

# The UN Concept of the Rule of Law

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## A. Introduction

The rule of law in international investment arbitration lies at the heart of the International Law Association (ILA) Committee on the Rule of Law and International Investment Law.<sup>1</sup> The Committee's mandate is 'to study rule-of-law implications of international investment law on both substantive and procedural matters.'<sup>2</sup> In this regard, the Committee looks both at the way how 'substantive protections found in treaties attempt to ensure government decision-making based on the rule of law',<sup>3</sup> and at the extent to which 'investment arbitration itself operates in a manner that is consistent with the rule of law'.<sup>4</sup> The ILA Committee is devoting considerable attention to the difficulty of defining the multifaceted aspects of the concept of the rule of law which have often developed with particular legal-cultural connotations in domestic law, such as 'prééminence du droit' (also 'règle de droit', 'etat de droit', 'la primauté de droit'), 'Rechtsstaatlichkeit' or the rule of law.<sup>5</sup>

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

2 See the ILA Committee on 'Rule of Law and International Investment Law' mandate in its committee description available at: [www.ila-hq.org/en/committees/index.cfm/cid/1056](http://www.ila-hq.org/en/committees/index.cfm/cid/1056) (30/04/2019).

3 Ibid.

4 Ibid.

5 See Grote, in: Starck (ed.), pp. 269–306; Palombella, in: Palombella/Walker (eds.), pp. 17–42; Bingham.

This takes place against the background of a lively debate on the notion of the rule of law as it is used in different national legal systems.<sup>6</sup> At the same time, one is faced with the difficult problem of ascertaining whether there can be an agreed content of an international rule of law.<sup>7</sup>

## B. Rule of Law Notions

That the ‘rule of law’ does not have a clear, generally accepted meaning and may be particularly responsive to different legal cultures is widely accepted.<sup>8</sup> In common law traditions, the rule of law, building on the work of Dicey who stressed the supremacy of law over governmental power, equality before the law, and the enforcement of the law before courts,<sup>9</sup> often emphasises procedural aspects, such as access to justice and the right to a fair procedure.<sup>10</sup> In contrast, other legal cultures focus more on the (formal) legality of state action, such as the Kelsenian concept of the ‘Rechtsstaat’.<sup>11</sup> Nevertheless, also on a broader geographical range, rule of law concepts appear to converge on a number of points, such that, for instance, Chesterman concludes his comparative survey by suggesting that the ‘elements of the core definition may be

6 *Tamanaha; Berman; Allan; Craig*, in: Bellamy (ed.); *Waldron; Dyzenhaus; Bingham; Flores/ Himma* (eds.).

7 *Brownlie; Chesterman*, Am. J. Comp. L. 2008/56, pp. 331-361; *Koskenniemi; Allott; Zurn/ Nollkaemper/Peerenboom* (eds.).

8 See *United Nations General Assembly*, The Rule of Law at the National and International Levels, A/RES/69/123, 18 December 2014, para. 9 (‘Calls, in this context, for dialogue to be enhanced among all stakeholders with a view to placing national perspectives at the centre of rule of law assistance in order to strengthen national ownership, while recognizing that rule of law activities must be anchored in a national context and that States have different national experiences in the development of their systems of the rule of law, taking into account their legal, political, socioeconomic, cultural, religious and other local specificities, while also recognizing that there are common features founded on international norms and standards’).

9 *Dicey*, pp. 172, 177-78, 208 (‘We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land [...]. We mean in the second place [...] not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals [...]. [Thirdly,] the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.’).

See also *Chesterman*, p. 336 (‘Dicey’s three aspects of the rule of law – regulating government power, implying equality before the law, and privileging judicial process – are commonly regarded as basic requirements of a formal understanding of the rule of law.’).

10 *Beaulac*, in: Palombella/Walker (eds.), pp. 197-204.

11 *Kelsen*, pp. 312 f.

summarized as a government of laws, the supremacy of the law, and equality before the law.’<sup>12</sup>

In addition to different cultural connotations of rule of law notions, one has to distinguish between so-called thin and thick concepts of the rule of law,<sup>13</sup> sometimes also referred to as formal and substantive understandings of the rule of law concept.<sup>14</sup>

### C. Rule of Law on the International Level

Finally, there is the long-standing debate to which extent there can be an international rule of law in the sense of rule of law elements applying, not on the state level, but on the inter-state level and possibly also to the United Nations (UN) and other international organizations. While the applicability of the concept to the inter-state level has mainly focused on problems concerning the absence of an agreed international gov-

12 *Chesterman*, p. 342 (“That being said, what we might term a core definition of the rule of law as it has evolved over time appears to have three elements: First, the power of the State may not be exercised arbitrarily. This incorporates the rejection of “rule of man,” but does not require that State power be exercised for any particular purpose. It does, however, require that laws be prospective, accessible, and clear. Secondly, the law must apply also to the sovereign and instruments of the State, with an independent institution such as a judiciary to apply the law to specific cases. This implies a distinction from “rule by law.” Thirdly, the law must apply to all persons equally, offering equal protection without prejudicial discrimination. The law should be of general application and consistent implementation; it should be capable of being obeyed. This presumes that the rule of law is more than simply “law in the books” and that these principles also apply to “law in action.”.”).

13 See the exchange between Joseph Raz and Tom Bingham in this regard: *Raz*, p. 211 (“The rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.’); *Bingham*, p. 67 (“While [...] one can recognize the logical force of Professor Raz’s contention, I would roundly reject it in favor of a “thick” definition, embracing the protection of human rights within its scope. A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.’).

14 See *Chesterman*, p. 340 (“The content of the term “rule of law”, then, remains contested across both time and geography. Analysis of its content often begins by parsing out formal and substantive understandings. Those theories that emphasize the formal aspects describe instrumental limitations on the exercise of State authority; they tend to be minimalist, positivist, and are often referred to as “thin” theories-distinguishing them from the “thick” theories that incorporate substantive notions justice.’).

ernance and in particular the lack of a compulsory adjudicatory system,<sup>15</sup> the latter problem is one that has gained particular attention with the increased activities of the UN ranging from imposing targeted sanctions to administering territory and thus fulfilling state tasks that trigger 'normal' rule of law problems.<sup>16</sup>

Scholarly opinions on the feasibility of an international rule of law range from the view that in the 'primitive' international legal order in which 'there is no one binding court, no one executive or legislature, no separation of powers, and [...] there is the sovereignty of states (and so no hierarchy of powers), with which to contend' an international rule of law cannot exist,<sup>17</sup> to attempts to establish a thicker concept of the international rule of law, comprising 'legal order and stability, equality of application of the law, the protection of human rights through access to justice, and the settlement of disputes before an independent legal body,'<sup>18</sup> which need not necessarily be the International Court of Justice (ICJ), but could be one of the proliferating dispute settlement mechanisms on the international level.

Also, the UN has devoted attention to the issue of an international rule of law applying on the inter-state level. Already in the 1970 Friendly Relations Declaration, the General Assembly emphasised the 'paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations,'<sup>19</sup> which is obviously premised on the idea that the rule of law may also be established among states. It has subsequently repeatedly taken up more specific rule of law issues, e.g. when demanding compliance with ICJ judgments<sup>20</sup> or in the broader quest for the general

15 See, e.g., *Watts*, GYIL 1993/36, p. 37 (commenting on the lack of compulsory jurisdiction of the ICJ: 'Such a purely consensual basis for the judicial settlement of legal disputes cannot be satisfactory in terms of the rule of law.); see also *Beaulac*, pp. 197 ff.; *Kingsbury*, in: *Crawford/Koskenniemi* (eds.), pp. 203 ff.; *Keith*, LJIL 2015/28, pp. 414 f.

16 See, e.g., *Farral*, pp. 185 ff.; *Cameron/Everly*, EJIL 2010/21, pp. 239 f.; *Alvarez*, IILJ Working Paper 2016/4 (Global Administrative Law Series).

17 *McCorquodale*, ICLQ 2016/65, p. 289; citing *Correll*, Temple Int. Comp. Law J., 2004/18, p. 399 and *Higgins*, in: *Higgins* (ed.), pp. 1330 - 1340.

18 *McCorquodale*, ICLQ 2016/65, p. 296.

19 See *United Nations General Assembly*, Declaration on Principles of International Law Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations, A/RES/2625(XXV), 24 October 1970.

20 See *United Nations General Assembly*, Millennium Declaration, A/RES/55/2, 18 September 2000, para. 9 (UN Member States resolving to 'strengthen respect for the rule of law in international as in national affairs and, in particular, to ensure compliance by Member States with the decisions of the International Court of Justice, in compliance with the Charter of the United Nations, in cases to which they are parties.').

acceptance of the jurisdiction of the ICJ as a postulation of the rule of law on the international level.<sup>21</sup>

#### D. Rule of Law Concepts Used by the United Nations

For the purposes of this contribution, however, the focus is not on an international rule of law. Rather, the question is to what extent one can identify elements of a rule of law concept that applies to the exercise of state powers, or in the case of investor-state arbitration, to alternatives to state adjudicatory powers.

In spite of all the variations and contestations of the concept of the rule of law, it seems that national and regional differences need not necessarily exclude the possibility to arrive at an internationally shared core of the notion of the rule of law or at least of identifying some elements of the concept of the rule of law that would be widely accepted.

One approach that is likely to be of general acceptance and that will be pursued in this contribution is relying on the rule of law concept as it is used and developed in the UN. Thus, various UN documents are analysed in order to ascertain whether such a core of a rule of law concept may have emerged as generally accepted.

In fact, although developing a rule of law notion in the UN is often geared towards the organization's peace and security function, the major part of the UN's rule of law efforts focuses on the rule of law within states. Most of the relevant UN documents clearly posit the rule of law as an important tool for development and ascribe to good governance structures functions that are also relevant in the field of investment law.

An already fairly precise and important definition of the rule of law is contained in the UN Secretary-General 2004 Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies.<sup>22</sup> As the name suggests, this Report focuses on the rule of law not on the international level, but rather on the internal level. The

21 See *United Nations General Assembly*, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/RES/67/1, 30 November 2012, para. 32 ('We recognize the positive contribution of the International Court of Justice, the principal judicial organ of the United Nations, including in adjudicating disputes among States, and the value of its work for the promotion of the rule of law; we reaffirm the obligation of all States to comply with the decisions of the International Court of Justice in cases to which they are parties; and we call upon States that have not yet done so to consider accepting the jurisdiction of the International Court of Justice in accordance with its Statute. We also recall the ability of the relevant organs of the United Nations to request advisory opinions from the International Court of Justice.); see also *United Nations General Assembly*, (fn. 8), preambular para. 6 ('Reaffirming the duty of all States to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations and to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered, in accordance with Chapter VI of the Charter, and calling upon States that have not yet done so to consider accepting the jurisdiction of the International Court of Justice in accordance with its Statute').

22 See *United Nations Security Council*, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616, 23 August 2004.

Report refers, *inter alia*, to ‘[...] the demands of equal enforcement and independent adjudication of legal rules and principles as well as fairness in the application of the law, legal certainty, the avoidance of arbitrariness and procedural and legal transparency.’<sup>23</sup> All these procedural rule of law demands are clearly addressed to the judiciary and would appear to be particularly relevant for investment arbitration as well.

At the same time, these elements resemble very much the procedural fairness or due process notions found in many national legal orders, in the customary international law principles in regard to denial of justice,<sup>24</sup> as well as in the concepts of a fair trial or fair procedure as enshrined in human rights instruments, such as the Universal Declaration of Human Rights,<sup>25</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>26</sup> the European Convention of Human Rights (ECHR),<sup>27</sup> or the Charter of Fundamental Rights of the European Union.<sup>28</sup>

Also, the 2012 UN General Assembly Declaration on the Rule of Law<sup>29</sup> contains principles, though on a more abstract level, which are at least basically consented to by the most representative international body that may be relevant for identifying an internationally shared notion of procedural rule of law demands.

23 Ibid., para. 6 (‘The “rule of law” is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’).

24 See *Paulsson*, p. 133.

25 *United Nations General Assembly*, Universal Declaration of Human Rights, A/RES/3/217A, 10 December 1948, Art. 10 (‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.’).

26 Art. 14 para. 1 International Covenant on Civil and Political Rights, adopted 19 December 1966, entered into force 23 March 1976, 999 UNTS 171, (‘[a]ll persons are equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’).

27 Art. 6 para. 1 European Convention on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, entered into force 3 September 1953, 213 UNTS 221 (‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’).

28 Art. 47 paras. 1-2 Charter of Fundamental Rights of the EU, OJ C 364 of 18/12/2000, p. 20 (‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. [...]’).

29 *United Nations General Assembly*, (fn. 21).

The 2012 Rule of Law Declaration refers to various due process elements of the rule of law concept. Specifically, it calls for '[...] an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice [...].'<sup>30</sup> Furthermore, it expressly emphasises the need for judicial independence and impartiality as 'an essential prerequisite for upholding the rule of law'<sup>31</sup> as well as effective 'access to justice'.<sup>32</sup> In addition to these mostly 'procedural' rule of law aspects, the 2012 Declaration also endorses a more substantive concept of the rule of law when it refers to 'just, fair and equitable laws' as well as to 'equal protection of the law' 'without any discrimination'.<sup>33</sup>

Also in its repeated, annual resolutions on 'The rule of law at the national and international level', the UN General Assembly has reasserted elements of the concept. For instance, in its 2014 rule of law resolution, it specifically stressed the obligation of states to 'promote access to justice for all'.<sup>34</sup>

#### E. Elements of the UN Concept of the Rule of Law

On the basis of the above findings, it appears that the following elements can be regarded as universally accepted because they are found in UN resolutions adopted by consensus:

- 30 Ibid., para. 12 ('We reaffirm the principle of good governance and commit to an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice, commercial dispute settlement and legal aid.').
- 31 Ibid., para. 13 ('We are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice.').
- 32 Ibid., para. 14 ('We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid.').
- 33 Ibid., para. 2 ('We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.').
- 34 *United Nations General Assembly*, (fn. 8), para. 14 ('Recalls the commitment of the Member States to take all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid, encourages further dialogue and the sharing of national practices in strengthening the rule of law through access to justice, including with regard to legal aid, where appropriate, in both criminal and civil proceedings, and in this regard stresses the need to intensify the assistance extended to Governments upon their request.').

- Core notions of due process and a fair trial referred to as ‘[...] an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice [...].’<sup>35</sup>
- Access to such dispute settlement, as expressed in ‘the right of equal access to justice for all [...].’<sup>36</sup>
- Judicial independence and impartiality, identified as ‘essential prerequisite for upholding the rule of law.’<sup>37</sup>
- In addition to these, the following elements can probably also be regarded as part of inherent rule of law-requirements for dispute settlement.
- Consistency and predictability of dispute settlement outcomes as well as transparency.<sup>38</sup>

It seems that there is also some considerable overlap of these UN notions of the rule of law with what the Venice Commission has identified as elements of rule of law requirements for Council of Europe countries.<sup>39</sup>

Although the above-outlined UN concept of the rule of law seems to focus on the qualities of judicial or quasi-judicial dispute settlement methods, it also contains important demands for the other branches of government, requiring the legislator to adopt ‘just, fair and equitable laws’ and the executive branch – just as much as the judiciary – to afford ‘equal protection of the law’ ‘without any discrimination’.<sup>40</sup>

#### F. The Relevance of the UN Rule of Law Concept for International Investment Law

This UN notion of the rule of law offers a useful yardstick for the purposes of the ILA Committee on the Rule of Law and International Investment Law. It permits an analysis to assess whether and to what extent the ‘substantive protections found in

35 *United Nations General Assembly*, (fn. 21), para. 12 (‘We reaffirm the principle of good governance and commit to an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice, commercial dispute settlement and legal aid.’).

36 Ibid., para. 14 (‘We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid.’).

37 Ibid., para. 13 (‘We are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice.’).

38 *United Nations General Assembly*, (fn. 8), para. 14 refers to that in a slightly indirect way by recalling ‘the commitment of the Member States to take all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all [...]’), see also fn. 21.

39 *European Commission for Democracy through Law (Venice Commission)*, Report on the Rule of Law, adopted at its 86<sup>th</sup> plenary session, Study No. 512 / 2009, CDL-AD(2011)003rev, Strasbourg, 4 April 2011, available at: [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e) (30/04/2019).

40 *United Nations General Assembly*, (fn. 21), para. 2. See also fn. 33.

treaties attempt to ensure government decision-making based on the rule of law.<sup>41</sup> Given the focus of the UN's concept on judicial guarantees, most likely the fair trial or due process aspects contained in the obligation to accord fair and equitable treatment will be of special importance.<sup>42</sup>

At the same time, these procedural elements of the UN's rule of law-concept offer benchmarks to assess whether and to what extent 'investment arbitration itself operates in a manner that is consistent with the rule of law'.<sup>43</sup> This second question has been critically examined by academics<sup>44</sup> and then been adopted by states, questioning the legitimacy of the entire investment arbitration system.<sup>45</sup> The UN concept will again serve as a useful yardstick to assess the rule of law character of investor-state arbitration.

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41 See *supra* text at fn. 2.

42 See, e.g., *Schill*, IILJ Working Paper 2006/6 (Global Administrative Law Series); *Schill*, in: *Schill* (ed.), pp. 151-183; *Echandi*, in: Alvarez/Sauvant/Ahmed/Vizcamno (eds.), p. 13; *Satorova*, in: *Reinisch/Footer/Binder* (eds.), pp. 131-147.

43 See *supra* text at fn. 2.

44 See, e.g., *Van Harten*, pp. 152 ff.; *Schneiderman; Van Harten*, in: *Schill* (ed.), pp. 627 ff.

45 See, e.g., *Waibel/Kaushal/Chung/Balchin* (eds.).

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