of the sometimes

Commonwealth Caribbean, France, Italy, New Zealand, Norway, and South Africa answering in the affirmative and Austria, China, Finland, Germany, Ghana, Kazakhstan, and Poland answering in the negative.[53]

Whilst a number of the respondent countries were similar in that they had specific due process principles for public-private arbitration, they differed in substance. Brazil, for example, prohibits public-private arbitral awards from being kept confidential. New Zealand generally prohibits state agencies from resolving regulatory disputes through arbitration, with some exceptions. Most states in the Caribbean require special authority for a public body to enter into an arbitration agreement. Italy requires that the appointment of arbitrators in matters involving the state must be subject to "publicity and rotation".[54]

Several responses reveal that arbitration within their domestic jurisdiction involves what is known in the common law tradition as "public policy". Though similar but not synonymous, the civil law concept of "*ordre public*" was reported as a feature in Austria, Germany and Poland.[55] Slightly more than half of the respondents indicated that public policy concerns could be used to prevent the recognition or enforcement of arbitral awards. However, a number of the responses suggest that the use of public policy or *ordre public* as a ground to disregard arbitral awards was applied restrictively and thus rarely.[56] In its appellate jurisdiction, the Caribbean Court of Justice, in *BCB Holdings Ltd. & Belize Bank Limited v. Attorney General of Belize*, declined to enforce an arbitral award on the basis that doing so would contravene public policy. In particular, the CCJ found that enforcing the award would require it to disregard the core constitutional values of the sovereignty of parliament and the separation of powers and thereby attack the foundations upon which the rule of law and democracy are constructed through the Caribbean.[57]

*Differences in the rule of law relating to arbitration*

Despite the similarities detailed above, the responses also revealed differences in approaches to arbitration. Although restrictions on the use of arbitration for public matters were common, the type of restrictions differed. For example, in France public arbitration is generally banned unless it meets specific exceptions, whilst in Poland, although a public entity may be a party to arbitration, proceedings may only consider civil law issues and not matters of public law. The German response revealed various intersections between rule of law principles and the framework for arbitration proceedings in their jurisdiction: (1) rule of law principles were used to evaluate the validity of an arbitration agreement, (2) rule of law principles were used to resolve the situation where a party was unable to finance arbitration proceedings, (3) rule of law principles were used with regard to the unilateral appointment of an arbitrator, and (4) rule of law principles were used in deciding whether the decision to litigate or arbitrate could be determined unilaterally.[58]

Contrary to the other surveyed countries, Germany and Austria appear to have no specific restrictions on public entities being party to arbitration. Further, in Austria, arbitration agreements between "consumers and entrepreneurs" cannot be concluded for potential future disputes, but may only be arranged for disputes that have already occurred. The application of the right to be heard is regarded in a restrictive sense in that an arbitral award will only be set aside where a party was not heard at all.[59] "Consequently, arbitral awards rendered in Austria are rarely annulled on the basis of a violation of the right to be heard".[60]

In South Africa, the Protection of Investment Act (which is set to come into operation once the President's assent to commencement is published in the *Government Gazette*, probably before the end of July 2018) does not provide for investor-state arbitration; however, International Arbitration Act 15 of 2017, which came into force on 20 December 2017, permits public entities to participate in international commercial

---

incoherent distinctions between "public" and "private" arbitrations, see Jose E. Alvarez, "Is Investor-State Arbitration 'Public'?", 7 *J. of International Dispute Resolution* 534 (2016).

[53] Japan did not address this question.

[54] *Italy Response,* p. 27.

[55] J.L.B. Allsop, "Keynote Address: International Arbitration and Conformity with International Standards of Due Process and the Rule of Law" in *International Arbitration and the Rule of Law: Contribution and Conformity*, International Council for Commercial Arbitration Congress Series 19 (Wolters Kluwer, 2017) 763 at 766.

[56] The Austrian Supreme Court recently nullified part of an arbitral award on the ground that it violated the *ordre public* because, in the view of the court, the arbitrator's reasoning was unintelligible.

[57] *Caribbean Response,* pp. 5-6.

[58] *Germany response*, pp. 7-8.

[59] Austrian Supreme Court, 19 August 2015, docket no. 18 OCg 2/15s.

[60] *Austria Response,* p.18-19, *see also* L. Beisteiner, in G. Zeiler (ed.) *Austrian Arbitration Law* (2016) section 594 para. 14.

arbitration.[61] This new law requires that all arbitrations involving a South African public body be open to the public, unless there are sufficient reasons to the contrary.[62] This objective of transparency is in line with the rule of law.

Only the responses from Finland and New Zealand stated that civil servants received regular training, attended conferences and participated in investment law and arbitration seminars. New Zealand in particular has an annual Treaty-Making Seminar that is attended by staff from across the New Zealand Government, which educates civil servants who work with international treaties and highlights the nature and importance of New Zealand's treaty obligations.[63] Moreover, the Ministry of Foreign Affair's Trade Negotiation Division organizes seminars with agencies on services and investment aspects of free trade agreements. These efforts are ongoing in order to take into account changes in government staff. In contrast, the German response indicated that informal discussions with government officials revealed the view that such training is not necessary due to investment obligations being in accordance with domestic administrative law and constitutional principles. In Kazakhstan the government has tended to be aware of impending investment disputes and has often taken actions to mitigate the risk of proceedings before an arbitration claim is filed.[64]

With regard to recognition or enforcement, the Polish response highlighted that, in certain circumstances, Polish law requires foreign laws to be applied to international or foreign arbitration processes. Where such laws violate substantive Polish law, awards based on them will not be upheld by the Polish courts. This approach applies to both contract and treaty-based arbitration. Yet, foreign arbitral clauses appear to be subject to privileged treatment, as an assessment of the conformity of foreign arbitration awards with Polish laws are not subject to as much scrutiny as domestic awards. Even "an erroneous interpretation of peremptory norms, assuming that its significance does not offend legal order, would not be subject to review".[65] Menkes thus asserts that, with regard to foreign laws, public policy "serves a control function" and in regard to domestic laws "it is protective *sensu stricto*".[66]

Responses were mixed with regard to arbitration being highly regarded as a method of dispute resolution by members of the public, government agencies and academics. In Brazil "arbitration awards are generally well accepted and respected".[67] The response from France indicated a dislike of arbitration by the public, whilst in Poland there is a view that "public entities are extremely reticent towards ADR, unwilling to risk financial or professional responsibility".[68] These responses are unscientific in nature, but reflect assessments by members of the community with an interest in arbitration.

The answers to the question on whether the respective states had lost an investment arbitration also varied. France's first arbitration is awaiting notification of the decision, China has won two arbitrations and settled another via negotiation. Finland and New Zealand have not been party to an investment arbitration, and both Germany and Italy have never lost any to which they have been party. [69] Kazakhstan and Ghana have each been party to several investment arbitrations, as have a few Caribbean countries. South Africa has been a party to two investment arbitrations; they settled one and lost the other.[70] As a result, the South African government terminated most of its BITs and implemented a policy to refrain from concluding BITs, unless exceptional circumstances demanded it. Interestingly, the reasons given for the policy "included inter alia the lack of regulatory freedom and the fact that the government had constitutional obligations to ensure that it corrected the injustices of the past and where, as a result of legislation passed to address this", it gave rise to arbitration. What

[61] Text of the Act Accessed 13 July 2018 https://www.gov.za/documents/international-arbitration-act-15-2017-20-dec-2017-0000.

[62] International Arbitration Act 15 of 2017, Section 11.

[63] Letter from New Zealand Secretary of Foreign Affairs & Trade to Christian Riffel (1 May 2018).

[64] *Kazakh Response*, p. 8.

[65] *Poland Response*, p.15 referring to Postanowienie SN z dnia 29 listopada 2007 r., sygn. III CSK 176/07.

[66] *Poland Response*, p.16 referring to A. Wiśniewski, *Klauzula porządku publicznego jako podstawa uchylenia wyroku sądu arbitrażowego (ze szczególnym uwzględnieniem stosunków krajowego obrotu gospodarczego)*, Kwartalnik ADR Nr 2(6)/2009, pp. 119-131.

[67] *Brazil Response, p.7.*

[68] *Poland Response*, p.15.

[69] Norway, Japan and Poland did not address this question.

[70] The responses from Japan, Poland, Austria and Norway did not address this question. Brazil has not been party to treaties permitting investor-state arbitration. At present it is not immediately clear whether Brazil has been involved in other types of investment arbitration (contractual or state-state).

is perhaps interesting is that, in light of other countries' having experienced loss in arbitration proceedings, Brazil has for some time "refused to ratify investments agreements that it has previously signed."[71]

The South African response suggested that there has been a severe lack of understanding of the implications of "both the signing and implementation of" BITs by the South African government.[72] It was suggested that this was a significant contributing factor to why the South African government decided to terminate many of its investment treaties.

While the questionnaire asked about the response of governments to having lost investment arbitrations, it is worth noting that even governments who have been successful in fending off arbitration claims (the United States has famously never lost a case) have adjusted their treaty practice to be more defensively minded. The *Philip Morris* cases against Australia and Uruguay prompted widespread negative public response, even though Philip Morris lost both cases. Pending arbitrations, or even the threat of arbitrations, can also have negative effects.

***Other considerations***

Interestingly, although the questionnaire did not explicitly ask about restraints on the operation of the rule of law, several responses revealed such issues. In Italy, for example, some civil laws are permitted to be applied retrospectively, and in France, the President has special powers which are not amenable to judicial review.

Another interesting aspect raised by the responses is the effect of politics on the maintenance or violation of the rule of law. Disorganised institutions or the lack of resources and skills are often blamed for the absence or weak degree of rule of law in some nations. In our research, the response from Poland identifies an "assault" on the rule of law through changes made to the Constitutional Tribunal, common law courts, local government and civil service. The concerns have been so serious that they resulted in the first-ever investigation by the European Union into the rule of law in a member country.[73] The significant political upheaval and legal transformation currently occurring in Poland is making it "very difficult to assess what established rules will remain in place".[74] The response pertaining to Japan also revealed certain breaches of the rule of law through, for example, local governments "frequently circumventing the uniform application of domestic laws through administrative guidance (erosion of the supremacy of domestic law".[75] Lord Hoffman has stated that "it is very important to distinguish between the rule of law and other highly desirable features of a legal system which are not part of the rule of law."[76] Thus, while it is common knowledge that constitutions are often suspended during coups d'état or other political turmoil, research into more subtle means of undermining the rule of law may be fruitful.

The majority of questionnaire responses were from European or Nordic states (and one from New Zealand). There were only three from Asia, two from Africa, one from Latin America and one from the Caribbean. Investment arbitration has been viewed by some as an instrument through which a neo-colonialist agenda is implemented and a means by which the rule of law is imposed on countries considered to be "non-democratic states with a weak law and order tradition".[77] It may therefore be prudent for the Committee to benefit from a deeper understanding of how the rule of law operates in non-Western and developing nations. This is particularly important with regard to Africa where there is now a plethora of domestic arbitration options and several international arbitration centres, including those in Abidjan, Cairo, Kigali, Nairobi, and Port Louis. This trend has not gone unnoticed by the Permanent Court of Arbitration which in September 2017 concluded a cooperation agreement with the Nairobi Centre for International Arbitration and concluded a similar agreement

[71] *Brazil Response*, p.7.
[72] *South Africa Response*, p.8.
[73] J. Rankin, "Brussels launches unprecedented EU inquiry into rule of law in Poland", The Guardian, London, 13 January 2016 (accessed 3 January 2018) <https://www.theguardian.com/world/2016/jan/13/ec-to-investigate-polish-governments-controversial-new-laws>
[74] *Poland Response*, p.1.
[75] *Japan Response*, p.3.
[76] Lord Hoffman, "Closing Address, 23rd International Council for Commercial Arbitration Congress, 11 May 2016" in *International Arbitration and the Rule of Law: Contribution and Conformity* (The Netherlands: Wolters Kluwer, 2017) 21 at 22.
[77] T. Schultz and C. Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study" in (2014) 25 *European Journal of International Law* 1147.

with the Cairo Regional Centre for International Commercial Arbitration in December 2017.[78] It may also be useful to evaluate how "modern" arbitration operates alongside the customary arbitration that is present in many African nations.[79]

Finally, another point worthy of note are constitutional provisions which permit the allocation of state authority to an international organisation or institution.[80] The degree of compliance of such states with the laws or regulations of international or supranational organisations would be a good indicator of whether external aspects, as differentiated from internal aspects, of the rule of law are adhered to.

## III. INTERNATIONAL RULE OF LAW

Municipal legal systems are not the only source for the study of the rule of law. International organizations and international tribunals also serve as sites to study the development of rule of law principles in different contexts. For example, one of the aims of the United Nations is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment, or settlement of international disputes".[81] Municipal rule of law tells us something about the way that different societies have chosen to regulate themselves and what protections they view as important for achieving a just society. International rule of law principles serve both to assess municipal laws vis-à-vis international standards and to govern international organizations themselves. It is therefore important to appreciate that investment and the resolution of associated disputes need to be consistent with the international rule of law.[82]

In order to study the development of the rule of law in the international context, we also asked members to prepare reports on the approach of various international organizations. The reports they prepared will be made available on the ILA website. Below are short summaries of the reports prepared by various committee members. There is a certain amount of cross-fertilization as between international organizations regarding the development of rule of law principles, though various institutions have their own approaches suitable to the context in which they operate.

### INTERNATIONAL RULE OF LAW AS DEVELOPED BY DIFFERENT INTERNATIONAL ORGANIZATIONS

Though some doubt has been expressed as to whether there is an agreed definition of "rule of law" as it applies in the international context,[83] the concept of the rule of law is embedded within a number of international instruments, including the Universal Declaration of Human Rights and the UN Charter. Further, the General Assembly's adoption by consensus of a Declaration on the Rule of Law, described in more detail below, signifies that there is indeed some common thread of the concept that runs through the fabric of the international community.[84] However, "Due to the diversity of domestic constitutional traditions, democratic preferences, and international bargaining power among states, national conceptions of international rule of law continue to differ fundamentally".[85]

*United Nations*[86]

[78] "PCA signed Cooperation Agreement with NCIA", Permanent Court of Arbitration, 12 September 2017 < https://pca-cpa.org/en/news/pca-signed-cooperation-agreement-with-ncia/>; **"**PCA signs a Cooperation Agreement with CRCICA", Permanent Court of Arbitration, 22 December 2017: < https://pca-cpa.org/en/news/pca-signs-a-cooperation-agreement-with-crcica/>

[79] A.A Yusuf, "The Contribution of Arbitration to the Rule of Law - The Experience of African Countries" in *International Arbitration and the Rule of Law: Contribution and Conformity* (Wolters Kluwer, 2017); see also S.A. Brobbey, *The Law of Chieftaincy in Ghana: Incorporating Customary Arbitration, Contempt of Court, Judicial Review* (Advanced Legal Publications, 2008).

[80] Constitution of Poland, art. 90(1), see *Poland Response*, p.7.

[81] United Nations Charter Preamble

[82] E.U. Petersmann, "International Rule of Law and Constitutional Justice in International Investment Law and Arbitration" (2009) 16:2 *Indiana Journal of Global Legal Studies* at 519.

[83] Chesterman (n. 19).

[84] *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels* (United Nations General Assembly, 2012).

[85] Petersmann, (n. 82) at 516.

[86] The report "The UN Concept of Rule of Law" was prepared by Professor Dr. August Reinisch of the University of Vienna, Chairman of this Committee [hereinafter Reinisch].

There is a long-standing debate about to what extent there can be an international rule of law in the sense of rule of law elements applying, not on the state level, but on the inter-state level and possibly also to the United Nations and to other international organizations. "While the applicability of the concept to the inter-state level has mainly focused on problems concerning the absence of an agreed international government mechanism and in particular the lack of a compulsory adjudicatory system, the latter problem is one that has gained particular attention with the increased activities of the United Nations, ranging from imposing targeted sanctions to administering territory and thus fulfilling state tasks that trigger 'normal' rule of law problems".[87]

Some scholars doubt the feasibility of identifying an international rule of law because of the "primitive" legal order in which "there is no one binding court, no one executive or legislature, no separation of powers, and … there is the sovereignty of states (and so no hierarchy of powers) with which to contend",[88] while some admire attempts to establish a thicker concept of the international rule of law, comprising 'legal order and stability, equality of application of the law, the protection of human rights through access to justice, and the settlement of disputes before an independent legal body,' which need not necessarily be the ICJ, but could be one of the proliferating dispute settlement mechanisms on the international level."[89]

For the purposes of this report, the real focus is to what extent one can identify the elements of rule of law applicable to the exercise of state powers or alternatives to state powers, such as investor-state arbitration. Though some of the United Nations' rule of law development has been developed in the context of the organization's peace and security function, "the major part of the UN's rule of law efforts focus on the rule of law within states."[90]

The major United Nations documents on rule of law describe the rule of law and an important tool for development and the establishment of good governance. The UN Secretary General's 2004 Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies refers, inter alia, to "the demands of equal enforcement and independent adjudication of legal rules and principles as well as fairness in the application of the law, legal certainty, the avoidance of arbitrariness and procedural and legal transparency."[91] The 2012 General Assembly Rule of Law Declaration calls for "an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil, and administrative justice."[92] It also expressly emphasizes the need for judicial independence and impartiality as "an essential prerequisite for upholding the rule of law" as well as effective "access to justice."[93] "In addition to these mostly 'procedural' rule of law aspects the 2012 Declaration also endorses a more substantive concept of the rule of law when it refers to 'just, fair and equitable laws' as well as to 'equal protection of the law' 'without any discrimination.'"[94]

On the basis of the forgoing, as well as various other documents, the following elements "can be regarded as being universally accepted because they are found in UN resolutions, adopted by consensus:"[95]

- Access to dispute settlement, as expressed in "the right of equal access to justice for all"
- Judicial independence and impartiality, identified as "essential prerequisites for upholding the rule of law"
  and probably also
- consistency and predictability of dispute settlement outcomes, and
- transparency

---

[87] Reinisch, p. 3.

[88] R. McCorquodale, Defining the International Rule of Law: Defying Gravity?, 65 *International and Comparative Law Quarterly* 277, 289 (2016), citing H. Correll, "A Challenge to the United Nations and the World: Developing the Rule of Law", *Temple Int'l and Comparative Law Journal* (2004)].

[89] Reinisch, pp. 3-4, citing McCorquodale, (n. 88) at 296.

[90] Reinisch, p. 5.

[91] United Nations Security Council, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616, 23 August 2004, para. 6.

[92] United Nations General Assembly, 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, 30 November 2012, para. 12.

[93] Id., paras 13 & 14.

[94] Reinisch, p. 6, citing id, para. 2.

[95] Reinisch, p. 7, drawing from United Nations General Assembly, The Rule of Law at the National and International Levels, A/RES/69/123, 18 December 2014, paras 12-14.

Professor Reinisch also adds (noting the overlap with the Venice Commission elements, discussed more fully below):

- Legality, including a transparent, accountable, and democratic process for enacting law,
- Legal certainty,
- Prohibition of arbitrariness,
- Access to justice before independent and impartial courts, including judicial review of administrative acts,
- Respect for human rights, and
- Non-discrimination and equality before the law.[96]

*European Court of Human Rights*[97]

Notions about what the "rule of law" means are not uniform within human rights law generally, and not even in the European Convention on Human Rights itself.[98] The concept does not always retain its meaning when translated into different languages. Its context shifts as well, as the concept is used as a benchmark against which to measure both national and international legal systems.

The concepts of human rights and rule of law can be somewhat circular: the Preamble of the Universal Declaration of Human Rights says that "human rights should be protected by the rule of law," yet the content of law "should conform to basic standards of human rights."[99]

The thin approach focuses on the element of legality, and implies that governments both respect the law and govern through law.[100] This concept constrains governments to respect the law and govern through law, but also requires that governments act positively to ensure that human rights are respected "whenever and wherever the State exercises jurisdiction."[101] The "thick" approach focuses on the substantive content of laws. The latter approach requires more than the former; whilst the former requires a functioning state and respect for the law by those governing and the governed, the latter requires agreement about the content of the laws.[102]

In the human rights context the most developed body of law is that under the European Convention of Human Rights. The three French translations of rule of law have been addressed by the European Court, though *État de droit* is used far less often than *prééminance du droit*. *État de droit* tends to be used to emphasize the fundamental importance of courts and the fair administration of justice in a democratic society rather than as a guiding principle for the interpretation of rights guaranteed by the Convention.[103] The European Court of Human Rights remarked on the principle for the first time in its *Golder* judgment, where it held that:

> it would be a mistake to see in [the principle of *prééminence du droit*] a merely "more or less rhetorical reference", devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" was their profound belief in the rule of law … And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.[104]

According to the court, the concept of rule of law sheds light on the meaning of Article 6(1) of the Convention, and in particular establishes that Article 6(1) comprises the right of access to courts.[105] This principle is one of the means by which the Court has brought within the purview of the Convention the idea that states cannot restrict the right of access to courts by classifying someone as a civil servant; this is one way the

---

[96] Reinisch, pp. 7-8.
[97] The report, Rule of Law Notions in Human Rights Law, was prepared by Professor Dr. Ursula Kriebaum of the University of Vienna. The report on the European Union, *infra* at 19, also addresses some aspects of the rule of law developed by the Council of Europe and the European Court of Human Rights.
[98] Kriebaum, p. 1.
[99] *Ibid.*
[100] G. Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (2013), p. 20.
[101] Kriebaum, p. 2.
[102] *Ibid.*
[103] *Id*. at. 4.
[104] Golder v. United Kingdom, Judgment of 21 February 1975, section 34.
[105] Kriebaum, p. 6.

Court "uses the concept of the rule of law to bring requirements for administrative review increasingly within the scope of application of Article 6 (right to a fair trial)."[106]

Similarly, even though Article 6(1) does not itemize the components of a fair trial, the Court has identified them as including: finality of judgments,[107] publication of judgments and their enforcement,[108] and the duty to state reasons in those judgments.[109] Furthermore the state has to prevent unlimited discretion of both the judiciary and the executive[110] and also has to protect the judiciary against undue interference by the legislature.[111] The same would hold true for undue interference by the executive branch. Enforcement includes ensuring that remedies have real substance, rather than constituting simply a mechanism for execution of judgments.[112]

Insofar as the notion of rule of law is concerned, the Court has emphasized that it includes written and unwritten law and "implies qualitative requirements, notably those of accessibility and foreseeability as well as legal certainty."[113] The rule of law has also been used to require legal protections against arbitrary interferences with rights, including invalidation of property rights.[114] General procedural guarantees must be offered when state actions are alleged to infringe rights, including the duty to open investigations and to punish unlawful acts committed by state agents.[115] Article 7 of the convention, which provides that only the law can define a crime and prescribe a penalty, has been construed to permit the retroactive application of procedural, but not substantive, rules.[116]

Interferences with human rights "must be based on an instrument of general application in order to fulfill the requirements of the rule of law."[117] The rule of law also requires that individuals enjoy equality before the law.[118]

*European Union*[119]

"The rule of law is one of the founding principles of the European Union (EU)/ European Economic Community (EEC) and a legally binding constitutional principle."[120] One of the defining features of the rule of law is well-illustrated by its role in the European Union – it is itself an important value *and* it is essential for the protection of other values. "[C]ompliance with the rule of law is essential for the protection of all fundamental values as provided in Article (Art.) 2, Treaty on European Union (TEU) as well as rights and obligations arising from treaties and international agreements."[121]

In the European legal order values such as proportionality, legal clarity, and effective protection by courts are regarded as General Principles of Community Law, and all are based on the rule of law.[122] The

---

[106] Kriebaum, p. 6; Lautenbach, (n. 100), at 135

[107] See, e.g., Brumărescu v. Romania [GC], no. 28342/95, section 671, ECHR 1999-VII, Section 61; Ryabykh v. Russia, Judgment of 24 July 2003, sec. 51.

[108] See, e.g., Hornsby v. Greece, 19 March 1997, Reports 1997-II p. 509, section 40; Iatridis v. Greece [GC], no. 31107/96, sec. 58, ECHR 1999-II; Immobiliare Saffi v. Italy [GC], no. 22774/93, section 66, ECHR 1999-V; Hasan and Chaush v. Bulgaria [GC] App. no. 30985/96, ECHR 2000-XI, 26 Octoer 2000, section 87.

[109] Hadjianastassious v. Greece, 16 December 1992, sec. 33.

[110] Malone v. United Kingdom, 2 August 1984 (Art 8); Silver v. United Kingdom, 25 March 1983, sections 88-89.

[111] Stran Greek Refineries and Stratis Andradis v. Greece, 9 December 1994, section 49.

[112] Kriebuam, p. 7; Oneryildiz v. Turkey [GC] 30 November 2004, section 152.

[113] Kriebuam, p. 7, citing Konnov v. Latvia, 17 May 2018, section 185; Cetnro Europea/S.R.L. and Di Stefano v. Italay, Judgment of 7 June 2012, section 156; Malone v. United Kingdom, section 68, 2 August 1984;Brumaresxu v. Romania, 28 October 199, section 61; Sovtransavto Holding v. Ukraine, 25 July 2002, Riabykh v. Russia, 24 July 2003; Assanidzé v. Georgeia, 8 April 2004, Androne v. Romania, 22 December 0024, Baka v. Hungary, judgment of 23 June 2016, section 89; Del Rio Prada v. Spain [GC] no. 42750/09, section 77, ECHR 2013, section 125.

[114] Nagy v. Hungary, 13 December 2016, section 78.

[115] Kriebaum, p. 9.

[116] Council of Europe, Guide on Article 7 of the European Convention on Human Rights (30 April 2018), pp. 8-9.

[117] *Ibid*

[118] *Id*. at 10, citing Prosperity Party v. Turkey, 31 July 2001, section 43.l l

[119] The report on the "Rule of Law in the EU Legal Order" was prepared by Prof. Marc Bungenberg and Angshuman Hazarika of the University of Saarland [hereinafter Bungenberg & Hazarika].

[120] Bungenberg & Hazarika, at 3.

[121] *Ibid*..

[122][122] CJEU, Case C-101/08, Opinion of Advocate General Trstenjak, Audiolux S.A. e.a. v. Groupe Bruxelles Lambert S.A. (GBL) and Others and Bertelsmann A.G. and Others, ECLI:EU:C:2009:410, para. 71.

secondary principles legitimate expectations, the need to provide reasons for legal measures, and the right to be heard are derived from it.[123]

Rule of law has played an important role in the European project as developed by the European Court of Human Rights, with its rejection of absolutism yet its encompassing of principles such as the margin of appreciation in order to take account differences in individual situations. While we recognize that the European Court of Human Rights is the judicial organ of the Council of Europe and has an effect that extends beyond the European Union, decisions of the European Court of Human Rights have influenced the development of rule-of-law norms in the European Union itself. As noted above, the European Court of Human Rights has emphasized the "substantive" features of rule of law, including "legality, legal certainty, equality of individuals before the law, effective remedy if basic freedoms are at stake and extension of the guarantees afforded by the right to a fair trial."[124]

One of the more difficult questions confronting anyone studying the rule of law is the question of what to do with competing norms. In Marguš v. Croatia, the concurring opinion of Judges Spielmann, Power-Forde, and Nussberger showed that at certain times the rule of law might require that competing values be weighed against each other in extraordinary legal circumstances such as a situation where a judicial ruling contrary to the law in force is given.[125]

One general but generally accepted facet of the rule of law has focused on the pre-eminence of law over arbitrariness and individualism: "[A]t the core of the Rule of Law is the idea that an exercise of power should be subject to the law: the Rule of Law, not men."[126] The Venice Commission of the Council of Europe has announced "generally shared traits of rule of law:

(a) legality (including a transparent, accountable and democratic process for enacting law);
(b) legal certainty:
(c) prohibition of arbitrariness;
(d) access to justice before independent and impartial courts;
(e) respect for human rights;
(f) non-discrimination and equality before the law."[127]

*Access to Justice and Judicial Independence*

The rule of law checklist adopted by the Venice Commission identifies access to justice as one of the benchmarks for evaluating the rule of law within a state. The markers for this evaluation are (1) independence of the judiciary, (2) availability of a fair trial, including access to courts, and (3) constitutional justice. Furthermore, the European Court of Human Rights has recognized four pillars of judicial independence: (a) the manner of appointment, (b) the term of office, (c) guarantees against external pressure, (d) the appearance of independence.

Fundamental rights that can be protected through independent and effective judicial review are also essential to the rule of law in the European Union.[128] Fundamental rights must be justiciable to be fully protected, so they can only be insured if the judiciary and the constitutional courts can perform their duties.[129]

*Transparency*

Article 15(3) of TFEU places responsibility on Union bodies and institutions to ensure transparency in their proceedings, including ensuring that the rules of procedure provide for access to documents.[130] The Venice

[123] CJEU, Case C-101/08, Opinion of Advocate General Trstenjak, Audiolux S.A. e.a. v. Groupe Bruxelles Lambert S.A. (GBL) and Others and Bertelsmann A.G. and Others, ECLI:EU:C:2009:410, para. 71.
[124] Report of the Committee on Legal Affairs and Human Rights, "The Principle of the Rule of Law", the Parliamentary Assembly of the Council of Europe, Doc. 11343, 6 July 2007, para. 12.
[125] E Ct.HR, Case of Margus v. Croatia, Application no. 4455/10, Grand Chamber Decision of 27 May 2014, Joint Concurring Opinion of Judges Sikuta, Wojtyczek and Vehabovic, para. 11 [check the diacriticals]
[126] D. Kochenov, "The EU Rule of Law: Cutting Paths through Confusion", 2 ELR 5, 9 (2009).
[127] Communication from the Commission to the European Parliament and the Council, A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final, Annex 1 to 2, p. 3.
[128] Bungenberg & Hazarika, pp. 27-28.
[129] *Id*. at 28; Communication from the Commission (n. 127), at 158 final/2, p. 4.
[130] OJ C 326 26.10.2012, p. 23.

Commission has emphasized the importance of a transparent, accountable, and democratic process for enacting laws in order to comply with the principle of legality.[131] Transparency is both an essential and an aspirational requirement that is not always easy to meet. Advocate General Colomar highlighted both of these difficulties: "Transparency is concerned with the quality of being clear, obvious and understandable without doubt or ambiguity. The application of this principle in the field of law is something of an aspiration, as the translation of the law into everyday life is not straightforward and does not always offer clear answers."[132] In the European Union, the principle of transparency has been linked with the "duty to give reasons" for both administrative and legislative acts.[133]

*Legitimate Expectations*

The principles of legal certainty and of legitimate expectations are frequently discussed together but in fact they are separate principles and relate to different features of the Rule of Law.[134] Legal certainty requires that rules be clear and predictable, and not retroactively changeable, such that "people who are covered by a law must know how to conduct themselves to 'protect themselves from the arbitrary use of state power.'"[135]

*International Financial Institutions*[136]

In the context of international monetary and financial law, the rule of law has been used in the context of the Washington Consensus as part of good governance, and as one of the measures whereby states could achieve a good-governance label and thereby qualify for reform packages and other aid from international financial institutions.[137] The Washington Consensus, an "unfortunate" term coined by the English economist John Williamson to describe requirements, such as FDI liberalisation, deregulation, privatization, and legal security for property rights, has become shorthand for the neo-liberal approach to aid and funding packages for developing countries.[138] In practice, however, there was not a great deal of consensus, as even homogenous groups of economists struggled to agree on basic issues.[139] As the 1980s and 1990s progressed, demonstrating an adequate legal framework and transparency were considered to be important criteria to qualify for receiving financial assistance. In fact, for a period of time both free-market and human rights advocates agreed on the desirability of achieving the rule of law, a period sometimes described as "rule of law euphoria".[140] Soon it became clear, however, that there was no consensus here either.

The World Bank's approach to rule of law stemmed from these good governance ideas. Defining governance in its non-political aspects, a former WB General Counsel, Ibrahim Shihata, explained the meaning of "*good order* … not in the sense of maintaining the status quo by the force of the state (law and order) but in the sense of having a system, based on abstract rules which are actually applied and functioning institutions which ensure the appropriate application of such rules. This system of rules and institutions is reflected in the concept of *the rule of law* … often expressed in the familiar phrase of a *government of law and not of men*".[141] This relatively formal approach could be summarized as requiring:

a) a set of rules which are known in advance,

---

[131] Rule of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session, Venice, 11-12 March 2016, Doc. No. CDL-AD(2016)007, Council of Europe, Para. 18

[132] CJEU, Case C-110/03, Kingdom of Belgium v. Commission of the European Communities, ECLI:EU:C:2004:815, para. 44.

[133] Bungenberg & Hazarika, p. 24.

[134] *Ibid.*

[135] *Ibid.* at 25 citing Ahmetaj, Legal Certainy and Legitimate Expectation in EU Law, 1 IJRD 20, 21 (2014).

[136] The report on the "Rule of Law in International Monetary and Financial Law" was prepared by Dr. Marcin Menkes of the Warsaw School of Economics.

[137] Menkes, p. 6.

[138] *Ibid.*

[139] Menkes, p. 6 n. 28. J. Williamson, "A Short History of the Washington Consensus", in N. Serra & J.E. Stiglitz, *The Washington Consensus Reconsidered* (Oxford 2008). The phrase Washington Consensus is now often used to suggest a kind of "neo-liberal conspiracy" behind international investment flows.

[140] Menkes, p. 7. Yet even then some pointed out that there was more convergence on the protection of property rights, fair treatment of foreign investors, strong police, and law and order, rather than on more generalized fair and equitable treatment, human rights, and substantive legal content. Menkes, p. 7, n 37. See also T. Carothers, "Rule of Law Temptations", (2009) 31 *Fletcher Forum of World Affairs* 49.

[141] Menkes, p. 8, citing I. Shihata, *The World Bank and "Governance" Issues in Its Borrowing Members* [in:] I Shihata, *The World Bank in a Changing World:* Vol. I (1991), pp. 53-96.

b) such rules are actually in force,
c) the existence of mechanisms ensuring the proper application of the rules and allowing for departure from them according to established procedures,
d) the possibility to resolve conflicts of the rules through binding decisions of an independent judicial or arbitral body, and
e) known procedures for amending the rules when they no longer serve their purpose.[142]

This formal approach was modified by the subsequent General Counsel, Ko-Yung Tung. In accordance with a 2002 statement, the Rule of Law prevails where "the government itself is bound by the law, every person in society is treated equally under the law, the human rights dignity of each individual is recognised and protected by law, and justice is accessible to all. The Rule of Law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy."[143] In order to achieve these goals, indispensable elements are: transparent and equitable laws, legal empowerment and security in one's rights, enforceable contracts, basic security of one's person and property, and access to justice.[144] In addition to access to the judiciary, the World Bank recognizes the significance of arbitration and ADR, as subsidiary dispute settlement mechanisms, though it has noted that bypassing courts or other formal dispute resolution systems has been recognized as a problem.[145]

The International Monetary Fund has determined that "improving the management of public resources" and "supporting the development and maintenance of a transparent and stable economic and regulatory environment conducive to efficient private sector activities" are important for its mandate.[146] The IMF often cooperates with other institutions, such as the World Bank, in terms of setting governance measures and relying on their data to populate those indices.[147]

The European Bank for Reconstruction and Development ("EBRD") has an explicit political mandate to "foster the transition towards open market-oriented economics and to promote private and entrepreneurial initiative in the Central and Eastern European countries committed to and applying the principles of multiparty democracy, pluralism and market economics."[148] EBRD conditionality is generally regarded as more human rights oriented, and explicitly includes environmental and political criteria.[149] The political components of EBRD conditionality are sometimes regarded as fulfilling two functions: first, "policy-related conditions play a quasi-securitisation function," as in the case of the IMF; second, "they may be used to encourage particular attitudes, as in the case of World Bank loans."[150] The EBRD's defining values are transition, environmental and social sustainability, gender equality, transparency and integrity, and compliance (with a focus on business ethics), but the rule of law as such has not been quantified or assessed in any official decisions.[151] When EBRD does use a RoL index, it looks at reports published by the Central European Economic Review ("CEER"), a part of the European branch of the Wall Street Journal. CEER does not publish the constituent variables of its index, but they correlate closely with the international country risk guide.[152] The ICRG political risk ranking involves 12 variables: government stability, socioeconomic conditions, investment profile (i.e., investment risk factors not covered elsewhere), internal conflict, external conflict, corruption, military in politics, religious tensions, law and order, ethnic tensions, democratic accountability, and bureaucracy quality:

> Whereas fighting corruption and crime seem to belong to the Rule of Law *sensu stricto* from the international financial institutions perspective, the most common components are: Law (up to 3 points for the strength and impartiality of the legal system), Order (3 points for general observance of law), Democratic accountability (6 points on a scale stretching from alternating democracies to autarchy) and bureaucracy quality as a stabiliser of political changes (4 points). Accordingly, strictly legal elements

[142] Shihata (n. 141) at 85.
[143] Menkes, p. 9. Some have suggested that this approach is still limited to formal aspects, even if it is ambiguous.
[144] World Bank, Legal and Judicial Reform: Strategic Directions, Legal Vice Presidency World Bank 2002.
[145] EBRD/BIICL, The Importance of the Rule of Law and Respect for Contractual Rights in Transition Countries, World Bank, 2003.
[146] IMF, The Role of the IMF in Governance Issues: Guidance Note (Approved by the IMF Executive Board, July 25, 1997), IMF 1997, cited in Menkes, p. 12.
[147] Menkes, pp. 12 – 13.
[148] EBRD Article 1.
[149] Menkes, p. 14.
[150] *Ibid*.
[151] *Id*. at 14.
[152] *Id*. at 15.

constitute 13 out of the 100-point scale of political risks.[153] This means that the legal components of the Rule of Law index that indirectly shape the EBRD thinking (and influence the IBRD) remain rather limited.[154]

Other regional development banks and the OECD also consider rule of law to be an element of good governance. And one should also emphasize "the particular relevance of the Rule of Law as a guarantee of the autonomy of central banks from the executive and current political expectations."[155]

*World Trade Organisation*[156]

The WTO is an extremely relevant body for purposes of comparison to international investment law, as they together constitute the two most developed areas of international economic law as of today. There is also increasing acknowledgement on the convergence and overlap between the two areas from a transaction-based perspective.

While international trade had been considered for many years to be a policy-driven field that is more governed by diplomatic and political considerations than legal principles, this view has changed considerably with the conclusion of the Marrakesh Agreement leading to the creation of the World Trade Organization in 1994/5. In parallel, the development of comprehensive rule-based regional trade agreements ("RTAs") has reinforced this trend. In particular, the existence and use of sophisticated compulsory dispute settlement provisions in the WTO and (to a lesser extent) in RTAs led to international trade law now being considered subject to the "rule of law".

Rule of law in the WTO context does not mean only the juridification of international trade relations and the judicialization of trade dispute settlement. The WTO also imposes, albeit sometimes indirectly, rule-of-law standards on members. For example, Article VI of the General Agreement on Trade in Services requires that "In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general applications affecting trade in services are administered in a reasonable, objective and impartial manner."[157]

Interestingly, in Professor Ziegler's view, there has been a certain backlash in recent years, as many observers and politicians seem to have come to the conclusion that the rule-based approach and the role played by lawyers and, in particular, adjudicators, has become too strong. Criticism regarding the supremacy of international law and the constraints upon domestic policy considerations has been voiced and political action has been taken under the current system and in recent negotiations to make the system less rule-based and give governments more discretion regarding the application of the rules contained in international treaties.

## IV. Challenges for Rule of Law Reforms in the Context of Investment Law

One lesson from the foregoing report is that the rule of law can vary depending on its cultural context. This is one of the reasons for the difficulty in isolating a single agreed-upon definition of the rule of law save at such a high level of abstraction that it is not particularly useful. When one is engaged in a law-reform project, whether that be of domestic law or international law, or of a domestic institution or an international institution, the need to assess performance in light of the cultural context poses a challenge.

*Rule of Law and International Investment Law – A Socio-Cultural Perspective*[158]

The institutional approach in economic development literature postulates that the quality of domestic legal systems is necessary to facilitate development.[159] Thus, a great deal of rule of law literature focuses on legal institutions and governmental structures, but there is growing understanding that "[c]reating a society that is based on a strong rule of law is not a purely technical, law-led exercise involving the reform laws,

[153] PRS, *International Country Risk Guide Methodology*, http://bit.ly/2iY6o8i (accessed: 21.1.2017).
[154] Menkes, p. 15.
[155] *Id*. at 16.
[156] The report on "The Rule of Law in International Trade Law" will be prepared by Andreas R. Ziegler, Professor at the University of Lausanne and Rapporteur of this Committee.
[157] GATS Art. VI(1).
[158] This section is based on a report prepared by Moshe Hirsch, Professor at Hebrew University [hereinafter Hirsch].
[159] See, e.g., M.J. Trebilcock and M. Mota Prado, *Advanced Introduction to Law and Development* (2014), 32, 45; D. Rodrik, *One Economics, Many Recipes: Globalization, Institutions and Economic Growth* (2007) 184, 215-216

strengthened justice institutions, and better-trained legal personnel to operate them."[160] Rather, socio-cultural factors are also involved in shaping the rule of law, including informal conventions and norms of behaviour.[161] Thus, while resources have been directed towards reforming political institutions, diverse elements of public administration, legal institutions, and legal education institutions, rule of law deficiencies persist in many countries.[162] It seems that without transforming the cultural norms that underpin legal institutions rule of law reform will be at best less-than-fully successful. "Without a widely shared cultural commitment to the idea of the Rule of Law, courts are just buildings, judges just public employees, and constitutions just pieces of papers."[163] In response, some advocate programs that seek cultural changes, yet this approach gives rise to questions about whether that intervention is feasible and whether it can be morally justified.[164]

Investment law and institutions might be involved in attempts to promote rule of law cultural change in both developed and developing countries: see, for example, the corruption chapter of the Trans-Pacific Partnership. Investment tribunals are frequently confronted with arguments implicating rule of law considerations, particularly in cases involving fair and equitable treatment, full protection and security, and expropriation clauses. Yet, decisions involving these concerns are unlikely to introduce changes to rule of law culture. Indeed, "[s]uch judgements are commonly rendered in an adversarial and conflictual atmosphere, host states' governments (and the public) tend to resent calls to change their culture that are issued by foreign actors, and investment tribunals often suffer from a 'legitimacy deficit' in developing countries (prominently tribunals affiliated with the World Bank)."[165]

One of the areas of cultural tension implicated by international investment law is corruption. Some investment tribunals have a "perceived role as agents of rule of law cultural change" and they aspire to modify the 'corruption culture' prevailing in some areas of foreign investment."[166]

*Interfaces between National and International Law as Part of the Rule of Law in Global Governance*[167]

"Many areas of social relations in today's globalised world are governed by a combination of both national and international law, with national and international actors and instruments standing in a relationship of division of labour that is put into practice through a number of different interfaces."[168] Given this multiplicity of actors and sources, "neither a purely national, nor a purely international, understanding of the rule of law can be supreme."[169] The traditional hierarchy between international and domestic law and divisions between monism and dualism do not work well in the context of international investment law. The relationship between national and international law should be reconceptualised "not primarily in light of potential conflicts, but in terms of its complementarity in achieving policy goals in the regulation of foreign investment projects.".[170] This new conception is especially necessary given that unlike the situation in international trade law, there is no uniform regime governing investments; rather, legal rules are scattered across a variety of bilateral and multilateral agreements, and are found in rules of custom as well.[171]

Cases where international law and domestic law strive for supremacy, to be "master" over the other, do not facilitate the rule of law but create uncertainty about which normative command is applicable and which should be followed.[172] The rule of law itself should act as a "norm-interface" that fuses both national and international ideas about the rule of law to establish a practice that constrains the exercise of public authority. This approach is consistent with the idea that "the exercise of public power can never be without limits and

[160] L. McKay, *Towards a Rule of Law Culture* (USIP, 2015), p. 16.
[161] Hirsch, p. 2.
[162] Trebilcock and Prado (n. 159) 56. See also Hirsch, pp. 2-3.
[163] ABA Rule of Law Initiative and Freedom House, Rule of Law in Timor-L'este 2 (2007), cited in A.J. Cohen, "Thinking with Culture in Law and Development", 57 *Buffalo L. Rev*. 511, 538 (2009).
[164] Hirsch, p. 3. For a general discussion of the intersection between rule of law as exemplified by global governance programmes and embedded cultural and legal structures, see Zumbansen (n. 8).
[165] Hirsch, p 5.
[166] *Id*. at. 8.
[167] This report was prepared by Stephan W. Schill, Professor of Law at the University of Amsterdam [hereinafter Schill].
[168] Schill, p. 2.
[169] *Ibid.*
[170] *Id*. at 4.
[171] *Id*. at 7., 10.
[172] *Id*. at 12 -13.

needs to be subject to control mechanisms."[173] Some control mechanisms, even over international law, can exist at the national level, while others will exist at the international level.[174]

## V. THE RULE OF LAW AND INTERNATIONAL INVESTMENT LAW

For the Committee's purposes, the big question, and the topic of the next stage of research, will be how the principles described above affect our understanding of international investment law, and how application of those principles can be made to improve it. One danger is that the concept of "rule of law" becomes anodyne through repetition and overuse. A goal of this Committee is not to take the "rule of law" as an empty phrase, but to distill from the numerous contexts in which the phrase is used principles that can help to evaluate international investment law as a contributor to the rule of law, as a generator of the rule of law, and as a violator of the rule of law.

In the European Union the exact meaning and scope of "rule of law" is not specifically laid down by the CJEU; rather, it is a "compilation of national definitions and understanding of 'rule of law' based on the constitutional law of the states which has been further augmented by a 'European sense' by the EU institutions and then 'Europeanised' by the CJEU."[175] The concept of rule of law thus plays something of a bridging role. At one level it appears to be a universal principle, yet its precise content is informed by the context in which it operates. This process is somewhat similar to the work the Committee has undertaken in order to identify some of the baseline principles against which should be measured the rule of law as exemplified by international investment law.

*Structural Role/Separation of Powers*

In national legal systems in particular, the concept of rule of law fulfills a structural purpose; it both describes and ensures the principle of separation of powers or, to put it another way, to preclude arbitrariness, thereby ensuring the rule of law over the rule of men.

A feature of the rule of law emphasized by the European Court of Justice is the importance of review of governmental acts. In *Schrems v. Data Protection Commissioner*, the CJEU states "the European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights."[176] The opinion of the Advocate General, in C-682/15, *Berlioz Investment Fund SA*, emphasized that "applicability of Art. 47 of the Charter of Fundamental Rights of the European Union is an essential part of 'a Union subject to the rule of law' and all entities including the member states and the institutions cannot 'avoid review of the conformity of their acts.'"[177]

International investment law is, of course, an important vehicle for review of governmental decisions. There can be some tension here in that review is necessary for the rule of law, but the review itself must also comply with the rule of law. Note the potential for infinite regression as the review of every act is subject to review, and that review is subject to review. This is one reason for the establishment of an institution entrusted with final authority. As Mr. Justice Jackson so memorably said of the U.S. Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final.[178]

Within an individual legal system establishing who the final arbiter is can be found in the Constitution or undertaken as part of an iterative process, but the process occurs within a unified legal system. That process in federal states or in federations can be more difficult, as illustrated by the sometimes contentious relationship between the central government and constituent provinces in states like Canada and the United States and in the European Union itself. Another layer of complexity is added when two different systems collide. Thus the *Kadi* case illustrates the clash between the U.N. Security Council sanctions resolution, encapsulated in EU Regulation No. 881/2002, and the principle of right to a hearing. The applicants did not have a right of hearing before the U.N. Sanctions Commission, which meant that they had no avenue to challenge the sanctions levied against

[173] *Id*. at 38.
[174] *Ibid.*
[175] Bungenberg & Hazarika, p. 4, citing L. Pech, *The Rule of Law as a Constitutional Principle of the European Union*, p. 6.
[176] CJEU, Case C-362/14, Schrems v. Data Protection Commissioner, ECLI:EU:C:2015:650, para. 60.
[177] Bungenberg and Hazarika, quoting "CJEU, Case C-682-15, Opinion of Advocate General Wathelet, Berlioz Investment Fund S.A. v. Directeur de l'administration des Contributions directes, ECLI: EU:C-2017:2, paras 57 and 66, respectively.
[178] Brown v. Allen, 344 U.S. 443, 540 (1953) (J. Jackson, concurring).

them. The European General Court and then the CJEU determined that the EU regulation had to comply with EU law even when it was implementing a UN Security Council Resolution.[179]

ISDS is viewed by the European Commission as a "crucial tool to remedy deficiencies in the legal system of host states."[180] There is also the hope that it will have "a positive spill-over effect on the legal system of host states, exercising a push towards rule of law disciplines and thus developing improved administrative practices to comply with IIA obligations that also benefit national citizens and residents.[181] Thus investment protections and investment arbitration can be seen as compatible with EU goals.

The CJEU has not yet weighed in definitively on the compatibility of investment arbitration and EU law. In *Slovak Republic v. Achmea*, the CJEU held that intra-EU BITs containing broad applicable law clauses are incompatible with the EU legal order because they have an adverse effect on the autonomy of EU law.[182] This is a faithful reading of the decision; the Court did not unequivocally hold that all intra-EU BITs are incompatible with the EU legal order, though that is a possible interpretation of the ruling. The Court also left open the question whether treaties to which the European Union itself is a party should be treated differently from those involving only member states.[183]

The European Commission is moving to address these concerns by including in its post-Lisbon Treaty free trade agreements and investment agreements an investment court convened under that particular treaty and by engaging in an effort to establish a multilateral investment court, which would supersede those individual courts and into which all investment treaties could potentially feed.[184]

Investment law has been described as a species of global administrative law – a way to ensure "the exercise of public authority at the domestic level in relation to foreign investment activities with international law standards."[185]

*Access to Justice*

As described above, the concept of access to justice has a structural component – in order to ensure a check on the executive and the legislative parts of the government, access to the judiciary is essential. It also has a procedural component – ensuring that people receive a fair hearing within a reasonable period of time.

The European legal order places great emphasis on the importance of access to justice, with Art. 67(4) TFEU placing responsibility on the Union to facilitate it.[186] The Council of Europe has described access to justice as one of the fundamental principles of a democratic state based on human rights and the rule of law.[187] The justice available must satisfy standards of impartiality and independence, in addition to ensuring a fair and public hearing within a reasonable time.[188]

---

[179] CJEU, Joined Cases C-4-2/05P & C-415/05P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Kadi I), ECLI: EU: C:2008:461.
[180] Bungenberg & Hazarika, p. 36, quoting J. Griebel, *Internationales Investitionrsrecht* (2008), 24 et seq.
[181] Bungenberg & Hazarika, pp. 36-37, R. Echandi, "What do Developing Countries Expect from the International Investment Regime?", in J. Alvarez and K. Sauvant et al. (eds), *The Evoloving International Investment Regime: Expectations, Realities, Options* (2011) 11; M. Sattorova, "International Investment Treaties and the Promise of Good Governance: Norm and Institutional Design, Internalisation, and Domestic Rule-Making", Conference Paper No. 11/2014, 10th Anniversary Conference, Vienna, 4-6 September 2014, p. 4; Joachim Pohl, Societal Benefits and Costs of International Investment Agreements: A critical review of aspects and available empirical evidence, OECD Working Papers on International Investment, 2018/01, OECD Publishing, Paris https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en).
[182] Case C-284/16, Judgment of the Court (6 March 2018), paras. 58-59.
[183] Id., paras. 57-58.
[184] Gabrielle Kaufmann-Kohler & Michele Potestà, "Can the Mauritious Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appellate mechanism?", available at www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf.
[185] Schill, p. 23; B. Kingsbury & S. Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law", in A.J. van den Berg (ed.), *50 Years of the New York Convention* (14 ICCA Congress Series 2009).
[186] OJ C 362, 26.10.2012, p. 73.
[187] Council of Europe, Strengthening Judicial Independence and Impartiality as a Pre-Condition for the Rule of Law in Council of Europe Member States, Opening and concluding remarks, key speeches and General Rapporteur's Report (21-22 April 2016).
[188] CFREU, OJ C 326, 26.10.2012, p. 405 (referring to Art. 46 of the Charter)

*Independent and Impartial Tribunal*

The independence and impartiality of adjudicators is one of the core features of the rule of law in both municipal and international contexts. One of the concerns the European Commission is addressing with the MIC proposal is the problem of "double-hatting" – arbitrators acting as counsel and vice versa; arbitrators acting as expert and vice versa. Establishing a permanent judicial corps, whose members are engaged full-time in judging, alleviates those concerns. The intermediate step of an investment court system for individual treaties less clearly precludes those concerns; members of those tribunals would not be employed full time but would be precluded from engaging in other activities giving rise to an appearance of impropriety.

*Procedural Safeguards*

Investment tribunals both review municipal court decisions for compatibility with international standards and are themselves subject to such scrutiny. Although Article 6(1) of the European Convention on Human Rights does not itemize the components of a fair trial, the Court has identified them as including:

finality of judgments,[189]
publication of judgments and their enforcement,[190]
and the duty to state reasons in those judgments.[191]

*Legitimate Expectations*

It is ironic that the role of legitimate expectations is so controversial in international investment law, where it is often regarded as deleterious to its legitimacy as giving too many rights to investors, given its centrality as a tenet of the rule of law in the EU legal order and its centrality in the administrative laws of multiple countries.

*Equality Before the Law*

One core feature of rule of law is "equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts."[192] The obverse of this would suggest equal access for all to the same protections and remedies. This is one of the places that investment law arguably falls short by prioritizing foreign investors, or investments with foreign control, over domestic investors and investments. This distinction is, of course, at the heart of international law, which historically (outside the human rights context) is applicable precisely, and only, because of the international nature of the relationship in question. Yet, it is one of the grounds on which investment law is criticized most bitterly.

One of the questions in the preliminary ruling in *Achmea* was whether ISDS between an EU Member State and an investor from another Member State is at odds with the first paragraph of Article 18 TFEU. The CJEU did not need to answer this question because it had found that ISDS between an EU citizen and a Member State is not compatible with the autonomy of EU law.

Another aspect of equality before the law is the question of asymmetry – instances in which only one party can submit a claim. The International Court of Justice has analogised ISDS to a first-instance proceeding in which an employee challenges the acts of an employer – in the case at bar, an international organization. For the ICJ, there was nothing untoward in a first-instance procedure able to be initiated by only one person; key to equality was the same ability to appeal (or to seek annulment) of that initial decision.[193]

---

[189] See, e.g., Brumărescu v. Romania [GC], no. 28342/95, section 671, ECHR 1999-VII, Section 61; Ryabykh v. Russia, Judgment of 24 July 2003, sec. 51.
[190] See, e.g., Hornsby v. Greece, 19 March 1997, Reports 1997-II p. 509, section 40; Iatridis v. Greece [GC], no. 31107/96, sec. 58, ECHR 1999-II; Immobiliare Saffi v. Italy [GC], no. 22774/93, section 66, ECHR 1999-V; Hasan and Chaush v. Bulgaria [GC] App. no. 30985/96, ECHR 2000-XI, 26 October 2000, section 87.
[191] Hadjianastassious v. Greece, 16 December 1992, sec. 33.
[192] Dicey (n. 14), at 220-221.
[193] Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund of Agricultural Development, Advisory Op of 1 February 2012, ICJ Rep. 2012, p. 10, paras. 39-43.

*Transparency and Legal Certainty*

Legal certainty is related to the concept of transparency. As explained by the CJEU,

> the principle of legal certainty requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.[194]

This sentiment is remarkably similar to that expressed by the Metalclad tribunal in 2000:

> Prominent in the statement of principles and rules that introduces the Agreement is the reference to "transparency" (*NAFTA Article 102(1)*). The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.[195]

The *Metalclad* decision was widely regarded as placing too high a burden on states, yet it is remarkably similar to the standard as formulated by the ECJ, and applicable with the European Union, only four years later.

Good governance in international investment law is connected to transparency, not just with respect to "substantive" transparency as described in the *Metalclad* case but also transparency in dispute settlement proceedings. Both of these types of transparency can help to remedy the legitimacy concerns directed at investment arbitration. EU agreements now contain significant transparency requirements and have also begun to address concerns about the independence and impartiality of arbitrators.

In another parallel between concerns about the European Union and investment law, "the value of transparency has been recognized more strongly in the acts of the Union due to the widely perceived 'democratic deficit' in the functioning of the Union and transparency is one of the core values linked with taking the Union closer to the people."[196] These concerns are reflected in calls for more public accessibility to negotiating objectives to avoid the conclusion of treaties that do not reflect the will of the people in a polity.

Other cutting-edge transparency questions include whether third-party funding arrangements need to be disclosed, where public settlements in the shadow of threatened investor-state arbitration proceedings fall, what state documents (those enjoying crown privilege in domestic regimes, for example) can be withheld in investment proceedings, and whether expert reports need to be disclosed.

## VI. SYNTHESIS AND SUMMARY

With regard to international investment law, a debate has arisen as to whether, and to what degree, it incorporates international rule of law.[197] As the example of Brazil above demonstrates, there has been an increasing aversion of some countries – both developed and developing – toward BITs on the basis that is an incursion on the international rule of law. These developments are not necessarily unequivocally negative.

---

[194] CJEU, Case C-345/06, Gottfried Heinrich, ECLI:EU:C:2009:140, para 44.

[195] Metalclad v. Mexico, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 76. Note that this portion of the award was set aside by the court in British Columbia on the ground that transparency had not been established as a principle of customary international law applicable to the dispute pursuant to NAFTA Article 1105. United Mexican States v. Metalclad, Canada, Supreme Court of British Columbia (2 May 2001) [2001 BCSC 664, 5 ICSID Rep. 236. For a more general discussion of transparency, see A. Bianchi and A. Peters (eds.) *Transparency in International Law* (Cambridge 2013).

[196] Bungenberg & Hazarika, p. 23.

[197] P. Rajan, "National Contestation of International Investment Law and the International Rule of Law" in M. Kanetake & A. Nollkaemper (eds.), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart, 2016).

Rajan, for example, asserts that "national contestations provide an opportunity for a critical revision of the elements of international rule of law".[198]

The literature reveals that there are indeed differences in the definition ascribed to, and the understanding of, the term "rule of law" by different nations and institutions.[199] Similarly, the results of our modest survey demonstrates that the extent to which the rule of law is present, and the manner in which it is implemented in government design, has some significant differences amongst nations. Nevertheless, there are also similarities, the prime one being that it is accepted that at its core the rule of law requires that all persons and institutions are subject to, and equal before, the law.

Evidence suggests that the rule of law facilitates many facets of development.[200] It is thus likely to be a vital component of governmental design for those nations which seek to move from "developing" to "developed". Whilst there is often presumed to be a universal conception of what is just, fair, or good, there is the need to be more cognizant of specific local, cultural and social factors which may contribute to different notions of the rule of law than that accustomed in Western societies. The conscious approach by the Chinese to fuse their culture and legal tradition with the rule of law is demonstrative. The Committee may therefore benefit from more research on the relationship between the rule of law and investment arbitration in developing countries, particularly in Africa given that the aim of consolidating the rule of law is included as part of the African Aspirations listed in the African Union's Agenda 2063.[201] Whether, in their view, there is a strong presence of the rule of law in their state and if not, what factors militate against this would be useful. Further, some of the responses revealed what some would argue is a calculated attempt by government to consolidate power through the desecration of the rule of law. Such methods by which the rule of law is undermined may prove interesting for further research.

In the context of the analysis of international legal regimes, the report often lists concrete rules and elements the concept of the rule of law is understood to mean (see, eg, the list in the section on UN law). We will develop something comparable for the cross-analysis of domestic legal regimes based on the material that was submitted in order to guide the committee going forward.

An overarching question is how much leeway there is in establishing the constituent factors of the rule of law. For example, does investment arbitration provide greater access to arbitration albeit with less equality? Or does the rule of law require a constellation of all of the principles?

European Court of Human Rights decisions are used frequently in investment law, even when the respondent states are not European.[202] Furthermore, the European Court and other Human Rights bodies have contributed to developing right to property, a key feature of investment treaties in addition to appearing in 21 human rights treaties.[203]This cross fertilization might suggest that European Court-developed due process standards and the protections it has developed for property are useful sources for a cross-cutting rule of law.

Further questions we will consider are how the leading frameworks for analyzing international legal regimes, including investment law generally and investor-state dispute settlement, incorporate (or do not incorporate) the rule of law. Global administrative law, constitutional perspectives, international public law, human rights law, principal-agent theory, and compliance models, including managerial approaches, rational-actor theory, and democratic experimentalism, all deserve closer looks.

The identity of the reviewers, in addition to the context in which they operate (a national or supranational body) and subject to what conditions (such as the exhaustion of local remedies) are important, as will be an analysis of the primary proposals for reform of investment arbitration.

---

[198] *Ibid* at 117.
[199] N. Ramanujam, *Rule of law and economic development: A Comparative Analysis of Approaches to Economic Development across the BRIC Countries* (Faculty of Law, McGill University, 2012).
[200] See *ibid*; M. Trebilcock & R.J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar Publishing, 2008); especially para 7 note 53.
[201] Agenda 2063 Framework Document, African Union, September 2015 <https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf>.
[202] See, e.g., J. Alvarez, "The Use and Misuse of European Human Rights Law in Investor-State Arbitration", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875089; A. Bjorklund & S. Nappert, "Beyond Fragmentation", in T. Weiler & F. Baetens (eds.), *New Directions in International Economic Law – In memoriam Thomas Wälde* (Martinus Nijhoff Publishers 2011) p. 439.
[203] J. Alvarez, "The Human Right of Property", *University of Miami Law Review* (forthcoming 2018).

The 78th Biennial Conference of the International Law Association is due to take place in Sydney, Australia from 19-24 August 2018. This report has thus been prepared with that in mind and it is hoped that it will lay the foundation for fruitful dialogue and future research collaboration.

**Annex 1**

Dear Members of the ILA Committee on Investment and the Rule of Law

We look forward to seeing you in Vienna on 6 April for our first full-fledged Committee meeting. As you may remember, we noted in our earlier letter to you, one of the things that became clear during the discussion in Johannesburg was that conceptions of what the "rule of law" is vary widely, both in domestic law and in international law contexts. We discussed the advisability of having a preliminary stage in our research that would focus on the concept of "the rule of law" itself, prior to (or in parallel with) the research outline we had previously proposed. That stage will encompass a comparative law exercise to provide input on the way that domestic jurisdictions approach the "rule of law" concept, as well as an "international law" exercise to identify how it is used in various international contexts.

We realize that the "rule of law" is a broad concept and we certainly do not intend this to be a doctoral dissertation or to require a great deal of research. Rather, we would like to create a basis for discussion to identify commonalities and disparities in what the "rule of law" means in particular domestic contexts. To that end we have created the following questionnaire that ideally at least one person from each national branch will be able to fill out (collaborative work is encouraged) and return to provide a basis for our discussion in Vienna and for our interim report for the ILA meeting in Sydney (2018). You will see that the questions focus to some degree on arbitration, as befitting our topic, but they do range a bit more broadly given the public law nature of investment arbitration and the review mechanism therein.

Finally, we recognize that not all domestic law systems are the same. We invite you to be creative in adapting the questionnaire to your home jurisdiction in the event an important question/context is missing or somehow misrepresented or simply ill-fitting.

With all best wishes,
Andrea, Andreas, and August

The rule of law stems from the notion that a government's use of power should be constrained by the law, but the nature of that constraint varies contextually.

1. What does the rule of law mean in the constitutional context in your jurisdiction? Are there variations in what kind of standard government activity must meet? For example, are there different levels of review of government activity depending on the type of interest that is at stake? In the United States there is "rational basis" scrutiny, intermediate scrutiny, and "strict" scrutiny, depending on the type of governmental interest involved.

2. What role does the rule of law play in overall governmental design? – e.g., in some systems the separation of powers is reinforced by an independent judiciary with the power to review decisions of other branches of government; in other systems parliamentary supremacy is viewed as more consistent with democratic governance and rule of law constraints are left to the democratic process to implement.

3. What are the administrative law conceptions of the rule of law? What restraints does the concept of the rule of law impose on conduct by the executive, administrative agencies, etc.?

4. What does the rule of law mean in the judicial context? How does the concept of the rule of law influence the organization of courts, access to courts, the administration of justice/conduct of procedures, the making and reasoning of decision, and the enforcement of judicial decisions? Moreover, how does the concept of the rule of law influence relations between the courts and other branches of government, for example, in terms of granting powers to courts to review acts by other branches of government (executive and legislator), but also what limits the concept imposes on courts, for example in terms of restraint in the further development of the law or law-

making?

5. What does the rule of law mean in the legislative/law-making area? What constraints is the legislator subject to by the concept of the rule of law in your jurisdiction?

6. For all or any of the above, does the doctrine of "legitimate expectations" play a role, and if so, what? If it does not, is there an analogous provision in domestic law that plays a similar role to the concept as we know if from international investment law?

7. Again for all or any of the above, does the notion of proportionality play a role in assessing the balance of authority between the individual and the state? Is proportionality understood as part of the concept of the rule of law or does it have, if it exists in your jurisdiction, a different anchoring?

8. If relevant in your particular governmental structure, what is the relationship between the national government to subnational government entities with respect to the allocation of authority and competence regarding fairness in governance. In other words, does the doctrine of subsidiarity, or some similar notion, play a role in allocating competence as between government authorities, and if so is that allocation of power conceptualized in rule of law terms?

9. Does the doctrine of subsidiarity or something similar come up with respect to decisions by relevant supranational institutions, such as the European Union, including the European Court of Justice, the International Court of Justice, or the WTO Dispute Settlement Body?

10. How do ideas about arbitrability, and in particular whether a particular type of dispute is arbitrable, intersect with the rule of law? Does the rule of law, in other words, require that certain disputes be considered non-arbitrable?

11. Does your state distinguish between "public" and "private" arbitrations with respect to spheres of arbitral subject matters? Are there special procedures for public actors to agree to arbitrate disputes?

12. Would related ideas about inarbitrability, if they exist, apply equally to contract-based as to treaty-based arbitrations, whether in the context of set-aside or enforcement, or would your system be likely to make distinctions in this respect?

13. More generally, has the notion of public policy been used to preclude recognition and enforcement of arbitral awards because the arbitral awards, or the arbitral procedure followed, somehow failed to conform to ideas about the rule of law?
14. Are there specific due-process type principles to which public-private arbitrations have to conform in order to satisfy the rule of law? If so, are these different from private-private arbitrations?

15. Are any requirements for arbitrators, including requirements for independence and impartiality, justified by or couched in rule-of-law terms?

16. If your state has entered into any investment agreements, has the state made any efforts, on a national or subnational basis, to ensure that government officials are familiar with the state's investment obligations? If there are any such efforts, Have they provided any incentives to abide by those obligations (e.g. budgetary penalties or imposition of costs and/or damages on the entity whose measure might fall foul of an investment agreement)?

17. If your state has lost an investment arbitration, has there been any attempt to alter or amend the practice or the measure that gave rise to the investment law claim?

18. Is there something about your state's approach to the rule of law that is not covered above but that could be useful or important to consider?

19. What role does "substantive" transparency - i.e. the publication of/ availability of laws and decisions, play in your legal system? Is it conceptualized as part of the RoL?

20. What role does "procedural" transparency - i.e. public nature of judicial or administrative law proceedings, play in your legal system. In particular, are judicial and/or administrative hearings open to the public? Are judicial decisions publicly and freely (i.e. at no or little cost) available? Is this true for all levels of courts or tribunals, or only higher levels of courts or tribunals?

While we are engaging in this exercise, we thought it might be useful to ask the following questions which relate more to how international investment law has intersected with domestic law in practice.

21. If your state has entered into any investment agreements, has the state made any efforts, on a national or subnational basis, to ensure that government officials are familiar with the state's investment obligations? If there are any such efforts, are they either constant or repeated on a periodic basis to ensure that the educational efforts will reach new government officials, since many government officials rotate among different positions that serve for only a limited time in only one role? Have they provided any incentives to abide by those obligations (e.g. budgetary penalties or imposition of costs and/or damages on the entity whose measure might fall foul of an investment agreement)?

22. If your state has lost an investment arbitration, has there been any attempt to alter or amend the practice or the measure that gave rise to the investment law claim?

| | Question | Austria | Brazil | Caribbean[204] |
|---|---|---|---|---|
| | **Concept of rule of law?** | Yes. | Yes. | Yes. |
| 1 | **Court power to declare incompatibility with Constitution or strike down legislation?** | Yes | Yes. | Yes. |
| 2 | **Rule of law in government design?** | Yes - principles such as the separation of powers, legality and independence of the judiciary are incorporated throughout the entire public administration. | Yes - separation of powers, independence of all branches of government. The principle of legality is "extremely important in the conceptualization of the rule of law" in Brazil. | Separation of powers, independence of the judiciary and judicial review. |
| 3 | **Restraints imposed on the Executive or state agencies by the rule of law?** | Administration is bound by law in three ways: (1) Acts are permitted only if prescribed by law, (2) acts are permitted only as prescribed by law, (3) the law serves as an assessment standard to control administrative action. | Public administration is governed by Article 37 of the Constitution, which requires: legality, morality, impersonality and efficiency. | The concept of the rule of law implies that the executive cannot act arbitrarily or abuse its powers. |
| 4 | **Restraints imposed on the judiciary by the rule of law?** | The courts are obliged to comply with fundamentals of the rule of law such as the right to a fair trial, non-retrospectivity of criminal offences and effective remedy as per the European Convention on Human Rights. | The restraint imposed upon the judiciary by RoL considerations is that the judiciary "cannot act as if it was exercising a legislative function". | Some Caribbean jurisdictions, St Lucia, Barbados and Trinidad and Tobago for example, have judicial review legislation which enables a person not directly affected to apply for judicial review in the public interest. The rule of law is an important factor in determining whether there is "public interest". |
| 5 | **Restraints imposed on the legislator by the rule of law?** | Yes – by constitutional rights and the principle of equality. The principles of legality, legal clarity and legal certainty are particularly important in a legislative context. | Yes - the Constitution. | Yes - laws must be in compliance with the constitution. Any which are not are generally void and of no effect. |
| 6 | **Concept of legitimate** | Yes, derived from the | Yes | Yes – unless a change in |

[204] The Caribbean branch represents a region of countries that do not all follow the same legal tradition. Most of the information reported here pertains to Caribbean countries with a common law legal system. Some of the information arises from Caribbean Community (CARICOM) law, as evidenced by decisions of the Caribbean Court of Justice.

| | | | | |
|---|---|---|---|---|
| | **expectations or similar?** | principle of equality. Relevant in the context of retroactive legislation, acquired rights and factual arrangements. Criteria: Motive, type, intensity and unexpectedness of interference. No general ban on retrospectivity in civil law/regulation. | | policy was reasonably foreseeable or required by public interest. |
| 7 | **Principle of proportionality?** | Yes – of fundamental importance and generally applied in line with the ECHR definition of proportionality. | Yes – via "reasonableness". | Yes. |
| 8 | **Relationship between national & sub-national gov't?** | Austrian provinces have executive and legislative powers, but judicial power lies solely at the federal level. Certain competences may and under certain circumstances must be delegated. | "Each federative entity is autonomous: Union, States, Municipalities, and Federal District (capital) shall perform their activities within the competences' spheres ruled by Constitution." | No – the principle of subsidiarity is not applicable to the relationship between central and local government bodies in the Anglophone Caribbean. |
| 9. | **Principle of subsidiarity regarding supranational institutions?** | Not addressed. | "There is no immediate incompatibility between the doctrine of subsidiarity and decisions made by relevant supranational institutions." | The doctrine of subsidiarity does not apply to CARICOM in regard to "when action should be taken by the Community rather than the Members of CARICOM". |
| 10 | **Arbitrability & RoL? Public activities arbitrable?** | Matters of family law issues and some tenancy and consumer disputes cannot go to arbitration. Public entities may be a party to arbitration provided they are legally capable of entering into an arbitration agreement. | It appears that individuals with civil capacity "may participate in private arbitration of issues related to "tradable interests". | Dependent upon the precise Caribbean jurisdiction. |
| 11. | **Distinction between public /private arbitration?** | No. | Yes - public arbitration can be used for "conflicts relating to property transactional rights". | Yes - most Commonwealth Caribbean nations have special rules pertaining to public bodies entering arbitration agreements. |
| 12. | **Inarbitrability the same for contract and treaty-based arbitration?** | Not aware of any distinction. | No such distinction in Brazilian law. | Not aware of any distinction. |
| 13 | **Can public policy prevent recognition/enforcement of arbitral awards?** | Yes - through the concept of *"ordre public".* | Yes – if, for example, it offends national public order. | Yes - the Caribbean Court of Justice (CCJ) has refused to enforce an arbitral award on the basis that it would |

| | | | | |
|---|---|---|---|---|
| | | | | undermine the rule of law. *See: BCB Holdings Ltd & Belize Bank Limited v Attorney General of Belize* [2013] CCJ 5 (AJ) [59]. |
| 14. | **Specific due-process principles for public-private arbitration?** | No distinction between public-private and private-private arbitrations. | Yes - must be transparent; secrecy of awards not permitted. | Yes – specific constitutional due-process issues. |
| 15. | **Any requirement for arbitrators justified by RoL?** | There are laws to restrict the ability to "customize" arbitration proceedings. There is also a statutory requirement to disclose information which may detract from impartiality. | Independent and impartial. | Independent and impartial. Arbitrators are also required to disclose information which may detract from impartiality. Usually, sole arbitrators cannot be of the nationality of the parties without agreement of both parties. |
| 16 | **Anything unique about your RoL in your country?** | Not addressed. | No. | No. |
| 17 | **Civil servant awareness of International obligations? / Education initiatives?** | Not addressed. | Not addressed. | "There are no systematic programs geared towards ensuring effective and efficient application of the State's investment obligations". |
| 18 | **If lost an investment arbitration, any attempt to alter the relevant measure?** | Not applicable. | Not applicable. | No. |
| 19. | **Substantive transparency?** | Not addressed. | Not addressed. | In addition to publication of laws in print form, some countries make laws available on-line. Some countries, Belize, Jamaica and Trinidad and Tobago for example, have Freedom of Information legislation. This accountability provision reinforces the rule of law. |
| 20 | **Procedural transparency? (i.e. public nature of judicial proceedings)** | Not addressed. | Not addressed. | Most legal systems of the Commonwealth Caribbean include procedural transparency measures. |
| 21 | **Are judicial decisions public and available at little or no cost?** | Decisions of higher courts are available, but not the decisions of lower courts. | Not addressed. | CARILAW is an electronic database containing unreported Commonwealth Caribbean cases and |

| | | | | |
|---|---|---|---|---|
| | | | | decisions of superior courts in the region are reported.<br>Decisions of the Caribbean Court of Justice are available free of charge on its website. Also available are audio/video recordings of its proceedings. |
| | | **China** | **Finland** | **France** |
| | **Concept of rule of law?** | Yes – but weak. | Yes. | Yes – referred to as *"Etat de droit"* and influenced by the "German notion of *Rechtsstaat*, signifies the submission of the State to law". |
| 22 | **Other** | Not addressed. | After the Argentinian crisis, Brazil lost several arbitration proceedings and has thus refused to ratify investments agreements it has previously signed. | Not addressed. |
| 1 | **Court power to declare incompatibility with Constitution <u>or</u> strike down legislation?** | No -there is no constitutional court and the supreme court has no power to review the legality of any laws. | Yes - only in a case where that is actually in issue. No court can make that declaration *"in abstracto"*. No constitutional court. | Yes. There is a constitutional court, the "*Conseil constitutionnel*". |
| | | | | |

| | | | | |
|---|---|---|---|---|
| | | | There is however a Constitutional Committee based in Parliament which ensures that new laws comply with the Constitution | |
| 2 | **Rule of law in government design?** | Yes - some degree of separation of powers. Independence of "adjudicative power" but this appears to be given a narrow meaning and not equivalent to common notion of an independent judiciary. In fact, parliament supervises the supreme court. Transparency is weak. | Separation of powers and independence of the judiciary. | Separation of powers is a fundamental principle. |
| 3 | **Restraints imposed on the Executive or state agencies by the rule of law?** | Application of certain rule of law principles, such as proportionality, is increasing. | Administrative law regime, including specialized courts. | Full-fledged administrative law regime that is controlled by specilized courts that are bound to respect the legal rules that are superior to administrative acts. Regime is subject to different laws than tose applicable to private persons |
| 4 | **Restraints imposed on the judiciary by the rule of law?** | No. The rule of law is undermined by a number of laws and practices. For example, courts often decline to register cases thereby denying access to justice. Additionally, although the Constitution requires courts to be free from interference, the constitution also requires the judiciary to be subject to supervision by the CPC Committee of Politics and Law and neither is the judiciary independent from the legislature. | Yes, the Constitution. | As above. |
| 5 | **Restraints imposed by the rule of law the legislator?** | Yes – in theory, parliament is supposed to follow the procedures laid out in the Law-making law. | Yes – the Constitution. | Yes - "*actes de gouvernment*". E.g. exceptional presidential powers –extradition, which are <u>not</u> subject to judicial review. |
| 6 | **Concept of legitimate expectations or similar?** | Yes – increasingly so. | Yes – a similar concept exists in the context of international investment | Yes – the similar "*Confiance légitime*". Restricted use, non- |

| | | | | |
|---|---|---|---|---|
| | | | law and under domestic law. | specific state representation unlikely to trigger the doctrine. |
| 7 | **Principle of proportionality?** | Yes – increasingly so. | Yes. | Yes - implied in French Declaration of HR. Also stated in *Conseil d'Etat* and Constitutional Court cases. Both in the public interest and interest of the individual. |
| 8 | **Relationship between national & sub-national government.** | Extremely centralized state. | Not applicable. | Yes – "...the lowest level of power detains the competence to act. The upper level gets competence only if its action is more efficient". Though the principle is not framed in RoL terms. |
| 9. | **Principle of subsidiarity regarding supranational institutions?** | Not addressed. | National laws are obliged to comply with EU and international law and judgments. | Yes. |
| 10 | **Arbitrability & RoL? Public activities arbitrable?** | Public entities may be a party to arbitration in commercial matters, not for administrative issues. | "Any dispute in a civil and commercial matter which can be settled by agreement between the parties is arbitrable." | See below. |
| 11. | **Distinction between public /private arbitration?** | No - arbitrations are only private. Arbitrations may only deal with commercial disputes. | No distinction and no special procedures for arbitrators. | Yes - private law issues may be arbitrated. Public arbitration generally banned by the *Code de procedure civile*. Two exceptions: international issues (no public policy issue) & on a case-by-case basis specified in Acts, provided there are no issues of public policy. Some public persons are treated as private persons and authorized to arbitrate only by administrative Act. |
| 12. | **Inarbitrability the same for contract and treaty-based arbitration?** | Through BITs, specific investment disputes may be the subject of international arbitration. | No - for contract cases any civil/commercial dispute is arbitrable if it can be settled by agreement. Treaty – depends on the treaty. | State arbitration under contract not permitted without special dispensation. |
| 13 | **Can public policy prevent recognition/enforcement of arbitral awards?** | Yes. However, there is no domestic definition of this term and the principle has been | Not aware of any such cases. | "It can probably be said that the French conception of public policy, in the arbitration |

| | | | | |
|---|---|---|---|---|
| | | inconsistently applied. | | context, has no peculiarity as French judges apply the New York convention... (except, of course, in the case of ICSID awards). |
| 14. | **Specific due-process principles for public-private arbitration?** | Yes – a lack of due process may be the basis for setting aside an arbitral award. | No. | Not addressed. |
| 15. | **Any requirement for arbitrators justified by RoL?** | Arbitration institutions must be independent from state institutions. Requirements imposed on arbitrators are those contained within institutional professional rules. | Independent, impartial and conformity with the *audi et altera partem* principle. Arbitrators can be challenged if they "...would have been disqualified to handle the matter as a judge." | Independent and impartial. "French law imposes requirements that are basically the same as the ones imposed by international arbitration regulation...They do not seem to have any direct link with the rule of law." |
| 16 | **Anything unique about RoL in your country?** | Yes - the power of the ruling political party over all state departments. This party is not subject to any mechanism of accountability or supervision – effectively, not even the constitution. | No. | Not addressed. |
| 17 | **Civil servant awareness of International obligations? / Education initiatives?** | Some training is provided by the Ministry of Commerce to train local officials on China's treaty obligations. Public officials in central government are more knowledgeable in this area. | Yes, regularly. | "The debates on arbitration and CETA have shown that officials are not *at all* familiar with ISDS, even if France has made an interesting proposal that led the European Commission to submit its investment Court System project. They have understood that hostility towards arbitration was supported by the majority of the population, so that they decided to be against it as well...". |
| 18 | **If lost an investment arbitration, any attempt to alter the relevant measure?** | China has settled one ISA via negotiation and won two. Thus far no attempt to amend any related measure. | Finland has <u>not</u> been involved in investment arbitrations. | Thus far, France has only been party to one arbitration. Award pending. |
| 19. | **Substantive transparency?** | The Regulation of the Publication of Government Information, adopted in 2007, requires certain information, including those that demand public participation or affect the | Not addressed. | Not addressed. |

| | | | | |
|---|---|---|---|---|
| | | interests of citizens,be made public. In practice, difficulties remain at the local level where legally binding local rules and administrative documents are inaccessible or not published promptly. | | |
| | | **Germany** | **Ghana** | **Italy** |
| | **Concept of rule of law** | Yes. | Yes. | Yes – analogous concept of *"stato di diritto'* – but not expressly stated in Constitution. |
| 20 | **Procedural transparency? (i.e. public nature of judicial proceedings)** | Yes. Court hearings are open to the public but may be closed for reasons of confidentiality or public security. Despite improvements, significant impediments to procedural transparency remain. | Yes. Several constitutional provisions support the rule of law. For example, fair exercise of discretion and the right to administrative justice. | Not addressed. |
| 1 | **Court power to declare incompatibility with Constitution or strike down legislation?** | Court proceedings are public. | Not addressed. | Yes – see Art 134/136 of the Constitution. |
| 2 | **Rule of law in government design?** | Not addressed. | Separation of powers and an independent judiciary. | Separation of powers, independence of the judiciary, equality and principle of legality. No retrospective application of criminal laws. |
| 21 | **Are judicial decisions public and available at little or no cost?** | Courts now often publish judgments. | Yes, they are available. | Not addressed. |
| 3 | **Restraints imposed on the Executive or state agencies by the rule of law?** | Not addressed. | Several agencies are intended to act as a restraint on the Executive and administrative agencies: CHRAJ, the Office of Accountability in the Office of the President and the Judicial | Judicial protection against unlawful acts of the state is required by the principle of legality. |
| 22 | **Other** | Although China is incrementally incorporating aspects of the rule of law, it neither meets the standards of the thick or thin notions of the rule of law. | Not addressed. | The *Consail d'Etat* is an independent body responsible for administrative law. Intended to minimize abuse of power. |

| | | | | |
|---|---|---|---|---|
| | | | Complaints Unit. | |
| 4 | **Restraints imposed on the judiciary by the rule of law?** | Not addressed. | Although the courts have the power of judicial review, they are prohibited from reviewing executive action/omissions where it is deemed fall within the political question doctrine. | The *Rechsstaat* principle requires certain standards for court proceedings, including equality of arms and a fair trial. |
| 5 | **Restraints imposed on the legislator by the rule of law?** | Not addressed. | The Council of State has a mandatory role in the amendment of the Constitution. Article 107 of the Constitution prohibits the enactment of any law which seeks to (i) change a court judgment or (ii) retrospectively negatively impact the rights or burden of a person. Parliament is prohibited from enacting a law seeking to establish a one-party state. | Yes, legislative power is subject to control by the constitutional court. . |
| 6 | **Concept of legitimate expectations or similar?** | Yes. | Yes. | Yes –*"legittimo affidamento"* is very similar to the private law principle of *"the protection of reliance"*. |
| 7 | **Principle of proportionality?** | Yes. | Yes. | Not explicitly in the Constitution but recognised and used through principles of reasonableness, necessity and arbitrariness. However, proportionality is an autonomous principle with regard to EU law. |
| 8 | **Relationship between national & sub-national gov't?** | The principle applies, to an extent. | Neither the Constitution nor the Local Government Act refers to the principle of subsidiarity. However, Article 35(6)(d) of the Constitution provides that the state should, "make democracy a reality by decentralizing the administrative and financial machinery of government to the regions and districts…". | Article 118 of the Constitution - "administrative competences shall be allocated in accordance with the principles of subsidiarity, differentiation and adequacy." See also Article 120 of the Constitution.<br>The states have legislative competence for certain fields such as immigration. Regions (provinces and municipalities in some |

| | | | | |
|---|---|---|---|---|
| | | | | circumstances) have competence in all other areas not granted to the states. |
| 9. | **Principle of subsidiarity regarding supranational institutions?** | As a member of the EU, German laws should comply with EU law. | Ghana is a member of the Economic Community of West African States ('ECOWAS'). Though the principle of subsidiarity is not explicitly mentioned in any of the ECOWAS treaties or protocols, several documents published by ECOWAS mention subsidiarity as being a "guiding principle". Whether ECOWAS may be categorized as a supranational institution or is more appropriately deemed an intergovernmental organization may be debated. | EU law has primacy over national law, WTO law is not of direct effect, treaty law may have direct effect and customary international law has constitutional law status and will take primacy over a conflict with other constitutional provisions. The exception to this is the "*counter-limits doctrine (teoria dei controlimiti)".* |
| 10 | **Arbitrability & RoL? Public activities arbitrable?** | Any claim involving economic interests may be arbitrable. However, there are some exclusions, section 1030 (3) ZPO (Code of Civil Procedure). A 2009 case (in the context of the validity of shareholder resolutions) stated that arbitral proceedings should be "… conducted in compliance with a minimum standard of participatory rights and legal protection as required by the rule of law". Public activities are arbitrable. | The Alternative Dispute Resolution Act 2010 prohibits certain matters from being arbitrated. This includes the interpretation or enforcement of the 1992 Constitution, matters of national or public interest or which pertain to the environment as well as matters which cannot, by law, be determined by arbitration are not arbitrable. | "The Italian Code of Civil Procedure does not establish a positive rule (règle matérielle) that defines the arbitrability of disputes". Public activities are arbitrable. |
| 11. | **Distinction between public /private arbitration?** | No. | No – except with regard to the enforcement of foreign arbitral awards | Yes. |
| 12. | **Inarbitrability the same for contract and treaty-based arbitration?** | No distinction. | Not aware of any distinction. | No distinction. |
| 13 | **Can public policy prevent recognition/enforcemen** | Yes - through due process and the German concept of *"ordre* | Yes – by virtue of being party to the New York Convention. Although | Yes – via violation of due process. |

| | | | | |
|---|---|---|---|---|
| | **t of arbitral awards?** | *public".*<br>Courts have refused to enforce arbitral awards where there was no defined legal relationship between the parties on the basis that the lack of such a relationship "unduly limit the right of access to justice." | public policy is not specifically listed in the ADR act as grounds for refusal to recognize/enforce an award, issues such as lack of notice of proceedings, failure to abide by the agreed rules of procedure, fraud or corruption may prevent such recognition/enforcement. | |
| 14. | **Specific due-process principles for public-private arbitration?** | Yes - arbitration panels must provide minimum participatory rights as per the rule of law. | No - there does not appear to be any specific due-process principles. | Public arbitrations – requirement of "publicity and rotation" in appointment of arbitrators. There are further "stringent" requirements – Article 209 Code of Public Contracts. |
| 15. | **Any requirement for arbitrators justified by RoL?** | Independent and impartial. | Independent and impartial. Section 15 ADR Act arbitrators are required to disclose, in writing, any matters which may raise concerns regarding these two requirements. | The requirements or limitations for arbitrators in "public" arbitrations are more stringent than in private arbitrations. |
| 16 | **Anything unique about RoL in your country?** | "Rule of law considerations have played a role in assessing whether an arbitration agreement was validly formed". Court used rule of law in deciding whether one party could unilaterally decide whether to go to litigation or arbitration or to unilaterally appoint the arbitrator.<br>Courts have also used rule of law and access to justice principles regarding the inability of one party to finance arbitration proceedings. | Ghana operates a pluralist legal system. However there is a lack of literature on how the rule of law is, or is not, upheld within the domestic customary legal system. | No. |
| 17 | **Civil servant awareness of International obligations? / Education initiatives?** | Information not available. However,informal discussions reveal that such training appears unnecessary as investment obligations are in line with administrative law and constitutional principles. | Information not available. | Information not available. |

| | | | | |
|---|---|---|---|---|
| 18 | **If lost an investment arbitration, any attempt to alter the relevant measure?** | To date, Germany has not lost an investment arbitration. | Ghana has lost an investment arbitration. There does not appear to be any significant shift in practice as a result. | To date, Italy has not lost an investment arbitration. |
| 19. | **Substantive transparency?** | Not addressed. | Attempts at improving transparency are increasing. For example, upon significant opposition and public protest regarding a defence cooperation agreement between Ghana and the US, the President of Ghana made a public statement via live television and radio broadcast explaining the nature of the agreement and reiterating the intention to uphold democracy and the rule of law. Another example is the draft Right to Information Act pending before Parliament. | Not addressed. |
| 20 | **Procedural transparency? (i.e. public nature of judicial proceedings)** | Not addressed. | Judicial proceedings are generally open to the public. A notable exception to this are divorce cases and cases concerning children (adoption, custody, etc.). | Not addressed. |
| 21 | **Are judicial decisions public and available at little or no cost?** | Not addressed. | Yes - however, obtaining such documentation at the lower courts can be onerous due to a lack of a centralized computer system, faulty or inoperative computers and the high turn-over or absence of staff. | Not addressed. |
| 22 | **Other** | A 2009 case stated that certain arbitral proceedings were valid provided it complied with aspects of the rule of law. Germany has signed but not ratified the Mauritius Convention. | In addition to the modern form of arbitration, parties to a dispute in Ghana often utilize what is referred to as customary arbitration. This is a method of dispute resolution where leaders such as chiefs, heads of clan, or heads of family, act as arbitrators to resolve disputes based on the customs and traditions of the local community/tribe. It was a key feature of Ghana's | Civil laws may apply retrospectively in some instances. |

| | | | | |
|---|---|---|---|---|
| | | | justice system prior to colonization and continues to be used, particularly outside the large cities. It has now, to a large extent, been | |
| | | **Japan** | **Kazakhstan** | **New Zealand** |
| | **Concept of rule of law?** | Yes –but not expressly stated in the Constitution. Taken from | No – not expressly stated in the Constitution. What is present is similar to the | Yes – though the concept itself is not justiciable, |

| | | | | |
|---|---|---|---|---|
| | | the German *"Rechtsstaat"*. | German *"Rechtsstaat"* or the French *l'Etat de Droit* notion. | principles derived from the rule of law can be enforced through the courts. References to the rule of law in statutes: Section 3(2) of the Senior Courts Act 2016: "Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament."<br>Section 4(a) of the Lawyers and Conveyancers Act 2006: "Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations: (a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand". |
| 1 | **Court power to declare incompatibility with the Constitution or strike down legislation?** | Yes – but restrained by the political question doctrine. Very rare – since 1947 only 15 cases where laws declared unconstitutional and 12 held to be unconstitutionally applied. | Where the court views a law as infringing the Constitution, Article 78 of the Constitution requires the court to make a referral to the Constitutional Council "with a proposal to declare that law unconstitutional." | No -the courts have no power to strike down legislation. Parliamentary supremacy is viewed as more consistent with democratic governance. Courts have the power to strike down unlawful administrative acts and decisions, but not on grounds of rule of law *per se* though the rationale of judicial review is to uphold the rule of law. There is no separate constitutional court. |
| 2 | **Rule of law in government design?** | Independence of the judiciary. | Article 48 of the Law on Legal Acts enables courts and some state departments (e.g. Ministry of Justice) to initiate the termination or suspension of a legal act if it breaches a superior law. | Degree of separation of powers. |
| 3 | **Restraints imposed on the Executive or state agencies by the rule of law?** | Not addressed. | The Constitution provides checks and balances for all three branches of the | No. |

| | | | | |
|---|---|---|---|---|
| | | | government. Additionally, it is the responsibility of the Constitutional Council to ensure that constitutional norms are adhered to by all branches of state power. | |
| 4. | **Restraints imposed on the judiciary by the rule of law?** | Not addressed. | As above. | No. Rather, the judiciary exists in order to uphold the rule of law. |
| 5 | **Restraints imposed on the legislator by the rule of law?** | Legislature plays a role in drafting rules of judicial procedure. | As above. | No. |
| 6 | **Concept of Legitimate Expectations or similar?** | Yes – similar through doctrine of "good faith". | No – unless the norm is stated in a ratified Treaty. There are, however, other principles which, taken together, are similar to legitimate expectations. These include, for example, mutual responsibility and freedom of entrepreneurship. | Yes.<br>The concept of legitimate expectation can be invoked under New Zealand's administrative law in an application for judicial review brought to challenge a public decision. |
| **7.** | **Principle of proportionality?** | Yes – taken from German law. However, although used by the SC it is not expressly stated in any judgments. | No. | Yes- although it is not recognised as a stand-alone principle by the New Zealand courts. The notion of proportionality pervades much of New Zealand's statutory and common law. |
| 8 | **Relationship between national & sub-national gov't?** | Yes – to a degree through the Local Autonomy Act 1947 and the Promotion of Local Autonomy Act of 2006. Art.1bis, Section 2 Japan's Local Autonomy Act 1947 : "(t)he national government bears the burden of discharging services relating to the subsistence of the nation in international society, services relating to the activities of nationals that should be uniformly stipulated nationwide …, and the local governments bear the burden of discharging services familiar to the local inhabitants, …". | No - there is no sub-national government. | New Zealand is a unitary state with no federal allocation of powers. Local authorities may only act in accordance with the local government legislation. The Realm of New Zealand exhibits a number of federal features in New Zealand's relationship with the Cook Islands, Tokelau, and Niue. |
| 9 | **Principle of subsidiarity** | Not addressed. | No. | No. |

| | | | | |
|---|---|---|---|---|
| | **regarding supranational institutions?** | | | |
| 10 | **Arbitrability & RoL? Public activities arbitrable?** | Not addressed. | Some matters may not be the subject of arbitration such as, for example, disputes regarding minors, incapacitated persons, and those declared bankrupt. | Civil matters, including those arising under consumer protection, are arbitrable. However, criminal and other public matters may not be the subject of arbitration. |
| 11. | **Distinction between public /private arbitration?** | Not addressed. | No. | As above, generally there is no public arbitration. However, there are a few exceptions which permits arbitration as a mechanism for resolving particular types of disputes with state agencies. See, for example, the Biosecurity Act 1993. |
| 12. | **Inarbitrability the same for contract and treaty-based arbitration?** | Not addressed. | Yes – except where a treaty provides other grounds of inarbitrability inconsistent with the Arbitration Law. In such cases, the treaty takes precedence. See Article 3.2 of the Arbitration Law. | Not addressed. |
| 13 | **Can public policy prevent recognition/enforcement of arbitral awards?** | Not addressed. | Yes - arbitral awards may also be refused if the application for enforcement was made more than three years after the award entered into force. | Yes – see the Arbitration Act 1996, Schedule 1 Articles 34(6)(b) and 36(3)(b). |
| 14. | **Specific due-process principles for public-private arbitration?** | Not addressed. | Under the Arbitration Law there is a special requirement for agreement to arbitrate between natural/legal persons and state agencies/ certain state enterprises. This special requirement is expected to be removed or amended in the near future. | Natural justice as provided in the Arbitration Act 1996. |
| 15 | **Any requirement for arbitrators in line with the RoL?** | Not addressed. | Arbitrators must be independent and impartial as per the Arbitration Law. The following cannot act as arbitrators: "court judges, persons with limited legal capacity, persons convicted charged with | Impartial and independent. See Articles 12–13 of Schedule 1 of Arbitration Act 1996. |

| | | | | |
|---|---|---|---|---|
| | | | criminal crimes or having criminal records, public servants, Members of Parliament and municipal representative bodies, military servants". | |
| 16 | **Anything unique about RoL in your country?** | Not addressed. | No. | No. |
| 17 | **Civil servant awareness of International obligations? / Education initiatives?** | Not addressed. | There is no specific training covering international obligations. However, an inter-agency processes is used to analyse and approve investment treaties. There are no budgetary penalties on state agencies for breaching an international obligation. Any action by s state official which results in an investment dispute may face disciplinary action or criminal charges. | The Legislation Guidelines and the Cabinet Manual provide advice on the manner in which international obligations should be incorporated into the legislative process. Compliance with international obligations must be detailed in Cabinet papers which seek to change legislation. The Ministry of Foreign Affairs and Trade (MFAT) has a dedicated Treaty Officer who engages with various agencies involved in the negotiation of international agreements. A Treaty-Making Seminar is held annually. |
| 18 | **If lost an investment arbitration, any attempt to alter the relevant measure?** | Not addressed. | Not addressed. | According to UNCTAD Investment Policy Hub, New Zealand was not involved in any investment disputes, neither as the respondent nor as the home state of the investor. |
| 19 | **Substantive transparency?** | Not addressed. | Laws pertaining to the rights, freedoms and responsibilities of citizens must be published in order to apply. The Constitution also specifically requires the publication of all applicable treaties. | New Zealand's legislation is freely available online. There is an Official Information Act 1982, which provides citizens with the right to access information, enable their participation in government, and hold governments and government agencies to account. Ombudsmen encourage good administration by giving feedback and training to agencies. Importantly, pursuant to s 13(3) of the Ombudsmen Act 1975, |

| | | | | |
|---|---|---|---|---|
| | | | | "[e]ach Ombudsman may make any such investigation either on a complaint made to an Ombudsman by any person *or of his own motion*" (emphasis added). Furthermore, the Office of the Ombudsman monitors places of detention under the Crimes of Torture Act 1989 (s 16). |
| 20 | **Procedural transparency? (i.e. public nature of judicial proceedings)** | Not addressed. | Subject to certain exceptions such as state secrets or family matters, trials are public. Nevertheless, even in closed proceedings, the case background and sentence imposed are publicly announced. | All judicial proceedings are public unless there is good cause to exclude the public (e.g. to protect the interests of the victim in criminal proceedings). Administrative hearings are not necessarily open to the public. |
| 21 | **Are judicial decisions public and available at little or no cost?** | Not addressed. | With the exception of "closed proceedings", all court decisions are available free of charge on the electronic Supreme Court database. | Most higher court decisions are available online via the relevant court websites. Only a selection of District Court decisions is available online (http://www.districtcourts.govt.nz). Others require a request to the court itself. Availability is covered by Court Rules. Additionally, New Zealand Treaties online maintains a register of all of New Zealand's treaty obligations (www.treaties.mfat.govt.nz). |
| 22 | **Other** | Many laws are being drafted by admin agencies and then sent to the legislature and "…many local governments are frequently circumventing the uniform application of domestic laws through administrative guidance…". Establishment of an administrative court is banned – art.76.2 of the Constitution. | "…public entities are extremely reticent towards ADR, unwilling to risk financial or professional responsibility".<br><br>" international treaties and even international awards (adopted on a treaty basis) may be directly applicable and even acquire priority over domestic statutes (Constitution articles 9, 87(1), 89(1)), transfer of public authority to an | The role of the Ombudsman has to be underscored. This is where most public law issues are resolved in practice. No decision of the Ombudsman has been ignored by the government over the past 15+ years. |

| | | | | |
|---|---|---|---|---|
| | | | international organization or international institution in respect of specific matters requires additional consent (Constitution, art. 90).” | |
| | | **Norway** | **Poland** | **South Africa** |

| | | | | |
|---|---|---|---|---|
| | **Concept of rule of law?** | Yes. | Yes. | Yes. |
| 1 | **Court power to declare incompatibility with Constitution <u>or</u> strike down legislation?** | Yes - however, judgment of a constitutional violation is only "*inter partes".* The correction of any unconstitutionality must be made by parliament to have "*erga omnes* effects". | Yes. In light of the recent assault on the Constitutional tribunal, there is a growing acceptance of the notion that common and administrative courts can also refuse to apply an unconstitutional law; the currently discussed model draws from US-style "dispersed constitutional review". | Yes. |
| 2 | **Rule of law in government design?** | Separation of powers, independence of the judiciary, transparency, non-retroactivity. | Separation of powers, supremacy of the constitution, independence of the judiciary. | Separation of powers, judicial review, principle of legality. |
| 3 | **Restraints imposed on the Executive or state agencies by the rule of law?** | Yes. Any act emanating from the state must be founded on a statute (or other formal competence) if it restricts individual rights. | Any public decisions which violate the rule of law may be annulled. Civil servants are bound "to ensure a professional, diligent, impartial and politically neutral discharge of the State's obligations" (Constitution art. 153(1). | All acts/omissions of all branches have to be lawful and in compliance with the Constitution. |
| 4 | **Restraints imposed on the judiciary by the rule of law?** | The Supreme Court reviews acts, but while respecting separation of powers. Different levels of scrutiny are given to different types of acts. There is active discussion about the role of the Supreme Court as a law developer with respect to human rights principles and social norms that are in advance of legislation. | The judiciary constitutes one of the three mutually balancing branches of government, designed to ensure the founding premise of a democratic state: rule of law. The latter sets limits on judicial powers. | As above. |
| 5 | **Restraints imposed on the legislator by the rule of law?** | Yes - statute may restrict the power of the SC in rare cases. See Art.88 of the Constitution. The principle of non-retroactivity. | Statutes cannot prevent access to the courts for claims alleging infringement of freedoms or rights (Constitution, art. 77(2)). | As above. |
| 6 | **Concept of legitimate expectations or similar?** | Yes – through the principle of non-retroactivity for example. | Not explicitly, but may be implied from other areas of law as well as court decisions. | Yes. |

| | | | | |
|---|---|---|---|---|
| 7 | **Principle of proportionality?** | Yes. | Yes. | Yes – regarding the limitation of rights. |
| 8 | **Relationship between national & sub-national gov't?** | Not addressed. | Poland is a unitary state, although some normative and administrative powers have been transferred to local governments in accordance with constitutional principles of subsidiarity and autonomy. | No. |
| 9 | **Principle of subsidiarity regarding supranational institutions?** | Yes - particularly with regard to international law and the ECHR, however it is within "…the competence of the Norwegian Supreme Court, to interpret the Norwegian Constitution", thus HR interpreted under the Constitution may be different than the interpretation under the ECHR | The principle of subsidiarity stems from the EU and not from Polish law. Subsidiarity thus cannot constitute a basis for the allocation of jurisdiction between domestic and international dispute settlement bodies, and, arguably, it would not be a sufficient basis for challenging Polish domestic legal or administrative acts. | No. |
| 10 | **Arbitrability & RoL? Public activities arbitrable?** | Public activities may be arbitrable but there may be constitutional impediments. | Public entities may be a party to arbitration, but public law issues may not. Arbitration proceedings may only consider civil law questions of particular property and non-property rights. | No specific provisions pertaining to arbitrability in the context of the rule of law. Public entities not permitted to participate in investor-state arbitration. |
| 11 | **Distinction between public /private arbitration?** | Yes - private law matters freely arbitrable but there is a restrictive approach to public law arbitration BIT's as it would be a violation of constitutional competence if the arbitral award interpreted or set aside a Norwegian decision – unless approved by a special parliamentary procedure. | No – although both private and public entities can be parties to arbitral proceedings, there is no "public arbitration" in that public law matters cannot be the subject of arbitration. | Appears to be a distinction – but unclear given the new law. |
| 12 | **Inarbitrability the same for contract and treaty-based arbitration?** | Not aware of any distinction. | Not aware of any distinction. | Not aware of any distinction. No case law to suggest this. |
| 13 | **Can public policy prevent recognition/enforcement of arbitral awards?** | Yes - used rarely, approach in investment context is to use restrictively. | Public policy can only indirectly prevent the enforcement of an arbitration clause due to the "public order clause". | Yes – recognition and enforcement of an award can be presented if doing so would be against public policy. |
| 14 | **Specific due-process** | No, but limits on | There is no public- | No. |

| | | | | |
|---|---|---|---|---|
| | **principles for public-private arbitration?** | governmental ability to agree to arbitration in public matters. | private arbitration. | |
| 15 | **Any requirement for arbitrators justified by RoL?** | Not addressed. | They must be impartial and independent. Arbitrators may be of any nationality but cannot serve simultaneously as a judge. Additionally, arbitrators may be subject to requirements imposed from elsewhere (for example, by arbitration clauses, rules of various, codes of conduct by various arbitration associations. | No. |
| 16 | **Anything unique about RoL in your country?** | Not addressed. | Information not available. | Not addressed. |
| 17 | **Civil servant awareness of International obligations? / Education initiatives?** | Not addressed. | Information not available. | No. This is evidence by the view that " no real knowledge existed as to the implications…" of arbitration agreements. "This is one of the main reasons why the South African government decided to terminate a number (if not most) of its investment treaties". |
| 18 | **If lost an investment arbitration, any attempt to alter the relevant measure?** | Not addressed. | Not aware of any such attempts. | South Africa has been party to two arbitrations – lost one and settled the other. |
| 19 | **Substantive transparency?** | The principle of transparency for state activity is regulation by section 100 of the Norwegian Constitution and by the Act on Transparency, in existence since 1990 and strengthened in 2006. | Demonstrated by the Access to Public Information Act and the right to participation in public hearings. | Not addressed. |
| 20 | **Procedural transparency? (i.e. public nature of judicial proceedings)** | Not addressed. | Court hearings are public and may only be closed to the public "for reasons of morality, State security, public order or protection of the private life of a party, or other important private | Court hearings are as a rule held in public. |

| | | | | |
|---|---|---|---|---|
| | | | interest", nevertheless such judgments are made public (Article 45(1) and (2) of the Constitution). Access to public information can be limited on certain grounds such as public order, international relations or professional secrets. | |
| 21 | **Are judicial decisions public and available at little or no cost?** | Not addressed. | In 2001 the Minister of Justice issued a direction that the use of personal devices to copy documents or take pictures as an alternative for hand-written notes should be free of charge, but this practice remains inconsistent. Court decisions other than judgments are not published.. | Nowadays many judicial decisions are available via the internet for free, e.g. www.saflii.org. |
| 22 | **Other** | Some academic discussion that BIT's violate some constitutional principles – e.g. justice should be exercised independently by courts (arts. 2 & 88). "…the understanding of an arbitration clause in a treaty as transfer of constitutional competence to the arbitral tribunal has been an impediment to ratifying the Energy Charter Treaty and is the reason why Norway has not entered into new BITs since 1995."<br><br>"According to a not uncontroversial opinion of the Government, there is an established constitutional practice that treaties implying transfer of competence do not require the special procedure provided for in §§ 115 or 121 of the Constitution, if the | "…public entities are extremely reticent towards ADR, unwilling to risk financial or professional responsibility".<br><br>"international treaties and even international awards (adopted on a treaty basis) may be directly applicable and even acquire priority over domestic statutes (Constitution articles 9, 87(1), 89(1)), transfer of public authority to an international organization or international institution in respect of specific matters requires additional consent (Constitution, art. 90)." | Not applicable. |

| | | | | |
|---|---|---|---|---|
| | | effects of such transfer have restricted scope." | | |