INTERNATIONAL LAW ASSOCIATION
INTERIM REPORT (2020)*

RULE OF LAW AND INTERNATIONAL INVESTMENT LAW

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I. INTRODUCTION

Following the Biennial ILA Conference in Sydney in 2018, the ILA Committee on the Rule of Law and International Investment Law (‘the Committee’) intensified its work on the relationship between the rule of law and international investment law. In accordance with its mandate, both substantive and procedural issues of international investment law and their intersection with the ‘rule of law’ remained at the heart of the Committee’s activities. For this purpose, the Chair and Co-Rapporteurs organised academic workshops in 2018 and 2019 and additionally, a Committee meeting in 2019.

This draft report summarizes the progress made by the Committee since the conference in Sydney and outlines the plans of the Committee for the remainder of 2020 and 2021.

II. THE RULE OF LAW AND THE SUBSTANTIVE STANDARDS OF INTERNATIONAL INVESTMENT LAW

As discussed in the conference report for the Biennial ILA Conference 2018, the term ‘rule of law’ is complex and ambiguous. Various definitions and concepts of rule of law exist and to some extent the concept is used differently in the different domestic legal systems. Moreover, distinctions must be drawn between the notion of the rule of law as used in international law and in domestic legal systems. For purposes of the analysis of the substantive standards of international investment law from a rule of law angle, the definition adopted for the 2004 UN SG Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies served as a starting point for the discussions in 2018 and 2019:

The “rule of law” is a concept at the very heart of the Organization’s mission. It refers to 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,

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2 See ILA Committee on ‘Rule of Law & International Investment Law Description’, available at <http://wwwILA-hq.org/index.php/committees>: ‘The mandate of the Committee is to study rule-of-law implications of international investment law on both substantive and procedural matters’.  
5 See 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. This report was specifically adopted for the transnational justice context, but the underlying notion of the rule of law and the rule of law demands elaborated in the report appear to include important criteria for assessing national and international legal systems more generally.
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, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.6

Hitherto, much of the debate concerning the rule of law and international investment law focused on the interactions between the concept of the rule of law and current as well as future designs for investor-state dispute settlement. These have tended to be procedurally focused.7 Thus, the relationship between the rule of law and substantive standards of investment law remains understudied, but is gradually attracting more attention in investment arbitration and scholarship. In fact, some commentators see the substantive standards of treatment, in particular fair and equitable treatment, as expressions of the rule of law.8 More recently, arbitral tribunals have also explicitly linked ‘rule of law’ with fair and equitable treatment in their analysis of state conduct and compliance with the obligations assumed in investment treaties.9

The characterization of fair and equitable treatment and other treaty standards as emanations of the rule of law has not only been advanced by scholars as a justification of the existence of substantive standards of protection under international investment law,10 but also has been seen as informing the conceptualization, interpretation and application of substantive standards of international investment law.11 However, other commentators have advanced a

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6 Ibid. para. 10; see also August Reinisch, ‘The UN Concept of the Rule of Law’ (2019) 22 ZEuS 337.
7 See e.g. Emanuel Castellarin, ‘Investment arbitration and the international rule of law. Rule of Law at the Beginning of the Twenty-First Century’ (2018), available at <https://hal.archives-ouvertes.fr/hal-02490162> 3-7.
9 See e.g. Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 1308 (‘Absent any further guidance from the Treaty itself, it is generally accepted that the obligation to afford fair and equitable treatment (FET) contained in a treaty is a requirement that host States abide by a certain standard of conduct vis-à-vis protected investors. […] A host State breaches such minimum standard and incurs international responsibility if its actions (or in certain circumstances omissions) violate certain thresholds of propriety or contravene basic requirements of the rule of law, causing harm to the investor.’); Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, para. 243 (‘These rule of law-elements flowing from fair and equitable treatment […]’); OI European Group B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25, Award, 10 March 2015, para. 491 (‘Un Estado lo [i.e. FET] viola cuando adopta un acto (o una cadena de actos) manifiestamente antijurídicos o que desconocen las exigencias básicas del rule of law.’ [footnote omitted])

Against this backdrop and with the preliminary working definition in mind, the Chair of the Committee, August Reinisch, together with Committee member Stephan Schill held an academic workshop with several Committee members and some non-member experts in the field in Vienna on 3 December 2018. The goal of this academic workshop was to identify the possible rule of law content of substantive standards of investment protection and to critically analyse the relationship between rule of law and these core standards. Thus, both the question of how the concept of the ‘rule of law’ informs and is reflected in specific investment protection standards and of what ‘rule of law’ challenges arise out of the structure of these standards and their application in investor-state disputes were explored at great length. The first substantive part of the workshop addressed the limits that substantive standards of protection pose for the domestic legislative and executive branches of government, addressing fair and equitable treatment, legitimate expectations, direct and indirect expropriation, full protection and security, national and most-favoured-nation treatment, umbrella clauses, capital transfer provisions and transparency.\footnote{Fair and Equitable Treatment, Prohibition of Arbitrary and Unreasonable Measures (Martins Paparinskis); Legitimate Expectations (Caroline Henckels); (Direct and Indirect) Expropriation (Marc Bungenberg); National and Most-Favoured-Nation Treatment (Elizabeth Whitsitt); Umbrella Clauses (Arnauld de Nanteuil); Capital Transfer Provisions (Marcin Menkes); Regulatory Transparency/Transparency in Substantive Investment Protection (Manjiao Chi).} The second substantive part focused on the limits investment treaties impose on the domestic judiciary.\footnote{Investment Protection Standards and the Domestic Judiciary (Denial of Justice, Judicial Expropriation, Effective Protection) (Ursula Kriebaum).} Finally, interfaces between domestic law and
international treaty standards were analysed in light of rule of law criteria. Following this academic workshop, the organizers provided extensive comments on the papers presented and after a second round of comments the organizers expect the final version of the papers by September 2020.

This first academic workshop was complemented by a second workshop on substantive standards and rule of law held at Université Panthéon Assas in Paris on 25 June 2019. Unlike the first workshop in which the ‘positive’ relationship between the rule of law and substantive standards of treatment essentially formed the focus of the discussion, the second academic workshop was dedicated to rule of law problems or rule of law lacunae arising in the application of substantive standards of treatment. The overarching goal of the presentations and discussions was to analyse the extent to which the interpretation and application of the substantive standards of treatment in international investment treaties create challenges to the rule of law and reveal the existence of gaps in the investment treaty regime that requires modifications. Accordingly, a wide array of areas was addressed, including the interplay between investment treaty law and other rules of public international law—in particular human rights, investor accountability and the impact of investment treaties on domestic regulatory activities. Subsequently, these presentations were further explored in papers reviewed by the organizers of the academic workshop and returned to the authors for revision. The final versions of the papers are due in September 2020.

In light of the ongoing revisions of the papers, drawing conclusions on the relationship between the rule of law and substantive standards of investment law is premature at this stage, but a few observations on the basis of the papers presented seems appropriate. Analysing international investment law from the perspective of the rule of law provides ample opportunities to better comprehend and conceptualize the reasons for the existence of investment law and the current design of treaty standards. Moreover, it highlights areas for reform of investment law by identifying gaps, which in themselves are contrary to the need for adhering to rule of law criteria. Overall, a ‘rule of law’-analysis of the substantive standards of investment law seems to support the view that both the existence of investment treaty standards

16 “In Accordance with Host State Law”-Clauses, Inherent Legality, and Good Faith Requirements (Martin Jarrett); The Use of Investment Treaty Standards to Enforce Domestic Law and Other International Legal Regimes (Velimir Živković).
17 Substantive Standards of Protection, Separation of Powers, and Standards of Review: Fairness, Reasonableness, Proportionality (Esmé Shirlow); Investment Standards and Domestic Regulation/Legislation: Role and Limits of Regulatory Space (Catherine Titi); The Interrelations between Investment Treaty Standards and Other International Legal Regimes (Human Rights, Sustainable Development, Cultural Property, Indigenous Peoples and other Non-Economic Interests) as a Rule of Law Problem (Steffen Hindelang); The Impact of Investment Protection Standards on the Domestic Rule of Law: Strengthening or Weakening the Domestic Rule of Law? (Mavluda Sattorova); Rule of Law and Equality: The (Lack of) Protection of Domestic Investors (Krista Nadakavukaren Schefer); Rule of Law and Competing Concerns: Gaps in Investor Accountability (Human Rights Obligations, Corporate Social Responsibility, Access to Justice for Third Parties) (Susan L. Karamanian); Rule of Law, Legal Certainty, Predictability: Inconsistent Interpretations and Judicial Activism in the Interpretation of Substantive Standards of Treatment (Julian Arato)
as well as their interpretation and application provide a strong argument that the substantive protection standards reflect rule of law criteria.\textsuperscript{18} This is particularly true in the context of FET (but also other treaty standards), where requirements of non-arbitrariness, consistency, due process when taking decisions etc. resemble similar rule of law criteria encountered in domestic administrative law.\textsuperscript{19} A systematic framing of investment law standards in terms of rule of law may have a positive impact on the interpretation and application of substantive standards of investment law. Nevertheless, the open-ended nature of some treaty standards as well as the textual variety of treaty standards may prove unfavourable to rule of law because they may cause inconsistencies in interpretation and thus uncertainty for states and investors. Further concerns often framed as a rule of law problem are the limitations investment arbitration may impose on domestic authorities exercising regulatory power, a lack of investor obligations under international law as well as the lack of access to investment arbitration by domestic investors.

Under the aegis of the Committee, the papers prepared for the purpose of these workshops will be published in a book titled ‘Investment Protection Standards and the Rule of Law’, edited by the organizers of both academic workshops, August Reinisch and Stephan W. Schill, in order to disseminate the acquired knowledge to a wider audience of international scholars, arbitrators and other stakeholders. The revised papers will lead to a publication in 2021.

III. THE RULE OF LAW AND THE PROCEDURAL ASPECT OF INTERNATIONAL INVESTMENT LAW

Since the Biennial Conference in Sydney, the Committee has also made progress in its analysis of the relationship between the rule of law and procedural aspects of international investment law. For this purpose, the Co-Rapporteurs, Andrea Bjorklund and Andreas Ziegler, chaired a Committee meeting in Paris on 25 June 2019, which explored the procedural issues that should be studied in more detail by Committee members. The Committee identified two main areas, which are of particular interest: 1) rule of law demands in investment arbitration and 2) contributions of investment arbitration to the rule of law.

The following procedural issues will be explored by Committee members and

\textsuperscript{18} See also the awards cited supra footnote 9.
additionally, by some experts who are not members of the Committee, but who will bring invaluable contributions to the discussion. Both in consultations prior to the Workshop and during the Workshop itself, Committee members identified the following topics. For part 1): institutional guarantees of a fair trial/due process; access to arbitration/non-discrimination concerns; independence and impartiality of arbitrators; equality of the parties; procedural fairness; *iura novit curia*; standards & burdens of proof; role and effect of third-party funding; transparency in investment arbitration; right to be heard; consistency and predictability in decision-making; sufficiency of control mechanisms and the desirability of an appellate stage; cost and duration of proceedings; evidentiary matters; counterclaims; provisional measures; handling of objections to jurisdictions; ethics of counsel; and estoppel. For part 2): clarification, legal certainty, greater precision of areas of uncertainty; enforcement and compliance/accountability of governments; effect of transparency on the rule of law; investment arbitration as a constraint to the development of the rule of law; interaction of investment law with other areas of public international law; investment tribunals’ jurisprudence regarding human rights treaties; comparison of investment arbitration and likely alternatives (state-state arbitration; national courts; etc); and overall assessment of investment tribunal jurisprudence in light of rule-of-law standards.

Committee members and experts non-committee experts have been assigned the various topics and were advised to submit draft papers to the Co-Rapporteurs by mid-2020 for comments. After a review by Co-Rapporteurs, the draft papers will be circulated to other committee members for additional input. The Committee intends to publish in early 2022 the final versions of the papers as a book edited by the Co-Rapporteurs.

IV. CONCLUSION: FUTURE PLANS OF THE COMMITTEE

Against the backdrop of the academic workshops and the Committee meeting, the Committee will focus on finalizing the publication on the rule of law and substantive standards of investment protection in 2021. In addition, the Committee will continue its ongoing activities of the interaction between the rule of law and procedural aspects of investment law, which should lead to a publication in early 2022.

In parallel to these two book projects, which will provide the first detailed analysis of procedural and substantive questions of investment law from the perspective of the rule of law, and based on their findings the Committee intends to draft recommendations or practical guidelines that could be adopted as an ILA resolution. These recommendations or guidelines should outline rule of law criteria relevant for investment law and investment arbitration. First, based on the conclusions drawn from the papers published, rule of law criteria that allow a systematic assessment of national authorities’ conduct in terms of rule of law standards will be identified. Secondly, the recommendations and guidelines will provide rule of law criteria which investment arbitral tribunals ought to consider and respect in their arbitral proceedings,
and which the system of investment arbitration in general should observe. The Committee notes that the adoption of certain recommendations may occasionally be difficult due to disagreements between Committee members. While a compromise is desirable, the Committee will identify proposed recommendations even if no compromise can be reached on certain issues and highlight the disagreements since as such they may constitute important contributions to identifying and clarifying rule of law concerns in the field of investment law and investment arbitration. The Committee will now focus on this aspect in order to timely conclude its work with the Lisbon Conference 2022.