

International Investment Law and the Rule of Law

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Table of Contents

A. The Emergence of International Investment Law.....	269
B. International Investment Law: Challenge, Contestation and Reform....	270
C. International Investment Law and the Rule of Law	276
I. The Obvious: Investment Law to Promote the Rule of Law	276
1. Legalization and Judicialization for International Peace and Security	276
2. Strengthening the Role of Law by Empowering the Individual....	277
3. Strengthening the Rule of Law at Domestic Level?.....	278
4. Development Dimensions of International Investment Law.....	279
II. Less Obvious: How the Rule of Law Informs International Investment Law.....	280
1. Legal Certainty	281
2. Consistency of the Law	282
3. Legitimacy	283
III. International and Domestic Rule of Law: United or Conflicting?	283
1. International Investor-State Dispute Settlement and Domestic Adjudication – Local Remedies	283
2. Is Arbitration a Legitimate Way to Adjudicate Issues Relating to the Exercise of Public Authority?	286
3. Discrimination	287
4. An Utopian Proposal: Establishing a Global Human Right to Property	289

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D. Three Perspectives on the Rule of Law.....	290
I. The Rule of Law as an Empirical Indicator.....	290
II. The Rule of Law as <i>Lege Lata</i>	291
III. The Rule of Law as an Analytical Concept.....	291
E. Conclusion.....	292

Abstract

International investment law appeals to a lawyer's appetite for the rule of law by disciplining the exercise of power between States and foreign investors through legalization and judicialization. Originally supposed to serve as a fix to promote foreign investments in developing countries in times of legal uncertainties, now, thousands of bilateral investment agreements exist, and the number of cases in investment arbitration has exploded in the last decade. Further, there is a tendency of generalization, as investment protection now features as a standard element of international trade agreements, far beyond the original focus on developing countries. A number of flaws and shortcomings of the rules and procedures became apparent in the course of the more frequent use of the system and resulted in much discussion within the expert community, which resulted in some changes. Furthermore, the long neglected possibility became apparent, that investment claims could be directed against industrialized countries and that the conduct of their authorities could be subjected to review by international arbitration tribunals. This sparked heated public debates, particularly so in the EU. These two developments have in common, that they implicitly as well as explicitly raised the issue of the rule of law. This paper will assess the system of international investment law as it stands, its critique and its reform, through the lens of the rule of law. It will also make a highly idealistic proposal on the further development of international investment protection. In concluding, it will reflect on the proper use of the rule of law in legal analysis, by setting out the different perspectives in which the term may be employed, and the methodological consequences.

A. The Emergence of International Investment Law

From the very beginning, international law contained rules on the treatment of aliens and their property, and recognised a right of the home States of such individuals to exercise diplomatic protection.¹ The modern treaty-based international investment law stands for an updated continuation of this practice. The most significant updates to international investment law in modern times are the detailed rules on expropriation and compensation payments, as well as direct procedural capacity of foreign investors on the international level. International investment law in the modern sense emerged as a reaction to various events that occurred in the first half of the twentieth century. Calvo, a diplomat and scholar of quite some influence, particularly in Latin America, pleaded that foreign investors should be treated equally to domestic investors under domestic law, rather than enjoying a separate international law standard of treatment.² Much more radically, a strong movement in the United Nations and particularly so in the General Assembly called for a sort of absolute sovereignty, including full independence to regulate economic activities, in an attempt to establish a New International Economic Order, which was meant to bring justice to developing countries after the end of colonialism.³ These contestations went beyond academic debate and diplomatic activity. They also encouraged countries to legislate and to act accordingly in practice. A number of expropriations⁴ and the ongoing debates severely affected the investment climate and the actual flows of foreign direct investments, which were urgently needed to promote economic development.

In this situation, the two pillars of contemporary international investment law were established. First, the contested customary international law standards were seconded by treaty-based standards incorporated in bilateral agreements, which also gave some more detail in order to respond to the needs of modern investment realities. As is well known, the first of these bilateral investment

¹ For more detailed information on historical origins of International Investment Law see A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards and Treatment* (2009), 3–18.

² C. Calvo, *Le droit International théorique et pratique: précède d'un exposé historique des progrès de la science du droit des gens*, 4th ed. (1887), 138, para. 1276.

³ See GA Res. 3201 (S-VI), UN Doc A/Res/S-6/3201, 1 May 1974.

⁴ For instance, the large-scale nationalization in Russian Socialist Federated Soviet Republic following the Revolution in 1917; in Mexico in 1917 following the Agrarian Reform; furthermore, the nationalization of the Anglo-Iranian Oil Company in 1951 in Iran and the nationalization of the Universal Suez Maritime Canal by Egypt in 1956.

agreements was concluded between Germany and Pakistan in 1958. As on today, more than 3000 of such agreements have been concluded, and over time further developed to embrace more standards and rules for the pre-investment stage.⁵

Secondly, a forum for investor-State arbitration was set up in the framework of the World Bank. The International Centre for the Settlement of Investment Disputes (ICSID) and its establishing agreement⁶ provide for investor-State arbitration, drawing from established rules and practices in international commercial arbitration. The procedure furnishes the investor with an international legal remedy (Art. 1 of the Agreement) and consequently forecloses the investor home State from exercising diplomatic protection (Art. 27). Furthermore, in general, the procedure is detached from domestic remedies as it does not require the exhaustion of local remedies (Art. 26). On the other hand and in order to secure its effectiveness, the awards of ICSID arbitration enjoy an exceptionally strong enforcement, see Articles Art. 53 (1), Art. 54 (1).

B. International Investment Law: Challenge, Contestation and Reform

This combination of treaty-based substantial standards of protection and the unique arbitration procedure has proven to be quite successful over the years, as the growing numbers of bilateral investment treaties [BITs] and the increasing caseload in investment arbitration may signify.⁷ This extensive practice revealed certain weaknesses of the system, which gave rise to far-reaching criticism and demonstrated a need for reform in detail. This reform of international investment law is currently under way. Three strands of discourse and development can be seen, which took place at different times and levels, and were interconnected.

A first line of development took place in the 1990s, and responded to the increasing caseload in investment arbitration. With investment arbitration

⁵ United Nations Conference on Trade and Development [UNCTAD], 'World Investment Report 2017: Investment and the Digital Economy' (2017), available at <http://worldinvestmentreport.unctad.org/world-investment-report-2017/#key-messages> (last visited 13 December 2018).

⁶ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159 [ICSID Convention].

⁷ See UNCTAD's Overview of Investment Agreements, available at <https://investmentpolicyhub.unctad.org/IIA> (last visited 13 December 2018) and the ICSID Caseload Statistics, available at <https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx> (last visited 13 December 2018).

becoming a frequently used and standard element of international economic law, the relatively few cases, which involved manifest flaws and errors became significant in number and called for action. While in accordance with the very character and purpose of arbitration, the awards are final (Art. 53(1)), the provisions of the ICSID Convention on annulment of awards (Art. 51 and 52) were extensively interpreted in order to allow for a correction of the award in exceptional cases of manifest error.⁸ The extensive interpretation of the annulment provisions developed in actual procedures, and was seconded by the wider investment law community. Today, it is a widely accepted and established practice, that an annulment procedure can take place for a number of reasons and many observers agree, that in terms of functionality, this move goes into the direction of an appellate procedure.⁹ Also, the increasing caseload and the relatively small group of arbitrators preferred by parties resulted in cases of doubts as to their impartiality and independence. A code of conduct was elaborated and adopted to address this problem.¹⁰ Lastly, in responding to criticism against the former confidentiality of the procedure, transparency became an issue and a practice developed to make available awards as well as submissions of parties to the public. Recently, hearings were also streamed.¹¹ A more systematic approach to transparency is now pursued with the Mauritius Convention.¹²

However, this reform of investment law did not only address its procedural parts, but also substance. From 1990 onwards, in a second move, a more general trend to mainstream sustainable development, environmental protection,

⁸ *CDC Group plc v. Republic of Seychelles*, Decision on Annulment, ICSID Case No. ARB/02/14, 29 June 2005, para. 36.

⁹ C. Tams, 'An Appealing Opinion? The Debate About an ICSID Appellate Structure', *57 Beiträge zum Transnationalen Wirtschaftsrecht* (2006) 5, 9; R. Dolzer & C. Schreuer, *Principles of International Investment Law*, 2nd ed. (2012), 302.

¹⁰ International Bar Association, 'IBA Guidelines on Conflict of Interest in International Arbitration' (2014), available at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Practice%20Rules%20and%20Guidelines (last visited 13 December 2018); Comprehensive and Economic Trade Agreement, 30 October 2016, EU and Canada, Annex 29-B, available at <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter> (last visited 13 December 2018) [CETA].

¹¹ C. Trehearne, 'Transparency, Legitimacy, and Investor-State Dispute Settlement: What Can We Learn From the Streaming of Hearings?' (09 June 2018), Kluwer Arbitration Blog, available at <http://arbitrationblog.kluwerarbitration.com/2018/06/09/transparency-legitimacy-investor-state-dispute-settlement-can-learn-streaming-hearings> (last visited 13 December 2018).

¹² *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, 10 December 2014, 54 ILM (2015) 4, 747.

human rights and labour standards into international economic regulations emerged, which was promoted by the public¹³, by NGOs¹⁴ and a number of governments.¹⁵ Soon, international investment law came into the focus of such developments and these aspects were taken into account in arbitrations in view of the legitimate policy space to be afforded to host States.¹⁶ Even more significantly, chapters and articles on sustainable development, environmental protection, human rights and labour standards became a standard element of recent investment agreements and model agreements around the world.¹⁷

A third line of criticism and development concerns the interrelationship between international investment law and domestic legal systems. It marks a departure in the way, international investment law has been looked at thus far.

¹³ International Institute for Environment and Development, ‘Rethinking Investment Treaties, Laws and Contracts’ (2018), available at <https://www.iied.org/rethinking-investment-treaties-laws-contracts> (last visited 13 December 2018); Columbia Centre on Sustainable Investment, ‘Five-Pillar Framework for Sustainable International Investment’, available at <http://ccsi.columbia.edu/about-us/five-pillar-framework-for-sustainable-international-investment-2/> (last visited 13 December 2018).

¹⁴ OECD, ‘Guidelines for Multinational Enterprises’ (2011 Edition), available at <http://www.oecd.org/daf/inv/mne/48004323.pdf> (last visited 13 December 2018); UNCTAD, ‘Investment Policy Framework for Sustainable Development’ (2015), available at http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf (last visited 13 December 2018).

¹⁵ See the much discussed Norwegian draft model BIT, Kingdom of Norway, ‘Agreement for the Promotion and Protection of Investments’ (2007), available at <https://www.italaw.com/sites/default/files/archive/ita1031.pdf> (last visited 13 December 2018), with cover letter, available at <https://www.italaw.com/sites/default/files/archive/ita1030.pdf> (last visited 13 December 2018) and commentary, available at <https://www.italaw.com/sites/default/files/archive/ita1029.pdf> (last visited 13 December 2018). However, the project was eventually abandoned after a public hearing.

¹⁶ *Marvin Roy Feldman Karpa v. United Mexican States*, Award, ICSID Case No. ARB(AF)/99/1, 16 December 2002, para. 103; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, Award, ICSID Case No. ARB(AF)/00/2, 29 May 2003, para. 121.

¹⁷ See, *South Korea-Peru Free Trade Agreement*, 14 November 2010, South Korea and Peru, Ch. 18, available at http://www.sice.oas.org/TPD/PER_KOR/PER_KOR_Texts_e/18_KPFTA_Labor.pdf (last visited 13 December 2018); *Agreement Between Japan and the Kingdom of Cambodia for the Liberalization, Promotion and Protection of Investment*, 14 June 2007, Japan and Cambodia, Art. 24, available at http://www.meti.go.jp/policy/trade_policy/epa/pdf/epa/J-CAM_English.pdf (last visited 13 December 2018); *Agreement Between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment*, 22 March 2002, Korea and Japan, Art. 11, 16 (1), 21, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1727> (last visited 13 December 2018).

Whereas so far, international investment law and its developments were driven by an international law perspective, now domestic constitutional aspects became key. In this perspective, the potential interference of international investment law with the proper domestic system of the exercise and control of public authority by way of legislation, administration and judicial review came to the forefront.¹⁸

This latter kind of a criticism came up as the consequence of a paradigm change, which will very likely change the landscape of investment protection in the years to come.¹⁹ Investment law originally was intended to protect investors from the North in their operations in developing countries, while not significantly affecting industrialized countries themselves. While bilateral investment treaties were drafted so as to oblige all sides to afford protection on equal terms, this protection was hardly expected to materialise. It was understood, that it would be the countries in the North, which would export capital and benefit from investment protection. The possibility, that the *developing* parties to the agreements could turn into capital exporters, as in reality happened later with countries such as India and China was hardly taken into account.²⁰ Also, in Western industrialized countries the view prevailed, that protection under the domestic legal order was superior to investment law standards and that accordingly, international investment law would not be relevant.²¹ As claims initiated against Canada and Germany indicate²², this

¹⁸ See, in detail on the German constitutional law perspective, P.-T. Stoll, T. P. Holterhus & H. Gött, *Investitionsschutz und Verfassung* (2017).

¹⁹ See generally on international investment law's "shifting paradigm" S. Hindelang & M. Krajewski (eds), *Shifting Paradigms in International Investment Law* (2016).

²⁰ On the European roots of BITs and their purpose to safeguard existing investments in former colonies see J. W. Salacuse, *The Law of Investment Treaties*, 2nd ed. (2015), 100-101; criticised as neo-colonialism by K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (2013), 120; M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (2015), 10-44; cf. also the observation by O. de Schutter *et al.*, 'Foreign Direct Investment, Human Development and Human Rights: Framing the Issues', 3 *Human Rights and International Legal Discourse* (2009) 2, 137, 168 who consider the strengthening of provisions on human development provisions in BITs more likely as developing countries conclude BITs among another while remaining sceptical of its actual realization in practice.

²¹ P.-T. Stoll & T. P. Holterhus, "The 'Generalization' of International Investment Law in Constitutional Perspective", in Hindelang & Krajewski, *supra* note 19, 339, 342-343.

²² Canada has been subject to investment arbitration claims especially under NAFTA, see i.e. *S.D. Myers Inc v. Government of Canada*, UNCITRAL Final Award, 30 December 2002; the most prominent case against Germany in recent times related to the country's nuclear energy phase-out, see *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, pending at the time of writing.

expectation did not withstand a reality test. Investors took advantage of investor-State dispute settlement in a number of cases and arbitration panels on occasion found measures failing to meet minimum standards of protection. This raised a sometimes heated debate in some countries, which particularly put into question the legitimacy of the system as such and investor-State dispute settlement more specifically.²³

This debate came at a time, when new actors, approaches and formats emerged in the international investment system, pointing in different directions. First, there has been a tendency to expand the system. A number of newly capital-exporting States such as China became active, concluded a number of treaties and this way mutated from being rule takers to rule exporters.²⁴ In 2008, the Lisbon treaty furnished the EU with an exclusive competence in the field of “foreign direct investment” as part of its commercial policy powers.²⁵ This came in time for the EU to engage in the negotiation and conclusion of a large number of new and innovative trade agreements, for instance with the US, Canada, Singapore, Vietnam and others, which include investment chapters as a standard.²⁶ In contrast to earlier practice, where investment rules were

²³ Best coined as the “backlash” against international investment arbitration, see M. Waibel *et al.* (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010).

²⁴ See for example on China’s policy to conclude BITs with African countries in preparing acquisitions of large-scale land leases by A. Telesetsky, ‘A New Investment Deal in Asia and Africa’, in C. Brown & K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (2011), 539, 545-547.

²⁵ *Treaty on the Functioning of the European Union*, Art. 207 (1); see further CJEU, *Opinion Pursuant to Article 218(11) TFEU*, Opinion 2/15, 16 May 2017, ECLI:EU:C:2017:376, paras. 81-87.

²⁶ CETA, *supra* note 10, *Free Trade Agreement between the European Union and the Republic of Singapore*, currently in the signing process, EU and Singapore, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (last visited 13 December 2018); *Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam* [EU-Vietnam FTA], currently in the signing process, EU and Vietnam, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (last visited 13 December 2018); as to the USA, the EU aimed for concluding the Transatlantic Trade and Investment Partnership (TTIP), however the project came to a halt after a policy change by the US government, the EU textual proposal can still be accessed at European Union, ‘EU Negotiating Texts in TTIP’ (2016), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230&serie=866&langId=en> (last visited 13 December 2018). For an overview and current state of EU FTAs and other trade negotiations see European Commission, ‘Overview of FTA and Other Trade Negotiations’ (2018), available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (last visited 13 December 2018); on the policy strategy see European Commission, ‘Trade for All: Towards a More

mainly agreed upon with developing countries, this tendency, in the sense of a *generalization* saw investment protection as a standard element of international economic relations.²⁷

At the same time, international investment law is under challenge. A number of States in Latin America and Africa did drop out of the system, are considering doing so or are engaged in developing alternative means.²⁸ At the same time, the system is severely criticised by sections of the public in the EU and elsewhere.²⁹

To comfort these trends, investment treaty language nowadays accommodates the need to clarify major standards used and explicitly acknowledges a right to regulate.³⁰ Furthermore and in response to criticism as to the legitimacy of dispute settlement through arbitration and its predictability, the EU has proposed, and in some cases has already agreed upon, a replacement of arbitration by a two-tier investment court system, including an appeals

Responsible Trade and Investment Policy' (2015), available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf (last visited 13 December 2018).

²⁷ Stoll & Holterhus, *supra* note 21, 342-343.

²⁸ For example, South Africa, Indonesia, Bolivia and Ecuador terminated many of their BITs. The BITs concluded and their status is listed by the UNCTAD's Investment Policy Hub Website, see UNCTAD, 'International Investment Agreements Navigator' (2013), available at <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu> (last visited 13 December 2018); on denunciation in general see A. Tzanakopoulos, 'Denunciation of the ICSID Convention under the General International Law of Treaties', in R. Hofmann & C. Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (2011), 75. Other states did not terminate their BITs but changed their international investment protection policy. For example, Brazil continues to approve international investment treaties but rejects any provisions on international investment arbitration since its 2015 Model BIT, Federal Republic of Brazil, 'Model for a Cooperation and Facilitation Investment Agreement' (2015), available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4786> (last visited 13 December 2018).

²⁹ See for example Greenpeace, 'From ISTS to ICS: A Leopard Can't Change Its Spots' (2016), available at http://www.greenpeace.org/eu-unit/Global/eu-unit/reports-briefings/2016/2016_02_11_Greenpeace%20Position%20Paper%20ICS_Final.pdf (last visited 13 December 2018).

³⁰ On the changes in investment treaty design see the analysis by C. Henckels, 'Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP', 19 *Journal of International Economic Law* (2016) 1, 27.

procedure.³¹ Actually, efforts are being made to develop this into a Multilateral Investment Court.³²

C. International Investment Law and the Rule of Law

Protecting foreign investors against measures of a host State appeals to the lawyers' senses for the rule of law. And indeed, in various forms to be seen in detail, international investment law can be seen as promoting it. However, also the critiques of this particular area of international law might point to the rule of law in calling for reforms. As will be seen, however, the full implications of looking at international investment law through the lens of the rule of law only become apparent, where a proper line is drawn between the international and domestic dimensions of the rule of law.

I. The Obvious: Investment Law to Promote the Rule of Law

1. Legalization and Judicialization for International Peace and Security

First of all, the development of international investment law can be seen as an important achievement for the international rule of law. Both, the legalization of investment protection by BITs and investor-State dispute settlement (ISDS) – seen as judicialization – put rules and procedures in place, where power play and uncertainty reigned before.³³

To fully appreciate the relevance of this, it should be recalled, that one of the basic tenets of the development of modern international law is to promote peace

³¹ CETA, *supra* note 10, Art. 8.27-8.28; *EU-Vietnam FTA*, *supra* note 26, Ch. 8 Part II Art. 12-13. The EU's approach is also suggested as a general international model, for example by the International Institute for Sustainable Development (IISD), 'A Sustainable Toolkit for Trade Negotiators: Trade and Investment as Vehicles for Achieving the 2030 Sustainable Development Agenda' (2017), para. 5.5.3., available at <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/> (last visited 13 December 2018).

³² See most recently Council of the European Union, *Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes*, 20 March 2018, 12981/17 ADD 1 DCL 1.

³³ Supported for example by U. Kriebaum, 'Foreign Investments & Human Rights', 10 *Transnational Dispute Management* (2013) 1, 1; S. W. Schill & V. Djanic, International Investment Law and Community Interests, SIEL Working Paper 2016/01, 8-9, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799500 (last visited 13 December 2018).

through the development of international rules and the establishment of means for the peaceful settlement of disputes.³⁴ Given the number of State-to-State disputes concerning the treatment of foreign investors in the past, amounting the use of force even in some cases³⁵, the establishment of international investment law surely is an achievement. This is so, because investment disputes are settled through legal means. Further, in engaging the investor and the host State, investor-State dispute settlement prevents or better still, excludes a potentially difficult confrontation with the investor home State. This is because Art. 27 ICSID Convention explicitly prevents an investor home State from exercising diplomatic protection.

2. Strengthening the Role of Law by Empowering the Individual

Another obvious and impressive effect of international investment law is that it enables an individual to stand up against a State. As has been rightly observed, investor-State dispute settlement is one of the few areas, where international law, which in general is for States, stretches out to an individual.³⁶ In this regard, it comes close to the logic of human rights.³⁷ Indeed, human rights are often and rightly considered a core element of an international rule of law³⁸ and the same is certainly true for investment law in this perspective.

It has to be highlighted, that this marks a departure in the understanding of the rule of law. The traditional core of the rule of law is to establish rules,

³⁴ International dispute settlement as a means to promote international peace has its modern roots in the *Hague Convention for the Pacific Settlement of International Disputes*, 29 July 1899, 187 CTS 410 and *Hague Convention for the Pacific Settlement of International Disputes*, 18 October 1907, 205 CTS 233; for a contextualization of the role of international arbitration in international dispute settlement see for example P. Abel, 'Comparative Conclusions on Arbitral Dispute Settlement in Trade-Labour Matters Under US FTAs', in H. Gött (ed.), *Labour Standards in International Economic Law* (2018), 153, 156-158.

³⁵ On the violent history of foreign investment protection see for example Miles, *supra* note 20, 19-121.

³⁶ A. Peters, *Beyond Human Rights* (2016), 282-338.

³⁷ See N. Klein, 'Human Rights and International Investment Law: Investment Protection as Human Right?', 4 *Goettingen Journal of International Law* (2012) 1, 179.

³⁸ See for example *Universal Declaration of Human Rights*, 10 December 1948, UN Doc A/RES/3/217 A, Preamble, para. 3: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"; UN Human Rights Council, *Human Rights, Democracy and the Rule of Law*, UN Doc. A/HRC/RES/19/36, 19 April 2012, para. 16 (d)-(j).

procedures and institutions, where power play prevailed.³⁹ The point at issue here is, that it is not just rules, procedures and institutions, but their content that counts as well.⁴⁰ The protection and respect for individuals as provided for by international investment law can be seen to reflect such a substantial dimension of the rule of law. By including such dimensions, the rule of law can be said to embody fundamental values.

3. Strengthening the Rule of Law at Domestic Level?

As is often observed, international investment law may promote the rule of law at the domestic level.⁴¹ This is certainly true in that investment law standards of treatment relate to the conduct of public authorities within the domestic legal order of host States. However, it is worthwhile to look at this effect in some more detail and to contextualize it.

In a detailed perspective, first, this effect very likely depends on the level of the rule of law existing in the host country at hand. Indeed, where the reputation and stability of a legal system, including legislation, administration and jurisprudence are in question, the effect of international investment law may be substantial. However, where a stable and reliable legal system already exists, the effects of international investment law may be largely affirmative only, or minimal, or – as we will see later – even problematic.

Secondly, the extent and scope to which international investment law informs domestic legal systems is worth considering. This becomes particularly clear, if international investment law is seen in context with human rights law. Both come close in that they assign rights and legal protection to individuals and discipline States to that end. However, they differ in how this is to be achieved. Human rights law is much concerned with direct effect, proper implementation and access to justice and strives for being effective on the ground and to inform domestic legal systems to this end. Of course, international investment law may also produce a persuasive effect in view of domestic legal reform. In the sense

³⁹ On the genesis of the principle of the rule of law, see T. P. Holterhus, 'The History of the Rule of Law', F. Lachenmann & R. Wolfrum (eds), 21 *Max Planck Yearbook of United Nations Law* (2018), 430.

⁴⁰ *Ibid.*

⁴¹ See M. Sattorova, *The Impact of Investment Treaty Law on Host States*, (2018), 58; S. W. Schill, 'System Building in Investment Treaty Arbitration and Lawmaking', 12 *German Law Journal* (2011) 5, 1083, 1085; R. Dolzen, 'The Impact of International Investment Treaties on Domestic Administrative Law', 37 *NYU Journal of International Law and Politics* (2005) 4, 953, 971.

of a *spill-over* effect, the related effects may well go beyond benefitting foreign investors and produce advantages also for national individuals and businesses. However, international investment law is much less explicit than human rights law at this point and hardly reflects a similar intention in view of the domestic legal order. Probably, the reason for this relates to the purposes of investment law. It is destined to specifically protect foreigners and relies on international dispute settlement.

4. Development Dimensions of International Investment Law

In connection to its contribution to the rule of law, international investment law is often said to be about development.⁴² Indeed, the history, ambitions and real world effects of investment protection largely support this claim. It has been no accident, that the World Bank initiated the establishment of ICSID as a hub for investor-State-dispute settlement in times of serious uncertainties about the legal security of investors under international law.⁴³ The facilitation of foreign direct investments has been seen as a necessary component of the Bank's mandate to promote economic development and as an essential complement to its own lending activities.⁴⁴ And indeed, with some caveats as to a proper quantification, the emerging international investment law system and ICSID as a core part of it have a substantial part in the promotion of foreign direct investment flows around the world.⁴⁵

Even more, international investment law explicitly addresses the development concern in order to make sure, that protection is only afforded to those investments, which in a way contribute to the economic development in the host State.⁴⁶ The point at issue in this regard is the term *investment*, which is

⁴² N. Monebhurrin, *La fonction du développement dans le droit international des investissements* (2016), 65; Y. Radi, 'International Investment Law and Development: A History of Two Concepts', in S. Schill, C. Tams, R. Hofmann (eds), *International Investment Law and Development: Bridging the Gap* (2015), 69, 74.

⁴³ ICSID Convention, *supra* note 6, Preamble. See also A. R. Parra, *The History of ICSID* (2012), 11, 21-22.

⁴⁴ *Articles of Agreement of the International Bank for Reconstruction and Development*, 27 December 1945, Article I, 2 UNTS 134.

⁴⁵ UNCTAD, 'The Role of International Agreements in Attracting Foreign Direct Investment to Developing Countries' (2009), available at http://unctad.org/en/Docs/diaeia20095_en.pdf (last visited 13 December 2018).

⁴⁶ *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, Decision on Jurisdiction, ICSID Case No. ARB/00/4, 23 July 2001, para. 52; *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, Award on Jurisdiction, ICSID Case No. ARB/03/11,

an essential precondition for protection in terms of substantial standards as well as of investor-State dispute settlement.⁴⁷

However, improving legal security and protection to facilitate investment is just one way to see international investment law, the rule of law and development connected. Another way to look at it can build on the understanding that development builds on the rule of law and to ask, how international investment law can directly contribute in this way. Indeed, more recent economic research⁴⁸ and not least the writings of *Amartya Sen* have revealed, that the rule of law is a pertinent and critical element and driver of economic and social development.⁴⁹ From this point of view, however, the contribution of international investment law is likely to be less impressive for the reasons explained above in regard to the impact on the domestic legal order. While some spillover effects can be expected to the benefit of domestic individuals and business operators, international investment law by and large is focused on securing the rights and interests of foreign investors only.

II. Less Obvious: How the Rule of Law Informs International Investment Law

Asking for contributions of international investment law to the international rule of law is the obvious way to approach the relationship between the two. Yet, the opposite perspective is worth considering as well and arguably increasingly plays its role. This increasing relevance of the rule of law as a guiding principle in the development and practice in international investment law is more apparent, than it would appear at first glance.

6 August 2004, para. 53; *Malicorp Limited v. The Arab Republic of Egypt*, Award, ICSID Case No. ARB/08/18, 7 February 2011, para. 113.

⁴⁷ See also M. Jezewski, 'Development Considerations in Defining Investment', in M. Cordonier Segger, M. W. Gehring & A. Newcombe (eds), *Sustainable Development in World Investment Law* (2011), 215, 219-221.

⁴⁸ D. Kaufmann & A. Kraay, 'Growth Without Governance', World Bank Policy Research Working Paper No. 2928, 2002/11, available at <https://ssrn.com/abstract=316861> (last visited 13 December 2018).

⁴⁹ A. Sen, 'Global Justice', in J. Heckman, R. Nelson & L. Cabatingan (eds), *Global Perspective on the Rule of Law* (2010), 55.

1. Legal Certainty

An obvious first example for this is the issue of legal certainty. As has been seen, international investment law has been criticised for the rather general language of its substantive rules and the failure of investment arbitration to clarify those terms in a reliable way.⁵⁰ Foreseeability and predictability of the law and dispute settlement concern legal clarity and legal security, both of which belong to the core elements of legal certainty and the rule of law concept. A number of recent developments in international investment law address these points. The many efforts to clarify the concepts of indirect expropriation and fair and equitable treatment in recent bilateral investment treaties and in the investment chapters of trade agreements must be mentioned here.⁵¹ Also and ultimately, the efforts to establish an international investment court are based on these grounds.⁵²

A similar development concerns the earlier lack of means to correct errors in fact or law in arbitration, which was remedied by the extensive use of the annulment procedure and now shall be addressed by an appeals procedure, which is part of the concept of an international investment court.⁵³

⁵⁰ Dolzer & Schreuer, *supra* note 9, 35.

⁵¹ For instance, CETA, *supra* note 10, Art 8.12, 8.10 (2); *Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment*, 19 February 2008, United States of America and Rwanda, Art. 5, 6, available at <https://www.state.gov/documents/organization/101735.pdf> (last visited 13 December 2018); *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, 27 February 2009, ASEAN, Australia and New Zealand, Art. 6, 9, available at <http://www.asean.org/storage/images/2013/economic/afta/AANZFTA/Agreement%20Establishing%20the%20AANZFTA.pdf> (last visited 13 December 2018).

⁵² See C. Brown, 'The European Union's Approach to Investment Dispute Settlement' (2018), available at http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157112.pdf (last visited 13 December 2018); United Nations Commission on International Trade, *Report of Working Group III (Investor-State Dispute Settlement) on the Work of Thirty-Fifth Session*, UN Doc A/CN.9/935, 14 May 2018, para. 12–18; European Commission Press Release, 'Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations', available at http://europa.eu/rapid/press-release_IP-15-5651_en.htm (last visited 13 December 2018).

⁵³ J. Ketcheson, 'Investment Arbitration: Learning from Experience', in Hindelang & Krajewski, *supra* note 19, 97, 118.

2. Consistency of the Law

Next to legal clarity, consistency is an issue at hand. In recent years, the interrelationship between investment law and other parts of international law, such as environmental law, sustainable development more generally, human rights and labour standards has been intensively discussed⁵⁴ and have been addressed in recent case law⁵⁵ as well as in recently concluded BITs.⁵⁶ Such questions of interrelationship between diverse regimes in international law have been the subject of a larger debate on the fragmentation of international law.⁵⁷ While that debate did not arrive at a complete understanding about the necessary coherence between such regimes and the norms which call for unity, if nevertheless became clear, that inconsistencies between different parts of international law put into question legal clarity and potentially also the idea of the consistency of law.⁵⁸ Both these principles form part of a more general understanding of the rule of law.⁵⁹ At least in cases of a manifest inconsistency such as coverage for investments, whose operation conflicts with human rights or labour standards, the rule of law can be said to be at stake.

⁵⁴ J. E. Viñuales, *Foreign Investment and the Environment in International Law* (2012), 24–27; A. Kulick, *Global Public Interest in International Investment Law* (2014), 50, 69; G. Sacerdoti, ‘Investment Protection and Sustainable Development’, in Hindelang & Krajewski, *supra* note 19, 32 – 36.

⁵⁵ *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; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador’s Counterclaims, 7 February 2017.

⁵⁶ See, for instance: Canada, *Canadian Model Bilateral Investment Treaty* (2004), Art. 11, available at <https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (last visited 13 December 2018) [Canada Model BIT]; United States of America, ‘US Model Bilateral Investment Treaty’ (2012), Art. 12, available at <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (last visited 13 December 2018) [US Model BIT].

⁵⁷ Report of the Study Group of the International Law Commission to the Fifty-Eighth Session, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, 13 April 2006.

⁵⁸ *Ibid.*, paras. 420, 465.

⁵⁹ S. Chesterman, ‘Rule of Law’, R. Wolfrum (ed), 8 *The Max Planck Encyclopaedia of Public International Law* (2012), 1014, 1014; B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004), 132; J. Orth, ‘Exporting the Rule of Law’, 24 *North Carolina Journal of International Law and Commercial Regulation* (1998) 1, 71, 81.

3. Legitimacy

Lastly legitimacy may be said to be related to the rule of law. It plays a major role in the recently raised doubts as to the appropriateness of settling investment disputes by arbitration.⁶⁰ Arbitration is a perfectly legitimate means of settling international commercial disputes between private parties, who agree to do so. However, and as has been increasingly made clear in recent years, arbitrators chosen by parties might fail to meet legitimacy criteria appropriate to dispute settlement, where complaints of individuals against the exercise of public authority are at stake.⁶¹

III. International and Domestic Rule of Law: United or Conflicting?

In the above assessment of the impact of international investment law on the rule of law, a distinction has been made between international and domestic levels. The need to draw such a line is not evident at first glance. Historically, the rule of law emerged at domestic level and it took a while until the concept was transferred to the international level. As a result, quite a number of concepts from the national sphere were transferred to international levels and many of the concepts indeed can be said to exist in parallel. One might even discuss, whether such parallels reflect in part a conceptual unity between the two levels.⁶² However, such similarity of concepts does not at once imply harmony in the actual working of the rule of law at international and domestic levels. Indeed, it is submitted here, that clearly separating international and domestic levels of the rule of law is not only useful for conceptual analysis but probably even more essential, when looking at how the rule of law is implemented at these levels.

1. International Investor-State Dispute Settlement and Domestic Adjudication – Local Remedies

Indeed, a particularly clear line of conflict exists where international investor-State dispute settlement meets with domestic jurisdictions and

⁶⁰ K. Hobér, 'Investment Treaty Arbitration and Its Future -- If Any', 7 *Yearbook on Arbitration and Mediation* (2015), 1, 58.

⁶¹ See also C. 1. See M. N. Cleis, *The Independence and Impartiality of ISCID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (2017), 206–208; P. Sands, 'Conflict of Interest for Arbitrators and/or Counsel', in M. Kinnear *et al.* (eds), *Building International Investment Law: The First 50 Years of ICSID* (2016), 655, 664 – 665.

⁶² T. P. Holterhus, 'The History of the Rule of Law', *supra* note 39.

adjudication by domestic courts. As has been seen, investor-State dispute settlement can be seen as a contribution to or an emanation of the international rule of law. At the same time and in domestic perspective, the rule of law can be seen to call for the adjudication of such cases through domestic courts. This potential conflict is a core issue in international investment law and its developments. It has been a major issue in the critics against international investment law⁶³ and forms the main argument underlying the Calvo doctrine.⁶⁴ Furthermore, it has caused extensive discussion on the role of the exhaustion of local remedies⁶⁵ has been at issue in a number of arbitrations,⁶⁶ is addressed by specific provisions in some recent agreements⁶⁷ and very recently has driven the proposal for the establishment of an investment court.⁶⁸

The potential for conflict arises because domestic legal systems are equipped with their own proper dispute settlement systems, which are charged to see disputes arising within the respective jurisdiction exclusively. Such claim to exclusive adjudication rests on sovereignty and the rule of law principle, which essentially calls for institutions and procedures to be in place to allow individuals to challenge measures of public authority and to claim compensation.⁶⁹

⁶³ In this vein for example G. van Harten, *Investment Treaty Arbitration and Public Law* (2007), 153-158.

⁶⁴ P. Juillard, 'Calvo Doctrine/Calvo Clause', R. Wolfrum (ed.), 8 *Max Planck Encyclopedia of Public International Law* (2012), 1086, 1087, para. 6.

⁶⁵ See for example M. Sattorova, 'Return to the Local Remedies Rule in European BITs: Power (Inequalities), Dispute Settlement, and Change in Investment Treaty Law', 39 *Legal Issues of Economic Integration* (2012) 2, 223-247.

⁶⁶ For example, on the relationship of the protection against expropriation and prior adjudication on the matter by a domestic court, see *Waste Management Inc v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras. 174-175; see further A. van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability', in S. W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010), 721, 735-739.

⁶⁷ See for example CETA, *supra* note 10, Art. 8.31 (2) which stipulates that the Investment Tribunal has no jurisdiction to determine the legality of the measure in question under domestic law, importantly including EU law, and that domestic law shall be dealt with as a matter of fact, following the prevailing interpretation given by domestic courts or authorities.

⁶⁸ See for example the contextualization by N. Lavranos, 'How the European Commission and the EU Member States Are Reasserting Their Control Over Their Investment Treaties and ISDS Rules', in A. Kulick (ed.), *Reassertion of Control Over the Investment Treaty Regime* (2017), 309, 320-323.

⁶⁹ See for example on German constitutional law Stoll, Holterhus & Gött, *supra* note 18, 151-154.

In a similar way, the European Union claims the autonomy of its legal order, as a number of judgments of the Court of Justice of the European Union [CJEU] have indicated. This particular type of autonomy is primarily understood to entail that EU rules are exclusively interpreted by the EU courts and the CJEU in particular.⁷⁰ As is hoped, this might reduce the probability of a conflict, where investment law dispute settlement confines itself to adjudicating potential violations of investment protection standards defined by international agreement, without taking into account EU laws. It is to date an open question, however, whether this kind of a distinction is feasible.⁷¹

The relevance of such conflict can scarcely be denied by referring to a State's power to deliberately subject itself to international adjudication. Indeed, under their constitutional law, States have and do exercise this power in various ways and importantly also in the case of regional human rights courts. Just as is true for investor-State dispute settlement, human rights courts as, for instance, the European Court of Human Rights [ECHR] can hear individual complaints and adjudicate them with binding force for the respective States Parties, even including claims for compensation.⁷² However, such adjudication differs considerably from the situation in investor-State dispute settlement. The ECHR procedure fully accommodates the interest of States Parties by means of requiring the exhaustion of local remedies before initiating procedures.⁷³ This comparison indeed is telling in view of a design of international investment dispute settlement, which may prevent a clash between the exercise of the rule of

⁷⁰ ECJ, Opinion 1/91, 14 December 1991, EU:C:1991:490, para. 30.; ECJ, Opinion 1/92, 24 March 1995, EU:C:1995:83, para. 32; ECJ, Opinion 1/00, 18 April 2002, EU:C:2002:231, para. 13; CJEU, Opinion 1/09, 8 March 2011, EU:C:2011:123, para. 75; CJEU, Judgment of 3 September 2008, *Kadi and Al Barakaat*, C-402/05 P and C-415/05 P, EU:C:2008:461, para. 282; CJEU, Opinion 2/13, 18 December 2014, EU:C:2014:2454, para. 182; CJEU, Judgment of 20 April 2018, *Achmea*, C-284/16, EU:C:2018:158, paras. 32-37.

⁷¹ On this discussion see for example the recent contributions by C. Contartese, 'The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law', 54 *Common Market Law Review* (2017) 6, 1627, 1661; C. Eckes, 'International Rulings and the EU Legal Order: Autonomy as Legitimacy?', in M. Cremona, A. Thies & R. A. Wessel (eds.), *The European Union and International Dispute Settlement* (2017), 161.

⁷² C. Tomuschat, *Human Rights*, 3rd ed. (2014), 277-286; on the individual complaint system in Europe, America and Africa in a comparative perspective see P. Abel, 'Menschenrechtsschutz durch Individualbeschwerdenverfahren: Eine regionaler Vergleich aus historischer, normativer und faktischer Perspektive', 51 *Archiv des Völkerrechts* (2013) 3, 369.

⁷³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 35 (1), ETS 5, 8 [ECHR].

law at international and domestic levels. Indeed, a number of possibilities exist to secure that local remedies are exhausted in a way to accommodate a State's interest in seeing disputes being settled by its proper own adjudication before bringing them to an international body.⁷⁴

2. Is Arbitration a Legitimate Way to Adjudicate Issues Relating to the Exercise of Public Authority?

Next to allowing for local remedies in the first place, human rights courts differ from investor-State dispute settlement in that they are designed as courts, whose judges are appointed by the States Parties and perform a specifically defined office as international judges.⁷⁵ In contrast, investor-State dispute settlement is performed in the way of an arbitration, where arbitrators are chosen by parties to a dispute and the third and chairing arbitrator in a panel is chosen by its fellow arbitrators.⁷⁶ This differs considerably from the idea of a court. Having in mind the extensive practice of commercial arbitration at domestic and international levels, this might not look worrisome at first glance. Arbitration is provided for by most legal systems in the world as an alternative to court proceedings on

⁷⁴ There is nothing in international investment law that prohibits the inclusion of some sort of local remedies rule, as for example specifically mentioned in Art. 26 ICSID Convention, *supra* note 6. There is a variety of different forms to ensure that domestic courts address a dispute first, for example: cooling-off periods which force the investor to wait a certain amount of time before raising an investment claim, for example provided in Art. 24 USA Model BIT, *supra* note 56; fork-in-the-road provisions which allow an investor to raise either an investment claim or a lawsuit before a domestic court, for example provided *Agreement Between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Encouragement and Reciprocal Protection of Investments*, 1 August 1991, Greece and Albania, Art. 10 (2), available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/15> (last visited 13 December 2018); and classic local remedies-rules which demand from the investor to bring a dispute to domestic courts before resorting to investment arbitration, for example provided in *Treaty Between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments*, 9 April 1991, Germany and Argentina, Art. 10 (2) and (3) lit. a, available at http://www.wipo.int/edocs/lexdocs/treaties/en/ar-de/trt_ar_de.pdf (last visited 13 December 2018) which however allows for the filing of an investment claim if the competent domestic court does not issue a decision on the merits within 18 months of the initiation of domestic proceedings. See generally on these different clauses Aaken, *supra* note 66, 739-743.

⁷⁵ ECHR, *supra* note 73, Art. 19-23.

⁷⁶ See further M. Sasson, 'Investment Arbitration: Procedure', in M. Bungenberg *et al.* (eds.), *International Investment Law* (2015), 1288, 1321-1335, paras. 78-108.

the understanding, that it deals with disputes among private parties involving their private interest and that it is based on a consensus between those parties. Investor-State dispute settlement has been intentionally tailored along the lines of the well-established forms of international commercial arbitration.⁷⁷ And indeed, some observers did conclude, that arbitration can make an investor-State-dispute look like or even transform it into a matter of private law with the aim of *depoliticizing* the matter at hand.⁷⁸

It took some time for the view to emerge, that investor-State disputes are about individual rights as affected by the exercise of public authority and that, accordingly, public interest is involved in settlement.⁷⁹ This having said, the disputing party's *ad hoc* choice of arbitrators appears to be questionable in terms of legitimacy. There is quite some constitutional law reason to believe, that the public rather than individual disputing parties should have a say in selecting individuals to sit on a case involving public interest. For instance, this point has been made under the German Constitution and in view of its Art. 92 – (*Gesetzlicher Richter*) and Art. 20 para. 3 – the rule of law principle.⁸⁰ This is an essential point in the upcoming criticism about investor-State arbitration and the main concern, which drives the proposal for an international investment court, where individuals to sit on a case will be picked from a list as initially set up by States parties. More generally, this issue clearly indicates, that the rule of law also has a legitimacy dimension.⁸¹

3. Discrimination

Another tension might occur, where the protection of foreign investors, a welcome achievement of the international rule of law, works to the disadvantage of domestic investors and raises questions as to discrimination and the domestic rule of law. International investment law initially has been developed to remedy a lack of effective protection for foreign investors. Probably in order to accommodate sovereignty concerns, this law never touched upon economic rights more generally at national level. In the situation of questionable

⁷⁷ Z. Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', 74 *British Yearbook of International Law* (2004) 1, 151, 224.

⁷⁸ See for example I. F. I. Shihata, 'Towards A Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA', 1 *ICSID Review* (1986) 1, 1, 3-12, 24-25.

⁷⁹ Van Harten, *supra* note 63, 54-58, 96-99.

⁸⁰ Stoll, Holterhus & Gött, *supra* note 18, 139-143.

⁸¹ In this vein already van Harten, *supra* note 63, 167-175; on German constitutional law in this regard see Stoll, Holterhus & Gött, *supra* note 18, 151-154.

levels of protection of foreigners, this worked well. However, in a domestic legal environment, where foreign and domestic investors enjoy effective protection, the additional international protection of foreign investors may cause discrimination.⁸² The existence and extent of such discrimination very likely depends on the level of protection afforded by applicable international investment law as compared to the level of domestic protection. Many observers understand the level of substantive protection in most industrialized countries to easily exceed international investment law standards.⁸³ Whether this general statement stands a reality test in a given case, where complex legislation and adjudication meets the rather general terms of international investment law and the considerable variety of arbitral awards is an open question, particular when looking at details, such as the amount of compensation and its calculation.

When turning to the procedural side, the divergences become more obvious, as the international investor-State dispute settlement – a one-tier arbitration, which can be done in quite a short time stands against possibly lengthy litigation before a hierarchy of different courts at domestic level. Modern BITs or investment chapters put sophisticated conditions for the use of these two tracks alternatively or in sequence and prescribe certain conditions in order to prevent the parallel use of the two tracks and to give incentives to go to domestic courts first.⁸⁴ With all these complex regulations in mind, however, it is fair to resume, that a foreign investor enjoys more procedural options to remedy a measure by the host State as compared to a national.

In sum, it can be concluded, that international investment law may result in a discrimination of national investors at domestic levels. Certainly, the legality of such discrimination under domestic, regional and international law depends on applicable standards of non-discrimination and potential justifications. It is sufficient to conclude here, that discrimination might occur. Such discrimination may very well be a concern in view of the rule of law. This is so, because the rule of law can be understood to embrace the principle of non-discrimination as a separate element or as part of human rights more generally.

⁸² For a more detailed analysis see Stoll, Holterhus & Gött, *supra* note 18, 135-136.

⁸³ S. Hindelang & S. Wernicke (eds.), *Essentials of Modern Investment Protection – Harnack-Haus Reflections* (2015), 10, available at <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Harnack-House/Harnack-House-Reflections-Investment-Protection-ENG.pdf> (last visited 13 December 2018).

⁸⁴ See, for instance US Model BIT, *supra* note 56, Art. 24; Canada Model BIT, *supra* note 56, Art. 26; CETA, *supra* note 10, Art. 8.22.

4. An Utopian Proposal: Establishing a Global Human Right to Property

In overview, international investment law may look as an important but yet insufficient step forward to promote the international rule of law. It suffers from its focus on protecting foreigners only, which roots back to the ancient international law of aliens and diplomatic protection but possibly results in a discrimination of domestic investors. It also suffers from employing arbitration as a dispute settlement mechanism, which, as has been seen, does not fully correspond to needs of legitimation.

Yet investment law importantly and effectively protects individuals and in this way comes close to the idea of human rights. At this point, it is worth recalling, that a human right to property has been part of the *United Nations Universal Declaration of Human Rights* but still today is only provided for at regional level.⁸⁵

A human right to property could remedy the shortcomings of the investment law system. It would protect foreign and domestic investors alike and this way benefit social and economic development and prevent discrimination. It could come along with a human rights court-type dispute settlement and enforcement including compensation easing the legitimacy concerns of investment arbitration. Establishing such a right at global level indeed could be seen as the missing mile to go, to fully transform a useful but unsatisfactory legal construct, to present needs and realities of the global economy and human rights development.⁸⁶ Of course, there have been reasons for not embodying a right to property in the global human rights rulebook to date and such reasons are likely to prevail. Thus, there is need to keep and further refine international investment law. However, this should not be used as an excuse to not to call for the elaboration of a human right to property. Such right to property could not only cure some of the deficits of investment law. It is also called for to complete the global human rights rulebook. Investment law and such human right to property could even be mutually supportive. A human right to property could take the lead, where it has been established and implemented effectively by a State Party. Otherwise, investment law would come to bearing. Its application would be particularly well acceptable from the point of the rule of law, if it is

⁸⁵ *Additional Protocol I to the ECHR*, 20 March 1952, Art. 1, ETS 9, 1; *American Convention on Human Rights*, 22 November 1969, Art. 21, 1144 UNTS 123, 150; *African Charter on Human and Peoples' Rights*, 27 June 1981, Art. 14, 1520 UNTS 217, 248.

⁸⁶ On the global right to property see, for instance J. G. Sprankling, 'The Global Right to Property', 52 *Columbia Journal of Transnational Law* (2014) 2, 464, 465, 486, 504-505.

shown, that more appropriate forms of protection have failed to be effectively established.

Thus, the protection of property as a human right at global level could be linked to the existing system of international investment law: the application of international investment law with all its merits and shortcomings could be confined to cases, where States fail to agree on or the to properly implement a global human right to property. This way, an incentive would be created for States to accept and implement such a proposed human right to property. Where they fail to do so, the application of international investment law would look particularly well founded.

D. Three Perspectives on the Rule of Law

The above discussion of international investment law invites a more general reflection on the rule of law, the way it is understood and its conceptual underpinnings. As particularly the discussion of international investment law indicates, the rule of law is used in different ways.

I. The Rule of Law as an Empirical Indicator

Firstly, from a business perspective, but also with regard to the political, economic and social situation of certain countries, the rule of law is referred to as an empirical indicator, which allows for comparing and even for ranking particular countries. A number of rule of law indices exist, including in publications of the World Bank or other entities and foundations.⁸⁷ They are mostly created by way of expert interviews and therefore reflect the personal opinion of a number of selected individuals rather than the result of an institutional or legal analysis. Those indices might be helpful as an orientation for businesses and for general policy-making. They are even welcome in providing us with an overall picture. However, it has to be kept in mind that such quantitative indicators do not build on, and do not reflect, a more detailed legal reasoning or normative judgement.

⁸⁷ For instance, World Justice Project, 'Rule of Law Index' (2018), available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf (last visited 13 December 2018); World Bank, 'Worldwide Governance Indicators' (2018), available at www.govindicators.org (last visited 13 December 2018).

II. The Rule of Law as *Lege Lata*

Much to the contrary, we can – secondly – speak about the rule of law as part of applicable law – as *lege lata*. There is good reason to believe, that the rule of law, in spite of the rather general and abstract nature of the term, indeed forms part of the international and domestic legal orders as a general principle, from which even more specific rules and principles could be derived. Seen in this way, the rule of law has to be taken into account in legal analysis as applicable law.

Yet, while several substantive elements of international investment law such as the fair and equitable treatment standard as well as procedural issues such as the extended use of the annulment procedure suggest themselves as a manifestation of the rule of law principle, the principle is hardly ever applied in case law, treaty practice or more general reflections on the state of international investment law. Very likely, rather than directly and explicitly referring to the principle as such, positive rules, which reflect it, such as the aforementioned fair and equitable treatment standard or legal arguments based on certain elements of the rule of law such as the *bona fide* principle, have been employed. Where no positive rules or principles are at hand, however, the rule of law can come into play. Applying it in a given case would, however, require one to explore its legal foundations and meaning, which probably is a difficult and burdensome task.

III. The Rule of Law as an Analytical Concept

It has not been intended in this paper, to extensively explore the impact of the rule of law as *lege lata*. Rather, the paper has been concerned with international investment law with the aim to explain its developments and challenges in international and domestic dimensions and to draw some conclusions *de lege ferenda*. Accordingly, it was meant to make use of the rule of law in a third sense, which may be described as a conceptual approach. Rather than striving for ascertaining the legal validity of the rule of law as a principle in some circumstance and spelling out its significance in the context of specific legal questions, it has been used as a normative orientation to analyse, compare and categorize and discuss legal developments. This approach builds on the understanding, that the rule of law can be seen as a useful concept for legal analysis, which goes far beyond its manifest positive legal significance. Such *conceptual* use of the term is driven by the purposes of legal analysis and has to conform to its rationale. Concepts need to adequately respond to

research questions and purposes, be based on clear terminology, and be applied consistently.

E. Conclusion

The above discussion has manifested what was observed at the outset: investment law appeals to the lawyer's senses for the rule of law. Indeed, the concept of the rule of law brings together several pertinent issues, highlights interlinkages and thus provides us with a clearer picture of this particular, sometimes even peculiar part of international law. It has become clear, that a rule of law view on investment law must consider, that this law does not only contribute to, but might also be informed by the rule of law. It also turned out, that a dividing line has to be drawn between international and domestic levels, not so much in view of concepts but because conflicts may arise in the course of operation of the rule of law at different levels. Altogether, the rule of law concept will become significantly more relevant for the development of a part of international law, which emerged as some sort of a provisional fix for an economic problem and now has become a firm element of the international legal order. In substance, it has been proposed to establish a global human right to property to cure various shortcomings of international investment law. Such a human right could coexist and even be linked to international investment law in that the latter would apply only where the former has not been accepted and properly implemented.