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# UNCITRAL'S WORK IN INVESTOR-STATE DISPUTE SETTLEMENT: PROMOTING THE RULE OF LAW INTERNATIONALLY?

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## 1 Introduction

This chapter considers UNCITRAL's contribution to enhancing the rule of law internationally, focusing on its work in the sphere of investor-state dispute settlement ('ISDS').[1] The rule of law, or rather its promotion, is frequently invoked as a legitimising factor for ISDS. However, the discussion on the need for ISDS itself to live up to rule of law standards, a goal yet to be realised, is equally crucial.[2]

We show that UNCITRAL's work has made some contribution to enhancing the rule of law in ISDS, but more action is necessary.[3] The chapter is divided into three sections. First, to set the scene, we identify what is presently meant by the concept of the rule of law (2). Secondly, we highlight how UNCITRAL's prior and ongoing work in the field of ISDS is essentially driven by rule of law concerns (3). Finally, we conclude that significant further reform is needed if the rule of law is to be advanced, acknowledging the progress already made, particularly in its procedural aspects (4).

## 2 The rule of law: a contested concept

Support for the rule of law in the abstract is virtually universal.[4] The 2012 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels states, '[w]e reaffirm our solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law, which are indispensable foundations for a more peaceful, prosperous and just world.'[5] Clearly, the rule of law driven mission of the broader UN organisation is equally relevant to UNCITRAL. Promoting the rule of law in international trade and commerce in general, and ISDS in particular, should be UNCITRAL's central objective. Yet, what the rule of law actually entails is not an easy question to answer.

[1] International investment disputes can be defined as disputes arising between an investor and a state that may be submitted for resolution under a treaty providing for the protection of investments or investors, legislation governing foreign investments, or an international investment contract; see UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), 'Possible reform of investor-State dispute settlement (ISDS). Draft Codes of Conduct and Commentary. Note by Secretariat' (2022) A/ CN.9/WG.III/W 223, 23 November 2022, for Article 1(a), Code of Conduct for Arbitrators.

[2] Velimir Živković, 'Pursuing and Reimagining the International Rule of Law Through International Investment Law' (2020) 12 Hague Journal on the Rule of Law 1; August Reinisch, 'The Rule of Law in International Investment Arbitration' in Photini Pazartzis and others (eds), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Bloomsbury Publishing 2016) 291, 292.

[3] ILA Committee on the Rule of Law and International Investment Law, 'Report 2018' (2018) International Law Association Rep Conf 78, 31.

[4] Simon Chesterman, 'An International Rule of Law?' (2008) 56 The American Journal of Comparative Law 331.

[5] 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' (2012) A/RES/67/1, 30 November 2012 ('UN General Assembly 2012 Declaration'), Preamble and para 1.

A distinction has been drawn between the following two conceptions of the rule of law: formal and substantive.[6] The formal conception, also called 'thin' theory, concerns itself with the manner in which the law is made and applied, as well as the clarity and temporal dimension of the ensuing norms, rather than with their actual content.[7] Adherents of the substantive, or 'thick', theory, on the other hand, insist that while meeting certain formal requirements is a necessary prerequisite for the rule of law, it is not a sufficient one; for a law to be a 'good law', its substantive content must be in conformity with certain fundamental values and ideals.[8]

While proponents of the substantive theory acknowledge that the values promoted by the formal conception provide at least some protection to the individual,[9] they nevertheless consider the level of protection afforded to be inadequate. One of the most prominent critics of the 'thin' theory is Lord Bingham. Both in his oft-cited lecture on 'The Rule of Law' as well as his seminal book in which he identifies eight principles of the rule of law,[10] Lord Bingham illustrates the deficiencies of the formal conception by quoting one of its most well-known advocates, Joseph Raz:

> A non-democratic legal system, based on the denial of human rights, on extensive poverty, 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 … It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law … The law may … institute slavery without violating the rule of law.[11]

Unsurprisingly, both the thin and the thick theories of the rule of law attract critique. As Laws puts it, '[t]he thin theory offers a standard of legality that (…) is hardly worth having if it is taken on its own (…) But the thick theory collapses the Rule of Law into whatever set of socio-political norms, capable of being enforced by law, is favoured by any theorist who thinks about the matter.'[12]

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[6] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' in Richard Bellamy (ed), *The Rule of Law and the Separation of Powers* (2005) 467; Jack Beatson, *Key Ideas in Law: The Rule of Law and the Separation of Powers* (Hart Publishing 2021) 17.

[7] Craig, ibid. 467; Beatson, ibid. 17. both Craig and Beatson refer to Joseph Raz, 'The Rule of Law and Its Virtue', *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979).

[8] Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 11-12.

[9] Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Hart' (1958) 71 Harvard Law Review 630, 637.

[10] Tom Bingham, *The Rule of Law* (Allen Lane 2010) 37, 48, 55, 60, 66, 85, 90, 110: The eight principles suggested by Bingham are: '(1) The law must be accessible and so far as possible intelligible, clear and predictable (…) (2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion (…) (3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation (…) (4) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purposes for which the powers were conferred, without exceeding the limits of such powers and not unreasonably (…) (5) The law must afford adequate protection of fundamental human rights (…) (6) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves unable to resolve (...) (7) Adjudicative procedures provided by the state should be fair (…) (8) The rule of law requires compliance by the state with its obligations in international law as in national law.' See Tom Bingham, *The Rule of Law* (Allen Lane 2010) 37, 48, 55, 60, 66, 85, 90, 110. See also Tom Bingham, 'The Rule of Law' (The Sixth Sir David Williams Lecture, 16 November 2006) 6 ff. <https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures/rt-hon-lord-bingham-cornhill-kg-rule-law> accessed 7 August 2022.

[11] Tom Bingham, 'The Rule of Law' (The Sixth Sir David Williams Lecture, 16 November 2006) 17 <https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures/rt-hon-lord-bingham-cornhill-kg-rule-law> accessed 7 August 2022; Tom Bingham, *The Rule of Law* (Allen Lane 2010) 66; citing Raz (n 7) 211, 221.

[12] John Laws, *The Constitutional Balance* (Hart Publishing 2021) 15.

These theoretical divergences have also manifested at the international level. The following definition is taken from the UN Secretary General's 2004 Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies:

> The 'rule of law' (…) 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.[13]

It is the procedural rule of law elements contained in the above definition that appear to be of particular significance to ISDS: equal enforcement and independent adjudication, legal certainty, fairness in the application of the law, avoidance of arbitrariness and procedural and legal transparency.[14]

Another notable document in this regard is the 2012 General Assembly Declaration on the Rule of Law. Alongside the right of equal and effective access to justice, the 2012 Declaration, amongst other things, stresses judicial independence and impartiality as 'an essential prerequisite for upholding the rule of law'.[15] Moreover, the 2012 Declaration also alludes to due process and fair trial considerations when requiring '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'.[16]

In fact, besides referring to procedural rule of law elements, the 2012 Declaration appears to endorse a substantive rule of law conception as it makes reference to 'just, fair and equitable laws'.[17] The 2004 Report by the then UN Secretary-General Kofi Annan seems to embrace a substantive conception as well, setting forth the requirement that all laws shall be 'consistent with international human rights norms and standards'.[18] In relation to the latter, it has been remarked, that this 'almost certainly goes beyond what states would actually implement'.[19] It deserves mention, however, that the frequently emphasised 'dichotomy' between formal rule of law requirements and human rights does not apply equally to all human rights, but primarily the social and economic ones; some formal rule of law requirements are themselves fundamental human rights, such as the right to a fair trial.[20]

Ultimately, it is not the objective of this chapter to suggest what conception of the rule of law ought to be preferred. It is simply to point out both the differences in thinking on the topic and a pragmatic way to approach the issue. Bearing this objective in mind, two points may be made.

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[13] 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 ('UNSC Secretary General's 2004 Report') para 6.
[14] Reinisch (n 2) 291, 292; see also August Reinisch, 'The UN Concept of the Rule of Law' (2019) 22 ZEuS, 337, 341-342. Reinisch notes that the majority of pertinent 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'.
[15] UN General Assembly 2012 Declaration (n 5) paras 13-14.
[16] Ibid., para 12.
[17] Ibid., para 2.
[18] UNSC Secretary General's 2004 Report (n 13) para 6.
[19] Simon Chesterman, '"I'll Take Manhattan": The International Rule of Law and the United Nations Security Council' (2009) 1 The Hague Journal on the Rule of Law, 67. See also Živković (n 2) 11.
[20] Živković (n 2) 1.

First, at the very least, a rule of law driven approach to develop or reform any regulatory setting would require a focus on basic procedural guarantees. Crucially, access to justice, which in its procedural dimension is synonymous with the right to a fair trial, is at the heart of the concept of the rule of law.[21] Other procedural principles, such as legal certainty, consistency, predictability, avoidance of arbitrariness and transparency, are also important dimensions of the rule of law in its thin sense.[22] Secondly, even though the thick theory of the rule of law is contested, substantive considerations cannot be ignored. If the underlying substantive law is perceived to be lacking in legitimacy or is otherwise deficient, regardless of the procedural protections enacted, the overall regime's legitimacy and credibility will be strongly challenged. In such circumstances, the risk of a victory of form over substance is high. Therefore, a rule of law-driven approach ought to focus not just on its procedural dimension, but also have an eye on the substance. It is in this light that we understand the rule of law.

## 3 ISDS and UNCITRAL

This section explores to what extent UNCITRAL's work on ISDS has contributed to the promotion of the rule of law internationally. It will highlight how rule of law concerns underpin the procedural and substantive aspects of ISDS today (3.1). Further, it will show that UNCITRAL's role is not to be underestimated, despite the International Centre for Settlement of Investment Disputes ('ICSID') having created the key legal infrastructure for ISDS. In particular, this section will explore UNCITRAL's work on transparency and ongoing reform efforts aimed at enhancing the rule of law in ISDS (3.2).

### 3.1 The rule of law and ISDS

As is well-known, treaty-based investor-state arbitration ('ISA') emerged as a system in the 1990s, when the majority of bilateral investment treaties ('BITs') as well as several notable regional and sector-specific treaties, such as the North American Free Trade Agreement ('NAFTA') (now USMCA)[23] and the Energy Charter Treaty,[24] were concluded.[25] It has since evolved into the principal method of

[21] UN General Assembly 2012 Declaration (n 5) para 14. As one of the present contributors has explored elsewhere, the right to a fair trial is a fundamental human right, demanding that everyone whose legal rights have been adversely impacted has the right to access justice equally and fairly before an independent court or tribunal. See Rishi Gulati, *Access to Justice and International Organisations: Coordinating Jurisdiction between the National and Institutional Legal Orders* (CUP 2022) 39-69.

[22] See Reinisch (n 14) 344, who references United Nations General Assembly, 'The Rule of Law at the National and International Levels' A/RES/69/1, 18 December 2014, para 14. Reinisch notes that these inherent elements are referred to '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"'.

[23] NAFTA, enacted in 1994, has been replaced by a new agreement called the United States Mexico Canada Agreement ('USMCA'), which entered into force on 1 July 2020. See International Trade Administration, U.S. Department of Commerce, 'North American Free Trade Agreement (NAFTA)', available at <https://www.trade.gov/north-american-free-trade-agreement-nafta> accessed 10 January 2023.

[24] The Energy Charter Treaty ('ECT') is presently facing significant challenges. In 2018, a process to modernise the ECT, which came into force in 1998 and counts 53 signatories and contracting parties, was initiated. In June 2022, it was announced that the contracting parties had reached an agreement in principle on the modernisation of the ECT. Among the proposed amendments to the ECT are changes to the investment protection standards and a reference to the right to take regulatory action for reasons such as environmental protection or climate action. Since the conclusion of negotiations, however, several EU Member States (Poland, Spain, the Netherlands, France, Slovenia, Germany and Luxembourg – Italy had already left in 2016) have announced their intention to withdraw from the treaty. These announcements were followed by a resolution of the European Parliament on 24 November 2022, urging the European Commission 'to initiate immediately the process towards a coordinated exit of the EU from the ECT' and calling upon the Council 'to support such a proposal'. At the time of writing, the vote on the proposed amendments to the treaty, originally scheduled for 22 November 2022, had been postponed until at least April 2023. See European Parliament Resolution of 24 November 2022 on the Outcome of the Modernisation of the Energy Charter Treaty (2022/2934(RSP)), available at <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0421_EN.html> accessed 8 January 2023.

[25] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 7, 25 and fn 15, referencing UNCTAD *Bilateral Investment Treaties – 1959-1999* (United Nations 2000) 1; UNCTAD, *World Investment Report 2004* (United Nations 2004) 221: While the first BITs incorporating general consent to compulsory arbitration of disputes between the relevant state and foreign investor were concluded as early as the 1960s, it was only in the 1990s that general consent in BITs became the rule.

resolving international investment disputes.[26] According to data collected by the United Nations Conference on Trade and Development ('UNCTAD'), the total number of known ISA cases reached 1,190 at the end of 2021.[27]

The exponential rise in ISA cases has been driven by a vast network of more than 3000 international investment agreements ('IIAs'), the majority of which are BITs[28]. Judging by the system's initial momentum, the international community's perception appears, at least on balance, to have been a relatively positive one.[29] The standards of protection for foreign investors contained in these IIAs combined with the powerful enforcement mechanism provided through the ICSID regime as well as the New York Convention[30] made redundant the previously necessary reliance on the host state's domestic legal framework and interference on the part of the investor's home state in investment related disputes, be that via diplomatic protection or through power politics.[31]

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Between 1989 and 1999, the number of BITs increased from 385 to 1,857. By the end of 2003, a total of 2,265 BITs had been concluded, with 175 states participating in the system.

[26] While the present analysis will focus on treaty-based investor-state arbitration ('ISA'), it is worth noting that investment arbitrations can also be contract-based, or even involve both. See Andrea K Bjorklund and Lukas Vanhonnaeker, 'Applicable Law in International Investment Arbitration' in CL Lim (ed), *The Cambridge Companion to International Arbitration* (CUP 2021) 225, 227. For a discussion of the methods of resolving investor-state disputes see Chester Brown, 'Resolving International Investment Disputes' in Natalie Klein (ed), *Litigating International Law Disputes* (CUP 2014) 401, 417.

[27] As pointed out by UNCTAD, 'some arbitrations can be kept confidential'. It is thus likely the actual figures are higher. See UNCTAD, 'Facts on Investor-State Arbitrations in 2021: With a Special Focus on Tax-Related ISDS Cases' (2022) 1 IIA Issues Note, 1-2, available at <https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf> accessed 8 January 2023.

[28] See UNCTAD, 'International Investment Agreements Navigator', available at <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 8 January 2023. Out of a total of 2872 bilateral investment treaties, 2231 are currently in force. Out of the 429 treaties with investment provisions ('TIPs'), 335 are in force.

[29] It is worth noting that this perception was not exclusively positive. See Van Harten (n 25) 17, who states the following: 'Contemporary investment treaties differ from extraterritorial and colonial legal regimes in many respects. They are not imposed by direct force and they apply international law rather than a foreign domestic law to regulate states. They also subject disputes to adjudication by international tribunals instead of imperial courts or foreign consuls. On the other hand, investment treaties apply standards of review – to protect foreign investment from state regulation – that are based on a Western conception of international law that was long resisted by the Third World, and the typical contemporary arbitrator is a Western Professional. So, while investment treaty arbitration is unique, one should not lose sight of its ancestry or the fact that early international arbitrations of investment disputes sometimes followed in the wake of foreign invasion and occupation. In this light, it is not that surprising that investment treaty arbitration is viewed with hesitation, not to say suspicion, in many quarters, including among constituencies in developed countries that support more extensive regulation of multinational firms.'

[30] ICSID awards enjoy automatic recognition under the ICSID Convention (see n 55), which provides that ICSID awards are to be treated as final court judgments of contracting states and may be enforced accordingly. This is different for non-ICSID awards, which may be recognised and enforced under the New York Convention (see n 57). While the latter also provides a regime for the enforcement and recognition of arbitral awards within its contracting states, Article V of the New York Convention sets forth an exhaustive list of limited grounds on which recognition and enforcement of an arbitral award may be refused by a competent authority in the contracting state where recognition and enforcement are sought, such as the public policy exception (Art V(2)(b) New York Convention).

[31] A frequently proffered argument is that one of the main drivers for the creation of the ISDS regime was the wish to avoid having to rely on the partly insufficient, traditional methods of settlement of investment disputes, namely, diplomatic protection and litigation in domestic courts. See Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, OUP 2022) 339-340: 'The gaps left by the traditional methods of dispute settlement (diplomatic protection and action in domestic courts) have led to the idea of offering investors direct access to effective international procedures, especially arbitration. This carries advantages for the investor, the host State as well as for the investor's home State. The advantage for the investor is obvious: it gains access to an effective international remedy. The advantage to the host State is twofold: by offering an international procedure for dispute settlement it improves its investment climate and is likely to attract more foreign investment. In addition, by consenting to international arbitration the host State shields itself against other processes, notably diplomatic protection, and the negative consequences this may entail. The investor's home State gains flexibility in its foreign policy choices and is freed of domestic pressure to pursue its

To better appreciate how rule of law considerations underpin ISA regarding both procedure and substance, one should separate issues of forum and applicable law. Take forum first.

One of the main arguments in favour of resolving international disputes through ISA is that foreign investors should be provided with a neutral forum to enable them to access justice outside of the national courts of host states. The conventional wisdom, now challenged, has been that foreign investors need special protections to ensure that host states (including their national courts) do not treat them unjustly or unfairly. ISA aims to enhance the rule of law for foreign investors by providing access to justice for resolving investment disputes in an independent and impartial setting. ISDS in its current form would thus appear to promote the rule of law in its thin sense.

Moving on to applicable law, it is important to have in mind that the primary sources of substantive law applied by investment tribunals are the relevant IIAs themselves.[32] While commonalities between these IIAs do exist, their content cannot be said to be uniform; this is true particularly with respect to the substantive standards of protection. There are several investment protection standards that IIAs regularly include. Yet, as shall be discussed further below, these standards are typically of a rather vague and open-textured nature and lack detailed guidance as to how they are to be applied.[33] Notwithstanding the significant fragmentation of substantive sources, the following general point may be made: the substantive protections contained in IIAs do, at least on their face, embed various rule of law considerations, identified at section 2 above.

The limits imposed on host states' powers and the protection afforded to individual foreign investors from state abuse have indeed frequently been likened to rule of law standards. For instance, the fair and equitable treatment ('FET') standard has been described as 'an enhanced version of international law standards preventing denial of justice or, put in a positive way, demanding due process and fair trial.'[34] Schill describes the FET standard as an 'embodiment of the rule of law':[35] Based on an analysis of arbitral jurisprudence on FET, he identifies seven 'sub-elements or expressions of the broader concept of the rule of law in domestic legal systems',[36] namely: '(1) the requirement of stability,

nationals' interests.' See also Benedict Kingsbury and Stephan W Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law' IILJ Working Paper 2009/6 (Global Administrative Law Series), available at <https://www.iilj.org/publications/investor-state-arbitration-as-governance-fair-and-equitable-treatment-proportionality-and-the-emerging-global-administrative-law/> accessed 8 January 2023, 8.

[32] The other main sources of substantive law are applicable international law and the domestic law of the host State. See Bjorklund and Vanhonnaeker (n 26) 226.

[33] Brown (n 26) 409 ff.

[34] See Reinisch (n 2) 292, who refers to the following: Jan Paulsson, Denial of Justice in International Law (2005); Stephen M Schwebel, Justice in International Law: Further Selected Writings (2011); Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 European Journal of International Law 729; Martins Paparinskis, The International Minimum Standard and Fair and Equitable Treatment (2013). See also Stephan W Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 151-182; Stephan W Schill, 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law' [2006] Global Administrative Law Series, IILJ Working Paper 2006/6.

[35] Schill, ibid. 151-182; Stephan W Schill, 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law' [2006] Global Administrative Law Series, IILJ Working Paper 2006/6.

[36] Schill (n 34) 159-160.

predictability, and consistency of the legal framework;[37] (2) the principle of legality;[38] (3) the protection of legitimate expectations;[39] (4) procedural due process and denial of justice;[40] (5) substantive due process and protection against discrimination and arbitrariness;[41] (6) transparency;[42] and (7) the principle of reasonableness and proportionality.'[43] All of these aspects are related to rule of law concerns, including in its substantive sense.

Unsurprisingly, the prevalent narrative is that the international investment regime exists, first and foremost, to ensure that host states treat foreign investors in accordance with the rule of law. As a result of host states' promises to comply with certain minimum treatment standards,[44] so the narrative continues, foreign direct investment would be increased, and the use of resources improved.[45] Substantive investment protections enshrined in IIAs are there to safeguard just and fair treatment of foreign investors and foreign investments by host states, with several of the substantive protections being driven by rule of law concerns. Where these substantive protections are allegedly violated by a host state, ISA is said to enhance the rule of law at the international level by specifically providing an independent and impartial dispute resolution forum to the aggrieved investor.

Inevitably, as ISA has emerged as the typical method of resolving investor-state disputes in recent decades, it is through ISA that substantive standards of investment protection have developed in practice. Against this backdrop, it has been argued that '[a]rbitrators have developed a supranational

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[37] See Schill (n 34) 160-162, citing, inter alia, the following cases: *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005, para 274 ('there can be no doubt (…) that a stable legal and business environment is an essential element of fair and equitable treatment'); *PSEG Global Inc, The North American Coal Corp, and Konya Ingin Electrik Uretim v Ticaret Ltd Sirketi v Republic of Turkey*, ICSID Case No ARB/02/5, Award, 19 January 2007, para 254 ('Stability cannot exist in a situation where the law kept changing continuously and endlessly, as did its interpretation and implementation.'); *Metalclad Corp v United Mexican States*, ICSID Case No ARB(AF)/97/1 (NAFTA), Award, 30 August 2000, para 99 ('failed to ensure a (…) predictable framework for Metalclad's business planning and investment'); Técnicas Medioambientales *Tecmed SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003 ('*Tecmed v Mexico*') para 154 ('know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices and directives, to be able to plan its investment and comply').

[38] *Pope & Talbot Inc v Government of Canada*, UNCITRAL/NAFTA, Award on the Merits of Phase 2, 10 April 2001 ('*Pope & Talbot v Canada*') paras 174 ff.; *GAMI Investments Inc v Government of the United Mexican States*, UNCITRAL/NAFTA, Final Award, 15 November 2004, para 91; *Tecmed v Mexico* (n 37 above) para 154. See Schill (n 34) 162-163 for further case references.

[39] *International Thunderbird Gaming Corp v United Mexican States*, UNCITRAL/NAFTA, Arbitral Award, 26 January 2006 ('*International Thunderbird Gaming v Mexico*') para 147 ('the concept of "legitimate expectations" relates (…) to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the [state] to honour those expectations could cause the investor (or investment) to suffer damages'); see Schill (n 34) 163-166.

[40] See Schill (n 34) 166-167, referring to, inter alia, *Waste Management Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3 (NAFTA), Award, 30 April 2004, para 98, where the arbitral tribunal defined an FET violation as 'lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process'; see also *International Thunderbird Gaming v Mexico* (n 39) para 200.

[41] See Schill (n 34) 167-168, including case references.

[42] See Schill (n 36) 168-169, referring to *Pope & Talbot v Canada* (n 38) paras 123, 125, 128, 155 regarding the sub-element of reasonableness; and *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras 304 ff. regarding the principle of proportionality.

[43] See Schill (n 36) 169-170, including references.

[44] Besides 'fair and equitable treatment', these minimum treatment standards encompass 'full protection and security' and the non-discrimination standards of national treatment and most-favoured-nation ('MFN'). See generally August Reinisch, *Standards of Investment Protection* (OUP 2008); Dolzer, Kriebaum and Schreuer (n 31) 186-295.

[45] Živković (n 2) 15-16; Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2 Trade, Law and Development, 19; Lise Johnson et al., 'Costs and Benefits of Investment Treaties: Practical Considerations for States' (CCSI 2018); Joachim Pohl, 'Societal Benefits and Costs of International Investment Agreements' (2018) OECD Working Papers on International Investment No. 2018/1.

rule of law that has helped to create uniform standards for acceptable sovereign behavior.'[46] In a slightly less definitive manner, UNCTAD observed in a 2007 report on ISDS that 'the growing legal sophistication of investment dispute resolution (…) points to a further strengthening of the rule of law at the international level' and stated that 'the increased number of arbitrations may also motivate developing countries to improve domestic administrative practices and laws in order to avoid future disputes; this would further strengthen the predictability and stability of the legal framework that the conclusion of IIAs was supposed to produce in the first place.'[47] In other words, there is an expectation that, beyond its favourable effect on those directly benefitting from the standards embodied in investment protection treaties, investment arbitration will have a 'positive spill-over effect on the general rule of law climate';[48] both on the domestic and the international level.[49]

Despite this positive assessment of ISA and its potential, the system has also attracted serious criticism in recent times. Critical voices have always existed, not least in capital-importing countries, and so it would be incorrect to present this criticism as entirely novel.[50] Over the past two decades, however, opposition to the current ISDS regime has progressively gained in force,[51] and there has been talk about a 'backlash' against the system.[52] Those concerns revolve around the perceived lack of independence and impartiality of arbitrators; the consistency, coherence and predictability of arbitral decisions; the lack of an adequate control mechanism; the length and cost of proceedings; access to justice for communities adversely impacted by investment projects; and the levels of transparency.[53] To phrase it differently, the question is whether investment arbitration itself operates in a manner that is consistent with rule of law requirements; a question that has both been 'critically examined by academics and then adopted by states, questioning the legitimacy of the entire investment arbitration system.'[54] These concerns should not be underestimated for they turn on their head the very rule of law based rationale for promoting ISA in the first place. It is on such matters that UNCITRAL has tried to make progress.

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[46] David W Rivkin, 'The Impact of International Arbitration on the Rule of Law: The 2012 Clayton Utz/University of Sydney International Arbitration Lecture' (2013) 29 Arbitration International, 327, 328. See also Kingsbury and Schill (n 31), who argue that '[i]n setting standards for State conduct vis-à-vis foreign investors, for example in defining what is improper administration or a violation of due process under fair and equitable treatment, tribunals set standards which may influence future conduct by the respondent State and other States, and will very likely influence the decision-making of tribunals in other cases.'

[47] UNCTAD, 'Investor-State Dispute Settlement and Impact on Investment Rulemaking' (UNCTAD 2007) ix.

[48] Reinisch (n 2) 295. See also Rudolf Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2006) 37 New York University Journal of International Law and Policy 953, 971;' (2006) 37 NYU Journal of International Law and Politics 953, available at <https://www.iilj.org/publications/the-impact-of-international-investment-treaties-on-domestic-administrative-law/> accessed 8 January 2023. Kingsbury and Schill (n 31).

[49] For a study on the potential functional effects of investment arbitration regarding the rule of law on the domestic and international level see Thomas Schultz and Cedric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study' (2014) 25 The European Journal of International Law 1147.

[50] Van Harten (n 25) 152 ff. Gus Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 627 ff.

[51] Emanuel Castellarin, 'Investment Arbitration and the International Rule of Law' in Martin Belov (ed), *Rule of Law at the Beginning of the Twenty-First Century* (Eleven 2018) 211 ff.

[52] David Caron and Esmé Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences' in Andreas Follesdal and Geir Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (OUP 2018) 159 ff.

[53] UNCITRAL, 'Possible future work in the field of dispute settlement. Reforms of investor-State dispute settlement (ISDS). Note by the Secretariat' (2017) A/CN.9/917, 20 April 2017, 4.

[54] Reinisch (n 14) 345, referring to e.g. Van Harten (n 25) 152 ff.; Van Harten (n 50) 627 ff.; Michael Waibel and others (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010). See also Reinisch (n 2) 296 ff.; Živković (n 2) 22 ff.

### 3.2 UNCITRAL and its work on ISDS

Thus far, the dominant force in ISDS has been ICSID, which created an arbitration-based framework coupled with a strong enforcement mechanism through the ICSID Convention.[55] Yet, UNCITRAL continues to play an increasingly significant role. Since its creation by the UN General Assembly in 1966, UNCITRAL has been fulfilling its mandate of promoting 'the progressive harmonization and unification of the law of international trade'.[56] It has done so by drafting and promoting the adoption of several notable instruments, setting globally recognised standards, and, more generally, serving as a forum for discussion and negotiation of issues arising in various areas, including the settlement of disputes in the international context.

As the organisation mandated to harmonise and coordinate international commercial and trade law globally, UNCITRAL has helped negotiate various instruments of relevance to ISDS. For instance, the New York Convention,[57] which UNCITRAL oversees, helps to enforce awards where the ICSID Convention is inapplicable.[58] Moreover, the recently negotiated United Nations Convention on International Settlement Agreements Resulting from Mediation 2018, also known as the Singapore Convention on Mediation,[59] may help resolve investment disputes in the future. Additionally, the UNCITRAL Arbitration Rules deal with various procedural aspects of how an arbitration should be conducted, seeking to ensure due process for the disputing parties.[60] Where the UNCITRAL Arbitration Rules are used to conduct investment arbitrations, UNCITRAL's instruments are thus of obvious relevance to promoting the rule of law in ISA.

Admittedly, the aforementioned instruments were not developed specifically in the context of ISDS/ISA and their use in this sphere is incidental. Given the heightened scrutiny on ISDS in recent times, UNCITRAL has ended up devoting significant effort to this topic. Its most notable achievement has arguably been the negotiation of a transparency framework for ISA, including the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2014 ('Mauritius Convention on Transparency' or 'Mauritius Convention').[61] As is briefly discussed below, this framework has been driven by rule of law values pertaining to transparency in ISA.

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[55] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965) ('ICSID Convention'). The ratifications of the ICSID Convention, which had risen gradually already in the 1980s, accelerated in the 1990s. As a result, ICSID emerged as the leading forum for ISA. See Van Harten (n 25) 27. ICSID awards are binding and enforceable and may not be reviewed by domestic courts. See ICSID Convention, Articles 53, 54.

[56] United Nations General Assembly, Resolution 2205 (XXI) of 17 December 1966, para I. For further details concerning the mandate see the report of the Secretary-General, Official Records of the General Assembly, Twenty-first Session, A/6396 (1966); the report of the Fifth Committee of the General Assembly at its twenty-first session, Official Records of the General Assembly, Twenty-first Session, A/6594 (1966); and the relevant summary records of the proceedings of the Sixth Committee, which are contained in the Official Records of the General Assembly, Twenty-first Session, Sixth Committee, 947th-955th meetings (A/C.6/SR.947-955)

[57] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) ('New York Convention'), UN Treaty Series, vol. 330, 3.

[58] See further Conway Blake, 'Sovereign Immunity and International Arbitration: Whither the Rule of Law? ', in this Volume [ADD].

[59] United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) ('Singapore Convention on Mediation') available at <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements> accessed 8 January 2023. For a general discussion of the Singapore Convention, see Judith Knieper and Jonathan Haddad, 'The History, Evolution, and Future of the UNCITRAL Mediation Framework', in this Volume [ADD]. For a detailed exposition of the instrument, see Nadja Alexander and Clarissa Chern, 'The Singapore Convention', in this Volume [ADD].

[60] For a discussion of rule of law issues in investment arbitration, including procedural fairness and equality of arms, see Reinisch (n 2) 296 ff.

[61] Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration 2014 (adopted 10 December 2014, entered into force 18 October 2017). See further Jeremy Shelley, 'The Mauritius Convention and UNCITRAL Rules On Transparency in Treaty-Based Investor-State Arbitration', in this Volume [ADD].

### 3.2.1 UNCITRAL and its work on transparency

Like the rule of law itself, transparency has been referred to as a concept that is frequently invoked but seldomly defined or, in other words, 'overused but underanalyzed'.[62] For present purposes, the term transparency is used to refer to the principle that the public should have access to information concerning arbitral proceedings. In this sense, transparency can be understood as the reverse image of confidentiality, which continues to be one of the main attracting features of international commercial arbitration as an alternative to judicial proceedings before domestic courts:[63] Absent parties' agreement to the contrary, the default position in commercial arbitration is that 'the existence of the dispute, its subject-matter, the identity of the arbitrators, the materials submitted and the award itself' are to be kept confidential.[64]

The confidentiality of arbitral proceedings as a reflection of the principle of party autonomy may be appropriate in cases relating, if not exclusively then at least overwhelmingly, to the disputing parties. However, it is arguably not suitable for the resolution of disputes involving a public interest component.[65] Accordingly, several investment tribunals have observed that there is no such thing as a 'general principle of confidentiality' in ISDS.[66]

Unlike other rule of law issues, the lack of transparency of arbitral proceedings has been the subject of public criticism from relatively early on, as is illustrated by the following extract from a 2001 New York Times article on NAFTA:[67]

> Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small number of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental

[62] See Anne Peters, 'Towards Transparency as a Global Norm', in Andrea Bianchi and Anne Peters (eds), Transparency in International Law (CUP 2013) 534-607, who borrowed the phrase from Aarti Gupta, 'Transparency under Scrutiny: Information Disclosure in Global Environmental Governance', in Global Environmental Politics 8 (2008) 1. See also Julie A. Maupin, ' Transparency in International Investment Law: The Good, the Bad and the Murky', in Andrea Bianchi and Anne Peters (eds), Transparency in International Law (CUP 2013) 142-171.

[63] Van Harten (n 25) 159-160.

[64] Van Harten (n 25) 160. Note, however, that confidentiality can increasingly not 'generally be relied upon as a clear duty of parties to arbitral proceedings.' Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Kluwer Law International; OUP 2015) 124.

[65] Van Harten (n 25) 160.

[66] *SD Myers Inc v Canada*, Procedural Order No 16 (concerning confidentiality in materials produced in the arbitration), 13 May 2000, para 8: 'The Tribunal considers that, whatever may be the position in private consensual arbitrations between commercial parties, it has not been established that any general principle of confidentiality exists in an arbitration such as that currently before this Tribunal.' See also *Philip Morris Asia Ltd v Australia*, where the tribunal observed the following: 'The Tribunal is aware that, while confidentiality is a traditional and an essential feature of commercial arbitration in many jurisdictions, in investment arbitration the practice is much more diversified. This practice recognizes that investment disputes involve a public interest component which suggests that information about the dispute be made available not only to parties and the tribunal but also to civil society at large. This recognition has led to a growing practice – under the various rules chosen for investment arbitration – to provide for greater transparency.' *Metalclad Corporation v Mexico*, Case No ARB(AF)/97/1, Award, 30 August 2000, para 13; Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001, para 1 ('Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter 11 arbitration').

[67] See Van Harten (n 25) 160; Michael Waibel and others (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) 2.

> regulations challenged. And it is all in the name of protecting the rights of foreign investors (...)[68]

While it would be a stretch to equate the current ISDS regime to a 'fully public system of adjudication',[69] there has been a trend towards greater transparency both at the level of treaty practice and the applicable procedural rules.[70] As a result, information about the existence of ISA proceedings as well as pertinent documents, including investment awards, are increasingly made publicly available.[71] Among the institutional measures that substantially contributed to this development are the 2013 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('Rules on Transparency') as well as the Mauritius Convention on Transparency. As shall be discussed in the following section, the key reason why UNCITRAL was eventually chosen as the forum for the ongoing ISDS reform process was the Commission's central role in creating the Mauritius Convention as a multilateral model for reform.[72]

**(a) The UNCITRAL Rules on Transparency**

The UNCITRAL Arbitration Rules are among the key instruments drafted by UNCITRAL. As with other UNCITRAL instruments in the area of international dispute settlement, such as the UNCITRAL Model Law on International Commercial Arbitration,[73] the UNCITRAL Arbitration Rules were deliberately kept rather generic in order to broaden their scope of application to include both international commercial and investment arbitrations.[74]

Initially adopted by the UN General Assembly in 1976, the UNCITRAL Arbitration Rules have since been included in the relevant ISDS provisions of numerous IIAs.[75] While the majority of ISDS cases to date have been governed by the ICSID Convention, complemented by the ICSID Arbitration Rules, the second largest group of cases has been governed by the UNCITRAL Arbitration Rules.[76] In 2010, the

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[68] Anthony DePalma, 'Nafta's Powerful Little Secret: Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say' *The New York Times* (11 March 2001), available at <https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html> accessed 11 September 2022.

[69] Langford and others (n 110) 184.

[70] Caron and Shirlow (n 52) 168-171.

[71] Blackaby and others (n 64) 132-133; see also Reinisch (n 2) 305, who refers to the tribunal's comments in *Biwater (Gauff) Tanzania Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 3, 29 September 2006, para 122, regarding 'an overall trend in [international investment arbitration] towards transparency'. See also August Reinisch and Christina Knahr, 'Transparency versus Confidentiality in International Investment Arbitration—The Biwater Gauff Compromise' (2007) 6 The Law and Practice of International Courts and Tribunals, 97.

[72] See Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadma' (CIDS 2016) ('CIDS Report') 15, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/COMM/cids_research_paper_mauritius.pdf> accessed 8 February 2023. Langford and others (n 110) 172.

[73] See e.g. UNCITRAL, Model Law on International Commercial Arbitration (with amendments as adopted in 2006), United Nations Publication, Sales No. E.08.V.4 (2008) 1, fn 2: 'The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to (…) investment'.

[74] See Judith Knieper, 'UNCITRAL's Working Group III Discussion on Dispute Prevention' (2021) 17 University of St. Thomas Law Journal, 455, 456. See also UNCITRAL, Report of the Work of Its Forty-Eighth Session, U.N. Doc. A/70/17 (2015) para 268, where it was noted that the generic application of UNCITRAL instruments to different types of arbitration had been criticised as posing a number of challenges.

[75] For the latest version of the UNCITRAL Arbitration Rules see UNCITRAL, 'UNCITRAL Arbitration Rules', available at <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> accessed 8 January 2023. See also Knieper (n 74) 456.

[76] Other commonly used rules include the ICSID Additional Facility Rules, the Rules of Arbitration of the International Chamber of Commerce ('ICC Rules') and the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ('SCC Rules'). The rules governing the proceedings are typically set out in the arbitration agreement of the relevant IIA. In some cases, the foreign investor may be able to elect between rules that have received advance consent from the host

UNCITRAL Arbitration Rules underwent a major revision process.[77] It was in the course of this process that transparency was identified as a worthy candidate for reform. In 2013, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('UNCITRAL Rules on Transparency') were adopted and incorporated into the UNCITRAL Arbitration Rules (as revised in 2010) by inserting a new Article 1(4).[78]

The 2013 UNCITRAL Rules on Transparency, which entered into force on 1 April 2014, contain a set of procedural rules aimed at enhancing the transparency and accessibility to the public of treaty-based investor-State arbitrations.[79] Subject to certain safeguards, such as the protection of confidential information (Art 7), the rules provide for the publication of awards and certain other arbitral documents (Arts 2 and 3), public hearings (Art 6), as well as submissions by third parties (Art 4) and non-disputing treaty parties (Art 5).[80] The UNCITRAL Rules on Transparency are complemented by the UNCITRAL Transparency Registry, which was established to serve as 'a central repository for the publication of information and documents in treaty-based investor-State arbitration'.[81]

Although the UNCITRAL Rules on Transparency represent an important step towards greater transparency in ISDS, a major concern was that their impact could be rather limited since their default scope of application was confined to UNCITRAL arbitrations based on investment treaties concluded on or after 1 April 2014.[82] Arbitral proceedings initiated 'under the existing universe of 3,000 treaties',[83] i.e. under treaties concluded before 1 April 2014, would generally remain unaffected by the new rules unless the parties to the relevant treaty or the disputing parties had agreed to their application.[84] It was thus resolved by UNCITRAL to draft a convention that would facilitate the application of the UNCITRAL Rules on Transparency to the approximately 3,000 treaties already existing at the time of their enactment. The new convention should 'give those States that wished to

state. See UNCTAD (n 27); ICSID, 'ICSID Caseload – Statistics (Issue 2022 – 2)' (2022) <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics> accessed 8 January 2023.

[77] UNCITRAL Arbitration Rules (n 75). See also Caron and Shirlow (n 52) 171.

[78] UNCITRAL, 'Report of the United Nations Commission on International Trade Law. Forty-sixth session (8-26 July 2013)' (2013) A/68/17, Chapter III and Annexes I-II. See also UN General Assembly, 'United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)' (2013) A/RES/68/109, 18 December 2013.

[79] UNCITRAL, 'UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (Effective Date: 1 April 2014)' <https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency> accessed 24 September 2022. See also Stephan Schill, 'Transparency as a Global Norm in International Investment Law', available at <http://kluwer-arbitrationblog.com/2014/09/15/transparency-as-a-global-norm-in-international-investment-law/> accessed 8 February 2023, who states that the UNCITRAL Rules on Transparency 'reverse the presumptions of confidentiality and privacy in investment treaty arbitration in favor of a presumption of openness'.

[80] Submissions by third parties (Article 4) are also known as *amicus curiae* submissions. In contrast, the provision on submissions by non-disputing treaty parties (Article 5) is aimed, in particular, at the State of origin of the investor. See Dimitrij Euler, Markus Gehring and Maxi Scherer (eds), Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (CUP 2015).

[81] UNCITRAL, 'Transparency Registry. A Repository for the Publication of Information and Documents in Treaty-Based Investor-State Arbitration.' (*UNCITRAL Transparency Registry*), available at <https://www.uncitral.org/transparency-registry/en/introduction.html> accessed 8 February 2023: 'Consistent with the aim to enhance transparency in treaty-based investor-State arbitration, the Transparency Registry publishes information and documents where: [t]he Rules on Transparency (whether or not as amended by the Parties to the treaty) apply pursuant to article 1 of the Rules; or [t]he Transparency Registry is appointed for the publication of information and documents in treaty-based investor-State arbitration, either by Parties to an investment treaty or by the parties to a dispute.'

[82] UNCITRAL Rules on Transparency, Article 1(1).

[83] Maupin (n 62) 155: 'All claims arising under the existing universe of 3,000 treaties will continue to be exempt from any transparency requirements unless the disputing parties agree otherwise or unless the treaties are proactively amended by their contracting state parties to explicitly incorporate the new rules.'

[84] UNCITRAL Rules on Transparency, Article 1(2); UNCITRAL, 'Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session (New York, 4-8 February 2013)' (2013) A/CN.9/765, 13 February 2013, paras 75–78. See also Kaufmann-Kohler and Potestà (n 72) 27-28.

make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so, without creating an expectation that other States would use the mechanism offered'.[85]

**(b) The Mauritius Convention**

On 10 December 2014, the UN General Assembly adopted the Convention on Transparency in Treaty-based Investor-State Arbitration, also known as the Mauritius Convention on Transparency.[86] The Convention provides for a mechanism that is both efficient and sufficiently flexible so as to allow States and regional economic integration organisations to express their consent to the application of the UNCITRAL Rules on Transparency to pre-existing investment treaties. [87] States can express such consent by becoming a party to the Convention, which consequently supplements the relevant investment treaties concluded before 1 April 2014 with regard to transparency-related obligations.[88] Importantly, for those States that ratify the Mauritius Convention, it would also make the UNCITRAL Rules on Transparency applicable to treaty-based ISA proceedings regardless of whether they are governed by the UNCITRAL Arbitration Rules or a different set of arbitral rules.

The Mauritius Convention has justifiably been praised for its potential to significantly extend the scope of application of the UNCITRAL Rules on Transparency.[89] Yet, its ratification process has been relatively slow. To date, 23 States have signed the Convention and only 9 have ratified it: Australia, Benin, Bolivia, Cameroon, Canada, Gambia, Iraq, Mauritius and Switzerland.[90] It is worth noting, however, that the UNCITRAL Rules of Transparency are referred to in recent agreements on investment protection, such as the Canada-EU Comprehensive Economic and Trade Agreement ('CETA').[91]

### 3.2.3 UNCITRAL's ongoing reform efforts

UNCITRAL's work to date has contributed to enhancing the rule of law in ISDS, be that in the form of the UNCITRAL Rules on Arbitration or the UNCITRAL Rules on Transparency in conjunction with the Mauritius Convention. However, in spite of the progress made in areas such as transparency, the extent to which the ISDS regime can be deemed consistent with the rule of law remains limited given persisting deficiencies. Having recognised the need for reform, UNCITRAL entrusted its Working Group III with a broad mandate to address the real and perceived legitimacy deficits in the current

[85] UNCITRAL, 'Report of the United Nations Commission on International Trade Law. Forty-sixth session (8-26 July 2013)' (2013) A/68/17, para 127.
[86] UN General Assembly, 'Resolution adopted by the General Assembly on 10 December 2014. 69/116. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration' (2014) A/Res/69/116, 18 December 2014.
[87] As per Article 1(2) of the UNCITRAL Rules on Transparency, the Rules apply in relation to investment treaties concluded prior to 1 April 2014, inter alia, if the Parties to the relevant investment treaty agree to their application.
[88] See UNCITRAL, 'United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency")' <https://uncitral.un.org/en/texts/arbitration/conventions/transparency> accessed 8 February 2023. See also Kaufmann-Kohler and Potestà (n 72) 28.
[89] See Stephan W Schill, 'Editorial: The Mauritius Convention on Transparency' (2015) 16 The Journal of World Investment & Trade, 201-202, who noted shortly after the Mauritius Convention had been opened for signature on 17 March 2015 that the Convention 'could apply to some 3000+ investment treaty relations if both the respondent State and the investor's home State are contracting parties or, alternatively, if the investor-claimant accepts the unilateral offer to apply the UNCITRAL Transparency Rules made by the respondent in signing the Convention (see Article 2 of the Mauritius Convention).'
[90] As to the remaining 14 signatories of the Mauritius Convention, ratification is still pending: Belgium, Congo, Finland, France, Gabon, Germany, Italy, Luxembourg, Madagascar, Netherlands, Sweden, Syria, United Kingdom, United States.
[91] Canada-EU Comprehensive Economic and Trade Agreement ('CETA') Article 8.36.

ISDS regime.[92] In view of its achievements in negotiating the transparency framework, UNCITRAL would indeed appear to be the right organisation to pursue further multilateral reform to ISDS.[93]

The mandate entrusted to Working Group III comprises three phases. First, Working Group III should identify and consider concerns surrounding the ISDS system. On the basis of the concerns identified, it should then proceed to consider whether reform was desirable and, if so, develop potential reform solutions.[94] Notably, UNCITRAL's mandate is seemingly limited to procedural reforms, meaning that substantive reform of rules and standards in investment treaties is largely excluded; a fact that has been met with varying degrees of criticism.[95]

The concerns identified by Working Group III can be classed into three broad categories:[96] (i) lack of consistency, coherence, predictability and correctness of arbitral decisions by arbitral tribunals;[97] (ii) issues pertaining to arbitrators and decision makers;[98] and (iii) issues pertaining to cost and duration.[99] Apart from the concerns outlined above, Working Group III also identified the following

[92] UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of Its forty-second session (New York, 14–18 February 2022)' (2022) A/CN.9/1092, 23 March 2022, 3; UNCITRAL, 'Possible future work in the field of dispute settlement. Reforms of investor-State dispute settlement (ISDS)' (2017) A/CN.9/917, 20 April 2017. See also Langford and others (n 110) 172.

[93] The Geneva Center for International Dispute Settlement ('CIDS') prepared a study as to whether the Mauritius Convention could provide a useful model for possible reforms in the field of investor-State arbitration, the so-called CIDS Report. The CIDS Report concluded that while 'the challenges involved in broader reforms of the investor-State arbitration regime are substantially more complex than the introduction of a transparency standard in investment treaties (…) the Mauritius Convention could provide a useful model if States wish to pursue such broader reform initiatives at a multilateral level.' Kaufmann-Kohler and Potestà (n 72) 5, 97-98. Regarding the proposed multilateral instrument on ISDS reform ('MIIR') as a means of implementing the multiple reform elements see UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), 'Possible reform of investor-State dispute settlement (ISDS). Multilateral instrument on ISDS reform. Note by the Secretariat' (2022) A/CN.9/WG.III/WP.221, 22 July 2022.

[94] UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-second session (New York, 14–18 February 2022)' (2022) A/CN.9/1092, 23 March 2022, 3; UNCITRAL, 'Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS). Note by the Secretariat' (2017) A/CN.9/917, 20 April 2017.

[95] See e.g. UNCITRAL, 'Report of the United Nations Commission on International Trade Law. Fiftieth session (3–21 July 2017)' (2017) A/72/17, para 257: 'It was mentioned that work on investor-State dispute settlement reform should not be limited to procedural issues relating to investor-State dispute settlement but should encompass a broader discussion on the substantive aspects of international investment agreements, including but not limited to States' right to regulate, fair and equitable treatment, expropriation and due process requirements. Nonetheless, it was stated that work on substantive standards was deemed less feasible than work on the procedural aspects.' For a discussion of the mandate see Langford and others (n 110); see also Gus Van Harten, Jane Kelsey and David Schneiderman, 'Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters' Really Matter' (2019) Osgoode Legal Studies Research Paper 2.

[96] UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018)' (2018) A/CN.9/964, 6 November 2018.

[97] With regard to the first category, the following concerns, in particular, were identified: unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law by ISDS tribunals; lack of a framework for multiple proceedings brought pursuant to investment treaties, laws, instruments and agreements providing access to ISDS mechanisms; and limitations in the current mechanisms to address inconsistency and incorrectness of decisions. See UNCITRAL (n 96) paras 40, 53, 63.

[98] As to the second category, concerns related to the following issues: lack or apparent lack of independence and impartiality of decision makers in ISDS; limitations of disclosure and challenge mechanisms available under many existing treaties and arbitration rules; lack of appropriate diversity among decision makers in ISDS; and lack of sufficient mechanisms for the constitution of ISDS tribunals in existing treaties and arbitration rules to ensure appropriate qualifications on the part of decision makers. See UNCITRAL, ibid. paras 80-108. Notably, it was suggested that in the context of independence and impartiality of decision makers, issues related to third-party funding ('TPF') should also be discussed. See UNCITRAL, ibid. paras 120, 134.

[99] The third category included the following concerns: cost and duration of ISDS proceedings including the lack of a mechanism to address frivolous or unmeritorious claims; allocation of costs by arbitral tribunals in ISDS; security for costs; and third-party funding ('TPF'). See UNCITRAL, ibid., paras 123, 127, 133, 134. With regard to TPF, the Working Group eventually also decided that it would be desirable for UNCITRAL to undertake reform. See UNCITRAL, 'Report of Working

cross-cutting issues to be taken into account when developing reform solutions 'so that they would be considered legitimate by all relevant stakeholders':[100] means other than arbitration to resolve investment disputes as well as dispute prevention methods; exhaustion of local remedies; third-party participation; counterclaims; regulatory chill; and calculation of damages.[101]

Almost all of the aforementioned matters aim at procedural reforms with a view to rebalancing the asymmetric nature of ISDS where, by and large, only investors can raise claims against a respondent state. A degree of rebalancing which properly and appropriately accommodates state interests is manifestly necessary to deal with the legitimacy crisis that ISDS is facing. It is further apparent that the list of reform options before UNCITRAL and its members is lengthy. Based on UNCITRAL's agenda, two reforms are seemingly being prioritised.

The first one relates to concerns about arbitrator independence and impartiality and is being tackled jointly by ICSID and UNCITRAL through the development of codes of conduct for arbitrators and judges in international investment dispute resolution.[102] The lack of independence and impartiality of arbitrators might well be perceived rather than actual. Yet, it is among the most sensitive rule of law issues, not least because it negatively affects the public perception of ISA as a legitimate system for the settlement of investment disputes.[103] A key factor that has attracted particularly fierce criticism concerns the appointment of arbitrators.

Current arbitration rules generally operate on the principle that, in cases where a three-member tribunal is to be appointed, the parties to the dispute select one arbitrator each. The presiding arbitrator is then typically appointed by: the two party-appointed arbitrators; the parties to the arbitration; or an arbitral institution serving as the appointing authority. These case-by-case appointments give rise to serious concerns about arbitrators' impartiality and independence in a system involving an asymmetrical claims' structure.[104] It is indeed a feature of ISA that claims are brought almost exclusively by investors, whereas states are generally on the respondent side and can hardly ever bring counterclaims. The suspicion is thus that arbitrators will favour the class of parties bringing the claim 'in order to promote the system and their position within it'[105] as well as certain states that 'hold power in the key appointing authorities and in the arbitration industry.'[106] Repeat appointments, issue conflicts, and multiple hatting[107] are just some of the prominent issues in this context that need to be addressed systemically.

In light of these concerns, UNCITRAL and ICSID's joint effort to develop codes of conduct for arbitrators and judges in ISDS is to be welcomed. The true test will of course be whether any such code leads to

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Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019)' (2019) A/CN.9/970, 9 April 2019, para 25. For a discussion of TPF as a potential means of providing access to justice in ISDS see Patricia Schoeffmann, 'Third-Party Funding and ISDS. A Mutualistic Symbiosis?', in Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Welser and Zeiler (eds.), *Austrian Yearbook on International Arbitration 2022*, 353-383.

[100] See UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019)' (2019) A/CN.9/970, 9 April 2019, para 39.

[101] See UNCITRAL (n 100) paras 29-39. For a recent discussion of the issue of the calculation of damages see Jonathan Bonnitcha and others, 'Damages and ISDS Reform: Between Procedure and Substance' [2021] Journal of International Dispute Settlement 1.

[102] UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), 'Possible reform of investor-State dispute settlement (ISDS). Draft Codes of Conduct and Commentary. Note by Secretariat' (2022) A/ CN.9/WG.III/WP.223, 23 November 2022

[103] Reinisch (n 2) 297 ff.; Van Harten (n 50) 628.

[104] See Van Harten (n 50) 628.

[105] Van Harten (n 50) 643.

[106] Van Harten (n 50) 628, 643.

[107] See UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), 'Possible reform of investor-State dispute settlement (ISDS). Draft code of conduct. Note by the Secretariat' (2020) A/CN.9/WG.III/WP.201,9 November 2020, para 8.

real improvements. It needs to be legally binding, backed up with sanctions in case of non-compliance, and properly integrated into a very fragmented regulatory regime governing ISDS. If this can be achieved, UNCITRAL could make a real contribution to consolidating the rule of law in ISDS.

The second major reform being pursued at UNCITRAL is perhaps more ambitious. This is the attempt to create a more sophisticated formal dispute resolution regime consisting of a full-fledged appellate mechanism presently missing in ISDS.[108] It cross-cuts several of the concerns about ISDS and, if successful, could potentially address numerous procedural issues at once. Although the existing control mechanisms have arguably helped to improve coherence and consistency to some extent, they are not capable of securing them in the same way as a hierarchical system with a single body equipped with the power to correct errors of lower courts would be.[109] Consequently, different proposals for reform options have been put forward, including supplementing the existing investment arbitration regime with an appellate mechanism or establishing a permanent multilateral investment court ('MIC').[110]

Much has been written about this topic,[111] and thus only a brief remark is warranted. If a sophisticated dispute settlement mechanism comprising of an appeal option providing for guarantees necessary to ensure judicial independence and impartiality can be created, the so-called independence deficit said to afflict ISDS could in principle be remedied. Moreover, the chances of ISDS becoming more accessible, predictable, coherent and consistent, will be greatly enhanced too. At present, arbitral practice cannot be said to be in compliance with these fundamental rule of law norms.

As was mentioned in subsection 3.1, the current ISDS regime is highly fragmented. It features a wide network of IIAs that contain broad, open-textured investment protection standards[112] These investment protection standards are applied by arbitrators who are appointed on a case-by-case basis. Given that there is no hierarchical system of binding precedent, the standards have, perhaps

[108] The ISDS system does provide for some element of supervision in the form of setting aside procedures before domestic courts as well as through the ICSID annulment procedures: The 1958 New York Convention, which is applicable not only to commercial arbitrations but also to some ISDS awards, provides for the review by national courts on certain, narrow grounds. The majority of awards are, however, subject to the 1965 ICSID Convention. ICSID awards are binding and enforceable and may not be reviewed by domestic courts. While the ICSID system does provide for annulment proceedings, the grounds for annulment are limited and the standard of review does not amount to an appeal of the award. Moreover, ICSID annulment committees are not standing committees but are appointed on an ad hoc basis only.

[109] Van Harten (n 25) 166; Castellarin (n 51) 211 ff. Castellarin observes with regard to the status quo that 'the binding character of adjudication and the growing case-law, which could be positive elements for the promotion of the rule of law, risk to increase legal uncertainty instead of legal certainty.'

[110] UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), 'Possible reform of investor-State dispute settlement (ISDS). Appellate mechanism. Note by the Secretariat' (2022) A/CN.9/WG.III/WP.224, 17 November 2022, paras 40 ff. See also UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), 'Possible reform of investor-State dispute settlement (ISDS). Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters. Note by the Secretariat' (2021) A/CN.9/WG.III/WP.213, 8 December 2021; UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), ''Possible reform of investor-State dispute settlement (ISDS). Appellate and multilateral court mechanisms. Note by the Secretariat' (2019) A/CN.9/WG.III/WP.185, 29 November 2019; Malcolm Langford and others, 'Special Issue: UNCITRAL and Investment Reform: Matching Concerns and Solutions' (2020) 21 Journal of World Investment & Trade 167, 176.

[111] For a detailed discussion of this option see the contribution by Christian Carbajal Valenzuela and Arthur Tochetto Dal Piva, 'Latin America's Perspective on the Reform of the Investor-State Dispute Settlement Mechanism', in this Volume [ADD]. See furthermore Marc Bungenberg and August Reinisch, 'Possibilities for the Establishment of an MIC and a Possible Connection to Existing Institutions and System Conformity' in Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, European Yearbook of International Economic Law (Springer, 2020) 175–196, available at <http://link.springer.com/10.1007/978-3-662-59732-3_8> accessed 8 January 2023; Rishi Gulati and Nikos Lavranos, 'Guaranteeing the Independence of the Judges of a Multilateral Investment Court: A Must for Building the Court's Credibility' (*Columbia FDI Perspectives*, No. 262, 7 October 2019), available at <https://ccsi.columbia.edu/content/columbia-fdi-perspectives> accessed 8 January 2023.

[112] Živković (n 2) 14.

unsurprisingly, been interpreted in different ways.[113] So while arbitral tribunals have helped to consolidate the law regarding certain issues by taking into account the reasoning of earlier tribunals and thus arguably building a 'softened version of an emerging case law',[114] investment decisions can be inconsistent.[115] This outcome, namely that different adjudicators may draw differing conclusions when presented with similar claims is of course not a feature unique to investment arbitration but rather an issue affecting all forms of adjudication. Yet, in investment arbitration, the issue of jurisprudential incoherence[116] is particularly acute as there is no single appellate institution that would 'draw together diverse readings of treaties (…) into a firm jurisprudence.'[117] Thus, attempts to create a full-fledged appellate mechanism ought to be welcomed. Although, it should be acknowledged that opposing views on the specifics of reform options exist.

**4 Conclusion**

If the rule of law in ISDS is to be bolstered, significant and systemic reform is needed. The list of issues that need addressing is lengthy, to say the least. UNCITRAL is often criticised for dealing exclusively with procedural issues in ISDS. That said, international organisations have limited resources at their disposal. They ought to focus on areas in which they possess expertise, and which further have a realistic prospect of adoption by member states. Given UNCITRAL's expertise in the area of dispute resolution, combined with the inherent difficulty of reforming substantive standards of investment protection multilaterally, it appears wise for UNCITRAL to concentrate on a focused selection of procedural matters.

This is not to suggest that substantive reform is not pressing. Yet, UNCITRAL is perhaps not the best forum to tackle substantive concerns at this time. Reforming procedural aspects of ISDS is already a significant challenge given the diversity of views of member states. Moreover, the fact that the current reform is focused on procedural matters does not mean that it could not have a positive impact on substantive aspects as well. For instance, if a MIC and/or an appellate mechanism were to be established, this could greatly improve the consistency of interpretation of substantive protections. In the final analysis, despite the challenges faced by UNCITRAL, some real progress has been made in the previous decade. Its work on transparency in ISDS is commendable, though, admittedly, it remains to be seen how successful this framework will ultimately be. If properly formulated and implemented, the codes of conduct for arbitrators and judges in ISDS being jointly developed at UNCITRAL and ICSID will almost certainly enhance the rule of law in ISDS. And if UNCITRAL can help member states negotiate a more sophisticated dispute settlement system, it will make a marked contribution to enhancing the rule of law internationally.

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[113] Van Harten (n 25) 164.

[114] Reinisch (n 2) 304.

[115] Inconsistency in legal interpretation is prevalent even with regard to key questions such as the notion of 'investment', the approach to MFN clauses or the meaning of umbrella clauses. A prime example is the conflicting awards in the two parallel cases of *CME v Czech Republic* and *Lauder v Czech Republic*, where different tribunals reached diametrically opposed decisions on the same set of facts. See Reinisch (n 2) 302; Castellarin (n 51) 211 et seqq; Van Harten (n 25) 166. The latter adduces the following critical quote by Blackaby: 'Any system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness.' See Nigel Blackaby, quoted in MD Goldhaber, 'Wanted: A World Investment Court' (Summer 2004) *The American Lawyer*.

[116] Coherence shall for the present purposes be defined as 'the capability of an adjudicative system to resolve inconsistencies that arise from different decisions, and to ensure that the law is interpreted in a uniform and relatively predictable manner to allow those affected by the rules to plan their conduct.' See Van Harten (n 25) 164, referring to Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995) 38; T Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals' (2005) 99 AJIL 359, 361.

[117] Van Harten (n 25) 166.