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ARTICLE

The Reform of International Investment Law: Whose Rule of Law?

Ivana Damjanovic

Canberra Law School, University of Canberra, Canberra, Australia and Centre for European Studies, Australian National University, Canberra, Australia
Email: ivana.damjanovic@canberra.edu.au

Abstract

Public and political controversies over Investor–State Dispute Settlement (ISDS) have prompted reform processes in international investment law, at bilateral, regional and multilateral levels, with different actors shaping the future of international investment governance. In its essence, the options for the ISDS reform reflect the diverging perspectives on the rule of law in international law. Ultimately, they present a choice about who should control power over States' action in issues of public importance – the States who have created the system, or international investment tribunals who have shaped the legal development of the system. This paper considers the application of the rule of law as a normative meta-principle to international investment law and its dispute settlement, and it sheds light on different perspectives of this concept, as they shape the ongoing ISDS reform(s).

Keywords: International investment law; Investor-State Dispute Settlement (ISDS) reform; Multilateral Investment Court

I. Introduction

The rule of law is a concept with many meanings across legal and political systems, which emerged at domestic level and has progressively been transferred to international level.[1] As an expression of liberal democracy, it places restrictions on the exercise of regulatory powers of State rather than duties on citizens. Given different interpretations, the consensus primarily exists about its formal characteristics or the narrow, or 'thin' concept of the rule of law: laws should be known, internally consistent, and be applied equally to all by an independent judiciary. In substantive terms, the broader of 'thick' concept of the rule of law focuses on the issue of the rules' values – it considers the content of legal norms and their compliance with concepts such as human rights and justice.[2] Since no universal consensus on substantive standards exists (for example, States disagree on the scope and content of property rights or individual liberties[3]), broader conceptualisation of the rule of law is rather political. It is used to distinguish between 'good' and 'bad' laws, depending on whether the laws in question comply with substantive rights and standards, which are

[1] See, for example, Secretary-General of the United Nations, UN General Assembly, 67th session, "High-Level Meeting on the Rule of Law at the National and International Levels," UN Doc A/67/PV.3; Commission of Venice, "The Rule of Law Checklist" (Council of Europe 2016).

[2] M H Kramer, *Objectivity and the Rule of Law* (Cambridge, CUP 2007) pp 142–44.

[3] See J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, Oxford Scholarship Online 2012) p 210.

derived from the rule of law.[4] Nevertheless, the formal aspects of the rule of law ensure the functionality of the legal system, which is a necessary condition of the broader substantive concept.[5] International rule of law thus aims to emphasise the non-political nature of rules and its constraints on international politics.[6]

Protection of foreign investment in international law has been painted by an array of tensions since its beginnings. The underlying ideological and geopolitical divisions prompted the development of international investment law, with a view that law should take precedence over power in this important and lucrative sphere of international relations. If we accept that questions about the rule of law are, in its essence, primarily questions about control of law over power,[7] then the rule of law was the core reason for the creation of international investment law. Several decades fast forward, and many developments in between, the rule of law is still the core consideration in the assessment of international investment law[8] and its ongoing reform. While there is no consensus on what exactly the rule of law is, the ongoing reform processes at different levels are seeking to ensure and, in many aspects, correct the balance of power between different actors, interests and considerations that have shaped the international investment governance.

This paper builds upon the existing scholarship and considers the application of the rule of law in the field of international investment law, particularly critiquing different perspectives on the rule of law that shape the ongoing ISDS reform(s). It starts with a brief overview of tensions in international investment law and links them to the rule-of-law concerns relevant for the ISDS reform debate. It proceeds by examining the current ISDS regime through the prism of the rule of law, engaging with its many meanings and characteristics. The emphasis is placed on formal and procedural elements of the rule of law ('thin' rule of law) and systemic issues, which are linked to substantive issues ('thick' rule of law) only to the extent necessary to critique the law's presumed neutrality. Finally, the paper concludes by providing rule-of-law reflections on the reform options and particularly, considers the change of the dispute resolution paradigm – from arbitration to a court, as proposed by the EU. Given the political difficulty of addressing substantive imbalances of international investment law, the paper considers whether the reform of its dispute settlement mechanism could be the key to enhancing the rule of law of the system. The rule of law in the context of this paper is used as a normative concept, encompassing a range of more specific rules, to analyse, compare and discuss current and potential developments in international investment law, beyond the significance of this term in specific positive rules of international investment law.[9]

[4] P Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997) Public Law 467. See also the introduction to this Special Issue by De Sadeleer and Damjanovic.

[5] Kramer, supra, n 2, pp 183–84.

[6] M Koskenniemi, *The Politics of International Law* (Oxford, Oregon, and Portland, Hart 2011) p 36.

[7] See Dicey's conception of the rule of law in Craig, supra, n 4, pp 470–71.

[8] Scholars have examined the rule of law focusing on different aspects of international investment law. For example, for the impact of international investment law on the domestic rule of law, see M Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Oxford, Oregon, and Portland, Hart 2018); T Schultz and C Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study (2014) 25(4) European Journal of International Law 1147; S Franck, "Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law" (2006) 19 McGeorge Global Business and Development Law Journal 337. For critique of investment treaty arbitration, see for example, A Reinisch, "The Rule of Law in International Investment Arbitration" in P Pazartzis and M Gavouneli (eds), *Reconceptualising the Rule of Law in Global Governance* (Oxford, Oregon, and Portland, Hart 2016) pp 291–308; G Van Harten, "Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law" in S W Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford, OUP 2010) pp 627–658. For specific international investment law standards, see edited collection by A Reinisch and S W Schill (eds) *Investment Protection Standards and the Rule of Law* (Oxford, OUP 2023).

[9] Accordingly, the in-depth analysis of jurisprudence stemming from investment treaty awards is also not within the scope of this paper.

II. International investment law: tensions, reform challenges and the rule of law rationale

International investment law sets standards by which States must treat foreign investors. These standards include substantive and procedural rights, and most notably, an option for foreign investors to sue their host State before a tribunal independent from that State, through investment treaty arbitration. This dispute settlement mechanism is popularly known as ISDS, and it has thrived over the last two decades, contributing to significant developments in international law. At the same time, the flaws of this system have also crystalised, leading States to address them through legal reform processes – at bilateral, regional and global levels. Most significantly, since 2017 States have participated in the multilateral reform of ISDS, which is taking place under the auspices of the UN Commission for International Trade Law (UNCITRAL). The reform has exposed a number of tensions within and outside the system, as well as challenges stemming from the legal design and operation of international investment law. These issues in its essence concern different aspects of the rule of law, which accordingly serves as a normative goal of the reform.

1. Politics of international investment law

There are underlying ideological and geopolitical interests and consequent tensions, which have driven the development of international investment regulation, but which are still equally present today. The earliest period was dominated by discords about the minimum standard of treatment (MST) of foreign investments under customary international law (CIL), emerged as a reaction to the US attempts for economic dominance in Latin America. In the aftermath of decolonisation, the disagreement about the level of appropriate protection standards continued to dominate the debate, now within a more global context. Along the lines of the Cold War bipolar world, a network of bilateral investment treaties (BITs) emerged between capital-importing developing countries, who supported the State-controlled approach to economy, and capitalist economies of the capital-exporting developed countries. Western investors feared the lack of effective protection, while developing countries were concerned that Western States would undermine their State sovereignty through the economic activities of their investors. The International Centre for the Settlement of Investment Disputes (ICSID) in Washington was established to provide a neutral and depoliticised forum for the resolution of potential investment disputes, in its essence as an expression of the rule of law approach to the protection of foreign investment in international law.

Following the fall of communism, and with the rise of globalisation and free trade, an extra layer of complexity has been added. New global economic governance meant closer economic integration between countries of different economic development. Divisions between capital-importing and capital-exporting countries blurred as many States now perform both functions. In addition, transnational elites and private capital operating in world markets emerged as significant players. New liberal global order has prompted the growth of international investment law, despite its mixed economic benefits.[10] Ultimately, it has also led to domestic-level divisions and as a result, populism influencing foreign trade and investment policies.

A series of different global crises – from financial to existential, prompted an increased State interventionism in the markets, only convincing the proponents (foreign investors, arbitration practitioners) about the legal salience of the ISDS system, intended to restrict arbitrary powers of States. On the other hand, the opponents (non-business civil society)

[10] See D W Kennedy, "Some Caution About Property Rights as a Recipe for Economic Development" (2011) 1 Accounting Economics and Law 1.

have emphasised the undermining impact of ISDS on the domestic rule of law – primarily in weakening the reach and authority of domestic courts.[11] The rise of investment treaty arbitration brought to States an awareness of possible negative implications of international investment treaties, not only because of large monetary compensations[12] but also due to the increased limitations on government regulatory powers – the so-called "regulatory chill."[13]

Climate change debate and energy transition have only exacerbated disagreements, bringing new ideological dimension to the debate. On the one hand, ISDS could provide protections for much needed investment of private capital in clean energy transition; on the other, it is a key limitation to effective phase-out of fossil fuel investments. The Energy Charter Treaty (ECT), as the most litigated international investment agreement in the world, reinvigorated the opposition to ISDS, particularly in Europe.[14] Concerns over ISDS regulatory impact on climate policies are shared by other developed States[15] as well as climate change experts. [16] It is the pressure of international law (eg 2015 Paris Agreement obligations),[17] the objective of climate neutrality, and the cost for developed States, that might eventually turn the tide against international investment law.

At the same time, with different armed conflicts already raging or looming in different parts of the world, international investment law could once again prove effective in separating economic disputes from international politics, while invertedly, also politicising them. Since 2014, Ukrainian investors have utilised international arbitration claims against Russia for damages arising from its unlawful occupation of Crimea, albeit not without controversy regarding the territorial reach of Russia's investment agreements.[18] It has further been suggested that sanctioned Russian assets, which are frozen in Western countries, could be utilised for enforcement of investment awards.[19] At

[11] See further discussion on the interaction between domestic and international rule of law, infra, Part III.

[12] See, for example, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012). Ecuador was compelled to pay US$1.8 billion for terminating the contract with the oil company (US$2.3 billion with interest).

[13] See, for example, L N Skovgaard Poulsen and E Aisbett, "When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning" (2013) 65 World Politics 273, and C Côté, "Is Chilling Out There? International Investment Agreements and Government Regulatory Autonomy" (2016) 16 Academy of International Business Insights 14.

[14] The European Commission, under the pressure from the civil society groups and several Member States (including Germany, France, Spain, the Netherlands) proposed a coordinated withdrawal of the EU and its Member States from the ECT, after it invested four years in its modernisation: See European Commission, "Proposal for a Council decision on the withdrawal of the Union from the Energy Charter Treaty" COM (2023) 447 final, 7 July 2023.

[15] For example, in late 2022, the new Australian Government announced that it will not include ISDS in any new trade agreements, most likely with the view to mitigate potential claims related to its planned gas market intervention policies: see speech by the Australian Trade Minister Don Farrell, "Trading our way to greater prosperity and security," delivered at the RMIT, Melbourne, 14 November 2022. See also R Mizen, "Huge Lawsuits Loom Over Gas Market Intervention" *Financial Review*, 10 November 2022.

[16] See IPCC, "Climate Change 2022, Mitigation of Climate Change," Working Group III contribution to the IPCC Sixth Assessment Report (4 April 2022), 2433, 2442, 2582, and OECD, "Investment Treaties and Climate Change," Public Consultation, Compilation of Submissions (13 April 2022).

[17] See O Quirico, "From Investment Protection to Sustainability (via a Multilateral Investment Court): The EU and a New Universal Model for Investment Agreements?" in O Quirico and K K Williams, *The European Union and the Evolving Architectures of International Economic Agreements* (Springer 2023) pp 57–73.

[18] Tribunals in these cases have adopted a uniform approach and applied IIAs beyond the territory of lawful State sovereignty. See T Ackermann and S Wuschka, "The Applicability of Investment Treaties in the Context of Russia's Aggression against Ukraine" (2023) 38(2) *ICSID* Review – Foreign Investment Law Journal 453.

[19] See E Chang, "Lawfare in Ukraine: Weaponizing International Investment Law and Law of Armed Conflict Against Russia's Invasion" (2022) Institute for National Strategic Studies, Strategic Perspectives No. 39.

the same time, Russia also seem to be contemplating how international investment law mechanisms could be utilised to access its frozen funds abroad.[20]

These recent examples continue to demonstrate Janus-faced character of international investment law as both a foe and a friend of international politics. On the one hand, depoliticisation purpose of international investment law ultimately depends on the perceptions and perspectives of different actors taking part in the regime (namely, host and home States, investor, or dispute settlement process itself), especially in the modern context.[21] On the other hand, the availability of a neutral process to settle political disputes has achieved a certain level of depoliticisation, diverting investment disputes from the exercise of diplomatic protection, particularly in the ICSID context.[22]

2. *International investment law in the international legal order*

In addition to a complex political constellation of relations between different actors, which law is supposed to bridge in a rule-of-law-system, international investment regime is also subject to different legal tensions which are undermining, or at least, could be seen as undermining the rule of law in international investment law.[23] Over 2500 different investment treaties that are in force are interpreted by hundreds of *ad hoc* tribunals, with no appellate mechanism which would be a check for correctness and consistency of investment awards. As a general rule, there is no system of precedent in international law.[24] While arbitrators emphasise the need for proper consideration of earlier cases as their "moral duty" in fostering a predictable normative environment,[25] and tribunals express willingness to treat earlier awards as persuasive evidence,[26] practice has not ensured legal certainty. Fragmentation is a striking characteristic of international investment law, and its inconsistency a significant problem.[27] However, these concerns have also wider impact for the international rule of law.

The dispute settlement mechanism of international investment law has also exacerbated the broader problem of fragmentation in international law, with increasing

[20] See C Carolan, "Russia Turns to Old Soviet Treaty to Unfreeze Funds in Belgium," *The Brussels Times*, 18 January 2024.

[21] M Paparinskis, "The Limits of Depoliticisation in Contemporary Investor-State Arbitration" (2010) 3 Select Proceedings of the European Society of International Law 271. See further discussion on substantive rule of law, infra, Section III.1.

[22] U Kriebaum, "Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes" (2018) 33(1) ICSID Review 14. See also J E Viñuales, "Experiments in International Adjudication, Past and Present" in I de la Rasilla and J E Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (Cambridge, CUP 2023) pp 19–22.

[23] This is where the distinction could be drawn between legitimacy (both normative and sociological) as a political concept – concerning the authority to rule and perceptions about the authority, and legality as a legal concept – concerning the validity of the legal basis for the authority to rule, which falls under the narrow concept of the rule of law. While distinct, both concepts overlap and are thus relevant for the reform of ISDS: I Damjanovic, *The European Union and International Investment Law Reform: Between Aspirations and Reality* (Cambridge, CUP 2023) p 78.

[24] See Art 59, Statute of the International Court of Justice.

[25] G Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" (2007) 23 Arbitration International 357, 374.

[26] See, for example, observations by the tribunal in *Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20, Award (19 December 2016) para. 149; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAgua Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (30 July 2010) para. 189; *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (6 December 2016) para. 253.

[27] Divergent interpretations have been noted with respect to a number of standards, most notably different elements of the FET standard, MFN clause, umbrella clause, etc. See further discussion infra, Section III.1.

normative and jurisdictional conflicts between different international law subdisciplines or "regimes." These conflicts have been the most evident in relation to EU law, with a clash with jurisdiction over intra-EU investment disputes between international investment tribunals and the Court of Justice of the EU (CJEU).[28] However, they also persist in relation to general international law[29] and other regimes (eg environmental law,[30] human rights,[31] trade law,[32] etc) and undermine the coherency of international law, and thus also the rule of law.[33] Fragmentation can be linked to more general issue of specialisation, which has coincided with globalisation and the move from State-centred international law, giving an impression of a metamorphosis of international law from political into apparently apolitical and technical law.[34]

Disciplinary bias related to specialisation in international law is nothing unique to international investment law. Given the open-ended rules of modern international law, rules in a particular subfield have become the instrument of the discipline itself, determined by the manner in which the relevant institution understands its mission.[35] However, in international investment law this is further complicated by the nature of its character. Is it a public law or a private law regime? On the one hand, it deals with the relationship between the individual (foreign investor) and the State, which would be classified as public law domain, and which is of classical concern for the rule of law. At the same time, the dispute settlement is adopted from commercial arbitration, which is a private law mechanism for resolving disputes. Consequently, the regime is characterised

[28] For CJEU cases, see Case C-284/16 *Slovakische Republik v Achmea* ECLI:EU:C:2018:15; Case C-741/19 *Republic of Moldova v Komstroy* ECLI:EU:C:2021:655; and Case C-109/20 *PL Holdings* ECLI:EU:C:2021:875. For investment awards, see for example, *Vattenfall AB and Others v Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on *Achmea* issue (31 August 2018); *Eskosol S.P.A. in liquidazione v Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection (7 May 2019); *Theodoros Adamakopoulos and Others v Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction (7 February 2020). Among numerous examples, the award in *Green Power K/S and Obton A/S v Spain*, SCC Case No. 2016/135, Award (22 June 2022) is the only example in which an investment tribunal (with a seat in Stockholm) ascertained the lack of its jurisdiction over an intra-EU dispute under the ECT.

[29] One notable example of investment tribunals adopting incoherent approaches to general international law is the interpretation of defence of necessity, as codified in Art 25 of the ILC Draft Articles on State Responsibility. In the Argentine cases different tribunals (and the ad hoc committees that revised their awards) reached different (and in many aspects irreconcilable) conclusions on the issue: see *CMS Gas Transmission Co. v The Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005) and Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007); *Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic*, ICSID Case No ARB/01/3, Award (22 May 2007) and Decision for the Application for Annulment of the Argentine Republic (30 July 2010); *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v The Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006); *Sempra Energy International v The Argentine Republic*, ICSID Case No ARB/02/16, Award (28 September 2007) and Decision on the Argentine's Republic Application for Annulment of the Award (29 June 2010).

[30] See, for example *Bilcon of Delaware et al. v Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015).

[31] See, for example, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016).

[32] See, for example, *Methanex Corporation v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) part IV, ch B, para. 12; *Pope & Talbot Inc. v The Government of Canada*, UNCITRAL, Award on the Merits Phase 2 (10 April 2001) para 78.

[33] One notable recent example in which the tribunal managed to interpret the BIT in light of the broader framework of public international law (taking into consideration State obligations under the UNCLOS to determine the violation of the investment agreement), relying on Art 31(3)(c) of the VCLT: *Peteris Pildegovics and SIA North Star v Kingdom of Norway*, ICSID Case No. ARB/20/11, Award (22 December 2023). This case could be an example of good practice for systemic interpretation reconciling State duties under investment treaties and the UNCLOS (including also environmental claims).

[34] See Koskenniemi, supra, n 6, pp 318–30, 358.

[35] Ibid., pp 334–36.

by tensions between private and public interests, typically seen in administrative law.[36] International investment arbitration has thus been viewed as a product of historical "experiments," which contributed to evolution of international law from a State-centred system to an international regime for the protection of private rights, grounded in public international law.[37] Dealing with such complex regulatory context thus requires diversified legal approaches.

However, international investment arbitrators predominantly come from private law background. The field has been subject to criticism for functioning as a small pool of highly influential and powerful individuals with interchangeable roles (arbitrator, legal counsel, expert witness, tribunal secretary), which are at times even performed simultaneously – the (in)famous "double-hatting."[38] In addition, the majority of arbitrators is from the global North, while the majority of respondent States from the global South, or transitional economies in the European context. The field thus lacks diversity necessary to properly appreciate cultural subtleties of legal facts, particularly when they concern domestic laws.[39] While appreciating the need for specific expertise, empirical research thus raises different questions related to impartiality of arbitrators and suitability of the discipline to deal with significant issues of public interest.

Given the design of investment treaty arbitration, fragmentation poses an additional problem of institutional bias. Institutional bias concerns the interpretation of treaty provisions related to a tribunal's jurisdiction (parallel proceedings, treaty shopping, forum shopping). It has been argued that arbitrators, who are appointed on a case-by-case basis, have an inherent financial interest in adopting a more expansive interpretation of treaties, which can stimulate the ISDS industry.[40] While empirical studies remain inconclusive, from a normative perspective there are characteristics of the system which bring into question its institutional independence: asymmetrical claims structure allowing only investors to initiate proceedings, party autonomy in arbitral appointments, and related conflicts of interest. Both independence from external factors (and related institutional bias) and impartiality from internal factors (and related disciplinary bias) have the potential to undermine procedural fairness (the rule against bias), and thus also the rule of law.

Finally, openness and in particular, transparency plays a key role for the rule of law, ensuring scrutiny and accountability of the system to the public. They allow for the assessment of a tribunal's application of rules in a fair and unbiased manner. Confidentiality of investment treaty arbitration has been the key aspect of public criticism of ISDS, seen as promoting a "privatised justice system for global corporations."[41] Greater openness and transparency have thus been the objective of a number of reforms,

[36] It has been claimed that investment arbitration has been transformed into an 'adjudicative mechanism to control the exercise of public authority', comparable to a system of administrative law: G Van Harten and M Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law" (2006) 17 European Journal of International Law 121, 143.

[37] See I de la Rasilla and J E Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (Cambridge, CUP 2023); H Ruiz Fabri and M Erpelding (eds), "The Mixed Arbitral Tribunals, 1919–1939: An Experiment in the International Adjudication of Private Rights" (Baden-Baden, Nomos Verlagsgesellschaft mbH & Co. KG 2023).

[38] M Langford, D Behn and R Hilleren Lie, "The Revolving Door in International Investment Arbitration" (2017) 20 Journal of International Economic Law 301.

[39] V L Kidane, *The Culture of International Arbitration* (Oxford, OUP 2017).

[40] G Van Harten, "Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010" (2018) 29 European Journal of International Law 507.

[41] T McDonagh, *Unfair, Unsustainable, and Under the Radar: How Corporations Use Global Investment Rules to Undermine a Sustainable Future* (The Democracy Center 2013) p 8.

at the level of procedural rules[42] and in the new IIAs.[43] While new rules have brought improvements, the process still remains controlled by the parties and dependant on the tribunals' discretion, favouring the interests of the disputing parties before the interest of the public participation in the process.[44] Access to justice is primarily focused on enabling greater use of the system by small and medium enterprises (SMEs),[45] including through improvements of the controversial third party funding,[46] but the access to the system for other parties (eg domestic stakeholders) which might have an interest in the proceedings, remains largely limited.

Incremental reform proposals enhancing the rule of law of investment treaty arbitration are many and ongoing. Identified concerns of the UNCITRAL reform demonstrate a narrow rule-of-law-rationale of the reform, focusing on the procedural aspects of ISDS, rather than a more comprehensive reform of international investment law.[47] At bilateral and regional levels, States are making efforts to update their old BITs, introduce "modern" model BITs and conclude a new generation of international investment agreements (IIAs), seeking to, again incrementally, improve both substantive and procedural rules of international investment law, and only in some instances, more significantly restrict the protections offered to foreign investors. In its essence, these different approaches to reform demonstrate different perspectives on the rule of law in international investment law, to which we turn next.

III. The rule of law perspectives on international investment law

Given the character of the international legal system, which is often criticised by legal positivists and political realists through the compliance lens,[48] it could be argued that the mere existence of a dispute settlement and enforcement mechanism supports an international rule of law.[49] Accordingly, the very existence of ISDS, in combination with enforceable awards as the "essential" feature of the system,[50] contributes to the international rule of law. In addition, and as already discussed, ISDS ensures protection of private rights of foreigners against arbitrary and undue State interference. In particular, the Fair and Equitable treatment (FET) embodies a number of formal rule-of-law principles (eg stability, predictability and consistency, legality, due process, protection against discrimination and arbitrariness), as the expression of the requirement of the rule of law

[42] See, for example, UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration and related The UN Convention on Transparency in Treaty-based Investor–State Arbitration (adopted on 10 December 2014, entered into force 18 October 2017) (Mauritius Convention), and Amended ICSID Rules (entered into force 1 July 2022).

[43] See, for example, Art 8.38.2 CETA; Art 25 Indian Model BIT 2015.

[44] See Amended ICSID Rules (entered into force 1 July 2022), Rule 66.

[45] See, for example, Art 8.39.6 CETA and the EU commitment in the Statement No. 36, Council of the EU, "CETA – Statements to the Council minutes" (27 October 2016) 13463/1/16. In the framework of UNCITRAL, the proposed Advisory Centre seeks also to benefiting SMEs: see UNCITRAL, "Possible reform of ISDS: Advisory Centre" (25 July 2019) UN Doc A/CN.9/WG.III/WP.168, and "Possible reform of ISDS: Draft statute of an advisory centre" (27 November 2023) UN Doc A/CN.9/WG.III/WP.236.

[46] See Draft provision 21 in UNCITRAL, "Possible reform of ISDS: Draft provisions on procedural and cross-cutting issues" (26 July 2023) UN Doc A/CN.9/WG.III/WP.231.

[47] See UNCITRAL Secretariat, "Possible reform of ISDS" (30 July 2019) UN Doc A/CN.9/WG.III/WP.166, paras. 4–8.

[48] See, for example, R Howse and R Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters" (2010) 1(2) Global Policy 127.

[49] See for example, Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117, para. 36, with the CJEU referring to 'effective judicial review' as the essence of the rule of law.

[50] Corporate Counsel International Arbitration Group (CCIAG), "ISDS Reform, Submission by the CCIAG to UNCITRAL Working Group III" (18 December 2019) p 4.

in domestic legal systems.[51] International investment law, therefore, at least in principle, complies with the core idea of the rule of law, guaranteeing supremacy of international law over the arbitrary power of foreign investors' host States in domestic legal systems.[52]

While subject to criticism, there is at least some form of consensus among States about the utility of international investment law, as they continue "modernising" its treaties and reforming ISDS in the UNCITRAL. These reforms address different aspects of the rule of law and demonstrate State perspectives on the implementation of this meta-principle in international investment law.

1. Substantive rule of law: "neutrality" of international investment law?

In theory, the concept of the rule of law is understood as a formal (narrow, thin) and substantive (broader, thick) concept. Formal conceptions of the rule of law focus on formal legality of laws in constraining arbitrary government power, with a view to ensure law's neutrality.[53] At the domestic level, this concerns the effective system of checks and balances between the different branches of government, leaving the question of what the law should be to the legislator, and the question of what the law is, as applied with minimal discretion in each particular case, to the courts. The application of laws by the judiciary is thus normatively neutral and objective, clearly separating law from politics and economics. Building upon formal characteristics of laws, substantive rule of law considers the content of legal norms and their compliance with concepts such as human rights and justice.[54] The rule of law in international investment law thus concerns not only ISDS procedures and their compliance with the principles of procedural legality, in particular independence and impartiality of international investment tribunals.[55] It also requires that IIAs comply with formal legality as a minimum which can limit arbitrariness of decision-makers (investment tribunals) in the implementation of these agreements and ensure neutrality of laws.

One problem of IIAs, especially the so-called "old" generation agreements, are their vague provisions, which had left to arbitrators a wide discretion to interpret them. This has resulted in divergent interpretations of similar treaty provisions, which have been justified by the specifics of each case.[56] In the system of numerous treaties and ad hoc tribunals, with no clear hierarchy of rules, diverse jurisprudence presents difficulties in settling on what is the dominant rule and what are the exceptions.[57] At the same time, it is claimed that those outside the system – whether lawyers or the public – lack knowledge to properly understand complex rules and procedures. The mystique of legal expertise thus cloaks the system, undermining the rule of law in the aspects of the laws' predictability, logical consistency, stability and enforceability in practice.[58]

[51] See S W Schill, "Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law" in S W Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford, OUP 2010) pp 151–82.

[52] For example, see *Eureko B.V. v Republic of Poland*, Partial Award (19 August 2005) para. 233, where the tribunal emphasised the duty of the host State not to act for "purely arbitrary reasons" related to "domestic politics and nationalistic reasons of a discriminatory character."

[53] See Lon L Fuller, *The Morality of Law* (Yale University Press 1969) pp 41–2.

[54] M H Kramer, *Objectivity and the Rule of Law* (Cambridge, CUP 2007) pp 142–4.

[55] See discussion infra, Section II.2.

[56] See, for example, observations of the arbitral tribunal in *Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (29 January 2004), para. 97. A good example are renewable energy arbitrations against Spain under the ECT and the interpretation of the fair and equitable treatment standard by various tribunals: see, for example, I Reynoso, "Spain's Renewable Energy Saga: Lessons for International Investment Law and Sustainable Development," *Investment Treaty News*, 27 July 2019.

[57] However, some authors have also claimed that there are different instances of inconsistency, with some less harmful than others: see J Arato, C Brown and F Ortino, "Parsing and Managing Inconsistency in Investor-State Dispute Settlement" (2020) 21(2–3) The Journal of World Investment and Trade 336.

[58] See Fuller's principles in Lon L Fuller, *The Morality of Law* (Yale University Press 1969) pp 41–42.

The logic of law's neutrality is difficult to transpose into the international context, given that international law seeks to provide a flexible framework for cooperation rather than determining legal standards.[59] Law must thus ensure that "correctness" – which guarantees the distance of law from natural justice theories (what law should be), and "normativity" – which guarantees the distance between the law and actual State behaviour or its interests, are seen as neutral.[60] However, the more the rule is "normatively" distanced from State practice, the more political it seems, as it cannot be related to the States' social context.[61]

In the realm of international investment law, "correctness" is ensured by procedural correctness before a neutral forum, which seeks to depoliticise disputes between foreign investors and States, while "normativity" refers to the standard of applicable rules in this process and their outcomes – a tribunal's decision in each case. Correctness of the process thus disguises normativity (substance) by claiming to apply the "correct" standard of review to a State's behaviour, detached from politics. However, if the process produces outcomes (decisions) detached from the State's social context, it will be seen as political from the perspective of that State and its domestic constituencies – as bias in favour of, for example, more powerful State players (Western States), or in favour of private rights, interests or capital (multinational enterprises, the legal profession). Therefore, to speak of correctness, even if procedural, means taking a normative stance on what "correct" is – and that is inherently political.

This brings us to the core question of what is the "correct" standard in international law, and who should set it – States or investment tribunals? For economists of law, the appropriate standard is determined with reference to a State's interference in the functioning of the market. The role of the rule of law is thus to provide good governance – a stable framework in which individuals can plan their actions and realise their choices, rather than the State making choices on their behalf.[62] The substantive ideal of distributive justice is thus inevitably a form of arbitrary government, incompatible with formal laws enshrined in the rule of law.

The State is to provide a predictable framework in which investors can plan their investments and know with certainty that their private rights (property and freedom of contract) will be protected and favoured against State action. IIAs serve to ensure such legal framework, recognising a State's "right to regulate" as negative freedom and government constraint.[63] Investment treaty arbitration provides "neutral" mechanism for enforcement of these rights, while the system's close alliance with the World Bank through ICSID ensures its effectiveness.[64]

[59] Koskenniemi, supra, n 6, pp 58–59. For more on legal indeterminacy in international law, consider the example of the Libyan arbitrations: see A A Shalakany, "Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism" (2000) 41 Harvard International Law Review 419, 448–51.

[60] Koskenniemi, supra, n 6, p 38.

[61] Ibid., pp 38–39.

[62] F Hayek, *The Road to Serfdom* (first published 1944, University Chicago Press 1994).

[63] In particular, the FET standard, as interpreted by investment tribunals, embodies the requirement for the host State to provide stability and consistency of its regulatory framework in which the investment has been made: see, for example, *Técnicas Medioambientales Tecmed, SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para. 154; *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey*, ICSID Case No. ARB/02/5, Award (19 January 2007) para. 250; *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005) para. 274. *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No. UN3467, Final Award (1 July 2004) para. 191; *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) para. 217.

[64] States can face serious financial consequences for non-compliance with ICSID awards. See World Bank, "Disputes over Defaults on External debt, Expropriation, and Breach of Contract" (July 2001) Operational Manual OP 7.40, para. 5.

The neutrality of law also guarantees law's equality, as one of the fundamental principles of the rule of law. While international investment law poses questions about reverse discrimination – favouring foreign investors vis-à-vis domestic ones – this inherent bias of the system is acceptable in the service of good governance and as a precondition of the overall economic growth. Its promotion is considered non-political as it addresses the "application of rules rather than their substance."[65] Accordingly, this type of "governance," which replaces formal "government" and its democratic accountability with more ambivalent delegation of formal authority to international structures,[66] is a justified exception from the principle of formal equality.

In light of broad IIA provisions, through which States have effectively delegated the "lawmaking" functions and standard setting to international investment tribunals as the decision-makers, States are now taking measures to reverse this trend. Recent agreements have more specific provisions defining investors' rights and different types of provisions aimed at protecting public interest (eg right-to-regulate clauses,[67] carve-out clauses, reference to Corporate Social Responsibility (CSR) soft law commitments[68]), thus seeking to ensure better private–public balance in substantive clauses. Other types of clauses focus on limiting or excluding jurisdictional access to ISDS (eg duty to comply with the host State's laws,[69] frivolous claims, corruption or other process abuses[70]) and increasing State opportunities for utilising defences and counterclaims.[71] However, these improvements still leave the affected third parties without a procedural remedy under international law and do not reverse the inherent discrimination of the system between domestic subjects and foreign investors.[72]

Another issue is the effectiveness of these reform attempts given the fragmented manner in which the system operates. New studies demonstrate that tribunals continue to interpret new treaties like the old ones,[73] and in some cases demonstrating insufficiency of public policy carve-outs for excluding States' liability for compensation.[74] Attempts to correct tribunals' interpretations that stray from States' intentions, values and objectives *ex-post* – through interpretative statements – also have limitations. In some cases, tribunals have not been willing to accept them,[75] while in others, it might be difficult for

[65] I Shihata, as cited in S Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge, CUP 2010) p 138.

[66] See Koskenniemi, supra, n 6, p 321; W E Scheuerman, "Economic Globalization and the Rule of Law" (1999) 6 Constellations 3, 5.

[67] See, for example, See Art 8.9.1 CETA; Arts G-14 (environmental measures) and G-15 (energy regulatory measures) modernised Canada–Chile FTA; Art 32.1 Indian Model BIT 2015; Art 23 Nigeria–Morocco BIT; Arts 21 and 22 SADC Model BIT 2012.

[68] See, for example, Art G-14 *bis* on CSR, modernised Canada–Chile FTA; Art 9.17 CPTPP; Art 7 Dutch Model BIT 2018; Arts 14-16 SADC Model BIT.

[69] Art 7(1), Dutch Model BIT 2018; Arts 10 (Common Obligation against Corruption) and 11 (Compliance with Domestic Law), SADC Model BIT 2012.

[70] See for example, Art 8.18.3 CETA; Art 16(2) and (3) Dutch Model BIT 2018; Art 13.4 Indian Model BIT 2015; for frivolous claims, see Art 8.32 CETA.

[71] Counterclaims have mostly been unsuccessful due to the lack of reciprocal obligations for investors in IIAs (as opposed to such obligations in investment contracts or domestic law, when incorporated into an IIA): see *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims (7 February 2017). Counterclaims will be dismissed if obligations fall on States rather than investors: see *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016).

[72] Claims by third parties against foreign investors must be pursued in domestic legal systems under domestic law and cannot qualify as counterclaims: see *Hesham T. M. Al Warraq v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014).

[73] W Alschner, *Investment Arbitration and State-Driven Reform* (Oxford, OUP 2022).

[74] See *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021).

[75] In the same case, Canada's interpretation of the carve-out was dismissed: see ibid. para 836.

States to agree on a more specific interpretation, which in its core concerns the same disagreements that the creation of ISDS attempted to address.

2. Procedural rule of law: balance of power through the change of paradigm?

Given the political difficulty of addressing substantive imbalances of international investment law, the next question is whether the reform of its dispute settlement mechanism could be the key to enhancing the rule of law. Even more, could the change of paradigm – from arbitration to a court – more effectively address the problem?

Procedural reform could enhance the rule of law in international investment governance, by more prominently implementing natural justice principles – procedural fairness (due process) and the rule against bias (*nemo iudex in causa sua*). Procedural requirements of the rule of law are also institutional in character: a court with judges whose independence from political influence is guaranteed; its procedures, reasoning and decisions open to public scrutiny; and legal methods implemented more consistently, that could ensure better equilibrium between different interests, in particular between the foreign investors' rights and public policy goals. The enhanced rule of law could in turn also lead to more legitimacy. With proper institutional design, the system could perhaps become more just, while also being seen as more just – at least by some stakeholders.

The motivation to address ISDS controversies has driven the multilateral reform in the UNCITRAL since 2017, with a broad mandate given to its Working Group III to identify concerns and develop appropriate recommendations.[76] The major limitation of the process is its core focus on procedural aspects of ISDS, with cross-cutting issues (eg dispute prevention, exhaustion of local remedies third-party participation; counterclaims; regulatory chill; and calculation of damages) having ancillary relevance, and only where intersecting with procedural issues, thus receiving insufficient attention overall. Since April 2019, the reform has entered its final Phase III, with a number of reform options in consideration, which are to be presented to the UNCITRAL Commission for the "approval in principle" in a staggered manner.[77] Flexibility and consensus have been the guiding principles of the reform, with a view to integrate the ongoing work of relevant international organisations and "allowing each State the choice of whether and to what extent it wished to adopt the relevant solution(s)."[78]

While the UNCITRAL reform process is ongoing and set to conclude by the end of 2025, it is clear that maintaining arbitration remains the preferred mode of the dispute settlement in the field. The reform process is aimed at producing a multilateral framework, which would sufficiently harmonise different rules, while leaving flexibility to States to choose those options that most suit them.[79] The core aspects of the reform involve improving different aspects of the procedure,[80] addressing accountability of arbitrators through a Code of Conduct,[81] and setting up a Multilateral

[76] UNGA "Report of the United Nations Commission on International Trade Law Fiftieth session" (July 2017) UN Doc A/72/17.

[77] UNCITRAL Secretariat, "Workplan to implement ISDS reform and resource requirements" (17 March 2021), UN Doc A/CN.9/WG.III/WP.206.

[78] Ibid., para 264.

[79] Multilateral instrument on ISDS reform (MIIR) – in the form of a framework convention with optional protocols (as separate treaties), or one single convention with annexes, or with both protocols and annexes. See UNCITRAL Secretariat, "Possible reform of ISDS: Multilateral instrument on ISDS Reform" (22 July 2022) UN Doc A/CN.9/WG.III/WP.221.

[80] See UNCITRAL, supra, n 46.

[81] See UNCITRAL Secretariat, "Draft code of conduct for arbitrators in international investment dispute resolution and commentary" (28 April 2023) UN Doc A/CN.9/1148, which was adopted by the Commission during its 56th annual session in Vienna in July 2023.

Advisory Centre.[82] As part of that broader framework, States could choose a more ambitious approach and "opt in" to new institutions, such as an appellate mechanism with arbitration in the first instance – supported by China, and a Multilateral Investment Court (MIC) – supported by the EU.

While initially highly politicised, in the post-Covid-19 period, the process has entered into technical discussions stage, more typical for UNCITRAL, however still demonstrating difficulties of reaching a consensus, even on issues which are considered "non-structural" and necessary. The Code of Conduct, after being delayed for almost a year, falls short on prohibiting "double-hatting"[83] and providing an enforcement mechanism, which was initially envisaged as a key component of the Code.[84] For the moment, and until incorporated into a multilateral instrument on ISDS reform, the Code will apply on a voluntary basis, in addition to the existing instruments.[85] This adds to the complexity and fragmentation in the field but it also demonstrates a piecemeal and trade-offs approach to reforms, which is unlikely to bring more profound change of the system.

Contrasted to this approach, the EU is proposing what it has coined as a "systemic response" to all identified UNCITRAL's concerns, which also accommodates the demand for flexibility. An MIC would combine judicial independence with an appellate mechanism.[86] As the reform advances, this proposal has distinguished itself from other options, in particular with respect to independence of judges with full-time office in a permanent body, as opposed to ad hoc arbitrators.[87] Further, the EU's approach seeks to ensure integration of other mechanisms (eg standing appellate mechanism) and avenues for a "dialogue" between the treaty parties, which should guarantee long-term State control over the interpretation of IIAs.[88] In this way, the EU envisages to ensure a single authoritative judicial interpretation, which would eventually lead to more consistency, while also providing mechanisms to address situations when court's interpretation "strays" from the State's intended effects of treaty provisions.

The EU vision of independence reduces the autonomy of private parties as the core element of the traditional ISDS system while seeking to guarantee the independence of the new MIC from the host State, in line with the established ISDS narrative. The work of the court is further subject to public scrutiny, with an aim to changes the narrative of ISDS from a secretive transnational private justice system into an international court specialised for investment disputes. This EU vision of the rule of law in the form of a court goes to the heart of arbitration as the defining element of ISDS, shifting the private law character of investment treaty arbitration towards a public law paradigm in international

[82] See UNCITRAL, "Possible reform of ISDS: Draft statute of an advisory centre," supra, n 45.

[83] While the Code of Conduct regulates double-hatting through the concurrent ban and cooling off periods, discretion is left to disputing parties to waive these conditions: see Art 4 of the Draft Code of Conduct for arbitrators, supra, n 81.

[84] See UNCITRAL Secretariat, "ISDS Reform, Draft code of conduct: means of implementation and enforcement" (2 September 2021) UN Doc A/CN.9/WG.III/WP.208.

[85] For example, International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (2014).

[86] See UNCITRAL, "Possible reform of ISDS, Submission from the EU and its Member States" (24 January 2019) UN Doc A/CN.9/WG.III/WP.159/Add.1, paras. 40–56; Council of the EU, "Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes" (20 March 2018) 12981/17 ADD 1 DCL 1, paras. 10–11; 13–15.

[87] While initially conceived as part of one code of conduct, a separate Code of Conduct for judges has been developed and adopted in principle, alongside the Code of Conduct for arbitrators. See UNCITRAL, UNCITRAL Secretariat, "Draft code of conduct for judges in international investment dispute resolution and commentary" (28 April 2023) UN Doc A/CN.9/1149, which will be finalised at a later stage once contours of the standing mechanism have been agreed.

[88] EU Negotiating Mandate, para. 9; the EU submission to UNCITRAL, para. 26.

investment law. No other reform option goes as far in its vision of enhancing transparency and independence of ISDS proceedings.

The court would encompass jurisdiction for the existing EU's IIAs (only a few in place, none of which have yet entered into force) and over 1300 EU Member States' extra-EU BITs, which are mainly old-type BITs. The Court should also integrate other procedural elements already integrated in new EU IIAs – such as its approach to consultations prior to the initiation of main proceedings, parallel claims, denial of benefits, transparency, third-party funding, etc[89] as well as some other features of the EU system (eg selection of judges to MIC reflects procedures for the selection of the CJEU judges).

However, as the new court would rely on the underlying substantive rules of the existing IIAs, it remains to be seen how "systemic" the reform would actually be. The difficulty of the continuous application of the existing substantive rules is the underlying private law paradigm of IIAs – an arbitration agreement, which would remain the basis of claims submitted to a new international court. It is, however, possible, that the court adopts new interpretations, embraces a wider spectrum of values and cultures, and a bigger margin of appreciation for domestic policies. While EU IIAs largely integrate the practice of modern investment treaties, they also incorporate EU law by ensuring that international investment law standards do not conflict with the fundamental principles of EU law and the right of the EU to regulate.[90] The proposed court could thus also contribute to developing a new normative framework in international investment law.

While a new MIC, if established, would in principle bring ISDS closer to a more classical conception of the rule of law, the exact extent of its normative contribution to the international rule of law would depend on the Statute of the new court, its members and its procedures. Given the EU's leading role in the creation of the court, and in light of the current proposals, the MIC's framework would likely reflect the EU's vision of international investment law, even if the court is eventually established under the auspices of the UN. While this could lead to a more coherent EU international investment regulation in the long-term, it will also add to overall complexity and fragmentation in international investment law.

3. *Thinking beyond the rule of law: ISDS as an Alternative Dispute Resolution (ADR) mechanism?*

The evaluation of international investment law requires consideration of the specific character of arbitration as an ADR mechanism in the sphere of business disputes. Such analysis takes into account different set of criteria: efficiency, flexibility, specialisation through party autonomy, confidentiality and continuous relationships between subjects. In this context, legitimacy of the system is measured by business correlations, whereby some of the main points of international investment law's controversy become the main incentives for the parties to engage in international arbitration. Therefore, it has been argued that the types of control mechanisms used in domestic contexts are not appropriate for international arbitration and, instead, involvement of other international institutions rather than domestic courts would be preferred.[91]

For investors, arbitration should retain its private law character, with party autonomy, efficiency and effectiveness of enforcement as its core advantages. Control mechanisms

[89] See Comments by the EU and its Member States to Draft provisions on procedural and cross-cutting issues (26 July 2023), UN Doc A/CN.9/WG.III/WP.231*.

[90] Opinion 1/17 ECLI:EU:C:2019:341.

[91] M Reisman, "The Breakdown of the Control Mechanism in ICSID Arbitration" (1989) 4 Duke Law Journal 739.

should ensure balance between "consistency," "correctness" and "finality."[92] Accordingly, absolute consistency would undermine correctness,[93] which requires flexibility in applying the law to the facts of each particular case; while an appellate mechanism would favour consistency against correctness and finality. Instead, the control should be ensured by parties' scrutiny.[94] This vision thus further endorses the private law character of ISDS, and directly contradicts its conceptualisation as a public law system, as envisaged by the EU. As long as investors have recourse to arbitration through restructuring their investment, it is unlikely that they would favour a court.[95]

On the other hand, States face the challenge of balancing their commercial hat with the public hat in the framework of ISDS. Under their commercial hat, States will prefer a more efficient private system of dispute settlement, and mutually beneficial control mechanisms, aimed at maintaining business relationship.[96] However, under the public law hat, States prefer authoritative interpretations of public policy obtained through courts, which are seen as better placed to settle disputes about value differences (who is right) as opposed to disputes about interests (who gets what).[97] Accordingly, the preferred dispute settlement mechanism will depend on the perceived State functions in each particular case. As States contemplate ISDS reforms, perhaps the core question for them to consider is whether the change of the dispute resolution paradigm would give them more control over setting the standards in international investment law, which so significantly affect their domestic policy processes.

In domestic contexts, there is an overall evident shift from public (courts) to privatised justice through a range of ADR mechanisms. What sets apart these mechanisms from ISDS is the recourse to domestic courts, which ultimately ensures domestic court control over ADR, guaranteeing compliance with public policy and the rule of law. On the contrary, ISDS has been created as a fully internationalised system, with a view to avoid the control of domestic courts. Further, its effects on the domestic rule of law remain inconclusive.[98] On the one hand, high compensations can lead to "regulatory chill," discouraging States from regulating in the public interest. In addition, investment tribunals cannot mandate removal of illegal domestic measures, which would contribute to the rule of law in the long term. This is the key point of difference between international investment law and EU law, which due to its supranational character has more "intrusive" effects on domestic legal orders of its Member States. The

[92] Precedent and absolute consistency would thus undermine correctness – in this sense seen as correctness regarding substantive standards, implying that flexibility is required for a tribunal to reach a correct decision in each particular case.

[93] In this sense, correctness refers to correctness regarding relevant substantive standards (which I referred to as normativity – see supra, Section III.1), rather than procedural correctness, which refers to procedural fairness (due process and the rule against bias).

[94] Corporate Counsel International Arbitration Group's (CCIAG) submission to UNCITRAL, which provides an excellent overview of investors' views on ISDS reform: CCIAG, "ISDS Reform, Submission by the CCIAG to UNCITRAL Working Group III" (18 December 2019).

[95] See survey by Queen Mary University of London, finding that on balance, respondent investors do not favour the creation of a MIC, and believe that the MIC would negatively affect the confidence of investors in the ISDS system: "2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS" (May 2020).

[96] M Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Social Change" (1974) 9 Law and Society Review 95, 110–111. These controls depend on the availability of sanctions, such as withdrawal and refusal to continue beneficial relations, which are more likely in the case of larger investors (MNEs), with more resources and power.

[97] Ibid., p 112.

[98] See B K Guthrie, "Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law" (2013) 45 New York University Journal of International Law and Politics 1151.

replacement of investment treaty arbitration with judicial mechanisms of the EU legal order in *inter se* Member States relations could thus have positive effects on the international rule of law, at least in the long term.[99] However, in the short- and mid-term, uncertainty around enforcement of intra-EU awards and incoherency between practices of domestic courts in the EU and those outside the EU, has undermining effects on the international rule of law.[100]

IV. Conclusion

International investment law shifts the domestic judicial control over States' legislative and executive action in issues of public importance, from domestic courts to international arbitration tribunals. By favouring arbitration as an international private law mechanism over domestic courts, ISDS disturbs the domestic democratic process of checks and balances. The complexity of this field of international law is further magnified by its internal fragmentation, contributing to the wider phenomenon of fragmentation in international law. With a large number of legal instruments, the reform processes in international investment law also display their fragmented character, aimed at flexibility to accommodate different State preferences in their regulation of foreign investment.

In light of reform developments and proposals, international investment law is likely to continue evolving between different degrees of private and public justice. Various multilateral proposals in the UNCITRAL differently strike the balance between the private nature of ISDS and the need for public oversight – from improving the current mechanism to creating new institutions – including a new international court, which should in its essence reflect the EU's vision of the rule of law in international investment law.

The main limitation of the multilateral process is its scope, which avoids politically difficult questions of substance, narrowing itself to the classical formal questions of the rule of law. Can the procedural reform, which avoids the issues of substance, achieve consensus on the desired normative goals? The institutional reform should at least provide some clarity on jurisdictional issues – who and on what basis decides whether a dispute should be adjudicated by the investment dispute settlement body. This will not address the substantive injustices of the current system; however, issues of substance and related balance between private and public interest also depend on these preliminary jurisdictional issues.

While arbitration is likely to remain the dominant and preferred method of ISDS, there are also views among renowned practitioners that it will decline, at least in certain parts of the world, and will have a more limited reach, with likely return to the origins of ICSID and contractual mechanisms of foreign investment protection.[101] This would shift foreign investment protection further into the commercial sphere and give more control to States, but it would inevitably also favour larger investors in the key sectors, with more bargaining power.

[99] See Damjanovic, supra, n 23, pp 173–93.

[100] See, for example, the analysis of S Gaspar-Szilagyi and M Usynin, "Does the CJEU Misunderstand Investment Treaty Arbitration in Commission v. Micula" (2022) 7(1) European Investment Law and Arbitration Review 53.

[101] A Mourre, "Is Commercial Arbitration Entering in Dangerous Waters in the European Union?" (2023) 19(1) Asian International Arbitration Journal 1, containing the author's keynote speech at the Dubai and Middle East 8th Annual International Arbitration and Corporate Summit, Dubai, 28 February 2023. The US–Mexico–Canada (USMCA) Trade Agreement (new NAFTA) is a good example of this trend.

Flexibility, fragmentation and complexity in international investment law are likely to remain as key features of the system. Despite the different visions among the States and other actors, consensus exists on at least one element of the rule of law: the dispute settlement mechanism in international investment law must produce enforceable decisions. While effective enforcement endorses the core element of the international rule of law, as opposed to the rule of law at the domestic level, it will prove more complex for the proponents of new institutions in the field of international investment law.

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